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HONOR ROLL

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WASHINGTON STATE SUPREME COURT

OFFICER'S STATE OF MIND IRRELEVANT TO SEARCH ISSUE WHERE PRESENCE IN CURTILAGE LAWFUL; ALSO, PUD EMPLOYEE'S INFORMATION DISCLOSURE OK

State v. Maxfield, 125 Wn.2d 378 (1994)

Facts and Proceedings: (Excerpted from Supreme Court majority opinion)

> During the summer of 1991, defendant Mark Phillip Maxfield was involved in two marijuana grow operations, one in Clallam County and one in Jefferson County. His wife, defendant Pamela A. Maxfield, was involved in the operation of the marijuana grow in Jefferson County. The investigation of both marijuana grow operations began when a Clallam County Public Utility District (PUD) employee informed law enforcement that electrical power consumption at a residence in Sequim, Washington, was high.
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> On June 6, 1991, a Sequim police officer assigned to the Clallam County Drug Task Force (Drug Task Force) received a telephone call from the PUD employee. The PUD employee told the officer that power usage at 431 Atterbury Road in Sequim was high. He indicated that there were two meters at the residence, one on the house, which indicated low readings, and one on the garage, which showed high power usuage. The PUD employee told the officer that it would take some

extremely heavy equipment to have that kind of high reading and that two transformers providing service to the garage had blown and a third, heavier duty transformer had been installed.

The PUD employee indicated to the Drug Task Force officer that the records could be examined only after law enforcement filed a request for inspection.

The officer filed such a request and inspected the PUD records.

The PUD employee involved here had been employed by the PUD since 1973 and in 1991 was the PUD's treasurer-comptroller. He also was designated by the PUD as the contact person for law enforcement officers requesting records pursuant to the state public disclosure act, RCW 42.17, and in that capacity had had contact with Drug Task Force members several times with regard to other cases prior to June 6, 1991. The PUD employee had never initiated contact with the officer involved here before that date, had not been directed to call law enforcement with suspicious power readings, and had not been asked to find out about the residence at 431 Atterbury Road.

The PUD employee testified that he could not recall the specific instance involved here, but that he did not survey power company records looking for high consumption. He stated that he most likely received such information from a meter reader. When he learned of suspiciously high power consumption he might suggest the meter reader contact the Drug Task Force or he might call the Drug Task Force himself, simply to give them an address.

He also testified that during the year preceding the present case a member of the Port Angeles Police Department, who was not a member of the Drug Task Force, attended a PUD general employees' meeting to discuss the problem of illegal drug use in Clallam County. Further, the PUD employee testified that he knew the police were always interested in any information from any source regarding drugs.

The PUD employee had initiated contact with the Drug Task Force approximately six times, always on his own initiative. He had never been asked by police about a particular individual and had never been asked by police to provide any information without a written request.

The information contained in the PUD records involved here triggered an investigation that eventually implicated defendants in the marijuana grow operations.

As part of the investigation, a private investigator, who was a former police officer, was asked by the Drug Task Force to aid in the investigation of this case. The investigator testified that he went to the address at 431 Atterbury Road on June 27, 1991, to see if he could find evidence of a marijuana grow operation. He testified that he went to the house and knocked on the door. There was no answer, but he heard noises in the garage, so he walked across the driveway to the garage and then on what appeared to be a pathway to an entry door. He also knocked on that door. Again, there was no answer. During this time he smelled marijuana and looked for evidence of a marijuana growing operation. He observed mildew on the

garage entry door, an air treatment apparatus that is inconsistent with use in a garage, but consistent with use in a marijuana grow operation, and potting soil that had been dumped from potlike containers.

The evidence gathered from the PUD and at the residence, as well as additional evidence, was the basis of a search warrant that led to the discovery of a marijuana grow operation at 431 Atterbury Road and then another at defendants' residence in Port Townsend.

On July 25, 1991, in connection with the Atterbury Road marijuana grow operation, defendant Mark Maxfield was charged with manufacture of a controlled substance and possession with intent to deliver a controlled substance in Clallam County Superior Court. The following day, in connection with a marijuana grow operation at his residence in Port Townsend, he was charged in Jefferson County Superior Court with possession of a controlled substance (marijuana) with intent to manufacture or deliver. On July 30, 1991, Pamela Maxfield was charged with possession with intent to manufacture or deliver in Jefferson County Superior Court.

All parties agreed to be bound, in both the Clallam County and Jefferson County actions, by the Jefferson County Superior Court ruling on defendants' motion to suppress evidence.

Following a CrR 3.6 hearing, the trial court denied the motion to suppress evidence and entered findings of fact and conclusions of law.

Defendants were then convicted, as charged, upon stipulated facts.

[Footnote omitted]

ISSUES AND RULINGS: (1) Did the PUD employee's divulgence to the police of a customer's power consumption violate RCW 42.17.314 or the search and seizure restrictions of the federal constitution? (ANSWER: No) (2) Did the agent who visited the defendants' property violate their Fourth Amendment right to privacy where he knocked at doors at their house and garage while hoping to discover evidence of a marijuana grow? (ANSWER: No, his state of mind is irrelevant and his presence in these areas of the curtilage open to the pubic was lawful). Result: Jefferson County Superior Court UCSA convictions of Mark and Pamela Maxfield affirmed; Clallam County Superior Court UCSA convictions of Mark Maxfield affirmed.

ANALYSIS:

PUD EMPLOYEE DISCLOSURE ISSUES

RCW 42.17.314 provides:

> A law enforcement authority may not request inspection or copying of records of any person, which belong to a public utility district or a municipally owned electrical utility, unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and

> the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this rule is inadmissible in any criminal proceeding.

The majority opinion begins its analysis by noting that information obtained by police in violation of this statute may not be used to obtain a warrant. The Court goes on, however, to declare that this statute does not prohibit public utility company employees from initiating contact themselves and then voluntarily providing customer power consumption information to the police. That is what happened here, the majority rules. Moreover, the majority also rules that the fact that the police had previously made a general request that PUD employees provide information about suspicious activity did not violate the statute.

Defendants had also tried to raise a state constitutional privacy challenge to the admissibility of the power consumption records, but they failed to properly frame that argument, so the Court leaves this question to a future case. Finally in regard to the PUD records, the Court rejects the defendants' Fourth Amendment challenge to the use of the PUD records, ruling that there was no "reasonable expectation of privacy" in these records within the meaning of the Federal cases.

(2) CURTILAGE ISSUE

The Court's analysis on the issue of whether the agent who visited the residence violated the Fourth Amendment privacy rights of the defendants is as follows:

> It is well settled that when a law enforcement officer or agent is able to detect something by the use of one or more of his senses while lawfully present at the place where those senses are used, that detection does not constitute a search within the meaning of the Fourth Amendment. The protection of the Fourth Amendment extends to individuals in their "persons, houses, papers, and effects", but that protection is limited to the curtilage. Curtilage is the land immediately surrounding and associated with the home -- that area associated with the intimate activity of a home and the privacies of life.
>
> > It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonable respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.
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> State v. Seagull, 95 Wn.2d 898 (1981). **[Nov. '81 LED:02]**
>
> If a law enforcement officer or agent does not go beyond the area of the residence that is impliedly open to the public, such as the driveway, the walkway, or an access route leading to the residence, no privacy interest is invaded. Whether the intrusion into an area has substantially and unreasonably exceeded the scope of an implied invitation depends on the facts and circumstances of the particular case.

> The fact that the investigator was there attempting to find evidence of a marijuana grow does not change the rule set forth in Seagull. [COURT'S FOOTNOTE: State v. Petty, 48 Wn. App. 615 (1987) **[Nov. '87 LED:04]** (an officer's underlying intent or motivation is irrelevant to the judicial inquiry into the lawfulness of the officer's conduct).]
>
> In Seagull, this court recently held that an officer who walked through the yard of a residence from one entrance to another did not intrude upon a constitutionally protected area. In that case the officer did not take the most direct route between the two entrances but, instead, walked down the middle of an open area.
>
> Similarly the investigator involved in the present case testified that he stayed on the pathway, the driveway or the immediate access routes to the house and garage at all times. Defendants' argument that the investigator intruded upon private areas that were not impliedly open to the public is not supported by the record in this case.

[Some footnotes and citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **REAL PROPERTY FORFEITURE PROVISIONS OF RCW 69.50.505 REQUIRE FULL ADVERSARIAL HEARING "WITHIN 90 DAYS" --** In Tellevik et. al. v. Real Property Known As 31641 West Rutherford Street et. al., 125 Wn.2d 364 (1994) (Tellevik II) the State Supreme Court rules by a 6-3 majority that the real property forfeiture provisions of the Uniform Controlled Substances Act at RCW 69.50.505 require that a full adversarial hearing must be provided "within 90 days" of some triggering event, but the Court leaves some question remaining regarding what constitutes the triggering event for the Court's 90-day rule.

In an earlier decision in the same case, the State Supreme Court had declared that a "seizure" of real property is deemed to occur under RCW 69.50.505 at the point that the seizing government agency files papers (including a "lis pendens") recording the government's assertion of a right to forfeiture of real property. (See Tellevik I at 120 Wn.2d 68 (1992) **Jan. '93 LED:08**.) In Tellevik I, the Court stated that the initial "seizure" does not require a hearing, but that if the seizure is subsequently challenged by a claimant to the real property, a hearing must be held "within 90 days." However, the Court in Tellevik I did not say exactly of what event the hearing was to be "within 90 days." Tellevik II addresses the question of what constitutes the triggering event, but does not appear to provide any clarification on this question for the ordinary real property forfeiture case. Under the special facts of Tellevik II, where the case had been sent back to the lower courts after the Supreme Court's decision on a constitutional issue raised in Tellevik I, the Court holds that the triggering event for the 90-day rule was the date that the Supreme Court order of "mandate" was issued in Tellevik I. Because no hearing had been held within 90 days of the mandate that sent the case back to the lower court, the forfeiture proceedings must be dismissed, the Tellevik II majority holds.

As noted, however, both Tellevik I and Tellevik II leave open the question of what constitutes the triggering event for the 90-day rule in the ordinary forfeiture scenario. Is it: (a) The date of

"seizure" (i.e., filing of lis pendens)? or (b) The later date when a claim is filed by a person asserting an interest in the seized property? or (c) The date that a claimant requests a hearing? or (d) Some other date? While there is some suggestion in Tellevik I and Tellevik II that the date of seizure triggers the 90-day rule, this can yield absurd results. Under that view, a claimant could wait until the 90th day after seizure, and then file a claim and ask that forfeiture proceedings be dismissed immediately, because no adversarial proceedings had been held within 90 days of seizure. It seems likely that the Court will eventually rule that it is not the date of seizure, but instead is the date of claim-filing or some subsequent event, that starts the running of the 90-day period. **LED EDITOR'S NOTE: As always, we urge law enforcement agencies and officers to consult their legal advisors for their interpretations of this and other thorny issues of law.**

Result: affirmance of King County Superior Court order dismissing the State's real property forfeiture complaints.

(2) **UNDERCOVER AGENT IS NOT ANOTHER PERSON FOR PURPOSES OF CONSPIRACY STATUTE'S AGREEMENT ELEMENT --** In State v. Pacheco, 125 Wn.2d 150 (1994) the State Supreme Court rules 5-4 that the Court of Appeals ruled erroneously in upholding Herbert Pacheco's conspiracy convictions. Pacheco was a deputy sheriff who agreed with an undercover police agent to commit the crimes of murder and delivery of a controlled substance. Pacheco was convicted in superior court on these two conspiracy counts (as well as on a non-conspiracy controlled substances attempted delivery count), and the Court of Appeals subsequently upheld the convictions on all counts. See 70 Wn. App. 27 (Div. II, 1993 **March '94 LED:11**. On appeal to the State Supreme Court, Pacheco argued successfully that the agreement element of the conspiracy statute (RCW 9A.28.040) requires a genuine agreement. The majority holds that this requirement was not met in Pacheco where the agreement was solely with an undercover agent, even if the defendant unwittingly believed at the time that he was agreeing with a non-law enforcement person to the commission of the criminal act. The majority characterizes its interpretation of the agreement element of the statute as a "genuine" or "bilateral" agreement requirement, as opposed to a "unilateral" agreement requirement.

Result: Clark County Superior Court convictions for conspiracy to murder and conspiracy to deliver a controlled substance reversed; convictions for attempted delivery of a controlled substance (two counts) affirmed.

(3) **INTENT TO ASSAULT ONE PERSON CONSTITUTES INTENT TO ASSAULT ALL PERSONS AFFECTED UNDER RCW 9A.36.011; COURT OF APPEALS' RESTRICTIVE "TRANSFERRED INTENT" RULING IS REVERSED --** In State v. Wilson, 125 Wn.2d 212 (1994) a unanimous State Supreme Court reverses a Court of Appeals decision (see 71 Wn. App. 880 -- **May '94 LED:14**) and reinstates two first degree assault convictions of Mark S. Wilson.

Wilson had fired several bullets from a firearm into a tavern after being "86-d." He had missed his two intended victims and had hit two unintended victims. He was prosecuted and convicted on four counts of first degree assault (two counts for the attempt to shoot the two intended victims and two counts for the two unintended victims actually hit). The Court of Appeals had reversed Wilson's convictions as to the two unintended victims, reasoning that those convictions were based on a "transferred intent" theory which the law doesn't support when: (1) the same assaultive acts result in injury to unintended victims, and (2) those acts result in assault convictions. See **May '94 LED:14**.

The State Supreme Court disagrees with the Court of Appeals, concluding that the literal language of the first degree assault statute -- RCW 9A.36.011 -- allows prosecution for all four counts of assault without reliance on a "transferred intent" theory. The Court explains:

> The Court of Appeals vacated the two assault in the first degree convictions committed against the two unintended victims, Hensley and Hurles. The Court of Appeals concluded the doctrine of transferred intent does not apply under RCW 9A.36.011 if a defendant successfully assaults his or her intended victim or victims.
>
> > There is no reason justifying use of the legal fiction known as transferred intent to prove that Wilson assaulted Hurles and Hensley in the first degree. The State tried, convicted, and sentenced Wilson for offenses against his intended victims, the seriousness of which was consistent with his state of mind. It was error for the trial court to allow proof of Wilson's intent to inflict great bodily harm against Jones and Judd to support charges of assault in the first degree against Jones and Judd and against Hurles and Hensley.
>
> We hold the doctrine of transferred intent is unnecessary to convict Wilson of assaulting Hensley and Hurles in the first degree. Under a literal interpretation of RCW 9A.36.011, once the mens rea is established, RCW 9A.36.011, not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement. The decision of the Court of Appeals vacating the two convictions of assault in the first degree against Hensley and Hurles is reversed.

[Citation omitted]

Result: relying on special sentencing provisions for "serious violent" offenses at RCW 9.94A.400(1)(b), the Supreme Court also reverses a trial court ruling that Wilson's sentences for two of the counts were to be served concurrently with the other two counts; case remanded to Kitsap County Superior Court for imposition of consecutive sentences for four first degree assaults.

(4) **DNA EVIDENCE CREATED BY PCR TECHNIQUE HELD GENERALLY ADMISSIBLE; MIRANDA EXCLUSIONARY RULE GETS PRO-STATE READING** -- In State v. Russell, 125 Wn.2d 24 (1994) the Washington State Supreme Court holds in a 5-4 decision that forensic evidence obtained through the polymerase chain reaction amplification (PCR) technique is generally accepted in the scientific community. Therefore, under the Washington test for admission of testimony about novel scientific techniques based on Frye v. U.S., 293 F. 1013 (CA DC 1923) (known as the "Frye Test"), the testimony in this case about DNA evidence was admissible, the majority holds. Two dissenting opinions were filed, one arguing that there is insufficient agreement in the scientific community about PCR evidence to meet the Frye test, and the other dissent arguing that the majority has construed the Frye test too liberally.

On another issue, among many in this complicated case, the Court holds that the fruit (physical

evidence) of a Miranda violation (failure to adequately advise the defendant of his rights during interrogation) need not be suppressed. The Federal constitutional rule is that if a custodial statement is otherwise voluntarily given, the fact of a technical Miranda violation does not require suppression of physical evidence which was the fruit of the un-Mirandized statement. The Supreme Court fully considers and rejects defendant's argument that an "independent grounds" reading of the Washington constitution requires a different result.

Result: King County Superior Court convictions of aggravated first degree murder (two counts) and first degree murder (one count) of George Russell affirmed.

(5) **CHALLENGE TO SEATTLE'S HOUSING INSPECTION PROGRAM RAISES CONSENT SEARCH, ADMINISTRATIVE SEARCH WARRANT ISSUES** -- In Seattle v. McReady, 124 Wn.2d 300 (1994) constitutional issues are addressed relating to the City of Seattle's residential housing inspection program. After enacting an ordinance creating the program, the City filed a declaratory judgment action asking the trial court to validate the program. Apartment building owners counterclaimed for damages resulting from four inspections, three of which were conducted with the consent of the tenants and one of which was based on an administrative warrant issued by the Seattle Municipal Court. The trial court: (i) entered a declaratory judgment upholding the program, (ii) issued four additional inspection warrants, (iii) and dismissed the counterclaim for summary judgment.

On appeal, the State Supreme Court at 123 Wn.2d 260 [See **May '94 LED:03**] reversed the trial court rejecting, on state constitutional grounds, Seattle Municipal Court inspection warrants issued on less than probable cause. A second opinion has now been issued by the State Supreme Court in order to address inspection warrants issued by the Seattle Municipal Court based on probable cause.

(1) Consent Search

The State Supreme Court holds under the Fourth Amendment and under the State Constitution (article 1, section 7) that tenants have authority to consent to governmental searches of both: (1) their individual apartments, and (2) the common areas of their apartment complexes. The apartment owners had argued that, as owners of the property in question, their consent was a necessary prerequisite to a consent search of either category of area.

Tenants generally have authority to consent to searches of either area to the detriment of, and without regard to the wishes of, their landlords, the Court holds. The Court does imply, however, that as to common areas (e.g., hallways, laundry rooms, etc.) if the landlord is present when consent is requested, then under the common-authority-mutual-consent-rule of State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03, the landlord's consent must also be requested. The Leach mutual-consent rule would presumably have no applicability where the consent is to search the tenant's individual apartment, because, during the time that the tenancy is in place, the tenant has the superior privacy interest in the personal living area, and the landlord's wishes generally could not override those of the tenant. (Note also that the State Supreme Court held in State v. Cantrell, 124 Wn.2d 183 (1994) **Sept. '94 LED:05** that common-authority-mutual-consent-rule of Leach does not apply to vehicle searches.)

(2) Municipal Court Authority

As to the inspection search which was based on a municipal court judge's administrative inspection warrant, the Court holds that the warrant was invalid due to lack of subject matter jurisdiction of the Seattle Municipal Court. Unlike a superior court, a municipal court lacks subject matter jurisdiction under the state constitution to issue an administrative inspection warrant based on probable cause to believe that a civil infraction (as opposed to a crime) has been committed.

Result: King County Superior Court ruling affirmed in part (relating to consent search issues) and reversed in part (relating to subject matter jurisdiction/administrative warrant issue).

(6) **CORONER'S INQUEST STATUTE AND IMPLEMENTING KING COUNTY ORDER UPHELD --** In Carrick v. Locke, 125 Wn.2d 129 (1994) the State Supreme Court rules unanimously that: (1) the statute on coroner's inquests (chapter 36.24 RCW) does not violate the "separation of powers" doctrine, and (2) that the King County executive order implementing the statute is lawful. Result: King County Superior Court preliminary injunction against inquest is dissolved and case is remanded to King County District Court to conduct inquest.

(7) **RESTITUTION MUST BE ORDERED BY COURT WITHIN 60 DAYS OF SENTENCING --** In State v. Krall, 125 Wn.2d 146 (1994) the State Supreme Court holds that under RCW 9A.94A.142(1), a trial court may not order restitution more than 60 days after the sentencing hearing in a criminal case. Result: King County Superior Court restitution order reversed because it was not entered within 60 days of sentencing.

(8) **FIREARMS LAW'S RESTRICTIONS ON ALIENS SURVIVES CONSTITUTIONAL ATTACK, THOUGH QUESTIONS REMAIN --** In State v. Hernandez-Mercado, 124 Wn.2d 368 (1994) the State Supreme Court rejects attacks on the validity of former RCW 9.41.170 by an alien who had pleaded guilty of being a noncitizen in possession of a firearm without a license. Defendant's attack on the state statutory restriction on unlicensed aliens possessing firearms was based on: (1) federal statutory "preemption" (a challenge which the Court easily rejects), and (2) federal constitutional equal protection requirements (a challenge which the Court has more difficulty with). The Court leaves room for a future challenge on equal protection grounds. Note, however, that RCW 9.41.170 was amended in 1994 (see chapter 190, Laws of 1994). The provision in former RCW 9.41.170 which most troubles the Court in Hernandez-Mercado (the provision which exempts from the special licensing requirement those who have declared their intent to become U.S. citizens) was deleted by the 1994 legislation, so the amended statute appears likely to withstand a future equal protection challenge. Result: affirmance of decisions of lower courts (Okanogan County District and Superior Courts) denying defendant's motion to vacate his conviction under former RCW 9.41.170.

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WASHINGTON STATE COURT OF APPEALS

TERRY/SUMMERS QUESTION, K9-BASED PC ISSUE ADDRESSED -- STATE PREVAILS

State v. Flores-Moreno, 72 Wn. App. 733 (Div. II, 1994)

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

On September 20, 1990, officers of the Tacoma Police Department asked the Pierce County Superior Court to issue a search warrant for drugs thought to be located in a residence at 645 Bavarian Lane, Lacey, Washington. In part, they based their request on information from a person named Lynda Neville. Their affidavit amply established Neville's reliability. It also established that Neville had described the occupant of the residence as a Mexican male, 5 feet 9 inches in height, named Arturo or Tico, and that Arturo or Tico had been delivering drugs at the residence on various occasions within the preceding 10 days.

After the court issued the warrant, the officers drove to Lacey to serve it. They were accompanied by members of the Thurston County Narcotics Task Force, including Lieutenant John Suessman. They were also accompanied by Keila, a trained, certified, drug-sniffing dog.

The officers arrived at the residence at about 5:45 p.m. Those approaching the front saw the defendant, Flores-Moreno, close the trunk of a Grand Prix automobile and approach the driver's door as if to get in. The automobile was parked in the driveway of the residence, and Flores-Moreno matched the general description of "Artuiro or Tico". He was detained while the officers searched the house. Because he could not speak English, he could not communicate who he was or why he was there.

As some of the officers were dealing with Flores-Moreno, Suessman saw three people moving toward the back of the house. He quickly intercepted them, with gun drawn. He later testified that one of the three "immediately threw his hands up in the air and shouted to me, 'I'm a police officer.' Once I inspected his credentials, he was, indeed, a Seattle police officer".

After Suessman put his gun away, he learned that the three men were undercover officers who had begun a drug transaction with Flores-Moreno earlier that day. In Seattle, they had given him money with which he agreed to purchase cocaine and black tar heroin. They then had followed him to the residence at 645 Bavarian where, a moment before the Tacoma police arrived, they had watched him put what they believed were narcotics into the trunk of the Grand Prix.

Within a few minutes after Suessman accosted the Seattle officers, he and they returned to the front of the residence and asked that Keila's handler have her sniff the trunk of the car. Keila indicated a positive reaction for the presence of narcotics in the trunk and on the door handle of the maroon Grand Prix.

The officers then telephoned a judge of the Thurston County District Court and requested a search warrant for the Grand Prix. The warrant issued, and the ensuing search of the car revealed a "piece" of black tar heroin. According to findings made later by the trial court, this "piece" "was equivalent to 400 units or 'matchheads', each containing two to three personal dosages. . .". It was a sufficient quantity to support the average heroin addict for well over a year", with a street value of approximately $10,000.

On September 24, Flores-Moreno was charged with one count of unlawful possession of heroin with intent to distribute. Before trial, he filed a motion to

suppress, which the trial court denied.

Trial commenced on January 10, 1991, and Flores-Moreno testified. He claimed that after borrowing the Grand Prix from a friend in Seattle, he had driven to the residence in Lacey to find his brother. He denied both drug trafficking and drug possession.

At the end of the evidence, the trial court instructed the jury on both possession with intent to deliver and simple possession. The jury found the defendant not guilty of possession with intent to deliver, but guilty of possession.

[Footnotes omitted]

ISSUES AND RULINGS: (1) Was Flores-Moreno lawfully detained at the outset based on reasonable suspicion? (ANSWER: Yes); (2) Did the officers lawfully seize the car based on probable cause following the K-9 sniff? (ANSWER: Yes, because they had probable cause to search the car and held it for only a reasonable period of time while the warrant was sought). Result: Thurston County Superior Court controlled substances possession conviction affirmed, exceptional sentence (not discussed here) modified by striking requirement of submission to polygraph examination while on community placement.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) INITIAL DETENTION

The defendant was lawfully detained at the outset. Under Terry v. Ohio, 392 U.S. 1 (1968), an officer is entitled "to briefly detain, for limited questioning, a person whom he reasonably suspects of criminal activity . . .". Under Michigan v. Summers, 452 U.S. 692 (1981)**[Sept. '81 LED:01]**, a valid warrant to search for drugs "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted", even if the occupant is initially found outside the home.

Here, Terry is satisfied because information provide by Neville gave the police an articulable suspicion of criminal activity on the part of a person who met the defendant's description. Additionally, Summers is satisfied because the police immediately had adequate reason to believe that Flores-Moreno was the occupant of the residence for which they had a warrant. Under either rule, the police had the right to detain Flores-Moreno initially.

Under Terry, and we assume under Summers, detention must be brief, and not in excess of a reasonable time. Here, only a few minutes elapsed from when Flores-Moreno was first detained until the dog reacted to drugs in the car. The trial court found that detention during that time was reasonable, and we agree.

(2) LAWFUL SEIZURE OF CAR

In State v. Huff, 64 Wn. App. 641 (1992), we held "that when an officer has probable cause to believe that a car contains contraband or evidence of a crime,

he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search." Thus, the questions here are whether and when the police had probable cause to search the car, and whether they detained it for more than a reasonable time in order to secure a warrant.

The police had probable cause to search the car after the dog gave a positive reaction for drugs. When the Tacoma officers first drove up, they saw Flores-Moreno close the trunk of the Grand Prix and approach the driver's door as if to get in. Within a few minutes, the Seattle officers related that they had watched Flores-Moreno conduct a drug deal in Seattle; that they had followed him to Lacey; that the drug deal called for him to return to Seattle with drugs; and that they had seen Flores-Moreno put something in the trunk of the Grand Prix just before the Tacoma officers drove up. Coupled with the Tacoma officers' observations and the drug dog's positive reaction to the car, these observations were such that a person of reasonable caution would have believed that the car contained drugs, and the police had probable cause to search as of that time.

Flores-Moreno claims that the dog's positive reaction cannot contribute to probable cause because the record inadequately demonstrates the dog's training and certification. Probable cause to search can be established by the positive reaction of a drug sniffing dog whose reliability has been shown. Here, the telephonic affidavit supporting the search warrant stated that Keila had received 525 hours of training, had been certified by the Washington State Police Canine Association as a Certified Narcotics Detection Canine, and had participated in 97 searches in which narcotics were found. These qualifications show reliability for purposes of probable cause, and Flores-Moreno's claim is not well taken.

The police did not detain the car for more than a reasonable time. They detained it about 45 minutes after they acquired probable cause to search, and about 50 minutes overall. Both periods were reasonable under the circumstances.

[Some citations omitted]

FACT THAT DRUGS WERE DISCOVERED AT SEATTLE POST OFFICE EN ROUTE TO ALASKA ADDRESS IS NOT PROBABLE CAUSE TO SEARCH ADDRESSEE'S WINLOCK RESIDENCE

State v. Dalton, 73 Wn. App. 132 (Div. II, 1994)

Facts and Proceedings:

On October 31, 1990 a police agency received an anonymous phone call that Tim Dalton was selling "speed" in a certain area in Washington. The caller gave Dalton's phone number and noted Dalton had an associate in Alaska. About four months later, another police agency received another anonymous phone call. This call gave Dalton's Winlock, Washington address and phone number, and stated that on February 14 or 15, 1991, Dalton would be transporting 16 pounds of marijuana to Alaska via Alaska Airlines.

After an investigation corroborated only innocent aspects of Dalton's Alaska connections, police learned that the U.S. Post Office in Seattle had received a package addressed to Dalton's post

office box in Alaska. The package's return address was not Dalton's. A postal inspector obtained a federal warrant to search the package and confiscated 8 pounds of marijuana found in the package.

Shortly after the successful package search by the postal inspector based on these basic facts, a Washington police officer sought a warrant to search Dalton's "residence, vehicles, garage and/or any unattached buildings" for evidence connecting Dalton to "delivery of marijuana". The ensuing search yielded marijuana plants, drug paraphernalia and drug records in Dalton's residence, garage and an outbuilding; in addition, several pounds of marijuana were found in a car on the property.

Dalton was charged with the unlawful manufacture of marijuana. He unsuccessfully moved to suppress the evidence seized under the warrant and was convicted on stipulated facts.

ISSUE AND RULING: Did the facts: (1) that the package addressed to Dalton's Alaska P.O. Box contained marijuana, (2) that two anonymous informants reported Dalton as a drug dealer, and (3) that police corroborated some innocuous details in the anonymous reports, establish probable cause to search Dalton's residence, outbuilding, garage and vehicle? (ANSWER: No) Result: Lewis County Superior Court conviction for unlawfully manufacturing a controlled substance reversed.

ANALYSIS:

After discussing the definition of probable cause and several Washington cases interpreting that definition (including State v. Gross, 57 Wn. App. 549 (Div. I, 1990) **Aug. '90 LED:13** -- where evidence of drug-dealing was held to establish PC to search residence based on the totality of the circumstances -- and State v. Rangitsch, 40 Wn. App. 771 (Div. I, 1985) **Oct. '85 LED: 19** -- where mere evidence of possession of illegal drugs on the street was held not to be PC to search residence), the Court of Appeals explains why it does not believe there was probable cause to search Dalton's residence, outbuilding, garage, and vehicles:

> [T]here is nothing in the affidavit, other than the unconfirmed statements of the unidentified informants, to indicate that Dalton was selling or delivering controlled substances to others. The most that can be said is that a package of marijuana bearing a return address of "Dan Wilson, Federal Way" was addressed to Dalton's post office box in Alaska, and that three unidentified informants indicated that Dalton was involved in distributing controlled substances. The latter information is of almost no value, because, except for innocuous details, there was no corroboration of these informants' tips. Indeed, all investigation following receipt of the anonymous tips (i.e., the flyover of Dalton's residence and the search of his luggage at SeaTac Airport) disclosed no incriminating evidence. Furthermore, none of the information provided to the magistrate tied Dalton's home to controlled substances. This is unlike Gross, where a letter was found in the package of controlled substances, indicating that the dealer thought his phone was tapped and that he wanted payment in check. It was reasonable for the court in Gross to infer from this letter, as it did, that Gross "was referring to his home phone" and that the check would presumably be sent through the mail because "[m]ail is one of those items that people normally receive and keep at their places of residence."

Here, though, there was no evidence from which an inference could be made that drugs could be found at Dalton's home. As previously noted, an aerial surveillance of Dalton's property and a search of his luggage on February 27, 1991, revealed nothing. Furthermore, the return address on the package indicated that another person, who lived in Federal Way, had sent the marijuana to Alaska, not Dalton. While one could reasonably infer that Dalton might be the recipient of the marijuana in Alaska, it does not follow that he was dealing drugs, particularly from his home in Winlock.

In short, the information provided to the magistrate was insufficient to support a conclusion that Dalton was probably engaged in ongoing drug trafficking or that criminal activity was or had occurred at or around Dalton's residence. While he may have been about to possess drugs in Alaska, "[p]robable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home." **[LED EDITOR'S NOTE: Here the Court cites the Rangitsch case. See Oct. '85 LED:19]** A generous view of the information provided to the magistrate creates much suspicion about Dalton. It was, however, insufficient to justify issuance of a search warrant for Dalton's house. We reach the same conclusion as to the search of the outbuilding, garage, and the automobile located on or around his residence. Consequently, the trial court erred in not suppressing the evidence seized pursuant to the warrant.

[Citations and footnotes omitted]

"MERE PRESENCE" INSUFFICIENT TO SUPPORT "JOYRIDING" ACCOMPLICE LIABILITY

State v. Luna, 71 Wn. App. 755 (Div. III, 1993)

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

During the late evening of October 15 and early morning of October 16, 1991, a group of juveniles was engaged in vehicle prowling. The group included Mr. Luna, Chris Lauriton, Darrick Brown, Ronald Brasher, and perhaps others. They began the evening in a white 1986 Camaro driven by Mr. Lauriton. At one point, Mr. Lauriton stopped the Camaro, exited, and walked away. The other occupants of the car, including Mr. Luna, got out of the Camaro, but stood near the car.

Suddenly, a red pickup truck sped past the group, Mr. Lauriton at the wheel. The other boys jumped back into the Camaro, Mr. Luna driving, and followed the truck onto the freeway, where it eventually pulled over onto the shoulder. Mr. Lauriton got out of the truck and back behind the wheel of the Camaro. Mr. Brown then took Mr. Lauriton's place in the truck, and Mr. Luna sat in the back seat of the Camaro. Mr. Brown drove the truck recklessly, causing substantial damage to it, and eventually abandoned it in an alley near an apartment complex.

Shelly Marquis was at the apartment complex near where the truck was abandoned. She saw the red pickup truck in the alley and noticed three men, one of whom she later identified as Mr. Luna, walking toward the truck. Believing the group looked suspicious, Ms. Marquis called for her brother, who yelled at the

group. The three men fled, entered another pickup truck and drove away.

There is no dispute that the red pickup truck, owned by Thomas Vinion, was stolen by Mr. Lauriton, nor that Mr. Brown drove the truck knowing it was stolen. On the other hand, there is no evidence that Mr. Luna knew of Mr. Lauriton's intentions before he took the truck, nor that he knew of Mr. Brown's intention to drive it when they stopped on the freeway. Mr. Luna admitted that he knew the truck was stolen when he followed it in the Camaro, and that he drove the Camaro in a race with the truck, during which the truck was damaged.

At the close of the evidence, the court made oral findings and a decision, concluding that Mr. Luna was guilty beyond a reasonable doubt of being an accomplice to taking the truck.

ISSUE AND RULING: Was the evidence sufficient to support the juvenile court determination that Luna was guilty of taking a motor vehicle without permission -- i.e., joyriding? (ANSWER: No.) Result: Spokane County Juvenile Court order adjudicating Luna under RCW 9A.56.070 reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In this case, there is no dispute that Mr. Vinion's truck was taken without permission. There is likewise no dispute that Mr. Luna did not personally take the truck, drive it or ride in it. Thus, his liability for the crime depends solely upon whether he was an accomplice.

The crime of taking a motor vehicle without permission can be committed either by intentionally driving the vehicle away, or by voluntarily riding in the vehicle with knowledge that it was unlawfully taken. RCW 9A.56.070(1). Thus, both Mr. Lauriton and Mr. Brown are guilty, under the evidence, as principals to that crime. Mr. Luna may be guilty as an accomplice if the State's evidence establishes the requisite elements of accomplice liability as to either Mr. Lauriton's crime or Mr. Brown's.

The essential elements of accomplice liability are set forth as follows:

> (3) A person is an accomplice of another person in the commission of a crime if:
> (A) With *knowledge* that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it;

[Court's emphasis.] RCW 9A.08.020(3).

A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to make succeed. Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.

> The State's evidence is insufficient to prove that Mr. Luna possessed the mental state required of an accomplice. While Mr. Luna knew, after the fact, that Mr. Lauriton took the truck without permission, there is no evidence that he knew of, or even suspected, Mr. Lauriton's intent before the theft occurred. Neither can it rationally be concluded under the evidence that Mr. Luna, by following the stolen truck in the Camaro, promoted or facilitated the theft, or aided Mr. Lauriton in stealing the truck. Mr. Luna did not, by driving away in the Camaro, seek to make the theft succeed, since it had already occurred and he was unaware of Mr. Lauriton's plans after that point.
>
> While a person may be an accomplice if his conduct aids another in planning or committing the crime, the aid must be rendered with knowledge that it will promote or facilitate the crime. There is no evidence Mr. Luna had such knowledge. It is true that he transported Mr. Brown to the point on the freeway where Mr. Brown committed the crime; however, there is no evidence, direct or circumstantial, to suggest that Mr. Luna knew that Mr. Lauriton was going to stop the stolen truck, or that Mr. Brown was going to take over driving it. Therefore, Mr. Luna cannot have known that he was aiding in that crime by driving Mr. Brown to the place where it occurred.

[Some citations omitted]

EMERGENCY JUSTIFIES WARRANTLESS ENTRY IN DV CIRCUMSTANCES

State v. Menz, 75 Wn. App. 351 (Div. II, 1994)

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

> On January 23, 1992, at 5:30 p.m., an anonymous caller called the Hoquiam police to report domestic violence in progress at 2639 Sumner. Although unsure, the caller thought the participants were named Debbie and Dale, and that a 10-year-old child lived with them. The caller was unsure about the presence of weapons. 2639 Sumner was the address of Dale Menz.
>
> When three officers responded, they found that the front door to the residence was standing open 5 or 6 inches. The officers could not see into the home, but they could hear a television playing inside. No vehicles were in the driveway, and the household lights were on.
>
> The officers knocked and announced their presence two or three times. They received no response. Concerned about the home's occupants, they entered and began searching areas large enough to hold a person in hiding, or a person incapable of responding. [COURT'S FOOTNOTE: An officer who was on the scene explained that, in his experience, domestic violence victims sometimes hide from police because they are ashamed to expose their injuries, or because they have been threatened with violence.] When they entered a bedroom, they discovered marijuana plants. They subsequently obtained a search warrant, returned, and seized the plants.

> The State charged Menz with manufacturing marijuana. Menz moved to suppress the marijuana on grounds that the search of his home had been illegal. The trial court denied the motion, holding that the police had been justified in entering and searching for injured people. Menz was found guilty and sentenced to 60 days in jail.

ISSUE AND RULING: Was the warrantless entry lawful under the exigent circumstances exception to the constitutional search warrant requirement? (ANSWER: Yes) Result: Grays Harbor County Superior Court conviction for manufacturing controlled substances affirmed.

ANALYSIS:

The Court of Appeals begins its analysis by explaining that there are three elements to the proof of emergency circumstances justifying a warrantless entry of private premises:

> (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

The Court then explains why it believes that the facts of this case satisfied the "emergency" exception to the warrant requirement:

> The first requirement is satisfied here. The officers testified that they subjectively believed someone in the home might need help. The judge accepted their testimony, finding "[t]hat the officers' entry was designed solely to determine if anyone might be present within the residence who was injured and unable to respond due to those injuries, or refusing to respond out of fear."
>
> The second and third requirements are also satisfied. The officers were responding to a report of domestic violence. It was a winter night. The front door was open, the lights were on, and the TV was playing, but they could raise no answer from anyone inside. Even though the initial report was anonymous, a reasonable person facing this combination of circumstances would have thought that someone inside needed assistance, and the officers were within the emergency exception when they entered.
>
> We recognize that two important policies are competing in this case. The first is to allow the police to assist those who are injured and need assistance; as stated in State v. Raines, 55 Wn. App. 459, 778 P.2d 538 (1989) **[Jan. '90 LED:10]**, "[p]olice officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a home. The other policy is to protect citizens against warrantless searches not based on probable cause. Resolution of this competition turns on the facts and circumstances of each case, and in our view the facts of this case fall on the side of allowing the police to help those who need assistance.
>
> Menz asserts that this holding will lead to the police intruding into private homes based on unreliable anonymous tips. However, we disagree. If police reacting to

an anonymous tip of domestic violence find normal circumstances -- for example, the house is dark, the front door is closed, no occupant responds to knocking -- the tip is not corroborated and entry is not permitted. On the other hand, if the police find abnormal circumstances -- for example, the front door is open on a winter night, lights are on, a TV is playing, yet no one answers the door -- the tip is corroborated and entry is permitted. In neither case are the police allowed to enter solely by virtue of an unreliable anonymous tip.

We distinguish **[State v. Swenson, 59 Wn. App. 586 (Div. I, 1990) Feb. '90 LED:16]** on its facts. The only peculiar circumstance in that case was that the front door was open at 2:30 a.m. There was no indication that anyone was home, no indication that anyone was being hurt, and no indication that a crime was taking place. In contrast, the police in this case were told that domestic violence was occurring. They had reason to believe people were home because the front door was open on a winter night, the lights were on, and the TV was playing. Yet they could not get anyone to answer the front door. As we have already explained, these circumstances generated a reasonable concern for the well-being of the home's occupants, even though the circumstances in Swenson did not.

Lastly, Menz contends the police exceeded the scope of a permissible search when they entered the closed bedroom. Again, we disagree. Given that the police could legally search for a victim of domestic violence, the scope of the search included bedrooms and areas where a victim could be.

LED EDITOR'S NOTES: In addition to the case of State v. Raines cited in the above-quoted text of the Court's opinion, two other Washington cases upholding warrantless entries in domestic violence response situations previously reported in the LED are: State v. Lynd, 54 Wn. App. 18 (Div. I, 1989) Nov. '89 LED:07; and State v. Yoder, 55 Wn. App. 632 (Div. II, 1989) Jan. '90 LED:19.

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"ADMINISTRATIVE PER SE" LICENSE REVOCATION FOR DUI -- UPDATE

LED EDITOR'S INTRODUCTORY NOTE:

The following update was authored by Heather Hamilton, Administrator of the Driver Hearings Section, Department of Licensing (DOL). If law enforcement personnel have any questions, Mrs. Hamilton's telephone number is (206) 902-3868. Previous training on this subject area was provided in June 1994 by Hearing Officer, Steve Lang, at satellite training locations throughout the State.

*ADMINISTRATIVE PER SE HEARINGS FOR ADULTS -- **TESTIMONY ISSUES***

Administrative per se hearings for adult DUI arrestees are considered "hearings of record," which means that court appeals are now decided from the record made at these hearings. Law enforcement will not need to appear at civil court appeals on these cases. Therefore, your testimony and the documents you present in evidence at the administrative per se hearings are vital to making a complete record for any subsequent appeal.

At a hearing on the adult administrative per se law before Department hearing officers, the arresting law enforcement officer will be expected to provide testimony and documents relevant to the following issues:

(1) Whether the licensee was arrested by a law enforcement officer who, at the time of arrest, had reasonable grounds to believe that the licensee was driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor and/or drugs;

(2) Whether the licensee was advised of the implied consent warnings required under RCW 46.20.308;

(3) Whether a valid test was administered, including:
- *(a) Whether the officer administering the test was certified by the State Toxicologist as an operator on the BAC Verifier Datamaster;*
- *(b) Whether the licensee's mouth was checked and found to be clear of foreign substances, and the licensee did not vomit or have anything to eat, drink or smoke for at least 15 minutes prior to providing breath samples; and*
- *(c) Whether a breath test ticket was produced showing a valid test according to WAC 448-13-050 and WAC 448-13-060 (submit the breath test document into evidence to establish the proper working order of the machine at the time the test was administered);*

(4) Whether the results of the test indicated an alcohol concentration of .10 or above.

*ADMINISTRATIVE PER SE HEARINGS FOR MINORS -- **TESTIMONY ISSUES***

Testimony and documents are the same for administrative per se hearings for adults EXCEPT that:

1. *Minors need not have been arrested for driving while intoxicated; they need only have been driving with alcohol in their system; and,*
2. *The breath test results need only show concentrations of .02 or more.*

TELEPHONE HEARINGS

With the increase in hearings workload, DOL is authorized to hold these administrative per se hearings by telephone. The Department now needs your internal telephone number on the sworn report to efficiently reach you for your testimony. If you have a different telephone number where we need to reach you after you receive the hearing schedule notice, please let the hearing officer know.

DOCUMENTS FOR HEARINGS

Officers should bring to an in-person hearing, have or make available via fax for a telephone hearing, the following documents:

1. *A copy of your BAC operator's certification card;*
2. *A copy of the breath test ticket(s); and,*
3. *Any other documents which you feel are relevant to the issues outlined in* ***"testimony issues"*** *above.*

FORMS REVISIONS COMING

The Department is revising the temporary license/hearing request form to clarify the probationary action for first offenses since July 1, 1994.

We are also reviewing the sworn report. We will make it two-sided with report of breath/blood test on one side, and refusal to submit on the other. Other changes to clarify its use are planned.

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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 express the thinking of the writer and do 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.