WASHINGTON DEFENDER ASSOCIATION

PRACTICE TOOL | 4.7.2023 | Sheri M. Oertel

SHERI'S SIDEBAR

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

Litigate well, this is what we are up against: There are judges who don't understand the law, and prosecutors arguing the law incorrectly because they know they are losing…

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Today there are some shorter tidbits, so I have a few extra included...

1. **Anyone ever fight the ridiculous distance of 1,000 feet for an NCO?**

   I am attaching a visual aid tool for trials – or send your investigator out to get this same information PHOTOGRAPHICALLY AT THE SCENE (much stronger evidence) to prove to the DPA or jury that there is no way possible to determine who the person is at 500/1000 feet so the NCO could not have possibly been knowingly violated. I bet after you get a few acquittals in your jurisdiction the court stops writing this distance and goes back to 300 feet, which is hard enough for the State to prove!
   In an unrelated article, the Washington Legislators are attempting to impose a 1,000 yards distance from whales. See attached Practice Tool distance document I use in NCO Violation Trials showing the inability to "knowingly" violate an NCO at 1,000 feet (0.19 or 1/5 of a mile)!
   Under the heading: Housing and Environment in the link:

   > "A bill to protect Southern Resident Orca pods that passed the Senate has split lawmakers too. It would increase the size of the no-boat buffer zone around the endangered whales, requiring whale watchers and other boaters to stay at least **1,000 yards away** from them. Lawmakers opposed to the bill worry the distance is too far to see the whales at all and that the distance would be difficult to gauge — it's about half a nautical mile. Meanwhile, supporters say it's a big step to protect the whales from human disruptions to their feeding and hunting patterns."

https://www.opb.org/article/2023/03/11/wa-lawmakers-pass-housing-firearm-bills-ahead-of-cutoff-leave-rent-control-recycling-bills-behind/?outputType=amp

Ok, legislators and courts, just continue to put totally unreasonable, irrational distances into laws. It gives us an excellent defense! Other than using a football field, I doubt most legislators or laypeople could tell someone any distance with any sort of reliability.

- **PRACTICE TIP:** Watch for the dumb thing police have started doing – measuring VNCO distances "as the crow flies" – including *through* buildings, trees, etc.
  - Visually a defendant could not knowingly violate to a protected person if can't tell it is a person, or who the person is at the opposite location. Disproving the distance to a residence is a bit more difficult because the residence doesn't move.
  - Also, pull a map of the area and google map it for distances, as it could be driven or walked. Or have your investigator go walk it and measure distance in the manner which the HC would have to actually travel. **This wins trials.**

2. **How do you align these two authorities???**

Impeachment by prior inconsistent statement does *not* provide a means of introducing *a statement made by someone else*, to contradict the witness on a factual matter. *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (Div, 2 1998)(defendant's statement that his defense would be general defense and/or self-defense was not admissible to impeach a defense witness); *State v. Williams*, 79 Wn. App. 21, 902 P.2d 1258 (Div. 2 1995), amended, (Sept. 26, 1995)(statement made by attorney *inadmissible* to impeach witness).

And

In a criminal case, if the *defendant* chooses to testify, *the defendant may be cross-examined* about inconsistent statements *made by defense counsel* in opening arguments. *State v. Garland*, 169 Wn. App. 869, 282 P.3d 1137 (Div. 2 2012)(extended discussion).

SAY WHAT NOW? AND EVERY CASE DECISION IS FROM DIV. 2?

3. **There has been an ongoing debate about defense counsel's obligation to redact discovery as part of the client's case file request, and the duty to provide it to a client (or an unredacted version to their new attorney) post-conviction or post withdrawal/termination of representation. First, *Padgett*, then *Murray*, and now *Albright (attached)* fully clarifies:**

   a. **DEFENSE COUNSEL HAS AN OBLIGATION TO PROVIDE THE CLIENT'S FILE AND REDACTED DISCOVERY UPON REQUEST OF THE CLIENT, EVEN POST TERMINATION & POST CONVICTION.**

   b. **THE STATE HAS NO OBLIGATION (absent exceptional circumstances where the requesting party demonstrates "good cause," defined as "a substantial likelihood the discovery will lead to evidence that would compel relief under RAP 16.4(c) [PRP]." Quoting *In re Gentry*, 137 Wn.2d 378, 390-92, 972 P.2d 1250 (1999).**

Whatever legal distinction some defense counsel believes is in *Padgett* and *Murray*, *Albright* makes this obligation upon defense counsel unambiguous.

- Some attorneys argue because discovery is primarily digital, and at time extensive, defense has no duty to download all of it and keep it as part of the

case file. They argue the State can be forced to provide it to appellate counsel and/or the defendant, or the defendant can do a public records request. *Albright* totally clarifies and removes that loophole if you didn't believe *Murray* did.

- **PRACTICE TIP:** Defense counsel has a duty to download all digital discovery and keep it as part of the client's file under the RPCs. However, more importantly, most of the digital storage systems used by the State contain "audit files" which both police and the prosecutors can review.
    - See RPCs 1.1 Competence, 1.3 Diligence, 1.16 Declining or Terminating Representation (duty to provide case file and discovery to client or new attorney), RPC 1.6(8)(c) Confidentiality of Information relating to the representation of a client.

    - The audit file tells the DPA which evidence you reviewed, when, where you stopped video at, how often you went back to which pieces of evidence and where, i.e. it tells the State your strategy, the issues you have spotted, the areas you are investigating. Failure to download discovery knowing the State gets this information is a violation of your duty to your client. Don't get caught giving the State your strategy and tipoffs to fix issues prior to trial!

    - ***AXON body/dash cam & storage issues training coming from WDA late this summer or fall. Keep an eye out for the Discovery Series Registration options.*

I am attaching the recent WDA Practice Advisory. [Apologies, I had also attached it to the last edition, but ended up moving the issue here to put a more pressing issue in the last edition]. Also, on March 14th a new case opinion was released specifically addressing this issue again. See *State v. Albright*, No. 38482-9-III (attached)(holding the State has no obligation to provide discovery to anyone post-conviction, even for appeals and PRP's but defense counsel does have the obligation to provide the file and redacted discovery to a defendant upon request (or unredacted to another attorney now representing the defendant upon request).

4. **Were you aware that you can contact DOL to get firearm registration information for a case?** Thanks for the information and link, Janna @ DPD!

    Email DOL Firearms Firearms@DOL.WA.GOV Ask for a trace request and provide the serial # make and model of the firearm. They should send you something official on letterhead.

Dan clarified for us: "I will say that what you'll get is who was the last purchaser who filled out the 4473. So, if they did a private sale before the universal background checks went into effect there won't be a record.

Sheri: Dan reminds us that since 2019, private sales are required to go through a licensed dealer with a background check, with some exceptions like sales between family members. RCW 9.41.113(3)-(4).

In practice, real life with lay persons, we know that private sales occur without the mandated background checks. Hence, the registration information may still be inaccurate if there was a sale after 2019. The information above is useful if you are helping a client legally sell and record the sale of a firearm.

5. **Do you know the legal distinction of when the State has an affirmative duty to prove a prior conviction is constitutionally valid?** Thanks to the attorney who recently had a predicate issue wherein this reminder arose; which allowed it to be shared with everyone!

The state has an affirmative duty to show a prior conviction is constitutionally valid if the prior conviction is an essential element of the current charge. See *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 726, *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986).

- The legal distinction is that the State does not have an affirmative duty to prove the constitutionality of the prior conviction to use it for scoring at sentencing, but if the J&S is facially invalid, the trial court still cannot use it for scoring. See e.g. *State v. Paniagua*, 22 Wn. App.2d 350, 511 P.3d 113 (2022).
- Therefore, on ALL felony VNCO with predicate misdemeanor VNCO convictions, pull the statement of plea of guilt and the J&S and see if the essential elements are there or missing to allow you to argue facially invalid and cannot use for:
    - 1) scoring, most commonly as repetitive DV!!
    - 2) as a predicate to bump the VNCO up to a felony.
- You would be flabbergasted how many muni and district courts allow a pro se defendant to fill out his/her own statement of guilt. They plead to NON-CRIMES and do not ever list the RCW or elements. Ooops, what happens if the HC plead to a non-crime? FACIALLY INVALID and no way the State can prove the conviction was constitutionally valid to use it as a predicate.
    - You can go a step further and see if the person can write a motion to get the conviction vacated. If it is constitutionally invalid, would the time bar apply? Isn't that the way defense gets Blake cases get around the CrR 7.8 time bar to vacate those constitutionally invalid convictions?
    - That way, the "predicate" can never be used again for DV repetitive scoring, or as a predicate.

6. **Did you know the court lacks initial authority to issue an arrest warrant without first determining that the State has attempted to get an address for the individual?**

> (3) *Ascertaining Defendant's Current Address*.
> (i) Search for address. **The court ***shall not*** issue a warrant** unless it determines that the
> complainant has attempted to ascertain the defendant's current address by searching the
> following: (A) the District Court Information System database (DISCIS), (B) the driver's license
> and identicard database maintained by the Department of Licenses; and (C) the database
> maintained by the Department of Corrections listing persons incarcerated and under supervision.
> The court in its discretion may require that other databases be searched. CrR 2.2(a)(3).

- I said initial authority because (3)(ii) provides exceptions to the address search requirement if the person has already appeared on the case; is known to be in custody; or if the person's name is unknown.
- **How many have had clients with arrest warrants where the State has not marked ANY address check confirmation, yet the Court issued the warrant anyway?**

 Who can say, "abuse of discretion," or "lacking authority?"

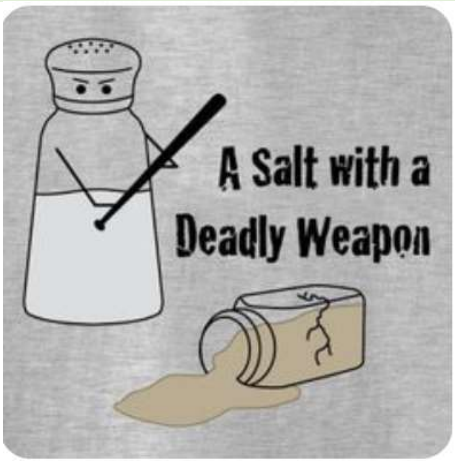
- Remember that between RCW 10.88.320, written by the legislature, and CrR 2.2, written by the Supreme Court, the Supreme Court Rules GOVERN over any inconsistencies or conflicts.
  - *State v. Flaherty*, 177 Wn.2d 90, 296 P.3d 904 (2013)(citing RCW 2.04.200 – **all laws in conflict with Supreme Court rules "shall be and become of no further force or effect.")**
- This sounds like a motion for release, without conditions imposed because the arrest lacked authority to begin with…. 

7. **Did you know a malaproprism is the mistaken use of a similar sounding word, often with unintentionally amusing effect, for example:** "dance a *flamingo* " (instead of *flamenco*).

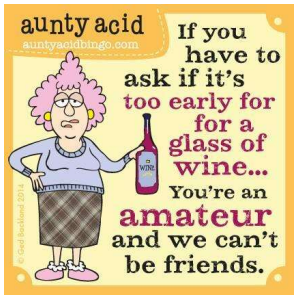
Did you know that these sayings should be….

The table below, citing in part: https://www.businessinsider.com/phrases-people-use-wrong-2017-3

REGULARLY IMPROPERLY STATED PHRASE – DO NOT USE - Malaproprism	**ACTUAL CORRECT PHRASE**	**MEANING, ORIGIN, COMMENTS OR SNIDE REMARKS (for those of you who recall my listserv requests as a practicing attorney 😉)**
For all intensive purposes…	**For all intents and purposes…**	Concentrated on a single area verses Intention or purpose
Nip it in the butt…	**Nip it in the bud…**	Nipping a bud off blooming plants allows for a restart, a new beginning verses biting someone in the butt!
One in the same…	**One and the same…**	"One in the same" refers to one thing in a group of other things that look the same — meaningless. Conversely, "One and the same" means that two things are alike.
Deep seeded…	**Deep seated…**	The correct phrase means firmly affixed in place verses planted deep in depth. However, green thumb plant growers know that a plant with deeper roots is more firmly affixed. So….this one is up for debate I think!
Case and point…	**Case in point…**	"Case in point" means, "Here's an example of this point I'm trying to make." The version with "and" makes them two different things, which isn't helpful to your argument at all.
Should/could/would of….	**Should/could/would have….**	Using "of" here is just wrong. You need to pair a verb with another verb. Otherwise, people will think "of" what?

OUR FAVORITE CLIENT MALAPROPRISM…		
Squash my warrant	**Quash my warrant**	 verses "to set aside or void"
	**Assault with a deadly weapon**	 I probably said that the first time I watched "Cops" on tv. Oops.

Be well this weekend, enjoy the onset of spring.



And if you need to whine, wine.

Sheri