LAW ENFORCEMENT DIGEST – August 2021

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Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- Washington Courts of Appeal
- Washington State Supreme Court
- Federal Ninth Circuit Court of Appeals
- United States Supreme Court

Cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

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

TOPIC INDEX

CASES

1. City of Seattle v. Long, No. 98824-2 (Aug. 12, 2021)
2. State v. Bass, COA No. 80156-2-1 (Aug. 2, 2021).
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5. State v. Level, COA No. 37463-7-III (Aug. 24, 2021)

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- Caselaw Update authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

QUESTIONS?

- Please contact your training officer if you need to have this training reassigned to you.
- If you have questions/issues relating to using the ACADIS portal, please review the FAQ site.
- Send Technical Questions to lms@cjtc.wa.gov or use our Support Portal.
- Author: Linda J. Hiemer, JD| Legal Education Consultant

City of Seattle v. Long

No. 98824-2

Washington Supreme Court

August 12, 2021

Facts Summary

TOPIC: Homestead Act and Impoundment of Vehicles

In 2016, Long was living in his truck. Long worked as a general tradesman and stored work tools as well as personal items in his vehicle. One day, Long was driving to an appointment when the truck began making "grinding" noises. On July 5, 2016, Long parked in a gravel lot owned by the city of Seattle. Long stayed on the property for the next three months.

On October 5, 2016, police alerted Long that he was violating the Seattle Municipal Code by parking in one location for more than 72 hours. SMC 11.72.440(B). Long claims he told the officers that he lived in the truck. Later that day, a parking enforcement officer posted a 72-hour notice on the truck, noting it would be impounded if not moved at least one city block. Long did not move the truck. While Long was at work on October 12, 2016, a city-contracted company towed his truck. Without it, Long slept outside on the ground before seeking shelter nearby to escape the rain and wind.

Though he did not contest that the truck was parked illegally, Long argued that the impoundment violated the state and federal excessive fines clauses, substantive due process, and the homestead act. Long moved for summary judgment, which the municipal court denied.

Training Takeaway

A "uniquely American contribution" to real property law, homestead exemptions are based on the notion that citizens should have a home where family is sheltered. The act is favored in law, and courts construe it liberally so it may achieve its purpose of protecting family homes. Under the homestead act some residences are automatically protected while others require an owner to file a declaration.

The Washington Homestead Act, RCW 6.13.040(1), automatically protects occupied personal property, such as a vehicle being used as a person's primary residence and no declaration is required. The homestead exemption protects the vehicle up to fifteen thousand dollars. The homestead act did not prohibit the impoundment of Long's illegally parked vehicle, but it did apply to the attachment, execution, or forced sale of the vehicle to pay any costs related to the impoundment.

Homestead protections are resolved upon enforcement, not at the time of issuance, of a parking ticket or impoundment of a vehicle. Impoundment of a vehicle that has been unlawfully parked for a period pursuant to a statute that authorizes an impoundment is reasonable and lawful and, therefore, does not violate the homestead act.

EXTERNAL LINK: https://www.courts.wa.gov/opinions/

State v. Bass

COA No. 80156-2-1

Washington Court of Appeals, Division I

August 2, 2021

Facts Summary

TOPIC: Discarded DNA

> Note: This opinion supersedes the opinion that was originally filed on June 1, 2021 and appeared in the June 2021 LED. That opinion can be read here: https://www.courts.wa.gov/opinions/pdf/801562.pdf

In November 1989, 18-year-old Amanda Stavik, returned home to rural Whatcom County with her college roommate to celebrate Thanksgiving with her family. On Friday, November 24, 1989, Stavik made plans with her roommate to go out that evening with a former high school friend, Brad, and his friend, Tom Bass, Defendant Timothy Bass's younger brother. Sometime between 2:00 and 3:00 p.m., Stavik decided to go for a run with the family dog along a path that went past Bass's residence. The dog returned home alone. A search ensued, and Stavik's body was found a few days later partially naked and floating in the river adjacent to the running path.

During the autopsy, the medical examiner found semen which led the State to conclude that someone had kidnapped and raped Stavik while she was out on her Friday afternoon run and that she had died while fleeing her captor. The doctor preserved the samples he collected and sent them to the FBI and the Washington State Patrol Crime Lab for analysis.

The Crime Lab developed a DNA profile from the sperm. The police investigation led to several suspects whom they later excluded when their DNA did not match the DNA in the sperm sample. Eventually, the case went cold.

Twenty years later, in 2009, Detective Bowhay reopened the investigation and began asking for DNA samples from anyone who lived in the area or who may have had contact with Stavik near the time of her death. Over the course of the investigation, Detective Bowhay and his team collected more than 80 DNA samples for testing. In 2013, Detective Bowhay asked Bass for a DNA sample. Bass told Detective Bowhay that he did not really know Stavik and initially said he did not know where she lived. Bass refused to provide a DNA sample absent a warrant.

Bass was working as a delivery truck driver for Franz Bakery. Detective Bowhay reached out to Kim Wagner, the manager of the Franz Bakery outlet store, hoping to obtain company consent to swab the delivery trucks for "touch DNA," or DNA left behind when people touch or use something. Detective Bowhay did not identify the employee he was investigating. Wagner told Detective Bowhay he would need to talk with the corporate offices in order to get permission for any such search and provided him with a phone number for the corporate office. The company refused to give permission to law enforcement to search its vehicles.

Over two years later, in May 2017, Detective Bowhay contacted Wagner again and asked her for the general areas of Bass's delivery route. Wagner asked if he was investigating Stavik's murder. He confirmed he was. She asked if his investigation was related to Bass; he again confirmed it was. The detective informed Wagner he was looking for items that Bass might cast off that may contain his DNA. Wagner provided Detective Bowhay information regarding Bass's normal route, and Detective Bowhay agreed to update her if he found anything.

Shortly thereafter, Detective Bowhay surveilled Bass as he drove his route, hoping to collect anything Bass discarded, like cigarette butts, bottles, anything he might have drank from, anything he might have thrown away. He later told Wagner that Bass had not discarded any items. Wagner indicated that she would see if he discarded any items at work, such as water bottles, and asked if that would help. Detective Bowhay said "okay," but told her that he was not asking her to do anything for him.

In August 2017, Wagner saw Bass drink water from a plastic cup and throw the cup away in a wastebasket in the bakery's employee break room. She collected that cup and stored it in a plastic bag in her desk. Two days later, she saw Bass drink from a soda can and, again, after he discarded it in the same trash can, she retrieved it and stored it with the cup.

Detective Bowhay did not direct Wagner to take any items and did not tell her how to handle or package these items. Wagner contacted Detective Bowhay via text to let him know she had two items Bass had discarded in the garbage. Detective Bowhay met Wagner in the Franz Bakery parking lot, picked up the items, and sent them to the Washington State Crime Lab for analysis. The Crime Lab confirmed that the DNA collected from Bass's soda can and cup matched the male DNA collected from the semen in Stavik's body. Law enforcement arrested Bass for Stavik's murder in December 2017.

The State charged Bass with first degree felony murder. In pretrial motions, the trial court denied Bass's motion to suppress the DNA evidence obtained from items Wagner collected at the Franz Bakery. The jury found Bass guilty. On appeal, Bass challenged the admissibility of the DNA evidence, arguing Wagner acted as a state agent in conducting a warrantless search in violation of article I, section 7 of the Washington Constitution. In June 2021, the Washington Court of Appeals upheld the lower court's ruling. Bass sought reconsideration; the court denied Bass's request.

Training Takeaway

Under Article I, Section 7 of the Washington Constitution, "[n]o person shall be disturbed in his [or her] private affairs, or his [or her] home invaded, without authority of law." Both this section under the Washington Constitution and the Fourth Amendment to the United States Constitution were intended as a restraint upon sovereign authority. This rule does not apply to the acts of private individuals. But evidence discovered by a private citizen while acting as a government agent is subject to the rule.

To prove a private citizen was acting as a government agent, the defendant must show that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person. The mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one.

For an agency relationship to exist, there must be a manifestation of consent by the police that the informant acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control.

The trial court heard live testimony from both Detective Bowhay and Wagner. At the conclusion of that hearing, the trial court found that Wagner was not acting as an agent of Detective Bowhay when she retrieved the plastic cup and soda can from the garbage can at the Franz Bakery outlet store because it was Wagner who conceived the idea to search the garbage, and Detective Bowhay did not direct, entice, or instigate Wagner's search.

Reviewing this testimony, the Court of Appeals held that substantial evidence supported the trial court's finding that Detective Bowhay did not direct, entice, or control Wagner and Wagner was not acting as a state agent when she retrieved Bass's cup and soda can from the workplace trash can. The Court added that, "These findings in turn support the legal conclusion that Wagner's seizure of Bass's discarded items and the DNA evidence was not the fruit of an unlawful search." Therefore, the Court of Appeals upheld the conviction.

Bass moved for reconsideration. Bass argued that the detective did instigate and encourage Wagner by having repeated contacts with her and failed to discourage Wagner when she volunteered to look for items Bass may have discarded. Detective Bowhay conceded he did not discourage Wagner from looking for items Bass might discard at work. Wagner testified that she talked with police maybe less than five times over a two year period.

The Court determined that Bass sought to treat a failure to dissuade as the equivalent of implied encouragement. The Court reasoned that law enforcement does not have a duty to discourage private citizens from acting on their own. The number of contacts between Wagner and police and the failure to discourage a private citizen's actions did not rise to the level of instigation or encouragement required to make Wagner an agent of law enforcement.

EXTERNAL LINK: https://www.courts.wa.gov/opinions/

State v. Brownlee

COA No. 53753-2-II

Washington Court of Appeals, Division II

April 20, 2021, publication ordered August 10, 2021

Facts Summary

TOPIC: Confrontation and Forfeiture by Wrongdoing Doctrine

The State charged Brownlee with residential burglary, assault in the second degree, and tampering with a witness. The jury concluded that each count was a crime of domestic violence. The charges arose out of two incidents that occurred in May 2019, involving Jacqueline White, the mother of his child. White wrote a sworn statement detailing the circumstances of Brownlee's assault against her. White had a prior no contact order against Brownlee due to a past assault against her.

Before trial, the State had mailed subpoenas to White's last known address, attempted personal service, and issued a material witness warrant. Despite these efforts, the State did not reach her. White was unavailable for trial.

When White failed to appear to testify at trial, the State sought to admit White's sworn written statement as substantive evidence. The State argued that Brownlee had procured White's unavailability thereby forfeiting his confrontation right under the doctrine of forfeiture by wrongdoing.

In making its decision, the trial court reviewed White's statement and Brownlee's phone calls from jail. Specifically, the trial court considered the phone calls Brownlee made before the May 2019 incident and arrest while he was in jail for a prior domestic violence charge also involving White.

On January 30, 2019, Brownlee called a person by the name of Sierra and learned

that White was staying with Brownlee's cousin. Brownlee requested help from Sierra but conveyed that there was "only so [] much" he could say over the phone. Brownlee said that there are things that can be done to get him out of jail, and that Sierra should "fix" his situation. While asking Sierra for assistance, Brownlee repeatedly confirmed with, "You know what I'm saying?"

On February 3, Brownlee called his mother and told her he was not worried about White testifying. He also told her that they should not talk about the case over the phone anymore and that he would write her a letter. He asked her to be his eyes and ears and to forward his comments "down the pipeline." He mentioned that he did not want to speak on the phone about his case. He also told his mother to pay attention to the letters he sent to her, that she knows what to do, and added, "'Ya know what I'm sayin'?" Brownlee referred to White and said she will not appear at trial and will not be found.

Brownlee ended the call by asking his mother to ensure everyone is on the same page. He instructed his mother to have his cousin call the State to inform them that she would not testify.

In considering forfeiture by wrongdoing, the superior court also reviewed evidence other than the phone calls stemming from the May 2019 incidents. During Brownlee's arrest for the May 2019 incidents, he made a spontaneous comment that White would recant. Brownlee also attempted to send White a text message telling her to recant, but he accidentally sent the message to a police officer instead. The trial court issued findings of fact and conclusions of law determining that Brownlee had forfeited his right to confrontation. The court admitted White's sworn statement.

A jury convicted Brownlee of two counts of residential burglary, two counts of second-degree assault, two counts of violation of a no contact order, and two counts of tampering with a witness. Brownlee appealed his convictions.

Brownlee argued that the trial court erred in admitting White's written statement as substantive evidence. Brownlee also challenged several findings by

the trial court in its admitting of White's statements under the forfeiture by wrongdoing doctrine. Lastly, Brownlee argued that the trial court violated his right to confrontation under the Sixth Amendment to the United States Constitution by admitting White's out-of-court statements. The Court rejected Brownlee's arguments and affirmed the trial court's rulings.

Training Takeaway

The Sixth Amendment gives criminal defendants the right to confront the witnesses against them. The forfeiture by wrongdoing doctrine is an equitable exception to the Sixth Amendment's right to confrontation. Under the doctrine, defendants that procure the unavailability of a witness forfeit their right to confront the missing witness. The forfeiture by wrongdoing doctrine requires that: (1) the defendant engaged in wrongdoing; (2) the wrongdoing was intended to render the absent witness unavailable at trial; and (3) the wrongdoing did, in fact, render the witness unavailable at trial.

A defendant commits wrongdoing if they directly procure a witness's unavailability or use an intermediary to do so. Further, a defendant who uses threats of violence against a witness commits wrongdoing. Additionally, prior domestic violence can be relevant to the inquiry of whether a defendant has wrongfully procured a witness's unavailability.

The Court of Appeals concluded that the facts showed with a high degree of probability that Brownlee attempted to procure White's unavailability. First, the record showed Brownlee made multiple attempts to procure White's unavailability. He expressly asked White to recant statements in a prior case. During multiple phone calls, he used thinly veiled language asking people to "fix" his situation. During these calls he repeatedly said there were things that could be done to get him out of jail. And he stated upon his arrest that White would recant, and he attempted to send her a text message telling her to recant.

Second, the record shows that Brownlee's communications were intended to procure White's unavailability. He appeared to believe that absent the forfeiture by wrongdoing doctrine, White's unavailability would result in his freedom.

Third, White was unavailable despite the State's reasonable efforts to contact her. White made a sworn statement showing a prior willingness to cooperate. After Brownlee's comments about White recanting, she stopped responding to the State's attempts to reach her.

Based upon these facts, the Court of Appeals determined that Brownlee, through his wrongdoing, forfeited his constitutional right to confront witnesses against him.

EXTERNAL LINK: https://www.courts.wa.gov

State v. Palmer
COA No. 52362-1-II

Washington Court of Appeals, Division II

August 19, 2021

Facts Summary

TOPIC: Right Against Self-Incrimination

Palmer and his girlfriend, DD, moved in together in 2013. They lived together with DD's two biological children from a prior marriage, her son AD, and her daughter PD. PD has a diagnosis of autism. Palmer and DD also had a baby together, LP. Sometime in 2014, the family moved to Washington. Palmer served as caregiver to the children and in that role disciplined both PD and AD. Child Protective Services (CPS) had been involved with the family, taking custody of the children in 2015, but releasing LP to Palmer's custody and PD and AD to DD's custody.

Palmer subsequently moved from the family residence with LP but would visit DD's house on weekends with LP. During a family car trip in 2016, Palmer grabbed AD by the neck, leaving a scratch. At some point after the car trip incident, Palmer told DD that PD had touched his penis. Thereafter, PD disclosed to DD that Palmer had touched her vagina. Approximately four months after PD's disclosure, DD contacted law enforcement.

Law enforcement authorities interviewed the children on two separate occasions. Detective Ramirez participated in PD's interview during which he learned of the accusations against Palmer. Eventually, Ramirez took Palmer into custody, read him Miranda rights, and questioned him. Ramirez ended the questioning after Palmer repeatedly refused to admit to any wrongdoing. Ramirez returned the next morning for additional questioning, but Palmer refused to talk.

The State charged Palmer with one count of child molestation in the first degree and two counts of assault of a child in the second degree.

Palmer and Detective Ramirez both testified at trial. The State asked Detective Ramirez if he had spoken to Palmer after Palmer's arrest and overnight confinement. Ramirez testified, "I went back the next morning, thinking that, you know, a day sitting in the county jail, you know, there's some time to think, and maybe Mr. Palmer would want to do the right thing here.". Ramirez further testified that he told Palmer, "You've had some time to think. Do you want to talk?" and that Palmer responded that he did not want to talk.

A jury convicted Palmer of child molestation in the first degree, assault in the fourth degree, and assault of a child in the second degree. The trial court sentenced Palmer to an indeterminate sentence of 82 months to life imprisonment.

Palmer appealed his convictions and sentence. Palmer argued that the State violated his right against self-incrimination when it solicited comments from Ramirez at trial about Palmer's decision to remain silent. The Court of Appeals agreed and remanded the case for a new trial.

Training Takeaway

Palmer challenged the constitutionality of the State's eliciting witness comments on Palmer's post-arrest silence. The Fifth Amendment to the United States Constitution states that no person "shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST., amend V. The Washington Constitution contains a similar provision: "[n]o person shall be compelled in any criminal case to give evidence against himself." WASH. CONST., art. I, § 9. Washington courts have interpreted both provisions to provide the same protection.

The right against self-incrimination prohibits the State from eliciting comments from witnesses about the defendant's pre- or post-arrest silence.

The State may also not suggest the defendant is guilty because they chose to remain silent, because the assurance of Miranda is that remaining silent will not be penalized.

The Court decided that the State unequivocally elicited a comment from Ramirez about Palmer's decision to remain silent.

The Court determined that Ramirez's testimony was a comment on Palmer's right to remain silent. In addition, the Court found that the State suggested that Palmer was guilty due to his silence. Ramirez testified that Palmer remained silent after being given a chance to "do the right thing" by admitting criminal conduct. The Court reasoned that that statement presupposed Palmer's guilt and created an impossible choice: Palmer could either do right by confessing to molesting a child or do wrong by remaining silent. Implicit in the "silence equals wrongfulness" notion is that silence withholds the "truth"—that "truth" being one's criminal conduct, even if there was no criminal conduct.

The Court held that in that context, a defendant cannot maintain their presumption of innocence by remaining silent. A detective's belief on this front may assist with their investigative duty, but established authority prohibits using a defendant's right to remain silent to suggest guilt to the jury. The Court granted Palmer a new trial and reminded the State that it was forbidden from eliciting comments about Palmer's silence during his new trial.

EXTERNAL LINK: http://www.courts.wa.gov/

State v. Level

COA No. 37463-7-III

Washington Court of Appeals, Division III

August 24, 2021

Facts Summary

TOPIC: Unlawful Possession of a Stolen Vehicle

A police officer stopped Level for driving a moped without wearing a helmet. The condition of the moped led the officer to suspect it was stolen. A review of the moped's vehicle identification number confirmed this suspicion. The State charged Level with possession of a stolen motor vehicle.

A jury convicted Level of the stolen vehicle charge. Level appealed claiming that a moped did not qualify as a motor vehicle under Washington's stolen motor vehicle statute set forth in RCW 9A.56.068(1).

Training Takeaway

The stolen motor vehicle criminal statute does not define motor vehicle, so the Court looked to definitions contained in other statutes cross-referenced with the stolen motor vehicle statute. That definition provides that "A motor vehicle is a self-propelled device that is capable of moving and transporting people or property on a public highway."

The Court ruled that a moped readily meets that definition. Therefore, a moped qualifies for prosecution under the stolen motor vehicle statute.

EXTERNAL LINK: http://www.courts.wa.gov/