LAW ENFORCEMENT DIGEST – September 2020

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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.

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CASES

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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 want to have this training assigned to you for credit.
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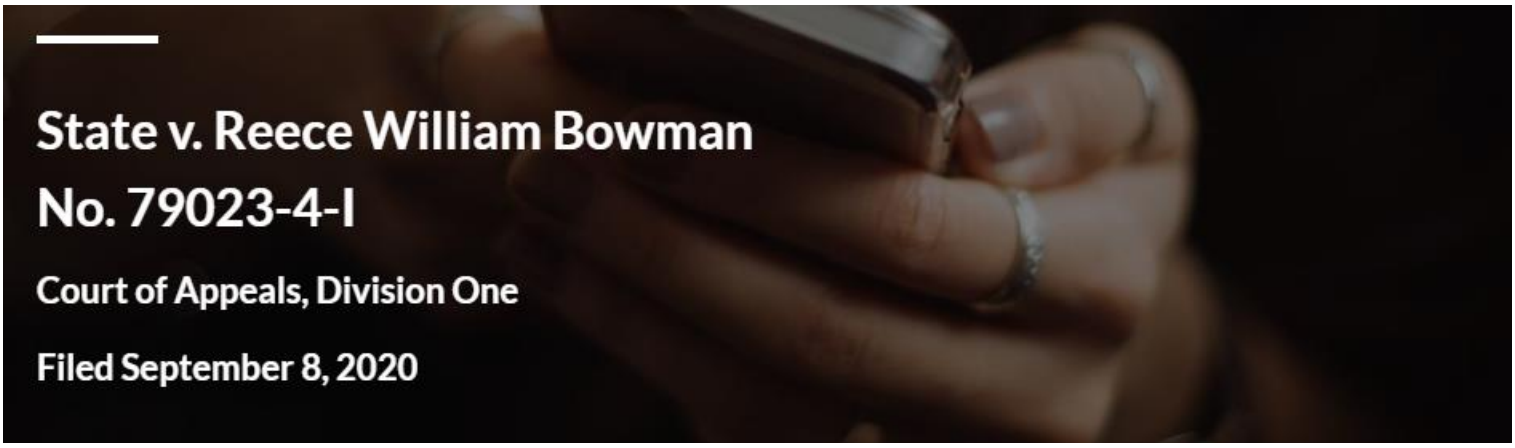


State v. Reece William Bowman

No. 79023-4-I

Court of Appeals, Division One

Filed September 8, 2020

Facts Summary

TOPIC: RIGHT TO PRIVACY/TEXT MESSAGES

Reece Bowman received texts messages from an unfamiliar number claiming to be an associate of his named Mike Schabell and who was asking to buy drugs. Unknown to Bowman, the individual sending the text messages was a Department of Homeland Security Agent. A month earlier, Schabell had been arrested and was offered the opportunity to cooperate with law enforcement. Law enforcement wanted to know who his drug suppliers were, and Bowman was identified as one of his suppliers.

When Schabell was arrested a second time, he gave law enforcement permission to search his cell phone. Looking through Schabell's phone, law enforcement located a conversation with Bowman that included Bowman's cell phone number and information that Bowman had sold Schabell methamphetamine earlier that day. **The agent texted Bowman from his undercover phone and there was an exchange of conversation where the agent, posing as Schabell, requested more product and to meet up again.** The agent used details and information from the earlier conversation between Bowman and the actual Schabell to identify and authenticate himself to Bowman.

Arrangements were made to meet at a 7-11 in Queen Anne and Bowman arrived, along with his girlfriend and two-year old daughter. The agent and arrest team were waiting for Bowman when he arrived and arrested him. Officers read Bowman his rights and searched his person, finding 3.5 grams of methamphetamine on him during the search incident to arrest. Officers then asked Bowman for consent to search his vehicle, indicating that if he refused, the vehicle would be impounded, and his girlfriend and daughter would be removed and left without transportation. Bowman consented and law enforcement recovered 55.2 grams of methamphetamine, digital scales, and $610 in cash from the vehicle.

Bowman admitted to law enforcement in the interview conducted later that he had six to seven drug customers and that there were two ounces of methamphetamine in his car that belonged to him. **Bowman was charged with Violation of the Controlled Substances Act (VUCSA) and he later moved to suppress all evidence against him, arguing that the agent's text message conversation with him violated his privacy rights under the Washington Constitution, Article I, Section 7.** The trial court denied the motion, finding that his privacy rights were not violated.

Bowman was found guilty by a jury and appealed.

Training Takeaway

Under Article I, Section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The interpretation of this article requires a two-part analysis –

1. Whether the action complained of constitutes a disturbance of "private affairs" and
2. If a valid private affair has been disturbed, then whether the intrusion is justified by "authority of law."

In this case, the first inquiry was to determine if the text message conversation constituted a private affair. **"Private affairs" are those privacy interests that citizens of this state have held, and should be entitled to hold, safe from government trespass without a warrant.** The Washington State Supreme Court held in State v. Hinton in 2014 that individuals have a privacy interest in text message conversations with known contacts. This differs from another case addressed by the Supreme Court, State v. Goucher, in which it was determined that privacy rights are not violated when a person has a voluntary conversation with a stranger.

In the case at hand, Bowman was not having a conversation with someone who was a stranger to him, but rather a person who represented himself as someone who Bowman knew. While the unfamiliar phone number gave some indication that the other party to the conversation might be someone other than Schabell, the agent clearly identified himself as Schabell, a known associate to Bowman. The agent provided details that Schabell would have known and provided a reasonable explanation as to why he was using a different phone, i.e. that his previous phone had broken. Therefore, Bowman had a reasonable expectation of privacy for that conversation and the agent invaded that right of privacy.

In the second step of the inquiry as to whether the agency operated with "authority of law," the Court found that there was no warrant so evaluated the inquiry under the consent given by Schabell to law enforcement. Consent can provide authority of law required by Article I, Section 7 if the State can show:

1. That the consent was voluntary;
2. That the person giving consent had authority to do so; and
3. That any search did not exceed the scope of the grantor's consent.

In this case, the State was unable to show that either elements 2. or 3. of the inquiry were satisfied.

First, Schabell, who was not a party to the conversation between Bowman and the agent, had no privacy interest in the conversation and had no authority to consent to the State's invasion of Bowman's privacy interest in the conversation. Second, the search exceeded the scope of the permission given by Schabell. Schabell had consented to a search of his phone, but he did not consent to being impersonated, even if he had authority to consent to the agent impersonating him.

The Court found that the agent was not acting under authority of law and violated Bowman's right of privacy and reversed the finding of guilt with instructions to suppress the evidence obtained in violation of Bowman's right to privacy.

External Link: www.courts.wa.gov/opinions/pdf/790234.pdf

Facts Summary

TOPIC: USE OF UNLAWFUL DECEPTION

In November 2016, a Federal Bureau of Investigation ("FBI") agent, while conducting an undercover **investigation into the file-sharing of child pornography, located a network user sharing suspected child pornography files on a file-sharing network.** The FBI traced the internet protocol ("IP") address used to share the files to an account registered to Stefan Ramirez at a specific residential address on Archie Avenue.

The FBI surveilled the residence on four occasions in February, March, and May 2017. Although the internet account was in Ramirez's name, several people were known to have lived at the Archie Avenue residence, any one of whom could have used Ramirez's computer to share the suspected child pornography. The FBI obtained a warrant to search the residence, including "[v]ehicles located at or near the premises that fall under the dominion and control of STEFAN RAMIREZ or any other occupant of the premises." **Thus, though the warrant authorized the search of the house and car, it did not authorize the FBI to search or arrest Ramirez himself, and it permitted the FBI to search or seize Ramirez's car only if it was located "at or near the premises."**

However, the agents manufactured the authority to seize them by falsely claiming to be police officers responding to a burglary to lure Ramirez home. By luring Ramirez home, the agents' successful deceit enabled them to obtain incriminating statements from Ramirez and evidence from his car and person.

Ramirez filed a motion to suppress the statements and the evidence, **arguing** in relevant part **that the agents unlawfully used a ruse to create the authority to seize Ramirez and his car**, and that his statements, his phone, and the electronic devices taken from his car were therefore all obtained in violation of the Fourth Amendment.

The District Court denied the motion. Ramirez then entered a conditional guilty plea to receipt and distribution of material involving the sexual exploitation of minors. Ramirez appealed.

The Ninth Circuit reversed on the grounds that under the warrant and the law, FBI agents had no authority to seize Ramirez or search his car when they arrived to execute the warrant, because neither was at the residence but for the ruse to lure Ramirez there.

Training Takeaway

The Ninth Circuit Court of Appeals observed that:

- The Fourth Amendment to the Constitution of the United States dictates that "no warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized." - U.S. Const. amend. IV.
- The particularity requirement "confines an officer executing a search warrant strictly within the bounds set by the warrant." - Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 n.7 (1971).
- "To the extent [government] agents want to seize relevant information beyond the scope of the warrant, they should [seek] a further warrant." - United States v. Sedaghaty, 728 F.3d 885, 914 (9th Cir. 2013).
- Thus, a search or seizure pursuant to an otherwise valid warrant is unreasonable under the Fourth Amendment to the extent it exceeds the scope of that warrant. - Horton v. California, 496 U.S. 128, 140 (1990).

The Court stated that it must decide whether it was reasonable under the Fourth Amendment for the FBI to use deception in executing the warrant to expand the authorized scope of the items and persons to be searched and seized. The Court explained that unlike permissible use of deception such as undercover operations, deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the target's trust and cooperation to conduct searches or seizures beyond that which is authorized by the warrant or other legal authority, such as probable cause.

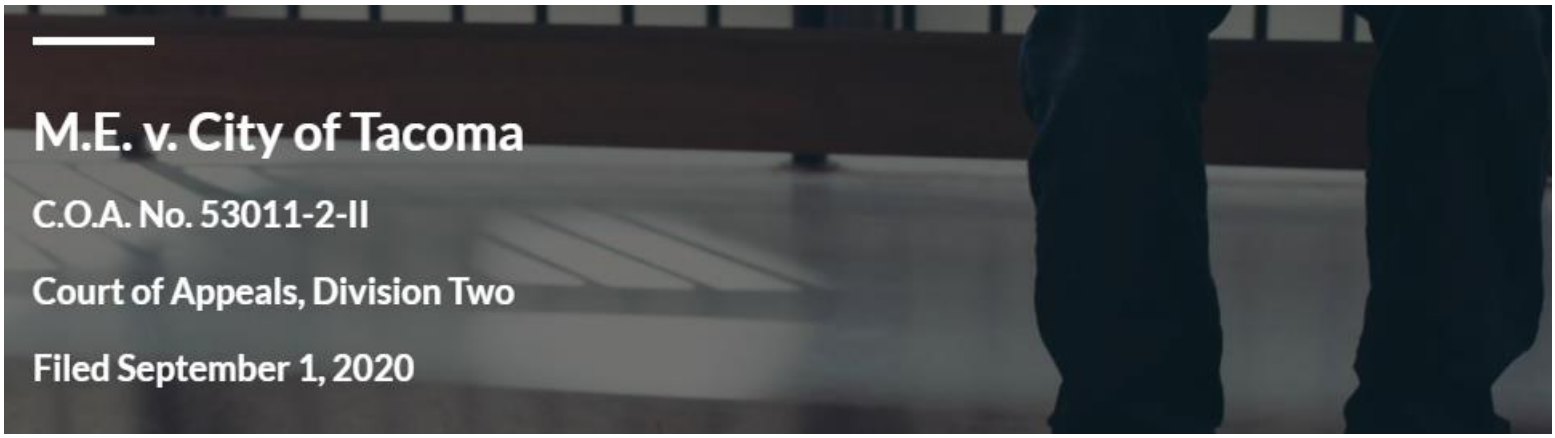
Here, **the warrant did not authorize the FBI agents to seize Ramirez, nor did the Government argue that it had reasonable suspicion or probable cause to do so.** The Government conceded instead that at the time the agents seized Ramirez, the agents knew only that child pornography had been shared from the Archie Avenue residence; it did not know who was responsible.

The Ninth Circuit stated that because Ramirez and his car were not located at the Archie Avenue residence when the FBI arrived to execute their search warrant, **Ramirez and his car fell outside the scope of the warrant**. The FBI therefore lacked the legal authority to seize them when they arrived to execute the warrant, before they employed their deliberate ruse. The Court found that it was only by posing as police officers investigating a fictitious home burglary that the agents convinced Ramirez to drive home, thereby creating the authority to seize him and his car that did not otherwise exist at the time.

The Court held that, under the particular facts of this case, **the agents' use of deceit to seize and search the defendant violated the Fourth Amendment**. Balancing the Government's justification for its actions against the intrusion into the Ramirez's Fourth Amendment interests, the Court concluded that the Government's conduct was clearly unreasonable. The Court rejected the Government's argument that the agents never seized Ramirez and maintained that the seizures of Ramirez and the electronic devices in his car were the direct result of the FBI agents' unreasonable ruse.

The Court also held that the Government failed to carry its burden to show that Ramirez's incriminating statements, made after an agent revealed the true purpose of the investigation and asked to speak with him, were not obtained through exploitation of illegality rather than by means sufficiently distinguishable to be purged of the primary taint. **The Ninth Circuit Court of Appeals reversed the District Court's denial of Ramirez's suppression motion and remanded for further proceedings.**

External Link:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/25/18-10429.pdf



M.E. v. City of Tacoma

C.O.A. No. 53011-2-II

Court of Appeals, Division Two

Filed September 1, 2020

Facts Summary

TOPIC: CHILD ABUSE INVESTIGATIONS AND COMMON LAW DUTY TO PROTECT

In October 2011, M.E., age 5, and J.E., age 3, lived with their mother, Jocelyn Drayton, as their primary residential parent and had supervised visitation with their father, Eddo. After a supervised visit, Eddo contacted TPD and reported that J.E. vomited after taking some of her mother's medication. **In response to the call, TPD Officers Corn and Terwilliger were dispatched to Drayton's residence to conduct a welfare check.**

Upon arriving at the residence, the officers learned that Drayton was at work and the children were being watched by Drayton's roommate, who told the officers that the children were asleep in their mother's master bedroom. The officers visually checked the children for signs of injury, but they did not want to wake the children due to the late hour. In her report, **Officer Corn stated that she did not "see a need to remove the children," but noted the condition of the home was "not suitable" for children and referred the report to Child Protective Services (CPS) for further investigation.**

In January 2012, Detective Brooks received a referral from CPS regarding M.E. and J.E. The referral was made by M.E. and J.E.'s visitation supervisor who reported that on the way back from their visitation with Eddo, the girls told her about a "ghost" that was "peeking" at them in the bathroom. J.E. said that "[t]he ghost is entangled with Jason."

The CPS visitation supervisor believed that Jason referred to Drayton's boyfriend, Jason Karlan. A detailed investigation that included interviews and medical examinations of M.E. and J.E. followed with no signs of abuse. The detailed facts related to the 2012 investigation are omitted as not relevant to the Takeaways below, but can be reviewed independently in the published court opinion.

In April 2013, Detective Quilio received a CPS referral regarding allegations that Karlan had sexually abused J.B., whom Karlan babysat. Karlan often babysat for J.B. while he was watching M.E. and J.E. After investigation, Quilio had probable cause to arrest Karlan for child rape of J.B.

In October 2013, Detective Quilio received a CPS referral from M.E.'s school counselor. The counselor's referral included information that M.E. had a supervised visit with Eddo the prior weekend. The next day, M.E. came to the school counselor and reported that Karlan would wake her up in the middle of the night and touch her "in the wrong parts and has her do things." The counselor also reported that M.E. said, "daddy said I get to see him more if I remember things."

Based on the disclosures, the prosecutor charged Karlan with three counts of first degree rape of a child and three counts of first degree child molestation. All the charges were based on a charging period from August 1, 2012 to October 1, 2013.

On August 29, 2014, the State moved to dismiss the charges related to M.E. with prejudice because "based on newly discovered evidence obtained this week, a reasonable doubt has been raised as to whether or not the defendant committed the crimes charged under this cause number." **The Pierce County Superior Court dismissed the charges.**

Eddo filed a civil lawsuit against the City of Tacoma seeking damages under a common law negligence claim. The City filed a Motion for Summary Judgment, which the Court granted and entered a judgment in favor of City on the grounds that Eddo failed to prove one element of a common law claim of negligence - a duty of care. Eddo appealed. The Court of Appeals affirmed the lower court's ruling in favor of the City.

Training Takeaway

As discussed in the case of H.B.H. (a prior case that the plaintiff Eddo relied upon), the Washington Supreme Court recognized **a common law duty requiring DSHS to protect foster children** from abuse based on a special relationship exception to the general rule that a party is not required to protect against the criminal acts of a third party. - 192 Wn.2d at 178. Eddo argued that under H.B.H., law enforcement had a special relationship with M.E. and J.E. that imposed a duty to protect on law enforcement.

The Court explained that the legal relationship between DSHS and foster children as discussed in H.B.H. was a special relationship in that DSHS is the "'custodian and caretaker of foster children,'" and, therefore, DSHS had taken custody of foster children.

The Court also stated that the **"entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship."** The Court held that none of the justifications for finding a special relationship between DSHS and foster children apply to law enforcement.

A unique relationship between DSHS and foster children exists since DSHS becomes the legal custodian of foster children once they are the subject of a dependency action. No such relationship exists between law enforcement and a child that may be involved in an investigation. Even when law enforcement officers take a child into protective custody, the law enforcement officer transfers that child to the care and custody of DSHS. M.E. and J.E. were not dependent children.

The Court held that the special relationship creating a common law duty to protect recognized the prior case did not extend to law enforcement agencies investigating allegations of child abuse. Law enforcement agencies do not have any legal relationship arising under common law that makes them responsible for the protection of children independent of the statutory duty to investigate.

A cause of action for negligent investigation under RCW 26.44.050 is present when the failure to

adequately investigate results in:

- “a placement decision to remove a child from a non-abusive home,
- let a child remain in an abusive home, or
- place a child in an abusive home.”

The Court held that law enforcement and, therefore, the City, had no common law duty to protect arising out of a special relationship.

External Links

- http://www.courts.wa.gov/opinions/
- WA courts government Cite

State v. Miller

C.O.A. No. 37351-7-III

Court of Appeals, Division Three

Filed September 1, 2020

Facts Summary

TOPIC: CRIMINAL IMPERSONATION

Lillian Meador, a senior who resided in assisted living, was recovering in a skilled nursing facility after being hospitalized briefly for an illness. Williams was assigned to be Meador's care manager at the facility. Mark Miller, who Williams learned was Meador's financial advisor and friend, was identified as her emergency contact.

Williams phoned and spoke with Miller numerous times to set up a care conference and determine whether someone held a power of attorney for Meador, as Meador performed poorly on cognitive tests. Miller either provided inconsistent or incomplete information and became upset. **Concerned that Miller might be exploiting Meador, Williams filed a report with Adult Protective Services (APS) and initiated a guardianship proceeding.** APS assigned Investigator Horn, who met with Meador and found her to be confused and uncomfortable about any questioning regarding Miller. She could not provide any details about finances except to say she thought she banked at Chase.

About the same time, Miller contacted a lawyer, David, seeking representation for Meador to contest the guardianship. David agreed to represent Meador. During one meeting with Meador, David assisted Meador in opening some mail which included two checks from Insurance Company totaling $240,000. David attempted to meet with Miller to discuss Meador's finances, but Miller missed both appointments and stopped visiting Meador. The nursing facility noted that Miller had visited regularly especially to collect Meador's mail.

APS Investigator Horn, concerned, contacted the Vancouver Police Department. The assigned detective discovered that an associate of Miller's had withdrawn $50,000 from Meador's account. Also, the detective received information that Miller had contacted Insurance Company seeking to cash out Meador's annuities totaling $240,000. During the recorded call with Insurance Company, Miller provided his legal name but represented himself as Meador's nephew, not as her financial advisor. He requested documents to initiate withdrawal, which Meador signed and returned.

Miller was charged with first degree theft of the $50,000 withdrawn from Meador's bank accounts, criminal impersonation for the call to Insurance Company, and attempted first degree theft for the steps taken to cash out the annuities. The State alleged three aggravating circumstances for the theft and attempted theft counts:

1. That the victim was particularly vulnerable or incapable of resistance;
2. Miller used his position of trust, confidence, or fiduciary responsibility to commit the crimes; and
3. The crimes were major economic offenses.

The jury found Miller guilty as charged, including finding all aggravating circumstances charged by the State. **Miller appealed the conviction on numerous grounds**. On the criminal impersonation verdict, Miller argued that the State failed to present sufficient evidence to support the "assumed a false identity" element of criminal impersonation. The Washington Court of Appeals disagreed.

Training Takeaway

Miller was charged with criminal impersonation in the first degree under RCW 9A.60.040(1)(a). **A person is guilty of the crime under that provision if the person "[a]ssumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose."** Miller argued that in contacting Insurance Company, he provided his true name, and making a false representation that he was Meador's nephew did not constitute assuming a false identity within the meaning of the statute. **This presented an issue of statutory construction.**

The Court stated, "[o]ur fundamental objective in construing a statute is to ascertain and carry out the legislature's intent, and if a statute's meaning is plain on its face, we give effect to that plain meaning as an expression of legislative intent."

The Court added that the fact that Miller provided his true name does not take him outside the operation of the statute. This court has previously held that "the assumption of a false identity" is not the same as using a false name. It has further held that "assuming a false identity" does not require assuming the identity of an actual person, as is required for identity theft.

The statutory terms "false identity" and "assumed character" are not defined, but dictionary definitions support their application to someone who misrepresents his relationship to another. In the absence of statutory definitions, courts may rely on the plain meaning of terms.

The Court found that not only does the plain language of the statute encompass falsely asserting a family relationship, but it is easy to foresee that falsely claiming to be someone's spouse, parent, child, or other family member could be used to facilitate a fraud or advance some other unlawful purpose. **The Court determined that it was consistent with the legislature's purpose to apply the statute to Miller's misrepresentation of his relationship to Meador.**

External Link: State v. Miller, 14 Wn. App. 2d 469, 471 P.3d 927, 2020 Wash. App. LEXIS 2417