March, 1992

HONOR ROLL

383rd Session, Basic Law Enforcement Academy, November 5, 1991 through January 31, 1992

President: *Officer Daniel T. Smith - Everett Police Department*
Best Overall: *Deputy Kevin Hester - Whatcom County Sheriff's Department*
Best Academic: *Deputy Kevin Hester - Whatcom County Sheriff's Department*
Best Firearms: *Officer Daniel T. Smith - Everett Police Department*
Best Mock Scenes: *Officer Brad S. Gillaspie - Woodland Police Department*

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Corrections Officer Academy - Class 165 - January 6 through January 31, 1992

Highest Overall: *Officer Carol Y. Harris - Twin Rivers Correction Center*
Highest Academic: *Officer Marvin Jeffries - Chelan Police Department*
Highest Practical Test: *Officer Carol Y. Harris - Twin Rivers Correction Center*
Highest in Mock Scenes: *Officer Carol Y. Harris - Twin Rivers Correction Center*
Highest Defensive Tactics: *Officer Jody Hagen - Twin Rivers Correction Center*

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) STATUTE AUTHORIZING POLYGRAPH TESTING OF APPLICANTS FOR LAW ENFORCEMENT WORD-PROCESSING POSITIONS UPHELD -- In O'Hartigan v. Dept. of Personnel, 118 Wn.2d 111 (1991) the State Supreme Court votes 6-3 to reject the challenge to a statutorily-authorized polygraph test requirement by an applicant for a word-processing position with the Washington State Patrol.

O'Hartigan had applied for a clerical position with WSP but had refused to participate in the polygraph process. She claimed that the polygraph process statutorily authorized at RCW 49.44.120 violated: (a) her right to privacy under the State and Federal constitutions, and (b) her right to equal protection of the law. The crux of her argument on both constitutional issues was that a word-processor does not, like a law enforcement officer, hold a position of public trust with power to deprive citizens of their personal liberty, and therefore the government's interest in backgrounding the job applicant is not sufficient to outweigh the applicant's interest in maintaining

privacy of the information sought. The majority rejects this argument, declaring:

> O'Hartigan's argument belies the importance of her role. The record discloses that, if hired, she would have been privy to highly confidential and extremely sensitive matters, including investigative reports, ongoing narcotics investigations, employee disciplinary records, sergeant and lieutenant examinations, internal affairs investigation reports, and professional standards reports. Such information is safeguarded because if it were compromised, this could endanger law enforcement officers or the public safety.

The majority does hold, however, that there are limits on the use of the polygraph by law enforcement agencies screening job applicants. The majority declares in this respect:

> By authorizing the use of the polygraph in this specific setting we are not authorizing a fishing expedition into the job applicant's personal matters. Nor do we authorize indiscriminate and standardless questioning by the examiner. In this case the questionnaire and the initial questions the polygraph examiner asks are written out, and the examiner simply reads them. The examiner's questions are limited and are directly related to the employment situation sought. We conclude the questions asked of O'Hartigan were no more intrusive than was reasonably necessary to achieve the State's legitimate purpose.
>
> According to the stipulated facts, the examiner can follow up the initial questions with other questions if he or she may feel it is necessary. There are no predetermined questions or guidelines for these follow-up questions. If the examiner is not sure of the results of the previous phase of the test, or believes the test subject is lying, he or she may ask whatever additional questions are necessary to allay those doubts. As the Ninth Circuit pointed out in the context of polygraph testing of prospective employees for a law enforcement agency:
>
> > When the State's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests . . . an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action.
>
> [Thorne v. El Segundo, 726 F.2d 459 (9th Cir. 1983)]. Limits need to be set in order for the actual administration of a polygraph test to be constitutional. We hold the State must adopt guidelines for this phase of polygraph testing in order to comply with the Thorne requirement against standardless, boundless inquiries.

Result: reversal of King County Superior Court ruling holding that RCW 49.44.120 is unconstitutional as applied to O'Hartigan.

LED EDITOR'S COMMENTS:

(A) Appetite for activism -- This case is significant in terms of measuring the current appetite, or lack thereof, for activism on the State Supreme Court. Justice Guy's opinion for a majority of six is significant not only because it upholds the statute but, more important, it rejects plaintiff's argument (favored by the dissenting opinion, authored by Justice Utter) that "strict scrutiny" must be applied to all government infringements on

privacy rights, regardless of the nature of the privacy right affected. The majority holds that statutorily-authorized government intrusions on privacy interests involving one's right to confidentiality (to nondisclosure of intimate personal information) need only be supported by a "rational basis." The majority contrasts the government intrusion here on confidentiality privacy interests with government intrusions on autonomy-related privacy interests -- such as interests related to marriage, procreation, family relationships, child-rearing and education. The latter category of interests require a compelling interest to justify governmental restrictions on them, the State Supreme Court declares in O'Hartigan, while the former are tested under a "rational basis" test.

(B) Need for guidelines to limit scope of disclosure on follow-up questions -- The majority's requirement that guidelines be developed to cover the follow-up questions phase of polygraph testing has resulted in the following additional guidelines by WSP --

> **Interviews of applicants will include only inquiries directly and specifically related to the employment sought by the applicant.**
>
> **If an applicant is deceptive to polygraph examination questions, he/she will then be given the opportunity to explain or resolve that issue. A subsequent confirmatory examination(s) may be necessary to verify the applicant's responses.**
>
> **The polygraph examination will not be used as a fishing expedition into an applicant's personal matters. Questions will be kept within the scope of the department's need to verify moral and ethical character specifically relating to the application and background documents.**
>
> **Examiners will utilize the Personnel Section screening documents and Polygraph Section question forms. Deceptive polygraph responses will be resolved by narrowly focused questions relating to the specific issue.**
>
> **Examiners should remain conscious of the extreme sensitivity of background information and shall not share that information except with those who need to know.**

(2) FIREARMS ACT UNCONSTITUTIONAL IN NOT ALLOWING MENTAL DISORDER CONFINEES TO REGAIN ELIGIBILITY FOR CCW PERMITS -- In Morris v. Blaker, 118 Wn.2d 133 (1992) the Washington Supreme Court holds: (1) that the revocation of plaintiff's permit to carry a concealed weapon did not violate his constitutional right to equal protection or to due process, and (2) that such revocation under chapter 9.41 RCW is permitted and overrides certain qualified statutory protections under the Involuntary Commitment Act, but (3) that chapter 9.41 RCW violates equal protection insofar as it prevents a person formerly committed for a mental disorder from subsequently proving eligibility to obtain a concealed weapons permit.

Result: Pierce County Superior Court ruling dismissing plaintiff's civil right suit reversed; case remanded for further proceedings.

LED EDITOR'S COMMENTS: At LED deadline, we were still in the process of mulling over what this case portends for law enforcement. The Supreme Court did not hold that the confinee-plaintiff had a right to get his CCW permit back. The Supreme Court held instead

that the plaintiff could sue for damages because no process was provided by statute to allow him to prove a re-gained eligibility.

Whether such a procedure can be provided in the absence of statutory authorization we don't know. We understand that such a non-statutory process has been previously offered this particular litigant. We have our doubts that a non-statutory process would satisfy the Supreme Court.

In any event, this issue may soon be moot. We are aware that amendatory legislation has been proposed to the 1992 session of the State Legislature to cure this problem. This amendatory legislation is Senate Bill 6369, and at LED deadline the amendatory legislation appeared to have a strong chance for passage.

(3) PUBLIC DUTY DOCTRINE DOES NOT GIVE PAROLE OFFICERS ABSOLUTE IMMUNITY FOR NEGLIGENT SUPERVISION OF PAROLEES -- In Taggart v. State, 118 Wn.2d 195 (1992) the State Supreme Court holds in a 7-1 decision that parole officers have a statutory duty to supervise and report on a parolee's actions such that a person victimized by the parolee may sue the parole officer and his or her agency for negligent supervision under certain circumstances.

Taggart thus creates another in a growing list of exceptions to the "public duty" doctrine. The public duty doctrine has historically protected government employees and their agencies from being sued for failing to prevent a third person from harming a member of the public, even where the government employee -- e.g., a law enforcement investigator -- has notice of the dangerousness of the third person. An exception in the law enforcement arena was created in Bailey v. Forks, 108 Wn.2d 262 (1987) August '87 LED:12. In Bailey the State Supreme Court held that certain alcohol-related statutes create a special duty for Washington law enforcement officers to arrest suspected drunk drivers whom they contact, such that an accident victim of the drunk driver may sue a law enforcement officer who had allowed the drunk driver to go on his way after a face-to-fact contact.

The Taggart decision is limited to the parole setting. It holds that a parole officer has a duty to prevent the parolee from causing physical harm to other persons when the parolee's criminal and parole history demonstrates that it was reasonably forseeable that bodily harm would be inflicted on others if the parolee was not controlled. Parole officers are qualifiedly immune from liability for negligent parole supervision under the rule announced in Taggart. They are immune if the harm occurred while they were acting in furtherance of a statutory duty and were acting in substantial compliance with the directives of superiors and with relevant regulatory guidelines for parole officers.

As noted, the general "public duty" doctrine continues to provide immunity from suit in the law enforcement arena after Taggert. Thus, an officer's knowledge or suspicion of other types of criminal activity by a suspect does not create a special duty (for civil liability purposes) upon the law enforcement officer to prevent harm to others by the suspect. Barring the creation of a special duty to a particular victim (e.g., by the officer's making of promises to the victim or taking of action which prevents a rescue or significantly increases the risk of harm to the victim) the officer and his or her agency generally may not be sued by the victim of the criminal for failing to prevent the injury inflicted by the criminal.

Result: reversal of King County Superior Court orders dismissing the claims under the public duty doctrine. Two cases, consolidated for purposes of appeal, remanded to Superior Court for trials.

LED EDITOR'S COMMENT: While Taggart is expressly limited to the parole setting, it reflects a clear trend of erosion of the public duty doctrine. No doubt, plaintiff's lawyers will try to apply the rationale of Taggart to suits against law enforcement investigators. We do not think that law enforcement will lose its general protection under the public duty doctrine in the next decade, but we expect to see the Court expand previously created exceptions to the doctrine and to find some additional special statutory duties beyond that found in Bailey v. Forks.

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WASHINGTON STATE COURT OF APPEALS

DWI CITATION ISSUED BY WASHINGTON OFFICER IN IDAHO HELD INVALID

City of Clarkston v.Stone, 63 Wn. App. 500 (Div. III, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On August 23, 1989, a Clarkston police officer clocked a vehicle in the 100 block of Bridge Street going 43 m.p.h. in a 25 m.p.h. zone. He followed the vehicle across the bridge into Idaho where the vehicle was stopped. After the driver identified himself as Robert Stone, the officer suspected he was under the influence of alcohol and requested him to perform field sobriety tests. The officer issued a citation to Mr. Stone for driving while under the influence, returnable to the Asotin County District Court in Clarkston. Mr. Stone moved to suppress the evidence supporting the citation on the basis the officer did not have jurisdiction to issue the citation in Idaho. The motion was granted and the citation was dismissed. The City appealed to superior court which affirmed the dismissal.

ISSUE AND RULING: Does a Washington officer have authority to issue a citation in Idaho? (ANSWER: No). Result: Asotin County Superior Court's affirmance of District Court dismissal of DWI citation affirmed. Status: decision final, case mandated to lower court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The City contends the Uniform Act of Fresh Pursuit, enacted in both Washington and Idaho, provides authority for the extra-jurisdictional arrest, which it argues applies to the citation issued here. We disagree.
>
> Idaho Code § 19-701 provides:
>
> > Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

> [COURT'S FOOTNOTE: Washington's act, RCW 10.89.010 grants identical authority to peace officers of other states.]
>
> This act only applies to a suspected felon; it does not apply to a gross misdemeanor -- driving while under the influence. We conclude the Clarkston police officer did not have authority under Idaho's fresh pursuit act to make the arrest. Accordingly, the court did not err in dismissing the citation.

[Footnote, some citations omitted]

LED EDITOR'S COMMENT: We'll revisit this issue in an LED in the near future, after we've had more time to study this issue.

CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DELIVER UPHELD

State v. Zamora, 63 Wn. App. 220 (Div. III, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> At about 10:20 p.m. on July 7, 1989, officers of the Interagency Narcotics Enforcement Team (INET) executed a search warrant at the Moses Lake residence of Mr. Zamora. His adult son, Andres, and another man known as Spike were in Andres' bedroom preparing to smoke cocaine; Mr. Zamora was not at home. Andres and Spike were detained, and the house was searched. Cocaine and associated paraphernalia were found in Andres' bedroom. No drugs or paraphernalia were found in a second bedroom, but cocaine and paraphernalia were also found in the east office area. Andres testified the second bedroom was normally occupied by his teenage son who was then out of town, and the east office area was used by Mr. Zamora as a bedroom.
>
> In the east office/bedroom, the INET officers opened a desk with a key supplied by Andres, who testified he used the key to put business papers and money in the desk during his father's frequent absences. In the desk, the officers found: numerous documents in the name of, and letters addressed to, Pete B. Zamora; a canister containing 56 bindles of cocaine packaged in two separate plastic bags; a cocaine processing kit; empty paper bindles; gloves used to prevent absorption while handling cocaine; and $2,300 in cash. In a filing cabinet, the officers found scales, razor blades, a knife and cloth, and unfolded bindle papers. In a garbage can, the officers found numerous plastic baggies (some with corners cut off: and baggie corners (commonly used as alternative bindles), at least two of which contained cocaine residue. The east office/bedroom closet contained clothes which an older man would wear and many boxes of papers addressed to Pete Zamora.
>
> During the search, from about 10:40 p.m. until 3:40 a.m., numerous phone calls were received at the residence on two different lines and numbers. A family line rang in the front area of the residence and in Andres' room; a business line rang only in Mr. Zamora's office. The 20 to 25 callers who called the family line extension in Andres' bedroom usually asked for Andy, sometimes for Spike. The 15 or so callers who called the business line in the east office/bedroom all asked for Pete.

ISSUE AND RULING: Was there sufficient evidence to support the conviction of the senior Mr. Zamora for possession of cocaine with intent to deliver? (ANSWER: Yes) Result: Grant County Superior Court conviction of possession of cocaine with intent to deliver affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Appellate review of the sufficiency of the evidence to support a jury verdict is limited to determining whether viewing the evidence most favorably to the prosecution, any rational trier of fact could have found guilt beyond a reasonable doubt. Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances aa a matter of logical probability.
>
> An inference of intent must flow rationally from the evidence produced. A large quantity of drugs, along with large amounts of cash, scales, gloves and repackaging materials leads to a rational and logical inference of intent to deliver. Here, any rational trier of fact could have found Mr. Zamora possessed the cocaine with intent to deliver.

[Some citations omitted]

INDECENT LIBERTIES -- SEXUAL TOUCHING ALONE NOT "FORCIBLE COMPULSION"

State v. Ritola, 63 Wn. App. 252 (Div. II, 1991)

Facts: (Excerpted from Court of Appeals opinion)

> Ritola was a resident at Toutle River Boys Ranch, having been placed there by a juvenile court. On November 7, 1989, after dinner, he and the counselor played Nintendo in the gymnasium. No one else was present. When they finished the game, the counselor reached over to turn the TV off. Ritola, who was standing behind her and a little to the right, suddenly grabbed her right breast, squeezed it, then "instantaneously" removed his hand. After removing his hand, he said, "Nice tits." The counselor was shocked, and she immediately told Ritola that what he had done was inappropriate. He then left the gym.
>
> The State charged Ritola with indecent liberties by forcible compulsion. The charge was based on RCW 9A.44.100(1)(a), which provides that a person is guilty of indecent liberties when he knowingly causes another person not his spouse to have sexual contact with him or another by forcible compulsion.
>
> The trial court convicted. It found that the act occurred so suddenly that the counselor did not have time to resist before it was completed. It further found, however, that resistance could be "implied", and that Ritola had therefore brought about sexual contact by forcible compulsion.

[Footnote omitted]

ISSUE AND RULING: Did Ritola's action of touching an intimate part of the counselor, taken alone, support the finding of forcible compulsion under the indecent liberties statute? (ANSWER: No) Result: Cowlitz County Juvenile Court conviction for indecent liberties reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The Washington Legislature has enacted a somewhat integrated scheme of major sexual offenses. Codified in RCW 9A.44, that scheme differentiates between sexual intercourse and sexual contact. In general terms, sexual intercourse is sexual touching that includes penetration. RCW 9A.44.010(1). Sexual contact is sexual touching -- "touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire" -- that does not include penetration. RCW 9A.44.010(2). Sexual intercourse committed by forcible compulsion is indecent liberties. RCW 9A.44.100(a).
>
> Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact. Force in the pure scientific sense is what puts an object or body into motion, the result sometimes but not always being contact with another object or body. Force in this scientific sense is involved in every act of sexual touching, and if forcible compulsion and force were synonymous, every such act would be criminal. It seems obvious, however, that the Legislature did not want to make every act of sexual touching criminal, for some such acts are beneficial, perhaps even necessary, to the maintenance of human society. Thus, the Legislature defined forcible compulsion so as to require more force than that needed to bring about sexual intercourse or sexual contact. It said:
>
> > "Forcible compulsion: means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.
>
> RCW 9A.44.010(6). As paraphrased by Division One of our court, this means that forcible compulsion is not the force inherent in any act of sexual touching, but rather is that "used or threatened to overcome or prevent resistance by the female."
>
> The record in this case does not support a finding of forcible compulsion. It is undisputed that Ritola used the force necessary to touch the counselor's breast, but as noted, that is not enough for forcible compulsion. There is no evidence that the force he used overcame resistance, for he caught the counselor so much by surprise that she had no time to resist. Nor is there evidence of any threat, either express or implied.
>
> The State relies on State v. McKnight, [54 Wn. App. 52 (1989)], but that case is easily distinguishable. McKnight, age 17, and the victim, age 14, were sitting on the living room couch in her apartment when they began kissing. The victim told him to stop, but instead he slowly pushed her down on the couch. When he started to pull on her clothes, she again told him to stop, but he did not. After she was disrobed, he got on top of her and had intercourse with her. During intercourse, she told him that it hurt. After intercourse, the examining doctor found that her genital area was torn and bleeding in such a way as to indicate either

unusually aggressive intercourse or inadequate preparation for intercourse. Although the victim told the police that she had resisted verbally but not physically, the defendant argued at trial that she had consented. Apparently, the defendant did not argue that the intercourse was nonconsensual but without forcible compulsion. The trial court found forcible compulsion and convicted. Division One held (1) that the evidence must be sufficient to show that the force used was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration, and (2) that a reasonable trier of fact could find such force from the fact that the defendant had pushed her onto the couch while she told him to stop, and took her clothes off while she told him to stop. We have no quarrel with that holding, given the facts from which it was derived. In our case, however, the evidence does not support a reasonable inference that the force used by Ritola was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching.

The State contended at oral argument that when there is no forcible compulsion, sexual touching without the consent of the victim should still amount to a felony sexual offense rather than fourth degree assault, because sexual touching is more offensive than the other types of unpermitted touching that constitute fourth degree assault. While that may be true, it is not the law. In the absence of forcible compulsion, sexual intercourse constitutes rape in the third degree if it occurs without consent of the victim and lack of consent is clearly manifested. RCW 9A.44.060. In the absence of forcible compulsion, sexual contact constitutes indecent liberties if the victim is incapable of consent by reason of being mentally defective, mentally handicapped or physically helpless, RCW 9A.44.100(1)(b), or if the victim is developmentally disabled and under the supervision of the perpetrator. RCW 9A.44.100(c). In the absence of forcible compulsion, however, sexual contact with a nonimpaired adult is not a sexual offense within RCW 9A.44, even though it occurs without that adult's consent.

We have no occasion to consider whether the sexual contact that took place in this case constitutes fourth degree assault. Neither party argued to the trial court or to this court that fourth degree assault is a lesser included offense within indecent liberties, or that its elements are met by the evidence presented here.

[Some citations, one footnote omitted]

"FORCIBLE COMPULSION" EVIDENCE SUPPORTS RAPE CONVICTION

State v. Soderquist, 63 Wn. App. 144 (Div. III, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

Mr. Soderquist was employed as a licensed practical nurse at Eastern State Hospital. He worked the night shift in Pod B, in which the residents require total care because of age or extensive disabilities. James Walker, a mental health technician, worked the night shift with Mr. Soderquist.

On August 31, 1988, Mr. Walker returned to the ward after making some photocopies. Mr. Soderquist was not at the nurse's station. Mr. Walker went to

check one of the patients, and as he approached the room of Peggy Smith, he heard moaning, "kind of a distress sound". Ms. Smith was a young woman who was in the advance states of Huntington's chorea, a neurological disease which is terminal and which produces dementia and affects the patient's muscle control and ability to communicate. She could walk with assistance, and she could nod and shake her head. While she could not speak, she could communicate her emotional state to the staff.

Mr. Walker testified that he entered Ms. Smith's room and saw her with her back against the headboard of the bed and her nightgown pulled up over her abdomen. Mr. Soderquist was hunched over Ms. Smith with one foot on the bed between Ms. Smith's legs. Mr. Walker described Ms. Smith's face:

> [I]t was -- fearful. I mean -- I have seen her before. But I mean this was -- more so than I have ever seen her, really just distressed, . . . scared. I mean, her eyes were wide open.

Mr. Walker stated Ms. Smith had her hands next to her hips, "[k]ind of lifting".

Mr. Walker testified that he could see Mr. Soderquist's buttocks. Mr. Soderquist turned around. His face was "blood red". The two men stared at each other for a moment, then Mr. Walker left the room. When Mr. Soderquist came back to the nurse's station a few minutes later, he asked Mr. Walker if he was going to turn him in. Mr. Soderquist then stated: "[S]he wanted it . . . She was willing. . . . No one was hurt. I didn't even have an erection."

Mr. Walker reported the incident at the end of the shift. A doctor who examined Ms. Smith the next day found no bruising or other evidence of assault.

Mr. Soderquist was convicted of second degree attempted rape on January 24, 1990.

ISSUE AND RULING: Was there sufficient evidence of "forcible compulsion" to support the second degree rape conviction? (ANSWER: Yes) Result: Spokane County Superior Court conviction for second degree rape affirmed; exceptional sentence of 32 months also affirmed on grounds that defendant violated a position of trust and assaulted a particularly vulnerable victim.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The first issue is whether, after viewing the evidence most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Mr. Soderquist acted with "forcible compulsion", one of the elements of RCW 9A.44.050(1)(a).
>
> RCW 9A.44.010(6) defines "forcible compulsion" as including "physical force which overcomes resistance".
>
> > The *force* to which reference is made in forcible compulsion "is not the force inherent in the act of penetration but the force used or threatened to overcome or prevent resistance by the female." (Footnote omitted.) 3 C. Torcia, *Warton on Criminal Law [sec sign] 288,* at 34 (14th ed. 1980) . . ..

> *Where the degree of force exerted by the perpetrator is the distinguishing feature between second and third degree rape, to establish second degree rape the evidence must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration.*

(Footnote omitted. Italics by Court.) State v. McKnight, 54 Wn. App. 521, 527-28, 774 P.2d 532 (1989).

The evidence of forcible compulsion meets the Green standard. Mr. Walker's testimony was that Ms. Smith's expression was "scared", *unlike any expression he had seen her exhibit before,* and that she was trying to lift herself back against the headboard, in a direction away from Mr. Soderquist. The combination of the lifting motion and the unusual facial expression distinguishes what he saw from the testimony of the other caregivers that Ms. Smith often backed away from them when they were trying to help her. It is evidence consistent with concluding that Ms. Smith was resisting Mr. Soderquists's sexual advances. Mr. Walker's testimony that Mr. Soderquist was on the bed, leaning over Ms. Smith with his pants down, is evidence that Mr. Soderquist was attempting to overcome that resistance. We hold the facts in evidence offered to prove forcible compulsion satisfy the Green test.

[Some citations omitted]

LIMITATION PERIOD FOR FAILURE TO APPEAR ONE YEAR; OFFENSE IS NOT CONTINUING

State v. Klump, 61 Wn. App. 911 (Div. III, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On June 23, 1987, Ronald J. Max Klump, also known as John William Johnson, was issued a citation for two traffic infractions in Stevens County. Whether Mr. Klump was advised to respond to the citation or to appear in court on a specific date in 1987 is unclear. It is undisputed that on September 29, 1987, the clerk of the Stevens County District Court filed a notice with the Washington Department of Licensing, pursuant to RCW 46.64.020, that Mr. Klump had failed to appear or respond to the 1987 citation. No complaint or arrest warrant has ever been issued on the 1987 failure to appear or respond.
>
> In June 1989, during an unrelated traffic stop, the officer requested a license check with the Department of Licensing. He was advised that there was one failure to appear arising from the 1987 citation in Stevens County. Mr. Klump, again using the name John William Johnston, was arrested for that failure to appear and his vehicle was searched. Cocaine was found as a result of the search. A motion to suppress that evidence was denied and Mr. Klump was convicted of possession of a controlled substance.

[Footnote omitted]

ISSUE AND RULING: Is failure to appear on a traffic citation a continuing offense for which a

warrantless arrest may be made more than one year after the initial failure to appear or respond to the traffic citation? (ANSWER: No) Result: Spokane County Superior Court conviction for possession of a controlled substance reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Klump contends failure to appear or respond is a misdemeanor subject to a 1-year statute of limitation; no criminal process having been issued before the 1-year limitation, the State is now precluded from commencing any such process.
>
> It is undenied that prior to issuance of the 1989 citation no criminal process had been issued against Mr. Klump for failure to appear or respond on the 1987 citation. RCW 46.63.060(2)(k) and RCW 46.64.020(2) both state that failure to respond to a notice of infraction as promised is a misdemeanor; RCW 46.64.020(2) goes on to state that one is guilty of a misdemeanor for failure to respond regardless of the disposition of the charge upon which he or she was originally arrested or the disposition of the notice of infraction. RCW 46.64.030 purports to govern the arrest and prosecution for violation of this charge. It relies principally on RCW 10.31.100. Nowhere in the latter statute is one permitted to arrest someone without a warrant for failure to appear or to respond.
>
> In this case, no criminal process was outstanding at the time the officer stopped Mr. Klump in 1989. RCW 9A.04.080(1) states: "No misdemeanor may be prosecuted more than one year after its commission." It is uncontested that Mr. Klump's failure to appear once is a misdemeanor, RCW 46.63.060 and RCW 46.64.020. A criminal prosecution is started in district court by complaint . . .; or by a notice of traffic infraction . . .. Here, no process was issued for failure to appear or respond and more than 1 year had expired before Mr. Klump was arrested in 1989.
>
> We hold the offense of failure to appear or respond is committed when the violator fails to respond within 15 days or fails to appear at a date set for a court appearance. That is the failure the Legislature addressed. There is nothing in this act to indicate the Legislature intended a continuing criminal offense. It may be that administratively the Department of Licensing maintains its administrative remedies during the 5-year period; however, that is not an issue before us.
>
> By designating the offense a misdemeanor, and not inserting any language to indicate it shall be a continuing offense each day that the violator fails to appear or respond, the normal statute of limitation continues to run. As noted by the court in State v. Hodgson, 108 Wn.2d 662 (1988), "[s]uch statutes of limitation are matters of legislative grace; they are a surrendering by the sovereign of its right to prosecute." If the State desires to toll the statute, it must institute criminal process. RCW 9A.04.080(3). Consequently, the offense was time barred when Mr. Klump was arrested in June 1989, more than 1 year from the date of the 1987 offense of failure to appear or respond. The statute had run.
>
> Further, the trial court found that upon his arrest for another traffic infraction and upon learning of one failure to appear, the officer had reason to believe that Mr. Klump would not respond to that citation and he could properly place Mr. Klump under custodial arrest. It held the ensuing search was legal.

> In all likelihood, the arresting officer in 1989 was not advised no process had been issued and he made the arrest for the current infraction based on Mr. Klump's failure to appear in 1987. Had process been issued, the officer had a right to make a custodial arrest. Unfortunately here, no process had been issued, over 1 year had passed since the date of the offense, and thus the officer had no valid basis to make the arrest.
>
> The motion to suppress has been granted.
>
> The judgment is reversed and the case remanded for trial if the State has sufficient evidence, other than that acquired during the 1989 search, with which to proceed.

[Citation, footnote omitted]

LED EDITOR'S COMMENT:

The Appeals Court is probably right on the statute of limitations issue. However, we think that the Court of Appeals was remiss in failing to carefully respond to the prosecutor's alternative argument that a "failure to appear", whether stale or not, might justify a custodial arrest based on the arrestee's likely failure to honor his present promise to appear.

The prosecutor here argued that an officer's present knowledge of a person's past failure to appear would justify a determination by the officer that the suspect will not honor his present promise to appear. The test for lawfulness of a custodial arrest is an objective one (i.e., Would a reasonable officer have been justified in making the arrest?), so the Court of Appeals could and should have reached this issue. See State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990) Feb. '91 LED:05 (where facts would have supported a custodial arrest under an objective standard, officer's subjective intent to merely cite and release, rather than make a custodial arrest, did not invalidate a search which did not exceed the scope of a lawful search incident to arrest); see also State v. Lewis, 62 Wn. App. 350 (Div. II, 1991) Dec. '91 LED:19 (officer's belief that he did not have probable cause to arrest would not have invalidated the arrest if facts known to officer at time of seizure had added up to probable cause under objective analysis).

Although the Court of Appeals chose to avoid the issue here, this should not discourage law enforcement officers from considering a history of FTA's as a basis for a custodial arrest of a traffic violator. "Failure to appear" in the past seems to us to be a pretty good indicator of likelihood of doing so again.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) AVERAGING OF BREATH TEST RESULTS UNDER "10 PERCENT RULE" SHOULD BE TAKEN TO THREE DIGITS, NOT TWO -- In State v. Cascade District Court, 62 Wn. App. 587 (Div. I, 1991) the Court of Appeals addresses the administrative regulation at WAC 448-12-220, which provides that a breath alcohol test is presumed to be accurate if the result of each of two breath test measurements is within 10 percent of the "average" of the two measurements. The Court of Appeals holds that the "average", for purposes of the regulation, is computed by

dividing the sum of two measurements (expressed in two digits) in half, taking the answer to three digits (rather than two digits as argued by defendant).

Accordingly, the Court of Appeals finds defendant's breath test results to be valid. He had .14 and .17 Datamaster results, the average of which is .155 taken to three digits. Both readings were within 10% of this average, and hence the breath test results were valid. If defendant had prevailed in his argument that the average should be taken to only two digits, the test results would have been invalidated as violating the 10% rule.

Also of interest is the Court of Appeals' holding that the "rule of lenity" for interpreting criminal statutes in favor of the accused does not apply to interpretation of rules or statutes which govern only evidentiary matters and do not define crimes or penalties.

Result: Snohomish County Superior Court suppression ruling reversed; case remanded to Cascade District Court for trial.

(2) STATE V. RAY RETROACTIVE; PRIOR THEFT CONVICTION ADMISSIBLE TO IMPEACH WITNESS -- In State v. Eisenman, 62 Wn. App. 640 (Div. I, 1991) the Court of Appeals holds that State v. Ray, 116 Wn.2d 531 (1991) Sept '91 LED:15, which makes theft convictions per se admissible for impeachment purposes under ER 609(a)(2) applies retroactively to criminal trials in which the defendant testified. Result: Whatcom County Superior Court conviction for second degree burglary affirmed.

(3) BURGLARY CONVICTION, UNLIKE THEFT CONVICTION, NOT PER SE ADMISSIBLE TO IMPEACH A WITNESS -- In State v. Watkins, 61 Wn. App. 552 (Div. I, 1991) the Court of Appeals holds that burglary is not per se a crime involving dishonesty, and therefore a burglary conviction is not per se admissible to impeach a witness under Evidence Rule (ER) 609. Burglary is different from theft, the Court declares. Therefore, while State v. Ray, 116 Wn.2d 531 (1991) Sept. '91 LED:15 holds that a theft conviction is per se admissible to impeach a witness under ER 609, a burglary conviction is not. The trial court must look to the facts underlying the burglary conviction to determine whether it involved dishonesty and is therefore admissible to impeach a witness. Result: Snohomish County Superior Court conviction for second degree assault affirmed, because the erroneous admission of the prior burglary conviction to impeach a defense witness was harmless error.

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UNPUBLISHED OPINIONS FROM THE WASHINGTON STATE COURT OF APPEALS

The following three case decisions in College Place v. Zitterkopf, Pasco v. Mendez and State v. Stjern are "unpublished" decisions of the Washington State Court of Appeals. As unpublished decisions, they cannot be cited to any court as legal authority.

Nonetheless, in the opinion of your LED Editor, these decisions probably reflect the prevailing view on the issues before the respective courts. Even though neither defense nor prosecution lawyers will be able to cite these opinions, law enforcement officers should consider the analysis by the Court in these cases.

PASCO'S FALSE REPORTING ORDINANCE SURVIVES CONSTITUTIONAL

CHALLENGE

City of Pasco v. Mendez, No. 10930-5-III (12/10/91)

Facts and Proceedings: (Excerpted from unpublished Court of Appeals opinion)

> Mr. Mendez was a passenger in a vehicle stopped for speeding in the city of Pasco. After arresting the driver, Officer D. Blackledge searched the vehicle and found a substance resembling cocaine on the floor where Mr. Mendez had been sitting. He arrested Mr. Mendez based on probable cause to believe he was in possession of a controlled substance. Mr. Mendez initially identified himself as Carlos Andratti. During booking, he identified himself first as Javier Garcia, and finally as Javier Mendez. There was an outstanding warrant for the arrest of Mr. Mendez.
>
> When the Franklin County prosecutor advised Officer Blackledge that Mr. Mendez would not be charged with possession of cocaine, the officer issued a citation to Mr. Mendez for giving false information, based on the three different names Mr. Mendez had given at the time of his arrest.
>
> Mr. Mendez appealed his Municipal Court conviction. The Superior Court reversed the conviction, finding PMC 9.40.030 facially unconstitutional.

ISSUE AND RULING: Is the Pasco false reporting ordinance unconstitutional? (ANSWER: No)
Result: City of Pasco Municipal Court conviction for false reporting affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Mendez was arrested under PMC 9.40.030 which provides in relevant part:
>
> GIVING FALSE INFORMATION TO POLICE OFFICER
>
> > It is unlawful for any person to: . . . (2) knowingly to give false information as to his identity, current address, if he has any, or his activities when requested by a city police officer to give such information when stopped for a lawful investigatory detention by a city police officer. For purposes of this section a "lawful investigatory detention" means that an officer has a reasonable suspicion based upon objective facts to believe that the person stopped or signaled to stop was engaging in or had engaged in criminal conduct.
>
> Stop-and-identify statutes are subject to constitutional challenge as violative of the United States Constitution's First Amendment right not to speak, the Fourth Amendment prohibition against unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination, or the Fourteenth Amendment due process prohibition of vagueness. Although the parties have cited several cases in which the vagueness prohibitions of the due process clause were dispositive, the Superior Court ruling which is challenged on appeal was based primarily on Fourth Amendment considerations.
>
> Detention of an individual for the purpose of requiring him to identify himself is a

seizure subject to the Fourth Amendment reasonableness requirement. Brown v. Texas, 443 U.S. 47 (1979). Although the detention is less intrusive than an arrest, it must be justified by the officer's "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Brown held the application of a statute which requires an individual to identify himself, when stopped on less than reasonable suspicion, violates the Fourth Amendment. The Pasco ordinance meets the Brown test since it expressly requires an investigatory detention to be based on reasonable suspicion.

Brown did not reach the issue of whether the Fourth Amendment would permit criminalization of a person's failure to identify himself in the context of a stop based on reasonable suspicion. State v. White, [97 Wn.2d 92 (1982)] however, held that even when an officer has a reasonable suspicion which justifies a detention,

> a detainee's refusal to disclose his name, address, and other information cannot be the basis of an arrest. Although a person may be briefly detained on the basis of reasonable suspicion "while pertinent questions are directed to him . . . the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest . . ."

White concluded Washington's stop-and-identify statute, RCW 9A.76.020(1) and (2), was invalid because it would permit an arrest for the exercise of the constitutionally protected right to refuse to answer and would allow circumvention of the probable cause requirement. The Pasco ordinance does not authorize arrest based on refusal to answer a request for identification.

Mr. Mendez contends that the ordinance is unconstitutional because it permits an individual who is detained on the basis of a reasonable suspicion, and who chooses to answer the officer's questions, to be charged with a crime if the answers he gives are false.

Cases from other jurisdictions suggest giving false information may be criminal if it has the effect of hindering or obstructing a law enforcement officer in the discharge of his legal duty. . . .

Although none of these cases involved Fourth Amendment principles, they strongly suggest there is a meaningful distinction between refusal to answer and the giving of false information when the false information creates a greater hindrance than mere silence. . . .

Pasco's ordinance at issue here neither permits detention in the absence of "reasonable suspicion based upon objective facts", nor authorizes arrest based solely on refusal to respond to questions. Thus, it is not facially violative of the Fourth Amendment. Only after the unchallenged arrest did Mr. Mendez give false information as to his identity.

We reverse the decision of the Superior Court.

[Some citations omitted]

LED EDITOR'S COMMENT: See also Bellevue v. Acrey, 37 Wn. App. 57 (Div. I, 1984) July '84 LED:12, a case not discussed in Mendez. In Acrey, a published decision, the Court of Appeals held that a Bellevue false reporting ordinance was not unconstitutionally vague. We prefer the Pasco ordinance for clarity of statutory language and narrowness of the prohibition.

Also, while there is ample room for debate on this point, we feel that a person who lies to an officer during a Terry stop may also be charged under subsection (3) of the state obstructing law, RCW 9A.76.020, if it can be proven that the lie "hindered, delayed or obstructed" the officer. Officers should be selective in charging obstructing under the state statute in this situation and should limit the obstructing charge to cases of clear delay caused by the giving of false information. Agencies may wish to adopt an ordinance along the lines of the Pasco ordinance, as that ordinance is more carefully drawn than the state obstructing statute to expressly address the giving of false informatioon during a Terry stop.

RIGHT TO ADDITIONAL BLOOD TEST MAY REQUIRE RIDE FOR DWI ARRESTEE

City of College Place v. Zitterkopf, No. 10971-2-III (12/10/91)

Facts and Proceedings: (Excerpted from unpublished Court of Appeals opinion)

> The Municipal Court's unchallenged findings of fact show Mr. Zitterkopf was arrested on June 10, 1989. He had failed a field sobriety test and was transported to the Walla Walla County Jail; breath tests administered by the arresting officer at 2:23 a.m. and 2:26 a.m. showed .15 and .16 blood alcohol respectively. About 10 minutes after the arresting officer left the jail, Mr. Zitterkopf twice requested an additional test as provided in RCW 46.20.308(2) and RCW 46.61.506(4). He was told the request must be made to the arresting officer, but the officer could not be reached, and no one was available to give the test.
>
> The Superior Court concluded the jailers' failure to assist Mr. Zitterkopf in obtaining transportation to the hospital was an unreasonable interference with his right to obtain the additional test. Nevertheless, the court concluded the results of an additional test would not have been exculpatory; therefore, the statutory right to additional tests was not violated; and Mr. Zitterkopf's conviction was affirmed.

ISSUE AND RULING: Was Mr. Zitterkopf's right to obtain additional alcohol tests interfered with in a manner which prejudiced his DWI prosecution? (ANSWER: Yes) Result: Reversal of Walla Walla Superior Court affirmance of Municipal Court DWI conviction; case remanded for Municipal Court trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> An accused has the right to additional tests when arrested for driving under the influence of alcohol:
>
> > The person tested may have a physician, or qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. The

> failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

RCW 46.61.506(5). Interference with the statutory right of an accused to procure additional tests or to make an informed judgment whether to submit to a blood alcohol test requires suppression of test results.

In State v. Stannard, 109 Wn.2d 29 (1987)[Jan. '88 LED:11], the court engaged in a due process analysis only after concluding there had been no interference with the statutory right of the accused. Here, the due process analysis was inappropriate; the conclusion additional tests would not be exculpatory was speculative. There was interference.

The hospital was only two blocks from the jail. Mr. Zitterkopf was brought by the policeman from an adjoining city to the jail. Ostensibly, he had no transportation. No mention is made of bail or Mr. Zitterkopf's ability to post bail. Nor is the availability of a deputy sheriff to escort Mr. Zitterkopf to the hospital noted. Whether Mr. Zitterkopf could have made a telephone call to procure other assistance is not of record. It is highly questionable whether anyone from the hospital would have journeyed to the jail to take Mr. Zitterkopf's blood. The only effort made was to contact the arresting officer. This is insufficient effort to avail Mr. Zitterkopf of his right to other tests. His request 10 minutes after completing the breath tests was reasonable.

The Superior Court held the description of Mr. Zitterkopf's driving, his performance of the field tests, and his physical appearance at the time of his arrest would have been sufficient to support a guilty verdict. However, the Municipal Court made no findings as to the manner of Mr. Zitterkopf's driving or his physical appearance at the time of his arrest; it simply noted he failed the field sobriety test. This finding, alone, is insufficient to support the conviction. Mr. Zitterkopf's conviction must be reversed.

The existence of a "statutory option to use breath or blood testing in DWI cases . . . does not foreclose proof [of intoxication] by other means." Since other evidence of Mr. Zitterkopf's intoxication was presented at trial, the case is remanded for retrial, excluding the evidence of breath tests.

[Some citations omitted]

MINOR'S PRESENCE AT JUVENILE DRINKING PARTY PLUS ALCOHOL ON BREATH WOULD SUPPORT MIP CONVICTION -- In State v. Stjern, No. 26405-2-I, the Court of Appeals for Division I rejects a minor's argument "that his mere presence at a juvenile drinking party, coupled with the smell of alcohol on his breath, is insufficient evidence as a matter of law to support a conviction of consumption of intoxicating liquor" under a county ordinance. The Appeals Court holds that "a rational trier of the fact could find, although clearly need not find, Stjern guilty" of "consumption" of intoxicating liquor as a minor.

Result: case remanded to Snohomish County courts for prosecution of case under county MIP ordinance.

LED EDITOR'S NOTE: Because the pertinent portion of the county ordinance at issue in the Stjern case mirrors the state law prohibition on consumption of liquor by minors at RCW 66.44.100, the same analysis would apply to a prosecution under that law.

Note also that another ruling in this case, the correctness of which was conceded by the State, was that the State Supreme Court ruling in State v. Truong, 117 Wn.2d 63 (1991) Aug. '91 LED:17 (holding that state liquor statutes preempt the adoption of a local ordinance prohibiting minors from appearing in public after consumption of liquor) precluded prosecution of Stjern under this portion of the Snohomish County ordinance. Finally, note that at LED deadline, House Bill 2296 and Senate Bill 6158 were still alive in the state legislature; these identical cross-filed bills would amend RCW 66 to establish a state-law prohibition on minors appearing in a public place or being in a motor vehicle in a public place after having consumed alcohol.

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NEXT MONTH

In the April LED we will digest, among other recent decisions, the February 6, 1992 ruling of the State Supreme Court in State v. Barber. In Barber, the Court clarifies the obvious -- the "fact" that a person's race does not "fit the neighborhood" in which he is observed does not provide reasonable suspicion justifying a Terry stop. The Barber decision received a lot of print media attention in Seattle, but we do not believe that it breaks any new legal ground in the law relating to arrest, stop, and frisk.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.