Law Enforcement Digest

NOVEMBER 2014

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

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HONOR ROLL

704th Basic Law Enforcement Academy – May 27 through October 2, 2014

President:	Carson J. Steiner, Grays Harbor SO
Best Overall:	Todd E. Olson, Seattle PD
Best Academic:	Todd E. Olson, Seattle PD
Patrol Partner Award:	Todd E. Olson, Seattle PD
Tac Officer:	Sean Hendrickson, WSCJTC

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

( ) WARRANTLESS BODY CAVITY SEARCH OF ARRESTEE VIOLATES FOURTH AMENDMENT – In United States v. Fowlkes, ___ F.3d ___, 2014 WL 4178298 (9th Cir., Aug. 25, 2014), the Ninth Circuit holds that a law enforcement officer's warrantless body cavity search of an arrestee (pulling a slightly protruding baggie of drugs from a suspected drug dealer's rectum) violated the Fourth Amendment to the United States Constitution.

( ) CIVIL RIGHTS ACT LAWSUIT: SUSPICIONLESS STOP OF VEHICLE ON A HIGHWAY TO CHECK FOR COMPLIANCE WITH FISH AND GAME LAWS DOES NOT QUALIFY AS AN ADMINISTRATIVE STOP AND SEARCH UNDER THE FACTS OF THIS CASE; ACCORDINGLY, STOP VIOLATED THE FOURTH AMENDMENT AND BECAUSE LAW WAS CLEARLY ESTABLISHED, OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY – In Tarabochia v. Adkins, ___ F.3d ___, 2014 WL 4413235 (9th Cir., Sept. 9, 2014), the Ninth Circuit holds that Washington State Department of Fish and Wildlife (WDFW) officers' suspicionless stop of a moving vehicle on a highway to check for compliance with fish and game laws violated the Fourth Amendment to the United States Constitution. The Court rejected the officers' argument that the stop qualified as an administrative search of a pervasively regulated industry. In key part, the Court reasoned:

> The administrative search exception is applicable to warrantless searches where the search promotes an important governmental interest, is authorized by statute, and the authorizing statute and its regulatory scheme provide specific limitations on the manner and place of the search so as to limit the possibility of abuse . . . Where an inspection is authorized by statute but there are "no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." . . . .
>
> Instead of inspecting the Tarabochias' catch and commercial fishing records in the field, at a commercial fishing establishment, or through a fish and wildlife checkpoint – all of which, both parties agree, would have been authorized under Washington law – the WDFW officers decided to stop the Tarabochias as they traveled in their pickup truck on a highway. They effectuated this stop despite admittedly lacking any suspicion of unlawful behavior or statutory authority that would permit this search under the administrative search exception. We hold that, under these circumstances, this stop, and the search that followed, constituted a Fourth Amendment violation.

[Citations, footnotes omitted; emphasis added]

The Ninth Circuit rules further that the case law was well-established on the Fourth Amendment issue when the officers made the vehicle stop, and therefore the officers are not entitled to qualified immunity under the Civil Rights Act.

Result: Reversal of United States District Court (Western District Washington) order granting summary judgment dismissal based on qualified immunity; case remanded for trial.

LED EDITORIAL COMMENT: The ruling in this case is limited to its factual context, i.e., a suspicionless stop on a highway to investigate possible fishing law violations. The ruling and analysis does not limit application of the statutes at issue in other contexts such as "inspecting . . . catch and commercial fishing records in the field, at a commercial fishing establishment, or through a fish and wildlife checkpoint."

( ) POSSE COMITATUS ACT-LIKE RESTRICTIONS PRECLUDED NCIS AGENT FROM INVESTIGATING WASHINGTON CIVILIAN FOR DISTRIBUTING CHILD PORNOGRAPHY – In United States v. Dreyer, ___F.3d ___, 2014 WL 4474295 (9th Cir., Sept.12, 2014), the Ninth Circuit rules that evidence of an Algona, Washington civilian's distribution of child pornography obtained by a Naval Criminal Investigative Service (NCIS) agent must be excluded from evidence because the NCIS agent violated restrictions on the military from investigating civilians.

The Posse Comitatus Act (PCA), 18 U.S.C. § 1385, with certain narrow exceptions not applicable in this case, prohibits Army and Air Force military personnel from participating in civilian law enforcement activities. In addition, Congress has directed the Secretary of Defense to prescribe such regulations as may be necessary to prevent direct participation by a member of the Army, Air Force, Marine Corps, and Navy (including NCIS agents, the Dreyer panel asserts) in civilian law enforcement activities unless otherwise authorized by law. Thus, PCA-like restrictions apply to NCIS agents.

The Ninth Circuit's summary (which is not part of the opinion) describes the facts and opinions in the case as follows:

> A special agent of the [NCIS] launched an investigation for online criminal activity [i.e., distribution of child pornography] by anyone in the state of Washington, whether connected with the military or not. The agent found evidence of [distribution of child pornography] committed by the defendant, a civilian, in the state and turned it over to civilian law enforcement officials.
>
> The [Ninth Circuit] panel reaffirmed that NCIS agents are bound by Posse Comitatus Act-like restrictions on direct assistance to civilian law enforcement, and held that the agent's broad investigation into sharing of child pornography by anyone within the state of Washington, not just those on a military base or with a reasonable likelihood of a Navy affiliation, violated the regulations and policies proscribing direct military enforcement of civilian laws.
>
> The panel held that the exclusionary rule should be applied, and that the district court erred in denying the defendant's motion to suppress, because there is abundant evidence that the violation at issue has occurred repeatedly and frequently, and that the government believes that its conduct is permissible, despite prior cautions by this court and others that military personnel, including NCIS agents, may not enforce the civilian laws.

[Bracketed text inserted by LED Editor]

Result: Reversal of District Court (Western District of Washington) conviction of Michael Allen Dreyer for distribution of child pornography.

( ) CUSTODIAL SUSPECT'S REFERENCES TO GETTING AN ATTORNEY THAT HE MADE BEFORE RECEIVING MIRANDA WARNINGS WAS AN UNAMBIGUOUS REQUEST FOR AN ATTORNEY THAT PRECLUDED ANY ATTEMPT BY OFFICERS TO INTERROGATE OR CLARIFY – In Sessoms v. Grounds, ___ F.3d ___, 2014 WL 4668005 (9th Cir., Sept. 22, 2014), the Ninth Circuit rules that a custodial suspect asking for an attorney, before receiving Miranda warnings, was an unambiguous request for an attorney and prevented the officers from interrogating the suspect.

Tio Sessoms was 19 years old when he traveled from California to Oklahoma where his father lived. Sessoms told his father that he was wanted in a recently committed burglary-robbery-murder in California. His father told him to turn himself in to police, but to ask for an attorney before any questioning. Sessoms turned himself in to Oklahoma police and was placed in jail. Several days later, two California detectives arrived at the Oklahoma jail. Sessoms met with the detectives in an interrogation room.

After the detectives briefly introduced themselves and before they administered Miranda warnings, the following exchange occurred:

> Sessoms: There wouldn't be any possible way that I could have a — a lawyer present while we do this?
>
> [Detective]: Well, uh, what I'll do is, um —
>
> Sessoms: Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.

The detectives did not treat Sessoms' statement as an assertion of his right to an attorney that would require that they end the potential interrogation session. They instead tried to talk Sessoms out of asserting his attorney right. They talked to Sessoms about (1) how consulting an attorney would likely have the down-side result that he would not get to tell the detectives his side of the story, and (2) how the detectives already had a detailed statement about the crime from Sessoms' accomplice in the crime. Then the detectives administered the Miranda warnings, after which Sessoms waived his Miranda rights and gave a statement. **[LED EDITORIAL COMMENT: The focus of this case has been solely on whether the officers should have taken Sessoms' attorney references in the above block-quoted exchange as a clear invoking of his attorney right under Miranda. Because of this focus, there has been no discussion about whether the detectives violated Sessoms' rights by trying to talk him out of asserting his Miranda rights. But we view those efforts by the detectives to be troubling and something to be avoided by interrogating officers.]** Sessoms' statements during the interrogation were admitted at his trial. He was convicted of murder, robbery, and burglary.

The Supreme Court's 1966 Miranda opinion declares that where a suspect asserts his or her Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. Case law from the United States Supreme Court under Miranda, however, has established that where a suspect has initially waived his or her Miranda rights, the suspect's subsequent assertion of the right to counsel or to silence during the interrogation must be

unambiguous or the questioning may continue. See Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** (ambiguous reference to right to counsel - - "Maybe I should talk to a lawyer"); Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) **July 10 LED:02** (silence in the face of questioning held not to be an implied assertion of right to silence).

And by logical extension, the same applies to a suspect's statement just before or just after Miranda warnings are given - - the invocation of rights must be unambiguous, and if it is ambiguous, Mirandizing and questioning may go forward. Ambiguity is determined based on the words uttered by the suspect and on the context leading up to the suspect's would-be invocation. An unambiguous invocation cannot be made ambiguous by officers' clarifying of the suspect's wishes.

In this opinion, the Court reasoned that the statements by Sessoms were unambiguous assertions of his right to an attorney, that this precluded the interrogators from interrogating him or seeking to clarify his wishes, and that he is entitled to habeas corpus relief for an unreasonable error by the lower courts in not ordering his statements suppressed.

Result: Reversal of decision of U.S. District Court (Eastern District of California) denying the habeas corpus petition of Tio Sessoms in which he seeks relief from his convictions and sentence; case remanded for possible retrial.

LED EDITORIAL NOTE: For discussion of case law relevant to this case, see the following article by John Wasberg on the CJTC LED Internet page: Initiation of Contact Rules Under The Fifth Amendment.

LED EDITORIAL COMMENTS: It is not easy to predict what a court will deem to have been an unambiguous assertion of the right to silence or to an attorney in a custodial setting. We think that officers pursuing custodial interrogation are safest legally if they treat all seemingly ambiguous references to the right to silence or the right to counsel – whether the suspect's reference is uttered before or after Miranda warnings and/or waiver – in the same way, by (1) clarifying the statement and the suspect's wishes, and (2) re-Mirandizing or at least confirming that the suspect understands his or her rights and wishes to talk.

( ) CIVIL RIGHTS ACT LAWSUIT: OFFICERS EXERCISED DELIBERATE INDIFFERENCE OR RECKLESS DISREGARD IN FAILING TO DISCLOSE COMPELLING EXCULPATORY EVIDENCE TO THE PROSECUTOR – In Tatum v. Moody, ___F.3d ___, 2014 WL 4627967 (9th Cir., Sept. 17, 2014), the Ninth Circuit upholds a jury's verdict against California police officers for failing to disclose exculpatory evidence to the prosecutor.

The Ninth Circuit's summary (which is not part of the opinion) describes the facts and opinions in the case as follows:

> Plaintiff was incarcerated for 27 months pending trial on charges arising from a series of demand-note robberies. The charges were dismissed after plaintiff's defense counsel obtained exculpatory material which defendants failed to disclose. The panel held that plaintiff's claim was covered by the Fourteenth Amendment's guarantee of due process, and not by the Fourth Amendment. The panel held that the Constitution protects a plaintiff from prolonged detention when the police, with deliberate indifference to or in the face of a perceived risk that their actions will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from the prosecutors information strongly indicative of his

innocence. The panel held that the jury's determination that defendants acted with deliberate indifference or reckless disregard for plaintiff's rights satisfied the standard applicable to violations of due process and that the jury instructions described a cognizable constitutional claim. . . . .

Result: Affirmance of judgment of District Court (Central District of California) on jury verdict.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

( ) PUBLIC RECORDS ACT: WHERE GOVERNMENT OFFICIAL PRIMARILY USES PERSONAL CELL PHONE TO CONDUCT COUNTY BUSINESS, CALL LOGS AND TEXT MESSAGES PERTAINING TO GOVERNMENT BUSINESS, ARE "PUBLIC RECORDS" AND SUBJECT TO PUBLIC DISCLOSURE – In Nissen v. Pierce County, ___ Wn. App. ___, 2014 WL 4435860 (Div. II, Sept. 9, 2014), the Court of Appeals holds that where a government employee uses his or her personal cellular telephone to conduct government business, call logs for that official's private cellular phone constitute "public records" only with regard to calls that relate to government business and only if the call logs are used or retained by a government agency, and text messages sent or received by a government official constitute "public records" only if the text messages relate to government business. Any portion of the call log records reflecting private calls are not public records and, thus, are not subject to disclosure under the PRA. Similarly, purely private cellular phone text messages are not "public records" and are not subject to disclosure under the PRA.

Result: Reversal of Thurston County Superior Court order dismissing PRA action; remand to Superior Court for development of the record.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the

circuit number for “9” in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on “Washington State Legislature,” “bill info,” “house bill information/senate bill information,” and use bill numbers to access information. Access to the “Washington State Register” for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General’s Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General’s Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. Special thanks to John Wasberg and Shannon Inglis for providing significant contributions to this issue. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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