



Law Enforcement

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Digest

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

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NINTH CIRCUIT COURT OF APPEALS

SEARCH AND SEIZURE: NAVAL CRIMINAL INTELLIGENCE SERVICE (NCIS) AGENT’S SEARCH OF COMPUTERS IN WASHINGTON STATE VIOLATED POSSE COMITATUS ACT, BUT THE STATUTORY VIOLATION DID NOT REQUIRE SUPPRESSION TO DETER FUTURE VIOLATIONS BY THE NCIS United States v. Dreyer, 804 F.3d 1266 (November 4, 2015).

A civilian NCIS special agent investigated the distribution of child pornography on the Internet. In the course of that investigation, the NCIS agent used a software program that monitors online distribution of known child pornography files. Washington state NCIS agents asked the special agent to use that program to search a peer-to-peer file-sharing network. The special agent’s software search “query encompassed the entire state of Washington.” Ultimately, the query led to an FBI administrative search warrant that found child pornography on Washington resident Michael Dreyer’s computer. Dreyer had no military affiliation and NCIS turned the investigation over to Washington state law enforcement.

Dreyer was charged with both state and federal crimes. “In the federal case, Dreyer moved to suppress the evidence seized pursuant to both the state and federal warrants.” Dreyer argued that the NCIS search violated the Posse Comitatus Act. The federal district court denied the motion. A Ninth Circuit Court of Appeals panel found that the NCIS search violated the Posse Comitatus Act and the federal district court should have suppressed the evidence. The en banc Ninth Circuit Court of Appeals reheard the case and found that while the NCIS search violated the Posse Comitatus Act, the violation did not merit suppression of the evidence.

The Posse Comitatus Act, and relevant Navy regulations, prohibit the NCIS from conducting criminal investigations of civilians or providing direct assistance to civilian law enforcement. Since the NCIS investigation was not limited to military service members’ computers, the search violated the Posse Comitatus Act. However, the violation resulted from “institutional confusion about the scope and contours of the” Posse Comitatus Act. Specifically, the NCIS special agent believed that his investigative authority was not limited to military personnel.

While the Court found the search and violations troubling, it was “persuaded that the Government should have the opportunity to self-correct before . . . resort[ing] to the exclusionary rule[.]” “Unlike cases in which courts compel suppression to correct violations by law enforcement agencies, . . . this case arises from violations that took place under the purview of the military, which is unique in its command structure and its relationship to the other branches of government.”

However, the Court cautioned:

To be clear, we do not suggest that the exclusionary rule might be inapplicable for a constitutional violation merely because government actors who committed the violation do not understand the legal prohibition. In the more common Fourth or Fifth Amendment context, institutional confusion or ignorance is not a ground for refusing to exclude evidence.

Since the record did not show a need to deter future violations of the Posse Comitatus Act by the NCIS, the Court affirmed the federal district court’s denial of Dreyer’s suppression motion.

THE WASHINGTON STATE SUPREME COURT

SEARCH AND SEIZURE: SEARCH WARRANT FOR A CHILD PORNOGRAPHY INVESTIGATION THAT INCLUDED GENERAL TERM “PORNOGRAPHY” DID NOT SATISFY THE FOURTH AMENDMENT’S PARTICULARITY REQUIREMENT State v. Besola, ___ Wn.2d ___, 359 P.3d 799 (November 5, 2015 2015).

After receiving information that Mark Besola, a veterinarian, provided prescription drugs to a drug addict and had child pornography, police officers sought a search warrant for drugs and child pornography. The judge granted the search warrant for the drugs, but denied issuing a search warrant for child pornography.

While executing the search warrant on Besola’s residence for drugs, officers observed CDs and DVDs “with handwritten titles that implied that they contained child pornography.” “On the basis of this observation, police requested and obtained an addendum to the search warrant.”

The warrant indicated that the crime under investigation was “Possession of Child Pornography RCW 9.68A.070” and provided:

[T]he following evidence is material to the investigation or prosecution of the above described felony:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all document demonstrating purchase, sale or transfer of pornographic material.

During the subsequent search, “[p]olice seized a number of computers, memory storage devices, CDs, and DVDs.” “They ultimately found child pornography on one computer and on 41 disks with handwritten titles.” Besola and Jeffrey Swenson (who lived in Besola’s house) were charged and convicted of possession of depictions of minors engaged in sexually explicit conduct and dealing in such depictions.

On appeal, Besola and Swenson argued that the search warrant was overbroad and did not satisfy the Fourth Amendment’s particularity requirement, because the warrant authorized seizure of “any and all printed pornographic materials” and “any photographs, but particularly of minors.” The Washington State Supreme Court agreed.

Under the Fourth Amendment, search warrants must “particularly describ[e] the place to be searched, and the persons or things to be seized.” This is known as the “particularity” requirement. Its purpose is to prevent general searches, prevent “the issuance of warrants on loose, vague, or doubtful bases of fact,” and prevent “the seizures of objects on the mistaken assumption that they fall within the issuing

magistrate’s authorization.” “By describing the items to be seized with particularity, the warrant limits the discretion of the executing officer to determine what to seize.”

The particularity requirement is heightened when a warrant seeks items protected by the First Amendment – such as pictures or writings. “In such cases, the particularity requirement must be accorded the most scrupulous exactitude.”

In this case, the search warrant fell short of the particularity requirement. First, “the descriptions of the items to be seized expressly included materials that were legal to possess, such as adult pornography and photographs that did not depict children engaged in sexually explicit conduct.” Second, the warrant’s description of the things to be seized “could easily have been made more particular by adding the precise statutory language – ‘depictions of a minor engaged in sexually explicit conduct.’”

Since the warrant did not meet the particularity requirement, it was overbroad. As such, the seizure of the CDs and DVDs containing child pornography violated the Fourth Amendment. The Supreme Court reversed the convictions.

THE WASHINGTON STATE COURT OF APPEALS

SEARCH AND SEIZURE: FARE ENFORCEMENT OFFICER HAD AUTHORITY TO BRIEFLY DETAIN PASSENGER WHO EXITED BUS, DID NOT HAVE A TICKET, AND DID NOT HAVE IDENTIFICATION IN ORDER FOR SHERIFF’S DEPUTY TO ARRIVE ON SCENE AND CHECK THE PASSENGER’S IDENTITY. State v. Mitchell, __ Wn. App. __, __ P.3d __, 2015 WL 6680069 (November 2, 2015).

A fare enforcement officer (FEO) was checking the proof of payment for passengers exiting the Rapid Ride busses. When Lavelle Mitchell exited the bus, the FEO asked for his proof of payment. But, Mitchell did not have his proof of payment or government-issued identification. Mitchell gave the FEO his name, date of birth, and address. A sheriff’s deputy was called to the scene and arrived within a few minutes. The sheriff’s deputy ran Mitchell’s information and learned that Mitchell had an outstanding arrest warrant. The sheriff’s deputy then arrested Mitchell. During the search incident to arrest, the sheriff’s deputy found two guns in Mitchell’s jacket. Since Mitchell had a previous conviction that disqualified him from firearms possession, he was charged and convicted of unlawful possession of a firearm.

On appeal, Mitchell argued that the FEO did not have authority to detain him after he exited the bus, and did not have authority to detain him while waiting for the sheriff’s deputy to arrive on scene to check his identifying information. The Washington Court of Appeals, Division Two, disagreed.

RCW 35.58.580(1) requires bus passengers to pay the fare “and produce proof of fare payment when asked by someone tasked with monitoring fare payment.” Under RCW 35.58.580(2)(a)-(b), the failure to pay the fare or produce proof of payment when asked is an infraction. RCW 35.58.585(2)(b) authorizes FEOs to “issue a notice of civil infraction when the infraction occurs in the officer’s presence, request identification, and detain a person for a period of time reasonably necessary to identify the person.” That is what happened in this case.

By riding the bus, Mitchell had the obligation to produce proof of payment upon a FEO's request. Here, the FEO witnessed Mitchell exiting the bus and asked him to provide proof of fare payment. When Mitchell failed to provide proof of payment, RCW 35.58.585(2)(b)(ii) "authorized [the FEO] to request personal identification from Mitchell." When Mitchell said he did not have identification, the FEO "had the authority to detain Mitchell for the time reasonably necessary to identify him." Accordingly, the FEO had authority to detain Mitchell, and the subsequent arrest and search were lawful.

MIRANDA AND SEARCH AND SEIZURE: OFFICER ASKING ARRESTEE FOR CONSENT TO SEARCH VEHICLE DID NOT VIOLATE *MIRANDA*; AND, EVEN IF THE OFFICER TOLD THE ARRESTEE THAT HIS CAR WOULD BE IMPOUNDED IF HE DID NOT CONSENT, THE ARRESTEE'S CONSENT TO SEARCH THE VEHICLE WAS VALID. State v. Cherry, ___ Wn. App ___, ___ P.3d ___, 2015 WL 7459090 (November 24, 2015).

An officer, who had many contacts with Matthew Cherry, sees Cherry driving a car. The officer knows that Cherry has a suspended license and stops Cherry. The officer then arrests Cherry for driving while license suspended, places him in the patrol car, and reads him *Miranda* rights. Cherry tells the officer that he does not want to make any statements.

The officer then asks Cherry if the passengers in the car could drive the car away. Cherry responds that both passengers did not have a license, and he did not know of another licensed driver who could drive the car away. The officer told Cherry that the car would be impounded for security reasons.

After the passengers left, the officer asked Cherry if he would consent to the officer searching the car. Cherry responded that he did not want the officer searching the car and "that there were no drugs in the car because he had used them earlier, and he laughed." The officer then called for a narcotics canine officer and told Cherry that a canine officer was on the way.

Cherry then told the officer that he could search the car. The officer "asked Cherry to confirm his consent and told him he could revoke it at any time." During a suppression hearing, Cherry testified that the officer told him that the car would not be impounded if he consented to the search. The officer denied that allegation. The search yielded a methamphetamine pipe. Ultimately, the officer decided not to impound "the car because of Cherry's cooperation and because the car was not parked illegally." Cherry was charged and convicted of unlawful possession of a controlled substance.

On appeal, Cherry argued that the evidence should have been suppressed because: (1) the officer violated *Miranda* by asking him for consent to search the car; and (2) the consent was not voluntary because the officer threatened to impound the car if he did not consent to the search. The Court of Appeals, Division Two, disagreed.

First, the officer asking Cherry for consent to search the car after reading *Miranda*, and Cherry stating that he did not want to make any statements, did not violate his Fifth Amendment rights. "The admissibility of statements obtained after a person in custody has decided to remain silent depends on whether his right to cut off questioning was scrupulously honored." Here, the officer's "request for consent to search was not designed to elicit testimonial evidence and Cherry's consent was not an incriminating statement." "Therefore, law enforcement did not violate Cherry's constitutional right to remain silent by requesting consent to search his car after Cherry had invoked that right."

Second, even if the officer told Cherry that he would not impound the car if Cherry consented to the search, Cherry's consent was voluntary. It should be noted that the officer denied telling Cherry that the car would not be impounded if he consented to the search. "Consent to search is an exception to the warrant requirement." "To show valid consent, the State must prove that the consent was freely and voluntarily given." "Factors used to determine whether a person has voluntarily consented include whether *Miranda* warnings were given, the individual's education and intelligence, and whether he was advised of the right to consent." "Where officers tell a defendant they will impound his car and request a search warrant if he does not consent to its search, they are not being coercive." "Furthermore, this is not a case where the officers misrepresented their authority in an attempt to obtain consent or stated that they would search the car with or without consent."

Accordingly, the Court of Appeals affirmed the convictions.

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>]
