Law Enforcement Digest

APRIL 2015

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

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HONOR ROLL

709th Basic Law Enforcement Academy – October 28, 2014 through March 12, 2015

Best Overall:	Travis W. Park, Pasco PD
Best Academic:	Travis W. Park, Pasco PD
Patrol Partner Award:	Joe W. Michels, Auburn PD
Tac Officer:	Sabrina Kessler, Redmond PD
	Sean Hendrickson, Force & Fitness, WSCJTC

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

SEARCH AND SEIZURE: BEFORE ENTERING A SUSPECT'S HOME TO SEARCH FOR EVIDENCE OF A CRIME OR CONTRABAND, OFFICERS MUST READ ALL OF THE *FERRIER* WARNINGS TO THE SUSPECT State v. Budd, __ Wn. App. __, __ P.3d __, 2015 WL 894324 (March 3, 2013).

An anonymous tip reported that Michael Allen Budd stated, during internet chats, that he "molest[ed] his nine-and-a-half-year-old daughter and [talked] about engaging in sex with" other young girls he met online. The anonymous tip also reported seeing "child pornography on Budd's computer and estimated the amount of pornography to be more than 15 Gb." An officer "served a search warrant on Yahoo! and Google and determined that, based on Budd's internet protocol address, he resided in Ephrata."

Three other officers "travelled to Ephrata to perform a knock and talk and assuage [the] concerns that [Budd's] daughter might be in danger." When Budd arrived at his home, the officers identified themselves and "told Budd that they received a tip that he kept child pornography on his computer, and expressed concern for his daughter." In response, "Budd insisted that he was not touching or harming his daughter . . . [but] he was not surprised that the officers had come." Budd told the officers "if you do it long enough, you get caught."

It is unclear what happened next. The officer's report did not state that she read Budd *Ferrier* warnings before entering his home. At the suppression hearing, the officer gave qualified answers during cross-examination about whether she read Budd *Ferrier* warnings before entering the home. However, it was clear in her report and in her testimony that the officers reviewed a *Ferrier* warning consent form with Budd inside his home and he then signed the form. Both Budd and the officers understood that he limited his consent to the officers seizing his computer to search it for evidence of child pornography. The issue on appeal was whether an officer must read complete *Ferrier* warnings to a suspect before entering the suspect's home.

In this case involving a knock-and-talk, the Court of Appeals, Division III, held that the officer must provide the suspect complete *Ferrier* warnings **before** entering the suspect's home. When asking a citizen for consent to enter his or her home for the purposes of a criminal investigation, "a law enforcement officer must ask the citizen for consent, inform the citizen that he can revoke consent at any time, and notify the citizen that he can limit the scope of the entry into the home."

The Court of Appeals reasoned that *Ferrier* requires an officer to read these warnings before entering a home during a knock-and-talk encounter because:

> Sound reason supports a demand that law enforcement give the *Ferrier* warnings before entry into the house. A house is considered a castle and entitled to the greatest protection from government entry and roaming. The intrusion into privacy begins at the home's threshold. Once the police enter the home, seizure of contraband in plain view is open season. Coercion increases once the officer is inside and in confined quarters with the suspect. . . . Once inside the house, the police may further manipulate the suspect into agreeing to an unending search. Resistance to a voluntary search of recessed areas of the home is lessened.

Since the record did not show that the officer read Budd *Ferrier* warnings before entering his home, the Court of Appeals found that the entry, and subsequent seizure and search of the computer, violated his constitutional rights. Consequently, the Court of Appeals found that the evidence discovered on the computer should be suppressed and instructed the trial court to dismiss the criminal charges.

LED EDITORIAL NOTE: Since it is unclear whether the officer read Budd *Ferrier* warnings before entering his home, it is prudent to document when the *Ferrier* warnings are read to a suspect in the investigatory report. Additionally, even if a suspect invites an officer into the home during a knock-and-talk, it is prudent for the officer to read *Ferrier* warnings before entering the suspect's home.

This opinion also noted that after Budd informed the officers that his daughter was not home, and therefore not in immediate danger, the officers could have sought a search warrant. The Court of Appeals also noted that the knock-and-talk "technique remains lawful, within the strictures of *State v. Ferrier*[.]"

SEARCH AND SEIZURE: OFFICER CALLING PHONE NUMBERS FROM A CELL PHONE ABANDONED IN A STOLEN VEHICLE AFTER A SUSPECT HAS FLED FROM THE VEHICLE IS SUPPORTED BY THE ABANDONMENT AND EXIGENCY EXCEPTIONS TO THE WARRANT REQUIREMENT State v. Samalia, __ Wn. App. __, __ P.3d __, 2015 WL 968754 (March 5, 2015).

While on patrol, an officer's automatic license plate reader "indicated he had passed a stolen vehicle." The officer confirmed with dispatch that the vehicle was reported stolen. The officer stopped the vehicle. At that point, the driver exited the vehicle and fled. The officer "pursued the male driver but he got away."

The officer searched the car, in part, to identify the driver. The officer located a cell phone in the car. "Not knowing who the phone belonged to, he called some phone numbers found in the cell phone's contacts section." A person answered the call and "agreed to meet with him." The officer's sergeant met with this person "and called her cell phone from the abandoned cell phone." This person's "cell phone displayed [the driver of the stolen vehicle's] name and picture." Based on this information, the officer was able to identify the driver of the stolen vehicle.

The driver moved to suppress this evidence by arguing the officer calling numbers from the cell phone constituted an unconstitutional search. The trial court denied this motion and the Court of Appeals, Division III, agreed.

The Court of Appeals reasoned that the officer calling numbers on the cell phone was a lawful search based on: (1) the driver abandoned the cell phone; and (2) the exigent circumstances of the driver fleeing from a stolen vehicle justified the limited search of dialing numbers from the phone's contacts list.

First, an exception to the warrant requirement is a search of voluntarily abandoned property. "A critical factor in determining whether abandonment has occurred is the status of the area where the searched item was located." In this case, "the search area was an unattended stolen vehicle that [the driver] had been driving and had fled from when a police officer approached and directed him to return to the vehicle." Consequently, the driver "did not have a privacy interest in the searched area."

Second, the Court of Appeals rejected the argument that a search "warrant is always required to search a cell phone." While an officer may not search a cell phone incident to arrest, the exigent circumstances of a fleeing felon justified the search in this case.

The Court of Appeals also noted "the use of the abandoned cell phone was too attenuated because the information leading to [the driver's identification' came in the form of a name appearing on [another person's] cell phone."

LED EDITORIAL NOTE: The United States Supreme Court has held that the search incident to arrest exception to the warrant requirement does not authorize an officer to search an arrestee's cell phone. Courts have noted that prudent officers should seek search warrants when possible. It is unclear whether the Washington State Supreme Court would find that abandoning a cell phone also means the suspect abandoned his or her privacy interest in the data contained in the phone. Until the Washington State Supreme Court or the United States Supreme Court addresses these issues, it is prudent to seek a warrant to search a cell phone. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

SEARCH AND SEIZURE: SEARCH INCIDENT TO ARREST EXCEPTION TO WARRANT REQUIREMENT DID NOT JUSTIFY SEARCH OF LOCKED BOX IN ARRESTEE'S BACKPACK State v. VanNess, __ Wn. App. __, __ P.3d __, 2015 WL 8878865 (March 2, 2015).

Based on a citizen's report about Stephen Lee VanNess (who had outstanding arrest warrants), an officer contacted VanNess and arrested him. At the time of arrest, VanNess was wearing a backpack. The arresting officer "asked VanNess for permission to search the backpack." VanNess did not consent to the search.

The police department's policy directed "officers to search backpacks for dangerous items, [because previously] an officer had failed to search a backpack and, after transporting it to the police station, discovered a pipe bomb inside." Based on his department's policy, the arresting officer searched the backpack. The search yielded four knives.

While searching the backpack, the arresting officer "also found a box measuring six inches by four inches by two inches, with a three-number combination lock." The arresting officer asked VanNess for permission to "search the locked box." VanNess did not consent to the search. The arresting officer "asked if the box contained anything dangerous." VanNess did not respond. In another situation, when the arresting officer "executed a warrant to search vehicle [he had] discovered a box of similar size that contained a dangerous handgun." Consequently, the arresting officer decided to look inside the box found in VanNess' backpack. Using a flathead screwdriver, the arresting officer opened the locked box by "one-quarter to one-half inch." The officer did not see a weapon. However, he did see "evidence of controlled substances." The officer "stopped his search, returned the box to the backpack, and sealed the backpack."

After checking the backpack into evidence, the arresting officer obtained a search warrant for the locked box. That search yielded "methamphetamine and heroin, a digital scale, a glass pipe, and several plastic baggies." VanNess was charged with possession with intent to deliver. Before trial, VanNess moved to suppress the evidence found in the box. The trial court denied the motion, and the Court of Appeals, Division I, disagreed.

The Court of Appeals found that the search incident to arrest exception to the warrant requirement did not justify the arresting officer using the screwdriver to look into the locked box. The Court reasoned that at the time of the search, VanNess had been handcuffed and another officer was at the scene. "VanNess no longer had access to the contents of his backpack [and] a combination lock separated VanNess from the locked box's contents." In addition, the arresting officer "did not raise a concern for his own immediate safety as a reason to search the box [and based the search on] his previous experience opening a similar box when executing a warrant and finding a loaded handgun." The Court noted that the "State does not explain why [the arresting officer] waited for a warrant [to further search the box] but could not have waited for a warrant" before using the screwdriver to look inside the box.

The Court also rejected argument "that the inventory search exception to the warrant requirement justified the search of the locked box." "Officers may conduct a warrantless inventory search (1) to protect the arrestee's property, (2) to protect the government from false claims of theft, and (3) to protect police officers and the public from potential danger." However, the inventory exception does not apply to locked containers absent "manifest necessity." In this case, the arresting officer "did not identify any evidence that the locked box contained any dangerous item or otherwise presented a safety issue." In addition, the arresting officer's "use of a screwdriver to pry the box open in the immediate presence of others undermined the State's [argument] that he opened the box to check for a possible bomb or hair-trigger firearm." Since there was no exigent circumstance to look inside the box, the Court found the search unconstitutional.

LED EDITORIAL NOTE: As noted in the State v. Samalia commentary, courts may scrutinize a search where the officer could have obtained a warrant, but instead relied on an exception to the warrant requirement to conduct a search. The search incident to arrest and exigency exceptions to the warrant requirement recognize that waiting for a search warrant may jeopardize officer or public safety. In this case, the Court of Appeals reasoned that the locked box did not present a safety concern such that the arresting officer did not have time to obtain a search warrant. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

SUFFICIENCY OF EVIDENCE: NOTE TO BANK TELLER STATING "NO DYE PACKS, NO TRACKING DEVICES, PUT THE MONEY IN THE BAG" IS INSUFFICENT EVIDENCE OF A THREAT TO SUPPORT A FIRST DEGREE ROBBERY CONVICTION State v. Farnsworth, 184 Wn. App. 305, __ P.3d __ (Amended on reconsideration, January 13, 2015).

Charles Farnsworth and James McFarland decided to rob a bank. McFarland "approached [the bank's teller] . . . and handed her a note stating, 'No die [sic] packs, no tracking devices, put the money in the bag.'" After the teller handed McFarland $300 in cash, he left and got in a truck driven by Farnsworth. They were soon stopped by police and arrested.

McFarland pled guilty to first degree theft and testified against Farnsworth. McFarland testified that Farnsworth wrote the note that he handed to the teller. The jury found Farnsworth guilty of first degree theft. On appeal, Farnsworth argued that there was insufficient evidence of a threat to support this verdict. The Court of Appeals, Division II, agreed.

RCW 9A.56.190 defines "robbery" as:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

Washington law defines "a threat to include any direct or indirect communication of intent to cause bodily injury, to damage property, or to physically confine or restrain another person." In the context of a bank robbery, "when a rational fact finder could reasonably infer from the evidence that a defendant's note made an implied threat to a bank teller, the evidence is sufficient to establish the disputed element of robbery."

The Court of Appeals reasoned that there was insufficient evidence of a threat to the bank teller because:

- "McFarland simply handed over a note instructing the teller to 'put the money in the bag.'"
- "McFarland did not insinuate that he would take further action if the teller did not comply with the note's instructions."
- "[T]here is no evidence that McFarland made threats or used violence."
- "[T]he facts of this case do not show even a slight threat, either implicit or explicit."

The Court of Appeals also reasoned that "Farnsworth acted as an accomplice, not a principal." "To convict a person of robbery as an accomplice, the State must prove at trial, among other elements, that the accomplice knew that the principal intended the use or threatened use of immediate force, violence, or fear of injury in taking or retaining property." In this case, "[t]here is no evidence that Farnsworth ever agreed to aid, abet, or encourage the commission of a crime that involved the use or threatened use of force, violence, or fear of injury."

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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]

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