January 1996

HONOR ROLL

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438th Session, Basic Law Enforcement Academy - Seattle - August 31 through November 30, 1995

President:	Deputy Edward L. Hewitt, Sr. - Clark County Sheriff's Department
Best Overall:	Officer Kathleen A. Peninger - Camas Police Department
Best Academic:	Officer Stephen W. Verrill - Seattle Police Department
Best Firearms:	Officer Chris T. Ivanovich - Warden Police Department

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439th Session, Basic Law Enforcement Academy - Spokane - September 7 through November 30, 1995

Highest Achievement in Scholarship:	Officer James C. Collins - Spokane Police Department
Highest Achievement in Night Mock Scenes:	Officer Daniel G. Lesser - Spokane Police Department
Outstanding Officer (Attitude & Effort):	Deputy Ned C. Bernath - Adams County Sheriff's Office
Highest Achievement in Pistol Marksmanship:	Officer Breton E. Van Sloten - Grandview Police Department
Best Overall Firearms:	Officer Stephen C. Halleck - WA ST University Police Dept

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Corrections Officer Academy - Class 221 - November 6 through December 8, 1995

Highest Overall:	Officer Lloyd R. De Shazer - Olympic Correctional Center
Highest Academic:	Officer Lori Lorraine Black - Pine Lodge Pre-Release
Highest Practical Test:	Officer Pedro A. Botello - Yakima County Corr/Deten Center
	Officer Michael D. Kerrone - Olympic Correctional Center
Highest in Mock Scenes:	Officer Lloyd R. De Shazer - Olympic Correctional Center
Highest Defensive Tactics:	Officer John P. Cagle - Kent Corrections Facility

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Corrections Officer Academy - Class 222 - November 6 through December 8, 1995

Highest Overall:	Officer Terry W. Mendez - Grays Harbor County Jail
Highest Academic:	Officer Terry W. Mendez - Grays Harbor County Jail
Highest Practical Test:	Officer Joel D. Langsca - Kent Corrections Facility
	Officer Terence E. Madden - Grandview City Jail
	Officer John H. Paul, III - Sunnyside City Jail
Highest in Mock Scenes:	Officer Terry W. Mendez - Grays Harbor County Jail
	Winford D. Taylor - Clallam Bay Corrections Center
Highest Defensive Tactics:	Officer Harry Kendell Peterson - Benton County Corrections
	Officer Steven C. Stout - Twin Rivers Corrections Center

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WASHINGTON STATE SUPREME COURT

GOOD NEWS, BAD NEWS. : BAC TEST DOES NOT BEGIN WITH MOUTH CHECK, BUT "RIGHT TO COUNSEL" RULE (CrRLJ) REQUIRES EARLY, LIMITED POST-ARREST WARNING

State v. Trevino, 127 Wn.2d 735 (1995)

Fact and Proceedings (Consolidated appeals):

State v. Trevino

A Spokane County deputy sheriff had arrested Oscar Trevino on probable cause for DUI following a traffic stop. The deputy transported Trevino to the public safety building for a BAC test. Preparatory to that test, the deputy asked Trevino if he had anything in his mouth; Trevino replied: "No."

The mouth check was completed, and a few minutes later, for the first time following the arrest, and as part of a Miranda warning, the deputy advised Trevino of his right to counsel. Then implied consent warnings were given. Subsequently, Trevino consulted with an attorney by telephone and thereafter took the BAC test, measuring 0.24. He was later charged with DUI.

Pre-trial, Trevino moved successfully in district court to suppress the breath test results on grounds that combined: (1) a "right to counsel" theory under Washington court rules, and (2) an implied consent theory. The State unsuccessfully appealed to Superior Court and the Court of Appeals.

State v. Miesse

Tina Miesse was arrested on probable cause for DUI by a Kitsap County deputy sheriff following a one-car accident. The deputy gave a Miranda warning (which included a right to counsel warning) before transporting Miesse from the scene. At the county jail, the deputy checked Miesse's mouth before giving her: (1) a second Miranda warning, and (2) implied consent warnings. After receiving warnings, she took the test and recorded a 0.12. After Miesse was charged with DUI, she unsuccessfully moved to suppress in district court. The State Supreme Court took direct review of that decision, consolidating it with the Trevino case for review purposes.

ISSUES AND RULINGS: (1) [Trevino only] Was Washington court rule CrRLJ 3.1(c)(1) violated by the arresting deputy's failure to advise Trevino sooner following arrest of his right to counsel? (ANSWER: Yes); (2) [Trevino only] Was Trevino prejudiced by the deputy's failure to give a timely

"right to counsel" warning per the court rule? (ANSWER: No); (3) [Trevino and Miesse] Does the BAC test begin with a mouth check, such that, for purposes of BAC test validity, the arresting officer must give a counsel warning and an implied consent warning prior to a BAC-related mouth check? (ANSWER: No) Result: Trevino case suppression ruling reversed and case remanded to trial court for trial; Miesse case denial-of-suppression ruling affirmed and case remanded for trial.

ANALYSIS:

(1) RIGHT TO COUNSEL -- COURT RULE (CrRLJ 3.1)

The Supreme Court declares in regard to the CrRLJ's "right to counsel" provision:

> Pursuant to CrRLJ 3.1(c)(1), an arresting officer is required to advise an arrested person "*as soon as practicable*" of his right to a lawyer. The rule provides, further, that the right shall accrue "*as soon as feasible after the defendant has been arrested*" (CrRLJ 3.1(b)(1) (emphasis added). Although the terms "as soon as practicable" and "as soon as feasible" are not defined in the rule, the Task Force Comment to Rule 3.1 suggests that this advice must be given "immediately" after the arrest. 4A Lewis H. Orland & Karl B. Tegland, Wash. Prac., *Rules Practice* CrRLJ 3.1 task force cmt., at 780 (4th ed. 1990). We subscribe to that view of when the advice of the right to counsel should be given.
>
> It is readily apparent that the advice that the deputy sheriff was required to give to Trevino, pursuant to CrRLJ 3.1(c)(1), was not given to him immediately after his arrest. As we have observed above, Trevino was taken into custody at 12:24 a.m. He was then transported to the Public Safety Building in downtown Spokane where the preliminary steps such as checking his mouth were completed. At least forty-five minutes expired from the time Trevino was arrested until he was advised by the arresting deputy that he had a right to a lawyer. There is absolutely nothing in the record which sheds any light on why that advice was not given to him during this period of time. Indeed, there is not even the faintest suggestion that it was not practicable or feasible to give Trevino the required advice sooner than it was given. Clearly, the rule was violated.
>
> Although as we have indicated, it is not necessary for us to decide in this case when the breath test begins, it is difficult for us to conceive of a situation where it would not be practicable or feasible to advise a DUI suspect of his or her right to counsel prior to inquiring about or checking the contents of the suspect's mouth. Ordinarily, these steps would have followed observations in the field, and the administration of a field sobriety test. Those preliminary steps would necessarily take a considerable amount of time, affording the arresting officer ample opportunity to advise the suspect of his right to a lawyer. To be sure, under these facts, the advisement of Trevino was not given "as soon as practicable" or "as soon as feasible" after arrest.

(2) PREJUDICE

The Supreme Court agrees with the State's position in Trevino that the court rule on "right to counsel" requires that defendant show actual prejudice occurred due to the delay in warning. Then the Supreme Court explains why it sees no prejudice in Trevino's situation:

> [W]e are satisfied the violation of CrRLJ 3.1(c)(1) did not taint the evidence obtained by the deputy. Trevino, as the record reveals, was advised of his right to speak to an attorney well in advance of giving a breath sample. Significantly, he actually spoke to an attorney before he furnished the officer with a sample of his breath. Consequently, Trevino obtained the benefit of the rule, which is clearly designed to ensure that arrested persons are aware that they have the right to the assistance of counsel before they provide evidence which might tend to incriminate them. Suppression, of course, remains appropriate in cases where there has been a taint of the evidence. In Evergreen **[See 100 Wn.2d 824 (1984) April '84 LED:05]**, for example, where the suspect was not advised of his right to counsel until after a breath sample had been taken from him, suppression was appropriate.

(3) START OF BAC TEST

In part, the Supreme Court's explanation of its view that BAC testing does not start with the mouth check (and hence that implied consent warnings need not necessarily be given before that step) is as follows:

> WAC 448-13-040 . . . indicates that the "method for performing a breath test . . . includes" the preliminary steps of inquiring about and checking a suspect's mouth, it goes on to state that those same preliminary steps are to be performed *"prior to the test being performed."*
>
> [T]he purpose of the implied consent warning is to allow a suspected DUI offender to make a knowing and intelligent decision about whether to submit to a breath test. We believe that purpose is served as long as the warning is given sufficiently in advance of the time the suspected offender is asked to provide a breath sample so that the suspect can make a knowing and intelligent decision as to what is the best course of action for him or her. The sequence of the steps in the test is less important, in our opinion, than the fact that the suspect has an opportunity to reflect on the warning prior to making the irrevocable decision to submit or not submit the breath sample. Importantly, the decision to refuse to submit to a breath test can still be made until the time that the actual breath sample is given. Any time, therefore, that the implied consent warning is given to the suspect sufficiently in advance of the request for a breath sample so that the suspect can knowingly and intelligently decide whether to submit to the test, the requirement that the warning precede the test is not violated.
>
> In holding that checking the mouth was part of the test, the court of appeals in Trevino concluded that a refusal to open the mouth for inspection would be tantamount to a refusal to submit to a breath test and, therefore, it must be part of the test. We disagree. We fail to see how a suspect could be deemed to have refused to submit to a breath test prior to the time he or she had received the required implied consent warning. Only after a proper warning has been given, followed by the suspect's refusal to have his or her mouth inspected, can it be said that there is a refusal to submit to a breath test.
>
> Here, Miesse was given the warning at least six minutes before she submitted her

breath sample. In our judgment, that was sufficient time to allow her to reflect upon the ramifications of the decision she was called upon to make.

LED EDITOR'S COMMENTS:

(1) BAC TESTING RAMIFICATIONS --

Following the Court of Appeals 1994 decision in Trevino [see August '94 LED at 02-04], Washington law enforcement officers began giving Miranda warnings and implied consent warnings before checking the BAC-candidate's mouth. Although the Trevino/Miesse decision by the Supreme Court establishes that such timing of this step of the process is not a requirement for the BAC-testing process, we see no reason for officers to change the approach.

(2) COUNSEL WARNING RAMIFICATIONS --

The Supreme Court opinion in Trevino/Miesse has ramifications outside the BAC-testing context. The Court's discussion regarding court rule CrRLJ 3.1(c)(1) makes clear to us that the Court believes that officers should routinely advise persons of their right to counsel under the CrRLJ's before transporting them following arrest. If officers don't advise arrestees of the counsel right prior to transport, then any volunteered statements (even without any interrogation efforts) during transport will likely be suppressed on grounds that the failure to warn was prejudicial.

The Criminal Justice Training Commission has for many years had a special provision on its Miranda card, reading as follows:

> **Regardless of Miranda applicability, Washington State requires that the following advisement be given to every person taken into custody: "You have the right to Counsel. If you are unable to pay for Counsel, you are entitled to have one provided without charge."**

We believe that this warning, alone, satisfies the CrRLJ requirement, with no need for an acknowledgement of understanding or waiver of rights from the arrestees. Alternatively, full Miranda warnings which also contain the counsel right warning (again, with no need for acknowledgement or waiver) will also satisfy the CrRLJ. Of course, if the arresting/transporting officer wishes to conduct any interrogation, then, because such a circumstance of (1) custody plus (2) interrogation triggers the Fifth Amendment Constitutional protection: (a) full Miranda warnings, (b) acknowledgement of understanding, and (c) waiver (express or implied) will be required before any questioning occurs.

Historically, for good reasons under Miranda, patrol officers have been advised by detectives not to Mirandize or question arrestees in certain circumstances. If agencies are not worried about the suppression under CrRLJ 3.1 of any volunteered statements which may be made during transport, they may continue to instruct patrol officers in these same circumstances that they need not give the CrRLJ counsel warning. We see no other adverse consequences (i.e., other than suppression of statements and evidence which are the fruit of the failure to advise) in the failure to give the CrRLJ counsel warning in this context.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **"AUTOMATIC STANDING" STILL ALIVE UNDER WASHINGTON'S EXCLUSIONARY RULE** -- In State v. Carter, 127 Wn.2d 836 (1995) the State Supreme Court rules in favor of the prosecution on the ultimate question of suppression of narcotics evidence, but the Supreme Court rejects the prosecution's argument (and overrules the Court of Appeals determination) that the Court should eliminate the "automatic standing" doctrine.

The "automatic standing" doctrine allows a person to challenge a police search of an area (in Carter the area in question was a motel room rented to an acquaintance of defendant Carter) even if the person has no privacy interest in that area. In Carter, the Supreme Court majority allows defendant Carter to challenge the search of the acquaintance's motel room, but the majority then asserts, with very little analysis on the issue, that exigent circumstances (i.e., a commotion outside the motel room which likely alerted the suspects inside) justified the warrantless entry of the motel room by police. Justice Alexander dissents on the exigent circumstances issue, joined by Justices Utter, Johnson and Madsen. Result: affirmance of King County Superior Court convictions for delivery of a controlled substance (one count) and possession of a controlled substance with intent to deliver (one count).

LED EDITOR'S NOTE: Your LED Editor has difficulty: (1) understanding the rule established by Justice Smith's opinion for the Carter majority, and (2) determining Carter's significance to law enforcement interests. We will study the decision and discuss it with others in the coming months, hoping to be able to provide some insights when we revisit the subject in a future LED. For past LED's addressing the "automatic standing" issue, see: (1) State v. Simpson, 95 Wn.2d 170 (1980) April '81 LED:04; (2) State v. Zakel, 119 Wn.2d 563 Nov. '92 LED:06; and (3) the Court of Appeals decision in Carter, State v. Carter, 74 Wn App. 320 (Div. I, 1994) June '95 LED:17. In light of the State Supreme Court's adherence to the "automatic standing" rule, what we said in the June '95 LED re Carter and "standing" will have to be studied.

(2) **"SPEEDY TRIAL" CLOCK STARTS WITH CITATION ISSUANCE, EVEN IF CITATION NOT FILED** -- In State v. Bonifacio, 127 Wn.2d 482 (1995) the Washington State Supreme Court rules that the mere issuance of a criminal citation starts the "speedy trial" clock of the court rule at CrRLJ 3.3.

In Bonificio, officers issued the defendant a written citation for a "CCW" violation. The citation was not filed but instead was sent to the city attorney for screening and a filing decision. Four months later the city attorney filed a complaint for the weapons violation in municipal court. Defendant Bonafacio moved to dismiss on speedy trial grounds under CrRLJ 3.3, arguing that issuance of the citation started the running of the court rule's time-for-trial clock.

The Supreme Court's holding and its rationale (in part) are set out by the Court as follows:

> [W]e hold that issuance of a citation, regardless of whether it is subsequently filed, starts the running of the time for trial clock. Although the City correctly observes that CrRLJ 2.1(b)(6) indicates that a prosecution is initiated by a citation *when* it is

signed and filed, that rule must be read together with CrRLJ 2.1(d), which provides that the officer "shall" file the citation with the clerk of the court within 48 hours after issuance. This latter requirement . . . is mandatory and buttresses [the] conclusion that the criminal process is initiated by issuance of the citation. . . .

The issuance and receipt of a citation is not an insignificant intrusion on one's liberty. It is, therefore, important that the rule requiring the filing of citations CrRLJ 2.1(d), be observed. If consequences do not flow from an officer's failure to file a citation within the time allotted, many persons who have been issued citations will be left in legal limbo, not knowing whether or not the citation they have received will lead to proceedings in court. Under the trial court's decision, greater fairness and efficiency is assured because persons who have been issued citations will generally know within 48 hours of the issuance of a citation whether it will lead to court proceedings. We do not mean to suggest that a prosecuting attorney or city attorney cannot, by filing a complaint, amend a charge that was initially commenced by issuance of a citation. Neither are we suggesting that a citation may not be filed more than 48 hours after it is issued. The significant aspect of our holding is that the time for trial computation relates to the date the citation is filed or 48 hours after its issuance, if it is not filed.

The amicus brief of the Prosecuting Attorney of King County makes the point that our decision in Auburn v. Brooke, 119 Wn.2d 623 (1992) **[Dec. '92 LED:19]** makes it necessary, in most cases, for the prosecuting attorney or city attorney to file a complaint, regardless of whether the police officer filed the citation or forwarded it to the prosecuting authority for review. We do not quarrel with that assertion. Our decision should not, however, cause problems for prosecutors. As we have observed, there is nothing to prevent the State or a city from seeking an amendment by complaint if, after review, it is deemed that a charge initiated by citation was unartfully stated. The prosecuting authority will simple have to be prepared to try the case, if it is to be tried, within a time period that relates to the issuance of the citation, not the subsequent filing of a criminal complaint. That should not be a great burden for the government to bear.

[Some citations omitted]

Result: affirmance of King County Superior Court decision affirming Seattle Municipal Court dismissal of the weapons charge.

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WASHINGTON STATE COURT OF APPEALS

"EXCESSIVE NOISE" TRAFFIC STATUTE UPHELD; ALSO, FRISK UPHELD

State v. Olsson, 78 Wn. App. 202 (Div. III, 1995)

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

> On March 15, 1992, Lincoln County Sheriff's Deputy Kelly Hembach was parked by the side of the road on Highway 28 when Mr. Olsson drove by in his black Camaro. Deputy Hembach heard "excessively loud noise" emanating from the Camaro's vehicle exhaust, a violation of RCW 46.37.390. He stated he is familiar with the vehicle type and could tell the noise was more than would have come from an unaltered factory vehicle. The officer also observed the Camaro's muffler and the exhaust system appeared to have less clearance in relation to the roadway than is required by RCW 46.61.680. He therefore stopped Mr. Olsson for the vehicle's excessive noise and for the equipment violation.
>
> Upon being stopped, Mr. Olsson told Deputy Hembach he was carrying a knife. He produced the knife and gave it to the deputy. Deputy Hembach stated Mr. Olsson appeared to have "a heightened awareness to his surroundings." His pupils would not react and were fixed at mid-range. He had glassy eyes with redness around the membrane. Deputy Hembach suspected Mr. Olsson was under the influence of drugs. Then, during a pat-down search, he felt something in Mr. Olsson's pocket, which Mr. Olsson told him was another knife. While retrieving the "knife", Deputy Hembach found a substance later identified as cocaine. He arrested Mr. Olsson for driving a motor vehicle while under the influence of drugs and for possession of cocaine.
>
> Mr. Olsson moved to suppress the evidence of cocaine on the basis the officer stopped and searched him without probable cause. The court denied the motion, concluding Deputy Hembach properly stopped Mr. Olsson's vehicle for violation of either RCW 46.37.390 or RCW 46.61.680. The court also concluded the deputy's subsequent patdown of Mr. Olsson was appropriate, given his reasonable suspicion Mr. Olsson was under the influence of drugs and his reasonable concern Mr. Olsson was carrying another weapon. Mr. Olsson stipulated to the facts as to his possession of cocaine for purposes of trial. The court subsequently convicted him of possession of a controlled substance.

ISSUE AND RULING: (1) Is RCW 46.37.390 unconstitutionally vague, such that it does not provide a lawful basis for a vehicle stop? (ANSWER; No); (2) Did the officer have a lawful basis for a stop based on the exhaust system's apparent lack of sufficient clearance from the roadway? (ANSWER: A dispositive answer is not given, though the Court suggests a "yes"); (3) Did the officer have a sufficient factual basis to justify a frisk following the stop? (ANSWER: Yes) Result: Lincoln County Superior Court conviction for possession of cocaine affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) RCW 46.37.390 Not Vague

Under RCW 46.37.390(1), "Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise. . .". Mr. Olsson argues the phrase "excessive or unusual noise" does not provide a standard to measure the amount of noise an exhaust system may emit and still comply with the statute. A statute is unconstitutional if it fails to define an offense so that ordinary people understand what it proscribes, or if it does not provide ascertainable standards to protect against arbitrary enforcement.

Other jurisdictions have upheld statutes similar to RCW 46.37.390(1) against challenges they are void for vagueness. [Citing and discussing numerous cases.]

We agree with the foregoing opinions that what is loud and excessive noise for a vehicle is a matter of common knowledge and is as capable of ascertainment as other circumstances in which law enforcement officers must depend upon their senses to determine whether a violation of law has occurred. RCW 46.37.390 is not void for vagueness. The statute is specific enough that persons of reasonable understanding are not required to guess at its meaning.

(2) Stop Under RCW 46.61.680

Mr. Olsson asserts the court erred when it determined his vehicle did not comply with RCW 46.61.680, so as to justify the stop on an alternative basis. He cites Deputy Hembach's testimony the exhaust system was hanging below the rim of Mr. Olsson's vehicle. RCW 46.61.680 prohibits exhausts hanging lower than the rim of a *wheel*. Because we have already upheld the stop on the basis of the violation of RCW 46.37.390(1), we need not decide this issue. However, our review of Deputy Hembach's testimony, in context, indicates the exhaust system violated RCW 46.61.680.

(3) Basis for Frisk

Third, Mr. Olsson argues Deputy Hembach had neither a reasonable suspicion of criminal activity so as to justify detaining him, nor a reasonable concern for officer safety so as to justify searching him.

Under Terry v. Ohio, 392 U.S. 1 (1968), a law enforcement officer may stop a person if he has a reasonable suspicion the person is involved in criminal activity. The officer may also frisk the person for weapons, but "the scope of the frisk must be limited to the protective purpose". Here, the record supports a finding Deputy Hembach had specific facts leading him to believe Mr. Olsson was under the influence of drugs. He also had legitimate safety concerns which prompted his pat-down search of Mr. Olsson. As he testified at the suppression hearing:

> At that point in time I had told him that I needed to pat him down for officer safety reasons because myself and another deputy were present and there were two more people in the vehicle which posed a threat to myself and the other officer. At that point in time, since I had already taken one knife from him, I asked to pat him down.

[Some citations omitted]

TRESPASS ARREST FAILS PC TEST, BUT DRUG PARAPHERNALIA POSSESSION ARREST OK

State v. Morgan, 78 Wn. App. 208 (Div. III, 1995)

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

> On February 6, 1992, at about 12:15 a.m., Pasco Police Officer Dwight Davison noted a pickup parked in Walter's Field - a public park. Officer Davison noticed water, a roll of aluminum foil, and a pile of white powder spread out on the hood of the pickup. Based on his 11 years as a police officer, including 1 year with the Tri Cities Metro Drug Task Force, Officer Davison concluded that the items on the hood of the truck were used for the purpose of freebasing cocaine.
>
> Officer Davison arrested both Scott Widener, the driver and owner of the pickup, and the defendant, William Morgan, for trespassing in violation of Pasco Municipal Code 9.48.010. Officer Davison searched Mr. Morgan pursuant to the arrest and found a bindle of white powder which later proved to be cocaine. The trial judge dismissed the trespass charge concluding that it was a malum prohibitum, rather than a malum in se crime. The court, however, concluded that Officer Davison had probable cause to arrest Mr. Morgan on the charge of possession of drug paraphernalia.

ISSUES AND RULINGS: (1) Did the officer have probable cause to believe that Morgan was committing criminal trespass? (ANSWER: No); (2) Did the officer have probable cause to believe that Morgan was in possession of drug paraphernalia with intent to use in violation of Pasco Municipal Code 9.75.020? (ANSWER: Yes, rules a 2-1 majority) Result: Franklin County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) TRESPASS ARREST ISSUE

> Apparently both parties agree that Walter's Field in Pasco is a public park and, as such, we presume is freely open to the public. A city, however, may control the use of its property so long as the restriction is for a lawful nondiscriminatory purpose. But some notice reasonably calculated to inform users of the park that it is closed and not available for public use must be given before they are tagged with the label "trespasser". Such notice might include, as suggested in this case, signs at the entrance gates. But signs are not the only means of providing notice. The city might rely on other means to inform the public that the park is not open for public use, such as road blocks or a request by police or other authorities to leave the park. Evidence might also be adduced that the user had previously been informed of the closure dates. Absent some notice, there would be no reasonable grounds for a police officer to believe that a misdemeanor trespass had been committed in the officer's presence. RCW 10.31.100; . . .. Officer Davison did not therefore have reasonable grounds to believe that the misdemeanor crime of trespass was being committed in his presence.

(2) PARAPHERNALIA POSSESSION ARREST ISSUE

Probable cause is not subject to calculation by formula or mathematical certainty. It is a combination of facts, circumstances and judgment. The traditional formula provides that

> [p]robable cause for an arrest without a warrant arises from a belief based upon facts and circumstances within the knowledge of the arresting officer that would persuade a cautious but disinterested person to believe the arrested person has committed a crime. The officer need not have knowledge or evidence sufficient to establish guilt beyond a reasonable doubt, for in this area the law is concerned with probabilities arising from the facts and considerations of everyday life on which prudent men, not legal technicians, act.

The question is not whether the State can prove beyond a reasonable doubt that Mr. Morgan had joint constructive possession of the drug paraphernalia, but only whether Officer Davison had probable cause to believe he had joint constructive possession based upon the circumstances presented that night in the park.

Pasco Municipal Code 9.75.020 makes it unlawful to use, or possess with intent to use, drug paraphernalia. Any person who violates this section is guilty of a misdemeanor. Constructive possession requires that the defendant have dominion and control over the contraband or the premises where the contraband is found. The determination of constructive possession is made by examining the "totality of the situation" to determine if there is substantial evidence tending to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband.
Here, Officer Davison was patrolling a public park, after midnight, during the middle of winter, when he noticed water, aluminum foil, and white powder on the hood of a pickup occupied by Mr. Widener and Mr. Morgan. Based on 11 years' experience as a police officer (one with a drug task force), he concluded that the paraphernalia on the hood of the pickup was for the purpose of freebasing cocaine. That conclusion was reasonable. As noted, possession of this paraphernalia is a misdemeanor.

The officer's experience and expertise is no doubt helpful in establishing that the material on the hood of the pickup was drug related and that experience and expertise supports the court's conclusion that the material was drug paraphernalia. But that experience is of no assistance on the issue of whether Mr. Morgan was in joint constructive possession.

Mr. Morgan argues that his knowledge of the presence of drugs or mere proximity to the drugs at the time of his arrest is not sufficient. We disagree. Arguably both Mr. Widener and Mr. Moran were merely in proximity to the drug paraphernalia on the hood. Neither acknowledged ownership of the drugs. . . .[T]he drugs were not locked away in a trunk effectively denying the passenger access. The paraphernalia was located on the hood in plain view of both the driver and passenger (and Officer Davison). There is nothing which would distinguish Mr. Widener's relationship with the paraphernalia from Mr. Morgan's. The pickup

merely served as a platform for the paraphernalia. The drugs were not hidden away in a glove compartment, a trunk, or underneath a seat where it might be argued Mr. Morgan would have no access or knowledge of them. We conclude therefore that the facts presented to Officer Davison that night in the park were sufficient to give Officer Davison probable cause to believe that Mr. Widener and Mr. Morgan intended to possess or use the drug paraphernalia located on the hood of Mr. Widener's pickup.

[Some citations omitted]

POSSESSION OF "PRECURSOR" CHEMICALS NOT "RECEIVING" AND NOT A CRIME

State v. Bernard, 78 Wn. App. 764 (Div. I, 1995)

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

> Jason R. Bernard stopped for a custom inspection at the Blaine border crossing with three pounds of ephedrine, a chemical used to manufacture methamphetamine, hidden in his car. He had purchased the ephedrine in Canada and intended to deliver it to his partner in Washington for ultimate sale in Oregon. Customs agents searched Bernard's car and seized the ephedrine. The Whatcom County prosecutor charged Bernard with the unlawful *receipt* of a precursor drug, contrary to RCW 69.43.070(2). At the bench trial, the court found Bernard guilty as charged.

ISSUE AND RULING: Did the trial court err in ruling that Bernard "received" ephedrine in violation of chapter 69.43 RCW? (ANSWER: Yes) Result: Whatcom County Superior Court conviction for receiving a precursor drug reversed; charges dismissed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The key issue before us is whether the trial court erred by concluding on the basis of the stipulated facts before it that Bernard "received" the ephedrine found in his possession in Whatcom County. Bernard argued that the trial court's conclusion was erroneous for three reasons. First, Bernard "possessed" the ephedrine in Washington but did not "receive" it here; the word "receives" in RCW 69.43.070(2) does not include "possession". Second, the statute is ambiguous as the word "receives" is interpreted to mean "possesses"; under the rule of lenity we must construe the statute in his favor. Third, by enacting RCW 69.43, the Legislature intended to regulate people who supply or receive precursor drugs in Washington, not those who "possess" them without having "received" them here.
>
> RCW 69.43.070(2) provides that
>
> > [a]ny person who receives any substance listed in RCW 69.43.010 with intent to use the substance unlawfully to manufacture a controlled substance under chapter 69.50 RCW is guilty of a class B felony under chapter 9A.20 RCW.
>
> Ephedrine is listed under RCW 69.43.010(1)(f) as a precursor substance.

. . .

Black's Law Dictionary (6th ed. 1990) at 1268 defines "receive" as follows:

> To take into possession and control; accept custody of; collect.
> *To "receive" stolen property, means acquisition of control in sense of physical dominion or apparent legal power to dispose of property and envisages possession or control as an essential element.*

[Court's emphasis] In the context of the crime of receiving stolen property, Black's notes that possession is an element of receiving. Thus, receipt of stolen property requires more than mere possession of it.

The same reasoning applies to the use of the word receipt in the context of this case. Bernard purchased the ephedrine from someone in Canada. When Bernard completed that transaction, his act of receiving the ephedrine ended. When customs officials seized the hidden ephedrine from him at the border, he was obviously in possession of the chemical. However, he no longer was receiving it. Bernard therefore did not violate RCW 69.43.070(2).

The Legislature has expressly prohibited certain types of possession in other statutes. For example, RCW 69.50.401(a) provides that with some exceptions, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401(b) makes it a crime for a person "to . . . possess a counterfeit substance." RCW 9.68A.070 states that "[a] person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class C felony." The plain language of RCW 69.43.070(2) does not similarly proscribe the possession of precursor chemicals. Had the Legislature intended possession of ephedrine (or the other substances listed in RCW 69.43.010(1)) to be a crime, it could have done so. We therefore are constrained to conclude that the Legislature did not intend possession of this chemical to be a crime.

[Some text and citations omitted]

STRIKER SPEEDY TRIAL: OUT-OF-STATE DEFENDANT NOT AMENABLE TO PROCESS

State v. Stewart, 78 Wn. App. 931 (Div. II, 1995)

Facts and Proceedings: At the time that the Jefferson County Prosecutor charged Gabriel Stewart by information and a warrant was issued, Stewart was in Arizona attending school. At that time Stewart was on probation for an unrelated Washington conviction. He had obtained permission from his Washington probation officer to attend school in Arizona.

On one occasion while Stewart was in Arizona in the ensuing months, he was stopped by an Arizona law enforcement officer in a minor traffic matter. Upon learning of the outstanding warrant in Washington, the Arizona officer initially placed Stewart under arrest, but the officer then released Stewart a few minutes later upon learning that, per the terms of the warrant, Jefferson County would not extradite.

Several months later, Stewart returned to Jefferson County, contacted the prosecutor, and put forward a speedy trial challenge to the charge.

ISSUE AND RULING: Was the Striker decision's presumed arraignment/speedy trial period of CrR 3.3 running at any time while Stewart was in Arizona? (ANSWER: No) Result: Jefferson County Superior Court dismissal order reversed; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Defendants not detained in jail or subject to conditions of release pending arraignment "shall be arraigned not later than 14 days after that appearance in superior court which next follows the filing of the information or indictment." CrR 3.3(c)(1). But this rule does not address long delays prior to their first appearance. Rather, the Supreme Court has determined that "if the . . . information is filed before arrest, the accused will be promptly brought before the court *if he is amendable to process*." (Court's emphasis) State v. Striker, 87 Wn.2d 870 (1976). This promptness rule incorporates a prosecutorial duty of good faith and due diligence in bringing defendants to trial. See State v. Anderson, 121 Wn.2d 852 (1993) **[Jan. '94 LED:07]**. Failure to comply with this duty will result in dismissal with prejudice. CrR 3.3(i).
>
> The Striker promptness rule has been invoked with delays as short as forty-five days. In the present case, the delay from filing to Stewart's first appearance was 345 days. We therefore must determine whether the Striker rule applies.
>
> The State contends the Striker rule does not apply because Stewart was not amendable to process during his absence from Washington. This court has previously so held under similar circumstances. In State v. Lee, 48 Wn. App. 322 (1987) [**Oct. '87 LED:17]**, we determined that the defendant was not amenable to process (i.e., not subject to the law of this state) during his absences from the State, so the Striker rule did not apply. . . . This was true in Lee despite the prosecutor's knowledge of the defendant's whereabouts in Oregon, and despite Washington's ability to extradite the defendant from Oregon. Under Lee, Stewart was not amenable to process, and the Striker rule does not apply.
>
> *[COURT'S FOOTNOTE: Without benefit of citation to authority Stewart nonetheless asserts he was "clearly" amenable to process in Jefferson County on the delivery charge because he was on probation in Washington while he was in Arizona. Although acknowledging the State's argument that a probation officer's knowledge cannot be imputed to the prosecutor's office, Stewart nonetheless contends knowledge was necessarily obtainable via compliance with former CrR 2.1(f), which required the prosecutor to request a copy of the defendant's criminal history when filing an information. Presumably Stewart means to imply the prosecutor could have discovered Stewart was on probation, and then inquired regarding his where-abouts. The official comment to CrR 2.1(e) notes, however, that the purpose of the rule "is to ensure that [such] . . . criminal history is available when and if the court is required to determine the validity of a plea agreement," not to provide notice or knowledge to the prosecutor of possible probation. Moreover,*

Lee holds that out-of-state defendants are not amenable to process for purposes of Striker even if the prosecutor knows their whereabouts.]

Although the first trial judge recognized the Lee exception to the Striker rule properly applied in this case, it nonetheless concluded Stewart's "arrest" in Arizona triggered the prosecutor's duty under Striker to exercise good faith and due diligence in obtaining Stewart's presence for trial. For this, the trial court apparently relied upon Anderson which concerned a federal prisoner's repeated attempts to obtain a speedy trial in Washington. Stewart also relies upon Anderson here.

Anderson is legally and factually distinguishable. That case involved CrR 3.3(g)(6), which tolls speedy trial time when defendants are incarcerated in another state or a federal prison. The court held this rule incorporates the prosecutorial duty of good faith and due diligence in obtaining defendant's presence for trial in a timely manner; because Anderson was denied a speedy trial due to Washington's failure to exercise due diligence, the rule was violated.

The Anderson court based its holding both on the defendant's attempts to obtain a speedy trial, and on the existence of the Interstate Agreement on detainers, RCW 9.100 (IAD). The IAD allows Washington to request that another signatory jurisdiction continue its custody of an individual against whom Washington has pending charges, until those charges are resolved; that individual may then demand a Washington trial through the responsible penal authority of the other jurisdiction; the trial must be commenced within 180 days of such a demand.

CrR 3.3(g)(6) does not apply in the present case. Stewart was not incarcerated in another jurisdiction, but away at school. He as not detained in jail or prison, but was merely stopped by the roadside for a minor infraction. He made no attempt to request extradition from Arizona or otherwise to invoke his speedy trial right until after he returned to Washington, approximately four months after he learned about the outstanding warrant. Anderson is inapposite.

Nor does Stewart's brief detention in Arizona one month before he returned to Washington require application of Anderson. Nothing in Anderson implies the prosecutor fails to exercise good faith or due diligence by limiting the interstate scope of arrest warrants. Anderson does not apply in these circumstances.

The first trial judge's determination that speedy trial time should begin to run from the time of Stewart's "arrest" was thus both factually and legally incorrect. The second judge's reliance upon that determination was therefore incorrect. We see no basis for a rule that would require the State to issue unlimited arrest warrants and to extradite in all circumstances, no matter how trivial, for fear of triggering speedy trial time, even though the absent defendant has knowledge of an outstanding warrant and has made no effort to invoke his speedy trial rights.

Because Lee controls and Striker does not apply, Stewart was properly arraigned within fourteen days of his first appearance on October 3, 1993. The State then had 90 days, until January 6, 1994, to bring him to trial. CrR 3.3(c)(1). The trial court, however, erroneously dismissed the charge with prejudice on December 17,

1993, preventing the State from trying Stewart within ninety days. We therefore reverse, and remand for trial.

[Footnotes and some citations omitted]

CROSS-REFERENCE NOTE: See the three entries on other recent "Striker rule" decisions in the "Brief Notes" section of this LED immediately following this entry.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **NO STRIKER SPEEDY TRIAL PROBLEM WHERE DEFENDANT RESIDED IN ARIZONA THROUGHOUT PERTINENT TIME PERIOD** -- In State v. Hudson, 79 Wn. App. 193 (Div. I, 1995) Division One of the Court of Appeals rules that where a drug defendant had moved to Arizona to attend school at the time that formal charges and a warrant were filed against him, the defendant was not "amenable to process" while in Arizona under the Striker rule for presumed arraignment and speedy trial under CrR 3.3 (see discussion generally re: Striker rule in immediately preceding entry of this LED re: Stewart case).

Accordingly, upon defendant's return to Washington from Arizona after living there continuously for a year-and-a-half (he was extradited following an arrest on the warrant), he was subject to prosecution in a timely fashion thereafter under CrR 3.3.

Result: affirmance of Snohomish County Superior Court decision denying defendant's motion to dismiss controlled substances charges; case remanded for trial.

(2) **STRIKER SPEEDY TRIAL RULE: DUE DILIGENCE LACKING WHERE DEFENDANT MOVED BACK AND FORTH BETWEEN ALASKA AND KNOWN RESIDENCE IN SEATTLE DURING PERTINENT TIME PERIOD** -- In State v. Jones, 79 Wn. App. 7 (Div. I, 1995) Division One of the Court of Appeals finds a violation of the Striker interpretation of the rule for speedy trial (see discussion generally re: Striker rule in the entry on Stewart above at pages 13-15) even though the defendant had lived in Alaska for part of the pertinent time period.

At the time that formal controlled substances charges were filed against Jones, he was temporarily in Alaska on a job. Jones had previously told one of the narcotics detectives that he, Jones, would be going to Alaska periodically for several months at a time to work. During one of defendant's subsequent trips to Alaska to work, the State filed an information and issued a summons for Jones to appear at an arraignment two weeks later on June 15, 1992. The summons was sent by certified mail to Jones' Seattle address, but the letter went unclaimed all three times that the post office attempted delivery.

Jones was not aware of and failed to appear at the June 15, 1992 arraignment. A bench warrant issued for his arrest on June 17, 1992. A copy of the unclaimed summons was transmitted by the prosecutor's office to the police agency which employed the narcotics detective mentioned above.

One month later, in July 1992, Jones returned from Alaska and lived at his Washington address for much of the next year. He was not made aware of the attempts to serve him with the summons. He first found out about the pending charges when he was arrested in Washington on

the outstanding warrant on June 5, 1993 following a traffic stop.

Under these facts, the Court of Appeals rules that, unlike the defendants in the Stewart and Hudson cases noted above in this LED, defendant Jones was "amenable to process "much of the time during the twelve months between the filing of charges and his arraignment. Only during times that he was actually out of state would the Striker speedy trial period be tolled under the "amenability to process" element of the rule.

The State also argued in Jones that it had exercised due diligence in trying to bring defendant to trial. In rejecting this claim by the State, the Court explains:

> In Perry [State v. Perry, 25 Wn. App. 621 (1980)], the State sent a summons to the address provided by defendant at the time of his arrest. Because he had moved without advising the State, the summons was returned as undeliverable. While the State could have located the defendant by inquiring of either his parents or his attorney, the court held the State had acted diligently by sending the summons to defendant's last known address:
>
> > [L]aw enforcement agencies are not required . . . to physically go out and search the countryside for defendants who have either given the wrong address to the Court or who moved from that address without leaving forwarding information.
>
> But this case is different from Perry. Here, it is critical that Jones neither gave the wrong address nor moved without advising the State. Also, it is critical that he did not have notice that he had been charged or that he had missed his arraignment. Several cases underscore the significance of the accused's lack of actual notice.
>
> In State v. Williams, 74 Wn. App. 600 (1994), the State sent a summons to the defendant by certified mail ordering him to appear for arraignment on a charge of first degree theft. Several facts parallel this case. Although the State possessed the defendant's correct address, the summons was returned as "unclaimed." Also, the defendant never received the summons and he remained unaware of the charge until he was arrested on the bench warrant over three years later. Finally, once the summons was returned, neither the investigating agency not the prosecutor took any further steps either to notify the defendant of the charge or to serve the bench warrant.
>
> This court rejected the State's argument that under Perry it exercised due diligence by sending a letter to the defendant's last known address. The court distinguished Perry because in that case the defendant knew of the pending charges and he changed his location without providing the State with accurate information of his whereabouts. In those circumstances, sending a letter to his last known address constituted due diligence. But in Williams, as here, the defendant did not know of the charges. Therefore, the court rejected "the bald assertion made by the State that, after a summons is 'properly sent' and the defendant fails to respond, the prosecutor is not required to take further steps to locate the defendant . . .." The court affirmed the trial court's dismissal of the charge.
>
> In State v. Kitchen, 75 Wn. App. 295 (1994), the case turned upon whether

> defendant had actual notice. Although the summons was mailed to his correct address, the defendant filed an affidavit averring that he did not receive it. The court noted; "The State may assume, and the trial courts should presume, that a letter sent by regular first-class mail to the defendant's correct address and not returned to the sender was delivered, and that the defendant was given notice of the charge filed against him." But the presumption is rebuttable. Thus, if a defendant convinces the court that he or she was without fault in failing to appear at arraignment, the court must then examine the State's diligence in attempting to notify the defendant. Because the trial court failed to take facts on this specific issue, this court remanded for a finding regarding whether defendant received actual notice of the original arraignment.
>
> This court issued several warnings during the course of its decision. It noted that because the actual-notice presumption is rebuttable, "the State should exercise caution in failing to take any further steps to notify defendants who fail to appear at their scheduled arraignments." Also, the court was "not inclined" to agree that simply mailing a notice to a correct address constitutes due diligence. Instead, other factors, including other information regarding defendant's location which the State possesses, may have an impact on the due diligence analysis.
>
> In this case, the State diligently sent the summons by certified mail to Jones ordering him to appear for arraignment. This summons was returned as "unclaimed." Because it was not "rejected" or "undeliverable," the State was alerted that Jones simply did not receive it. When Jones failed to appear at arraignment, the State took no further steps to either notify Jones of the charge or to serve the bench warrant. Yet, the State possessed his correct address and a message telephone number. The State knew that his employment frequently took him out of state, but that the absences were temporary and that his residence was in Seattle. In these circumstances, the State failed to diligently act upon the information it had regarding Jones' whereabouts.

[Some citations omitted]

Result: Snohomish County Superior court conviction of attempted possession of a controlled substance reversed; case remanded for dismissal of charges.

(3) **STRIKER SPEEDY TRIAL "DUE DILIGENCE" FAILURE WHERE STATE DIDN'T FOLLOW UP ON UNCLAIMED CERTIFIED LETTER TO KNOWN OR PROBABLE ADDRESSES --** In State v. Bazan, __ Wn. App. __ (Div. I, 1995) -- No. 34257-6-I) Division One of the Court of Appeals finds a violation of the Striker interpretation of the speedy trial court rule (see discussion of generally re: Striker rule in three LED entries immediately above) even though the State sent the summonses for two separately scheduled arraignment proceedings to defendant's proper address by certified mail.

On both occasions, the certified mail was returned to the prosecutor's office "unclaimed." After the second return of a summons unclaimed, 540 days passed before defendant was arrested and brought in for arraignment on a charge of possession of cocaine with intent to deliver.

The trial court had found that defendant must have known that each of the certified mailings was a

summons, and that therefore he was at fault for any delay in the arraignment date. However, the Court of Appeals disagrees, accepting defendant's argument that: "although the envelopes containing the summonses showed a return address of the sheriff's office, there is no indication of the sender on the notice of certified mail."

The Court of Appeals also indicates that, in any event, return "unclaimed" of a certified mailing of a summons, as opposed to return "refused" of such a mailing of a summons, will never be sufficient to show fault on the part of defendant and may not even be enough to show notice by the State. (Citing State v. Williams, 74 Wn. App. 600 (Div. I, 1994) and State v. Kitchen, 75 Wn. App. 295 (Div. I, 1994)). The Kitchen case and the case of State v. Hunsaker, 74 Wn. App. 209 (Div. I, 1994) stand for the propositions that, if the notification of the arraignment is sent by regular first class mail, as opposed to certified mail, then: (1) if the mailing does not come back "undelivered", the defendant will be presumed to have received the summons and will be required to prove he did not get it; but (2) if the mailing does come back "undelivered", then the State will be put to a further "due diligence" proof.

The Court of Appeals concludes its analysis of the due diligence question in Bazan as follows:

> Here, the State sent the summonses by certified mail to Bazan's Marysville address. This is the address Bazan gave as his residence and it is the place where Bazan was arrested and lived throughout the period between his arrest and arraignment. The summonses were also sent to a Lake Stevens address which was on the booking information. Each of the notices of certified mail was returned "unclaimed." Thus, the State knew that Bazan had not received the summonses. Yet for a period of approximately sixteen months, the State made no other efforts to contact Bazan. It did not send the summons by regular first class mail, call him at the telephone number he provided, contact the investigating officer who offered to help, or attempt personal service of the summons or the warrant. Bazan was under no duty to bring himself to trial. In these circumstances, the State failed to diligently act upon the information it had regarding Bazan's whereabouts.

[Citation omitted]

Result: Snohomish County Superior Court conviction for possession of cocaine with intent to deliver reversed; charges dismissed.

(4) **NO VIOLATION OF DOUBLE JEOPARDY, SPEEDY TRIAL, OR DUE PROCESS RIGHTS WHERE STATE CHANGED DUI CHARGE TO VEHICULAR ASSAULT UPON LEARNING OF EXTENT OF VICTIMS' INJURIES** -- In State v. Higley, 78 Wn. App. 172 (Div. II, 1995) the Court of Appeals rejects defendant Higleys' challenge to his vehicular assault conviction. Higley was originally charged with DWI and reckless driving stemming from an accident in which the driver of the other automobile was injured. Higley was granted deferred prosecution and entered a treatment program. The charges were later dismissed without prejudice after the other driver discovered that he had permanent injury. Higley was then charged with vehicular assault.

In response to Higley's argument that this chain of events violated his double jeopardy rights, the Court of Appeals rules that jeopardy had not attached while the deferred prosecution was pending completion. The Court also holds that double jeopardy would not apply even if defendant had been convicted of the DWI charge, because the vehicular assault charge was grounded in facts

which were either (a) not in existence, or (b) not discoverable through due diligence at the time that deferred prosecution was established. The Court explains on this latter double jeopardy subissue:

> Even if the double jeopardy clause would otherwise apply, it does not bar prosecution for a greater charge if, when jeopardy attached to a lesser charge, a fact essential to support the greater charge was not in existence or was not discoverable by the State in the exercise of due diligence. Diaz v. United States, 223 U.S. 442 (1912); State v. McMurray, 40 Wn. App. 872 (Div. I, 1985) **[Sept. '86 LED:16]**; State v. Escobar, 30 Wn. App. 131 (1981) **[Dec. '81 LED:08]**. Hereafter, we call this the Diaz exception.
>
> To prove vehicular assault, as opposed to DWI or reckless driving, the State must prove serious bodily injury. RCW 46.61.522(1). Serious bodily injury means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. RCW 46.61.522(2).
>
> It is undisputed that before March 1990 the State did not know that Dixon had suffered serious bodily injury. Thus, the issue is whether the State exercised due diligence to discover that fact.
>
> The District Court ruled that the State exercised due diligence in discovering the extent of Teri Dixon's injuries and in bringing its motion to dismiss. In an agreed order, the Superior Court made the same ruling for the same reasons.
>
> Higley now assigns error to this ruling. He says that if the State had been exercising due diligence, it would have recontacted Dixon after the accident but before November 28, and thus would have discovered the fact of serous bodily injury before the hearing on November 28, 1989.
>
> It is our view that due diligence does not require an investigating trooper to recontact an accident victim about the extent of her injuries after she has been examined at a hospital, the hospital staff has found no serious injury, and the hospital staff has so informed the trooper. The record does not suggest anything else the State could or should have done to discover the extent of Dixon's injuries. Thus, we hold that the State did not fail to exercise due diligence, and that the Diaz exception applies here.

[Some citations omitted]

The Court also rejects defendant's challenge on "speedy trial" theories under the court rule for Superior Court (CrR 3.3) and the constitution. The Court rules as to both theories that because defendant's own application for deferred prosecution status was the cause of almost all of the delay in the filing of vehicular assault charges, there was no speedy trial violation.

Result: Kitsap County Superior Court conviction for vehicular assault affirmed.

(5) **SALES TAX ON REPAIR COSTS INCLUDED IN DETERMINING MALICIOUS MISCHIEF**

DEGREE -- In State v. Gilbert, 79 Wn. App. 383 (Div. III, 1995) the Court of Appeals rules that sales tax imposed on the cost of repair to a City of Ritzville patrol car was lawfully included in determining damages to the patrol car for purposes of determining the degree of malicious mischief. Accordingly, because the sales tax on the repair bill in this case pushed the bottom line on the bill over the $250 felony level, defendant's conviction for second degree malicious mischief was justified, the Court holds.

Result: Adams County Superior Court conviction for second degree malicious mischief affirmed.

(6) **ANSWERING PHONE WHILE EXECUTING SEARCH WARRANT DOES NOT VIOLATE HOME OCCUPANT'S STATUTORY (9.73) OR CONSTITUTIONAL (ART. 1, SEC. 7) RIGHTS** -- In State v. Gonzales (Hector), 78 Wn. App. 976 (Div. I, 1995) the Court of Appeals upholds defendant's VUCSA conviction against his challenge focused on a police officer's act of answering defendant's telephone while executing a search warrant at Gonzales's residence (the caller placed an order for drugs and this transaction later became part of the State's case against Gonzales).

Responding to defendant's statutory challenge under the "Privacy Act" (chapter 9.73 RCW) governing electronic surveillance, the Court of Appeals points out that the statute only addresses the use of "devices" to record, transmit or intercept private conversations. A telephone in this factual context is not a "device" under chapter 9.73 RCW, the Court holds. Accordingly, the statute cannot be violated by picking up someone's telephone and listening to or participating in a conversation.

In response to defendant's constitutional privacy challenge under article 1, section 7 of the Washington Constitution, the Court holds that, while chapter 9.73 provides some statutory protection, there is no reasonable expectation of privacy for constitutional purposes and hence no constitutional privacy protection for incoming phone calls. Therefore, law enforcement officers lawfully present at premises pursuant to valid search warrant may answer incoming telephone calls to those premises and listen and/or participate in the conversations.

Result: affirmance of King County Superior Court VUCSA convictions of: (1) conspiracy to possess with intent to deliver, and (2) possession (with school zone enhancement).

LED EDITOR'S NOTE: See also State v. Goucher, 124 Wn.2d 778 (1994) Dec. '94 LED:14, a State Supreme Court decision holding that an officer's acts of: (1) answering the phone during a search warrant execution, and (2) setting up a transaction with the caller, did not violate the rights of the caller either.

(7) **ARREST AUTOMATICALLY AUTHORIZED FOLLOWING APPELLATE COURT MANDATE TERMINATING REVIEW OF DEFENDANT'S CONVICTION** -- In State v. Hunt, 76 Wn. App. 625 (Div. I, 1995), the Court of Appeals rejects defendant's challenge to his arrest and a "search incident" to that arrest which yielded cocaine and led to a conviction for possession of the cocaine.

In 1990 a jury had convicted Robert James Hunt of possession of cocaine with intent to deliver. He sought review and obtained a release on bond pending review, but ultimately he lost his appeal. On September 17, 1992, the Court of Appeals issued an order of "mandate" terminating review of the case.

Subsequently, the county prosecutor informed Hunt's attorney by phone that Hunt should

immediately report to the DOC. Hunt allegedly told his attorney that he, Hunt, would report to DOC on September 28, 1992. Instead, however, on September 28, 1992 police officers spotted Hunt at a pay phone, and they arrested him. They searched him and found cocaine on his person.

Hunt challenged the September 28, 1992 arrest, asserting that statutory provisions in chapters 10.70 and 10.73 RCW required that when the Court of Appeals terminates review of a defendant's conviction, he must be given written notice of a date and time to appear in Superior Court. However, the Court of Appeals rejects his argument, asserting that the order of "mandate" from the Court of Appeals automatically activated the requirement of appearance before DOC, and therefore authorized immediate arrest.

Result: King County Superior Court conviction for possession of cocaine affirmed.

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NEXT MONTH

In the February 1996 LED, we will digest, among other recent case decisions of interest, the December 7, 1995 decision of the Washington State Supreme Court in State v. Cole and State v. Szymanowski; (consolidated cases) (the majority decision of the supreme Court holds that forfeiture of **proceeds** of controlled substances crimes is not punishment for purposes of constitutional double jeopardy analysis).

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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.