April 1996

HONOR ROLL

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442nd Session, Basic Law Enforcement Academy - December 5, 1995 through February 29, 1996

President:	Deputy Nicole S. Bergmann - Kitsap County Sheriff's Department
Best Overall:	Officer Jeremy R. Bos - Everson Police Department
Best Academic:	Deputy Nicole S. Bergmann - Kitsap County Sheriff's Department
Best Firearms:	Officer Douglas R. Faini - Auburn Police Department

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Corrections Officer Academy - Class 225 - February 5 through March 1, 1996

Highest Overall:	Officer Chase Kenyon Kellogg - Yakima Ct Corr/Deten Center
Highest Academic:	Officer Linda Suzanne Keller - Lewis County Corrections
Highest Practical Test:	Officer Linda Suzanne Keller - Lewis County Corrections
Highest in Mock Scenes:	Officer Marsha A. Bradshaw - Adams County Jail
	Officer Tami Lynn Horn - Skagit County Jail
Highest Defensive Tactics:	Officer Murray T. Cox - Airway Heights Correctional Center
	Officer Tami Lynn Horn - Skagit County Jail

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Corrections Officer Academy - Class 226 - February 5 through March 1, 1996

Highest Overall:	Officer Noah A. Stewart - Okanogan County Correctional Facility
Highest Academic:	Officer Troy E. Surber - Jefferson County Jail
Highest Practical Test:	Officer Maritza Martinez - Yakima Police Department
Highest in Mock Scenes:	Officer Jefferey A. Perkins - Coyote Ridge Correctional Center
Highest Defensive Tactics:	Officer Troy E. Surber - Jefferson County Jail
	Officer Noah A. Stewart - Okanogan County Correctional Facility

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WASHINGTON STATE SUPREME COURT

CITIZEN'S USE OF SCANNER ON "24-HOUR-A-DAY" BASIS TO EAVESDROP ON DRUG-GROWING NEIGHBORS' CORDLESS TELEPHONE CONVERSATIONS VIOLATES RCW 9.73; EVEN RESULTS OF FOLLOW-UP INVESTIGATION BY POLICE EXCLUDED

State v. Faford, State v. Caskey, ___ Wn.2d ___ (1996)

Facts and Proceedings:

A Mason County citizen became involved in a dispute with his neighbors in 1991. He obtained a police scanner and began eavesdropping on a regular basis on the neighbors' cordless telephone conversations. Over a several month period of constant eavesdropping, he learned that they were growing marijuana in their home.

On several occasions, the eavesdropping neighbor made anonymous phone calls to the local police to report that the neighbors were growing marijuana. The police did not do anything to follow up on the calls. Then the eavesdropping neighbor overheard a cordless phone conversation in which the neighbors discussed moving the grow operation. He called the police, who this time inquired into the details and followed up by going to the suspected grow operation house to conduct a "knock and talk." The Supreme Court majority opinion describes as follows what happened after that:

> When Robert Faford answered the door, one officer explained the police investigation, including some of the detailed information received from Fields, and requested permission to remove the operation from the growing shed. When Faford asked the consequences of his consent, the officer described the outcome of a knock and talk: in exchange for no immediate arrest, the police would search, remove plants and equipment, and send a report to the prosecutor. The officers did not Mirandize Faford, obtain a written consent to search prior to entering any premises, or specifically inform him of his right not to consent.
>
> After some discussion, Faford led the officers through the home to the growing shed, unlocked the door, and allowed them to enter. The officers photographed the growing operation, and a WESTNET truck later removed the plants and equipment. Following the search, Faford, a thirty-nine-year-old high school graduate with a fourteen-year work history, read and signed a written consent to search form. On May 20, 1993, police returned to Defendants' home with a search warrant and seized additional evidence.
>
> The three Defendants and Gale Faford were charged with cultivating marijuana and conspiracy to cultivate marijuana. Consolidating the four cases for pretrial rulings, the trial court denied their motion to suppress the evidence derived from the scanned telephone conversations and ensuing searches. A jury acquitted Gale Faford on one charge and, deadlocked on the second, later dismissed it. A jury convicted Lisa Faford as charged; the trial court convicted Robert Faford and Brian Caskey as charged.

ISSUES AND RULINGS: (1) Was the citizen's use of the scanner to eavesdrop on the cordless phone conversations an illegal "interception" under RCW 9.73.030? (ANSWER: Yes); (2) Were the conversations "private" under RCW 9.73.030? (ANSWER: Yes); (3) Under the facts of this case, where the eavesdropping was intensive over several months, must all results of the eavesdropping, including the results of the police agency's immediate follow-up investigation (the results of both the consent search and subsequent warrant search), be excluded under RCW 9.73.050? (ANSWER: Yes; rules a 6-3 majority. Justices Guy, Talmadge and Durham dissent on the exclusionary ruling).

Result: reversal of Mason County Superior Court convictions of Lisa Faford, Robert Faford and Brian Caskey for cultivating marijuana and conspiracy to cultivate marijuana. Status: State's motion for reconsideration pending in the State Supreme Court.

ANALYSIS:

(1) "Interception" Prohibited By 9.73.030

The majority opinion authored by Justice Dolliver notes that, among other things, RCW 9.73.030 prohibits police and citizens alike in Washington State from making the "interception" of private communications "by any device . . . designed to record or transmit said communication . . .". The majority justices conclude that use of a scanner to convert into audible sound the inaudible sound waves from a cordless phone communication constitutes use of a device to "transmit", and that therefore the use of the scanner was a covered interception.

The majority rejects the State's contention that the cases of State v. Bonilla, 23 Wn. App. 869 (Div. II, 1979) **Nov. '79 LED:04** (listening at police station extension phone not an interception), and State v. Corliss, 123 Wn.2d 656 (1994) **June '94 LED:02** (listening at a tipped phone receiver not an interception) are to the contrary. Listening at an extension phone (Bonilla) or at a tipped phone receiver (Corliss) is not the same as using a scanner to convert cordless phone communications to audible sound, the majority opinion declares.

(2) "Private" Communications Per 9.73.030

Turning next to the undefined statutory term, "private," the majority opinion notes that past cases have held that the question here is "a question of fact determined by the intent *[a subjective element]* or reasonable expectations *[an objective element]* of the parties." The majority opinion then notes some circumstances in past cases where conversations or communications were held not private:

> [W]e have held an inconsequential, nonincriminating telephone conversation with a stranger lacked the expectation of privacy necessary to trigger the privacy act. Kadoranian [v. Bellingham Police Dept., 119 Wn.2d 178 (1992) **Aug. '92 LED:06**]; see also State v. Slemmer, 48 Wn. App 48 (1987) **Oct. '87 LED:14]** (no expectation of privacy from recording meeting where defendant knew public minutes available); State v. Forrester, 21 Wn. App. 855 (1978)**[March/April '79 LED:05]**, (no expectation of privacy where defendant called police with extortion demand requiring notification of others).

[Some citations omitted]

Here, however, viewed subjectively, the defendants' expectation was that their telephone conversations would remain confidential between the parties to the calls. The majority opinion then turns to the State's argument that, in light of scanner and cordless phone technology, it is not reasonable for cordless phone users to believe their conversations are not going to be overheard by many people. Pointing out first that this ignores the subjective element of the privacy analysis, the Court then notes:

> The State's focus on technological ease ignores the intrusive nature of the

> interception in this case. Fields did not accidentally or unintentionally pick up a single cordless telephone conversation on his radio or cordless telephone, but undertook twenty-four-hour, intentional, targeted monitoring of Defendants' telephone calls with a scanner purchased for that purpose. This type of intentional, persistent eavesdropping on another's private affairs personifies the very activity the privacy act seeks to discourage.

The majority opinion also points out on the objective element that the State failed in the suppression hearing to show that most cordless phone purchasers are warned by manufacturers' manuals of a likelihood of interception. Considering the foregoing, as well as case law and statutes elsewhere, the majority concludes that, under the facts of this case, the intercepted communications were private.

(3) Exclusionary Ruling

The majority opinion concludes by addressing the issue of the exclusionary remedy under RCW 9.73.050:

> The privacy act explicitly mandates exclusion of "any information" gathered from illegally intercepted communications. This court has defined the scope of "any information" broadly to require exclusion of any simultaneous visual observation as well. Evidence obtained in a violation of the act is excluded for any purpose, including impeachment. We hold the trial court erred by admitting any testimony from Fields regarding the intercepted conversations and the accompanying visual observations of suspect activity.
>
> In addition, we hold the trial court erred by admitting evidence subsequently seized by the police pursuant to Fields' tips. We acknowledge the fruit of the poisonous tree doctrine generally does not apply to private searches. At the same time, the exclusionary rule requires the government hold an independent right to conduct a subsequent warrantless search beyond the bounds of the original private search. In the present case, the subsequent police search of Defendants' residence indisputably expanded the scope of the private illegal telephone interception. Whether the police held an independent right to enter and search Defendants' property thus depended on the validity of Robert Faford's consent.
>
> **The police obtained consent to search solely through the knowing exploitation of Fields' illegality. To permit the State to introduce evidence exclusively and directly flowing from a privacy act violation would render any privacy protection illusory and meaningless. We conclude the exploitation of Fields' information thoroughly tainted the subsequent search and seizure to demand suppression of that evidence.**

[Citations omitted; emphasis added by LED Ed.]

DISSENT:

The dissenting opinion by Justice Guy (joined by Justices Talmadge and Durham) questions only the statutory exclusionary rule interpretation by the majority. Justice Guy takes strong exception to the majority ruling that in effect barred the police from following up the information obtained

from the citizen-eavesdropper. Justice Guy's dissent points out that under the Fourth Amendment and the State Constitution, the "fruit of the poisonous tree" doctrine does not apply to illegal private searches unless the police "instigated, encouraged, counseled, directed, or controlled that conduct." While the majority's ruling is limited to chapter 9.73 and in no way affects constitutional exclusionary standards, Justice Guy nonetheless expresses in strong terms his belief that the majority's exclusion of the results of the otherwise lawful, follow-up consent search is irrational.

LED EDITOR'S COMMENTS:

(1) *Not every scanner intercept is a violation of chapter 9.73 and/or calls for global exclusion of evidence.* The case-by-case approach of the Faford Court leaves some room for argument on the privacy question in future cases involving less intrusive circumstances, such as inadvertent intercepts, and perhaps even intentional intercepts of short duration. If a citizen comes forward with information about suspected illegal activity picked up by a scanner from cordless phone communications, law enforcement officers might consider the following approach: (1) warn the citizen that intentional intercepts of this sort are prohibited by chapter 9.73 RCW, and that such monitoring should therefore cease; and (2) take the information to the prosecutor for advice on how to proceed with investigation of the parties to the communications. As noted above, the case-by-case approach of the Faford Court on the privacy issue suggests that less intensive scanner eavesdrops may be deemed by the Court to be lawful. Also, while the language of the Faford majority opinion is relatively broad on the exclusionary holding, we think that the Court might not make the same ruling on exclusion if the police pursue a less aggressive follow-up course than an immediate "knock-and-talk."

(2) *Prosecutor's motion to reconsider pending.* We hold a faint hope that the State Supreme Court will grant the Faford prosecutor's "motion for reconsideration", which was pending before the Court at LED deadline. Among other things, the motion asks the Court to reverse itself on its interpretation of the 9.73 exclusionary provision. While such motions are seldom granted, we hold some hope in Faford, primarily because we think that the exclusionary holding is patently wrong and result-oriented, and that two more Justices may come to this realization upon further reflection.

(3) *Legislative fix possible.* As noted, we believe that Faford's exclusionary holding is irrational and result-oriented. We term it "irrational" both because it does not square with the constitutional "private search" rule, and because, on its face, the Court's exclusionary ruling appears, with no good reason, to preclude any police follow-up investigation in the Faford factual context. We term it "result-oriented" because we doubt very much that the holding would have been the same if the communications intercepted had discussed bodies buried in Mr. Faford's basement, rather than a marijuana grow. Because the Faford case interprets a statute (9.73), not a constitutional provision, a legislative fix is possible if the State's motion to the Court for reconsideration is denied. While we think it unlikely that the Washington Legislature would approve eavesdropping on cordless phone communications, we believe that the Legislature would probably be receptive to a narrowing of the 9.73.050 exclusionary provision. One relatively limited amendment option would narrow the Faford exclusionary holding to allow into evidence the results of any otherwise lawful police investigations which would follow up citizen intercepts violating chapter 9.73, where such unlawful citizen activity had not been encouraged, counseled, etc. by the police.

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WASHINGTON STATE COURT OF APPEALS

SHERIFF'S AGREEMENT RE TASK FORCE GIVES TASK FORCE AUTHORITY TO ELECTRONICALLY INTERCEPT THROUGHOUT COUNTY; BUT NON-TASK FORCE MEMBER CANNOT AUTHORIZE INTERCEPTION OUTSIDE HIS OWN CITY; OTHER 9.73 ISSUES -- PRESERVATION OF TAPE, POST-RECORDING REVIEW -- ADDRESSED

State v. Knight, 79 Wn. App. 670 (Div. II, 1995)

Facts: (Excerpted from Court of Appeals' opinion)

> At all times material to this case, Deputy Arne Gonser was employed by the Skamania County Sheriff's Office. Officer Craig Landwehr, Officer Douglas Luse, and Captain Robert Kanekoa were employed by the Vancouver Police Department. Lieutenant James Pillsbury was employed by the Clark County Sheriff's Office. Raymond Blaisdell was the Sheriff of Skamania County and, by contract, the chief law enforcement officer for the City (now Town) of Stevenson. Stevenson is an incorporated municipality within Skamania County.
>
> Gonser, Landwehr, Luse, and Pillsbury were also members of an interlocal Drug Enforcement Task Force called the Clark-Skamania Narcotics Task Force. Kanekoa was not. Pillsbury was the task force supervisor.
>
> The task force had been formed in 1988, by written agreement executed pursuant to RCW 39.34. The agreement provided "for the establishment of a Drug Enforcement Task Force to be supported by the financial and manpower resources of the participating jurisdictions in accordance with the provisions set forth hereinbelow." The agreement was signed by Clark County, Skamania County, and the Cities of Vancouver, Camas, and Washougal. It was also signed by the Sheriff of Clark County and the Sheriff of Skamania County. It was not signed by the City of Stevenson.
>
> On May 13, 1992, Luse bought from Shawn Knight a substance that appeared to be methamphetamine. Luse made the buy at Knight's residence in Stevenson. The substance turned out to be vitamin B.
>
> On May 27, 1992, Luse tried to make another buy from Knight. Knight indicated he had no drugs to sell.
>
> On June 18, 1992, in anticipation of again contacting Knight, Luse applied to Pillsbury for authority to intercept and record conversations. See RCW 9.73.230(1). Pillsbury granted the requested authorization and filled out a written report. See RCW 9.73.230(2). Wearing a body wire, Luse went to Knight's residence in Stevenson, where he purchased methamphetamine from Knight and Messersmith while Landwehr and Gonser recorded the conversation on standard cassette tapes. On June 25, 1992, Pillsbury signed a report to the court. See RCW 9.73.230(6).

On June 26, 1992, in anticipation of contacting Knight again, Luse applied to Kanekoa for another grant of authority to intercept and record. Kanekoa granted the requested authorization and filled out a written report listing "all members of the Clark-Skamania Narcotics Task Force" as persons empowered to intercept and record. See RCW 9.73.230(2). Wearing a body wire, Luse again went to Knight's residence, where he bought methamphetamine from Knight while Landwehr and Gonser recorded the transaction on standard cassette tapes. Messersmith was not present on this occasion. On July 1, 1992, Kanekoa signed a report to the court.

On July 16, 1992, a judge of the Skamania County Superior Court reviewed both intercept reports and found probable cause.

On November 4, 1992, by amended information, the State charged Knight with one count of delivery of material in lieu of a controlled substance on May 13 (Count I), delivery of a controlled substance on June 18 (Count II), and delivery of a controlled substance on June 26 (Count III). On November 19, 1992, the State charged Messersmith with delivery of a controlled substance on June 18. In all but Count I against Knight, the State alleged that the crime was committed within 1,000 feet of the perimeter of the school grounds.

Knight and Messersmith moved to suppress evidence obtained as a result of the recorded conversations. A hearing was held, and the motion was denied. The cases proceeded to trial, at which the recordings made on June 18 and June 26 were admitted. The jury returned guilty verdicts on all counts.

ISSUES AND RULINGS: (1) Where the Sheriff of Skamania County was a participant in the inter-county and inter-agency task force established by interlocal agreement, did all members of the task force have jurisdiction to enforce the criminal laws in the Skamania County city of Stevenson, even though Stevenson was not a participant in the task force? (ANSWER: Yes); (2) May a law enforcement officer above the rank of first line supervisor participating in an interlocal joint law enforcement task force authorize, under RCW 9.73.230, the interception and recording of conversations concerning controlled substances in any jurisdiction encompassed by the interlocal joint task force agreement, not just the officer's home jurisdiction, unless otherwise limited by the terms of the interlocal agreement? (ANSWER: Yes); (3) May an officer above the rank of first line supervisor not participating in an interlocal joint law enforcement task force authorize an interception and recording outside the officer's city or county of employment? (ANSWER: Generally, no); (4) Did the task force comply with the requirement of subsection (4) of RCW 9.73.230 that the tape recording be protected from editing or alteration? (ANSWER: Yes); (5) Did the task force substantially comply with post-recording judicial review requirements of RCW 9.73.230, or was there no prejudice to defendant in any non-compliance? (ANSWER: Yes to both; therefore, reversal of the conviction is an inappropriate sanction for any technical noncompliance).

Result: affirmance of Skamania County Superior Court convictions of Shawn Knight for delivery of material in lieu of a controlled substance and one for the delivery of a controlled substance; affirmance of the conviction of defendant Messersmith; and reversal of the conviction of defendant Knight on a second charge of delivery of a controlled substance.

Status: defendant's petition for review is pending in the State Supreme Court; the State did not petition for review but will respond to defendant's petition.

ANALYSIS:

(1) SHERIFF'S POWER THROUGHOUT COUNTY

Relying on the common law authority of the office of sheriff, the Court concludes that a sheriff has jurisdiction in all areas of a county, whether incorporated or unincorporated. Accordingly, where a sheriff has entered into an interlocal agreement for a task force, unless the sheriff limits his grant of authority under an interlocal, intercounty, task force agreement, all members of the task force have authority under the agreement to enforce the criminal laws in all areas of the county of the participating sheriff.

(2) TASK FORCE MEMBER'S OUT-OF-COUNTY AUTHORIZATION

Turning to the issue of whether a task force member from a city in Clark County could authorize an interception in a city in Skamania County, the Court of Appeals begins its analysis by setting out RCW 9.73.230(3), which reads as follows:

> **An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction. [Emphasis is added by LED Ed. -- See Comments by LED Ed. below at pages 10-11.]**

The Court of Appeals then implies that:

> [T]his statute means, by necessary implication, that an authorization to intercept and record is invalid outside the local jurisdiction of the issuing supervisor except when "the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction." RCW 9.73.230(3). **[See LED Editor's Comment at page 10 below. The Court of Appeals has made an incorrect reading of the sentence, we believe.]** The stated exception does not apply here, and other exceptions may not be implied.

Having reached the conclusion that, by virtue of the interlocal agreement, all members of the task force had jurisdiction to enforce the law in Skamania County (see issue 1 above), the Court of Appeals concludes that the authorization by a City of Vancouver task force member above the level of first-line supervisor in that agency was valid in the City of Stevenson.

(3) NON-TASK FORCE MEMBER'S INVALID OUT-OF-COUNTY AUTHORIZATION

On the other hand, the Court of Appeals concludes that the 9.73.230 authorization by the City of Vancouver captain who was not a member of the interlocal task force was invalid. Because that officer lacked authority to enforce the law in Skamania County, the Court holds, the interception in Stevenson County was unlawful. **[See LED Editor's Comment at pages 10 - 11 below.]**

(4) PROTECTION-OF-TAPE REQUIREMENT

On the tape-protection issue, the Court of Appeals explains why it finds no violation of the statute:

> Knight and Messersmith argue that the police "failed to scrupulously observe" RCW 9.73.230(4), because they "failed to take any special precautions to insure that 'the recording . . . shall be done in such a manner that protects the recording from editing or other alterations.'" The State responds by saying that it presented evidence showing that each recording was made on a tape not previously used; that it was immediately marked and given to Luse; that he immediately put it into the evidence system of the Clark County Sheriff's Department; and that it was not altered or edited between the date on which it was made and the date of trial. The State argues that this evidence meets the requirements of RCW 9.73.230(4), and we agree.

(5) POST-RECORDING REVIEW REQUIREMENT

On the post-recording review requirement, the Court begins its analysis as follows:

> Knight and Messersmith argue that the State failed to comply with the requirements of RCW 9.73.230(6) or (7)(a). We consider only the June 18 transaction, since the June 26 transaction must be reversed on other grounds.
>
> RCW 9.73.230(6) provides that within fifteen days after the signing of an authorization that results in the interception or recording of a conversation, the law enforcement agency shall submit a report and the original authorization to a judge having jurisdiction. RCW 9.73.230(7)(a) provides that the judge, within two judicial days of receiving these documents, shall determine whether one party consented, whether probable cause existed, and whether a proper report was filled out at the time.
>
> In this case, Pillsbury signed a written report on June 25, seven days after the June 18 incident. The record does not show whether the report was then submitted to the judge, or whether it remained with Pillsbury for a time. In any event, the judge reviewed it and found probable cause on July 16, eleven days after the latest date on which the report could properly have been reviewed.

The Court then concludes its analysis of this issue by asserting that any non-compliance with this post-recording court review requirement does not warrant reversal of a conviction unless: (1) the State cannot show substantial compliance with the court review requirement, or (2) the defendant shows that he was prejudiced by the State's failure to strictly comply. The Court finds both (1) substantial compliance by the State and (2) no prejudice to defendant.

LED EDITOR'S COMMENT: We are concerned about the ruling in Knight on what we designate as "ISSUE 3" above -- the limitation on non-task force officers authorizing 230 activity outside the city or county of employment of the non-task force authorizer. We believe that the Court of Appeals has misread the admittedly ambiguous language of RCW 9.73.230(3) -- set forth in its entirety in bold above at page 9 -- by failing to understand the context in which the term "jurisdiction" is used and in failing to read the introductory

clause of subsection (3) as a separate declaration not restricted by the remainder of subsection 3. The introductory clause of subsection (3) unqualifiedly declares: "[a]n authorization under this section is valid in all jurisdictions within Washington state . . ."

Thus, our contrary view is that the first clause of subsection (3) means what it says and has no exceptions -- every otherwise lawful 230 authorization is valid in every city and county in the state of Washington. We believe that the final clause of subsection (3) was included by the Legislature in order to make the authorization valid in "another jurisdiction" beyond Washington State under certain circumstances. The final clause of subsection (3) does not in any way limit the initial clause of subsection (3). That is, we believe that the concluding reference to "another jurisdiction" in the final clause of subsection (3) -- addressing situations where nonconsenting parties cause consenting parties to go to "another jurisdiction" -- addresses only situations where the consenting parties are caused to go to a jurisdiction other than the State of Washington (e.g., Oregon, idaho, British Columbia, etc.). Prosecutors may wish to make an argument along these lines in future cases, though we believe that the prosecutor in Knight will not be able to make a similar argument to the State Supreme Court in responding to defendant Knight's petition for review to that court.

Assuming for the sake of discussion that agencies wish to fall in line with Knight's ISSUE 3 ruling, we note the following: we assume that the non-task force officer above the line of first line supervisor may give extra-territorial authorization if he or she has a letter of consent under chapter 10.93 RCW from the chief or sheriff of the extra-territorial city or county (NOTE: although the Knight Court briefly mentions letters of consent, for some unknown reason, the Court of Appeals deems such letters irrelevant under the facts of the Knight case). However, barring an appropriate letter of consent, if the Knight Court is correct on ISSUE 3, then only task force members are empowered to authorize 230 activity in the neighboring Washington city or county participating in the task force. . . Consult your prosecutor and/or legal advisor.

And note that the issue of the territorial scope of the authorization is a different issue from that concerning the territorial authority of the officers carrying out the authorization. The officers doing the intercepting and recording must have independent territorial jurisdiction to carry out the authorization. See chapter 10.93 RCW -- Mutual Aid Peace Officer Powers Act.

FIVE-YEAR-OLD FOUND COMPETENT TO TESTIFY

State v. Avila, 78 Wn. App. 731 (Div. I, 1995)

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

> In 1991, NT was four years old. She and her mother, TT, lived in an apartment complex in Burlington. One of their neighbors, Pam Richards, cared for NT while TT was at work. Avila was Richards's fiancee and occasionally stayed overnight at her apartment. He was at her apartment daily between December 18, 1991, and January 3, 1992.
>
> On January 8, 1992, NT told her mother that sometime in late December 1991, while she was at Richards's apartment, Richards went to the store and left her and

> Arron, Richards's son, alone with Avila. NT told TT that Avila had placed his hands inside her panties and played with her "thingee". NT made a number of similar statements to TT and to Jean Willard, who started caring for NT after the incident at Richards's apartment.
>
> Before trial began, the court held a hearing to determine whether NT was competent to testify and whether NT's statements to TT and Willard were admissible child hearsay. In response to the prosecutor's questions, NT stated that she was five years old, described the color of her skirt and the shapes on her jacket and identified an animal on the prosecutor's tie as a tiger. NT counted from 1 to 17 before she was interrupted. The prosecutor asked her to identify an object in front of her. She replied that it was her doll and she identified "the pink one over [t]here" as "little piggy".
>
> The prosecutor asked NT if she remembered who the judge was. NT pointed to the court. The prosecutor then asked her whether "he is the one that needs to hear what you say and what happened to you". NT nodded affirmatively. The prosecutor then asked: "Is it important to tell the judge the truth about things?" She gave an inaudible response. The prosecutor repeated the question. This time NT nodded affirmatively and said "Mommy".
>
> The prosecutor then asked NT a series of questions about her trip to Disneyland with her aunt and uncle in April 1992, three months before the hearing. NT stated that she went there with Tony, her uncle, that she had fun and played on the rides. She explained that her mother didn't go with her because she was working. The prosecutor asked NT about her babysitters. NT stated that, at the time of the hearing, she went to "Grandma Jean's". The prosecutor asked if anyone else ever babysat for her. She replied "Pam" (Richards). When asked if she liked going to Richards's, NT responded negatively. The prosecutor asked "how come" and NT stated: "This is so hard for me" and I don't want to do this". The prosecutor's final question on this subject was whether she went to Richards's "a lot of days or one day". NT responded that she went there on "lots of days". The defense did not ask NT any questions.
>
> The trial court found NT competent, stating that it did not "have any question but she understood the obligation to speak the truth on the witness stand" and that the elements set forth in the Allen case were met. . . . She had to be called to the stand twice because she was too upset to testify at first. When she was recalled, NT testified that Avila "touched [her] private part".

[Footnotes omitted]

ISSUE AND RULING: Did the trial court err in determining the five-year-old victim/witness competent to testify? (ANSWER: No) Result: Skagit County Superior Court conviction of first-degree child molesting affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> State v. Allen, 70 Wn.2d 690 (1967), sets forth the test for determining the competency of a child witness. The child witness must demonstrate:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.
>
> The responsibility for determining a witness' competency rests with the trial court, who "saw the witness, noticed her manner and considered her capacity and intelligence". . . .
>
> At the competency hearing, NT responded affirmatively when the prosecutor asked her if it is important to tell the judge the truth about things. This is sufficient to meet the first factor, an understanding of the obligation to speak the truth on the witness stand. NT also demonstrated that she had the mental capacity at the time of the incident to receive an accurate mental impression of it. NT was four years old at the time of the incident. Although she found it hard to talk about the incident, she was able to recollect details of a trip to Disneyland which she took several months before the hearing. The trial court also observed that she was a bright child. NT's recollections of the trip to Disneyland and of her babysitters satisfy the third factor, a memory sufficient to retain an independent recollection of the occurrence. Finally, NT's answers to the prosecutor's questions at the competency hearing demonstrated that she had the capacity to express her memories of past event and to understand questions about them, thus satisfying the fourth and fifth Allen factors.
>
> NT's reluctance to testify about the abuse both at the competency hearing and at trial does not defeat the trial court's competency determination. Nor does her failure to answer any questions or testify about the incident at the competency hearing undermine that finding. A court is not required to "examine a child witness regarding the particular issues and facts of the case to determine competency". State v. Przybylski, 48 Wn. App. 661 (1987). In Przybylski, we held that as long as the witness demonstrates the ability to "accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well". NT was about to testify about events contemporaneous with the incident, and the trial court properly concluded that she would be competent to testify about the incident as well.
>
> In addition, NT's actual trial testimony demonstrates that she was a competent witness. Although a trial court determines competence pretrial, on appeal we will examine the entire record to review that determination. This approach is consistent with the great deference we give to a trial court's competency determination because of its unique opportunity to observe the witness' demeanor.

[Some citations omitted]

ADULT COURT MAY NOT ISSUE ARREST WARRANT FOR JUVENILE

State v. Werner, 79 Wn. App. 872 (Div. II, 1995)

Facts:

A deputy prosecutor filed charges against Leonard Dyer in the adult division of the superior court, and a superior court judge in that adult division of the court issued an arrest warrant for Leonard Dyer. At that point in time: (1) Dyer was still a juvenile, and (2) the juvenile division had not declined jurisdiction as to Dyer.

Police then went to Dyer's residence (he resided with his stepfather, Thomas Werner) to arrest him on the warrant. When Dyer answered the door, the officers arrested him. Dyer asked for permission to get dressed; the officers agreed. They followed Dyer into the house. While in the house, the officers smelled a strong odor of growing marijuana, although they could see no signs of a grow operation at that point.

Later that day, after Dyer had been taken to jail, one of the officers returned and asked the stepfather, Werner, if he would consent to a search of the house. Werner refused consent, stating that the officer would need a search warrant. The officer hid outside the premises, and moments later, observed Werner loading boxes into a truck in a hurried manner. When the officer then approached and contacted him, Werner admitted his involvement in the grow operation and signed a consent-to-search form. Police found a marijuana grow operation in the house.

Proceedings:

Werner was charged with possession of marijuana with intent to manufacture. Meanwhile, the invalid adult court charges against Dyer on which the arrest warrant had been based were dismissed without prejudice to properly charge him as a juvenile, and the invalid adult court arrest warrant was dismissed. Thereafter, Werner's motion to suppress the marijuana grow evidence seized by police in the consent search was granted, and the case against him was dismissed for lack of evidence. The trial court held that the police had violated Werner's rights when they entered his home to arrest his stepson, Dyer, on the invalid arrest warrant.

ISSUE AND RULING: (1) Was the arrest warrant issued by the adult division of the superior court valid against the juvenile, Dyer, on whom adult court declination had not occurred? (ANSWER: No); (2) Does the exclusionary rule require suppression of the evidence which had been seized as the fruit of the earlier unlawful entry and arrest of Dyer? (ANSWER: Yes) Result: Grays Harbor Superior Court decision suppressing the evidence affirmed.

ANALYSIS:

(1) Lawfulness of Entry

The Court of Appeals concludes that the warrant for Dyer's arrest was invalid because the Fourth Amendment of the U.S. Constitution prohibits officers from entering a person's home to arrest him without a valid arrest warrant, valid consent, or exigent circumstances. Mere probable cause to arrest will not justify forcible entry to make that arrest. The Court notes that the officers did not seek Dyer's consent, nor was there any evidence of an exigency.

The only justification for the forcible entry asserted by the State in this case was the arrest warrant for Dyer. Because the arrest warrant was invalid, the entry into the house was invalid, and

Werner's Fourth Amendment rights were accordingly violated by the entry, the Court declares.

(2) Good Faith of Officers

In response to an argument by the State that the Court of Appeals should admit the evidence under the Fourth Amendment's "good faith" exception to exclusion, the Court of Appeals asserts that the Washington courts have not yet adopted a "good faith" exception to the exclusionary rule. Accordingly, the Court of Appeals concludes that the evidence seized in the consent search must be suppressed.

FAKE ID BANK WITHDRAWAL SCHEME "FORGERY", NOT "MONEY LAUNDERING"

State v. Aitken, 79 Wn. App. 890 (Div. I, 1995)

Facts and Proceedings:

Harold Aitken used the name of John Alexander, a baby who had died in 1955, to obtain a state ID card in New Mexico. With the false ID card and John Alexander's social security number, Aitken obtained a business license in New Mexico and opened a checking account there.

Soon thereafter, Aitken moved to Seattle and opened savings and checking accounts at Key Bank in the assumed name of John Alexander. In a short time following, he deposited three checks written on the New Mexico account and totaling about $13,000 into various Washington branches of Key Bank.

Then Aitken entered a Key Bank branch and presented a withdrawal slip for $7,500 to be drawn from the recently-established "John Alexander" account at Key Bank. When the Key Bank personnel checked this account, they determined that all three checks that had been written on the New Mexico account had been returned for insufficient funds. The Key Bank personnel called the police, who arrested Aitken before he had left the bank.

Aitken was charged with forgery and money laundering. Aitken was found guilty on both charges in a non-jury trial.

ISSUES AND RULINGS: (1) Is there sufficient evidence to support a "forgery" conviction? (ANSWER: Yes); (2) Is the "money laundering" statute a general statute which is superseded by the more specific statute, "unlawful issuance of checks or drafts"? (ANSWER: No); (3) Do the facts of this case support a "money laundering" charge? (ANSWER: No) Result: Kitsap County Superior Court conviction for forgery affirmed, but money laundering conviction reversed.

ANALYSIS:

(1) Forgery evidence

Aitken argued on appeal that the forgery conviction was not supported by the evidence. His theory was that he had a right to assume another name and was authorized to use any such assumed name in drawing on the bank account in that name. However, the Court of Appeals rules that the crime of forgery is committed with the use of an assumed name, if the person assumed the name "for the purpose and with the intent of perpetrating a fraud."

A written instrument is falsely made, the Court holds, if it purports to be authentic, and the purported maker of the instrument did not actually authorize its making. The true John Alexander (deceased) did not authorize Aitken to use his name, the Court concludes. Hence, the forgery conviction is supported by the evidence, the Court holds.

(2) Money Laundering Statute Superseded?

The Court of Appeals rejects Aitken's argument that the "money laundering" statute is a general statute that is superseded by the more specific statute addressing "unlawful issuance of checks or drafts". This argument does not stand up in this case, the Court holds, because the two criminal statutes do not punish the same conduct.

(3) Sufficiency of Evidence of Money Laundering

On the issue of whether there was sufficient evidence to convict Aitken of money laundering under chapter 9A.83 RCW, however, the Court of Appeals agrees with Aitken. The money laundering statute requires the manipulation of "the proceeds of specified unlawful activity." Since the New Mexico checks had been rejected for insufficient funds, there were no proceeds in the Key Bank account for Aitken to "manipulate," the Court holds.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **"INTENT TO DELIVER" EVIDENCE SUFFICIENT WHERE DRUG BUYER HAD $808 CASH AND NO DRUG USE PARAPHERNALIA ON HIS PERSON IMMEDIATELY FOLLOWING $1000 DRUG BUY** -- In State v. Lopez, 79 Wn. App. 755 (Div. III, 1995), the Court of Appeals for Division Three rules that the State produced sufficient evidence to support a drug defendant's conviction for possessing cocaine "with intent to deliver."

Defendant Antonio Verde Lopez had been arrested immediately after he had purchased for $1000 a two-ounce packet of cocaine from an undercover officer. The officer's search incident to that arrest is described by the Court of Appeals as follows:

> Detective Aiken took Mr. Lopez into custody. He recovered $600 in currency from Mr. Lopez' left front pants pocket, along with an envelope containing fourteen individual quarter-gram bindles of cocaine, weighing a total of 4.7 grams. In Mr. Lopez' right front pants pocket was $208 in currency. His wallet contained $18.50. The officers found no drug user paraphernalia on either Mr. Lopez or Mr. Hernandez.

The Court of Appeals explains on the "intent to deliver" issue in the Lopez case that one cannot be found convicted of possessing illegal drugs with "intent to deliver" based solely on mere possession, even of a large quantity, of illegal drugs.

Additional evidence showing intent to deliver is needed, the Court of Appeals says, and was present here:

> We hold that Mr. Lopez' possession of large amounts of cash after the transaction

> indicates an intent to deliver. After the sale, Mr. Lopez had in his possession a total of $826.50. This is $500 more than the officer's original asking price for the two ounces, and is suggestive that Mr. Lopez intended to distribute the large amount of cocaine, rather than retain it for his own use.

Result: Chelan County Superior Court conviction of possession of cocaine with intent to deliver affirmed; however, on double jeopardy grounds, the Court of Appeals merges into one charge the two "possession with intent" charges against Lopez for: (1) the drugs already on his person before the undercover drug deal, and (2) the two-ounce packet of drugs possessed as a result of the drug deal.

LED EDITOR'S NOTE: See the February '96 LED entry on State v. Davis, 79 Wn. App. 591 (Div. III, 1995) Feb. '96 LED:13 for additional case citations and more detailed discussion of the "intent to deliver", evidence-sufficiency question.

(2) **NO MIRANDA "INTERROGATION" IN OFFICER'S SPONTANEOUS PATROL CAR STATEMENT TO ARRESTEE** -- In State v. Breedlove, 79 Wn. App. 101 (Div. II, 1995), the Court of Appeals rules that an officer's patrol car response to an arrestee's question was not "interrogation" under the Miranda rule, and therefore the arrestee's response to the officer was admissible under Miranda, even though the officer had not given Miranda warnings to the arrestee.

The Court of Appeals summarizes the pertinent facts as follows:

> Werner arrested Breedlove in Seattle and personally transported him to Tacoma. At trial, Werner testified that, as the patrol car entered Tacoma, Breedlove asked what city they were in and that Werner told Breedlove "he was in Tacoma where he had killed somebody . . .." According to Werner, Breedlove responded that he had never been in Tacoma. On cross-examination, Werner also testified that he did not expect a response from Breedlove to his statement regarding their whereabouts.

The Court then analyzes the Miranda interrogation issue as follows:

> One is entitled to the protections afforded by Miranda v. Arizona if he or she is "(1) taken into custody . . . and (2) subjected to custodial interrogation." The trial court correctly refused to suppress Breedlove's statement because Miranda warnings were not required here and the exclusionary rule was inapplicable. Werner did not interrogate Breedlove because Werner's statement was not "reasonably likely to elicit an incriminating response" from the suspect.
>
> The exchange between Werner and Breedlove closely resembles that in State v. Webb, **[64 Wn. App. 480 (Div. I, 1992) Jan '93 LED:12]**. In Webb, the defendant, while being booked, asked the officer "if all this is necessary." The officer replied, "You're damn right this is necessary. You went in and vandalized Sheryl's apartment." The defendant then stated, "But the stuff I damaged was mine too." The Court of Appeals held that the officer's statement "not only was a reasonable response to [the defendant's] inquiry, but it did not call for a response from [the defendant]." The court concluded that the officer "could not have known that his . .

> . statement would elicit an incriminating response from [the defendant]" and therefore the defendant's statement was not induced by improper custodial interrogation. In the instant case, Werner, just as the officer in Webb, responded to Breedlove's question with an accusation that Breedlove committed the crime for which he was arrested. As in Webb, Werner's statement did not call for a response from Breedlove and Werner could not have known that his statement would elicit an incriminating response from Breedlove. As such, Werner's statement was not interrogation and the absence of Miranda warnings is irrelevant.

[Footnotes omitted]

Result: Pierce County Superior Court conviction for second degree murder reversed on grounds (right to self-representation at trial) not addressed here; case remanded for re-trial.

LED EDITOR'S COMMENT: The Breedlove decision correctly applies the Miranda rule. Beware, however, of the court rule, CrRLJ 3.1, which requires that persons be advised of their "right to counsel" immediately after they have been arrested. See discussion of State v. Trevino, 127 Wn.2d 735 (1995) in the January 1996 LED beginning at page 3. We cannot determine from the Breedlove opinion whether the officer advised Breedlove of his right to counsel under CrRLJ 3.1 after arrest and prior to transport. In light of the Trevino Court's 3.1 discussion, it seems likely that, if defendant (a) had not received a CrRLJ 3.1 warning prior to transport, and (b) had raised a CrRLJ 3.1 objection in the 3.5 hearing, the Court of Appeals would have been compelled to suppress Breedlove's volunteered statement based on the court rule alone.

(3) **INJURY-ACCIDENT-HIT-AND-RUN STATUTE (RCW 46.52.020) APPLIES EVEN IF NO MV CONTACT --** In State v. Hughes (Billy Ray), 80 Wn. App. 196 (Div. III, 1995), Division Three of the Court of Appeals rules that under RCW 46.52.020, the "hit"-and-run statute, there is no requirement that vehicles actually have contact in order for the statute to apply. Billy Ray Hughes had been involved in a night-time drag race with a friend when the friend's vehicle left the road. Occupants of the second vehicle were killed. Hughes was convicted of: (1) reckless driving, and (2) failure to report an injury accident (HIT-AND-RUN) as required by RCW 46.52.020. Hughes appealed only the hit-and-run conviction. The statutory analysis by the Court of Appeals is as follows:

> The issue before us is whether a driver can be "involved in an accident" for purposes of RCW 46.52.020 without physical contact between his vehicle and the person or property of another. Mr. Hughes notes RCW 46.52.020 is the "hit-and-run" statute, and argues it clearly contemplates a collision with a person or property. Citing State v. Vela, 100 Wn.2d 636 (1983) and State v. Martin, 73 Wn.2d 616 (1968). [H]e asserts the offense has an element of striking and the mental element of knowledge that there has been a collision. He further argues if the phrase "involved in an accident" is ambiguous and in need of interpretation, we must apply the rule of lenity and construe the statute strictly against the State.
>
> All of the Washington cases citing this statute apparently involved literal hit-and-run circumstances; thus, none have addressed the issue presented in this case. Martin and Vela do not hold there must be a striking of a person or property before a driver is required to stop, provide information and render aid. Martin holds

knowledge of the accident is an element of the offense, while Vela holds knowledge that the accident resulted in injury or death is not an element.
. . .

Washington's first hit-and-run statute imposed affirmative duties (to stop, assist and report) on any person operating or driving a motor vehicle on such highway." In 1937 the Legislature revised the statute, dropping the express contact requirement except when a driver collides with an unattended vehicle. The duties of an operator of a vehicle "which collided with any other vehicle which is unattended" were separated from the duties of an operator of a "vehicle involved in an accident" resulting in the injury to or death of any person, or other property damage, or damage to a vehicle which is driven or attended. Laws of 1937, ch. 189. . ..

The current statutes retain the 1937 distinction: RCW 46.52.010 describes the duties of an operator of a vehicle "which collided with any other vehicle which is unattended" and those of the driver of a vehicle "involved in an accident" resulting only in damage to property on or adjacent to any pubic highway, while RCW 46.52.020 describes the duties of any driver of any vehicle "involved in an accident" resulting in injury or death, or damage to an attended vehicle, or damage to other property. Harmonizing the two statutes and giving effect to both, we conclude the Legislature did not intend that the duty to stop, identify and render aid in an injury accident be interpreted so narrowly as to attach only to the driver of a vehicle which collided with another; otherwise, it would not have dropped the express contact requirement.

Moreover, Mr. Hughes' interpretation does not serve the underlying rationale of facilitating investigation of accidents, identifying those responsible and providing immediate assistance to those injured. Instead, it leads to unjust and absurd results. Under his interpretation, for example, a driver who causes a serious or fatal accident by turning or passing unsafely and forcing an oncoming car off the road to avoid a head-on collision would have no duty to stop and assist. Similarly, a driver who causes a serious or fatal accident between two other vehicles would also have no duty to stop.

Courts in at least four other states have found that a driver can be "involved in an accident" within the meaning of similar statutes when the driver's actions cause another driver taking necessary evasive action to collide with a third vehicle. . . .

We conclude the Legislature intended to and did broaden the category of drivers subject to the duties imposed by RCW 46.52.020 when it dropped the contact requirement in favor of the phrase "involved in an accident." Therefore, the trial court did not err in refusing Mr. Hughes' proposed instruction.

[Some citations omitted]

Result: affirmance of Benton County Superior Court conviction for hit-and-run injury accident.

(4) **CONFESSIONS INADMISSIBLE WHERE NO CORPUS DELICTI FOR CRIMES OF THEFT**

AND BURGLARY -- In the consolidated cases of State v. DuBois and State v. Bustamonte, 79 Wn. App. 605 (Div. I, 1995), the Court of Appeals reverses convictions in two unrelated cases based on the corpus delicti rule. The corpus delicti rule generally requires that, in order for a defendant's confession or admission to be admissible in a criminal prosecution, the State must show: (1) an injury or loss, and (2) someone's criminal act as the cause of that loss.

In the BuBois burglary case, the only evidence of a burglary of a school shop, other than DuBois' confession, were the facts: (1) that a window at the school had been open for an indefinite time period, (2) that DuBois was in possession of some welding rods of unknown source which may or may not have been taken from the school, and (3) that unmarked welding rods were missing from the school shop. In the Bustamonte shoplifting theft case, the only evidence of a theft, other than Bustamonte's confession, was her mere possession of an unopened pack of cigarettes which may or may not have come from the store (Bustamonte was drawn to store personnel's attention by another shopper whose inadmissible hearsay report to store personnel was that Bustamonte had stolen some cigarettes; the witness was not called to testify at the trial.)

Result: reversal of DuBois' Whatcom County Superior Court juvenile adjudication of guilt for second degree burglary; reversal of Bustamonte's King County Superior Court juvenile adjudication of guilt for third degree theft.

(5) **CORPUS DELICTI FOR FELONY-MURDER ESTABLISHED WITHOUT CORROBORATION OF UNDERLYING FELONY --** In State v. Burnette, 78 Wn. App. 952 (Div. I, 1995), the Court of Appeals rejects defendant's corpus delicti challenge to the admission of his confession in a felony-murder trial.

Under the corpus delicti rule a confession is inadmissible unless there is independent evidence that prima facie establishes the corpus delicti of the charged crime (i.e., ordinarily, this means that the State must prove that there was an injury or loss caused by a criminal act). Evidence will establish the corpus delicti if sufficient circumstances exist from which the fact of injury or loss can logically and reasonably be inferred. It is not necessary to establish the corpus delicti beyond a reasonable doubt or by a preponderance of the proof.

In Burnette, the State sought to introduce Burnette's admissions to his acquaintances that he had robbed and murdered the victim. The State was able to corroborate that the murder victim had died through criminal means, but the State arguably was unable to corroborate that a robbery had occurred. This proof was sufficient to satisfy the corpus delicti rule, the Court of Appeals holds, because the corpus delicti of felony murder does not include a requirement that there be corroborating evidence of the underlying felony, only of the criminal homicide.

Result: Whatcom County Superior Court conviction for first degree murder affirmed.

(6) **CONFESSIONS AND ADMISSIONS NOT ADMISSIBLE BECAUSE CORPUS DELICTI FOR MANSLAUGHTER TWO NOT ESTABLISHED IN "SIDS" DEATH CASE** -- In State v. Aten, 79 Wn. App. 79 (Div. II, 1995), the Court of Appeals reverses Vicki Jo Aten's conviction for second degree manslaughter based on inadmissibility of her confessions under the corpus delicti rule. The Court of Appeals rules, 2-1, that insufficient independent evidence of the crime of second degree manslaughter was produced by the State to permit into evidence several admissions of guilt that defendant had made following the death of a four-month-old child that defendant had been babysitting.

After an autopsy, a pathologist concluded that the child had died from Sudden Infant Death Syndrome (SIDS). However, in the following weeks, Ms. Aten admitted to the child's mother, the child's doctor, and a sheriff's deputy (in varying and ambiguous statements) that she had "suffocated" the child by putting her hand over the child's mouth. At the same time, however, she insisted that the child had been alive when she had later laid the child down to sleep on the night in question. At trial, the pathologist testified that an autopsy could not distinguish between an intentional suffocation of a child and SIDS.

The majority judges in Aten assert in an opinion comprehensively analyzing the case law on the corpus delicti rule that this was an appropriate case for application of the rule because: (1) an important purpose served by the corpus delicti rule is to protect persons from being convicted based solely on their subjective sense of guilt or responsibility; (2) a common response to SIDS death is a sense of guilt; (3) this sense of guilt appeared to be the reason for Ms. Aten's admissions; and (4) there was insufficient corroboration of guilt. The Court thus rules there was insufficient evidence of the corpus delicti of second degree manslaughter under the circumstances.

Result: reversal of Clallam County Superior Court conviction for second degree manslaughter; case remanded for dismissal of the charges.

(7) **NO MENTAL STATE ELEMENT FOR ANY VARIATION OF "RAPE" OFFENSES; HENCE, VOLUNTARY INTOXICATION NO DEFENSE TO SECOND DEGREE RAPE CHARGE** -- In State v. Brown, 78 Wn. App. 891 (Div. II, 1995), the Court of Appeals rejects a second degree rape defendant's argument that, under the facts of his case (i.e., oral-genital contact), intent is an element of the rape statute.

Defendant argued that he should have been allowed to argue to the jury that he had suffered an alcoholic blackout when he had placed his mouth and tongue on the vagina of a sleeping female. Defendant's theory was: (1) that due to his blackout he lacked intent to commit a crime, and (2) that the definition of "sexual intercourse" at RCW 9A.44.010(1)(c) requires proof of a purpose of "sexual gratification" under certain circumstances (i.e., where the variation of "sexual intercourse" involves sexual contact between persons involving the sex organs of one person and the mouth or anus of another).

The Court of Appeals acknowledges that, while the statute could be read in this way, legislative intent would be violated in such a reading because, among other things, this would eliminate the distinction between rape and crimes such as "child molesting" and "indecent liberties." The Court declares in effect that no variation of "rape" contains an intent element, and hence intoxication cannot be a defense to any rape charge. Accordingly, Brown was lawfully denied a chance to argue intoxication as a defense, the Court of Appeals holds.

Result: Kitsap County Superior Court second degree rape conviction of James K. Brown affirmed.

(8) **DESTRUCTION OF ARSON EVIDENCE BY THIRD PARTY DOES NOT IMPLICATE "DUE PROCESS" PROTECTIONS; BUT INSURANCE COMPANY LOSES ON RESTITUTION ISSUE** -- In State v. Martinez, 78 Wn. App. 870 (Div. II, 1995), the Court of Appeals rejects arson defendant Martinez's challenge to his conviction.

Along with other challenges to his conviction, Martinez claimed that his "due process" right to preservation of evidence was violated when, following the fire, the police had allowed the owner of the burned building to replace the furnace in the building. Martinez's theory of the case was that a faulty furnace (not his use of a match and accelerants) was the cause of the fire at issue. The Court explains as follows why this preservation-of-evidence argument fails:

> CrR 4.7(a)(4) requires the prosecuting attorney to disclose all "material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." Martinez's first argument fails because the furnace does not fall within the scope of the rule. The furnace was never in the possession or control of the prosecutor's office or the police.
>
> Even if we assume that the rule applies to the furnace, violation of procedural rules of discovery does not necessarily mean a defendant's constitutional right to due process has been violated. The due process right to obtain evidence applies only to evidence favorable to the defendant and material to guilt or punishment.
>
> To be material, "'evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means.'" *[COURT'S FOOTNOTE: Evidence is not material if there is only the possibility that it might have helped the defense or affected the outcome at trial. If police fail to preserve nonmaterial evidence, there is no due process violation unless the defendant can show the police acted in bad faith. Here, Martinez has not alleged, and the facts do not indicate, that the prosecutor acted in bad faith.]* Here, the first prong of the materiality test cannot be met. The evidence at issue was not in the control or possession of the prosecutor or police,nor did it have apparent exculpatory value before it was destroyed. The police began to suspect arson within a few days of the fire; however, because the insurance investigator, the county fire marshall and the state fire marshall had all ruled out the furnace as a cause of the fire, the police never made an effort to obtain it. Evidence which was not obtained cannot be preserved. Moreover, the prosecutor does not have a duty to seek out exculpatory evidence.

[Citations omitted]

On the other hand, the Court of Appeals is convinced by defendant's challenge to the trial court's restitution order. The Court of Appeals rules that the insurance company was not entitled to restitution for either: (a) its costs of investigating the arson, or (b) its attorney fees and costs in pursuing a civil action against Martinez.

Result: Cowlitz County Superior Court conviction for first degree arson affirmed; restitution award to the insurer reversed.

LED EDITOR'S NOTE: Only to the extent that an insurance company must pay for a loss inflicted by a criminal defendant can the insurance company generally obtain restitution for insurance company costs related to a criminal act. See State v. Barnett, 36 Wn. App. 560 (Div. I, 1984).

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