Law Enforcement Digest

2016 SUBJECT MATTER INDEX

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

****

2016 SUBJECT MATTER INDEX

LED EDITORIAL NOTE: This annual LED subject matter index covers all LED entries from January 2016 through and including the December 2016 LED. Monthly issues of the LED starting with January of 1992 are available on the Criminal Justice Training Commission (CJTC) website at: https://fortress.wa.gov/cjtc/www/. Through 2011, the annual subject matter index appeared in the December LED. Since 2012, the annual subject matter index has been published as a separate, stand-alone document that, like the monthly LEDs, can be found on the CJTC's LED webpage; some multi-year LED subject matter indexes can also be found there.

In this 2016 index, entries are arranged chronologically within each category and subcategory based on the date of the appearance in the LED (in other words, earlier entries appear before later entries within the categories and subcategories). Citations to court decisions include a citation to the LED, generally as the final part of the entries; the LED citation is abbreviated. For example, the citation in the first entry under "Arrest, Stop and Frisk" immediately following this note, to "April 16:02" means that the Megallon-Lopez entry appears in the April 2016 LED starting at page 2.

ARREST, STOP AND FRISK (See also "Searches" topic)

Where stop based on reasonable suspicion of trafficking illegal drugs was justified, officers did not commit Fourth Amendment violation in falsely telling drug trafficking suspect that he was stopped for traffic infraction. United States v. Magallon-Lopez, 817 F.3d 671 (9th Cir., March 31, 2016) – April 16:02

Arrest warrant should not issue for failure to pay LFOs absent a prior court order for obligated defendant to appear at a specific hearing. State v. Sleator, 194 Wn. App. 470 (Div. III, June 14, 2016) – June 16:07

Refusal of FSTs: in case where officer requested "voluntary" testing after arresting on a warrant, justices issue confusing split of opinions on issue of whether jury could be informed of refusal to perform field sobriety tests; majority view appears to be that pre-

arrest field sobriety tests are a seizure but not a search. State v. Mecham, 186 Wn.2d 128 (June 16, 2016) – June 16:03

Four key rulings under Fourth Amendment: (1) 911 phone call plus officers' observations provided reasonable suspicion for Terry seizure for trespass or DUI; (2) arrest for obstructing for running from attempted Terry seizure held lawful; (3) warrantless search of person incident to arrest for obstructing held lawful; (4) warrantless search of car based on probable cause to believe drugs or evidence of drug dealing were in car held lawful (note that this final ruling would not pass muster under the Washington constitution). United States v. Williams, 837 F.3d 1016 (9th Cir., Sept. 20, 2016) – September 16:03 (Only the first issue was addressed in the LED) Status: On January 11, 2017, the 3-judge panel issued an amended opinion that did not change the result or any of the relevant analysis.

Seizing companion of arrestee: Because officers had an "objective rationale predicated on safety concerns" to seize a companion to secure the scene of an arrest, article I, section 7 of the Washington state constitution allowed for the seizure of the companion even though the officers did not have reasonable suspicion of the companion under the standard of Terry v. Ohio. State v. Flores, ___ Wn.2d ___, 379 P.3d 104 (September 15, 2016) – September 16:04

Vehicle frisk justification: Officer's protective search of arrestee's vehicle for firearms that officer knew to be in vehicle held not justified under Terry or under exigent circumstances exception because the circumstances at the recreational fishing parking area did not justify the officer's perception of danger. State v. Cruz, 195 Wn. App. 120 (Div. III, September 22, 2016) (revised opinion) – September 16:07 Status: Washington Supreme Court expected to rule in late March 2017 on whether to grant discretionary review.

Protective sweep issue resolved against the State because, after homicide suspect was arrested outside his home, officers had no reasonable suspicion that the home harbored a dangerous person to justify a sweep; but trial court's error on this issue is held to be harmless because other evidence of guilt was overwhelming. State v. Chambers, 197 Wn. App. 96 (Div. I, December 1, 2016) – Dec 16:04

CIVIL LIABILITY

Civil Rights Act lawsuits

Qualified immunity denied for sheriff and other government actors where Mario A. Garcia was incarcerated based on a warrant for the arrest of Mario L. Garcia, who was described on warrant at nine inches shorter and 40 pounds lighter than plaintiff Mario A. Garcia v. County of Riverside, 817 F.3d 635 (9th Cir., Feb. 3, 2016) – January 16:01

U.S. Supreme Court grants qualified immunity to officer who used a firearm to try to disable the car of a fleeing, speeding, threatening and possibly drunk suspect, but the officer instead accidentally shot and killed the suspect. Mullenix v. Luna, 136 S.Ct. 305 (Nov. 9, 2015) – February 16:02

In search for parolee-at-large, no qualified immunity for non-exigent, forced, warrantless entry of lawfully occupied shack located within semi-enclosed curtilage of third party's home. Warrantless entry of shack led to officers' shooting of occupants, supporting –

under "provocation doctrine" – plaintiffs' claims against officers for the shooting. Court declares that shack had privacy protection, and court rules against officers on exigent circumstances, protective sweep, consent and knock-and-announce issues. Qualified immunity is granted on knock-and-announce issue but, going forward, officers must knock and announce if they reasonably should know that an area within the curtilage is a separate residence. Mendez v. County of Los Angeles, 815 F.3d 1178 (9th Cir., March 2, 2016) – March 16:01 Status: On December 2, 2016, the U.S. Supreme Court granted review on issues relating to proximate causation and to the Ninth Circuit's "provocation doctrine."

Police K-9 Bites: In case involving an office worker who got drunk, accidentally set off burglar alarm after hours, and then fell asleep so soundly in her office that she did not hear a K-9 officer's warnings, majority opinion for split panel concludes that a reasonable jury could find the police agency liable based in part on agency's use of "bite and hold" police dogs. Lowry v. City of San Diego, 818 F.3d 840 (9th Cir., April 1, 2016) – April 16:03 Status: Under September 16, 2016 order: "Upon the vote of a majority of non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."

Tasing of suspect solely because the nature of the investigation was suspected domestic violence held not justified, but officer given qualified immunity under don't-do-it-again ruling because case law was not clear at time of application of Taser. Thomas v. Dillard, 818 F.3d 864 (9th Cir., April 5, 2016) (amended on May 5, 2016 to correct two clerical errors) – May 16:02

Qualified immunity denied to officers on plaintiffs' claims for unlawful arrest, unlawful detention and illegal search where (1) officers acted inconsistently with their early discovery that teen at family birthday party had only a paintball gun, and (2) persons detained did not meet description by complainant. Sialoi v. City of San Diego, 823 F.3d 1223 (9th Cir., May 24, 2016) – May 16:04

Viewing allegations, including the inconsistencies in officers' statements, in best light for plaintiffs, officer's fatal shooting of suspect was unreasonable under Fourth Amendment on theory that, in the absence of additional threatening movement by suspect, officers either should have (1) warned that deadly force was imminent, or (2) waited for suspect to comply with order to raise his hands. However, court grants qualified immunity because case law was not established at the time of the shooting. C.V. v. City of Anaheim, 823 F.3d 1252 (9th Cir., May 25, 2016) – May 16:06

Because Fourth Amendment case law not clearly established, qualified immunity is granted to courtroom marshal who, under judge's direction to "escort" disruptive, defiant private bail agent from courtroom, "grabbed" and "forcefully pushed" him through courtroom doors. Brooks v. Clark County, 828 F.3d 910 (9th Cir., July 7, 2016) – July 16:01

Two-plus million dollar verdict against jail officers and agency upheld; no qualified immunity for officers who jury found had violated the constitutional Due Process right of a pre-trial detainee in a sobering cell to be free from violence at the hands of a known violent person placed with him; also, agency liability standard of Monell held to be met based on inadequate scheme for audio surveillance and visual cell checks. Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir., August 15, 2016 – August 16:01

Qualified immunity denied to officer in fatal shooting of suspect during attempted investigatory stop where, among other things: (1) officer did not see anything indicating that suspect was armed; (2) officer did not give deadly force warning; (3) suspect did not stop and did not comply with commands to remove hand from sweatshirt pocket but was not clearly fleeing; and (4) officer shot suspect approximately one second after giving command to suspect to remove hand from pocket, just as suspect was taking his hand out of the pocket. A.K.H. v. City of Tustin (California), 837 F.3d 1016 (9th Cir., September 16, 2016) – September 2016 LED:02

No summary judgment for officer who shot erratic woman who had a large kitchen knife; jury must resolve fact questions regarding whether: (1) woman received adequate warning from officers, (2) she raised the knife as if to attack another female civilian nearby, and (3) chain-link fence blocking officers from accessing the two women made shooting the knife-yielder an unreasonable choice. Hughes v. Kisela, 841 F.3d 1081 (9th Cir., November 28, 2016) – Nov 16:01

Lawsuits based on negligence by governmental agency

5-4 majority of Washington Supreme Court rejects lawsuit that alleged negligence by county corrections under a purported "take-charge" relationship in failing to adequately evaluate and treat psychotic schizophrenic who committed mass murder after his release. Binschus v. State of Washington, Skagit County (and others), ___ Wn.2d ___, 380 P.3d 468 (September 23, 2016) – September 2016 LED:06

Lawsuits against governmental agency based on another theory

"Lawful application of a police dog" under statutory exemption to strict liability for dog bites interpreted by Washington Supreme Court. "Lawful application" held to exist where, at the point when a police dog bit a police officer: (1) the police dog was being used by a law enforcement agency to investigate a burglary in progress, (2) the dog was specially trained for law enforcement work, and (3) the dog was being used by a police dog handler. Finch v. Thurston County, 186 Wn.2d 744 (October 13, 2016) – Oct 16:02

DUE PROCESS PROTECTION, INCLUDING BRADY REQUIREMENTS ON GOVERNMENT

Brady violations in Louisiana death penalty case require new trial. Wearry v. Cain, 136 S.Ct. 1002 (March 7, 2016) – February 16:03

Two-plus million dollar verdict against jail officers and agency upheld; no qualified immunity for officers who jury found had violated the constitutional Due Process right of a pre-trial detainee in a sobering cell to be free from violence at the hands of a known violent person placed with him; also, agency liability standard of Monell held to be met based on inadequate scheme for audio surveillance and visual cell checks. Castro v. County of Los Angeles, 833 F.3d 1060 4268955 (9th Cir., August 15, 2016 – August 16:02

ELECTRONIC SURVEILLANCE AND RECORDING (Privacy Act, Chapter 9.73 RCW)

Recording in case involving inadvertent "pocket call" to voicemail poses "interesting" issues regarding Privacy Act (chapter 9.73 RCW), but appeals court avoids issues, instead concluding simply that any error by the trial court in admitting the voicemail

recording was harmless. State v. Sinclair, 191 Wn. App. 380 (Div. I, Jan. 27, 2016) – January 16:03

County district court judge has authority and jurisdiction under chapter 9.73 RCW and other RCWs to issue order for interception and recording of phone call in investigation of felony. State v. Bliss, 191 Wn. App. 903 (Div. II, Dec. 22, 2015) – January 16:03

Trial record held to contain substantial evidence of defendant's unlawful recording of private communications in violation of RCW 9.73.030, so defendant's convictions upheld for installation and use of "mobile spy" on girlfriend's phone. State v. Novick, 196 Wn. App. 513 (Div. II, October 25, 2016) – Oct 16:06

FIRST AMENDMENT FREEDOM OF SPEECH

Free speech, harassment law and true threats addressed. Indirect threats made by defendant during counseling held to be "true threats" sufficient to support felony harassment conviction where (1) threats induced mortal fear in targets, and (2) defendant's plan was detailed and (3) he did not see his plan as wrong. State v. Trey M., 186 Wn.2d 884 (October 27, 2016) – Oct 16:03

HARASSMENT (Chapter 9A.46 RCW)

Free speech, harassment law and true threats addressed. Indirect threats made by defendant during counseling held to be "true threats" sufficient to support felony harassment conviction where (1) threats induced mortal fear in targets, and (2) defendant's plan was detailed and (3) he did not see his plan as wrong. State v. Trey M., 186 Wn.2d 884 (October 27, 2016) – Oct 16:03

IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL (RCW 46.20.308)

Implied consent warnings: Officer's omission of language about testing for marijuana that was required under a former version of RCW 46.20.308 requires suppression of breath test result. State v. Robison, 192 Wn. App. 567 (Div. I, Feb. 16, 2016) – February 16:05 Note: The Washington Supreme Court reversed this decision; see entry below in this topic.

Fourth Amendment limits on taking breath or blood from DUI suspects: search incident to DUI arrest, but warrantless blood test is not allowed as search incident to DUI arrest; driver may be sanctioned for refusing warrantless breath test but not for refusing warrantless blood test (exigency must be shown for blood test). Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016) – June 16:02

Officer's omission from implied consent warning of irrelevant language about testing for marijuana that was included in a former version of RCW 46.20.308 does not require suppression of breath test results. State v. Murray, State v. Robison, 187 Wn.2d 115 (December 8, 2016) – Dec 16:01

Interplay of implied consent statute and constitutional limits on searches: Refusal of breath tests by DUI arrestees may be admitted against them in DUI trials because: (1) constitutionally, the breath test is per se a lawful search incident to arrest; and (2) statutorily, telling jury about exercise of the right to refuse is a lawful consequence of the

refusal. State v. Baird, State v. Adams, ___ Wn.2d ___ , 2016 WL 7421395 (December 22, 2016) – Dec 16:03

INTERROGATIONS AND CONFESSIONS (See also "Sixth Amendment Right to Counsel" and "Criminal Rule 3.1" topics)

Unanimous Washington Supreme Court rules that booking questions about gang affiliation for safe-housing purposes produce involuntary responses because an inmate's safety hinges on the answer. Supreme Court also rules that, while asking question is not unconstitutional, it is error to admit the gang-affiliation statements, and in this case the error was not harmless. Supreme Court also takes issue with some "irrelevant and prejudicial" expert testimony about gangs. State v. DeLeon, 185 Wn.2d 478 (May 5, 2016) – May 16:08

Invoking rights under Miranda: "I don't want to talk no more, man" was unambiguous assertion of right to silence by suspect, and officer's response – "I understand that, but the bottom line is" – which triggered suspect to talk more, constituted further interrogation of invoking suspect in violation of Miranda. Jones v. Harrington, 829 F.3d 1128 (9th Cir., July 22, 2016) – July 16:03

Miranda ruling: Panel rules 2-1 that correctional officer asking a murder arrestee, who had earlier invoked his right to an attorney, whether he was gang-affiliated was interrogation that did not come within Miranda exceptions for "booking questions" or "public safety." United States v. Williams, 842 F.3d 1143 (9th Cir., December 5, 2016) – November 16:03

ROBBERY (Chapter 9A.56 RCW)

Sufficiency of evidence of Robbery: Restaurant absconder's pulling of knife on server who was seeking payment for meal just consumed was Robbery. State v. Thomas, 192 Wn. App. 721 (Div. II, December 22, 2015 decision ordered published on March 15, 2016) – March 16:05

Sufficiency of evidence of robbery: Threat was implied, though not express, in demand note that defendant handed to a bank teller ("no dye packs, no tracking devices, put the money in the bag"), so bank robbery conviction is upheld. State v. Farnsworth, 185 Wn.2d 768 (June 23, 2016) – June 16:04

SEARCHES (See also "Arrest, Stop and Frisk" topic)

Abandoned property/Abandonment doctrine

Abandonment doctrine under search and seizure law: Vehicle thief lost privacy right in his cell phone that he left behind in stolen vehicle when he ran from police after vehicle stop; Washington Supreme Court does not address theories regarding exigent circumstances, community caretaking, or attenuation exception to exclusionary rule because theories were not raised at trial court level. State v. Samalia, 186 Wn.2d 262 (July 28, 2016) – July 16:04

"Community caretaking exception to search warrant requirement (See also "Exigent Circumstances" and "Emergency Circumstances" subtopics under this "Searches" topic)

Community caretaking exception to search warrant requirement: Following arrest of car's occupants suspected of committing a drive-by shooting minutes earlier, reasonable suspicion that gun was in car, plus non-investigative and non-pretextual public safety concerns about accidental gun discharge during towing, supported officers looking for gun in car and retrieving gun before the officers impounded the car and had it towed. State v. Duncan, 185 Wn.2d 430 (April 28, 2016) – April 16:05

Consent exception to search warrant requirement – first party consent

Ferrier warnings for knock-and-talk consent search: 5-4 Washington Supreme Court majority (1) resolves dispute over facts in favor of defendant and concludes that three Rs of knock-and-talk warnings – rights to refuse consent, restrict scope, and retract – were not given prior to entry of home; (2) rules that such pre-entry warnings are required for consent to enter home, even for the limited purpose of seizing computer; and (3) rules that giving full warnings immediately after entry of the home does not satisfy Ferrier requirement. State v. Budd, 185 Wn.2d 566 (May 19, 2016) – May 16:09

Consent exception to search warrant requirement – third party consent

Third party consent to search vehicle under Fourth Amendment: Owner's consent to search vehicle overrides borrower's express objection to search. State v. Vanhollebeke, 197 Wn. App. 66 (Div. III, December 13, 2016) – Nov 16:05

Exigent circumstances exception to search warrant requirement (See also "Community Caretaking" and "Emergency circumstances" subtopics under this "Searches" topic)

Exigent circumstances exception to search warrant requirement as interpreted in Missouri v. McNeely: Rapid rate of dissipation of THC in bloodstream held not sufficient in 2012 Seattle DUI investigation to justify not applying by email or phone for a search warrant authorizing a blood test for THC. City of Seattle v. Pearson, 192 Wn. App. 802 (Div. I, February 29, 2016) – February 16:06

Impound/inventory exception to search warrant requirement

Impound-inventory search: Search of locked backpack pocket per agency policy because of reasonable concern that the pocket contained knife that posed danger to jail staff upheld as lawful impound-inventory search justified under Washington constitution by "manifest necessity." State v. Dunham, 194 Wn. App. 744 (Div. II, June 28, 2016) – June 16:08

Incident to arrest (searching person, effects) exception to search warrant requirement

Fourth Amendment limits on taking breath or blood from DUI suspects: Warrantless breath test is allowed as search incident to DUI arrest, but warrantless blood test is not allowed as search incident to DUI arrest; driver may be sanctioned for refusing warrantless breath test but not for refusing warrantless blood test (exigency must be shown for blood test). Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016) – June 16:02

Interplay of implied consent statute and constitutional limits on searches: Refusal of breath tests by DUI arrestees may be admitted against them in DUI trials because: (1) constitutionally, the breath test is per se a lawful search incident to arrest; and (2) statutorily, telling jury about exercise of the right to refuse is a lawful consequence of the refusal. State v. Baird, State v. Adams, ___ Wn.2d ___ , 2016 WL 7421395 (December 22, 2016) – Dec 16:03

Knock-and-talk as non-private circumstance or as exception to warrant requirement

Ninth Circuit interprets Florida v. Jardines rule that in some circumstances, merely going to a suspect's front door can be an unlawful search. Evidence that resulted from suspected kidnapper's reaction to officers' 4 a.m. knock at front door held inadmissible, because going to door at that hour with intent to make warrantless arrest held to be "search" and to be not justified under Fourth Amendment doctrines for knock-and-talk or exigent circumstances or protective sweep. United States v. Lundin, 817 F.3d 1151 (9th Cir., March 22, 2016) – March 16:03

Knock and announce requirement

In search for parolee-at-large, no qualified immunity for non-exigent, forced, warrantless entry of lawfully occupied shack located within semi-enclosed curtilage of third party's home. Warrantless entry of shack led to officers' shooting of occupants, supporting – under "provocation doctrine" – plaintiffs' claims against officers for the shooting. Court declares that shack had privacy protection, and court rules against officers on exigent circumstances, protective sweep, consent and knock-and-announce issues. Qualified immunity is granted on knock-and-announce issue but, going forward, officers must knock and announce if they reasonably should know that an area within the curtilage is a separate residence. Mendez v. County of Los Angeles, 815 F.3d 1178 (9th Cir., March 2, 2016) – March 16:01

At 6:47 a.m., where there was no noise from inside home and no other evidence indicating residents were awake, residents could be expected to be asleep, so 6-second to 9-second wait prior to forced entry was not long enough. State v. Ortiz, 196 Wn. App. 301 (Div. III, October 13, 2016) – Oct 16:05

Privacy expectations, scope of constitutional protections (see also "Open View" subtopic under this "Searches" topic)

Ninth Circuit interprets Florida v. Jardines rule that in some circumstances, merely going to a suspect's front door can be an unlawful search. Evidence that resulted from suspected kidnapper's reaction to officers' 4 a.m. knock at front door held inadmissible, because going to door at that hour with intent to make warrantless arrest held to be "search" and to be not justified under Fourth Amendment doctrines for knock-and-talk or exigent circumstances or protective sweep. United States v. Lundin, 817 F.3d 1151 (9th Cir., March 22, 2016) – March 16:03

Abandonment doctrine under search and seizure law: Vehicle thief lost privacy right in his cell phone that he left behind in stolen vehicle when he ran from police after vehicle stop; Washington Supreme Court does not address theories regarding exigent circumstances, community caretaking, or attenuation exception to exclusionary rule

because theories were not raised at trial court level. State v. Samalia, 186 Wn.2d 262 (July 28, 2016) – July 16:04

Probable cause to search

Probable cause for search warrant: Affidavit describing earlier investigation of Lakewood massage parlor fails to show probable cause to search lynnwood massage parlor; fact that employees of both massage parlors are korean is declared to be irrelevant. In the Matter of Search Warrant for 13811 Highway 99, Lynnwood, Washington, 194 Wn. App. 365 (Div. I, June 6, 2016) – June 16:05

Protective sweep

Protective sweep issue resolved against the State because, after homicide suspect was arrested outside his home, officers had no reasonable suspicion that the home harbored a dangerous person to justify a sweep; but trial court's error on this issue is held to be harmless because other evidence of guilt was overwhelming. State v. Chambers, 197 Wn. App. 96 (Div. I, December 1, 2016) – Dec 16:04

SEXUAL EXPLOITATION OF CHILDREN (Chapter 9.68A RCW)

Texting crime: 17-year-old texting picture of his erect penis to an adult woman for purpose of harassment constitutes "dealing in depictions of a minor engaged in sexually explicit activity" under RCW 9.68A.050(2)(a). State v. E.G., 194 Wn. App. 457 (Div. III, June 14, 2016) – June 16:06 Status: On January 3, 2017, the Washington Supreme Court granted discretionary review; oral argument has not yet been scheduled.

THEFT AND RELATED CRIMES (Chapter 9A.56 RCW)

"Access device" and sufficiency of evidence: activated gift card is an "access device" under chapter 9A.56 RCW. State v. Nelson, 195 Wn. App. 261 (Div. II, July 26, 2016) – July 16:06

Retail Theft with Special Circumstances: Arrangement of magnets on key that was used to unlock Wal-Mart security devices constituted "an article, implement or device designed to overcome security systems" within the meaning of RCW 9A.56.360(1). State v. Wade, __ Wn. App. __ , 380 P.3d 1288 (Div. III, September 27, 2016) – September 16:09

Vehicle theft, a Class B felony under RCW 9A.56.065, held to not apply to theft of a riding lawn mower. State v. Barnes, 196 Wn. App. 261 (Div. III, October 6, 2016) – Oct 16:04

TRESPASS (Chapter 9A.52 RCW)

Sufficiency of evidence of criminal trespass: No "implied license" by homeowner for persons to "dingdong ditch" by (1) ringing front doorbell of home, (2) shouting racist comment, and (3) running away; therefore, defendant is guilty of trespass as accomplice when friends did as he had solicited. State v. C.B., 195 Wn. App. 528 (Div. III, August 23, 2016) 16 – August 16:03

Question of what constitutes a "premises" under chapter 9A.52 RCW explored; Court of Appeals holds that a vehicle is a "premises" such that the second degree criminal

trespass statute applies to a person found sleeping in another's vehicle. State v. Joseph, 195 Wn. App. 737 (Div. III, September 1, 2016) – September 16:07 Status: Washington Supreme Court granted defendant's petition for discretionary review; awaits decision.

****