

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: *Thank you for your service, protection and sacrifice*

NOVEMBER 2022

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WASHINGTON STATE COURT OF APPEALS

FOR PURPOSES OF THE HARMING-A-POLICE DOG STATUTE, RCW 9A.76.200(1), “MALICIOUSLY” MEANS “AN EVIL INTENT, WISH, OR DESIGN TO VEX, ANNOY, OR INJURE” A POLICE DOG

In State v. Moose, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, November 22, 2022), Division Three rules that the term “maliciously” in RCW 9A.76.200(1) regarding harming a police dog, the term “maliciously” means “an evil intent, wish, or design to vex, annoy, or injure” a police dog. In key part, the Moose Court’s explanation of the reasoning behind this ruling is as follows:

Mr. Moose continued to ignore the officers’ commands to come out from between the cars and the police decided to use a police dog, K-9 Trex, to help take Mr. Moose into custody. As K-9 Trex approached Mr. Moose, [the defendant] shot a fireball at the dog, lighting his head on fire. K-9 Trex retreated, the fire quickly extinguished itself, and the dog bravely reengaged and helped subdue Mr. Moose so officers could take him into custody. The dog’s whiskers and eyelashes were burned off and the fur on his head was singed.

. . . .

[Mr. Moose] argues RCW 9A.76.200 requires proof a person “maliciously” harmed a police dog; RCW 9A.04.110(12) in turn defines “maliciously” as “an evil intent, wish, or design to vex, annoy, or injure another person” and because Mr. Moose harmed a police dog, not “another person,” [Mr. Moose thus argues that] the State failed to prove he acted maliciously as required by RCW 9A.76.200.

Mr. Moose’s argument is unconvincing. He ignores the prefatory phrase that precedes the statutory definitions: “In this title unless a different meaning plainly is required . . . ‘maliciously’ shall import an evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110(12) (emphasis added).

A statute criminalizing malicious injury of a police dog plainly requires a definition of “maliciously” that applies to police dogs. Further, Mr. Moose’s reading of “maliciously” in RCW 9A.76.200 to require acting against “another person” violates multiple canons of statutory interpretation. Statutes should be interpreted so that no portion is rendered meaningless and so as to avoid absurd results. Gronquist v. Dep’t of Corr., 196 Wn.2d 564, 571, 475 P.3d 497 (2020). Mr. Moose’s interpretation does precisely the opposite. He suggests we read RCW 9A.76.200 so as to render the entire statute meaningless. This is an absurd result that was clearly not intended by the legislature. The State was not required to prove Mr. Moose harmed “another person” to prove he harmed a police dog, and the evidence at trial was sufficient to sustain his conviction.

Result: Affirmance of Yakima County Superior Court convictions of Richard Scott Moose for (A) attempted arson in the second degree, (B) harming a police dog, (C) resisting arrest, and (D) attempted malicious mischief in the second degree.

THIRD DEGREE ASSAULT: UNDER RCW 9A.36.031(1)(d) AN ASSAILANT’S HANDS ARE NOT A “WEAPON OR OTHER INSTRUMENT OR THING LIKELY TO PRODUCE BODILY HARM”

In State v. Altman, ___ Wn. App.2d ___, 2022 WL ___ (Div. II, August 23, 2022, unpublished Opinion ordered published on November 15, 2022), Division Two of the Court of Appeals addresses the question of whether a jury verdict of Third Degree Assault against defendant is supported by the evidence. The State relied on the defendant's use of his hands against his victim to support the element of RCW 9A.36.031(1)(d) that requires proof of use of a "weapon or other instrument or thing likely to produce bodily harm."

In key part, the Altman Opinion's legal analysis is as follows:

Under RCW 9A.36.031(1)(d), a person is guilty of third degree assault if he or she, "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." The issue here is whether a hand meets the statutory requirement of "other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

The statute does not define the term "other instrument or thing likely to produce bodily harm." Therefore, the statute is given its plain and ordinary meaning as defined in the dictionary. State v. Marohl, 170 Wn.2d 691, 699 (2010). In Marohl, the [Washington Supreme Court] applied the dictionary definition to "instrument" and "thing," describing both as:

[A]n "instrument" is "a means whereby something is achieved, performed, or furthered." Webster's Third New International Dictionary 1172 (2002). More narrowly, an "instrument" is a "utensil" or "implement." A "thing" is "an entity that can be apprehended or known as having existence in space or time," "an inanimate object," or "whatever may be possessed or owned or be the object of a right—distinguished from person."

The [Marohl Court] also applied the dictionary definition to the term "likely" to mean "of such a nature or so circumstanced as to make something probable." . . . The court went on to hold that "[o]nly assaults perpetrated with an object likely to produce harm by its nature or by circumstances fall within [RCW 9A.36.031(1)(d)]'s purview."

Marohl went on to cite to another canon of statutory construction, *eiusdem generis*, to conclude that an "instrument or thing likely to produce bodily harm" must be similar to a weapon. In turning to the dictionary definition of "weapon," the court held that an instrument or thing must be used like a weapon, "as an 'instrument of . . . combat' or 'something to fight with.'" . . .

The issue in Marohl was whether a floor is an instrument or thing under the third degree assault statute when the facts showed the defendant, a mixed martial arts fighter, held the victim in a chokehold and the victim was injured when he fell onto the floor after he lost consciousness. The court held that because the defendant made no effort to proactively use the floor to injure the victim, the defendant did not use the floor like a weapon. In response to the State's argument that the chokehold contributed to the defendant taking the victim "into the ground and slamming him into the floor," the court stated that "[a] bare arm may not be the instrument or thing that elevates an assault charge." . . .

Footnote 3 of Altman Opinion: *The Marohl court noted that the legislature amended the second degree statute to include assault by strangulation one month after the incident on review. . . .*

Footnote 4 of Altman Opinion: *In [State v. Donofrio, 141 Wash. 132, 137-38 (1926)], the defendant was charged with assault with a weapon or other instrument or thing likely to produce bodily harm, but the victim could not identify what she was struck with. . . . The [Donofrio] court opined that the trial court should have given a lesser included assault instruction to the jury because the jury might believe the victim was hit by a bare fist or hand, implying that a bare fist or hand is not an instrument or thing likely to produce bodily harm.*

Here, in light of Marohl's definition of "instrument or thing likely to produce bodily harm," hands do not qualify. The State relied solely on Altman's hands to support the lesser alternative charge of third degree assault. Hands are not a "utensil" or "implement." Nor are hands "an inanimate object." Instead, hands are an extension of a person. See *id.* at 699. Because there is no other evidence that Altman used anything other than his hands when grabbing and squeezing A.W.'s neck, the State failed to present sufficient evidence to support the essential element of "a weapon or other instrument or thing likely to produce bodily harm" for third degree assault. RCW 9A.36.031(1)(d).

Footnote 5 of Altman Opinion: *We note that there may be a circumstance where hands may be considered a weapon with appropriate training or depending on its intended use and circumstances. However, we are constrained to follow our Supreme Court precedent. State v. Gore, 101 Wn.2d 481, 486-87 (1984).*

Therefore, there is insufficient evidence to support Altman's conviction for third degree assault.

Result: Thurston County Superior Court conviction of Trevor Scott Altman for third degree assault reversed, and the charge is dismissed with prejudice, thus barring re-trial on that charge.

COURT OF APPEALS PANEL DECLARES TO HAVE BEEN UNCONSTITUTIONAL THE PRE-2021 WASHINGTON STATUTE ADDRESSING SURRENDER OF FIREARMS FOR SOME DEFENDANTS WHO WERE SUBJECT TO PROTECTION ORDERS; 2021 AMENDMENTS TO THE STATUTORY SCHEME PROBABLY CURED THE CONSTITUTIONAL PROBLEMS

In State v. Flannery, ___ Wn. App. 2d ___, 2022 WL ___ (Div. II, November 22, 2022), a three-judge Division Two panel upholds a Kitsap County Superior Court decision by ruling that the former firearm-surrender statute, RCW 9.41.800, requiring in some circumstances that defendants subject to protection orders surrender their firearms and file proof of surrender (or a declaration of non-surrender) was unconstitutional.

The Flannery Court declares that the former statutory scheme violated the Fifth Amendment and article I, section 9 of the Washington constitution by compelling defendants to incriminate themselves by signing an incriminating declaration about their unlawful prior ownership or

possession of firearms. The Court also opines that the former statutory scheme violated the Fourth Amendment and article I, section 7 of the Washington constitution because the statute required defendants to search their own homes, seize their firearms, and convey them to law enforcement without reasonable suspicion or probable cause.

It appears that the Washington Legislature's 2021 amendments to the relevant statutes, including an immunity provision for firearm surrender orders issued under RCW 9.41.800, cured the constitutional defects of the pre-2021 statutory scheme.

Result: Affirmance of Kitsap County Superior Court order vacating a firearm surrender order and dismissing Dwayne Allen Flannery's criminal charge for failure to comply with the firearm surrender order.

BRIEF NOTES REGARDING NOVEMBER 2022 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The two entries below address the November 2022 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. Robby Wayne White: On November 1, 2022, Division Two of the COA rejects the defendant's challenges to his Clark County Superior Court convictions for one court each of (A) *second degree assault* and (B) *unlawful imprisonment*. Among other rulings, the Court of Appeals rules that, because White waived his rights in a custodial interrogation and voluntarily answered questions in a police interrogation, **there was no violation of defendant's right to silence for the prosecutor to point out to a jury the differences between the defendant's Mirandized post-arrest statements to law enforcement and his trial testimony. This, no error occurred when the trial judge allowed the prosecutor to point out that the defendant's trial testimony contained details that he had not originally disclosed during the law enforcement interrogation.**

The Opinion in State v. Robby Layne White can be accessed on the Internet at:
<https://www.courts.wa.gov/opinions/pdf/D2%2056211-1-II%20Unpublished%20Opinion.pdf>

2. State v. Marcus John Inman, Jr.: On November 8, 2022, Division Two of the COA rejects the defendant’s challenges to his Lewis County Superior Court convictions for one count each of (A) *attempting to elude a pursuing police vehicle* and (B) *second degree identity theft*. Among other rulings, the Court of Appeals rules that **using someone else’s name in a traffic stop constitutes identity theft under circumstances where the defendant has an outstanding arrest warrant (or, presumably, also in other circumstances where a records check would provide justification for an arrest)**.

In key part, the White Court’s analysis of the issue of sufficiency of evidence of identity theft is as follows:

A person is guilty of identity theft when they “knowingly obtain, possess, use, or transfer a means of identification . . . of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Second degree identity theft occurs when the defendant commits identity theft without obtaining certain items of value. See RCW 9.35.020(2), (3). “Means of identification’ means information or an item that is . . . personal to or identifiable with an individual or other person, including: A current or former name of the person.” RCW 9.35.005(3). Additionally, the means of identification must refer to a real person. State v. Berry, 129 Wn. App. 59, 67 (2005). Verbally giving a law enforcement officer a means of identification of another person during a traffic stop to thwart the police’s attempt to ascertain the individual’s correct identity constitutes identity theft. State v. Presba, 131 Wn. App. 47, 55-56 (2005).

. . . .

The evidence Inman stipulated to shows that Inman knowingly used Inocencio’s name – a means of identification – because he admitted that he lied about his name. Additionally, Inocencio is a real person – he is Inman’s cousin. The evidence further shows that Inman used Inocencio’s name to thwart the police’s identification of him so that they would not arrest him due to the Lewis County Warrant. That shows he knowingly used a means of identification with the intent to commit a crime – thwarting police identification and the enforcement of a warrant. After viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Inman guilty beyond a reasonable doubt of second degree identity theft.

The Opinion in State Marcus John Inman Jr. can be accessed on the Internet at:
<https://www.courts.wa.gov/opinions/pdf/D2%2056460-2-II%20Unpublished%20Opinion.pdf>

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the “LE Resources” link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules/].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [<http://www.supremecourt.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [<http://www.leg.wa.gov/legislature>]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].
