May 1995

HONOR ROLL

427th Session, Basic Law Enforcement Academy - January 4 through March 28, 1995

President:	*Officer Ruben Baca - Bellingham Police Department*
Best Overall:	*Officer Raymond Norris - Sequim Police Department*
Best Academic:	*Officer Raymond Norris - Sequim Police Department*
Best Firearms:	*Deputy Erik T. Anderson - Klickitat County Sheriff's Department*

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Corrections Officer Academy - Class 209 - March 13 through April 7, 1995

Highest Overall:	*Officer Steven R. S. Johnson - Washington State Penitentiary*
Highest Academic:	*Officer Steven R. S. Johnson - Washington State Penitentiary*
Highest Practical Test:	*Officer Paddy L. Hescock - Clallam Bay Corrections Center*
Highest in Mock Scenes:	*Officer Steven R. S. Johnson - Washington State Penitentiary*
Highest Defensive Tactics:	*Officer Page Blanton - Clallam Bay Corrections Center*

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Corrections Officer Academy - Class 210 - March 13 through April 7, 1995

Highest Overall:	*Officer Chandra Dee Prestegard - Cowlitz County Jail*
Highest Academic:	*Officer Kathleen Ann Seehorn - Ferry County Jail*
Highest Practical Test:	*Officer Jesse Robson - McNeil Island Correctional Center* *Officer Dennis Leroy Simons - Washington State Reformatory* *Jonathan R. Sipes-Dreyer - Pine Lodge Pre-Release*
Highest in Mock Scenes:	*Officer Dennis Leroy Simons - Washington State Reformatory*
Highest Defensive Tactics:	*Officer Robert A. Vitek - Coyote Ridge Correctional Center*

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WASHINGTON STATE OFFICERS WIN GOLD - GULLA THREEPEATS

Police and firefighters from Washington State were among the 7,000 competitors from around the world who entered the 1995 World Police and Fire Games in Melbourne, Australia. One thousand of the entrants were from the United States, and 15 from Washington State.

Among those from Washington who entered and won were King County's Officer Don Gulla, Seattle P.D.'s Officer Bob Alexander, and Auburn P.D.'s Sergeant Jim Detrick.

Don Gulla, currently an instructor at the Washington State Criminal Justice Training Commission's Basic Law Enforcement Academy, completed in the men's senior black belt Kumite division (195 pounds and under). Don holds previous gold medals from the 1985 and 1989 WPF Games, and he won gold again in 1995. Don's preparation included training for one year with another BLEA instructor, Rob "Hardhead" Bardsley.

The bench press gold medal went to Bob Alexander of Seattle for a lift of 375 pounds. Jim Detrick won a gold medal in Karate-Kumite in the masters brown belt over 195 pound class. These officers were matched against

tough competition from 46 countries, including dedicated teams from Russia, Japan, Malaysia, the former Czechoslovakia, Austria, Hungary, Bulgaria, Italy, and Canada.

Many officers and firefighters will be preparing for the 1995 regional police and fire games to be held in Bellingham in August. The 1997 WPF Games will be hosted by Calgary, Canada, and the 1995 WPF games will occur in Stockholm, Sweden.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

FOURTH AMENDMENT EXCLUSIONARY RULE DOESN'T REQUIRE SUPPRESSION OF EVIDENCE GAINED IN ARREST BASED ON COMPUTER RECORD WHICH WAS ERRONEOUS AS RESULT OF COURT WORKER'S ERROR -- In Arizona v. Evans, 56 CrL 2175 (1995) the U.S. Supreme Court rules, 7-2, that errors that are caused by a court's clerical employees and that result in an unconstitutional arrest do not trigger the Fourth Amendment exclusionary rule. Writing for seven members of the court, Chief Justice Rehnquist declares that application of the court's landmark good-faith decision, U.S. v. Leon, 468 U.S. 897 (1984)**[Oct. '84 LED:07]**, "supports a categorical exception to the exclusionary rule for clerical errors of court employees."

The majority opinion explains that a straight-forward application of Leon leads to the conclusion that the exclusionary rule does not require suppression of evidence gained as the result of a court clerk's error. Leon observed that deterrence of misconduct by police, "not court employees," is the purpose of the Fourth Amendment exclusionary rule.

The erroneous computer record in this case was in fact the fault of a court employee, and "the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction," the Court

declares. Unlike the police, court employees are not engaged in the competitive exercise of enforcing the laws, the majority says, thus noting that court employees have no stake in the outcome of a criminal prosecution, so the threat of exclusion could not be expected to prod them into keeping more accurate records.

Looking at the conduct of the arresting officer in this case, the Supreme Court majority says that there was no indication that the officer was not acting reasonably when he arrested the defendant in reliance on the faulty computer record. The majority gives no opinion on whether suppression would be appropriate if the erroneous computer record was the fault of a police department clerical employee.

Justice O'Connor, along with Justices Souter and Breyer, joins Rehnquist's opinion but adds a concurrence in which she expresses the view that exclusion of evidence would be appropriate in a case in which the police utilized a computer recordkeeping system lacking a mechanism to ensure its accuracy, or which routinely has proven to be erroneous. Any reliance on such a system would not be reasonable, she says.

Result: suppression rulings of lower courts reversed and case remanded to Arizona state courts, presumably for trial on drug possession charges.

LED EDITOR'S COMMENT: This decision is inconsistent with and implicitly overrules the Washington Court of Appeals decision in State v. Trenidad, 23 Wn. App. 418 (Div. III, 1979) Oct. '79 LED:01. Trenidad is the only Washington appellate court decision on point factually with Evans. Trenidad reached the opposite conclusion in interpreting the Fourth Amendment Exclusionary Rule; hence, our conclusion is that Evans overrules Trenidad.

Whether the Washington State Supreme Court would suppress evidence in this factual context based on an "independent grounds" reading of article 1, section 7 of the Washington Constitution remains to be seen. The Washington courts have not yet resolved whether article 1, section 7 has a "good faith" exception to exclusion. Because Evans' "erroneous computer entry" ruling is closely linked to the "good faith exception" rule of the U.S. Supreme Court, whatever approach the Washington Supreme Court ultimately takes under the state constitution on the "good faith" issue will likely control on the "computer entry" issue, or vice versa, depending on which issue first comes before the State Supreme Court for resolution.

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WASHINGTON STATE SUPREME COURT

DUI ARRESTEE'S REFUSAL OF BAC TEST FINAL -- NO RECONSIDERATION ALLOWED

DOL v. Lax, 125 Wn.2d 818 (1995)

Facts:

A WSP trooper investigating a one-car accident arrested Ralph Lax on probable cause to believe Lax was guilty of DUI. During transport, Lax became so verbally and physically agitated that the trooper put him in leg restraints. Shortly thereafter, Lax began complaining of chest pains, so the trooper took him to a hospital.

What happened at the hospital is summarized by the State Supreme Court as follows:

> At the hospital emergency room, Trooper Przygocki advised Lax of his implied consent rights and requested a blood sample. Lax, who was being administered an EKG, refused to allow the blood sample.

Later, Lax offered to have a blood sample drawn by hospital staff. Prior to that sample being taken, Lax asked the trooper if he still wanted blood. The trooper advised him that he had already refused the test, but "if he was to demand to be offered", the trooper would have to take the blood as evidence. The blood sample was taken by medical personnel approximately 12 minutes after the initial refusal. It was analyzed by the State and used as evidence in Lax's trial for DWI.

Proceedings: (Excerpted from Supreme Court opinion)

> Trooper Przygocki completed and signed a report of Lax's refusal to submit to a blood test and sent the report to the Department [of Licensing]. The Department revoked Lax's driver's license. Lax appealed the revocation. Following a bench trial in Jefferson County Superior Court, Judge Hanley sustained the Department's decision to revoke Lax's driver's license. Lax appealed to the Court of Appeals, Division Two, which reversed. Division Two, in a divided decision, held subsequent consent can negate or make ineffective an earlier refusal. **[See Oct. '94 LED:07]** This holding conflicts with earlier decisions from Division One holding an initial refusal is final. Mairs v. Department of Licensing, 70 Wn. App. 541 (1993)**[See Feb '94 LED:18]**.

ISSUE AND RULING: If a DUI arrestee initially refuses a BAC test but then reconsiders and consents to the test, should the arrestee's driver's license be revoked for refusal of the BAC test? (ANSWER: Yes, Washington's implied consent law contains a "bright line" refusal standard.) Result: Court of Appeals ruling reversed, Jefferson County Superior Court ruling affirming DOL license revocation affirmed.

ANALYSIS:

The State Supreme Court begins its analysis by addressing the pertinent statutory language as follows:

> RCW 46.20.308(5) provides:
>
> > If, following his or her arrest and receipt of warnings under subsection (2) of this section, *the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given* except as authorized under subsection (3) or (4) of this section. [Court's emphasis.]
>
> Upon receipt of a sworn report the person "refused to submit to the test or tests", the Department must revoke the person's driver's license. RCW 46.20.308(6).
>
> . . . The language at issue here says if a driver "refuses" an officer's request to submit to a test, "no test shall be given". RCW 46.20.308(5). The statute does not give the driver some amount of time to decide whether to refuse. Nor does it define refusal. We therefore must give "refuse" its ordinary meaning: "to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected) . . .". Once a driver has expressed positive unwillingness to comply with the officer's request for a breath or blood test, the driver has "refused" and the statute does not require an officer to administer a test.

[Some text, some citations omitted]

The Court then discusses prior Washington State Court of Appeals' decisions which support its "bright line" refusal interpretation and do not allow for reconsideration of an initial refusal. Next, the Court points out that

most courts in other states which have considered the question have opted for a "bright line" refusal rule. Finally, the Court turns to policy considerations, noting that the implied consent statute has the following three objectives:

> (1) to discourage individuals from driving an automobile while under the influence of intoxicants, (2) to remove the driving privileges from those individuals disposed to driving while inebriated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication.

The Court's analysis of the policy considerations is as follows:

> The first two of these goals, deterrence and public safety, are best served when license revocation unavoidably follows refusal to take a test. A bright line rule provides this certainty.
>
> The goal of evidentiary reliability is harder to assess. Lax argues the flexible rule is a better way to achieve this goal because it would result in more drivers being tested. However, the quality as well as the quantity of evidence must be considered. Delay in testing generally favors the DWI suspect by giving time for the body to "burn off" alcohol. State v. Bence, 29 Wn. App. 223 (1981).
>
> Courts adopting the flexible rule have tried to deal with this problem by allowing a refusal to be withdrawn only when the evidence is still reliable, but reliability may be hard for an officer to assess. It will vary depending upon how long ago the driver stopped drinking. If absolute reliability is difficult to assess, however, relative reliability is not. Following the reasoning of Bence, the sooner the test is given, the more reliable it normally is. It would seem, therefore, the goal of evidentiary reliability is better fostered by a bright line rule discouraging delay in testing.
>
> We therefore find the legislative purpose of the implied consent law is best promoted by a bright line rule. We also think a bright line rule has great practical importance because it is more efficient with regard to law enforcement resources. If a refusal can be withdrawn or negated, the drunk driver has a tool which could be used to manipulate the officer and gain extra time. The circumstances of the refusal and consent might have to be weighed in many cases. This individualized consideration may take time more profitably spent dealing with other, perhaps more urgent tasks.
>
> Having examined the words of the statute and the policy behind it, we find the bright line rule to be most consistent with them. We therefore hold Ralph Lax's subsequent consent does not in any way change the legal fact or consequences of his initial refusal.

[Some citations omitted]

CORPUS DELICTI OF ATTEMPTED MURDER ESTABLISHED, SO STATEMENT ADMISSIBLE

State v. Vangerpen, 125 Wn.2d 782 (1995)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> At 2:15 a.m., Officer Drew Nielsen, a Bothell police officer, stopped the Defendant for

speeding. After approaching the car, the officer smelled alcohol and asked the Defendant if he had been drinking. The officer testified that he saw Defendant's left hand moving quickly toward the inside of his right leg where the officer thought he saw the butt of a gun. The officer reached into the car and grabbed the gun from underneath Defendant's leg. The officer testified that the gun was a .32-caliber revolver and that it was loaded and cocked when he grabbed it.

Officer Nielsen radioed for backup and officers Stuveland and Lawson arrived. All three officers testified that just after the suspect exited the car, they heard the Defendant say that he should have killed the cop when he had the chance. Officer Nielsen testified that sometime later, after he had advised the Defendant of his Miranda rights, the Defendant stated that he had been going to kill the officer with the gun if the officer talked to him about drinking and driving.

ISSUE AND RULING: Was there sufficient evidence of the corpus delicti of attempted murder in the first degree to allow the admission of Vangerpen's inculpatory statements to the arresting police officers? (ANSWER: Yes) Result: King County Superior Court conviction for attempted first degree murder reversed for procedural error not addressed here, but the State lawfully may re-file the charges and prosecute the case.

ANALYSIS: (Excerpted from Supreme Court opinion)

A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. The corpus delicti rule was established to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. In State v. Smith, 115 Wn.2d 775 (1990)**[March '91 LED:06]**, we reiterated the corpus delicti rule:

> The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is *independent proof* thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.
>
> The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. *It is sufficient if it prima facie establishes the corpus delicti.*

[Court quoting Bremerton v. Corbett, 106 Wn.2d 569 (1986)**Nov. '86 LED:03 Corbett is the leading Washington case on corpus delicti for DUI.**]. "Prima facie", in this context, means that three is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved. The independent evidence need not have been sufficient to support a conviction or even to send the case to the jury.

In a charge of attempted murder in the first degree, the corpus delicti can be established by evidence that a substantial step was taken to criminally end someone's life. Conduct is a substantial step if it is strongly corroborative of the actor's criminal purpose. In this case the trial court and the Court of Appeals correctly concluded that the act of reaching quickly toward the loaded, cocked, concealed gun is strongly corroborative of an attempt to fire the gun with an intent to end the officer's life.

[Some citations and footnotes omitted, LED Editor's Note in bold print.]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **NO MIRANDA WARNINGS REQUIRED BEFORE QUESTIONING CONVICTED DEFENDANT IN SEX OFFENDER TREATMENT PROGRAM --** In State v. Warner, 125 Wn.2d 876 (1995) the Washington State Supreme Court addresses two self-incrimination issues, among others. First, the Court holds that, where a convicted defendant in a sex offender treatment program at Maple Lane was asked to disclose all prior sexual assault victims, there was no "custody" for Miranda purposes. Therefore, Miranda warnings were not required prior to such inquiry. The Supreme Court explains its "custody" holding as follows:

> When dealing with a person already incarcerated, "custodial" means more than just the normal restrictions on freedom incident to incarceration. There must be more than the usual restraint to depart. In State v. Sargent, 111 Wn.2d 641 (1988) **[Jan. '89 LED:04]**, there was a custodial interrogation where the questioning by the probation officer took place in a booth in the King County Jails visiting area and the defendant was locked in his side of the booth. In Post **[State v. Post, 118 Wn.2d 596 (1992) March '93 LED:03]**, on the other hand, this court rejected the argument that an interview by a Department of Corrections psychologist was custodial where the interviewee was on work release, even though "Post was 'required' to submit to his evaluation in the sense that it was widely known that if individuals did not cooperate during the interview process, it was a factor considered against them." We held that psychological compulsion is not enough to establish "custody" for Miranda purposes. The circumstances surrounding Mr. Warner's disclosures cannot be considered "custodial" in the sense used in the relevant cases.

The second self-incrimination issue addressed by the State Supreme Court is whether defendant Warner's admissions should be suppressed on the separate ground that defendant Warner made his admissions due to threats by the government of sanctions for exercise of his Fifth Amendment right against self-incrimination. The State Supreme Court declares that the trial court did not adequately address this "compulsion" issue, and accordingly, the Court remands the case to the trial court for findings on whether the admissions "were compelled by the threat of a penalty."

Result: Snohomish County Superior Court order dismissing five counts of first degree rape of a child reversed as to four of the counts; case remanded to Superior Court to determine whether the Fifth Amendment privilege against self-incrimination applies (on grounds that admissions were compelled), and, if so, whether any exception to the fruit of the poisonous tree doctrine -- including the "inevitable discovery" exception to exclusion -- apply.

LED EDITOR'S NOTE: **Another issue addressed by the Court is whether public policy and the psychologist-patient privilege of RCW 18.83.110 require that confessions of guilt to mental health counselors made in prison treatment programs should be protected in order to encourage full participation. The Supreme Court rejects Warner's argument to this effect, ruling that the child abuse reporting requirement of RCW 26.44.030 controls over the psychologist-patient privilege. The Court also explains on this issue that no psychologist-patient privilege would apply even if RCW 26.44.030 did not exist, explaining:**

> **Like all privileges, the psychologist-client privilege does not apply if it is clear that the client did not intend the communications to be confidential. . . . An objective test applies here; the client's intent that the communication be confidential must be reasonable under the circumstances. . . . Where the examination is conducted for purpose of providing a third party with information, there is clearly no confidentiality anticipated or expected. . . . Although it**

is a harder case where the purpose of the communication is treatment, the record shows that in this case, Warner did not have an expectation of confidentiality since he was informed that there would be disclosure. . . . Moreover, a privilege is waived if it is not asserted or if there is a voluntary disclosure of the communication by the holder of the privilege to a third person. Finally, privileges are generally disfavored in criminal cases. . . . This policy is especially strong in child sex abuse cases. [Citations omitted]

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WASHINGTON STATE COURT OF APPEALS

QUESTIONING BY OFFICERS FOLLOWING FATAL MV ACCIDENT NOT "CUSTODIAL" FOR MIRANDA PURPOSES; FREE-TO-LEAVE, PROBABLE CAUSE TESTS REJECTED

State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995)

Facts re Miranda Issue: (Excerpted from Court of Appeals opinion)

> Shortly after 11:30 p.m. June 8, 1991, defendant Ferguson drove his Volkswagen Fox northbound on 124th Street into the intersection of 124th and the Kent-Kangley Road, headlong into the passenger side of an eastbound Nissan Pulsar which was passing through the intersection at the same time. Raymond Carver, an occupant of the Pulsar, died at the scene of the accident. Terina Rowan, the other occupant of the Pulsar, was seriously injured. Ferguson was injured slightly when his head struck the windshield of his car, cracking the windshield.
>
> . . .
>
> The first police officer to arrive on the scene was an off-duty sheriff's deputy, Officer Garnett, who happened to be driving by. By department policy, he was required to render assistance until on-duty police arrived. After learning that 911 had been called and that a licensed practical nurse (Audrey Hall) was trying to help Carver and Rowan, Officer Garnett approached Ferguson. Ferguson was out of his car, seated on a grassy knoll at the northeast corner of the intersection.
>
> Garnett asked Ferguson if he had been driving the Volkswagen. Ferguson answered yes. Garnett asked for Ferguson's driver's license. Ferguson responded that it was in his vehicle. From Ferguson's facial expression and general demeanor, Garnett believed Ferguson to have been drinking. He asked Ferguson if this was so. Ferguson stated that he had been drinking. Garnett asked how much. Ferguson admitted to two mixed drinks.
>
> Garnett then assisted with traffic control, but kept an eye on Ferguson, as a bystander had said Ferguson had been trying to leave the area.
>
> Trooper Larrigan of the Washington State Patrol arrived at the scene shortly after midnight. Garnett handed him Ferguson's driver's license and told him Ferguson had been drinking. Larrigan approached Ferguson and asked if he had been drinking. Ferguson said that he had had a couple of drinks. By this time, an aid crew was assisting Ferguson. Larrigan told the crew not to transport Ferguson to the hospital just yet, and went to check on the people in the Pulsar and to get his accident report forms out of his patrol car.
>
> Learning that Carver had died at the scene, Larrigan returned to Ferguson, who by then had been strapped to a backboard and placed in an ambulance. Larrigan told Ferguson he was under arrest for vehicular homicide and read him his Miranda rights. Ferguson stated that he wanted to talk to a lawyer. He was asked no further questions.

Proceedings:

Ferguson, whose blood test had revealed a .19% BA level, was charged with vehicular homicide. After Ferguson lost a pre-trial suppression motion regarding his on-the-scene statements to the officers, he was tried and

convicted of vehicular homicide in a jury trial.

ISSUE AND RULING: Was Ferguson in "custody" (restraint on freedom of movement to a degree associated with formal arrest) when the officers asked him questions at the accident scene such that Miranda warnings were required? (ANSWER: No) Result: King County Superior Court conviction for vehicular homicide affirmed.

ANALYSIS:

(1) "Custody"

The Court of Appeals explains as follows its reasons for concluding that Ferguson was not in "custody" for Miranda purposes:

> "Custody" for the purposes of Miranda is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest. The inquiry into restraint is an objective one: how would a reasonable person in the suspect's position have understood the situation? The issue is not whether a reasonable person would believe he or she was not free to leave, but rather "whether such a person would believe he was in police custody of the degree associated with formal arrest".
>
> In [Berkemer v. McCarty, 468 U.S. 420 (1984)**Oct. '84 LED:01**], the United States Supreme Court said:
>
> > [T]he usual traffic stop is more analogous to a so-called "Terry stop," see Terry v. Ohio, 392 U.S. 1 (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed . . . a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. [T]he stop and inquiry must be reasonably related in scope to the justification for their initiation. Typically, this means that the officer may ask the detainee a moderate number of questions to determine is identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond . . . The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of Miranda.
>
> . . .
>
> Ferguson argues that Berkemer does not apply because there is nothing "ordinary" or "routine" about the investigation of a vehicular homicide. We disagree. The seriousness of the potential traffic charge does not alter the analysis. Certainly, a driver who is involved in a fatality road accident is likely to be detained longer than a driver who is pulled over for committing a relatively minor traffic infraction. But as the Supreme Court noted in Berkemer, (quoting Terry v. Ohio, 392 U.S. 1 (1968)), "'[t]he stop and inquiry must be "reasonably related in scope to the justification for their initiation."'"
>
> An argument similar to Ferguson's was rejected in Cordoba v. Hanrahan, 910 F.2d 691 (10th Cir. 1990). There, the driver also argued that he was in custody for purposes of Miranda

> because the investigation of an automobile accident is more coercive than a routine traffic stop. A police officer came upon the scene of a motor vehicle accident and found the driver leaning against his damaged automobile. The officer asked what happened. The driver responded that he had been drinking and driving. Thereafter, the driver was arrested and given his Miranda warnings.
>
> At the ensuing suppression hearing the officer testified that the driver was not free to leave until the officer finished his investigation. The court held that, like a routine traffic stop, the investigation of an automobile accident is analogous to a Terry stop. . . We agree.
>
> . . .
>
> We hold that neither Officer Garnett's determination that if Ferguson had tried to leave the scene, Garnett would have restrained him in view of Ferguson's statutory duty to remain at the scene of the injury accident, nor Trooper Larrigan's direction to the aid crew not to transport Ferguson to the hospital just yet, nor the fact that this was a fatality accident, standing alone or taken together, changed Ferguson's temporary detention from a Terry stop to a custodial arrest for purposes of Miranda.
>
> Turning now to the specific facts of this case, we note that both officers questioned Ferguson as he sat on a grassy knoll near the intersection, in full view of various civilian witnesses. The questions were brief and nondeceptive. Ferguson was asked straightforwardly whether he had been drinking.
>
> We find nothing in these facts to distinguish Ferguson's situation from that of the drivers in Berkemer and Cordoba. Accordingly, we affirm the trial court's decision to allow the State to introduce Ferguson's responses into evidence during its case in chief.

[Some text, citations and footnotes omitted]

(2) "Probable Cause" Test Rejected

In a footnote, the Court of Appeals explains why it need not answer the irrelevant question of whether the officers had probable cause to arrest Ferguson before they questioned him at the scene:

> In Heinemann, [105 Wn.2d 796 (1986) [**July '86 LED:06**], as well as in State v. Harris, 106 Wn.2d 784 (1986)**[Dec. '86 LED:04]**, our Supreme Court determined that its adoption of the Berkemer analysis modified the "probable cause to arrest" standard adopted by the court in State v. Creach, 77 Wn.2d 194 (1969). Accordingly, even if Ferguson is correct when he argues in his brief that the officers had probable cause to arrest him when they asked him the questions (an issue not argued below), Ferguson's reliance on the probable cause to arrest standard set forth in Creach is misplaced. Accordingly, we will not further address those arguments.

(3) "Deception" Rule Stated

In another footnote, the Court of Appeals states its belief **[See LED Editor's comment below]** that non-custodial, Miranda-less questioning by officers should be conducted in a "nondeceptive" manner:

> In Washington, courts look not only to whether pre-Miranda questioning is noncoercive but

> also to whether the questioning is nondeceptive. See Heinemann. A driver who has just been involved in a car accident and who is asked by an investigating officer whether he or she has been drinking could hardly be deceived as to the reason for the question: the officer obviously is investigating fault for the accident.

LED EDITOR'S COMMENT:

We believe that the Court of Appeals correctly analyzed all but one of the Miranda questions before it. Its digression regarding a purported "nondeception" rule for pre-Miranda questioning is understandable, but wrong. It is true that the 1986 Heinemann case cited by the Ferguson Court (and another State Supreme Court case -- see below) did talk, in dicta (language in an opinion not necessary to support the decision) of a nondeception requirement. However, we believe that a subsequent State Supreme Court decision in State v. Short, 113 Wn.2d 35 (1989) Oct. '89 LED:13 totally laid to rest the theory of a nondeception rule.

As is noted above, the deception or "trickery" issue arises from dicta in two State Supreme Court cases: Heineman v. Whitman County, 105 Wn.2d 796 (1986) July '86 LED:06, and State v. Hensler, 109 Wn.2d 357 (1987) January '88 LED:02. We had hoped that the Washington-unique "trickery" trigger to Miranda warnings which the language in the Heineman and Hensler decisions seemed, taken at face value, to create was laid to rest in State v. Short, 113 Wn.2d 35 (1989) October '89 LED:13. In the Short case, the State Supreme Court held that an undercover agent need not give Miranda warnings in the course of an undercover operation. Mr. Short's argument that an undercover agent must give Miranda warnings demonstrated the absurdity of a "deception rule" which, so far as we know, has never been applied anywhere to suppress otherwise voluntary statements.

Unfortunately, however, Short didn't expressly overrule Heineman and Hensler, and the Heineman language was resurrected in more dicta in State v. Walton, 67 Wn. App. 127 (1992) January '93 LED:09. Now the dicta has again appeared in Ferguson. We are fairly confident that Short demonstrates the absurdity of and eliminates the possibility of a nondeceptive questioning rule. In short, we believe that the language in Walton and Ferguson erroneously overlooks Short.

In other words, we believe that no appellate court will exclude a statement based on the so-called, never-applied, nondeception rule (for example, an officer in a clearly non-custodial and non-coercive situation falsely tells a suspect that a witness has identified him.) Nonetheless, because the Court in Short didn't expressly disavow the rule, we can understand why some judges and attorneys would conclude that some vestige of the so-called rule applies. They should be made aware, however, that such a "rule" would be unique to Washington, and that the Washington courts have never applied "independent constitutional grounds" analysis to a Miranda or other interrogation issue. See State v. Earls, 116 Wn.2d 364 (1991) May '91 LED:02.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **"SINGLE SCOOP" RULE FOR FRISKING REJECTED; RECOGNIZED HARMLESS ITEMS MAY NOT BE REMOVED FROM POCKET ALONG WITH POTENTIAL WEAPON DETECTED IN TERRY PATDOWN** -- In State v. Fowler, 76 Wn. App. 168 (Div. III, 1994) the Court of Appeals rules that illegal drugs seized by a law enforcement officer during a lawful frisk were inadmissible in evidence because their seizure exceeded the scope of the frisk.

In the landmark 1968 U.S. Supreme Court decision in Terry v. Ohio, the Supreme Court ruled that a law enforcement officer may temporarily seize a person on reasonable suspicion of criminal activity, and the officer

may then conduct a protective patdown search for weapons if the officer reasonably believes the suspect to be armed. Terry holds that during the protective frisk, only those items believed to pose a threat to the officer may be seized, unless non-dangerous items come into plain view during the lawful "frisk".

In Fowler, the officer's initial decision to pat down a defendant during a traffic stop was lawful because it was based on furtive gestures and the failure of the vehicle to pull over in a timely manner. At issue was the scope of the frisk.

In patting one of Fowler's pockets, the officer felt both an indeterminate hard item (which turned out to be a pager) and two soft objects (which turned out to be cigarette paper packets containing LSD hits on blotter paper). The officer did not believe the soft objects to be weapons, but he pulled everything out of the pocket to insure that he extracted the hard object.

The Fowler Court rejects what it refers to as the State's "single scoop" theory. Under Terry, the initial pat-frisk gave the officer authority to remove only what possibly was a weapon, i.e., the hard object that turned out to be a pager. The Court holds that the officer did not have authority to take items out of the pocket which he did not deem to be weapons; accordingly, the soft items -- the LSD packets -- should not have been removed and did not lawfully come into "plain view." Therefore, the LSD packets were inadmissible as evidence.

Result: Grant County Superior Court suppression order affirmed.

(2) **WHERE MIRANDA VIOLATION RESULTS IN BOTH TESTIMONIAL RESPONSE AND VOLUNTARY PRODUCTION OF PHYSICAL EVIDENCE, ONLY TESTIMONIAL ELEMENT OF RESPONSE IS REQUIRED TO BE SUPPRESSED --** In State v. Lozano, 76 Wn. App. 116 (Div. III, 1994) the Court of Appeals rejects by a 2-1 vote defendant's Miranda-based objection to her criminal convictions for possessing a controlled substance.

A community corrections officer (CCO) had arrested Lozano as a parole absconder and had taken her to his office to await police transport to jail. While awaiting the police and without Mirandizing Lozano, the CCO asked her if she had "anything on her person," warning her that the police would search her after they arrived. Lozano responded by voluntarily producing some black tar heroin from her pocket; she was later charged with possession of a controlled substance.

The trial court subsequently ruled in a suppression hearing that Lozano's act of producing the heroin in response to the Miranda-less questioning was testimonial. Therefore her response was inadmissible under Miranda [See State v. Willis, 64 Wn. App. 634 (Div. III, 1992) **June '93:10** -- holding that CCO must give Miranda warnings prior to custodial questioning. Note: Ordinary visits between CCO and parolee are not custodial.] However, the trial court ruled that the physical evidence which was left behind was admissible because Lozano voluntarily produced it. Lozano was convicted of possession in a non-jury trial based on the circumstantial evidence that the illegal drugs had appeared in the CCO's office after he and Lozano had entered it.

The Court of Appeals majority agrees with the trial court's analysis. The majority bases its decision on State v. Wethered, 110 Wn.2d 466 (1988)**[Aug '88 LED:02]**. There, the Washington Supreme Court ruled under similar circumstances that where police conduct custodial interrogation in the absence of Miranda warnings and waiver, and the arrestee voluntarily hands over evidence or contraband, the physical evidence itself generally will be admissible under the Fourth Amendment, even though the arrestee's testimonial act of producing it will not be admissible under the Fifth Amendment. Wethered holds that, to the extent that incriminating inferences can be logically drawn from the physical evidence without submission of evidence of the testimonial act, those inferences may be drawn by the finder of fact. The Wethered analysis applies to Lozano's case, the majority

declares.

Result: Yakima County Superior Court conviction for possession of heroin affirmed.

(3) **OFFICERS MAY TEMPORARILY SEIZE WEAPONS DURING CONSENT SEARCH EVEN IF SCOPE OF CONSENT DOESN'T INCLUDE WEAPONS** -- In State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) the Court of Appeals for Division Two rejects defendant's Fourth Amendment argument that FBI agents searching his mother's home pursuant to her consent exceeded the scope of her consent when they seized a shotgun and asked her for permission to take it into their possession.

The FBI agents were investigating Louis Baldassari for a bombing. They went to his mother's home where he resided. His mother consented to a search of Louis' room and of the garage. The scope of the search was limited to "materials which could be used to make bombs," because that is what the agents told Baldassari's mother they were looking for.

During the search of Louis' room, the agents found a shotgun. The agents asked for and obtained permission from Mrs. Baldassari to take the shotgun. One week later, the agents found out that Louis was a suspect in a shotgun killing being independently investigated by the Tacoma Police Department. The FBI turned the shotgun over to the Tacoma Police, and the shotgun became a key piece of evidence in a state court prosecution of Louis Baldassari and Bryan Wilson Cotten for murder and assault.

In rejecting Baldassari's argument that the officers exceeded the scope of the consent given by his mother, the Court of Appeals explains:

> At the outset, we note that the seizure of the shotgun is not supported by the "plain view" doctrine, in that it was not immediately apparent to the FBI agents that the shotgun was evidence of any crime. Horton v. California, 496 U.S. 28 (1990)**[Aug. '90 LED:02]** (discussing requirements of plain view seizure). Indeed, the State has not asserted that Bickers had probable cause or any suspicion at all that the shotgun was evidence of a crime. This is not surprising in light of Bickers' concession that the FBI agents were looking for evidence related to a bombing and had no knowledge at the time of the search that Baldassari was a suspect in a murder investigation.
>
> The lack of probable cause does not, however, necessarily invalidate the seizure. Searches or seizures have often been considered reasonable even in the absence of an individualized showing of probable cause. For instance, in Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court upheld a police officer's right to briefly stop and frisk a suspect to search for weapons because the officer had reasonable suspicion that the person was armed and dangerous.
>
> The case we find most persuasive is Michigan v. Summers, 452 U.S. 692 (1981) **[Sept. '81 LED:01]**. In that case, the Court permitted law enforcement officers who were conducting a search in a residence to briefly detain occupants in order to "minimiz[e] the risk of harm to the officers". After analyzing both the "character of the official intrusion and its justification", the Court determined that a brief detention was a reasonable one within the Fourth Amendment. *[COURT'S FOOTNOTE: Although the brief seizure of the occupants in that case occurred pursuant to a search warrant, the Court noted that that fact did not preclude the possible application of the doctrine to other types of searches if the situation warranted.]*
>
> Consistent with the above authority, we conclude that an officer conducting a search pursuant

to consent has the authority to briefly seize any dangerous weapons or instrumentalities that he or she may come across, to secure them by removing ammunition or otherwise rendering the weapon temporarily unusable, and to keep the weapon with him or her while conducting the search. *[COURT'S FOOTNOTE: Although we perceive no reason that this doctrine should not be applied to other types of searches, we need not address that at this time.]* We are quick to point out that our holding is not meant to clothe the officer with authority to remove the weapon from the house. Rather, the seizure must be brief and is limited to ensuring that officers are able to protect themselves while in the residence. The character of their intrusion is limited and the justification is strong. A brief seizure of a weapon in such circumstance is *not* for evidence gathering purposes, but rather for purposes of protecting the searching officer's safety. In this manner, our holding is quite analogous to Summers where the brief detention of occupants of a residence that was being searched was held to be permissible, notwithstanding a lack of evidence that the persons being detained presented a risk of harm. *[COURT'S FOOTNOTE: Indeed, the situation here is even more compelling than Summers because the searching FBI agents were confronted with the presence of a deadly weapon. In Summers, the detention was upheld on grounds that the occupants of the searched premises might pose a danger to the searching officers. Here, the possible danger was readily apparent, and a brief seizure of the weapon is entirely reasonable.]*

Here, Bickers acted reasonably in securing the shotgun to ensure the safety of all the officers who were conducting the consensual search. He had been made aware that Baldassari was suspected of being involved in a crime of violence -- a bombing. Furthermore, it was reasonable for Bickers and the other agents to assume that other persons might be able to gain access to the home as it was being searched and that such persons could use any weapons located therein. In short, Bickers was justified in briefly seizing the weapon and in taking the shotgun to Barbara Baldassari, who was then asked if the officers could take the weapon from the house. Her consent to their request then expanded the scope of her earlier consent. Assuming that Barbara Baldassari had the power to consent, at that point, the justification for the seizure of the shotgun changed from officer safety to a consensual seizure, which would justify removal of the shotgun from the house.

Result: Pierce County Superior Court convictions of Cotten and Baldassari for first degree murder and second degree assault affirmed.

LED EDITOR'S NOTES: **Other search and seizure rulings of the Court of Appeals in Cotten are as follows: (1) the FBI agents' initial removal of the shotgun from Baldassari's room was a "seizure" under the Fourth Amendment (though justified as noted above); (2) Baldassari's mother had authority under a "joint control" theory to consent to the search of her adult son's room (there is very little discussion of this issue); (3) the search and seizure by the FBI agents was not subject to an "independent grounds" challenge under the Washington constitution because: (a) neither state nor local officers assisted the federal officers in their investigation or search (this is the "reverse silver platter" rule of State v. Gwinner, 59 Wn. App. 119 (1990) Jan. '91 LED:17); and (b) defendants failed to properly structure their argument to make an "independent grounds" challenge under the Washington state constitution.**

(4) **ROUTINE BOOKING INVENTORY SEARCH AT JAIL FOLLOWING ARREST UPHELD** -- In State v. Smith (Ethel Mae), 76 Wn. App. 9 (Div. I, 1994) the Court of Appeals upholds defendant's conviction for possession of cocaine, rejecting her argument that cocaine found in a routine booking inventory search at the jail following her arrest on a "no bail" warrant.

The Court notes that the U.S. Supreme Court has held under the Fourth Amendment: (1) that a routine inventory search of the personal property of a person being booked into jail is a recognized exception to the

constitutional warrant requirement; and (2) that such a search is justified: (a) to protect the persons's property from unauthorized interference, (b) to protect the police from groundless claims that property was not adequately safeguarded, and (c) to avert any danger to the police or others. See Illinois v. LaFayette, 462 U.S. 640 (1983) **[Sept. '83 LED:07]**. The Court of Appeals goes on to hold that the testimony in this case reflected that standardized procedures were followed in the booking inventory search of Smith's purse, and, therefore, the search was lawful. In a final note on the inventory search issue, the Court of Appeals rejects Smith's "independent grounds" argument that the Washington Constitution, article 1, section 7, prohibited the inventory search of this case. The Court implies that the booking inventory search exception is similar under the State and Federal constitutions.

Result: King County Superior Court conviction for possession of a controlled substance affirmed.

(5) **NO RECKLESS OMISSION FROM WARRANT AFFIDAVIT IN OFFICER-AFFIANT'S FAILURE TO NOTE CI'S DRUG ADDICTION, CRIMINAL RECORD, GRUDGE AGAINST SUSPECT, AND BLOOD RELATIONSHIP TO SUSPECT; "INTENT TO DELIVER" EVIDENCE SUFFICIENT** -- In State v. Taylor, 74 Wn. App. 111 (Div. I, 1994), the Court of Appeals rejects defendant's challenge to a search warrant based on what defendant argued were deliberate or reckless omissions of material facts from the affidavit supporting the warrant.

The CI was shown in the affidavit to be credible based on an excellent 2 1/2 year track record of providing information leading to arrests and/or convictions. However, defendant had argued that the affiant-officer should have informed the warrant-issuing magistrate of the following facts about the confidential informant: (1) the CI -- whose identity was learned by defendant prior to trial -- was a drug addict with pending criminal charges when the affidavit was prepared (THE COURT OF APPEALS REJECTS THIS CHALLENGE SUMMARILY BY POINTING OUT THAT IT IS QUITE COMMON FOR CI'S TO BE IN SUCH A SITUATION WHEN PROVIDING INFORMATION TO POLICE, AND HENCE THE AFFIANT'S INCLUSION OF SUCH INFORMATION WOULD NOT HAVE AFFECTED THE MAGISTRATE'S PROBABLE CAUSE DETERMINATION); (2) the CI held a grudge against the suspect over a drug debt (THE COURT OF APPEALS REJECTS THIS PART OF THE CHALLENGE BASED ON THE COURT'S VIEW THAT SUCH ULTERIOR MOTIVES OF CI'S ARE ALSO COMMON, AND KNOWLEDGE OF SAME GENERALLY WOULD NOT AFFECT A MAGISTRATE'S DETERMINATION OF PC); and (3) the CI was the suspect's uncle (THE COURT OF APPEALS REJECTS THIS PART OF THE CHALLENGE BASED ON THE GOVERNMENT'S RIGHT TO PROTECT THE IDENTITY OF CI'S, AND THE FACT THAT DETAILING THE RELATIONSHIP IN THE AFFIDAVIT WOULD HAVE REVEALED THE CI'S IDENTITY).

The Court of Appeals also addresses the issue of whether the State produced sufficient evidence to prove defendant's "intent to deliver" drugs. The Court's analysis on this issue is in part as follows:

> "Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." [State v. Brown, 68 Wn. App. 480 (1993)**[May '93 LED:11**] In cases where the evidence was found sufficient to support an inference of intent to deliver, at least one factor in addition to possession of narcotics was present. In State v. Harris, 14 Wn. App. 414 (1975), the court found that possession of five 1-pound bags of marijuana, scales, and the fact that marijuana is usually sold to dealers by the pound evidenced an intent to deliver. In State v. Simpson, 22 Wn.2d 572 (1979), the court determined that the jury could have reasonably inferred intent to deliver from the defendant's possession of 7.8 grams of uncut powder, part of which was heroin, balloons commonly used for packaging, and an unusual quantity of lactose used for cutting heroin. Finally, in State v. Lane, 56 Wn. App. 286 (1989**[April '90 LED:11]**), 1 ounce of cocaine, a scale, and large amounts of cash evidenced an intent to deliver. The court primarily relied on the large quantity of cocaine, worth about $1,000, and testimony that a standard

size purchase of cocaine is one-eighth ounce.

> The cases cited above establish that the presence of contraband, together with packaging and processing materials, such as baggies, scales, and cutting agents, sufficiently support a finding of intent to deliver. Here, in addition to 15 grams of cocaine, 1 gram of heroin and 1 bottle of diazepam pills, the police found baggies, scales and a large amount of cash at the Ithaca Place residence. Taylor apparently believes that the State must present evidence that the Defendant was dealing each drug in his possession separately in order to establish that he possessed them with the intent of selling them. The law does not require such a showing. The evidence of drug dealing generally was sufficient to allow the jury to conclude that Taylor intended to deliver not only the cocaine, but the heroin and diazepam as well.

[Some citations omitted]

Result: King County Superior Court conviction for VUCSA (six counts) and sentence enhancement for deadly weapon affirmed.

LED EDITOR'S COMMENT: The issue of what constitutes an intentional or reckless material mistatement or omission by an officer-affiant writing a search warrant affidavit is a difficult one on which to generalize. The issue has significant Exclusionary Rule and civil liability implications. The basic rule is that, unless the information will identify a CI, the officer-affiant should include the information, describe it accurately, and not recklessly rely on false information. However, as the Taylor case illustrates, the rule is subject to "common sense" interpretation. We will address this issue in greater detail in a future LED. Meanwhile, consult your prosecutor and/or legal advisor.

(6) **BLOOD TEST OF DUI SUSPECT BEING TREATED AT HOSPITAL NOT JUSTIFIED UNLESS NO BREATH MACHINE AVAILABLE --** In Shelden v. DOL, 68 Wn. App. 681 (Div. II, 1993) the Court of Appeals holds that in order to revoke a driver's license under the authority of the implied consent statute, RCW 46.20.308(2)(b), which allows the police to request that a DUI arrestee being treated at a medical facility following a traffic accident take a blood alcohol test, the State has the burden of proving that a breath alcohol testing machine was not present at the facility. The Court of Appeals declares that because there was no evidence in the record that there was or was not a breath analysis instrument at the hospital where Shelden was being treated following his one-car accident, the license suspension based on Shelden's refusal of a blood test cannot stand. Result: Kitsap County Superior Court order upholding a DOL license revocation reversed; judgment granted to driver. **LED EDITOR'S NOTE: See the similar ruling by Division One of the Court of Appeals in O'Neill v. DOL, 62 Wn. App. 112 (Div. I, 1991) Feb. '92 LED:11.**

(7) **VIOLATION OF "MISDEMEANOR PRESENCE" RULE OF RCW 10.31.100 WOULD NOT CONSTITUTE VIOLATION OF FEDERAL CONSTITUTION'S FOURTH AMENDMENT, AND HENCE "POLICE TEAM" PROBABLE CAUSE ARREST VIOLATING THAT STATE STATUTE WOULD NOT SUPPORT FEDERAL CIVIL RIGHTS LAWSUIT** -- In Torrey v. Tukwila, 76 Wn. App. 32 (Div. I, 1994) the Court of Appeals rejects the federal civil rights lawsuit of adult entertainment dancers from the Deja Vu Airport Club in the City of Tukwila. The dancers had filed their suit following their arrests for misdemeanor violations of the Tukwila ordinance regulating adult entertainment businesses. Among other things, the dancers alleged that their arrests were unlawful under the misdemeanor presence rule of RCW 10.31.100 because: (1) the officers arresting them were not the officers who had observed their misdemeanor crimes, and (2) the "police team" or "fellow officer" rule doesn't apply under RCW 10.31.100 to misdemeanors for which arrest authority exists only if the misdemeanor is committed in the presence of "the officer." **[LED EDITOR'S NOTE: No reported Washington case has ruled on whether arrest for a misdemeanor crime not subject to one of the "presence" exceptions must be made by an officer who actually observed the misdemeanor; however, the statute on its face does**

appear to be so limiting.]

Without deciding or even indicating how it would rule on the dancers' interpretation of RCW 10.31.100, the Court of Appeals declares that the "misdemeanor presence" requirement of that statute is not part of the Fourth Amendment. Under the Fourth Amendment, so long as the "police team" collectively has probable cause to make an arrest for a crime (whether for a felony or a misdemeanor), the arrest is lawful. Accordingly, in the absence of a violation by the police of the Fourth Amendment or of any other constitutional standard of the United States Constitution, the dancers' lawsuit grounded in the federal civil rights statute (42 U.S.C. section 1983) must be dismissed, the Court of Appeals holds.

Result: King County Superior Court order on summary judgment for the City of Tukwila affirmed.

(8) **"UNWITTING POSSESSION" OF ILLEGAL DRUGS ESTABLISHED BY DEFENDANT** -- In State v. Hundley, 72 Wn. App. 746 (Div. II, 1994) the Division II Court of Appeals holds that defendant's conviction for possession of illegal drugs cannot stand because he produced sufficient evidence of "unwitting possession" of illegal drugs to create a reasonable doubt that he knowingly possessed the drugs. The facts and proceedings below are described by the Court of Appeals as follows:

> In a search incident to Hundley's arrest for fourth degree assault, Lewis County Sheriff's Deputy Frederick Wetzel discovered in Hundley's wallet a small plastic bag containing the 0.5 grams of green-brown vegetable material. Wetzel sent the bag to the Washington State Patrol Crime Laboratory.
>
> Using a portion of the material, state forensic scientist Greg Frank tested for the presence of marijuana. This test was negative. Frank then used another portion to perform an extraction procedure designed to eliminate plant material that can obscure detection of controlled substances. He tested the extract in a gas chromatograph mass spectrometer (GCMS).
>
> According to trial testimony, GCMS testing can detect amounts of a substance measured in micrograms, a millionth of a gram, or in nanograms, a billionth of a gram. Other testimony indicated that when the test results match standard graphs produced earlier using the same equipment and techniques on known substances, the GCMS test is definitive. Frank's GCMS test of the material indicated the presence of both heroin and cocaine. Arnold Mellinkoff reviewed the data generated by Frank's tests and concurred in his conclusion that the material contained heroin and cocaine.
>
> Hundley admitted possessing the material in the bag, but testified that he believed it to be incense or potpourri. He said he received it, as an unsolicited free sample, from Mid American Drug, a mail order company which sometimes mailed him free samples of products. A Mid American price list admitted into evidence, which Hundley testified had been folded up in his wallet next to the bag, listed prices for several types of incense sold by Mid American [One witness] acknowledged in his testimony that the material had an"herbal kind of smell, a potpourri".
>
> Hundley waived trial by jury. The trial court found that the material in the bag contained heroin and cocaine, and concluded as a matter of law that Hundley had the burden of proving his defense of unwitting possession by a preponderance of the evidence. The court found that Hundley had not met this burden, although he had created a reasonable doubt. Accordingly, the trial court found Hundley guilty of possession of cocaine and heroin.

[Footnote, text omitted]

The Court of Appeals for Division II acknowledges that Divisions I and III of the Court of Appeals have placed the burden on defendant to prove unwitting possession of drugs by a preponderance of evidence. However, the Division II panel in Hundley asserts that the defendant need only establish a reasonable doubt that he knowingly possessed the drugs. That was accomplished by Hundley in this case, the Division II Court of Appeals holds, and therefore Hundley's conviction is reversed.

Result: Lewis County Superior Court conviction for possession of a controlled substance reversed.

(9) **"SMITH AFFIDAVIT" QUALIFIES AS "PRIOR INCONSISTENT STATEMENT" UNDER HEARSAY RULE EXCEPTION AT ER 801(d)(1)(i) --** In State v. Nelson, 74 Wn. App. 380 (Div. I, 1994) the Court of Appeals rejects a pimp's argument that the "Smith affidavit" his prostitute gave police following her arrest did not qualify as a "prior inconsistent statement" for purposes of the hearsay rule exception at ER 801(d)(1)(i).

The affidavit given by the prostitute is called a "Smith affidavit" in recognition of the State Supreme Court decision in State v. Smith, 97 Wn.2d 856 (1982)**[Jan. '83 LED:01]** in which the State Supreme Court held that under ER 801(d)1)(i), which permits a witness's prior inconsistent statement given under oath at a trial, hearing or "other proceeding" or in a deposition to be admitted as substantive evidence, a sworn statement taken as standard procedure in a police investigation that resulted in the filing of an information is admissible as substantive evidence if it is shown to be reliable under the circumstances. Smith held further that reliability depends on whether: (1) the witness made the statement voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) the witness was subject to cross examination when giving the subsequent inconsistent statement. The "Smith affidavit" is a very useful investigation/evidence tool in cases where the witness is likely to recant a story by the time of trial.

In the Nelson case, the Court of Appeals holds that all four of Smith's requirements were met. Among other things, the Court rejects defendant's contention that the prostitute's affidavit did not qualify under the Smith test because the detective, not the prostitute, wrote out the statement. The Court of Appeals asserts that, because the witness told the detective what to write and the statement was taken in a noncoercive atmosphere, the statement was reliable, even though the witness did not write it out herself.

Result: King County Superior Court conviction for first degree promoting prostitution affirmed.

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NEXT MONTH

The June 1995 LED will include, among other entries, part one of our 1995 legislative update, plus an entry on the March 6, 1995 Division II Court of Appeals decision in City of Port Orchard v. Tilton, 77 Wn. App. __ (Div. II, 1995) where the Court of Appeals has ruled that the wording on standard citation forms (". . . I promise to respond as directed on this notice . . .") does not allow an officer to arrest a person who refuses to sign a traffic infraction notice or to charge them with the misdemeanor of ". . . refusal to sign an acknowledgement of receipt of the notice . . ." under RCW 46.61.021(3) and 46.61.022.

The Tilton decision declares that there is no legal requirement that a person "promise to respond." Accordingly, under Tilton, unless the language of the standard citation form is changed, violators cannot be lawfully arrested or cited with the misdemeanor of "failure to sign" a traffic citation. Craig Adams, police legal

advisor for the Pierce County Sheriff's Office, suggests the following interim "cure" to Tilton:

> If a person refuses to sign a Notice of Infraction, merely ask him/her to "Copy Receive" it. Just write the words "Copy Received" on the front of the Notice of Infraction, ask the person to sign it, and issue it to him/her. If the person refuses, you can issue the misdemeanor **(or make an arrest, if your agency's policy permits -- LED Ed.).**

More on this in the June LED. Meanwhile, check with your prosecutor and/or legal advisor.

Postscript re Tilton: As the May LED was going to print, we read the Tilton decision a few more times. Contrary to what we suggest above, Tilton seems to say that arrest is authorized for failure to sign a promise to respond to a notice of traffic infraction, even though such a failure does not constitute a crime. This issue will be analyzed in the June LED.

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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.