January, 1995

HONOR ROLL

422nd Session, Basic Law Enforcement Academy - August 31 through November 22, 1994

President:	*Officer Carey J. Ziter - Kirkland Police Department*
Best Overall:	*Officer Carey J. Ziter - Kirkland Police Department*
Best Academic:	*Officer Carey J. Ziter - Kirkland Police Department*
Best Firearms:	*Officer Peter C. Gaiser - King County Police Department*

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423rd Session, Spokane Basic Law Enforcement Academy - September 8 through December 2, 1994

Highest Scholarship:	*Officer Robert M. Boothe - Spokane Police Department*
Highest Night Mock Scenes:	*Officer Edward K. Cler - Spokane Police Department*
Outstanding Attitude & Effort:	*Deputy Donald B. Henderson, Jr. Spokane Ct. Sheriff's Office*
Highest Pistol Marksmanship:	*Officer Patrick M. Dobrow - Spokane Police Dept.*
Best Overall Firearms:	*Officer Robert M. Boothe - Spokane Police Dept.*

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Corrections Officer Academy - Class 202 - October 17 through November 11, 1994

Highest Overall:	*Officer Merina J. Healey - Airway Heights Correctional Center*
Highest Academic:	*Officer Merina J. Healey - Airway Heights Correctional Center*
Highest Practical Test:	*Officer Evan C. Archer - Airway Heights Correctional Center*
Highest in Mock Scenes:	*Officer Daniel K. McBride - Airway Heights Correctional Center*
Highest Defensive Tactics:	*Officer Janice L. Mauro - Airway Heights Correctional Center*

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Corrections Officer Academy - Class 203 - November 7 through December 9, 1994

Highest Overall:	*Officer Denise Elizabeth Arnold - Washington C.C. for Women*
Highest Academic:	*Officer Denise Elizabeth Arnold - Washington C.C. for Women*
Highest Practical Test:	*Officer Ronald J. Barron, Sr. - Clark County Jail*
Highest in Mock Scenes:	*Officer Denise Elizabeth Arnold - Washington C.C. for Women*
Highest Defensive Tactics:	*Officer John J. Devlin - McNeil Island Correctional Center*

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Corrections Officer Academy - Class 204 - November 7 through December 9, 1994

Highest Overall:	*Officer Duncan A. Withee - Cedar Creek Corrections Center*
Highest Academic:	*Officer Gale Ann Robinson - Geiger Corrections Center*
Highest Practical Test:	*Officer Thomas E. Kuch - Forks Jail*
Highest in Mock Scenes:	*Officer Richard T. Shaughnessy - Clallam Bay Corrections Center*
Highest Defensive Tactics:	*Officer Billy F. Renfro - Kitsap County Jail*

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WASHINGTON STATE COURT OF APPEALS

STREET DRUG VENDORS GET NO PRIVACY UNDER ELECTRONIC RECORDING LAW (9.73)

State v. D.J.W. (and nine others), __ Wn. App. __ (Div. I, 1994)

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

> Each of the appellants was arrested during Operation Hardfall, an undercover narcotics investigation conducted jointly by the Federal Bureau of Investigation (FBI) and the Seattle Police Department (SPD). A key player in the investigation was Kevin Glass, a cooperating witness who was also central to the success of a similar investigation in San Diego.
>
> At the beginning of Operation Hardfall, SPD Commander William D. Bryant submitted an application to the court seeking authorization pursuant to RCW

9.73.090 to record conversations between Glass, who consented to the recording, and unidentified nonconsenting parties. The application stated that Glass, a former gang member familiar with street drug buys, would drive through specific areas of King County in an automobile outfitted with audio and visual recording equipment. The equipment would be positioned to record conversations between Glass and persons who either stood within 10 feet of the front driver and passenger windows of the automobile or sat in the front seat. The areas into which Glass was to drive are recognized high narcotics trafficking areas known as stay out of drug areas or "SODAs".

The superior court issued an order authorizing the recordings. The order authorized the FBI and SPD to intercept and record "the communications or conversations of street traffickers dealing drugs in high narcotics trafficking areas of Seattle and unincorporated King County," concerning the commission of drug offenses as follows:

> in a 1976 Cadillac Seville, WA license plate IXX 155, and a 1985 Oldsmobile Cutlass, WA license plate 535 BRZ (maps attached hereto) or within 10 feet of the driver's or front passenger's door, when the vehicle is located in any of the high narcotics trafficking areas described in the application or within 1,000 feet of their boundaries, or any place where the vehicle is driven at the direction of the non-consenting party to the communication or conversation.

The equipment in Glass's automobile recorded each appellant engaging in drug transactions with Glass during Operation Hardfall. Each appellant was arrested and charged with delivery of cocaine. They all sought to suppress the evidence obtained through the recordings, and in each case the court denied the motion. Each appellant was found guilty of the charged crime and sentenced accordingly.

ISSUE AND RULING: Were the conversations between the police operatives and the street drug dealers "private" within the meaning of chapter 9.73 RCW, Washington's Privacy Act? (ANSWER: No) Result: affirmance of King County Superior Court convictions of 10 defendants (whose cases were consolidated for appeal purposes). Status: Petition for Review pending in the State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Determining whether a particular conversation is private is a question of fact. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178 (1992) **[August '92 LED:06]**; State v. Flora, 68 Wn. App. 802 (1992) **[July '93 LED:17]**. However, where the pertinent facts are undisputed and reasonable minds could not differ on the subject, the issue of whether a particular conversation is private may be determined as a matter of law. We find that in the instant case, reasonable minds could not differ and, as a matter of law, the conversations at issue were not private.
>
> The Privacy Act does not define "private conversation". However, in Kadoranian, the court set forth the analysis for determining whether a conversation should be deemed private:

> Cases interpreting this phrase hold that the term "private conversation" is to be given its ordinary and usual meaning. [T]he court in State v. Forrester, 21 Wn. App. 855 (1978) **[March-April '79:05]** interpreted the word "private" as:
>
> > "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly; not open or in public."
>
> Forrester then goes on to hold as follows:
>
> > To determine whether or not a telephone conversation is private, the court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.

Under the foregoing analysis, the conversations between the appellants and the cooperating witness were not private. The appellants were vendors of merchandise selling their wares on a public street to anyone who wished to be a customer. Just as a clerk in a store would be willing to engage in a conversation about a product with any customer who happened by, so did the appellants manifest a willingness to engage in a conversation with any prospective buyer. It is reasonable to conclude that their conversations with Glass were practically identical in substance to those between them and any other purchaser with whom they transacted business. The conversations, then, could not have been "secret" or intended only for the ears of the individual appellants and Glass, because the identity of the person with whom the appellants were conversing during any given conversation was not significant.

We find the situation here similar to that in Kadoranian, where the police intercepted a brief telephone conversation between the plaintiff and a police informant who called to speak with the plaintiff's father, a police suspect. The conversation consisted of the daughter telling the informant her father was not home. In rejecting the daughter's argument that the interception of the conversation violated the Privacy Act, the court stated:

> When Ms. Kadoranian answered the home telephone, there is no indication she knew who the caller was. She gave general information, without requiring identification from the caller, and without asking the caller's reason for wanting to talk to her father. There is no reason to believe that Ms. Kadoranian would have withheld this information from any caller. It does not appear that Ms. Kadoranian intended to keep the information (the fact that her father was not home) "secret" or that she had any expectation that her conversation was private.

In the instant case, there is no reason to believe the appellants would have withheld any information they gave Glass, including the fact that they had cocaine

> to sell, from any other prospective buyer. There is no indication that any of the appellants intended to keep this information from anyone other than, of course, the police. A desire to conceal one's conversation from the police is not enough to make that conversation private. We find no indication that the appellants had any expectation of privacy in their conversations with Glass. [Court's Footnote: The fact that some or all of the appellants entered Glass's automobile does not make their conversations private. We find no evidence suggesting that those appellants who entered the automobile did so out of a desire to keep the conversation private. Rather, they entered the automobile because doing so was necessary to complete the transaction with Glass, who remained inside the automobile at all times during the recorded transactions.]
>
> In sum, giving the term "private conversation" its ordinary and usual meaning, we conclude that the conversations between the appellants and Glass were not private. Consequently, recording the conversations did not violate the Privacy Act because the Act applies only to private conversations.

[One footnote, some citations omitted]

LED EDITOR'S NOTE REGARDING ADDITIONAL ISSUES:

In other significant rulings, the Court of Appeals holds that, even if one assumes the taped drug deal conversations were "private", the lower court's authorization of the recordings: (1) meets the relaxed probable cause/particularity requirements of RCW 9.73.090; (2) sufficiently identifies the statutory requirement under RCW 9.73.090 for identifying the nonconsenting parties and the subjects of the conversations; and (3) satisfies the requirement of RCW 9.73.130(3)(f) that an application to tape contain "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]" On the latter point, the Court cites the precedents of State v. Cisneros, 63 Wn. App. 724 (Div. I, 1992) May '92 LED:13 and State v. Knight, 54 Wn. App. 143 (1989), in holding that the following declarations by the police in the authorization request satisfied RCW 9.73.130(3)(f):

> **Without the audio and video recordings to corroborate the witness' account of the transactions, his credibility would be subject to attack. The recordings will show if the defendants were entrapped into committing the offense. In addition it is a common practice of narcotics dealers to rob a buyer of his money. The recording and transmittal of these conversations will allow the police to go to the aid of the witness if his safety is in jeopardy. There is also the possibility that the witness could be arrested for engaging in narcotics transactions by police officers who are unaware of Operation Hardfall. If this should occur, the transmittal of conversations would allow the surveillance officers to be aware of this situation and prevent the witness from being booked into jail. Finally, the video recording of the drug dealers will enable the police to identify the subjects who have committed the offenses.**
>
> **. . .**

> **[T]he presence of an undercover officer in the vehicle while the transactions occur would appear suspicious to street dealers, and thus make the dealers more cautious. This is because undercover officers look out of place with the cooperating witness.**

Finally, the Court of Appeals rejects the defendant's argument that privacy protections of the Washington constitution (article 1, section 7) protected them against one-party consent electronic interception and recording. Here, the Court of Appeals cites the State Supreme Court precedents of State v. Salinas, 121 Wn.2d 689 (1993) Nov. '93 LED:08, and State v. Corliss, 123 Wn.2d 656 (1994) June '94:02.

LED EDITOR'S COMMENT:

We expect that the State Supreme Court will accept review of this case to address the definition of "private" under chapter 9.73 RCW. We would further expect that the Court will ultimately agree with the Court of Appeals that the conversations at issue were not private, but that the Supreme Court will provide clearer guidelines as to what is "private" and what is not. Meanwhile, we believe that law enforcement personnel should not read too much into this ruling (yet), and we strongly recommend that law enforcement agencies considering similar long-term operations do what SPD did here -- go to the Superior Court for a court order under RCW 9.73.090 authorizing the operation in advance.

****

***LED EDITOR'S NOTE RE: SEARCH AND SEIZURE PRIVACY DECISIONS IN STATE V. HOKE, STATE V. CHAUSSEE, AND STATE V. JOHNSON* -- the next two LED entries and the entry at page 19 (re: State v. Johnson) address search and seizure privacy issues. Note that the Hoke and Chaussee cases were argued and decided solely under the Federal constitution's Fourth Amendment "reasonableness" standard, while the Johnson case was argued and decided exclusively under the generally more restrictive search and seizure privacy standard of the Washington constitution, article 1, section 7.**

ENTRY OF PARTIALLY SHIELDED YARD OF HOME UNLAWFULLY INVADES "CURTILAGE"

State v. Hoke, 72 Wn. App. 869 (Div. I, 1994)

Facts: (Excerpted from Court of Appeals opinion)

> In February 1991, Hoke resided in Bellevue, Washington. His house, which faced north, could only be reached via an access road from the main road. When approaching the front door from the access road, a large unfenced lawn occupied the east and northeast portions of the lot. The front door was the only door visible. To the west of the front door, the driveway ended at a 2-car garage. From this vantage point, the west and the south sides of the house were not visible. In addition, no defined pathway led from the front to the back, on either the west or east side.
>
> Along the west side, thick foliage bordered the lot approximately 12 to 15 feet from

the house. Stacked wood, a broken down truck, a wheelbarrow, and miscellaneous tools partially obstructed access along the west side.

Acting upon a confidential informant's tip, King County Police Department Detective [A] asked Detective [B] to investigate a possible marijuana grow at the Hoke residence. On February 15, 1991, at 10 a.m., Detective [B] arrived at Hoke's house to obtain a smell of growing marijuana. Detective [B] knocked twice on the front door, but no one answered. He noticed that the porch light was on and the newspaper was on the porch. Detective [B] testified that he had wanted the occupants to open a door because an opened door causes the air currents to change inside, which, in turn, causes the smell of marijuana to exit through the door.

Detective [B] then walked from the front porch around the west side of the house in search of another door. En route, Detective [B] smelled what he determined to be "growing marijuana" from a roof vent located on the west side. Detective [B] then left the premises immediately.

Detective [B]'s observations were included in the affidavit in support of a search warrant. The affidavit recited in relevant part:

> On 2-15-92 Detective Mark [B] went to the residence of . . . While walking near the garage at the residence Det. [B] smelled what he knows to be growing marijuana from the residence. . . .

On February 19, 1991, the police executed a search warrant for Hoke's residence and discovered a small marijuana grow operation and illegal electric power diversion used in the grow operation. The police then seized, among other items, one growing marijuana plant, five to six harvested plants, and items typically used in growing marijuana.

Proceedings:

Hoke was charged with manufacturing marijuana under the Uniform Controlled Substances Act and with defrauding a public utility (stealing electricity to grow marijuana). He lost a suppression motion and was convicted on both charges.

ISSUES AND RULING: Did the police officer unlawfully intrude into the curtilage of Hoke's home? (ANSWER: Yes) Result: King County Superior Court convictions for manufacturing marijuana and defrauding a public utility reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> It is well established that "[w]arrantless searches of constitutionally protected areas are unreasonable per se." The curtilage is an area "'so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.'" It is undisputed that Hoke's west-side yard was within the curtilage of Hoke's home.
>
> Entry into an area of curtilage by a government official will not necessarily result in

a violation of a resident's reasonable expectation of privacy. If an officer on legitimate business enters an area of the curtilage *impliedly open* to the public, such as a driveway, walkway, or access route leading to the residence or to the porch of the residence, no privacy interest is invaded.

If an officer is within an impliedly open area or a nonintrusive vantage point and detects something by use of the senses, such as sight or smell, it is in "open view". Such an observation can provide the basis for a search warrant.

However, a "substantial and unreasonable departure" from an area of curtilage impliedly open to the public will be deemed to exceed the scope of the implied invitation and to intrude on a constitutionally protected expectation of privacy. The scope of the implied invitation is dependent on the facts and circumstances of each case.

Hoke does not contend that Detective [B] violated his reasonable expectation of privacy when he walked up to the front porch from the access road. Rather, the issue before us is whether Detective [B] "substantially and unreasonably departed" from an area of the curtilage impliedly open to the public when he left the front porch and walked around to the west-side yard. If so, his observations and all evidence seized pursuant to the warrant must be suppressed.

The evidence presented shows that (1) access along the west side of Hoke's house was partially obstructed by stacked wood, a broken down vehicle, a wheelbarrow, and miscellaneous tools, indicating that the area was not an access route; (2) the west-side yard was covered with grass, further indicating that it was not an access route; (3) no defined pathway encircled the house in either direction, implying the absence of any access route from front to back; (4) thick foliage, which bordered the west-side yard, prevented access onto the property from the west, signaling a subjective expectation of privacy in that area; and (5) the detective was forced to deviate from the direct access route which ended at the front porch in order to reach the west-side yard.

. . .

We find that Hoke's west-side yard was not an area of the curtilage impliedly open to the public. Therefore, we conclude the detective exceeded the scope of his implied invitation by departing from the front porch and walking around to the west-side yard and, thus, intruded upon Hoke's constitutionally protected expectation of privacy. As a result, we reject the notion, implicit in the trial court's ruling, that the homeowner must take overt steps signalling that an area of the curtilage is private. To impose such a burden would be inconsistent with existing law and would seriously weaken the constitutional protection against unreasonable searches.

Because the showing of probable cause was dependent on observations gained during an unlawful search, all of the evidence seized pursuant to the warrant was tainted; thus, it is inadmissible.

[Citations and footnotes omitted]

NO PRIVACY OR CURTILAGE VIOLATION IN OFFICERS' APPROACH OF HOME

State v. Chaussee, 72 Wn. App. 704 (Div. III, 1994)

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

> On September, 5, 1990, Inspector David Blackman and former Inspector Kenneth Meyer of the Stevens County Sheriff's Department were flying as marijuana spotters aboard a National Guard helicopter. Inspector Blackman had received an anonymous tip that marijuana was being grown above Grimm Road in the Summit Valley area of Stevens County. While flying over the area, Inspector Meyer observed a marijuana garden. Photographs were taken. The marijuana garden was located inside a post and wire fences area at the bottom of a small hill between two buildings.
>
> After the helicopter landed in Chewelah, Inspector Blackman and Herb Blanchard of the Stevens County Sheriff's Department Emergency Services drove to Grimm Road in an attempt to locate the marijuana garden. Inspector Blackman drove a sheriff's vehicle up the common access road and observed about nine "no hunting" and "no trespassing" signs. He passed through an open gate leading to Ms. Chaussee's residence.
>
> Inspector Blackman knocked at the door of the residence and at a shop building. There was no response. From where he was standing, Inspector Blackman saw marijuana plants, 5 to 6 feet in height, growing in the garden. Mr. Blanchard and Inspector Blackman returned to their vehicle and ran a registration check on a vehicle parked at the residence. After being advised that the car was registered to Ms. Chaussee, Inspector Blackman requested a search warrant. Inspector Blackman and Mr. Blanchard waited in the sheriff's vehicle for the warrant to be issued and brought to the residence.
>
> Within 20 minutes, Ms. Chaussee arrived home. Inspector Blackman asked if she owned the property; she said yes. He advised Ms. Chaussee of her constitutional rights and informed her that he had observed marijuana plants in the garden. He told her that he was in the process of applying for a search warrant. Ms. Chaussee invited the officers into her home. Following some general conversation, Ms. Chaussee consented to a search. Inspector Blackman, Mr. Blanchard and Ms. Chaussee went to the garden. Inspector Blackman harvested and seized about 20 marijuana plants. Ms. Chaussee was charged with manufacture of a controlled substance, marijuana. RCW 69.50.401(a)(1).
>
> At a CrR 3.5/3.6 hearing, Ms. Chaussee testified she had moved to the area for privacy and did not expect salesmen, the public or tourists to come onto the land uninvited. She said that the "no trespassing" signs had been put in place several years earlier by another property owner with whom she shares the access road. None of the signs are located on her property and she has no control over who uses the road. Ms. Chaussee stated that the road to her house leads into a mowed area surrounded by trees. The shop building is on the other side of the driveway; the garden area is about three-fourths of an acre, fenced, and located about 50 to 60 feet from the shop building.

The court denied the motion to suppress, ruling that the officers did not need a search warrant before entering the curtilage. It noted that "the officers simply drove up to see if someone was home, no one was; they stopped their business and called for a warrant and were in the process of obtaining it when Ms. Chaussee appeared." The court concluded that "[t]here was no intrusive invasion of defendant's privacy" because the gate was open, there were no signs on Ms. Chaussee's property, the officers entered during daylight hours, the officers had approached by a common access route, and after determining no one was home, the officers returned to their vehicle and waited. According to the court, the marijuana garden was not within the curtilage. Ms. Chaussee was found guilty on stipulated facts.

ISSUE AND RULING: Did the officers violate Chaussee's Fourth Amendment privacy rights by driving to her house on a private road passing through land posted with "no trespassing" signs? (ANSWER: No) Result: Stevens County Superior Court conviction for manufacturing a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

For a search to fall within the proscription of the Fourth Amendment, the person "invoking its protection must claim state invasion of a justifiable, reasonable, or a legitimate expectation of privacy." That expectation raises two questions: (1) whether the individual by conduct has exhibited a subjective expectation of privacy; and (2) whether society is prepared to recognize that expectation as reasonable.

Police officers on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access route to a house or a walkway leading to a residence. But a substantial or unreasonable departure from the area exceeds "the scope of the implied invitation and intrude[s] upon a constitutionally protected expectation of privacy." The determination of whether an officer's presence amounts to an unconstitutional invasion of privacy must be based on the facts and circumstances of each case.

In State v. Ridgway, [57 Wn. App 915 (Div. II, 1990) **[Sept. '90 LED:04]** a tax assessor photographed what he believed to be marijuana plants on Mr. Ridgway's property. He gave the photographs to the sheriff. Mr. Ridgway's house was located at the end of a curving 200-yard driveway; it was not visible from the road -- neighboring houses could not be seen from the property. The gate at the entrance of the driveway was closed and two dogs were positioned at the door of the house nearest the driveway. The deputies walked around the closed gate and circled to the far door of the house to avoid the dogs. At the far door, they observed potted marijuana plants.

The court held the

> undisputed physical facts of this case do not allow the inference that Ridgway opened his property to uninvited visitors. The house is located in

> an isolated setting, hidden from the road and from neighbors. The long driveway is blocked by a closed gate, demonstrating a subjective expectation of privacy in the area beyond the gate...Moreover, barking guard dogs stationed at the nearest door warned uninvited visitors that they were not welcome. Indeed, the deputies were required to deviate from the direct route to the house to avoid the dogs.

The court concluded the deputies unlawfully entered the curtilage of Mr. Ridgway's home.

Ridgway is distinguishable. The road leading to Ms. Chaussee's residence was a common access road used by several property owners. Ms. Chaussee had no control over who used the road. She testified that members of religious groups, hunters and delivery drivers have unexpectedly appeared on her property. When Inspector Blackman and Mr. Blanchard drove up the road, the gate to Ms. Chaussee's house was open; the officers' route was direct. There were no barking dogs. When Ms. Chaussee returned home, she invited to the officers in and consented to the search. Ms. Chaussee did not demonstrate "a justifiable, reasonable, or a legitimate expectation of privacy."

Ms. Chaussee's argument that she has a legitimate and reasonable expectation of privacy based on the "no trespassing" signs is unpersuasive. A similar argument was recently rejected in United States v. Traynor, 990 F.2d 1153 (9th Cir. 1993)**[Jan. '94 LED:02]**. There, the United States Court of Appeals for the Ninth Circuit held "the presence of a "No Trespassing" sign [did] not itself create a legitimate expectation of privacy." Similarly, in State v. Vonhof, 51 Wn. App. 33, 40, 751, P.2d 1221, *review denied*, 111 Wn.2d 1010 (1988), *cert denied*, 488 U.S. 1008 (1989)**[Oct. '88 LED:18]**, the court held that the presence of "no trespassing" signs does not increase the constitutional level of privacy interests enjoyed by defendants.

Ms. Chaussee's reliance on State v. Dixson, 307 Or. 195, 766 P.2d 1015 (1988) is likewise misplaced. There, the Oregon Supreme Court affirmed the denial of a motion to suppress. In so doing, the court recognized that landowners may take steps, including the posting of "no trespassing" signs and the erection of high, sturdy fences, to keep out intruders. Ms. Chaussee's efforts to prevent intrusion were inadequate. The "no trespassing" signs, on which she relies, were located on property belonging to her neighbors and had been put up years before she moved into the area. There were no high fences, closed gates, security devices or dogs calculated to put police or other intruders on notice of her expectation of privacy.

Moreover, Inspector Blackman and Mr. Blanchard did not depart from the areas impliedly open to the public. The conduct of the officers was reasonable. After there was no answer at Ms. Chaussee's residence, Inspector Blackman and Mr. Blanchard returned to their vehicle to wait for the issuance of a search warrant. When Ms. Chaussee returned home, she invited them in and consented to the search.

The protection of the Fourth Amendment extends to people in their "persons,

house, 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. The court concluded that the garden area, located about 50 to 60 feet from the shop building in an enclosed area behind brush piles, was not within the curtilage. The Fourth Amendment protection did not extend to the garden area.

Ms. Chaussee has not demonstrated a reasonable and legitimate subjective expectation of privacy. The court did not err in denying the motion to suppress; the conviction is affirmed.

[Some citations omitted]

PC ESTABLISHED TO SEARCH FOR MURDER WEAPON IN SUSPECT'S PREMISES

State v. Condon, 72 Wn. App. 638 (Div. I, 1993)

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

Michael and Rebecca Hyde owned and operated Star Ranch, a small ranch in Snohomish County, where they trained and boarded horses. In June 1989, Michael hired Condon to work on the ranch. Condon helped Michael purchase and load hay, in addition to doing other odd jobs around the ranch.

In mid-1989, Condon moved into the Hydes' home, where he lived until late December 1989. On December 20, 1989, Michael returned home from a trip to eastern Washington and found Condon hugging Rebecca on the couch. Michael accused them of having an affair and punched Condon several times. Rebecca called 911, and Michael drove away. Michael was subsequently charged with fourth degree assault.

The next evening, Condon made dinner for Rebecca and they ended up sleeping together. After that night, Condon told Rebecca that he was in love with her. Rebecca, however, regretted the incident and for several months did not respond to further advances by Condon.

In April 1990, Rebecca needed additional stalls for boarding horses, and she temporarily rented a barn called the Gallery Stables, which had an apartment attached to it. Rebecca later moved into the apartment, in part because she and Michael were not getting along. Shortly thereafter, Condon and Rebecca resumed their affair. During this period, Condon made statements to numerous acquaintances indicating that he wanted to marry Rebecca, that he wanted Michael out of the way, and that he would kill Michael if he ever hurt Rebecca.

On Saturday, September 1, 1990, Rebecca began moving from the Gallery back to Star Ranch. That afternoon, she was in the house at Star Ranch unpacking, and Michael left to go to the store. Condon called right after Michael left, told Rebecca he had been watching the house, and asked her to meet him that evening. That night, Condon was late for their meeting, and he appeared in a hurry. Although Rebecca was angry with him, they went over to the Gallery and spent the night

together.

The next morning, Sunday, Condon woke up early and left the Gallery. Michael was supposed to come over and help Rebecca move, but he never showed up. That afternoon, after returning from horseback riding, Rebecca found a cigarette on the ground in front of the porch at Star Ranch. She picked it up and was going to smoke it, when she noticed there was blood on it. After noticing more blood on the ground, she called 911. A police officer came to the house and told her that the blood was not human and that her dog had probable killed a small animal. Later Condon came over and helped Rebecca finish moving from the Gallery. He spent the next 2 days and nights at Star Ranch with Rebecca. At some point during that time, Condon changed the message on the answering machine from Michael's voice to his own.

On September 4, 1990, Michael's mother called the Snohomish County Sheriff's office to report that her son was missing. Officers came over to Star Ranch, and Rebecca showed them the area where she had found the blood and bone fragments. They discovered a shotgun casing on the ground nearby. Behind the house, officer Russell Quay detected the odor of decaying flesh and discovered Michael's body underneath a wheelbarrow. The body had shotgun wounds to the head and chest.

On September 6, 1990, police obtained a warrant to search Condon's residence.

The affidavit . . . was based primarily on Rebecca's statement to the police. It stated that there had been ongoing, sometimes physical, conflicts between Michael, Condon, and Rebecca and that Condon was upset the day Rebecca moved back to Star Ranch. It also stated that Condon had been watching Star Ranch when Rebecca began moving her possessions back to the house, that Condon helped Rebecca move, and that he stayed at the ranch for several days, despite the fact that he was usually fearful of confronting Michael. In addition, Rebecca's statement, which was attached to the affidavit, stated that Condon told her she would have to sa were together Saturday night.

Officers found a shotgun and a number of 12-gauge shotgun shells. A laboratory analysis showed that the shotgun had fired the casing found at the crime scene. In addition, in Condon's wallet police found a business card for Star Ranch, which was printed with the names of Michael and Rebecca Hyde. These names had been crossed out and replaced with "John and Rebecca Condon". Condon was arrested and charged with first degree murder. A jury found him guilty as charged . . .

ISSUE AND RULING: Did the affidavit (summarized but not set out by Court) establish: (a) probable cause to believe (PC) that Condon had committed the murder and (b) PC that the gun would be at his residence? (ANSWER: Yes) Result: Snohomish County Superior Court conviction for first degree murder affirmed.

ANALYSIS: (Excerpted from Court of Appeals decision)

Condon argues that the affidavit failed to establish that he probably murdered

Michael Hyde. He argues that all the activities alleged in the affidavit were innocent and that nothing in the affidavit showed that his behavior that weekend was unusual. He claims that "[t]here simply was not enough information provided to the magistrate about Condon's behavior that would lead a reasonable person to conclude that Condon probably murdered Michael Hyde."

To support his claim, Condon cites State v. Anderson, 37 Wn. App. 157 (1984) **[July '84 LED:15]**. In that case, the defendant was charged with second degree burglary after officers searched his house and found items that had been stolen from a nearby service station. The affidavit supporting the search warrant alleged:

> (1) that the residents of the searched premises were customers of the service station and smoked cigarettes of the type stolen in the burglary; and (2) that the police officer observed"2 full cases of soda pop such as had been stolen from the . . . service station" in an outward-facing refrigerator located outside by one of the outbuildings on the south side of the residence.

The court held that these facts were insufficient to establish probable cause, reasoning that if the affidavit was deemed sufficient, any customer of the store with these goods in his or her possession would be subject to search.

Unlike the affidavit in Anderson, the affidavit in the present case established a strong likelihood that Condon, and no one else, committed the crime. These facts described Condon's affection for Rebecca, his open presence at the ranch, which, despite Condon's assertions to the contrary, was unusual, and his attempts to establish an alibi. From these facts, the magistrate could reasonably infer that Condon had a strong motive for the crime and that his behavior demonstrated guilty knowledge. Thus, the magistrate reasonably concluded that Condon probably committed the crime.

Condon further argues that the affidavit did not contain sufficient facts establishing that the items described in the warrant would be found at Condon's residence, as opposed to somewhere else. To support this contention, he cites State v. Rangitsch, 40 Wn. App. 771 (1985) **[Oct. '85 LED:19]**, in which the defendant was convicted of five counts of negligent homicide, for deaths which occurred as a result of driving under the influence of cocaine, and one count of possession of a controlled substance. The Court of Appeals reversed the conviction for possession of a controlled substance, concluding that the affidavit in support of the search warrant was insufficient because it was based solely on an officer's belief that habitual drug users keep narcotics in their homes.

As the State points out, however, many jurisdictions hold that when the object of a search is a weapon used to commit a crime, it is reasonable to infer that the weapon is located at the perpetrator's residence, especially in cases where the perpetrator is unaware that police have connected him or her to the crime. Thus, because it is reasonable to infer that the weapon used to commit a crime may be found at the perpetrator's residence, the fact that the affidavit did not specify why items should be found in Condon's residence, as opposed to anywhere else, does

not render it insufficient.

[Some citations omitted]

SALE OF 1/8 OUNCE OF COKE AT RESIDENCE NOT PC TO SEARCH IT FOR MORE DRUGS

State v. Sanchez, 74 Wn. App. 763 (Div. III, 1994)

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

> On November 3, 1991, police responded to a suicide call in Quincy, Washington. Oscar Smith had injected an eighth ounce of cocaine. Police expressed curiosity about his source and Mr. Schuh volunteered he obtained it from "Joe" at a house located near a certain park. He described the house as "the one where all the drive-by shootings had occurred and where grass had recently been planted on an adjacent lot". Mr. Schuh did not know the address. [Officer 1] relayed this information to [Officer 2]. Based on the description provided, [Officer 2] suspected the address of the house to be 10 "C" street and sought a telephonic warrant.
>
> The basis of Mr. Schuh's knowledge and his credibility are not seriously contested. At issue is whether the facts support an inference that additional cocaine would be found in the house. The affidavit recites four facts: (1) Mr. Schuh obtained cocaine from Joe at a certain house at some undisclosed time in the past; (2) the house had been raided the previous March and drugs were found; (3) during the prior search, police observed the house was marred by shotgun blasts; and (4) unidentified citizens had lodged unspecified complaints about suspected drug activity at the residence.
>
> A warrant issued and evidence of cocaine trafficking was seized. . . . [In a suppression hearing], the court questioned whether a single buy from a largely unidentified seller yielded probable cause to believe more cocaine would be found in the house. Concluding it did not, the court granted the suppression motion.

[Some text omitted; some names deleted]

ISSUE AND RULING: Did the search warrant affidavit desribing a single sale of 1/8 ounce ofcocaine at the house at 10 "C" Street establish probable cause to search that house for drugs? (ANSWER: No) Result: Grant County Superior Court suppression order affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> This is a "some-means-more" case in which past activity is used to infer the probability that the same activity is ongoing.
>
> This is one area of the law which does not lend itself to bright lines:
>
> > Sometimes the question comes down to whether probable cause that certain objects or a certain quantity of a substance is at a particular place may be said also to show that more of the same is probably there, so as to

> justify issuance of a warrant also authorizing a search for the additional amount. On occasion the some-means-more inference may be permissible, but this determination must be made on a case-by-case basis.

(Footnotes omitted.) 2 Wayne R. LaFave, Search and Seizure § 3.7(d), at 113 (2d ed. 1987).

. . .

When the evidence reflects multiple sales at the same location accompanied by boasts of access to prodigious quantities of cocaine from that location, there may be probable cause to believe the boasts true. When a suspect contemplates a sizable transaction in the immediate future with the drugs to be obtained from a certain location, and the transaction is preceded by a sample sale with the drugs obtained from that same location, and the sample sale actually occurs, there may be probable cause to believe the larger sale could be completed as well. When police officers recognize growing marijuana plants on the windowsill of an apartment, there may be probable cause to believe the premises contain processed marijuana as well. When a suspect himself provides indicia that his residential address is also his "business" address, probable cause may exist to search the residence.

Turning to the facts at hand, "Joe" was otherwise unidentified. He may or may not have resided at the house. As observed by the trial judge, it is equally plausible he may have used the premises as a drop for his transaction with Mr. Schuh. The fact the house was raided 7 months earlier and drugs found is of no weight absent knowledge of who lived there at the time. Moreover, as noted by the trial judge, the drugs then found were marijuana and amphetamine, not cocaine or heroin which respondents allegedly deal in. The import of the shotgun blasts is likewise tenuous. They were noticed during the prior raid and that is not showing of who resided there at the time. Finally, nebulous complaints by unidentified citizens over what they perceived to be drug activity fails the basis of the knowledge test.

This case is factually weaker than **[four cases cited by the court of Appeals in the earlier discussion --LED Ed.]**. The house was tainted. Probable cause existed to believe Mr. Schuh obtained cocaine there. A reasonable police officer would justifiably be interested in ascertaining what else might be found in the house. To that end, the reasonable police officer would determine who owned the house, who resided there, what their criminal backgrounds were, and whether the same persons resided there the preceding March. A reasonable police officer might try to arrange a controlled buy. He might document complaints from citizens with objective facts detailing the activities observed. There are any number of supporting facts a reasonable police officer might marshal to convince a magistrate that a fair probability existed that additional drugs would be found. This record is devoid of such facts. There is only a showing that a single sale was made by a largely unidentified individual, at an unknown time, who may or may not have resided at the house. The trial court properly suppressed on this inadequate showing.

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals also addresses the question of whether the Court should apply the "good faith" exception to the Exclusionary Rule as announced by the U.S. Supreme Court in U.S. v.Leon, 468 U.S. 897 (1984)(Oct. '84 LED:07). While the State Supreme Court has not addressed the "good faith" exception to exclusion in a search warrant case, Division III of the Court of Appeals rejected the idea in 1991 in State v. Crawley, 61 Wn. App. 29 (1991) Nov. '91 LED:09, and the Court refuses to reconsider the question in this case.

WARRANT AFFIDAVIT'S DESCRIPTION OF RELIABILITY OF DETECTIVE'S SENSE OF SMELL SUFFICIENT; NO RECKLESS MISSTATEMENT MADE REGARDING POWER CONSUMPTION

State v. Olson, 74 Wn. App. 126 (Div. I, 1994)

Facts:

In an affidavit supporting a warrant to search Bryan Olson's Burlington residence for a marijuana-growing operation, a police detective described a prior instance in which he had smelled growing marijuana at the residence. The affiant-detective then described his qualifications in part as follows:

> [Affiant] graduated from the Basic Drug Enforcement Administration (DEA) course for controlled substances in February 1992. As of this date he has attended one controlled substances investigation seminars [sic]. He graduated from a 36 hour patrol officer course in controlled substances investigation. . . .
>
> As of this date, while assigned to the task force, he participated in approximately 60 controlled substances investigations. In investigating those cases he had handled substances later identified as cocaine and marijuana. He has investigated approximately five cases involving the manufacture of marijuana.

The description of qualifications did not expressly say that the detective was trained to recognize the odor of growing or burning marijuana.

Another portion of the affidavit declared the conclusion of the detective that Olson's residence consumed approximately twice the power needed to operate a residence of its size.

Proceedings:

In a pretrial suppression motion, defendant's counsel convinced the trial court that: (1) the affidavit was inadequate to show the detective's qualifications to detect the odor of growing marijuana; and (2) the affidavit's estimate regarding the level of power usage at the residence as a reckless misstatement of the truth. Excluding these portions of the affidavit, the trial court determined that probable cause was not established; the trial court suppressed the marijuana grow evidence seized under the warrant and dismissed the case.

ISSUES AND RULINGS: (1) Did the affidavit establish the detective's ability to detect the smell of

growing marijuana? (ANSWER: Yes); (2) Was the detective's statement about power usage a reckless misstatement of the truth? (ANSWER: No) Result: Skagit County Superior Court suppression order reversed; case remanded for trial. STATUS: the Washington State Supreme Court has accepted review of this decision, so the decision is not yet final.

ANALYSIS:

(1) DETECTIVE'S OLFACTORY SENSE QUALIFICATIONS

The Court of Appeals explains as follows why it believes that the detective adequately recounted his special ability to detect the smell of growing marijuana --

> The detection of the odor of growing marijuana, by officers with the necessary skill, training or experience in making such olfactory identifications, establishes probable cause to believe that marijuana is being manufactured. The identification of the smell of marijuana must consist of more than a "mere personal belief". State v. Seagull, 95 Wn.2d 898 (1981)**[Nov. '81 LED:02]**. The probable cause standard is based on the reasonable person with the experience and expertise of the officer in question.
>
> Here, the court found that "[t]he affidavit did not adequately detail [the detective's] qualifications for smelling either burning or growing marijuana. Therefore the information in the affidavit referring to the odor of marijuana must be excised." A search warrant was upheld in a recent case when the officer "testified he had visited at least 150 indoor marijuana growing operations in the preceding 3 years and had obtained 70 to 75 search warrants based upon his smelling marijuana. He had been correct every time. He testified he had no doubt it was marijuana he smelled". State v. Remboldt, 64 Wn. App. 505 (1992)**[Aug. '92 LED:12]**. In Seagull the affidavit "stated the affiant was a police officer who had observed marijuana both in plant and crushed leaf form for the past 8 years."
>
> Here, the affidavit did not explicitly state that [the detective] was trained to recognize the odor of growing or burning marijuana. However, the details of [the detective's] qualifications for smelling marijuana are essentially the same as those described in Seagull and Remboldt which upheld the magistrate's finding of probable cause.
>
> The most commonsense interpretation of this experience is that the affidavit contained sufficient information for the magistrate to infer that [the detective] was qualified to identify both growing and burning marijuana by smell. Any other construction of the language would be strained, hyper-technical, and contrary to common sense. The affidavit does not contain a conclusory statement of personal belief. It enumerates why [the detective] could identify marijuana by smell: he had been trained to identify controlled substances, and had personally participated in marijuana manufacturing cases. We find no requirement that the officer be explicitly trained to identify the smell of marijuana; [the detective's] experience was sufficient. The court below improperly excised from the affidavit the statement that the officer smelled growing marijuana when he entered Olson's house.

[Some citations omitted]

(2) DETECTIVE'S POWER USAGE STATEMENT

The Court of Appeals explains that misstatements in a warrant affidavit are not to be stricken unless they are intentional lies by the affiant-officer or are made by the affiant-officer in reckless disregard of the truth. See Franks v. Delaware, 438 U.S. 154 (1978). The Court of Appeals then explains that the detective's power usage statement was in fact reasonably accurate, and hence not a Franks violation:

> Here, the affiant made an estimate. He did not guess or speculate when he made the statement, he relied on data supplied to him from the best available sources. He compared Defendant's power consumption to that of similar residences, considering *both* square footage and the appliances probably used inside the residence. The estimate of the electrical equipment at the Defendant's residence was based on the type of account Olson had with Puget Power; this information was collected and organized by Puget Power; not the the affiant. The "normal" power consumption for the residence was calculated using Olson's actual power consumption, a "Factbook" published by Puget Power, and from a "Property Appraisal Record" from the Skagit County Assessor's office. That record shows the square footage of Olson's residence to be 1,242 square feet. Statistics found in the fact book show an average power consumption of 11,950 kilowatt hours (kwh) for residences of 1,550 square feet in 1990 and 12,082 kwh for residences of 1,500 square feet in 1991. The calculated power consumption for Olson's residence was 9,894 kwh for 1990 and 10,003 kwh for 1991. **[COURT'S FOOTNOTE: The calculations were 9,894 kwh = (1,242 sq. ft./1,550 sq. ft. x 11,950 kwh) and 10,003 kwh - (1,242 sq. ft./1,500 sq. ft. x 12,082 kwh).]** The actual power consumption for Olson's residence for 1991 was 20,040 kwh. We find that under these facts the affidavit's statement that olson's residence consumed approximately twice the power needed to operate a residence of that size was reasonably accurate, and was not intentionally made in disregard of the truth.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **"INDEPENDENT GROUNDS" RULING UNDER ARTICLE 1, SECTION 7 -- RURAL BARN OWNER HAD REASONABLE PRIVACY EXPECTATION --** In State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) the Court of Appeals for Division II holds that federal (DEA) agents: (1) violated the state constitutional privacy rights of Tamara Sue and James Raymond Johnson when the agents entered the Johnson's rural property, and (2) were acting jointly with local and state police officers in Thurston County when they made their entry. The Court therefore orders suppression of evidence seized under a search warrant, which warrant was issued based on the fruit of the unlawful search by the federal agents.

The pivotal issue was whether the Johnsons had a reasonable expectation of privacy under the Washington constitution, article 1, section 7. The Federal constitution's Fourth Amendment, as

interpreted by the United States Supreme Court, would permit the search that occurred in this case, so the only chance for the defendants to escape prosecution was to establish that the state constitution provides greater protection than the state constitution.

The LED's reading of the facts of this case, based solely on our reading of the opinion of the Court of Appeals, is as follows: (1) the Johnsons' property was in rural Thurston County and was accessible only by a dirt road that passed through Millersylvania State Park; (2) at the end of that dirt road, the entrance to the Johnsons' property was blocked by a closed but unlocked chain-link gate with a fence extending in both directions from the gate -- the Johnsons had posted "no trespassing/private property" signs on both sides of the fence and on a tree just inside the fence on the Johnsons' property; (3) the DEA agents approached the property at 1:00 am, opened the gate, and entered the Johnson's property; (4) the DEA agents walked approximately 200 yards up the dirt road, approaching a barn on the property; (5) the agents stopped approximately 10 yards from a barn on the property (and 75 to 100 yards from the home on the property, which was located further up the dirt road), at which point they could smell the odor of green growing marijuana coming from the barns and they could also hear coming from the barn the sound of machinery consistent with that of marijuana growing equipment.

The Court of Appeals rules that, under the Washington Constitution, while a "no trespassing' sign alone does not establish a privacy right, the officers' entry of the property and approach of the barn violated the Johnsons' reasonable expectation of privacy under the Washington Constitution based on the totality of the circumstances.

Result: reversal of Thurston County Superior Court convictions: (a) of James Raymond Johnson for manufacturing a controlled substance, possessing a controlled substance, and defrauding a public utility; and (b) of Tamara Sue Johnson for possessing a controlled substance.

LED EDITOR'S COMMENTS:

(1) "Silver Platter" Exclusionary Rule Issue: We did not recount above the Court of Appeals discussion of the facts or legal analysis regarding the contested issue of whether the DEA agents were acting independently of state and local police such that their actions would not be subject to review under the Washington constitution. This so-called "silver platter" exclusionary issue did not appear to us to be close. There was extensive involvement of the local police helping the DEA agents in their investigation of the Johnsons leading up to the DEA agents' entry of their property at issue, and this circumstance made the investigation a joint operation, the fruits of which could not lawfully be handed to the state or local police on an exclusionary "silver platter." For a decision excluding evidence under the "silver platter" rule, see State v. Gwinner, 59 Wn. App. 119 (Div. I, 1990) Jan. '91:17.

(2) Privacy Analysis: The Division II Court of Appeals panel may have correctly guessed that the State Supreme Court would find a reasonable expectation of privacy on the record in this case. We assume that the prosecution could not show that hunters, peddlers, delivery persons, Jehovah's Witnesses, fair queen candidates and the like periodically came onto the Johnson's property, thus cutting away their claim of state constitutional privacy protection. On the above-described facts, then, their expectation of privacy seems fairly reasonable, as the Court of Appeals compares the "privacy expectation" facts in this case to those where such a claim was rejected in an earlier case, State v. Hornback, 73 Wn. App. 738 (Div. I, 1994) reported in the October '94 LED at pages 17-18.

There are, however, a few disturbing elements of the Division II panel's legal analysis. First, the Court suggests that, because the officers did not actually intend to walk up to the Johnson's house, their entry onto the property was more likely a privacy violation. This suggestion by the panel is flatly contrary to the well-established principle that the state constitutional test for reasonableness of a privacy expectation is purely objective. The issue is whether the Johnsons' expectation that police would not walk 200 yards up their driveway to look at their barn was a reasonable one, not: (a) whether the police subjectively harbored certain suspicions as they walked and looked, or (b) whether the police subjectively intended only to go so far up the driveway. We find nothing in the established search and seizure case law which supports the panel's suggestion. Compare the analysis in State v. Petty, 48 Wn. App. 615 (Div. I, 1987) Nov. '87 LED:04 where the Court correctly noted that an officer's motivation is irrelevant on the privacy protection issue.

We are a little less confident in our criticism of the panel's suggestion that the entry was more likely a privacy intrusion because it occurred at night, even though the DEA agents apparently were using no night-vision enhancement devices as they walked up the dirt road toward the barn. We find little in the established case law which lends any support to the notion that an otherwise unprotected "open view" area qualifies for protection when darkness falls, and we foresee great complexity in state constitutional privacy analysis if gradations of darkness or time of day must be factored in. On the other hand, we recognize there may be some "common sense" (at least from a civil libertarian point of view) appeal in the idea, and we acknowledge seeing at least one court decision from another state where nighttime entry was considered as a factor in privacy protection analysis.

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NEXT MONTH

The February 1995 LED will include entries on: (1) State v. Maxfield, a Washington State Supreme Court decision (case no. 611220) dated December 8, 1994, holding -- (a) that a law enforcement officer's suspicious state of mind was irrelevant to the issue of whether the officer's entry into the curtilage of a home invaded the resident's reasonable expectation of privacy; (b) that the area of the curtilage entered by the officer was impliedly open to the public; and (c) that where a public utility district employee acted on his own in divulging to the police electrical usage information on a customer, such information could be used by police to obtain a search warrant in spite of the restrictions of RCW 42.17.314; (2) Tellevik et. al. v. Real Property Known As 31641 West Rutherford Street, et. al., a Washington State Supreme Court decision (case no. 60982-9) dated December 8, 1994, holding that the real property forfeiture provisions of the Uniform Controlled Substances Act at RCW 69.50.505 require that a full adversarial hearing on forfeiture be held within 90 days of a law enforcement agency's seizure of the real property; (3) information from the Washington Department of Licensing 1994 Omnibus Drunk Driving Act.

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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.

TERRY/SUMMERS QUESTION, K9-BASED PC ISSUES 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, 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]

(2) **PC THAT PERSON IS GROWING MARIJUANA IN A HOUSE AT ANOTHER LOCATION IS NOT PC TO SEARCH THAT PERSON'S RESIDENCE** -- In State v. Olson, 73 Wn. App. 348 (Div. II, 1994) the Court of Appeals upholds the conviction of David Olson for growing marijuana even though the Court holds that certain evidence seized under a search warrant should have been suppressed by the trial court as the product of an unlawful search. We will address in this brief LED entry the Court of Appeals' search and seizure analysis on only its suppression ruling.

In July of 1991, police developed probable cause to believe that David Olson was involved in a marijuana-growing operation at one house (the GROW HOUSE) in Port Orchard. Police learned further that David Olson lived at another house (the RESIDENCE) in Port Orchard. They also knew that Olson had been arrested in 1990 for possession of a pound of marijuana.

Based on the probable cause to search the GROW HOUSE, plus the lead officer's statement that his training and experience supported a search of the RESIDENCE [see quote in bold in first paragraph of excerpt, below, this page], separate warrants were issued to search each of the houses. Marijuana and other incriminating evidence were found in each of the two houses. Olson lost suppression motions in Superior Court, and he was convicted of manufacturing marijuana.

The Court of Appeals holds that there was probable cause to search the GROW HOUSE, but not the RESIDENCE. The Court's analysis supporting its view that that was not PC to search Olson's residence is as follows:

> The State contends that there was also probable cause to support issuance of a warrant to search the buildings at 11452 Fairview, the residence of David Olson. In our judgment, the magistrate abused his discretion in issuing this warrant based on the information presented in the affidavit. The principal piece of evidence supporting the issuance of this warrant was Moss's statement, which he based on his training and experience, that individuals who cultivate marijuana commonly "hide marijuana, the proceeds of marijuana sales, and records of marijuana transactions in secure locations, 'safe house' or within the premises under their control . . . not only for ready access, but also to conceal them from law enforcement personnel".
>
> An officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation. If we adopted the position urged on us by the State we would be broadening, to an intolerable degree, the strict requirements that there be probable cause to believe that evidence of a crime will be discovered at a certain location. We conclude that, standing alone, an officer's belief that grow operators hide evidence at other premises under their control does not authorize a warrant to search those places.
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> The State points to the additional fact that David Olson was present in the brick building at 12295 Madrona, the location of the marijuana grow operation, for 30 minutes on July 24, 1991, and the fact that Olson's car was later seen parked at 11452 Fairview. Those facts, however, are merely innocuous details, and do not provide support for a probable cause determination.

The Court of Appeals goes on, however, to hold that the evidence seized under the warrant for the search of the GROW HOUSE was sufficient to support Olson's conviction for manufacturing marijuana.

Result: Kitsap County Superior Court conviction for manufacturing marijuana affirmed.

Status:

LED EDITOR'S COMMENT:

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **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).

(2) **RECORD OF JUVY DIVERSION AGREEMENT ON JOYRIDING CHARGE SHOULD NOT BE SENT TO DOL** -- In State v. Michaelson, 124 Wn.2d 364 (1994) the State Supreme Court rules that in a prosecution of a juvenile for taking a motor vehicle without permission ("joyriding") in which the juvenile enters into a diversion agreement, RCW 13.50.200 does not authorize the juvenile court to forward a copy of the diversion record to the Department of Licensing. The "joyriding" statute is not one of the laws "regulating the operation of vehicles on the public highways" and hence is not covered by RCW 13.50.200.

Result: reversal of Pierce County Superior Court order which had denied the juvenile defendant's motion to prohibit the county diversion unit from forwarding a record of the "joyriding" diversion agreement to DOL.

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