

MAY 2018

LAW ENFORCEMENT DIGEST

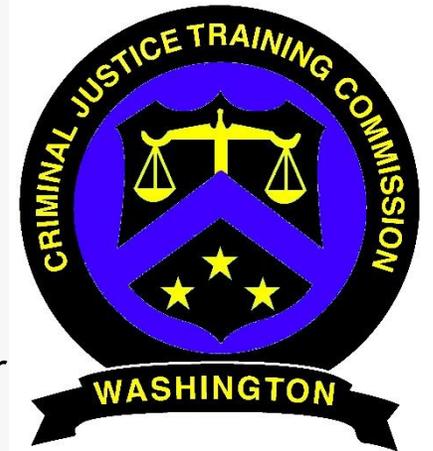


LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the new **Law Enforcement Digest Online Training!** This refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the previous month are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a [hyperlinked title](#) for those who wish to read the court's full opinion. Links have also been provided to additional Washington State prosecutor and law enforcement case law reviews and references.

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

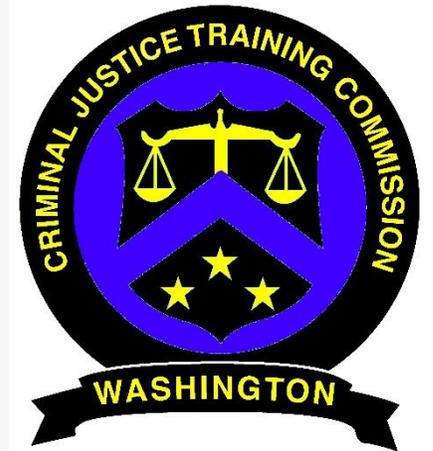


LAW ENFORCEMENT ONLINE TRAINING DIGEST

MAY 2018 Edition

Covering Select Cases Issued in April 2018

- Use of Force; Qualified Immunity
- Domestic Violence; Family and Household Member
- Community Caretaking; Warrantless Search
- Lane Travel
- Search Warrants; Firearms; Premises Search
- Domestic Violence; No Contact Order
- Additional Resource Links: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)



1 USE OF FORCE; QUALIFIED IMMUNITY

§ 1983 Claim; Assault
[Kisela v. Hughes](#), No. 17-467 (April 2, 2018)
UNITED STATES SUPREME COURT

Facts:

Officers responded to a report of an erratic woman holding a knife. When officers arrived to the scene, they saw a woman holding a large kitchen knife leave a house and stop 6 feet from a second woman. She refused to drop the knife after two commands to do so.

After only a minute or two on scene, the Petitioner fired shots at the woman, striking but not killing her. Following the shooting, all 3 officers on scene testified that they believed the woman posed a threat to the second woman at the scene (who was later identified as the woman's roommate). The woman filed a § 1983 claim, alleging that the officer used excessive force in violation of the 4th Amendment when he shot her. The 9th Circuit denied the officer qualified immunity in the case.

NOTE: The Supreme Court is not ruling on whether the officer's actions violated the 4th Amendment in this case – they are only deciding whether or not the officer was entitled to qualified immunity for his actions.

1

USE OF FORCE; QUALIFIED IMMUNITY

§ 1983 Claim; Assault
[*Kisela v. Hughes*, No. 17-467 \(April 2, 2018\)](#)
UNITED STATES SUPREME COURT

TRAINING TAKEAWAY:

An officer who shot a person who was reported to be acting erratically, was holding a large knife stopping within 6 feet of another person, and refused two commands to drop the knife, was entitled to qualified immunity because his actions did not violate clearly established law.

Qualified Immunity attaches when an official's conduct doesn't violate clearly established rights (statutory or constitutional) of which a reasonable person would have know.

The focus is on whether the officer had fair notice that his conduct was unlawful, and reasonableness is judged against the backdrop of the law at the time of the conduct.

The Court acknowledged that it is sometimes difficult for officers to determine how legal precedent may apply to the particular facts they are responding to, and therefore, officers are entitled to qualified immunity for their actions unless existing precedent squarely governs specific facts at issue.

1 USE OF FORCE; QUALIFIED IMMUNITY

§ 1983 Claim; Assault
[Kisela v. Hughes](#), No. 17-467 (April 2, 2018)
UNITED STATES SUPREME COURT

TRAINING TAKEAWAY:

General statements of law are not inherently incapable of giving fair and clear warning to officers, but the general rules set forth in “*Garner* and *Graham* [the primary cases setting standards for weighing use of force] do not by themselves create clearly established law outside of an ‘obvious case.’”

An officer cannot be said to have violated a clearly established right unless the right was sufficiently definite that any reasonable official in the officer’s shoes would have known they were violating it.

The Supreme Court here ruled that the 9th Circuit was stretching when they held that the officer violated clearly established law when the cases they referred to were either not similar enough to the facts of this case, or were decided after this incident occurred (and therefore not able to have informed the officer that his actions might not have been reasonable).

2 DOMESTIC VIOLENCE; FAMILY AND HOUSEHOLD MEMBER

ASSAULT OF A CHILD; FELONY
HARASSMENT
[State v. Scanlan](#), COA No. 74438-1-I (March 12, 2018)
DIVISION I, COURT OF APPEALS

Facts:

A mother and her minor child lived with mother's boyfriend in a family member's house for nearly two years. On the night in question, the mother's boyfriend assaults the mother, and assaults and threatens to kill the minor child. The defendant was charged with Assault as to the mother, and Assault of a Child and Felony Harassment as to the minor child.

At trial, the defendant was convicted of the charges with domestic violence special findings attached to each crime. He is now appealing his offender score and sentence.

2 DOMESTIC VIOLENCE; FAMILY AND HOUSEHOLD MEMBER

Assault of a Child; Felony
Harassment
[State v. Scanlan](#), COA No. 74438-1-I (March 12, 2018)
Division I, Court of Appeals

TRAINING TAKEAWAY:

A minor child and an adult living with the child who is not a parent, stepparent, grandparent, or stepgrandparent, are not “family or household members” for the purposes of a domestic violence allegation.

Without a biological or legal parent-child relationship, the statutory definition of “family or household member” does not apply to a child living with an adult who is not a parent/stepparent or grandparent/stepgrandparent to the minor.

Biological (birth) or legal (adoption, marrying the parent or grandparent of the minor) are the only circumstances that meet the domestic violence special finding.

There is no legal authority allowing a criminal court to apply the civil definition of “de facto” parent (i.e. an adult acting as a parent-figure to the minor) in a criminal case.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
[*State v. Boisselle*, No. 77767-0-1 \(April 16, 2018\)](#)
COURT OF APPEALS, DIVISION I

Facts:

911 Dispatch received an anonymous call reporting that “someone named Mike” had shot someone at a provided address. Shortly thereafter, the Puyallup Police tip line received an anonymous call that stated that “Mike” had shot someone, possibly killing them, and that it was in self defense. Two officers were dispatched to the address.

They received no response to knocking on the door, and were unable to see inside the duplex because the windows were all covered. They saw a light on in the upstairs bedroom, and could hear an aggressively barking dog inside. The officers noted a foul odor coming from the house and garage.

Officers contacted the listed owner of the property who told them he had rented the house to a tenant who moved out, and that he believed her son “Mike” was living there illegally. The listed owner told the officers that the property was now in bankruptcy, and he no longer owned it. Officers then made contact with the former tenant who confirmed that her son Michael had been living in the duplex, but that she hadn't seen him in a few days.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
State v. Boisselle, No. 77767-0-1 (April 16, 2018)
COURT OF APPEALS, DIVISION I

Facts, cont.:

One officer approached the back sliding door to the residence, and the barking dog inside charged at the door. When this happened, the officer was able to see overturned furniture which he thought may be a sign of a struggle.

A bystander told the officers that his friend had been living in the duplex with “Michael,” and hadn’t been seen in several weeks. Auburn PD then contacted the officers with information that they were investigating a possible homicide/missing persons report associated with that roommate, and suggested that if there was any evidence of missing carpet inside the residence, that would be relevant to their case. The officers could see through the back sliding door that there was missing carpet.

The officers testified that without being able to gain consent from a rightful owner/tenant, and not having anything on which to base a warrant (not knowing if there was even a crime to investigate), they felt it necessary to force entry to confirm the health and safety of the reported residents of the duplex.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
State v. Boisselle, No. 77767-0-1 (April 16, 2018)
COURT OF APPEALS, DIVISION I

Facts, cont.:

A sweep of the duplex that consisted of only looking in spaces large enough for a person to fit didn't turn up anyone.

Feeling that the foul odor was coming from the garage, the deputies forced entry from the duplex to the garage. As soon as the door was opened, all 4 could see a rolled up carpet with a shoe coming out the end and maggots spilling out. When they opened the garage door and then went around to the front, they could also see an arm sticking out of the rolled up carpet. At no time did they touch the carpet, or collect any evidence. The officers then secured the scene and applied for a search warrant.

This appeal stems from the defendant's claim that the officers violated his 4th Amendment rights against unlawful search and seizure when they performed a warrantless entry into the duplex.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
State v. Boisselle, No. 77767-0-1 (April 16, 2018)
COURT OF APPEALS, DIVISION I

LEGAL RULING:

The community caretaking exception to the warrant requirement permits officers to make a limited, warrantless intrusion to provide emergency aid or perform a health and safety check.

The officers' warrantless entry into a duplex was lawful under the community caretaking exception to the warrant requirement since they were responding to an anonymous tip of a shooting, were unable to make contact or confirm the safety of the supposed tenants, attempted to gain consent to enter by contacting the property owner and the last known tenant, and entered without pretext of investigating any crime.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
State v. Boisselle, No. 77767-0-1 (April 16, 2018)
COURT OF APPEALS, DIVISION I

TRAINING TAKEAWAY:

Emergency Aid is not negated simply because there is a delay between an officers' initial arrival and the time of the warrantless entry.

What amounts to an emergency, and what steps are necessary to address it, will be highly dependent on the circumstances.

Here, the deputies continued to try to gain additional information that would clarify whether someone was in danger or dead, and only when unable to do so did they force entry.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
[*State v. Boisselle*, No. 77767-0-1 \(April 16, 2018\)](#)
COURT OF APPEALS, DIVISION I

TRAINING TAKEAWAY:

Officers may make a warrantless search of a residence if:

- (1) they have a reasonable belief that assistance is immediately required to protect life or property,
- (2) a reasonable person in the same situation would similarly believe that there was a need for assistance,
- (3) the search is not primarily motivated by an intent to arrest and seize evidence, and
- (4) there is probable cause to associate the emergency with the place to be searched.

The officers repeatedly expressed concern that someone might be dead or injured inside the duplex, and only after several attempts to dispel this concern and the discovery of additional evidence supporting the need for the welfare check, did they force entry. The evidence demonstrates reasonable and subjective beliefs that the officers' assistance was needed to protect one or more individuals at the duplex.

The court also noted that although the Auburn police contacted the officers to let them know of a possible criminal investigation in their jurisdiction, there was no indication that any of the officers intended to conduct any criminal investigation when they were entering the duplex.

3 COMMUNITY CARETAKING; WARRANTLESS SEARCH

2nd Degree Murder; Unlawful Possession of a Firearm
State v. Boisselle, No. 77767-0-1 (April 16, 2018)
COURT OF APPEALS, DIVISION I

PRACTICE TIP:

The community caretaking exception to the warrant requirement is not to be used as pretext for an unlawful, warrantless entry.

The inquiry into a warrantless entry under the community caretaking emergency aid exception will be highly fact/circumstance dependent.

Always provide clear evidence of the likelihood of a person or property being at risk of death or injury, and be able to articulate your concern for their well-being, as well as any attempts made to dispel those concerns prior to resorting to a warrantless entry.

4 LANE TRAVEL

Driving Under the Influence
[State v. Thibert](#), No. 33341-8-III (April 26, 2018)
COURT OF APPEALS, DIV 3

Facts:

Defendant was stopped after a deputy observed him go into the left lane of a multilane highway to pass a car in the right lane. He exceeded 70 mph in doing this. After passing the other car, the defendant remained in the left lane even though there were no other vehicles in the right lane that would've prevented him from returning to that lane. The deputy stopped the defendant for a violation of RCW 46.61.100(2), captioned "Keep right except when passing, etc," which ultimately led to his arrest for DUI. Defendant seeks review of the validity of this interpretation of the statute.

Training Takeaway:

It is an infraction under RCW 46.61.100 to continuously drive in the left lane of a multilane roadway.

Drivers are to "drive in the right hand lane then available to traffic" except when performing transient actions of overtaking and passing another vehicle going in the same direction, travelling at a speed greater than traffic flow, allowing traffic to merge, or preparing to turn left.

5 SEARCH WARRANTS

POSSESSION OF STOLEN PROPERTY; UNLAWFUL
POSSESSION OF A FIREARM

State v. Witkowski, COA No. 49490-6-II (APRIL 24, 2018)
DIV. 2, COURT OF APPEALS

Facts:

Deputy obtained a search warrant to search the respondents' property, including their residence, for evidence of possession of stolen property and utility theft. The search warrant was limited to a stolen power meter and its accessories. While executing the warrant, officers observed a locked gun safe, an unlocked gun safe, ammunition, a rifle case, security cameras, and drug paraphernalia. The deputy knew the respondents were convicted felons, and thus prohibited from possessing firearms and ammunition.

The deputy then filed an addendum to the original warrant requesting to search at the respondents' address for evidence of unlawful possession of a firearm, identity theft, unlawful possession of a controlled substance, and unlawful use of drug paraphernalia. The area to be searched included the main residence, a shed, and any vehicles and outbuildings at the address. The addendum authorized seizure of evidence including firearms, parts, and accessories; surveillance systems; and any item used as a container for item 4 (the surveillance systems). It did not identify the gun safes as items to be seized, although the affidavit described that officers had found two gun safes in the residence during the original search.

5 SEARCH WARRANTS

POSSESSION OF STOLEN PROPERTY; UNLAWFUL
POSSESSION OF A FIREARM

State v. Witkowski, COA No. 49490-6-II (APRIL 24, 2018)
DIV. 2, COURT OF APPEALS

Facts:

When executing the warrant addendum, officers opened the locked gun safe, finding firearms inside.

During trial, the defendants moved to suppress evidence found inside the gun safe (a tall, upright safe the approximate size of a refrigerator that contained 11 loaded rifles and shotguns with their serial numbers filed off, a handgun, a police scanner, a large quantity of cash, ammunition, and cameras. The superior court suppressed the evidence, holding that the search warrant addendum did not cover the gun safes.

The state's motion to reconsider was denied, and they are now appealing to the Court of Appeals for discretionary review.

5 SEARCH WARRANTS

POSSESSION OF STOLEN PROPERTY; UNLAWFUL
POSSESSION OF A FIREARM

State v. Witkowski, COA No. 49490-6-II (APRIL 24, 2018)
DIV. 2, COURT OF APPEALS

TRAINING TAKEAWAY:

Officers may search a locked gun safe pursuant to a search warrant that authorizes a search for firearms and applies to the defendant's residence.

A search authorized by a valid search warrant may extend to the entire area covered by the warrant's description.

Places within the described premises are not excluded simply because an additional act of entry or opening is required, and containers within the premises may be included in the search even if they are not explicitly listed in the warrant.

In executing a warrant for a certain premises, officers may enter locked rooms/spaces, and may search a locked container where it could reasonably contain evidence specifically targeted by the search warrant.

5 SEARCH WARRANTS

POSSESSION OF STOLEN PROPERTY; UNLAWFUL
POSSESSION OF A FIREARM

State v. Witkowski, COA No. 49490-6-II (APRIL 24, 2018)
DIV. 2, COURT OF APPEALS

PRACTICE TIP:

REMINDER: This case applies to a premises search done under authority of a search warrant.

Washington Courts have previously held that locked containers may **not** be searched during the warrantless search of a vehicle.

6 DOMESTIC VIOLENCE NO CONTACT ORDERS

DOMESTIC VIOLENCE NO CONTACT ORDER
[State v. Granath, No. 94892-5 \(April 26, 2018\)](#)
WASHINGTON SUPREME COURT

FACTS:

Defendant was convicted of cyberstalking and violating a no contact order (“NCO”) with her estranged husband. As a condition of her suspended sentence, she was ordered to have no contact with him. The sentencing judge entered an order, but did not include an expiration date. When the defendant had completed her sentence, she moved to have the NCO vacated, claiming that the court only had authority to issue a NCO for the duration of her sentencing obligations.

TRAINING TAKEAWAY:

A DV no contact order issued by a court of limited jurisdiction is only valid for the duration of the underlying suspended sentence.

RCW 3.66.068(1)(a) extends a district court's jurisdiction over DV offenses for up to five years. The District Court may suspend all or some of the sentence for that period, and impose conditions on the defendant, violations of which may result in the defendant's suspended sentence being revoked.

FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

<http://www.waspc.org/legal-update-for-washington-law-enforcement>

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

<http://70.89.120.146/wapa/CaseLaw.html>

Questions?

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