



PRACTICE TOOL | 3.10.2023 | Sheri M. Oertel

## SHERI'S SIDEBAR

Hi all!

Intermittently things arise while working on research that I had changed, have been clarified, or I wasn't aware of at all. I want to start sharing these with you. My prior OPD panel co-workers asked to have a "Sheri's Corner" of tidbits and knowledge like we used to do when I was in private practice; hence "Sheri's Sidebar" is born. 😊 HI Prior Lunch Group from Franklin County! Anyway, here are the interesting tidbits, reminders, or new information that are helpful in practice.

1. **Were you aware that the right to an attorney has also been held to be a part of the First and Fourteenth Amendments, not only the Sixth Amendment?**

Many thanks to the attorney who shared this case with WDA recently!

I recommend you add these two Amendments to every argument related to the Right To Effective Counsel, the Right to Access of Counsel, etc. I read *Fox*, but not the other cited cases. I am sure they have many helpful tidbits for argument.

*State v. Fox*, 82 Wn.2d 289, 510 P.2d 230 (1973)(citing *Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.Ed.2d 89 (1964); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S. Ct. 353, 19 L.Ed.2d 426 (1967)).

2. **Did you know that generally, a court cannot impose a sentencing condition to "obey all laws" – only DOC can?** This is useful to know when probation violations get kicked into court.

"The first question is whether the trial court had authority to order Jones to engage in "law abiding behavior."<sup>10</sup> Before 1984, a trial court had authority to "impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes."<sup>11</sup> As a result, a trial court could order that an offender obey all laws. When the

SRA took effect in July 1984, it eliminated a trial court's authority to order an offender, other than a first-time offender, to obey all laws. In *State v. Barclay*,<sup>12</sup> Division Three held that “although **a first-time offender may be ordered to refrain from committing new offenses, the statute does not allow such a condition to be imposed upon a repeat offender.**” In *State v. Raines*,<sup>13</sup> Division One agreed. In 1999, the SRA was amended to provide that when sentencing for certain crimes committed on or after July 1, 2000, including first degree burglary, [t]he court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to (f) of this subsection.... [T]he court shall also require the offender to comply with any conditions imposed by the department of corrections under subsection (15) of this section. Subsection (15) provided that **the department may require the offender ... to obey all laws.**<sup>15</sup> These amendments remain in effect today.” *State v. Jones*, 118 Wn. App. 199, 204–05, 76 P.3d 258, 260–61 (2003)

3. Are you aware that the State cannot cross examine a testifying expert witness regarding opinions of other non-testifying professionals on which that specific expert did not rely upon to form his/her opinion?

Further, the State cannot impeach a testifying expert with opinions of other non-testifying professionals the State believes/argues the expert should have relied upon.

How many people have seen the State do this in trial (or motions) to prevent having to hire an expert or to not pay travel & testimony expenses to have that expert testify to rebut the defense expert?!



*State v. Hamilton*, 196 Wn. App. 461, 383 P.3d 1062 (2016); ER 705.7A, Rule 705. Disclosure of Facts or Data Underlying Expert Opinion, 5D Wash. Prac., Handbook Wash. Evid. ER 705, pg. 403 (2022-2023 ed.).

4. **Did you know it wasn't until 2022 that "de-escalation tactics" was defined (loosely) by the legislature for police, despite an attempt at de-escalation tactics being required prior to any use of physical force by law enforcement?**

Do you realize that none of the listed options for de-escalation are in the top 10 de-escalation techniques for crisis intervention???

RCW 10.120.020(2) "De-escalation tactics" refer to actions used by a peace officer that are intended to minimize the likelihood of the need to use force during an incident. Depending on the circumstances, "de-escalation tactics" may include, but are not limited to: Using clear instructions and verbal persuasion; attempting to slow down or stabilize the situation so that more time, options, and resources are available to resolve the incident; creating physical distance by employing tactical repositioning to maintain the benefit of time, distance, and cover; when there are multiple officers, designating one officer to communicate in order to avoid competing commands; requesting and using available support and resources, such as a crisis intervention team, a designated crisis responder or other behavioral health professional, or back-up officers. Effective March 17, 2022.

See: Crisis Prevention.com <https://www.crisisprevention.com/Blog/CPI-s-Top-10-De-Escalation-Tips-Revisited> and Texas Medical Liability Trust <https://hub.tmlt.org/tmlt-blog/de-escalation-techniques-and-resources>

1. Move to a private area.
2. Be empathetic and non-judgmental.
3. Respect Personal Space.
4. Keep your tone and body language neutral.
5. Avoid over-reacting.
6. Focus on the thoughts behind the feelings.
7. Ignore challenging questions.
8. Set boundaries.
9. Choose boundaries wisely, which are flexible, which are not.
10. Allow silence.
11. Allow time for the person to make (rational) decisions.

5. **Are you aware (for impeachment, cross exam, or other usefulness) that the Washington State Law Enforcement Academy have proposed 4 new academies to help with the shortage of officers?**

While that would typically be a good thing, do you know that the current academy has for at least the past decade, "trained new sheriff's deputies and police officers according to standards largely not based on evidence or research-based best practices, with inconsistent instruction

and tests that fail to ensure students have learned what they need to do their jobs. That's based on a 2019 review conducted on behalf of the state agency that runs the academy." **Although recommendations for changes have been made, they have been refused.**

<https://news.yahoo.com/71-gets-gun-graduates-washingtons-070008384.html> Thanks to Robert for first posting this article and issue on listserv last year.

- a. If one academy puts out X number of badly trained recruits each session, how many poorly trained officers are 5 academies in Washington going to put on the streets?

<https://time.com/5901726/police-training-academies/> Society is paying the Price for America's Outdated Police Training Methods

6. **On that note, here are some useful publications regarding the inadequacies of the Reid Technique of Interrogation.**

**\*\*Note, many PI's and former Law Enforcement have received new/recent training on how inadequate and inaccurate the Reid Method is – there is the potential to get an expert witness on the technique admitted for motions and trials. One of the primary security training providers has dropped Reid Method Training as an option, much less offering it as a requirement.**

Great Britain has already prohibited law enforcement from lying to suspects to obtain information. They found false confessions dropped.

The Reid Interrogation Technique and False Confessions: A Time for Change

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjkkdn-wtL9AhU1J0QIHX\\_pDyEQFnoECA4QAQ&url=https%3A%2F%2Fdigitalcommons.law.sattleu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1905%26context%3Dsjsj&usg=AOvVaw0qwlpofKzrTbIKaNcJz4i3](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjkkdn-wtL9AhU1J0QIHX_pDyEQFnoECA4QAQ&url=https%3A%2F%2Fdigitalcommons.law.sattleu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1905%26context%3Dsjsj&usg=AOvVaw0qwlpofKzrTbIKaNcJz4i3)

The Ineffectiveness of the Reid Technique in Law Enforcement Interrogations and How a Non-Accusatory Model of Interview Can Be Applied in Law Enforcement Interviews in the U.S.

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjkkdn-wtL9AhU1J0QIHX\\_pDyEQFnoECBAQAQ&url=https%3A%2F%2Fdigitalcommons.pace.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1328%26context%3Dhonorscollege\\_these\\_s&usg=AOvVaw3abSbSo6dEdDeNoAlJ18CU](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjkkdn-wtL9AhU1J0QIHX_pDyEQFnoECBAQAQ&url=https%3A%2F%2Fdigitalcommons.pace.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1328%26context%3Dhonorscollege_these_s&usg=AOvVaw3abSbSo6dEdDeNoAlJ18CU)

Security, law enforcement react to change in U.S. interrogation technique (i.e. one major training provider refuses to teach it any longer)

<https://www.securityinfowatch.com/security-executives/article/12314618/security-law-enforcement-react-to-change-in-us-interrogation-technique>

Getting to the Truth: An Alternative to Interrogation

<https://www.psychologytoday.com/gb/blog/injustice-system/202204/getting-the-truth-alternative-interrogation>

Have a great weekend all! Remember to take some time for your well-being, mental health, and stress reduction this weekend. It's hailing here...so maybe a fire, movie and hot chocolate for me and my peeps tonight.

Sheri

