



# Law Enforcement

July 2016

# Digest

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

\*\*\*\*\*

## July 2016 LED TABLE OF CONTENTS

**NINTH CIRCUIT COURT OF APPEALS**.....1

**CIVIL RIGHTS LAWSUIT: COURT MARSHAL DID NOT USE EXCESSIVE FORCE IN PUSHING DISRUPTIVE AND DEFIANT BAIL AGENT OUT OF THE COURTROOM.**  
Brooks v. Clark County, \_\_ F.3d \_\_, 2016 WL 3632372 (July 7, 2016)..... 1

**MIRANDA: SUSPECT’S STATEMENT THAT HE “DID NOT WANT TO TALK NO MORE” UNAMBIGUOUSLY INVOKED HIS RIGHT TO REMAIN SILENT AND THE OFFICERS SHOULD HAVE STOPPED THE INTERROGATION.**  
Jones v. Harrington, \_\_ F.3d \_\_, 2016 WL 3947820 (July 22, 2016).....3

**WASHINGTON STATE SUPREME COURT**.....4

**SEARCH AND SEIZURE: OFFICER DID NOT NEED SEARCH WARRANT (OR EXCEPTION TO THE WARRANT REQUIREMENT) TO SEARCH A CELL PHONE THAT THE SUSPECT ABANDONED BY FLEEING FROM THE POLICE AND VOLUNTARILY LEAVING IT IN A STOLEN VEHICLE.**  
State v. Samalia, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2016 WL 4053202 (July 28, 2016).....4

**WASHINGTON STATE COURT OF APPEALS**.....6

**SUFFICIENCY OF THE EVIDENCE: STEALING GIFT CARDS CONSTITUTES THE CRIME OF THEFT OF ACCESS DEVICE.**  
State v. Nelson, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2016 WL 3999883 (July 26, 2016).....6

\*\*\*\*\*

## NINTH CIRCUIT COURT OF APPEALS

\*\*\*\*\*

**CIVIL RIGHTS LAWSUIT: COURT MARSHAL DID NOT USE EXCESSIVE FORCE IN PUSHING DISRUPTIVE AND DEFIANT BAIL AGENT OUT OF THE COURTROOM.**  
Brooks v. Clark County, \_\_ F.3d \_\_, 2016 WL 3632372 (July 7, 2016).

Adam Brooks, a bail enforcement agent, went to the Las Vegas Regional Justice Center to take Malena Reed and Mary Beth Lourcey into custody. Reed and Lourcey were scheduled to appear in that court. Brooks, with two other bail enforcement agents, wanted to take Reed and

Lourcey into custody because they “had allegedly failed to keep the [bail] company apprised of their whereabouts.”

However, the judge presiding at the hearing told the bail agents that Reed and Lourcey were not fugitives. The judge directed the bail agents not to take the women into custody until the bond insurance company had filed a proper motion with the district court.” The bail agents continued to disrupt the court’s calendar by “calling out the name of a Nevada statute that describes a surety’s state-law power to authorize bail enforcement agents to arrest a defendant on its behalf.”

The judge again admonished the bail agents that the women were not to be taken into custody. The judge resumed the court’s calendar. However, Brooks again disrupted the calendar by telling the judge: “It’s illegal what you guys are doing here.” The judge again ordered Brooks out of the courtroom. Brooks continued to interrupt the judge’s calendar by declaring: “I’m taking names because it’s illegal. We’re a licensed bail enforcement company. I’m a retired police officer here. What you’re doing is illegal and I’m going to be suing your - everybody here.”

The judge then directed the court’s marshal “to please escort this nice gentleman out of the courtroom.” Brooks refused to comply. According to Brooks, the court’s marshal “shoved him through the courtroom’s double doors” and injured Brooks’ back.

Brooks then filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the court’s marshal. The lawsuit alleged that the court’s marshal exercised excessive force by pushing Brooks through the double doors. The Ninth Circuit Court of Appeals found that the court’s marshal was entitled to qualified immunity.

A law enforcement officer is entitled to qualified immunity in Section 1983 lawsuits if: (1) the officer did not violate the plaintiff’s constitutional rights; or (2) the constitutional right was not clearly established at the time. In Section 1983 lawsuits alleging that an officer used excessive force, “qualified immunity shields an officer from damages liability when it was not clearly established that the Fourth Amendment prohibited his conduct in the situation he confronted.”

In this case, the Ninth Circuit found that the marshal’s actions were not “indisputably unconstitutional.” The Ninth Circuit reasoned that:

[B]efore [the court’s marshal] shoved Brooks, Brooks had at least twice defied the judge’s order to leave; had continued to resist [the court marshal’s] verbal instructions to leave; and that two of Brook’s compatriots had similarly disrupted the court, harassing and intimidating two women in the courtroom, all in defiance of [the judge’s] orders. Given the chaos in the courtroom and the undisputed evidence that Brooks was intent on disobeying the court’s instructions - and given his extremely vague and insubstantial allegations about his injury - it is simply not “beyond debate” that [the court’s marshal] employed an unreasonable amount of force.

As a result, the Ninth Circuit found that the court’s marshal was entitled to qualified immunity.

///

///

///

**MIRANDA: SUSPECT’S STATEMENT THAT HE “DID NOT WANT TO TALK NO MORE” UNAMBIGUOUSLY INVOKED HIS RIGHT TO REMAIN SILENT AND THE OFFICERS SHOULD HAVE STOPPED THE INTERROGATION.** Jones v. Harrington, \_\_ F.3d \_\_, 2016 WL 3947820 (July 22, 2016).

Police officers investigated a drive-by shooting that resulted in a teenager’s death. The officers contacted a suspect in the shooting, Kevin Jones. The officers and Jones arrived at the police station between 9:00 and 9:40 p.m. After reading Jones his *Miranda* rights, the officers began the interrogation at 12:33 a.m. At the time, “Jones was nineteen years old, had graduated from technical school, and worked full-time[.]”

During the two to three hour interrogation, the officers told Jones that there was incriminating evidence against him, and they asked him to confess to being the driver. In actuality, there was no such incriminating evidence. The officers told Jones that his punishment would be more lenient if he was the driver and not the shooter.

During the interrogation, Jones changed his version of the events several times. The officers challenged his story as unbelievable. This exchange then happened between the officer and Jones:

[Officer]: Kevin, do you think - why don’t you stop this man.

Jones: All right.

[Officer]: Stop this. The thing is you drove a car, it shows that on the tape and that’s all I’m going to put down, as far as what you were doing. You drove the car. You just didn’t know it was going to happen like that. Kevin, sit up, man.

Jones: *I don’t want to talk no more, man.*

[Officer]: I understand that, but the bottom line is -

Jones: You don’t want to hear what I’m telling you.

[Officer]: I’m so sorry. I can’t - you’re mumbling, you got to speak up. I got bad hearing.

Jones: I’m telling you all.

The officers continued interrogating Jones and “he admitted to driving the car during the shooting.” According to Jones, “a stranger with a gun jumped into his car, ordered him to drive to the gas station, yelled at the teenagers, and then hopped out of his car at the intersection and began shooting.”

A few days later, the officers arrested Jones and conducted another interrogation. During that interrogation, Jones maintained that a stranger with a gun got into his car and shot at the teenagers.

The prosecution charged Jones with first degree murder, attempted murder, shooting at an occupied motor vehicle, and assault with a firearm. Jones’ confession was the main evidence used at trial. There was no physical evidence. During opening statements and closing arguments, the prosecutor relied on Jones’ confession to establish that he drove the car during the shooting. The jury convicted Jones of all charges.

After state courts denied Jones' appeals that claimed his confession was involuntary, he sought habeas relief in federal court. The federal district court found that Jones' request to remain silent was ambiguous and denied habeas relief. The Ninth Circuit Court of Appeals disagreed.

When officers interrogate an in-custody suspect, the suspect has the right to remain silent. Under *Miranda v. Arizona*, when the suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." If the officers continue questioning a suspect after he unambiguously requests to remain silent, the suspect's subsequent statements are involuntary and inadmissible.

In this case, the Ninth Circuit found that Jones' request to remain silent was unambiguous, and the officers continuing to question him violated *Miranda*. The Court reasoned:

[1] Jones's initial request to remain silent was unambiguous on its face, and nothing about the prior context of the statement made it ambiguous or equivocal. Jones states: "I don't want to talk to no more"; in other words, *he did not want to talk anymore*. . . .

[2] Jones did not equivocate by using words such as "maybe" or "might" or "I think." . . . Nor did anything Jones did or said make it ambiguous. During the interrogation leading up to this point, Jones spoke little. Most of the interrogation consisted of detectives repeatedly asking Jones questions, and Jones giving short, often one-word answers. . . .

[3] [T]he fact that Jones spoke to officers for a while before invoking his right to remain silent makes no difference.

The Ninth Circuit further found that the trial court's admission of Jones' involuntary statements was not harmless, because those statements were the prosecution's main evidence.

As a result, the Ninth Circuit granted Jones' habeas relief and ordered the State to release or retry him.

\*\*\*\*\*

**WASHINGTON STATE SUPREME COURT**

\*\*\*\*\*

**SEARCH AND SEIZURE: OFFICER DID NOT NEED SEARCH WARRANT (OR EXCEPTION TO THE WARRANT REQUIREMENT) TO SEARCH A CELL PHONE THAT THE SUSPECT ABANDONED BY FLEEING FROM THE POLICE AND VOLUNTARILY LEAVING IT IN A STOLEN VEHICLE.** *State v. Samalia*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2016 WL 4053202 (July 28, 2016).

A police officer on patrol identified a stolen vehicle. The officer contacted dispatch and confirmed the vehicle was reported stolen. The officer followed the vehicle. The driver stopped the vehicle, exited the vehicle, and faced the officer. The officer issued commands to the driver, but the driver ran away. The officer was unable to catch the driver.

The officer then went to the stolen vehicle and searched it. During the search, the officer found a cell phone. The officer called contacts listed on the cell phone. A woman answered one of the officer's calls from the cell phone. The officer told the woman "that he had found a cell phone and wanted to return it to its owner." The woman agreed to meet the officer. When the woman

arrived to pick up the cell phone, a police officer arrested her and took her cell phone. The officer used the cell phone seized from the car to call the woman's cell phone. During the call, the woman's cell phone "displayed [Adrian Sutlej] Samalia's name and photo, identifying him as the caller."

Based on this information, the prosecution "charged Samalia with possession of a stolen vehicle." Before trial, "Samalia moved to suppress the cell phone evidence, arguing that the officers violated his constitutional rights when they seized and searched his cell phone" without a warrant. The trial court denied the motion by finding that Samalia abandoned the cell phone and the police did not need a warrant to search it. After a bench trial, the court found Samalia guilty of the charges. Samalia appealed the trial court's denial of his suppression motion to the Washington State Supreme Court. The Supreme Court agreed with the trial court.

The Washington state constitution, article 1, section 7 provides: "No person shall be disturbed in his private affairs . . . without authority of law." The Washington State Supreme Court has found that the information on cell phones "are private affairs because they may contain intimate details about individuals' lives[.]" "However, citizens may lose their constitutional protections in a private affair under the abandonment doctrine."

The Supreme Court distinguished abandoned property from lost property. A person abandons property when that person "leaves an item in a place in which the [person] has no privacy interest as an attempt to evade the police." But, for lost or mislaid property, "the owner maintains a privacy interest in the property and the finder may have an obligation . . . to seek out the owner to return the property." For example, a woman who mistakenly left her purse at a store and then "frantically returned" to the store for her purse, did not abandon it and still held a privacy interest in the purse.

In this case, however, Samalia abandoned his cell phone in the stolen car and lost his privacy interests in the cell phone's contents:

Samalia was driving a stolen vehicle, and when Samalia stopped, he got out of the vehicle and faced [the officer]. Then, instead of obeying [the officer's] commands, Samalia ran away, abandoning the vehicle and its contents. [The officer] attempted to catch Samalia, but Samalia escaped, and [the officer] returned to the stolen vehicle. Inside the stolen vehicle, [the officer] found the cell phone. Indeed, there is nothing in the record to suggest that Samalia protected the information on his cell phone by any security measures.

Further, given that the area of the search is of critical importance, Samalia had no privacy interest in the stolen vehicle.

Since Samalia abandoned his cell phone, and lost his privacy interest in the cell phone, the officer did not need a warrant (or an exception to the warrant requirement) to search the phone. As a result, the Supreme Court affirmed Samalia's conviction.

///

///

///

///

\*\*\*\*\*  
**WASHINGTON STATE COURT OF APPEALS**

\*\*\*\*\*  
**SUFFICIENCY OF THE EVIDENCE: STEALING GIFT CARDS CONSTITUTES THE CRIME OF THEFT OF ACCESS DEVICE.** State v. Nelson, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2016 WL 3999883 (July 26, 2016).

Angel Rose Marie Nelson, a Kmart employee, activated several gift cards without paying for them. Specifically, she adding funds to the cards, but did not place cash in the register to pay for the cards.

Nelson was charged with second degree theft of an access device and second degree possession of a stolen access device (RCW 9A.56.040(1)(d) and RCW 9A.56.160(1)(c)). Before trial, Nelson asked the court to dismiss the charges. She argued the criminal statute's term "access device" did not include gift cards. The trial court granted the motion to dismiss. The prosecution appealed that decision to the Court of Appeals. The Court of Appeals agreed with the prosecution.

RCW 9A.56.040(1)(d) and RCW 9A.56.160(1)(c) respectively prohibit the theft of access devices and possession of stolen access devices. RCW 9A.56.010 defines terms used in RCW 9A.56.040(1)(d) and RCW 9A.56.160(1)(c). As such, the issue was whether a stolen gift card meets RCW 9A.56.010(1)'s definition of "access devices."

The Court of Appeals held that gift cards meet the statutory definition of "access device" in RCW 9A.56.010(1). That statute defines "access device" as:

"Access device" means any card, plate, code account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

The Court of Appeals found: (1) "that this statute requires an access device to be a means of account access"; and (2) "that the definition of 'access device' can include gift cards so long as they are a means of account access."

Based on this interpretation, the Court of Appeals found that the prosecution presented sufficient evidence that Nelson violated RCW 9A.56.040(1)(d) and .160(1)(c):

As discussed above, an item must access an account to be an access device. The [prosecution] presented evidence that Nelson activated the gift cards, placed funds on them, and then 'used' at least two of them. . . . This evidence, viewed in the light most favorable to the [prosecution] shows that Nelson used the funds she placed on the gift cards to access funds available with the third party vendors - in other words, that she accessed an account with those vendors. After she activated the gift cards at Kmart, she then used the cards to buy goods that the vendors made available to her because the gift card was a record of credits available to the holder of the gift card.

As a result, the Court of Appeals reversed the trial court's dismissal of this case.

\*\*\*\*\*

The Law Enforcement Digest (LED) 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. 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>]

\*\*\*\*\*