

Particularized Suspicion

State v Bailey 2021 MT 157: DUI – **PS issues**
affirmed/reversed on other grounds (video testimony)

State v Laster 2021 MT 269 – Reversed on PS issue
(pat down)/affirmed (vehicle search) – remanded

State v Pham 2021 MT 270 – Reversed on PS issue
(community caretaker exception)

State v Harning 2022 MT 64 – Reversed on PS issue

**PS issues not related to initial contact, but to
expansion/extension of contact.**

Particularized Suspicion

State v Bailey, 2021 MT 157 – Lewis & Clark County

- MHP Trooper responds to report of single vehicle crash. Vehicle on side with beer cans scattered on ground. Winter/cold; dark; remote area and not much traffic; road not well maintained – ice/snow/ruts.
- Upon approach to crash site Trooper observed vehicle matching description given by caller travelling toward him with obvious crash damage.

Particularized Suspicion

State v Bailey, 2021 MT 157 – Lewis & Clark County

- Traffic stop; Bailey admitted to being in crash and said he rolled over at 2 mph; Trooper suspicious based on experience/training and lack of steep sides to road - not possible.
- Bailey said left scene; got help from family member to roll vehicle back over and drive off.

Particularized Suspicion

State v Bailey, 2021 MT 157 – Lewis & Clark County

- Trooper investigating this as **Reckless/Careless Driving and Failure to Report** (i.e., traffic law violations) with suspicion of possible DUI based on report of beer cans, leaving scene, and unlikely story of rolling over at 2 mph.
- Trooper placed Bailey in back of patrol car due to cold weather and need to further question about crash for accident report (since car had been moved from crash site).

Particularized Suspicion

State v Bailey, 2021 MT 157 – Lewis & Clark County

- Once in car officer
 - smelled odor of alcohol;
 - observed watery, blood shot eyes; and
 - when asked Bailey admitted a.) drinking and b.) to having alcohol in vehicle (which he had tried to hide).
- Upon completion of accident report inquiry turned to DUI investigation resulting in DUI prosecution.

Particularized Suspicion – Quick Refresh

State v Bailey, 2021 MT 157 – Lewis & Clark County

Unreasonable searches and seizures: Prohibited by both Fourth Amendment to the United States Constitution and Article II, Section 11, of the Montana Constitution.

Warrant/Probable Cause: Required.

Exception: Temporary investigative stop (see §§ 46-5-401, -403, MCA) (see also *Terry*).

Officer may briefly stop and detain a person for investigative purposes without a warrant or probable cause for an arrest if, based on specific and articulable facts known to the officer, including rational inferences therefrom based on the officer's training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.

Particularized Suspicion – Quick Refresh

State v Bailey, 2021 MT 157 – Lewis & Clark County

Temporary Investigative Stop

#1: Time: Such a stop may last only as long as is reasonably necessary to confirm or dispel the predicate suspicion for the stop, and law enforcement’s means of detainment and investigative questions may not exceed the scope of the predicate suspicion for the stop.

#2: Extend/expand: During the stop additional objective data of wrongdoing “may give rise to further suspicions and enlarge the scope of the investigation.”

Particularized Suspicion – DUI Standard

State v Bailey, 2021 MT 157 – Lewis & Clark County

DUI Investigation:

Particularized suspicion to conduct a DUI investigation exists when there is:

- 1) objective data from which an experienced officer ha[s] sufficient cause to conduct the field sobriety tests, and
- 2) a resulting suspicion that the person to be so tested has been driving under the influence of alcohol or drugs.

Particularized Suspicion -

State v Bailey, 2021 MT 157 – Lewis & Clark County

In this case, PS for both the stop and the expansion into a DUI investigation were found to exist based on:

- Report of a rollover crash with beer cans near the scene;
- Officer's belief that explanation of the rollover crash did not make sense based on his experience with car crashes and location of crash site (level/flat terrain);
- Bailey's leaving the scene without contacting law enforcement (traffic law violation);
- The odor of alcohol coming from Bailey and his bloodshot/watery eyes;
- Bailey's admission of drinking alcohol; alcohol in vehicle.

Particularized Suspicion

State v Bailey, 2021 MT 157 – Lewis & Clark County

So, **good** stop, **good** DUI investigation by officer, and **good** prosecution.

One problem: lab tech (blood draw case) testified by two-way video.

Held: Violated Bailey's right to confront witnesses against him.

Reversed.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Drug charges & OPO.

District Court denied defendant's motion to suppress.

Defendant appealed.

911/neighborhood resident:

- Car going up and down street like casing houses/cars.
- Now stuck in snow.
- Guys look “very, very spooky” and one of them “really, really spooky looking”.
- Stolen cars had been dumped in neighborhood in past.
- Truck now on scene; helping get car unstuck.
- Everyone looked like “wannabe gang bangers”.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

BPD responds.

Car observed stuck in snowbank, partially out in street. Truck behind it trying to pull it out.

Officer:

- Had observed this very car in past parked at a high crime location with people walking up to it/away from it a lot.
- Neighborhood had problems with drugs/stolen cars.
- Car posed traffic hazard.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Laster had no good explanation for being in neighborhood/driving up and down street.

Asked for ID. Laster didn't have any, but gave his name.

Officer did pat down due to being in close proximity; felt something like pipe/loker in exterior pocket. Could have been a knife.

Laster: cigs/lighter.

Officer: Not feel like either of those items. Asked Laster if he could retrieve items: loker/meth residue.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Purpose of pat down: officer safety.

Laster placed in patrol car; asked for/gave consent to search vehicle based on loker/residue.

Vehicle search: scale, plastic baggies, pipe, bag/white crystalline substance.

Taken into custody, during intake it was learned that:

- Laster had provided brother's first name instead of his own.
- Under supervision of P&P and has active P&P warrant.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Defendant filed motion to suppress based on illegality of stop, pat down, and vehicle search.

State advanced two theories based on exceptions to warrant requirement:

- Valid temporary investigative stop/Terry stop
- Community Caretaking Doctrine

District Court denied motion to suppress on grounds that both exceptions applied in this case.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

56 page opinion.

Other issues addressed:

- Community Caretaking Doctrine (will talk about this in *Pham*)
- Inevitable Discovery
- Consent/Independent Source Exceptions

Good case to bookmark for future reference. Provides many different examples of good/bad PS and CCD.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Ultimately, Court concluded that the **initial** stop/interaction was justified as a *Terry* stop on grounds that certain traffic offenses had been committed based on vehicle's location/position relative to street and sidewalks (providing and citing various possible statutory violations).

However, expansion of stop/interaction to pat down was not validly based on any objective criteria. No basis in record to suspect criminal activity based on 911 call or observations of officers.

Loker/residue should have been suppressed.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

As to pat down, Officer did not testify to:

- Any specific facts or circumstances that caused him to actually believe that Laster might be presently armed and dangerous that night.
- Seeing any furtive or other suspicious movement, behavior, or indication from Laster that would have in any event reasonably supported such an inference.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

Particularized suspicion must be more than a mere generalized suspicion, possibility, undeveloped hunch, or good faith belief.

Examples of what it is not from various cases cited in *Laster*:

- Daytime observation of occupied vehicle legally parked alone in public-use area near oft-vandalized war memorial insufficient for particularized suspicion of criminal activity.
- Talking in phone booth on a cold night in the vicinity of a reported domestic abuse “in a high crime area” and then fleeing after officer passed by insufficient alone for particularized suspicion of criminal activity.

Particularized Suspicion

State v Laster, 2021 MT 269 – Yellowstone County

More examples of what PS is not from *Laster*:

- Mere suspicion of “possible” traffic violation “combined with no other objective data” insufficient to justify investigatory stop.
- Generalized observation that person looked suspicious in high crime “neighborhood frequented by drug users” insufficient to justify investigative stop.

Particularized Suspicion – Community Caretaking

State v Pham, 2021 MT 270 – Custer County

Drug charges.

Defendant convicted and appealed.

Pham was a Vietnamese immigrant. English second language. Driving to Butte from his home in Minnesota to check on a vehicle. Was on way back to Minnesota and stopped at a Conoco station in Miles City. Restroom, gas, and food.

DCI agent transporting marijuana (900+ pounds) for evidence storage to Billings comes in to use restroom and get a drink. Other agents outside in marked MHP crime scene van with the marijuana. “Stuffed full”, abnormal sight to average person for this reason.

Particularized Suspicion – Community Caretaking

State v Pham, 2021 MT 270 – Custer County

Other details omitted.

DCI agent sees Pham continuously staring at van; behaviour appears different – overt nervousness; decides to approach him after talking to other agents – either lost or committing crime.

Accounts differ between agent and Pham regarding what happened next.

Ultimately led to consent search of vehicle and 19 pounds of marijuana.

Particularized Suspicion – Community Caretaking

State v Pham, 2021 MT 270 – Custer County

Important points:

- Discussion of what constitutes a seizure for purposes of triggering need for warrant or exception to same.
- Community Caretaking Doctrine as exception to warrant requirement.

Particularized Suspicion – Community Caretaking

Look back to State v Laster, 2021 MT 269 – Yellowstone County

Community Caretaking Doctrine

- Another exception to warrant requirement
- “Narrowly applies only to ‘certain police-citizen encounters’ where police become involved, ‘unrelated to’ the enforcement or prosecution of the criminal law, to check-on or aid persons who may be ‘in peril’ or otherwise in need of some form of assistance.

Particularized Suspicion – Community Caretaking

Look back to State v Laster, 2021 MT 269 – Yellowstone County

Community Caretaking Doctrine

- Not all contacts: Not every police-citizen contact constitutes a constitutional “seizure”.
- CCD contacts often do “in order for the officer to ascertain” or confirm whether the citizen is in fact in peril or otherwise in need of assistance.

Particularized Suspicion – Community Caretaking

Look back to State v Laster, 2021 MT 269 – Yellowstone County

Community Caretaking Doctrine

- An officer may briefly stop and detain (i.e., seize) a person for a non-law enforcement caretaking or welfare purpose without a warrant, probable cause for an arrest, or particularized suspicion of criminal activity if, based on specific and articulable facts known to the officer and resulting rational inferences based on training or experience, the officer has an objectively reasonable particularized suspicion that an individual may presently be in peril or otherwise in need of assistance.

Particularized Suspicion – Community Caretaking

Look back to State v Laster, 2021 MT 269 – Yellowstone County

Community Caretaking Doctrine

- Time: The officer may briefly detain the person to investigate and take corresponding action to mitigate the peril or otherwise assist in furtherance of the person's safety or welfare.
- No pretext: A community caretaker stop must “actually involve a welfare check” and may not “be used as a pretext for an illegal search and seizure.”

Particularized Suspicion – Community Caretaking

Look back to State v Laster, 2021 MT 269 – Yellowstone County

Community Caretaking Doctrine

- Expand/Extend: CCD stop may ripen and transition into a criminal investigatory stop if, based on additional information obtained or observed during the lawful duration and scope of the initial stop, a reasonable particularized suspicion of criminal activity subsequently arises.
- Just like a *Terry* stop.

Particularized Suspicion – Community Caretaking

State v Pham, 2021 MT 270 – Custer County

Based agent's testimony Court observed that agent knew three things relevant to inquiry:

- 1) Pham was Vietnamese and by culture was deferential to police;
- 2) Several Vietnamese individuals had been arrested for drug trafficking along the same route Pham was traveling; and
- 3) Pham was staring at an MHP van full of marijuana long enough to make the agent suspicious.

Particularized Suspicion – Community Caretaking

State v Pham, 2021 MT 270 – Custer County

Not sufficient: This was not objective data or resulting suspicion to justify the actions which followed once the agent had determined Pham was not lost.

No basis to expand/extend: Agent lacked authority to extend/expand his interaction with Pham beyond inquiring whether Pham was lost or in need of assistance

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Drug charges. Defendant appealed denial of his motion to suppress.

Court held that officer lacked particularized suspicion to justify extending traffic stop and ordering a canine sniff search.

Reversed and remanded.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

'18 case – prior to new adult use marijuana laws.

Harning transporting truck full of ceramics to an art show in Colorado. Pulled over by MHP Trooper for speeding. Trooper observed several sealed cardboard boxes in the bed of the truck upon approach.

Harning rolled window down only three or four inches; Trooper asked him to roll it down further; Harning said didn't feel comfortable doing that and declined.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Trooper testified that he immediately noticed the odor of marijuana when Harning rolled his window down; and that Harning “hemmed and hawed” when asked why he felt uncomfortable about rolling it down further.

Trooper believed he was hiding something; testified that he preferred a rolled-down window for better communication; and that he “immediately” deemed Harning’s behavior “evasive” because not rolling the window down was atypical of most traffic stops.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Based on smell of marijuana, Trooper conducted further inquiry about medical marijuana card (didn't have one) and obtained Harner's admission to smoking marijuana in Big Timber (80 miles from traffic stop). When asked if there was marijuana in the vehicle Harning briefly hesitated and answered, "I have no marijuana on me."

Trooper testified at this point he suspected drugs were in the vehicle citing the odor, Harning's behavior, and Harning's interactions as the basis for his suspicion.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Long story short: Trooper conducted an initial DUI investigation on scene with FST's. Patted down/no drugs. Determined Harning not impaired.

Issued a warning ticket for speeding.

No problem with any of this.

Issue: Trooper decided at this point to begin a drug investigation (canine search) based on previous observations and belief that he smelled a “new” odor of marijuana.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Called for canine and told Harning he was free to stay or leave, but vehicle was going to be searched and would stay put. Harning elected to stay.

Canine search was positive; search warrant was obtained; marijuana pipe/grinder found and Harning was charged with CPDD/MJ & CPDP.

Court: Record does not support particularized suspicion to extend traffic and DUI stop into a drug investigation of the contents of Harning's vehicle.

Particularized Suspicion

State v Harning, 2022 MT 64 – Yellowstone County

Valid stop for speeding violation.

Valid expansion to DUI investigation based on odor of marijuana and admission to smoking.

No basis to extend stop/investigation to canine search for drugs in vehicle in absence of reason to believe:

- Harning's vehicle in particular contained drugs,
- Harning was using his vehicle to transport drugs, or
- Harning's vehicle had been used to facilitate drug activity.

Confrontation/Two-Way Video Testimony

State v Bailey, 2021 MT 157 – Lewis & Clark County

US Consti. Amend. VI.

Mont. Consti. Art II, Sec. 24

1.) Impossible/Impractical: Witness may testify via two-way video only upon adequate showing by moving party that personal presence of witness is impossible/impractical due to distance or expense.

2.) Furtherance of Important Public Policy: The State must additionally show it is necessary to further an important public policy (which does not include judicial economy as the sole factor).

Confrontation/Two-Way Video Testimony

State v Martell, 2021 MT 318 – Missoula County

Error to permit State's witness to testify via two-way video in absence of proper showing as to its necessity in order to further an important public policy.

Important public policies are not:

- Judicial economy
- Added expense
- Inconvenience

These issues do not outweigh a defendant's constitutional right to face to face confrontation.

Confrontation/Two-Way Video Testimony

State v Martell, 2021 MT 318 – Missoula County

Quickly: Felony theft case involving a fictitious check on an account of a vet group in Washington. Trial involved a witness from that vet group testifying via two-way video.

State's position: witness has a few minutes of testimony to offer.
Distance and expense favored video testimony.

Defendant objected as a violation of right to confront witnesses.

Court agreed and reversed.

Confrontation/Two-Way Video Testimony

State v Martell, 2021 MT 318 – Missoula County

Not grounds for reversal where the error is harmless based upon an examination of factors such as:

- Importance of the testimony to the State's case.
- Whether the testimony was cumulative.
- Presence or absence of corroborating or contradicting evidence as to important points.

If the evidence goes to an element of the crime charged and is the only evidence tending to prove that element the court is compelled to reverse.

Jury Access/Video View

State v Hoover, 2021 MT 276 – Lincoln County

Defendant convicted of PFMA as 3d or subsequent offense. Moved for new trial, denied. Defendant appealed.

Game camera footage captured Hoover in a physical/verbal assault on his teenaged son. Hoover also made incriminating statements to police captured on video. Based on this evidence Hoover was charged with PFMA.

Both videos were admitted into evidence at trial. One of the videos contained footage not admitted into evidence. Playback to the jury occurred by manually skipping over these parts.

Jury Access/Video View

State v Hoover, 2021 MT 276 – Lincoln County

During deliberations the jury twice requested to view the videos.

Both times the Court permitted the jury to view the videos with the bailiff manually skipping over the segments not admitted into evidence.

No notice was given to either party.

Jury Access/Video View

State v Hoover, 2021 MT 276 – Lincoln County

General rule: Upon retiring for deliberation, the jurors may take with them the written jury instructions read by the court, their own notes taken during the trial, and all exhibits that have been admitted as evidence during the trial and which in the opinion of the court will be necessary to their deliberations. Section 46-16-504, MCA.

Common Law: Irrespective of §§ 46-16-503(2) or -504, MCA, the court generally may not allow unsupervised or unrestricted jury review or replay of witness testimony or other evidence that is testimonial in nature.

Jury Access/Video View

State v Hoover, 2021 MT 276 – Lincoln County

Threshold question: The court **in consultation with the parties** is to determine whether the video is either testimony or testimonial in nature. (Not yet defined).

If not, the common law rule and § 46-16-503(2), MCA, do not apply.

If so, court must consider and determine **upon consultation with the parties**: (1) the particular testimony or portion of a testimonial exhibit the jury seeks; (2) the “exact” purpose of the request or the “exact nature of the . . . difficulty” which prompted the request; and (3) the “precise testimony” or portion of the subject testimonial exhibit that would be responsive thereto.

Jury Access/View of Evidence

State v Hoover, 2021 MT 276 – Lincoln County

The Supreme Court held that footage from game camera and interrogation video was testimonial in nature.

Court failed to take proper precautions before allowing bailiff to replay to the jury footage from game camera and interrogation video.

Error was not harmless.

Reversed and remanded.

Discovery/Rebuttal Evidence

State v Torres, 2021 MT 301 – Missoula County

DV/PFMA case.

Typical scenario: Couple meet, relationship ensues, then drugs/financial problem/physical abuse.

Trial: Both testify with differing accounts of what happened. Defendant acquitted on one count, jury deadlocks on another, and convicts on one.

Issue: State failed to disclose a rebuttal witness (D's ex-girlfriend) who testified in part on issue of prior abuse.

Discovery/Rebuttal Evidence

State v Torres, 2021 MT 301 – Missoula County

MCA 46-15-322(6): Pretrial disclosure of rebuttal witnesses is limited to those called related to “evidence of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

None of these were implicated here.

Discovery/Rebuttal Evidence

State v Torres, 2021 MT 301 – Missoula County

- Montana requires broad pretrial disclosure by the prosecution. Section 46-15-322, MCA.
- The purpose of the statute is to provide notice and prevent surprise. The statute mandates full disclosure of all the material and information within the prosecutor's possession and control, regardless of whether the State believes it is inculpatory or exculpatory.
- Court found no error.
- The State is not obligated by statute to provide pretrial notice of a witness called to impeach the credibility of a defense witness.

OPO: Sufficiency of Evidence

State v Bennett, 2022 MT 73 – Missoula County (Missoula Municipal Court)

Officer responded to a call from a local facility that Bennett had violated an order of protection by entering the facility.

Officer spoke with staff at the facility and then observed Bennett across the street next to some people.

The officer recognized Bennett from previous encounters and approached her on foot.

OPO: Sufficiency of Evidence

State v Bennett, 2022 MT 73 – Missoula County (Missoula Municipal Court)

The entire interaction was 40 seconds long and captured on body cam.

Officer asked to talk to Bennett. Bennett asked what about?

Officer: ‘Something that someone had reported to him’.

Bennett: ‘What about?’

Officer: ‘Inside the facility.’

OPO: Sufficiency of Evidence

State v Bennett, 2022 MT 73 – Missoula County (Missoula Municipal Court)

Bennett: ‘Haven’t been in the facility for three years.’

Officer: ‘You’re under arrest for VOOP.’

Appears Bennett tried to walk away from officer at that point (not clear in opinion) and she was also charged with OPO.

OPO: Sufficiency of Evidence

State v Bennett, 2022 MT 73 – Missoula County (Missoula Municipal Court)

Insufficient evidence of OPO: The defendant must be aware that his conduct is highly probable to hinder the performance of a peace officer's lawful duty to constitute obstruction.

Relevant questions to consider are:

- Whether the defendant had been advised he was the subject of an investigation or that an investigation was ongoing?
- Was the investigation actually hindered by the defendant's conduct?
- Was the defendant aware that his conduct was highly probably to hinder the investigation?