
MARCH 2019
LAW ENFORCEMENT
DIGEST
CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the March 2019 **Law Enforcement Digest Online Training**! This LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the month of the edition (ex – this February training covers the cases issued in March 2019) 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, as well as references to select RCWs. Links to additional Washington State prosecutor and law enforcement case law reviews and references are also included.

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.

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

MARCH 2019 EDITION

Covering select case opinions issued in February 2019

1. SEARCH & SEIZURE; CONSENT TO ENTER; MIRANDA; CHILD VICTIM INTERVIEW
2. TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE
3. INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY
4. ADDITIONAL RESOURCE LINKS: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

1 SEARCH & SEIZURE; CONSENT TO ENTER; MIRANDA; INTERVIEW OF CHILD ABUSE VICTIM

ASSAULT 2ND DEGREE; CHILD ABUSE
State v. Ho, COA No. 76519-1-I (March 25, 2019)
COURT OF APPEALS, DIV. I

FACTS:

CPS received a referral that a 10 year old boy had severe bruising on his buttocks and the back of his legs that appeared to have been caused by a paddle with holes in it. The following day a DSHS Social Worker called 911 to request a welfare check on the juvenile. The social worker and the responding deputy contacted the juvenile's biological father at their home. The father consented to the deputy and the social worker entering the home. When they explained to the father that they were there to conduct a welfare check on the child, the father stated that the child and his stepmother were at the mall. The social worker requested that the father request that they return to the residence. He called her, and she agreed.

While waiting for the stepmother and the child to return to the home, the father explained that his wife (the child's stepmother) was the primary caregiver due to his work schedule. When questioned about how they discipline the child, he stated that they talked to him, and occasionally spank him if needed. He denied knowing about any bruising on his son.

1 SEARCH & SEIZURE; CONSENT TO ENTER; MIRANDA; INTERVIEW OF CHILD ABUSE VICTIM

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FACTS, cont.:

A short time later, the stepmother and child arrived to the house. Neither parent objected to the social worker's request to interview the boy in his bedroom. The deputy stood by while the social worker conducted her interview. The deputy reported that the child seemed hesitant and reserved during the conversation. After some introductory questions, the social worker asked the child how he was disciplined. He stated that his mom "accidentally gets mad, she accidentally slaps my hand." He claimed this was done with an open hand, and stated that he falls down a lot and was not being careful.

When asked about bruising, the child claimed he had bruising on his bottom because he fell from a tree. He was unable to identify what tree he fell from, and when the social worker asked if he would show the bruises to the deputy, the boy refused to continue speaking.

The social worker and the deputy returned to the living room to speak with the parents. The social worker requested that the parents take the child to the hospital for an evaluation. The stepmother made several excuses as to why she couldn't take him.

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COURT OF APPEALS, DIV. I

FACTS, cont.:

The deputy told the stepmother that in Washington, it is legal to spank your child within reason. She then admitted that she spanked the child two times with her hand to deal with his behavior, and stated that she knew he had bruising on his buttocks. She continued to argue when the deputy and social worker again told her the child needed to be taken to the hospital for evaluation. Eventually she admitted that she used a "stick" to punish the child. When the deputy asked to see the stick, the stepmother guided him to a wooden dowel approximately 3 feet long and an inch in diameter. The deputy expressed the seriousness of using this type of instrument in striking a child. He then called a sergeant in the Special Investigations Unit who advised him that the child should be taken to the hospital and the stepmother placed under arrest. The deputy read the stepmother her *Miranda* rights which she said she understood. She agreed to speak with the deputy and asked for a pen and paper so she could write a letter to the judge to promise that it would never happen again. The deputy informed her that she would be able to write a statement once they reached the jail.

At the jail prior to booking, the stepmother told the deputy that she thought she wanted a lawyer. The deputy asked no further questions about the incident. The stepmother was charged and convicted at trial on one count of Assault 2nd. She now appeals her conviction, claiming that the deputy unlawfully seized her at her home, that she was interrogated in violation of her Miranda rights, and that her home was searched unlawfully.

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COURT OF APPEALS, DIV. I

TRAINING TAKEAWAY – CONSENSUAL HOME ENTRY & UNLAWFUL SEIZURE:

- **A seizure occurs under Art. 1, §7 when an officer restrains an individual's freedom of movement, and given the officer's display of authority or use of physical force, the person would not reasonably believe they are free to leave or a to decline a request.** See, State v. Young, 135 Wn.2d 498 (1998).

- **Merely questioning a person does not rise to a seizure.** By contrast, commanding a person, issuing orders, or demanding a particular action all generally establish a situation in which a reasonable person wouldn't feel free to end the contact. See, State v. O'Neill, 148 Wn.2d 564 (2003)

- **Entering a home upon consent of a person with authority to grant the consent is not a seizure. This is true whether or not the officer advised the person of their right to refuse the officer's entry.** See, State v. Khounvichai, 149 Wn.2d 557 (2003)

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TRAINING TAKEAWAY –

Where entry into and movement within a home is initiated by consent from the homeowner; the officer keeps open communication with the subjects about everything that's occurring; a suspected victim's wish to discontinue an interview is honored; and it's not until the entire contact nearly concludes and there is a consultation with a supervisor that the officer decides to arrest a subject; a reasonable person would have believed they were free to end the contact, and there is no unlawful seizure.

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TRAINING TAKEAWAY –

The totality of the circumstances in this case indicate that a reasonable person would have felt they could stop the interview or simply leave the room, therefore there was no unlawful seizure of the defendant.

- The victim's father consented to the social worker and deputy entering his home.
- The parents were informed of what the social worker and deputy were doing at all times.
- The child was initially questioned with the parents' consent, and the interview was stopped as soon as the child indicated he didn't want to continue.
- Neither the deputy nor the social worker searched through the house. Their movements were limited to the places to which they were invited: the entryway, the living room, the child's bedroom, and eventually the basement, where the defendant led the deputy to hand him the stick used in the assault.
- Only after all of that transpired, and the deputy contacted the sergeant, did he decide to arrest the defendant.

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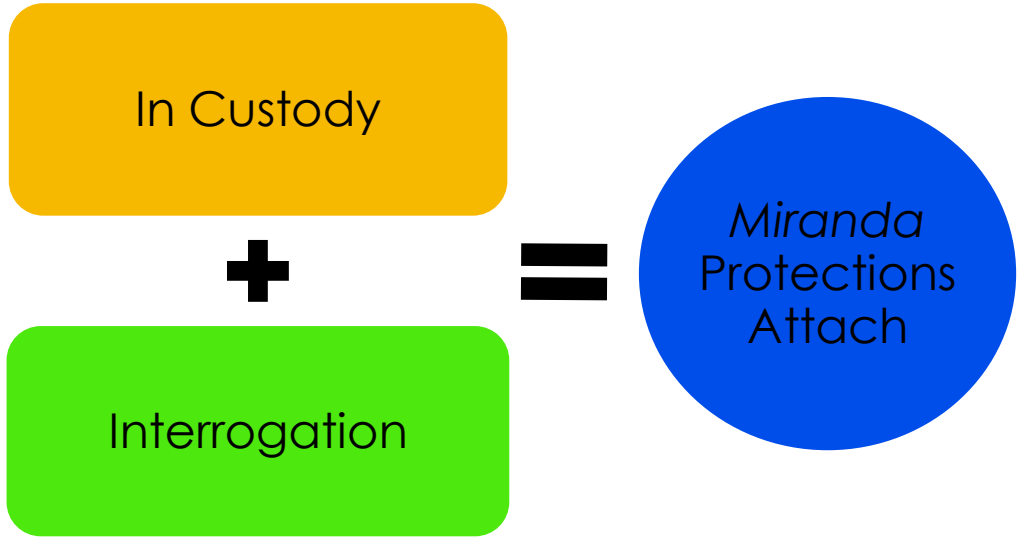
TRAINING TAKEAWAY – WHEN DO *MIRANDA* RIGHTS ATTACH:

A confession made while a suspect is (1) in custody, and (2) being interrogated by a state agent, is valid if the subject knowingly and intelligently waives their right to remain silent after having been given *Miranda* warnings.



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TRAINING TAKEAWAY – WHEN IS A SUSPECT "IN CUSTODY" FOR PURPOSES OF MIRANDA?

A suspect is not in custody when she confessed to a single armed officer who was inside her home with her husband's consent, and the officer made no threats, didn't block her physical movement, and conducted the interview while the suspect was in the company of her husband.

- **The fact that the suspect wasn't formally advised that she could terminate the interview or leave at any time wasn't enough to overcome the presumption that she wasn't in custody at the time she confessed.**

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TRAINING TAKEAWAY – IN CUSTODY:

A person is in custody if a **reasonable person** in their position **would objectively believe they were in police custody** to a degree associated with formal arrest.

- The officer's **intent** to take the person into custody, **or** their **suspicion** that the person is a potential suspect, doesn't matter.
- The **totality of the circumstances** determines whether someone is deemed "in custody" at the time of any incriminating statements.
- The defendant must show by objective facts that the officer restricted her freedom of movement.

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TRAINING TAKEAWAY – DETERMINATION OF "IN CUSTODY" WITHIN A HOME:

When the contact is occurring in the subject's home, the court will determine whether the otherwise familiar surroundings have been turned into a "police dominated atmosphere" by considering:

- The number of law enforcement personnel and whether they were armed;
- Whether the suspect was:
  - at any point restrained by physical force or threats;
  - isolated from others; or
  - informed she was free to leave or terminate the interview; and the context in which any such statements were made.

The only element that wasn't met in this case was the fact that the defendant wasn't formally advised by the deputy that she was free to leave or terminate the interview.

This one deviation didn't overcome the many circumstances that would have indicated to a reasonable person that she was not in custody at the time of her statements.

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COURT OF APPEALS, DIV. I

TRAINING TAKEAWAY – REPORTING GUIDELINES FOR CHILD ABUSE INVESTIGATIONS:

RCW 26.44 establishes guidelines for reporting and investigating claims of child abuse.

The statutory guidelines lay out preferred practices such as: gaining parental permission to interview the child; determining whether the child wants a third party to be present; elements of the written report/documentation; etc.

A violation of the child abuse interviewing guidelines does NOT require suppression of evidence gained in the investigation.

**The court did not find the interview in this case to be deficient.*

ADDITIONAL TRAINING

WA State law enforcement investigators, prosecutors, and specialized child interviewers interested in additional training opportunities on **Child Abuse Interviewing & Assessment** may be interested in the **free course** being offered throughout the state this summer. There are current spaces available in Yakima, Kennewick, and Tacoma: Training Info Here.

Provided Resource: WA State Quick Reference Interview Card FINAL Jan 2019

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

POSSESSION OF A CONTROLLED SUBSTANCE
United States v. Cooley, No. 17-30022 (Mar. 21, 2019)
NINTH CIRCUIT COURT OF APPEALS

FACTS:

A Crow Indian Reservation officer encountered the defendant's truck at 1am parked on the shoulder of a public, non-tribal highway crossing the Crow reservation. The truck's engine was running, and the headlights on. The officer knocked on the driver's side window, and the driver first started to roll down the passenger window, then rolled down his front window 6 inches. There was also a child in the truck. The officer could see only the top half of the driver's face due to the partially rolled down window and the tinting of the glass. He noted that the driver's eyes were bloodshot and watery, and that he "seemed to be non-Native."

The officer then continued asking the driver questions, learning that he had come from a town 26 miles away in order to purchase a truck from a man named "Thomas" and either "Spang" or "Shoulder Blade" as his last name. The officer knew the second man was a retired tribal officer for another jurisdiction, and the first man was associated with drug dealing.

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

POSSESSION OF A CONTROLLED SUBSTANCE
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FACTS, cont.:

The officer told the man that he didn't feel like his explanation added up. The man became agitated, repeating that he was there to buy a truck, and pulling the child onto his lap. The officer testified that the man's hands began to shake, he started pausing before answering questions, and lowered his voice making it hard to hear him. After complying with a request to roll his window down further, the officer saw 2 semiautomatic rifles on the front passenger seat. The officer noted in his testimony that being Montana, the mere presence of firearms in a vehicle "isn't cause for too much alarm."

The officer continued questioning the man about his reason for being in town and asked him to provide written identification. The man instead twice pulled out small bills from his right pocket and put them on the truck's center console. He then put his right hand back in his pocket, and the officer noticed his breathing had become shallow and rapid, and he was staring straight ahead "as if he was looking through his child" in a thousand-yard stare. The officer testified that based on his training and experience, this can be a sign the detainee is intending to use force. The officer drew his weapon to his side and ordered the driver to stop and show his hands. He again ordered the man to provide ID, and the man handed over his Wyoming license.

Unable to contact dispatch to run the man's information, the officer moved to the passenger side of the truck and opened the door. At this time, he noticed a loaded semiautomatic pistol in the area near the driver's right hand. When asked why he hadn't mentioned it before, the driver stated he didn't know the pistol was there. The officer removed the gun from the truck and disarmed it.

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

POSSESSION OF A CONTROLLED SUBSTANCE
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FACTS, cont.:

The officer then ordered the driver to exit the truck, which he did. After a pat down, the officer escorted the driver and the child to the patrol car. Once there, the man removed a few small, empty plastic bags from his pocket and placed them on the hood of the patrol car. The officer recognized these as bags commonly used to hold drugs. He placed the man in the back of his patrol car and called for additional assistance from his agency, as well as local county deputies because the man "seemed to be non-native." While waiting for backup, the deputy returned to the truck to turn off the engine. He found a glass pipe and plastic bag in the cab that appeared to have methamphetamine in them.

A Federal Bureau of Indian Affairs officer arriving on scene directed the officer to conduct an additional search of the truck. The officer discovered more methamphetamine.

The driver was charged with one count possession with intent to distribute methamphetamine, and one count of possession of a firearm in furtherance of a drug trafficking crime. He moved to suppress evidence obtained as a result of his encounter with the primary officer, claiming that the officer was acting outside of his jurisdiction in violation of the Indian Civil Rights Act.

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

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TRAINING TAKEAWAY – EXCLUSIONARY RULE:

Evidence obtained in violation of the Indian Civil Rights Act's 4th Amendment equivalent is subject to the exclusionary rule, making it inadmissible in the case against the defendant.

The evidence also fails to satisfy the federal "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine of excluding unlawfully seized evidence because that would require a showing that the tainted evidence would inevitably have been discovered through lawful means.

- The guns and drugs would not have been idly discovered through any other lawful means as they were well secured in the driver's truck.

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

POSSESSION OF A CONTROLLED SUBSTANCE
United States v. Cooley, No. 17-30022 (Mar. 21, 2019)
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TRAINING TAKEAWAY – DETERMINATION OF TRIBAL AUTHORITY OVER DETAINEE:

Officers cannot presume for jurisdictional purposes that a detainee is non-Indian (or Indian) merely by making assumptions based on physical appearance.
An officer may, however, rely on a detainee's response when asked about his Indian status.

- A tribal officer is required to determine whether a person is non-Indian shortly after seizing him.
  - Here, the officer testified that he determined the driver was non-Indian when he initially rolled down his window down 6 inches (before seizure), and he could see the top of half of his face.
- **Indian status is a political classification, not a racial or ethnic one.**
  - Indian status requires only "(1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe." See, *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015)
  - A person may have significant Native American ancestry and not be an Indian for tribal law enforcement purposes, or may be an Indian for tribal law enforcement purposes even if that person does not have any of the physical characteristics associated with Native American heritage. See, US v. Bruce (9th Cir. 2015)

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

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TRAINING TAKEAWAY – DETERMINATION OF TRIBAL AFFILIATION:

After determining a contacted party is non-Indian, the officer's authority to detain them is limited to a situation in which it was "apparent" that the driver had violated state or federal law. See, Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009)

- This standard is higher than particularized suspicion and probable cause, as it requires an obvious violation of a law.
- This prevents tribal officers without additional agreements expanding their police powers from having to turn a blind eye to obvious violations of state or federal law committed by non-Indians.
- **A tribal officer has authority to detain a non-Indian suspected of violating a state law for a reasonable amount of time as required to turn him over to state authorities**. See, State v. Schmuck, 121 Wn.2d 373 (1993).

There was insufficient evidence to support a reasonable conclusion that the driver had apparently violated a state or federal law where:

- The driver was observed to have bloodshot and watery eyes.
- No odor of alcohol.
- Possible but uncomfirmed slurred speech.
- Two semi-automatic rifles in the vehicle.
- Wads of cash in his pocket.
- Answers about his reason to be in the area that seemed untruthful to the officer.
- The driver's explanation, which the officer admitted was plausible, that he pulled over because he was tired.

2 TRIBAL POLICE; SEARCH & SEIZURE; EXCLUSIONARY RULE

POSSESSION OF A CONTROLLED SUBSTANCE
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TRAINING TAKEAWAY – TRIBAL OFFICER AUTHORITY TO DETAIN:

A tribal officer (not cross-commissioned, and not certified as a general authority peace officer) exceeds his authority when, on a public, non-tribal highway crossing a reservation, he detains and searches the vehicle of a person from whom he hasn't properly determined Indian status.

- The officer seized the driver when he drew his weapon, ordered the driver to show his hands, and commanded him to produce identification. A reasonable person would not feel free to ignore the commands of a police officer with a weapon drawn.

Evidence obtained as a result of that unlawful seizure will be subject to the exclusionary rule, and inadmissible.

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

TRAFFIC INFRACTION
Cruise-Gulyas v. Minard, No. 18-2196 (March 13, 2019)
SIXTH CIRCUIT COURT OF APPEALS

This ruling comes from the 6th District Court of Appeals but tracks with Washington State caselaw that has also discussed the intersection of free speech/profanity and policing.

FACTS:

A Michigan officer pulled over a driver for speeding. Instead of writing her a traffic infraction for the speeding, he wrote her for a reduced, non-moving violation. As the driver pulled away from the stop, she gave the officer the finger. Unhappy with this behavior, the officer initiated a second stop of the driver less than 100 yards from the original stop. He amended her initial non-moving violation to the original speed infraction.

The driver sued the officer under a §1983 claim alleging that he violated her constitutional rights when he pulled her over the second time and changed her original ticket to a more serious violation. She claims he unreasonably seized her in violation of the 4th and 14th Amendments; retaliated against her because of her protected speech in violation of the 1st and 14th Amendments; and restricted her liberty in violation of the Due Process clause. The officer moved for qualified immunity, which was denied.

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

TRAFFIC INFRACTION

Cruise-Gulyas v. Minard, No. 18-2196 (March 13, 2019)
SIXTH CIRCUIT COURT OF APPEALS

TRAINING TAKEAWAY – QUALIFIED IMMUNITY:

Qualified immunity protects police officers from personal liability unless they violate a person's clearly established constitutional or statutory rights that a reasonable person would have known. See, Kisela v. Hughes (2018).

- The court looks at whether the officer had fair notice that their conduct was unlawful.
- Reasonableness is judged by the law at the time of the conduct.

Previous caselaw established that an **obscene gesture** was **not a valid reason to stop a driver** (See, State v. Insogna (2013)), so the officer should have known that his action was unlawful. **The officer was not entitled to qualified immunity in this case.**

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

TRAFFIC INFRACTION
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TRAINING TAKEAWAY – UNLAWFUL SEIZURE:

The second stop, made without probable cause to believe the driver had committed a traffic violation or reasonable suspicion that she had committed a crime, was an unlawful seizure in violation of the driver's 4th Amendment rights.

- The authority to seize the driver on the basis of the driving infraction ended at the conclusion of the 1st stop.
- The second stop was distinct from the 1st stop, and would have needed an **independent justification**.

The second stop was clearly in retaliation for the gesture, and had no independent justification to support it.

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

TRAFFIC INFRACTION
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TRAINING TAKEAWAY – FREE SPEECH & "THE FINGER":

Using "the finger" is speech protected by the 1st Amendment, which any reasonable officer would know. See, Sandul v. Larion (6th Circuit, 1997).

- The US Supreme Court has long held that the State cannot regulate the simple public display of a 4-letter expletive as a criminal offense (specifically a charge of Disturbing the Peace for publicly wearing a jacket with the words "F__k the Draft" on it.
- To criminalize the language is an unconstitutional restriction on an individual's 1st Amendment Right to Free Speech and 14th Amendment right to Due Process. Cohen v. California (1971)

There is no law criminalizing the obscene gesture of "the finger," so the act on its own doesn't create probable cause or reasonable suspicion that a driver violated any law

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

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TRAINING TAKEAWAY – FREE SPEECH & "THE FINGER":

The gesture "was crude, not criminal," and therefore did not provide the required independent legal basis on which to initiate the second stop of the defendant's vehicle.

The Washington Supreme Court has previously ruled that **using profanity and otherwise yelling at law enforcement while they are engaged in investigating a crime is not a proper basis for a charge of Obstructing**. See, State v. E.J.J. (2015)

- "While the [juvenile's] words may have been disrespectful, discourteous, and annoying, they are nonetheless constitutionally protected."

3 INFRACTION; UNLAWFUL SEIZURE; FREE SPEECH; PROFESSIONAL COURTESY

TRAFFIC INFRACTION

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PRACTICE POINTER – CIVILITY AND PROFESSIONALISM:

Although the officer was understandably insulted and angered by the obscene gesture when he had just given the driver a break on her infraction, his emotions got the better of him in this situation.

Any person has a constitutionally protected right to Free Speech, which extends to giving the finger, regardless of the intended recipient of the gesture.

It's important to remind yourself in similar situations that you will rarely "win" in these encounters. While angry retaliation for a civilian's disrespectful action may feel good in the moment, this case is a perfect example of how that impulse could lead to a citizen complaint at best, or a lawsuit at worst.

Exercising restraint and professional detachment from these irritating, but ultimately meaningless, situations is the most effective way to react.

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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