MARCH 2018

LAW ENFORCEMENT DIGEST

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

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

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

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

LAW ENFORCEMENT ONLINE TRAINING DIGEST

MARCH 2018 Edition

Covering Select Cases Issued in February 2018

- Traffic Stops; Lane Travel Clarification
- Exigency; Search Warrant; DUI
- Unlawful Seizure
- Harassment; Corpus Delicti
- Warrantless Entry; DV; Civil Rights Act
- Drive By Shooting
- Public Records and Social Media
- Ignition Interlock Training from NHTSA
- Additional Resource Links: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

1 TRAFFIC STOPS, LANE TRAVEL

DRIVING ON A SUSPENDED LICENSE

State v. Brooks, COA No. 35002-9-III (February 1, 2018)

Division 3, Court of Appeals

Facts:

Defendant was driving in the "neutral area" or "gore point" at the time the Trooper initiated traffic stop. The stop was based upon a violation of RCW 46.61.680 (Driving with Wheels Off Roadway). Defendant was subsequently arrested for Driving on a Suspended License and various other non-traffic related misdemeanors.

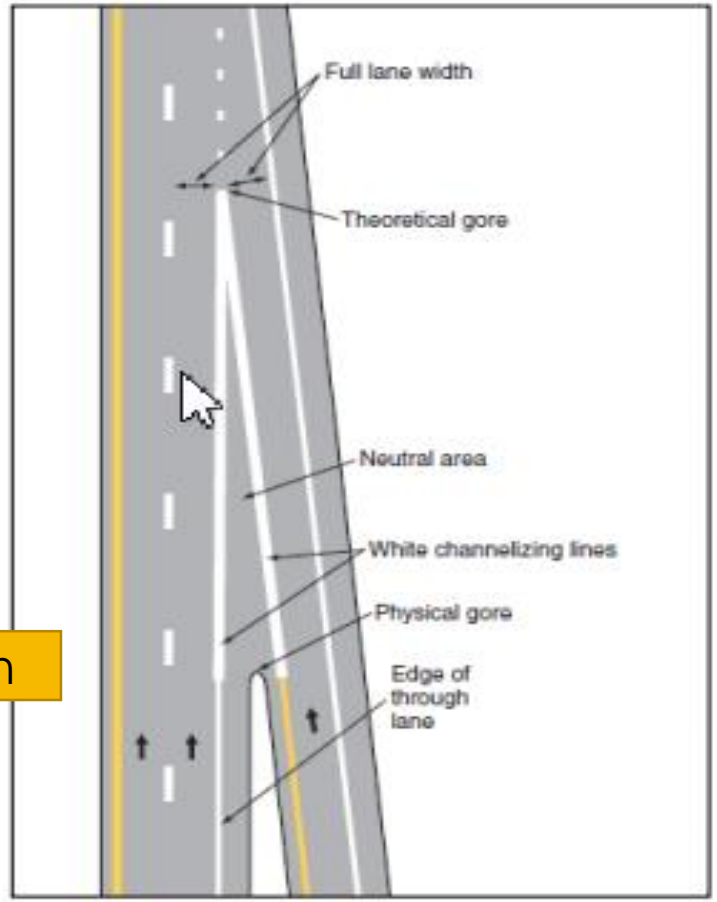

Diagram of the roadway in question

1 TRAFFIC STOPS, LANE TRAVEL

DRIVING ON A SUSPENDED LICENSE

State v. Brooks, COA No. 35002-9-III (February 1, 2018)

Division 3, Court of Appeals

FINDINGS:

The Court of Appeals Division III held that the neutral area separating a highway onramp from an adjacent lane of travel does not meet the definition of "roadway." A driver crossing into this area is subject to being stopped for a violation of RCW 46.61.680 (Driving with Wheels off Roadway). Judge Lawrence-Berry concurred in a separate opinion also finding that defendant was in violation of RCW 46.61.050(1) (Failure to Obey Traffic Control Devices) by driving across the white lines in that same neutral area.

The "neutral area" is not a roadway because it's not designed or ordinarily used for vehicular travel. It's intended as a buffer zone to keep vehicles separate as they make speed adjustments and merge (here to go from the highway onramp to the full speed of the highway). Its narrowing triangular shape is neither long enough, nor wide enough, to accommodate regular vehicle travel.

1 TRAFFIC STOPS, LANE TRAVEL

DRIVING ON A SUSPENDED LICENSE

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Division 3, Court of Appeals

TRAINING TAKEAWAY:

Detailed descriptions of driving behavior and roadway layout are critically important.

- A traffic stop can become the critical piece supporting a majory felony arrest – don't shortchange the detail and end up losing a good case in a motion hearing.
- Provide narrative reports or diagrams of any observed driving that forms the basis of a stop.
- A prosecutor should be able to pick up your report and diagram out the driving using only your words.
- Include a basic diagram showing roadway design, estimated speed, distance of observed driving, lane divider crossings, etc.

1 TRAFFIC STOPS, LANE TRAVEL

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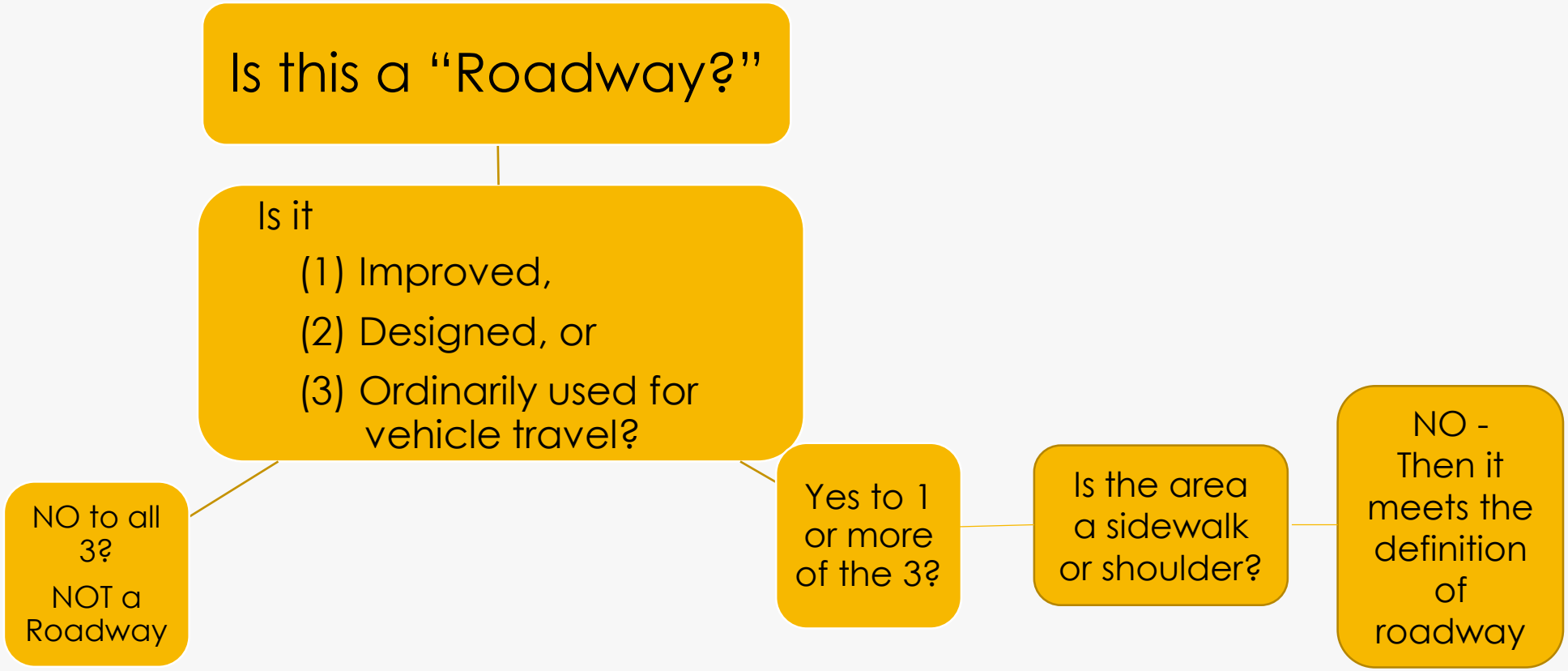

2 EXIGENCY, SEARCH WARRANT, DUI BLOOD DRAW

VEHICULAR ASSAULT

State v. Inman, COA No. 49174-5-II (Feb. 6, 2018)

Division II, Court of Appeals

Facts:

Defendant was involved in a motorcycle collision in which he, and his female passenger, sustained injuries. The first medic on scene found the defendant and passenger laying in a driveway approximately 20 feet from a damaged motorcycle in a ditch, both with injuries. The defendant was observed to smell like alcohol. The investigating deputy ran the plate of the motorcycle, and determined the defendant was the registered owner. The defendant admitted to driving the motorcycle, and to drinking before driving. Because of the significant injuries to the defendant and the passenger, both were to be medivacced to the nearest trauma center. The deputy was unsure of the extent of the injuries to the passenger, but believed he at least had probable cause to arrest the defendant for DUI. The defendant was read special evidence warnings advising him that he was under arrest and a blood sample was being drawn to determine the level of alcohol in his blood.

Defendant was ultimately charged and convicted at trial of vehicular assault stemming from the injuries to the female passenger, and now appeals that conviction.

2 EXIGENCY, SEARCH WARRANT, DUI BLOOD DRAW

VEHICULAR ASSAULT

State v. Inman, COA No. 49174-5-II (Feb. 6, 2018)

Division II, Court of Appeals

TRAINING TAKEAWAY

The warrantless blood draw was upheld because the deputy provided a thorough explanation of the exigent circumstances that justified the exception to the warrant requirement.

The details noted:

1. The rural location resulted in spotty cell phone coverage
2. Preparation of a search warrant affidavit takes approximately 30 minutes, and obtaining judicial approval at least another 15 minutes
3. The helicopter that would airlift the defendant to the trauma center would be arriving shortly, not allowing sufficient time to write and apply for the search warrant
4. Probable cause existed to arrest the defendant for DUI (RO of the motorcycle, smelled of alcohol, admitted to consuming alcohol before driving – and crashing)
5. Medical care would interfere with the ability to obtain an unadulterated blood sample, and the lapse of time would lead to dissipation of the evidence
6. The first officer on scene also confirmed that although there was a telephonic search warrant application process in place for the trauma center to which the defendant would be airlifted, it was his experience that the process was problematic, and had not worked in the past

2 EXIGENCY, SEARCH WARRANT, DUI BLOOD DRAW

VEHICULAR ASSAULT

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Division II, Court of Appeals

TRAINING TAKEAWAY

Exigent circumstances may justify a warrantless DUI blood draw, and the subsequent testing of the blood sample for the presence of alcohol and drugs.

- However, this is a rare EXCEPTION to the general requirement of obtaining a search warrant for a DUI blood draw.

If you obtain a warrantless blood draw under the exigency exception, you must be able to articulate every factor that supported your need to proceed without a warrant.

If you find yourself in a similar situation, every single factor of your decision process should be documented in your reports: how long it took for the initial contact; whether there was a collision and/or injuries to attend to; how long it would take to draft and then apply for a search warrant; what medical treatment the defendant may be given that will interfere with the blood results; whether dissipation of the evidence is likely; the need for the defendant to be removed from the area for medical treatment; etc.

3 UNLAWFUL SEIZURE

Unlawful Possession of a Controlled Substance
State v. Butler, COA No. 75410-6-I (Feb. 20, 2018)
Division 1, Court of Appeals

Facts:

Deputy stops a truck he sees driving erratically. A car also independently pulls over a few car lengths in front of the truck the deputy has stopped. The driver of the truck tells the deputy that he was driving erratically because the car had just hit his truck. As the deputy approaches the car, a male and female passenger exit the vehicle. The male begins to slowly jog in the opposite direction of the approaching deputy, with the female walking slowly behind him. Neither complies with the deputy's commands to stop. The male passenger walks into the woods. The deputy contacts the car's driver and asks if the two fled because they had warrants, to which the driver replied, "Yeah, probably." The deputy radios that the male had fled a traffic stop and had a probable warrant for his arrest. During his contact with the car's driver, the deputy sees the male passenger exit the woods and leave on foot in the opposite direction of the deputy.

3 UNLAWFUL SEIZURE

Unlawful Possession of a Controlled Substance
State v. Butler, COA No. 75410-6-I (Feb. 20, 2018)
Division 1, Court of Appeals

Facts:

A K-9 deputy arrives and, after learning from the first deputy that the suspect jogged from the car and likely had a warrant, begins to drive the area in an attempt to locate the male passenger. The K-9 deputy sees a male matching the passenger's description on the porch about to enter a residence. He calls out to the man to come and talk to him. The man complies, and provides identification when the K-9 deputy requests it. He is then arrested on an outstanding warrant. During the search of his person incident to arrest, a syringe and substances later identified as methamphetamine and heroin were found.

The defendant challenged his arrest on the basis that he was unlawfully seized. The trial court found that the original contact was an unlawful seizure, but the second contact was a lawful, independent, social contact. The defendant appealed his conviction for Unlawful Possession of a Controlled Substance, and the Court of Appeals reversed his conviction.

3 UNLAWFUL SEIZURE

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Division 1, Court of Appeals

TRAINING TAKEAWAY #1

Fleeing upon sight of an officer is not enough on its own to justify a seizure. Reasonable, articulable suspicion of criminal activity based on specific facts as to that person are required to justify a warrantless seizure.

A passenger in a vehicle that pulled over near a deputy's traffic stop and which was possibly involved in a hit and run, with no other evidence of criminal activity as to the defendant/passenger, was unlawfully seized when a deputy commands him to stop as he slowly jogs away from the car. His refusal to comply with the deputy's attempted seizure doesn't terminate the seizure or "clear the slate."

There was not enough to justify a *Terry* stop of the passenger. The deputy indicated he did not recognize the defendant/passenger, and the driver's answer of "Yeah, probably." when asked if his passengers fled because they had warrants was merely speculation.

NOTE: In this case, the State provided no evidence and did not argue any officer safety concerns to justify detaining the passenger.

3 UNLAWFUL SEIZURE

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TRAINING TAKEAWAY #2

A second deputy's contact of the defendant/passenger is a continuation of the original unlawful seizure by the first deputy, and is therefore a further unlawful seizure.

When an individual has been unlawfully seized, no subsequent events or circumstances can retroactively justify the stop. The second officer's contact was based on information gleaned from the first officer's unlawful seizure of the defendant/passenger. The Fellow Officer Rule necessarily requires the second deputy to have been operating in coordination with the first deputy. Since that information was merely speculation, and not specific, objective facts sufficient to support a reasonable, articulable suspicion of criminal activity, the second seizure was also unlawful.

The second deputy would not have been searching for or contacting the defendant/passenger if the original unlawful seizure had not occurred, and therefore it cannot be separated.

NOTE: the fact that the defendant/passenger didn't comply with the first deputy's attempted seizure does not terminate the unlawful seizure (aka "clear the slate" for the subsequent, related contact).

3 UNLAWFUL SEIZURE

Unlawful Possession of a Controlled Substance
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Division 1, Court of Appeals

TRAINING TAKEAWAY #3

Even if the second deputy's contact wasn't considered a continuation of the initial contact/unlawful seizure, the circumstances of his contact with the passenger/defendant and his calling out "Hey, buddy, come and talk to me." amounted to an unlawful seizure.

The court objectively considers the totality of the circumstances of a contact to determine whether a reasonable, innocent person would feel free to simply terminate the contact. If they would not, then the contact is a seizure.

The passenger/defendant had already been ordered to stop by the initial deputy, and had continued to leave the scene while the deputy watched. When he is then contacted by the second deputy, a reasonable person would think that it was not a coincidence, but that the two deputies had communicated. The request, "Hey buddy, come and talk to me." was not casual, social banter, but rather a command in these circumstances, and this contact was therefore a seizure.

4 HARASSMENT AND CORPUS DELICTI

Misdemeanor Harassment
State v. Pinkney, COA No. 49261-0-II (Feb. 20, 2018)
Division 2, Court of Appeals

Facts:

Defendant lived with his estranged wife, Ms. Clark-Pinkney, in her home. Although they had been separated for over 7 years, he had been living back with his essentially "ex" wife for almost 2 years prior to the incident at issue. On this date, Clark-Pinkney had asked the defendant to move from his spot on the couch, setting off a verbal dispute. Clark-Pinkney testified that the disagreement escalated when the defendant told someone on the VA hotline that he was "going to kill her." She says he then followed her from the room screaming that he was going to kill her, and that he was going to "punch her in the face" and "put his hands around your neck, and this time I'm going to kill you." (Both parties testified about a prior incident years before in which the defendant had grabbed Clark-Pinkney around the neck and thrown her to the ground.")

Defendant testified that there had been an altercation between the two, but that he hadn't said anything. His testimony was that he merely raised his clenched fist in Clark-Pinkney's face and growled at her.

Defendant was charged with Felony Harassment (threats to kill) and, in the alternative, misdemeanor Harassment. The jury didn't reach a verdict on the Felony Harassment, but did find defendant guilty of misdemeanor Harassment. Defendant now appeals, claiming that the evidence did not support this charge.

4 HARASSMENT AND CORPUS DELICTI

Misdemeanor Harassment
State v. Pinkney, COA No. 49261-0-II (Feb. 20, 2018)
Division 2, Court of Appeals

TRAINING TAKEAWAY #1

The plain meaning of "threat" as applied in the Harassment statute, RCW 9A.46.020, includes both verbal statements and non-verbal conduct and utterances.

Defendant's action of raising his fist and growling at Clark-Pinkney met the threat element of the crime of harassment. That action was intended to communicate a threat to cause bodily injury in the future to the victim, and placed her in reasonable fear that such a threat would be carried out. Raising a fist and growling are both threatening conduct.

4 HARASSMENT AND CORPUS DELICTI

Misdemeanor Harassment
State v. Pinkney, COA No. 49261-0-II (Feb. 20, 2018)
Division 2, Court of Appeals

TRAINING TAKEAWAY #2

The corpus delicti of a crime must be established by independent evidence in addition to the defendant's own admission.
The standard of proof for establishing the corpus delicti of a crime is lower than that required to convict. The victim's testimony is sufficient prima facie corroboration of the crime.

Evidence outside of the defendant's own admission doesn't need to independently support a conviction. It only needs to provide prima facie corroboration of the crime described in the defendant's incriminating statement.

Here, the defendant claims that the victim's testimony isn't sufficient to independently support the conviction since the jury's failure to convict him of Felony Harassment (based on the threats to kill) mean they did not believe her testimony. The lower standard of proof required to establish the corpus delicti of a crime versus a conviction invalidates that argument.

4 PUBLIC RECORDS ACT; PERSONAL SOCIAL MEDIA

Public Records Act Violation
West v. City of Puyallup, COA No. 49857-0-II (Feb 21, 2018)
Division 2, Court of Appeals

FACTS:

A Public Records Act request was filed with the City of Puyallup for Facebook posts, including those related to a privately operated "Friends of" page of a city council member. The City of Puyallup searched for any records on its own public Facebook page, and for any records it may have sent to the council member's personal Facebook account named in the PRA request. No records were discovered. The City filed a motion for summary judgment on the basis that the records were not "public records" as required to be disclosed, but rather the private records of the council member, and not under control of the City. The court granted the City's motion. The requester appeals that decision.

4 PUBLIC RECORDS ACT; PERSONAL SOCIAL MEDIA

Public Records Act Violation
West v. City of Puyallup, COA No. 49857-0-II (Feb 21, 2018)
Division 2, Court of Appeals

A public official's posts on a personal social media account may be a public record subject to disclosure under the Public Records Act if the posts (1) relate to the conduct of government, and (2) are prepared within the scope of the official's employment or official capacity.

A public employee's post on social media may be considered public records and be subject to disclosure under the Public Records Act if the usual PRA act 3-prong test is met:

A "public record" is
(1) Any writing,
(2) Containing information relating to the conduct of government or the performance of any governmental or proprietary function, and
(3) Prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3)

The council member's Facebook posts were not disclosable as public records because they were not prepared, owned, used, or retained by the City, and the City had no control over the Facebook page.

4 PUBLIC RECORDS ACT; PERSONAL SOCIAL MEDIA

Public Records Act Violation
West v. City of Puyallup, COA No. 49857-0-II (Feb 21, 2018)
Division 2, Court of Appeals

TRAINING TAKEAWAY

Use discretion when posting on any social media site, particularly if the posts relate to your employment or employer.

Even if such postings are on a personal social media page, they may still qualify as disclosable public records under the PRA if they meet the 3-prong test.

If you are acting within the scope of your employment when making such posts/comments, the communication, even if not on an official public page, may then be considered equivalent to an act/post/comment by your agency.

"Within the scope of your employment" for the PRA means when:

(1) The job requires it,
(2) The employer directs it, or
(3) It furthers the employer's interests.

5 WARRANTLESS ENTRY; DV; CIVIL RIGHTS ACT

42 USC §1983 claim arising from DV Assault

Bonivert v. City of Clarkston, COA No. 74662-6-I (Feb. 26, 2018)

9TH CIRCUIT COURT OF APPEALS

Facts:

Officers responded to a report of a physical domestic dispute. When officers arrived, the victim was outside the home with her child, her mother, and 3 friends. The victim's boyfriend, Bonivert, was inside the home with the doors locked. Nothing suggested he was an ongoing danger to himself or others, or that the victim was requesting assistance to reenter the home. The home was owned by Bonivert, and also occupied by his girlfriend and their 9 month old child.

Officers attempted a knock-and-announce, and tried to gain entry through various doors and windows, which were all locked. They requested Bonivert come speak to them, and later testified that his refusal to respond to them was concerning. Bonivert did not engage with the officers, and alleges he didn't hear them during much of the attempted contact. Officers obtained verbal permission from the victim to enter the home. They did not apply for a warrant. Officers gained entry by breaking a window to access the back door handle. Bonivert told the officers to get out of his house. During the subsequent contact, Bonivert was tased repeatedly in drive stun mode.

Bonivert brought §1983 claims against the City, County, and individual officers involved in the incident, alleging warrantless entry and excessive force in violation of his constitutional rights. The District Court granted summary judgment in favor of the City, County, and officers on the basis of qualified immunity. Bonivert now appeals.

5 WARRANTLESS ENTRY; DV; CIVIL RIGHTS ACT

42 USC §1983 claim arising from DV Assault

Bonivert v. City of Clarkston, COA No. 74662-6-I (Feb. 26, 2018)

9TH CIRCUIT COURT OF APPEALS

TRAINING TAKEAWAY

When a suspect is inside a locked home, and posing no immediate threat to himself or others, there is little justification for warrantless entry.

Consent by one occupant doesn't override the express "stay out" actions of a second, present occupant.

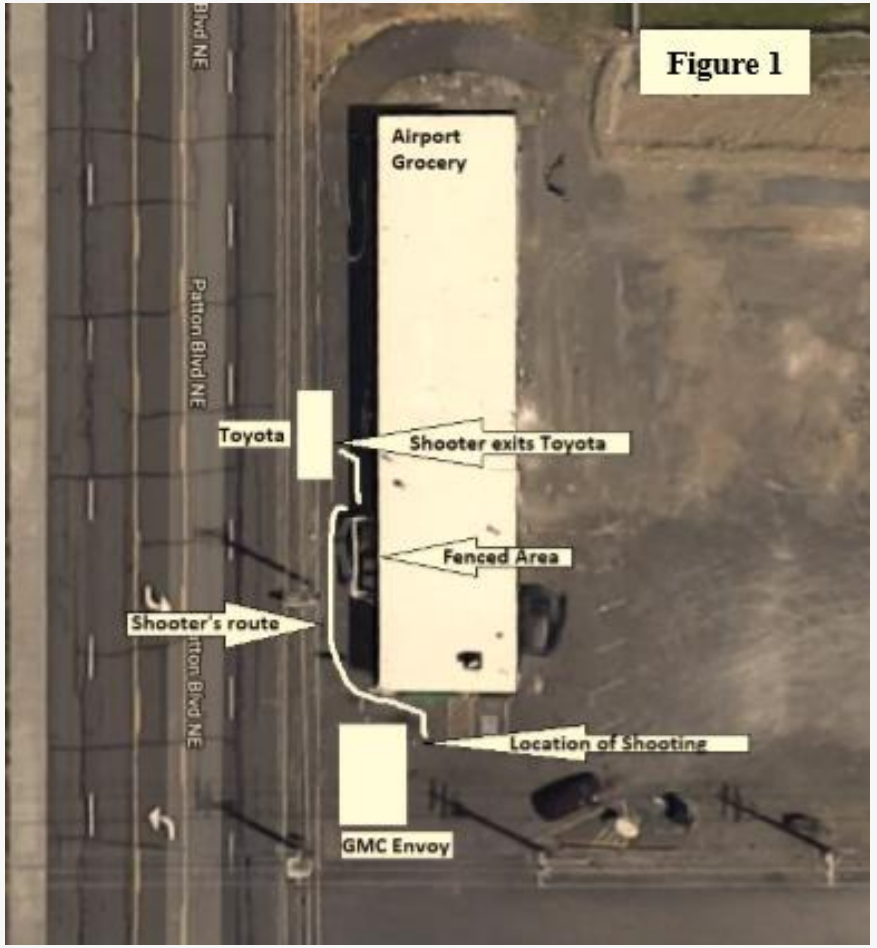
The DV victim in this case was safely outside the home, as were all of the other people previously inside the house with the suspect. She was also not requesting assistance from the officers to gain reentry into the home. There was little reason to not proceed in the most cautious manner by seeking a search warrant.

6 DRIVE BY SHOOTING; SENTENCE AGGRAVATOR

First Degree Murder with Drive By Shooting Aggravator
State v. Vasquez, COA No. 34107-1-III (March 1, 2018)
Division III, COURT OF APPEALS

Facts:

Defendant drove to a grocery store, and parked around the corner to the vehicle driven by his intended victim. After parking, he ran first to a fenced area where he hid for approximately a minute. Defendant then ran around the corner of the building and shot the victim from a location 63 feet away from his car. Defendant was convicted of First Degree Murder with a drive-by shooting aggravator, along with several counts of drive-by shooting, and now appeals.



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First Degree Murder with Drive By Shooting Aggravator
State v. Vasquez, COA No. 34107-1-III (March 1, 2018)
Division III, COURT OF APPEALS

TRAINING TAKEAWAY

Shooting someone 63 feet from one's vehicle, where there was also a break between defendant's arrival in the vehicle and reaching the position where the shooting occurred, does not establish a sufficient nexus between the shooter's vehicle and the crime to satisfy the drive-by shooting statute.

The shooter must either be inside or in the "immediate area" of the vehicle at the time of the shooting in order for the crime to be a drive-by shooting.

RCW 9A.36.045(1) states,

> "A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge."

Prior cases have examined the definition of "immediate area" in the drive-by shooting context and noted that the definition is narrow. A 2 block distance between the shooter and his vehicle was found to not fall within the scope of a drive-by shooting.

6 DRIVE BY SHOOTING; SENTENCE AGGRAVATOR

First Degree Murder with Drive By Shooting Aggravator
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Division III, COURT OF APPEALS

INVESTIGATION TIPS

In order to establish a sentence aggravator, you must provide specific facts which create a nexus between the crime and the element that triggers the aggravator.

If you are investigating a drive-by shooting, provide clear descriptions and specific distances of the shooter in relation to his or her vehicle.

Evidence creating a nexus between a shooting and a vehicle for the purposes of the drive-by shooting statute may include:

- Corroborating witness statements;
- Security video from nearby businesses;
- Witness video or photographs;
- Admissions from the shooter;
- Ballistics evidence (spent casings near the vehicle, bullet holes in the shooters vehicle from return fire, etc);
- General crime scene evidence.

TRAINING VIDEO

IGNITION INTERLOCK TRAINING VIDEO AVAILABLE FROM NHTSA

The National Highway Traffic Safety Administration is proud to announce the launch of a first-of-its-kind **online ignition interlock course for law enforcement.** This two-hour course will equip law enforcement officers with information and resources to assist them when they encounter a driver roadside who has, or should have, an ignition interlock installed in their vehicle. The course is hosted on the International Association of Directors of Law Enforcement Standards and Training First Forward website **free-of-charge**, and is **nationally certified for continuing education credits**. Please help us spread the word to your law enforcement partners!

[NOTE: this is a national training, not Washington-specific, so there are some variances from our state laws. If you have any questions, please contact WSP Impaired Driving Section Ignition Interlock Sergeant Brandon Villanti at Brandon.villanti@wsp.wa.gov.]

FURTHER READING

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

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

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

http://70.89.120.146/wapa/CaseLaw.html

Questions?

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