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COMMUNITY CARETAKING

It is not very often that the *Firehouse Lawyer* newsletter features a criminal case. But this is one of those rare occasions. Since 1973, the Supreme Court of the United States has held that there is an exception to the requirement for a warrant arising from the Fourth Amendment's protection against unreasonable searches. In *Cady v. Dombrowski,* 413 U.S. 433 (1973) the Court upheld a warrantless search for an impounded vehicle when the police were engaging in a "community caretaking function" as opposed to conducting a criminal investigation. Subsequent lower court cases have therefore held, for example, that a police officer, firefighter or emergency medical technician who conducts a "welfare check" (without a warrant of course) is not violating the Fourth Amendment.

However, in 2021, the Supreme Court decided *Caniglia v. Strom,* 593 U.S. ____, 141 S.Ct. 1591, 209 L.Ed. 2d 604 (2021),[1] wherein the Court held that this is not a broad doctrine that generally justifies warrantless searches of a person's home.

In a murder case decided on June 8, 2023, our State Supreme Court, in *State of Washington v.*

[1] https://www.supremecourt.gov/opinions/20pdf/20-157_8mjp.pdf

Teulilo[2] was faced with an argument that *Caniglia* means that Washington cases applying the "community caretaker exception" are no longer valid precedents, as applied to warrantless searches of a home.

In *Teulilo*, a sheriff's deputy was dispatched to a residence to do a welfare check. The dispatcher advised that Mrs. Teulilo had not arrived that morning to pick up a person for a hair appointment. (Mrs. Teulilo was a caregiver.) The dispatcher also advised that Mrs. Teulilo had been involved in some sort of domestic incident the day before with her husband, the defendant. The deputy reviewed the report of the domestic call, in which it was reported that Mr. Teulilo had threatened her. He also found a report from a month earlier when he had threatened to shoot her and then himself.

When he arrived, the deputy knocked on the door of the residence and announced "Sheriff's Office." There was no answer. The deputy was able to reach Mr. Teulilo at his work, but all he learned from Mr. Teulilo was that Mrs. Teulilo should be at work. Mr. Teulilo did confirm that the Dodge Caravan the deputy saw in the driveway was her vehicle.

The deputy called his supervisor who advised him to go ahead and check the door to the residence. He did so and called out but received no reply. He called his supervisor again and was advised to enter and do a welfare check. The deputy entered and found Mrs. Teulilo deceased in the bedroom with obvious signs of trauma to her face. He found no gun in the residence.

[2] https://www.courts.wa.gov/opinions/pdf/1013850.pdf

Based on the *Caniglia* decision, the defendant tried to suppress all evidence and observations arising from the warrantless entry into the home. The State Supreme Court held that the community caretaking exception to the warrant requirement was still valid as applied to the home in spite of the holding in *Caniglia.* The state high court noted that even in *Caniglia* the U.S. Supreme Court had acknowledged that it had previously held that law enforcement officers may enter private property without a warrant when certain exigent circumstances existed. One example the Court mentioned was the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury."

Under the totality of the circumstances, the *Teulilo* Court ruled that the warrantless entry was reasonable, noting that the entry was not for criminal investigative purposes but rather just to check on the person's welfare.

We have, in the *Firehouse Lawyer,* previously written about the emergency exception to the Fourth Amendment warrant requirement, such as when the fire personnel arrive at a home to find it in flames and bystanders report that there may be persons inside. Since welfare checks are still done by both fire and police, and since some of them involve residences, we decided that the fire service personnel needed to know about the *Teulilo* decision.

TAX INCREMENT FINANCING LAW

We continue to get questions from our clients about the relatively new tax increment financing law, codified at Chapter 39.114 RCW. A very recent question presented an intriguing possibility or question. A city in Washington

adopted an ordinance that expressly states that mitigation of any impacts to the local fire district, resulting from establishment of a tax increment area, will not be triggered until the development facilitated by the public improvements is 95% complete.

The state statute itself, however, provides that mitigation for the local fire district or other taxing district will be mandatory if the tax increment area impacts 25% of the junior taxing district ***or*** if the annual report of the fire district demonstrates an increase in the level of service directly related to the increment area. It seems to us that a mandatory state statute (RCW 39.114.020(5)) would pre-empt a local ordinance that requires less than state law.

Suppose the annual report makes it clear that the development contemplated in the increment area would require the fire district to acquire a ladder truck, since it does not already have one. This level of service might be needed because the increment area will include multi-family structures to meet the affordable-housing and density needs of the city. If the structures include buildings, for example, with four floors or more, a ladder truck might be—for the first time—an absolute necessity, in the judgment of the fire commissioners. It seems to us that the annual report stating that absolute need would trump or pre-empt the local ordinance about the 95% completion requirement.

Although not strictly the same as explicit pre-emption like that applying to firearms regulation under state law, as explained in cases such as *City of Edmonds v. Bass,* 199 Wn.2d, 403, 508 P.3d 172 (2022), it seems to us that this factual scenario presents the issue of a conflict between general laws of the state and a local ordinance. Article XI, Section 11 of the Washington Constitution provides that city ordinances must not conflict with the general laws of the state. Under our factual scenario set out above, the city ordinance establishing the tax increment area would be invalid or unenforceable because it conflicts with RCW 39.114.020(5).

We suggest that cities need to be careful not to violate state law.

CANNABIS TESTING IN HIRING PROCESS

We read recently in the Sebris Busto James newsletter[3] that the Washington laws relating to pre-employment cannabis testing will change effective January 1, 2024. Engrossed Senate Bill 5123, now a Session Law,[4] will take effect on January 1, 2024. As of that date, it would also be considered discriminatory to reject an applicant for employment based on past use of cannabis.

Since cannabis use is now lawful in many states, about seven states have adopted laws like this one. The legislators found that past use of cannabis has no correlation to future job performance and should be treated like use of alcohol.

This law will make it unlawful to discriminate in the hiring process if the discrimination is based on use of cannabis off the job and away from the workplace. Employers may still

[3] https://sbj.law/wp-content/uploads/June-2023-Cannabis-Testing-Restrictions.pdf

[4] https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5123-S.SL.pdf?q=20230627112105

perform pre-hiring drug tests, but now it would be discrimination to base rejection upon test results showing only "nonpsychoactive cannabis" metabolites in the test results. "Nonpsychoactive cannabis" would include THC, which is the chemical compound in cannabis that can cause impairment and psychoactive effects. However, THC is metabolized in twelve hours or less so it is then "nonpsychoactive THC".

But here is the good news: The law provides an exception for employers hiring personnel in safety-related jobs such as *first responders,* corrections officers, and those employed in the airline or aerospace fields. Those employed in federally-mandated drug testing positions are also exempt.

The Responsible Bidder

USED EQUIPMENT

In July 2022, we wrote a comprehensive article that delved into the "market conditions" exception to the public bid laws. Recently, we answered a client question as to whether they had to go out to bid to purchase used tools, in a procurement where the total estimated purchase did exceed the bid law threshold.

In our opinion, at least with regard to the kinds of tools they contemplated buying, there was no market wherein vendors competed to sell those kinds of used tools. It makes no sense to go out to bid when the potential competitors would be dealing with an "apples and oranges" situation. We remind our readers that our particular bid law starts out with the words, "Insofar as practicable…" RCW 52.14.110. We find it singularly impractical to go out to bid when there is no established market in the type of goods, supplies or equipment you are seeking to purchase. The "market condition" is that there is no market!

I suppose that we cannot establish that in every case of used equipment purchasing there would be no available market, but we urge our readers to at least question whether there is any.

HOW MANY BIDS DO I NEED?

Recently, a client asked us how many bids were necessary when going out to bid under the Washington bid laws applicable to fire districts. He said someone told him that a minimum of five bids were required before awarding a contract to the best bidder. Well, since we were not really familiar with any generally applicable bid law that required five (or any number really) bids, we had occasion to check all of the Washington bid statutes that might in certain situations be applicable to a fire district.

There are only a few pertinent Washington statutes that mention a number of bidders or contractors in any specific way. RCW 52.14.120 does provide that a public works project involving three or more specialty contractors requires the retaining of a general contractor as defined in RCW 18.27.010.

Also worth noting is the small works roster process statute at RCW 39.04.155. As an alternative to public bidding, this small works process is available to local government agencies if the project is estimated to cost no more than $350,000.00. If the agency creates and maintains a small works roster in accordance with the procedures set out in the statute, by resolution, the agency must establish procedures for securing telephone, written, or electronic "quotations" from contractors on the

roster. Contracts must be awarded to the lowest responsible bidder. The law states that quotations may be invited from all contractors on the roster or, as an alternative, quotations may be invited from at least five contractors on the roster. In that case, equitable distribution of the work is the goal. But if the estimated cost of the work is between $250,000 and $350,000, then the agency must notify all of the other contractors on the roster that quotations are being sought. As you can see, this "five contractors" rule is only applicable in a very narrow context under the small works roster.

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