December, 1993

HONOR ROLL

407th Session, Basic Law Enforcement Academy - August 2 through October 21, 1993

President:	*Officer Jeffrey T. Lewis - Vader Police Department*
Best Overall:	*Deputy Michael J. Hefty - Pierce County Sheriff's Department*
Best Academic:	*Deputy Winthrop W. Sargent - Pierce County Sheriff's Department*
Best Firearms:	*Officer Ronald E. Maxey - Colville Police Department*

****

Corrections Officer Academy - Class 188 - October 11 through November 5, 1993

Highest Overall:	*Officer Steven R. Ackron - Special Offender Center*
Highest Academic:	*Officer Leland D. Pryor - Washington State Penitentiary*
Highest Practical Test:	*Officer Steven R. Ackron - Special Offender Center*
	Officer Michael L. Crockett - DOC/Tacoma Pre-Release
	Officer Eric L. Jackson - McNeil Island Corrections Center
	Officer Louis A. Nelson - McNeil Island Corrections Center
Highest in Mock Scenes:	*Officer Gretchen A. Dold - Olympic Corrections Center*
Highest Defensive Tactics:	*Officer Steven R. Ackron - Special Offender Center*

****

DECEMBER LED TABLE OF CONTENTS

****

1993 SUBJECT MATTER INDEX

LED EDITOR'S NOTE: This is our thirteenth periodic LED subject-matter index since 1979. It covers LED's from January 1993 through December 1993. It includes all entries in the LED in 1993. See the December 1990 and December 1989 LED's for information about the location of prior periodic subject-matter and case name indexes, which, since 1989, have appeared in December, and for information regarding 10-year cumulative subject-matter and 10-year case name indexes published in 1989 covering the period from January 1979 through December 1988. We anticipate publishing another cumulative subject-matter index in December of 1993 or in early 1994. That index will cover the five-year period from January 1989 through December 1993. As with the index published in 1989, this cumulative index will have limited distribution (likely one per agency) due to the anticipated size of the index.

ARREST, STOP & FRISK

> **LED EDITOR'S NOTE regarding the Court of Appeal's statement of facts with no apparent support in the record in the case of State v. Richardson, a case previously reported in the Aug. '92 LED at 15. Jan. '93:07**
>
> **Radio dispatch re suspects randomly going door-to-door "looking for place to rent" did not provide "reasonable suspicion" to justify stop, frisk. State v. Walker, 66 Wn. App. 622 (Div. I, 1992) Jan. '93:16**
>
> **Washington Mutual Aid Peace Office Powers Act -- county not liable in assist action because its officers were subject to "direction and control" by city police command staff. Sheimo v. Bengston,**

64 Wn. App. 545 (Div. III, 1992) Jan. '93:18

Court finds probable cause for vehicular homicide arrest in alcohol use evidence plus admissions and circumstances of accident. State v. Dunivin, 65 Wn. App. 501 (Div. II, 1992) Jan. '93:19

Open container traffic infraction doesn't justify arrest, nor does fact that violator claimed that his only ID was a picture-less Costco card. State v. Barwick, 66 Wn. App. 706 (Div. III, 1992) Feb. '93:07

Prior contact with possible armed felon plus late-night hour and large size of detainee justify frisk during traffic stop. State v. Collins, 66 Wn. App. 157 (Div. I, 1992) Feb. '93:09

Law allowing stop because of license plate tab indicating prior "no license" arrest upheld in Fourth Amendment and Article 1, Section 7 challenges. Seattle v. Yeager, 67 Wn. App. 41 (Div. I, 1992) Feb. '93:10

Use of drawn guns to approach suspect on just-completed burglary not necessarily an "arrest". State v. Smith, 67 Wn. App. 81 (Div. I, 1992) Feb. '93:11

Officer's contact, drug inquiry, consent request, add up to "seizure". State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) March '93:09

Mental disorder statute justifies emergency detention and limited search of large handbag; PC arrest justifies search of small pouch inside larger bag as a search incident to arrest. State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93:15

Founded suspicion standard for frisk during Terry stop-and-frisk requires objective proof only that pat-down was not arbitrary or harassing. State v. Collins, 121 Wn.2d 168 (1993) July '93:07

"Plain feel" during Terry frisk may justify seizure of contraband but test will be difficult to meet. Minnesota v. Dickerson, 53 CrL 2186 (1993) Sept. '93:15

Patting of possible drugs during frisk did not justify coke seizure, in part because officer's description of what he expected to feel did not match what he said he felt. State v.Hudson, 69 Wn. App. 270 (Div. I, 1993) Sept. '93:17

Officer's deception as to purpose of entry request destroys consent. State v. McCrorey, 70 Wn. App. 103 (Div. I, 1993) Oct. '93:12

Officer's request to talk to person walking away, plus his "demand" for ID, declared to be a Terry stop requiring reasonable suspicion of crime. State v. Gleason, 70 Wn. App. 13 (Div. III, 1993) Oct. '93:15

Court disapproves officer's request for consent to search after traffic stop completed. State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. '93:21

No "seizure" in request to talk, order to remove hands from pockets. State v. Nettles, 70 Wn. App. 706 (Div. I, 1993) Nov. '93:09

ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)

Statute making intentional HIV exposure Second Degree Assault is not unconstitutionally vague. State v. Stark, 66 Wn. App. 423 (Div. II, 1992) Feb. '93:16

ATTEMPT (Chapter 9A.28 RCW)

Evidence of substantial step sufficient to support attempted murder convictions. State v. Hale, 65 Wn. App. 752 (Div. III, 1992) June '93:14

BURGLARY (Chapter 9A.52 RCW)

Fingerprints on inner side of glass from window which was broken in forced entry constitutes evidence of "entry" under burglary statute. State v. Berglund, 65 Wn. App. 648 (Div. I, 1992) Jan. '93:20

Assault outside residence is not "assault therein" under burglary statute. State v. Gilbert, 68 Wn. App. 379 (1993) April '93:18

House's attached garage is part of "dwelling" for purposes of burglary statute. State v. Murbach, 68 Wn. App. 509 (Div. III, 1993) May '93:16

Burglar's claim/threat that he was searching his pockets for his knife did not make him "armed" for purposes of Burglary One statute. State v. Chariello, 66 Wn. App. 241 (Div. III, 1992) May '93:17

CIVIL LIABILITY

"Professional rescuer doctrine" and "fireman's rule" get narrow reading; officers may sue men who assaulted them in their response to a hotel disturbance. Ballou v. Nelson, 67 Wn. App. 67 (Div. I, 1992) Feb. '93:19

No absolute immunity for prosecutor where allegation that he "shopped" for expert witness before probable cause developed. Buckley v. Fitzsimmons, 61 LW 4713 (1993) Dec. '93:17

COMMUNICATION WITH MINOR FOR IMMORAL PURPOSES (Chapter 9.68A RCW)

"Communication with a minor for immoral purposes" (RCW 9.68A.090) gets broad reading; conflicting Court of Appeals' rulings resolved in pro-state decision. State v. McNallie, 120 Wn.2d 925 (1993) May '93:07

CONSPIRACY (Chapter 9A.28 RCW)

"Substantial step" element of conspiracy statute does not require "overt act" as does "substantial step" element of attempt statute. State v. Dent, 67 Wn. App. 656 (Div. I, 1992) June '93:19. Review pending in State Supreme Court.

CRUEL AND UNUSUAL PUNISHMENT

Routine, through-the-clothes, body searches of female inmates by male correctional officers ruled impermissibly "cruel and unusual". Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) July '93:06

Prisoner allowed to pursue claim that second-hand smoke was "cruel and unusual" punishment. Helling v. McKinney, 61 L.W. 4648 (1993) Dec. '93:18

DISABILITY LAW

LEOFF I officer is disability retired because he can't perform strenuous physical activities. Morrison v. Retirement Systems, 67 Wn. App. 419 (Div. I, 1992) March '93:12

DISCOVERY (PRETRIAL, CRIMINAL)

Officer service records and personnel files not subject to discovery by criminal defendant absent special showing of basis for request. State v. Blackwell, 120 Wn.2d 822 (1993) May '93:09

ELECTRONIC SURVEILLANCE AND MONITORING (Chapter 9.73 RCW)

Broad exclusionary provision of electronic surveillance statute, RCW 9.73, mandates suppression of evidence where officers monitored conversations without court order or written supervisor authorization. State v. Salinas, 67 Wn. App. 232 (Div. I, 1992) Feb. '93:14 [See State Supreme Court affirmance entry below]

Listening in at tipped phone receiver not barred by statutory, constitutional privacy protections. State v. Corliss, 67 Wn. App. 708 (Div. I, 1992) March '93:12. Review pending in State Supreme Court.

Consenting use of "line trap" for source of phone calls not covered by Chapter 9.73 privacy law; computer hacker search warrant fails particularity test. State v. Riley, 121 Wn.2d 22 (1993) July '93:10

Citizen-police conversation during arrest of citizen in his front driveway held not "private" under communications privacy law (Ch. 9.73 RCW); hence, citizen's taping of conversation with police not proscribed by law. State v. Flora, 68 Wn. App. 802 (Div. I, 1992) July '93:17

All information, including visual observations, obtained by an officer wearing an unauthorized listening device is inadmissible; 1989 amendments to Chapter 9.73 RCW did not change chapter 9.73's basic broadly-inclusive exclusionary rule. State v. Salinas, 121 Wn.2d 689 (1993) Nov. '93:08

Informant's undisclosed pending charges don't negate probable cause; 9.73 requirements met; search of vehicle incident to arrest nearby lawful. State v. Lopez, 70 Wn. App. 259 (Div. III, 1993) Nov. '93:15

Monitoring of numbers coming to lawfully seized pager withstands statutory and constitutional challenges. State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) Dec. '93:20

EVIDENCE

Marital privilege -- no spousal incompetency to testify against other spouse under RCW 5.60.060(1) where any interspousal crime charged. State v. Thornton, 119 Wn.2d 578 (1992) Jan. '93:08

Officer's expert testimony re: significance of lack of drug paraphernalia in residence admissible to support UCSA intent to deliver element. State v. Sanders, 66 Wn. App. 380 (Div. I, 1992) Jan.

'93:16

Delay of a few hours between end of attack and victim's report does not disqualify report from "excited utterance" status. State v. Strauss, 119 Wn.2d 401 (1992) Feb. '93:05

Excited utterances by three-year-old admissible under hearsay exception of ER 803(a)(2) even though child could not be shown to be competent witness. State v. Bryant, 65 Wn. App. 428 (Div. I, 1992) Feb. '93:19

CCDR sent by "fax" admissible as proof driving privilege revoked. State v. Smith (Timothy), 66 Wn. App. 825 (Div. I, 1992) Feb. '93:19

Detective lawfully gave expert testimony about pimp-prostitute relationship. State v. Simon, 64 Wn. App. 948 (Div. I, 1991) Feb. '93:20

Fingerprint expert's testimony that another expert verified his analysis was inadmissible hearsay. State v. Wicker, 66 Wn. App. 409 (Div. I, 1992) Feb. '93:20

No marital privilege where defendant accused of witness tampering with regard to children so the children wouldn't testify against him for raping them. State v. Sanders, 66 Wn. App. 878 (Div. I, 1992) Feb. '93:21

Delayed report of rape by convalescent center's Alzheimer's sufferer not excited utterance. State v. Chapin, 118 Wn.2d 681 (1992) March '93:06

Spousal privilege applies to spouse's in-court testimony only; spouse's statements to others outside court are admissible if hearsay rules allow their admission. State v. Burden, 120 Wn.2d 371 (1992) May '93:09

"Grooming process" testimony by expert generally inadmissible in state's case-in-chief in molesting prosecutions. State v. Braham, 67 Wn. App. 930 (Div. I, 1992) May '93:15

DNA typing evidence admissible if valid probability statistics show the match is not coincidental. State v. Cauthron, 120 Wn.2d 879 (1993) July '93:14

"Battered child syndrome" meets scientific evidence standard; syndrome evidence may be admitted to help prove self-defense. State v. Janes, 121 Wn.2d 220 (1993) July '93:14

EXCLUSIONARY RULE (CONSTITUTIONAL)

Impeaching defendant with unlawfully seized evidence permitted under both federal and state constitutions. State v. Greve, 67 Wn. App. 166 (Div. I, 1992) March '93:18

Wyoming deputy's Miranda warnings satisfy federal constitution; out-of-state officer's independent actions need not satisfy Washington constitution to be admissible in Washington prosecution. State v. Koopman, 68 Wn. App. 514 (Div. III, 1992) May '93:15

Co-conspirators have no automatic standing to challenge searches of fellow co-conspirators. U.S. v. Padilla, 53 CrL 2109 (1993) July '93:05

EX POST FACTO DOCTRINE

Sex offender registration statute not violative of ex post facto provision. State v. Taylor, 67 Wn. App. 350 (Div. I, 1992) June '93:10

FREEDOM OF RELIGION

Animal sacrifice ordinance aimed at a local religious group fails religious freedom challenge. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Fla., 61 L.W. 4587 (1993) Dec. '93:16

FREE SPEECH

Sentence enhancement for hate crime upheld. Wisconsin v. Mitchell, 61 L.W. 4575 (1993) Dec. '93:16

Per se crimes portion of former malicious harassment statute invalidated on free speech grounds; current law would pass constitutional muster. State v. Talley, 122 Wn.2d 192 (1993) Dec. '93:17

GAMBLING (Chapter 9.46 RCW)

"Gross receipts" term in local gambling tax ordinance gets pro-taxpayer reading. TLR, Inc. v. Town of LaCenter, 68 Wn. App. 29 (Div. II, 1992) June '93:12

HARASSMENT (CRIMINAL) (Chapter 9A.46 RCW)

"Let's fight" evidence insufficient to support harassment conviction. State v. Austin, 65 Wn. App. 759 (Div. I, 1992) Jan. '93:20

IMPLIED CONSENT, BREATH, AND BLOOD TESTS FOR ALCOHOL

Implied consent warnings per RCW 46.20.380(2) support revocation of drivers' licenses; drivers' refusals of testing preclude issuance of occupational drivers' licenses. Burnett v. DOL and Gasaway v. DOL, 66 Wn. App. 253 (Div. II, 1992) Jan. '93:19

Court finds probable cause for vehicular homicide arrest in booze and admissions and circumstances of accident. State v. Dunivin, 65 Wn. App. 501 (Div. II, 1992) Jan. '93:19

DWI arrestee's right to pre-BAC test consult with counsel satisfied where public defender contacted by phone, and arrestee's private attorney could not be called due to SCAN authorization problem. Seattle v. Sandholm, 65 Wn. App. 747 (Div. I, 1992) Feb. '93:18

INDECENT LIBERTIES (RCW 9A.44.100)

Lips an "intimate part" in some circumstances under indecent liberties statute. State v. R.P., 67 Wn. App. 663 (Div. I, 1992) March '93:19

INDIAN/TRIBAL LAW ENFORCEMENT

Tribal officer had authority to: (a) stop speeding driver to determine if tribal member and (b) detain him for WSP as suspected non-Indian DWI. State v. Schmuck, 121 Wn.2d 373 (1993) Nov.

'93:07

INFANCY DEFENSE (RCW 9A.04.080)

Evidence insufficient to overcome presumption that eight-year-old not capable of crime. State v. K.R.L., 67 Wn. App. 721 (Div. II, 1992) June '93:11

INSANITY DEFENSE (RCW 9A.12.010)

"Irresistible impulse" variation on insanity defense rejected. State v. Potter, 68 Wn. App. 134 (Div. II, 1992) April '93:20

INTERROGATIONS AND CONFESSIONS

Court almost gets it right on Miranda trigger issue; neither focus, nor mere temporary restriction on freedom, triggers warnings need. On issue of sufficiency of MIP evidence, Court holds that odor of intoxicants plus admission of recent drinking are sufficient support for MIP conviction. State v. Walton (Jeffrey), 67 Wn. App. 127 (Div. I, 1992) Jan. '93:09

No Fifth Amendment violation where police declared to interrogation suspect that they will talk to prosecutor, but them make no other promises. State v. Putnam, 65 Wn. App. 606 (Div. II, 1992) Jan. '93:15

State wins on Miranda "interrogation" issue where question of "current address" asked in booking process; no "interrogation" in ordinary booking address request. State v. Walton (Bobby Gene), 64 Wn. App. 410 (Div. III, 1992) Jan. '93:15

Miranda Note: Miranda custody test revisited -- Muniz is irrelevant to custody issue. Feb. '93:03

Miranda Note: No special field sobriety test warnings requirement. March '93:02

Psychologist's post-conviction interview at prison not subject to Miranda. State v. Post, 118 Wn.2d 596 (1992) March '93:03

Article: "Initiation of Contact" rules under Fifth and Sixth Amendments. April '93:02

Wyoming deputy's Miranda warnings satisfy federal constitution; out-of-state officer's actions need not satisfy Washington constitution. State v. Koopman, 68 Wn. App. 514 (Div. III, 1992) May '93:15

Flowchart to "Initiation of Contact" article. May '93:19-21

Miranda warnings required where CCO talks to parolee at jail. State v. Willis, 64 Wn. App. 634 (Div. III, 1992) June '93:10

Mentally disabled defendant held to have voluntarily waived Miranda rights. State v. Cushing, 68 Wn. App. 388 (Div. I, 1993) June '93:13

Duration of "initiation of contact" bar under Fifth Amendment remains unresolved. U.S. v. Green, 53 CrL 2001 (1993) July '93:05

Federal prosecutor's meeting with charged defendant ruled violative of ethics rule but not a reason to dismiss case absent prejudice to defendant. U.S. v. Lopez, 52 CrL 1545 (1993) July '93:06

No "cat out of the bag" rule under Miranda? State v. Allenby, 68 Wn. App. 657 (Div. I, 1992) Oct. '93:18

Sixth Amendment confrontation clause – non-testifying co-defendant's hearsay statements to girlfriend meet very restrictive Sixth Amendment "reliability" test, but admissions to detective during custodial interrogation by detective do not. State v. Rice, 120 Wn.2d 549 (1993) Nov. '93:02

INTIMIDATING A JUDGE (RCW 9A.72.160)

Indirect threat toward judge sufficient to support conviction for intimidating a judge. State v. Hansen, 67 Wn. App. 511 (Div. I, 1992) Feb. '93:15

INTOXICATION DEFENSE

Defendant charged with attempted rape not entitled to assert defense of voluntary intoxication because he failed to show how intoxicants affected his mental state. State v. Gallegos, 65 Wn. App. 230 (Div. I, 1992) May '93:17

Voluntary intoxication defense applies to all drugs, not just alcohol. State v. Hackett, 64 Wn. App. 780 (Div. I, 1992) May '93:18

JUVENILE JUSTICE

Statute mandating HIV testing of all persons convicted of sexual offenses applies to both juvenile and adult sexual offenders and is constitutionally valid. In Re A, B, C, D, E, 121 Wn.2d 80 (1993) July '93:16

LEGISLATION (1993)

PART I. July '93:03

PART II. Aug. '93:1-22

PART III. Sept. '93:1-15

PART IV (includes complete LED index of 1993 legislation). Oct. '93:2-8

LOST PROPERTY, CLAIMS TO

Airport luggage x-ray operator loses claim to seized drug money. Farrare v. City of Pasco, 68 Wn. App. 459 (Div. III, 1992) May '93:17

MALICIOUS MISCHIEF (Chapter 9A.48 RCW)

Destruction of community property may result in malicious mischief conviction. State v. Webb,

64 Wn. App. 480 (Div. I, 1992) Jan. '93:12

MINOR IN POSSESSION (RCW 66.44.270)

ISSUE 1: Court almost gets it right on Miranda trigger issue; neither focus, nor mere temporary restriction on freedom triggers warnings need. ISSUE 2: Odor of intoxicants plus admission of recent drinking sufficient support for MIP conviction. State v. Walton (Jeffrey), 67 Wn. App. 127 (Div. I, 1992) Jan. '93:09

MISAPPROPRIATION OF RECORD (RCW 40.16.020)

Title 9A definition of "officer" applies to "misappropriation of record" charge under RCW 40.16.020. State v. Korba, 66 Wn. App. 666 (Div. II, 1992) June '93:10

MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Murderer loses on theory that hospital's termination of life support, not him, caused death of his victim. State v. Yates, 64 Wn. App. 345 (Div. II, 1992) Feb. '93:16

Evidence of substantial step sufficient to support attempted murder convictions. State v. Hale, 65 Wn. App. 752 (Div. III, 1992) June '93:14

MUTUAL AID PEACE OFFICER POWERS ACT (Chapter 10.93 RCW)

Washington Mutual Aid Peace Officer Powers Act -- County not liable in assist action because its officers were subject to "direction and control" by city police command staff. Sheimo v. Bengston, 64 Wn. App. 545 (Div. III, 1992) Jan. '93:18

PAWNBROKERS (Chapter 19.60 RCW)

Pawnbroker's multiple fees add up to excessive interest under 19.60 RCW. Wenatchee v. Johnston, 68 Wn. App. 697 (Div. III, 1993) Nov. '93:13

POLICE DOGS

Evidence sufficient to support conviction for harming a police dog. State v. Kisor, 68 Wn. App. 610 (Div. II, 1993) Nov. '93:18

PRIVATE SECURITY GUARD, PRIVATE DETECTIVE REGULATION

Article: Criminal violations of private security guard and private detective licensing laws -- Part I. May '93:02

Article: Criminal violations of private security guard and private detective licensing laws -- Part II. June '93:02

PUBLIC RECORDS, ACCESS TO COURT RECORDS, AND PROCEEDINGS

"Work product", performance evaluations get protection under Public Disclosure Act, chapter 42.17 RCW. Dawson v. Daly, 120 Wn.2d 782 (1993) May '93:10

Public Disclosure Act does not require that police disclose unsubstantiated report of child abuse. City of Tacoma v. Tacoma News, 65 Wn. App. 140 (Div. II, 1992) June '93:17

Law to protect ID of child sexual assault victims violates state constitutional mandate for open access to courts. Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993) July '93:16

RAPE AND OTHER SEX OFFENSES (Chapter 9A.44 RCW)

"Forcible compulsion" element of second degree rape statute not met by evidence. State v. Weisberg, 65 Wn. App. 721 (Div. II, 1992) June '93:16

RESTITUTION

Juvenile court may require assailant to pay for victims' psychological counseling. State v. Landrum, 66 Wn. App. 779 (Div. I, 1992) Feb. '93:21

SEARCH AND SEIZURE

Booking Searches

Gloria Smith rule against booking searches of persons arrested on bail warrants given "holding cell exception"; failure to obtain written supervisor authorization for strip search per RCW 10.79 does not require exclusion if verbal authorization given. State v. Harris, 66 Wn. App. 636 (Div. I, 1992) Jan. '93:13

Consent Search Exception

Overnight guest may have had authority to admit police to residence. State v. Ryland (Supreme Court No. 59, 466-0) Department II of the Washington Supreme Court reverses a decision of the Court of Appeals reported at 65 Wn. App. 806 (Div. I, 1992) Oct. '92:10. Court remands for new suppression hearing. Jan. '93:09

Landlord's consent to police entry of house invalid as lease not expired. State v. Birdsong, 66 Wn. App. 534 (Div. I, 1992) Jan. '93:14

Intoxicated suspect's demand that police come inside while he refused to step outside constituted consent to entry. State v. Cyrus, 66 Wn. App. 502 (Div. I, 1992) Jan. '93:14

Building inspector's non-consenting entry into house ruled an unlawful search. State v. Browning, 67 Wn. App. 93 (Div. I, 1992) Feb. '93:11

Consent to enter home not valid where given: (1) after officers state they'll "go get a search warrant if consent to enter is denied" and (2) PC for a warrant absent. State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93:13

Officer's deception as to purpose of entry request destroys consent. State v. McCrorey, 70 Wn. App. 103 (Div. I, 1993) Oct. '93:12

Court disapproves officer's request for consent to search after traffic stop completed. State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. '93:21. Petition for review pending in State Supreme Court.

DNA Data Bank Blood Draws

Statute mandating blood draw, DNA testing for violent as well as sexual offenders upheld. State v. Olivas, et. al., 122 Wn.2d 73 (1993) Dec. '93:18

Entry To Arrest (Payton Rule)

Intoxicated suspect's demand that police come inside while he refused to step outside constituted consent to entry. State v. Cyrus, 66 Wn. App. 502 (Div. I, 1992) Jan. '93:14

Consent to enter home not valid where given: (1) after officers state they'll "go get a search warrant if consent to enter is denied" and (2) PC for a warrant absent. State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93:13

Note: Evidence of (1) hit-run, car-bicycle accident, (2) alcohol use, and (3) erratic driving may justify forcible entry of home to arrest. Nov. '93:19

Execution: Time Limits On Serving Search Warrant

Search warrants for controlled substances are subject to same 10-day execution rule as other warrants. State v. Thomas, 121 Wn.2d 504 (1993) Aug. '93:22 Note: this decision affirmed a Court of Appeals decision reported in the Oct. '92 LED at 16.

Exigent Circumstances

No exigency, no emergency where officers testified that they had no reason to believe anyone was still inside just-burgled residence. State v. Muir, 67 Wn. App. 149 (Div. I, 1992) Feb. '93:08

Note: Evidence of (1) hit-run, car-bicycle accident, (2) alcohol use, and (3) erratic driving may justify forcible entry of home to arrest. Nov. '93:19

Incident to Arrest (Non-vehicle Search)

Correction note regarding State v. Clayton Donald Smith, reported in November '92 LED at 16, explaining that the fanny pack search in that case was held by the State Supreme Court to be lawful. Jan. '93:20

Mental disorder statute justifies emergency detention and limited search of large handbag; PC arrest justifies search of small pouch inside larger bag as a search incident to arrest. State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93:15

Incident To Arrest (Vehicle Search)

Informant's undisclosed pending charges don't negate probable cause; 9.73 requirements met; search of recently occupied vehicle incident to arrest near the vehicle lawful. State v. Lopez, 70 Wn. App. 259 (Div. III, 1993) Nov. '93:15

Knock And Announce (RCW 10.31.040)

Five-second wait after knock-and-announce satisfies RCW 10.31.040 under totality of the circumstances. State v. Garcia-Hernandez, 67 Wn. App. 492 (Div. I, 1992) Feb. '93:09

Particularity Requirement

Use of "line trap" for source of phone calls not restricted in any way by Chapter 9.73 privacy law; computer hacker search warrant fails particularity test. State v. Riley, 121 Wn.2d 22 (1993) July '93:10

Plain View, Open View

Pretext, plain view, exigent circumstances issues resolved in favor of state; no "inadvertence" requirement for plain view seizure. State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93:17

Pretext

Pretext, plain view, exigent circumstances issues resolved in favor of state; no "inadvertence" requirement for plain view seizure. State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93:17

Privacy Protection (Scope of Constitutional Protections)

Film lab manager was not a police agent in delivering photo negatives to police; no constitutional privacy protection for negatives given to commercial developer anyway. State v. Walter, 66 Wn. App. 862 (Div. I, 1992) Feb. '93:12

No privacy protection for suspect where phone company gave police billing information identifying the man and giving his address -- the phone number was listed, but without address, and under another's name. State v. Faydo, 68 Wn. App. 621 (Div. III, 1993) Oct. '93:09

Monitoring of numbers coming to lawfully seized pager withstands statutory and constitutional challenges. State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) Dec. '93:20

Private Citizen Search

Film lab manager not police agent in delivering photo negatives to police; no constitutional privacy protection for negatives given to commercial developer anyway. State v. Walter, 66 Wn. App. 862 (Div. I, 1992) Feb. '93:12

Probable Cause To Search

Report by informant that "friend" had made one purchase of drugs at residence did not establish PC to search residence. State v. Bittner, 66 Wn. App. 534 (Div. I, 1992) Jan. '93:13

No need for in camera hearing re identity of CI where entrapment claim unsupported. State v. Vazquez, 66 Wn. App. 573 (Div. II, 1992) Feb. '93:13

Informant's undisclosed pending charges don't negate probable cause; 9.73 requirements met;

search of recently occupied vehicle incident to arrest near the vehicle lawful. State v. Lopez, 70 Wn. App. 259 (Div. III, 1993) Nov. '93:15

Protecting Identity Of Confidential Informants

No need for in camera hearing re identity of CI where entrapment claim unsupported. State v. Vazquez, 66 Wn. App. 573 (Div. II, 1992) Feb. '93:13

Even if defendant correctly guesses ID of CI, court need not tell him of CI's in camera testimony if CI not a police agent or a guilt witness. State v. Stansbury, 64 Wn. App. 601 (Div. I, 1992) Feb. '93:14

Scope Of Search Authorization Under Warrant

Storage locker held next door to apartment unit within scope of warrant authorizing search of apartment. State v. Llamas-Villa, 67 Wn. App. 448 (Div. I, 1992) Feb. '93:06

Search of occupant's pants during narcotics warrant execution unlawful. State v. Lee, 68 Wn. App. 253 (Div. I, 1992) April '93:10 (Note "correction notice" re Lee in June '93 LED at 20). Case is now on review in State Supreme Court, but is now captioned "State v. Hill."

Strip Searches

Gloria Smith rule against booking searches of persons arrested on bail warrants given "holding cell exception"; failure to obtain written supervisor authorization for strip search per RCW 10.79 does not require exclusion if verbal strip search authorization given. State v. Harris, 66 Wn. App. 636 (Div. I, 1992) Jan. '93:13

SELF DEFENSE/DEFENSE OF OTHERS

Doctrine of "imperfect self-defense" does not apply in Washington. State v. Bergeson, 64 Wn. App. 355 (Div. II, 1992) Feb. '93:16

SENTENCING

Evidence sufficient to support conviction for conspiracy to deliver controlled substance. State v. Smith, 65 Wn. App. 468 (Div. I, 1992) June '93:15

Statute mandating HIV testing of all convicted of sexual offenses applies to both juvenile and adult sexual offenders and is constitutionally valid. In Re A, B, C, D, E, 121 Wn.2d 80 (1993) July '93:16

Sexual motivation sentence enhancement for juvenile offenders upheld. State v. Halstein, 122 Wn.2d 109 (1993) Dec. '93:20

SEX OFFENDER REGISTRATION STATUTE

Sex offender registration statute not violative of ex post facto provision. State v. Taylor, 67 Wn. App. 350 (Div. I, 1992) June '93:10

Community protection act's provisions of commitment of sex predators upheld. In re Young and In re Cunningham, 122 Wn.2d 1 (1993) Dec. '93:17

SIXTH AMENDMENT

Sixth Amendment confrontation clause – non-testifying co-defendant's hearsay statements to girlfriend meet very restrictive Sixth Amendment reliability test, but admissions to detective during custodial interrogation by detective do not. State v. Rice, 120 Wn.2d 549 (1993) Nov. '93:02

"SMALL ANIMAL" ORDINANCE

Seattle "small animal" ordinance withstands constitutional challenge. Ramm v. City of Seattle, 66 Wn. App. 15 (Div. I, 1992) June '93:20

TRAFFIC (Title 46 RCW)

Felony-eluder who presented no evidence of lack of awareness of pursuing officers could not argue that he was not "subjectively" reckless. State v. Sampson, 65 Wn. App. 9 (Div. I, 1992) June '93:11

DOL reminder regarding citations. July '93:04

WORKPLACE SAFETY REGULATIONS

P.B. Nicholls, SPD: "Bloodborne pathogens' protection update." Jan. '93:03

UNIFORM CONTROLLED SUBSTANCES ACT AND OTHER DRUG LAWS (Title 69 RCW)

Real property forfeiture provision of Controlled Substances Act upheld against constitutional attack. Tellevik et. al. v. Real Property Known As 31641 West Rutherford Street, Carnation, etc. et. al., 120 Wn.2d 68 (1992) and Tellevik et. al. v. 9209 218th N.E., Redmond, etc. et. al., 120 Wn.2d 68 (1992) Jan. '93:08

Officer's expert testimony re: significance of lack of drug paraphernalia in residence admissible to support UCSA intent to deliver element. State v. Sanders, 66 Wn. App. 380 (Div. I, 1992) Jan. '93:16

Drug law's enhanced penalty for drug-related crime near school bus route survives vagueness, equal protection challenges. State v. Coria, 120 Wn.2d 156 (1992) Feb. '93:05

Needle exchange program not violative of Drug Paraphernalia Act. Health District v. Brockett, 120 Wn.2d 140 (1992) Feb. '93:06

Factual impossibility in sting situation no defense to charge of attempted possession of controlled substance, RCW 69.50.407. State v. Lynn, 67 Wn. App. 339 (Div. I, 1992) Feb. '93:17

Testing of random sample of seized drug supports finding that entire quantity seized was cocaine. State v. Caldera, 66 Wn. App. 548 (Div. I, 1992) Feb. '93:20

Secured party loses security interest in vehicle if secured party ignores vehicle forfeiture notice

under RCW 69.50.505. Key Bank of Puget Sound v. City of Everett, 67 Wn. App. 914 (Div. I, 1992) March '93:19

Mere possession of 20 rocks of crack not sufficient evidence alone of "intent to deliver." State v. Brown, 68 Wn. App. 480 (Div. I, 1993) May '93:11

Charges of attempt to obtain controlled substance from doctor based on use of false name does not require proof that doctor actually relied on false name. State v. Donald, 68 Wn. App. 543 (Div. III, 1993) May '93:13

Evidence sufficient to support conviction for conspiracy to deliver controlled substance. State v. Smith, 65 Wn. App. 468 (Div. I, 1992) June '93:15

Evidence in undercover sting sufficient to support conviction for attempted possession of drugs even though undercover officers actually had no drugs; "factual impossibility" no defense to charge. State v. Roby, 67 Wn. App. 741 (Div. III, 1992) June '93:18

Trace amount of coke in baggies does not support charge of possession with intent to deliver without other evidence of delivery intentions. State v. Robbins, 68 Wn. App. 873 (Div. II, 1993) Nov. '93:12

Civil forfeiture laws subject to "excessive fines" challenge under the Eighth Amendment. Austin v. United States, 61 L.W. 4811 (1993) Dec. '93:15

WILDLIFE PROTECTION

"Innocent owner" defense of game forfeiture statute applies if owner can show either (a) no knowledge or (b) no consent; J.M.S. Farms could show neither. J.M.S. Farms v. Dept. of Wildlife, 68 Wn. App. 150 (Div. III, 1992) April '93:21

****

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) CIVIL FORFEITURE LAWS SUBJECT TO "EXCESSIVE FINES" CHALLENGE UNDER THE EIGHTH AMENDMENT -- In Austin v. United States, 61 L.W. 4811 (1993) the U.S. Supreme Court rules (unanimously as to result, though not as to the legal theory supporting it) that civil forfeiture under a Federal drug law analogous the Washington State's RCW 69.50.505 is punishment, and the forfeiture law is therefore subject to proportionality review under the Eighth Amendment's Excessive Fines Clause.

The Supreme Court gives little clue as to what forfeiture situations it would find to be excessive, choosing instead to send the case before it back to the lower court to address proportionality. This is an ominous case for those who favor forfeiture, as it could limit forfeiture severely depending on how the courts structure proportionality analysis. Result: reversal of Federal Court of Appeals ruling upholding forfeiture of Richard Austin's mobile home and auto body shop (Austin had negotiated a 2-gram cocaine sale from his autobody shop, had gone across town to his mobile home to get the cocaine and had returned to the shop with the cocaine, where he was arrested); cases remanded to the lower court to set proportionality standards and determine whether forfeiture under the circumstances of this case is "excessive."

(2) NO ABSOLUTE IMMUNITY FOR PROSECUTOR WHERE ALLEGATION THAT HE

"SHOPPED" FOR EXPERT WITNESS BEFORE PROBABLE CAUSE DEVELOPED -- In Buckley v. Fitzsimmons, 61 LW 4713 (1993) the U.S. Supreme Court rules in a close vote that a prosecutor's role prior to the development of probable cause in trying to find an expert who would help the prosecutor prove probable cause by matching-up certain physical evidence with defendant was not a quasi-judicial role but was a law enforcement administrative role. For that reason the prosecutor was not entitled to absolute immunity from a civil rights suit which claimed that the prosecutor fabricated false evidence by scouring the country shopping for an expert witness who would make the link that most other experts would not make. Instead, the prosecutor was entitled only to "qualified" immunity for his law enforcement administrative efforts, just as would be any law enforcement officer performing the same task.

Result: Court of Appeals decision that prosecutor had been engaging in quasi-judicial activity and therefore was entitled to absolute immunity reversed; case remanded to the federal district court in Illinois for trial of Buckley's civil rights suit.

(3) SENTENCE ENHANCEMENT FOR HATE CRIME UPHELD IN FREE SPEECH CHALLENGE -- In Wisconsin v. Mitchell, 61 L.W. 4575 (1993) the U.S. Supreme Court rules unanimously that a Wisconsin statute that provides penalty enhancement whenever a defendant selects a victim on the basis of the victim's race, religion, or other protected status does not punish thought in violation of First Amendment; not does the threat that the state may use a defendant's words to prove that selection of a victim was based on the victim's status chill protected speech so as to make the statute overbroad in violation of the First Amendment. Result: Wisconsin State Supreme Court decision striking down a trial court's enhanced sentence reversed; original enhanced sentence reinstated.

LED EDITOR'S CROSS-REFERENCE NOTE: See LED entry below at 19 re: Talley decision by Washington State Supreme Court on Washington's former "malicious harassment" law.

(4) ANIMAL SACRIFICE ORDINANCE AIMED BY FLORIDA CITY AT A LOCAL RELIGIOUS GROUP FAILS RELIGIOUS FREEDOM CHALLENGE -- In Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Fla., 61 L.W. 4587 (1993) the U.S. Supreme Court rules (unanimously as to result, though not as to legal theory supporting the result) that city of Hialeah, Florida municipal ordinances banning certain animal sacrifices violate the Free Exercise of Religion clause of the U.S. constitution's First Amendment. The ordinances ban: (1) unnecessary or cruel killing of animals (interpreted to exclude most non-religious killings from coverage); (2) "sacrifice" of animals (defined as "unnecessary" ritual killing not primarily for purpose of food consumption), (3) possession, sacrifice, or slaughter of animal with intent to use it for food; and (4) slaughter of animals for food outside of areas zoned for slaughterhouses. The U.S. Supreme Court holds that the ordinances are not neutral laws of general applicability but, instead, target the religious practice of animal sacrifice of the Santeria religion, as demonstrated by a pattern of narrow prohibitions and exemptions proscribing more religious conduct than necessary to protect city's asserted interests in preventing cruelty to animals and avoiding health risks associated with disposal of animals and exempting some other religious killings, while failing to address non-religious killings and disposal. The ordinances are not narrowly tailored to accomplish the city's asserted interests, and, in any event, the city has not demonstrated that its asserted interests are compelling in light of ordinances' overbreadth and underinclusiveness, which result in restriction only of conduct protected by First Amendment, while other conduct producing similar harm is left unregulated. Accordingly, the ordinances violate the First Amendment's Free Exercise Clause, the U.S. Supreme Court holds. Result: lower Federal court rulings upholding ordinances against a church challenge reversed.

(5) PRISONER ALLOWED TO PURSUE CLAIM THAT EXPOSURE TO CELLMATE'S SECOND-HAND SMOKE WAS "CRUEL AND UNUSUAL" PUNISHMENT -- In Helling v. McKinney, 61 L.W. 4648 (1993) the U.S. Supreme Court rules, 7-2, that a Nevada state prisoner who shared a cell with a 5-

pack-a-day smoker when he filed his suit may pursue a civil rights action against the state. The majority holds that prison conditions that allegedly pose risk of future, not just present, harm to a prisoner's health can be actionable under the Eighth Amendment's prohibition of cruel and unusual punishment. Therefore, the prisoner's claim that Nevada State prison officials, acting with deliberate indifference, have exposed him to levels of environmental tobacco smoke that pose unreasonable risk of serious damage to his future health, states an Eighth Amendment cause of action. Result: affirmance of Ninth Circuit Court of Appeals ruling that a lower Federal court should not have dismissed the prisoner's civil rights suit for failing to state a valid claim of constitutional deprivation; case remanded to Nevada federal district court for trial.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) PER SE CRIMES PORTION OF FORMER MALICIOUS HARASSMENT STATUTE INVALIDATED ON FREE SPEECH GROUNDS; ALL PORTIONS OF CURRENT LAW APPARENTLY WOULD PASS CONSTITUTIONAL MUSTER -- In State v. Talley, 122 Wn.2d 192 (1993) a unanimous State Supreme Court opinion upholds a portion of the former malicious harassment statute (RCW 9A.36.080) against constitutional attack, and strikes down on "free speech" grounds a portion of the former statute. The portion of the former statute which was struck down on constitutional "free speech" grounds had established as per se hate crimes such acts as "cross burning" and defacement of property with symbols such as swastikas.

LED EDITOR'S NOTE AND COMMENT: The invalidated portion of the former statute (RCW 9A.36.080(2)) was amended by chapter 127, Laws of 1993 (effective date: July 25, 1993 -- see August '93 LED:02) to correct the "free speech" problem addressed in Talley. In light of the unanimous State Supreme Court opinion in Talley and the U.S. Supreme Court opinion in Wisconsin v. Mitchell, 61 L.W. 4575 (1993) (see this LED at 18), there appears to be no "free speech" problem or any other constitutional defect in any portion of the current malicious harassment statute.

Result: King County Superior Court dismissal of charges against David K. Talley (cross-burning unaccompanied by express threats, assault or property damage) affirmed; King County Superior Court dismissal of charges against Daniel Myers and Brandon Stevens (cross-burning accompanied by property damage) reversed, cases remanded for trial or other disposition.

(2) COMMUNITY PROTECTION ACT'S PROVISIONS OF COMMITMENT OF SEX PREDATORS UPHELD -- In In re Young and In re Cunningham, 122 Wn.2d 1 (1993) the State Supreme Court rules, 6-3, that the sexually violent predator civil commitment provisions of the Community Protection Act (CPA) of 1990, as narrowly interpreted by the majority, is constitutionally valid. Among the majority's narrowing interpretations of the CPA at chapter 71.09 RCW are the following: (1) that a recent overt act must be proven by the State; (2) that a unanimous jury verdict is necessary; (3) that a probable cause hearing must be held within 72 hours of initial detention under the Act (this requirement is subject to harmless error analysis, however); and (4) that the jury must consider less restrictive alternatives to commitment.

With these narrowing constructions, the CPA is upheld against a variety of constitutional challenges. The majority's 72-page opinion holds on the constitutional issues: (1) that the Act is civil, not criminal, in nature, and therefore, constitutional self-incrimination protections do not apply; (2) the CPA is not an ex post facto law and does not violate constitutional double jeopardy prohibitions; and (3) that the CPA satisfies constitutional due process and equal protection requirements.

Result: King County Superior Court civil commitment order as to Andre Brigham Young affirmed in its sexual predator determination but remanded for consideration of less restrictive alternatives. King County Superior Court civil commitment order as to Vance Russell Cunningham reversed in its sexual predator determination, and case remanded for either (a) re-trial on new petition (if filed) or (b) release of Cunningham.

(3) STATUTE MANDATING BLOOD DRAW, DNA TESTING FOR VIOLENT OFFENDERS AND SEXUAL OFFENDERS UPHELD - In State v. Olivas, et. al., 122 Wn.2d 73 (1993) the State Supreme Court upholds RCW 43.43.754 against a multi-faceted constitutional attack which included a Fourth Amendment challenge. The statute directs the State to extract blood without a warrant to perform DNA tests on criminal defendants convicted of sex crimes or violent crimes. The Court finds no defect in the statute's failure to require that defendants be notified in advance that a consequence of a guilty plea to such categories of crimes is the extraction of blood for testing in order to create a DNA data bank. Result: affirmance of Yakima County Superior Court DNA blood test orders as to seven defendants - Joseph M. Olivas, Norman M. Skyles, Jorge V. Gallardo, Robert Ayala, Arnoldo A. Alcaraz, Alejandro L. Cruz, and Michael C. Briggs. LED EDITOR'S NOTE: a concurring opinion by justice Utter, joined by Justice Johnson, questions the majority's Fourth Amendment analysis; there is no dissenting opinion.

(4) SEXUAL MOTIVATION SENTENCE ENHANCEMENT FOR JUVENILE OFFENDERS UPHELD - In State v. Halstein, 122 Wn.2d 109 (1993), the State Supreme Court unanimously rules that RCW 13.40.135, which enhances the penalty for a juvenile offense which is sexually motivated, is not unconstitutionally vague or overbroad in violation of constitutional due process protections. Halstein's crime of burglary had been proven to be sexually motivated through proof that he had removed from the residence pictures of the resident (who he knew casually), along with condoms and a vibrator in a nightstand, and that he had left undisturbed personal property which had value. Result: King County Superior Court juvenile offense adjudication of guilt of second degree burglary with sexual motivation affirmed.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) MONITORING OF NUMBERS COMING TO LAWFULLY SEIZED PAGER WITHSTANDS STATUTORY AND CONSTITUTIONAL CHALLENGES - In State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) the Court of Appeals rejects defendant's statutory and constitutional challenges based on the fact that he came into police scrutiny after they had lawfully seized a third party drug dealer's telepager and had gotten defendant's phone number from the pager. The facts and the trial court proceedings are described by the Court of Appeals as follows:

> **On November 10, 1990, the Snohomish County Police seized a telepager pursuant to the arrest of a local cocaine dealer. For the next 6 days, the pager was left on and incoming calls were monitored. On November 16, the pager received an incoming call. A detective called the number and arranged a meeting with Wojtyna whereby a substance thought by Wojtyna to be cocaine (actually a powdered substitute) was exchanged for money.**
>
> **Wojtyna was subsequently arrested and charged with attempted possession of a controlled substance. On May 23, 1993, he brought a motion to suppress claiming the evidence was obtained in violation of Washington's privacy act (RCW 9.73). The trial court denied the motion, stating:**

> **There wasn't anything intercepted and [the pager] wasn't . . . a device. What privacy, if any, the defendant lost here was that somebody else may answer the pager just as somebody else may answer a phone. And I don't think you would have this if the police were executing a search warrant and the phone rang in the premises and they answered the phone. They're not intercepting anything. It may be a ruse to answer a pager and act like a dealer, but that's not violation of the statute.**

Wojtyna was convicted as charged.

The legal analysis of the Court of Appeals on the issues relating to: (a) the use of Wojtyna's phone number, and (b) the sufficiency of the evidence to convict him is as follows:

Constitutional Issue: The Court of Appeals rejects Wojtyna's argument that the warrantless monitoring of the pager and the documenting of his incoming number on the pager was an illegal search under the privacy clause of the Washington constitution. Wojtyna argued that the monitoring activity was similar to the warrantless obtaining of long distance telephone toll records and the use of pen registers found to violate the Washington constitution in State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED:04. However, the Court of Appeals finds a significant distinction between this case and Gunwall. The Wojtyna Court explains:

> **A pager is fundamentally different from a pen register, which is attached to a telephone line to identify the numbers a person dials. The activity condemned in Gunwall was seizure of a record of the phone numbers dialed by the defendant (either by examining telephone records or through the use of a pen register). Contrary to the seizure of a defendant's dialed numbers, the activity objected to here is the seizure of a number sent to and received by a third party which happened to be Wojtyna's. This is not a case where the State monitored every number Wojtyna dialed at the source, but rather, where his number was independently displayed and retrieved from the place to which he intended to send it.**

Privacy Act Question: Next, turning to chapter 9.73 RCW, the state statute which regulates electronic surveillance and recording, the Court of Appeals rules that the law enforcement activity here is similar to the warrantless placing of a line trap found to be lawful in State v. Riley, 121 Wn.2d 22 (1993) July '93 LED:10. As the State Supreme Court held with respect to the phone trap in Riley, the Wojtyna Court holds that the discovery of the number on the pager was not the interception of a "private communication" within the meaning of the statute.

Sufficiency Of The Evidence: Wojtyna also argued that because the substance he was trying to obtain was not actually a controlled substance, it was impossible for him to have committed the attempted possession of a controlled substance. The Court of Appeals cites State v. Lynn, 67 Wn. App. 339 (Div. I, 1992) Feb. '93 LED:17 to support its conclusion that factual impossibility is not a valid defense in this circumstance.

Result: Snohomish County Superior Court conviction for attempted possession of a controlled substance affirmed; case remanded for resentencing based on an issue not discussed here.

****

NEXT MONTH

The January 1994 LED will include, among other case entries, the November 4, 1993 decision of the Washington State Supreme Court in State v. Solberg (holding, among other things, that the unenclosed front porch of a residence is not a constitutionally protected area, and therefore, that the arrest of a resident who voluntarily stepped onto the porch to talk to the police was lawful.)

****

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 are 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.