Law Enforcement Digest

April 1997

HONOR ROLL

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457th Session, Basic Law Enforcement Academy - December 5, 1996 - March 4, 1997

President:	David P. Meyering - Snohomish County Sheriff's Office
Best Overall:	David M. Mather - Cheney Police Department
Best Academic:	Todd M. Aksdal - Kirkland Police Department
Best Firearms:	David M. Mather - Cheney Police Department
Tac Officer:	Don Gulla - King County Department of Public Safety
Asst. Tac Officer:	Pat Lowery - Kent Police Department

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Corrections Officer Academy - Class 245 - February 3 - February 28, 1997

Highest Overall:	Chet M. Christensen - King County Department of Adult Detention
Highest Academic:	Paul J. Filan - Washington State Penitentiary
Highest Practical Test:	Robert H. Austin - Auburn City Jail
	Mark R. Hanning - King County Department of Adult Detention
Highest in Mock Scenes:	Chet M. Christensen - King County Department of Adult Detention
Highest Defensive Tactics:	Chet M. Christensen - King County Department of Adult Detention

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Corrections Officer Academy - Class 246 - February 3 - February 28, 1997

Highest Overall:	Zak Morgan Thatcher - Island County Jail
Highest Academic:	Zak Morgan Thatcher - Island County Jail
Highest Practical Test:	Ronald Lau - Washington State Reformatory
	Edward Kim Pamatian - Washington State Reformatory
	Dale L. Porter, IV - King County Department of Adult Detention
	Sheldon R. Stewart - King County Department of Adult Detention
	Zak Morgan Thatcher - Island County Jail
Highest in Mock Scenes:	Dennis K. Riggs - Thurston County Jail
Highest Defensive Tactics:	Ronald E. Urie - King County Department of Adult Detention

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REVISION

Corrections Officer Academy - Class 244 - January 13 - February 7, 1997

Highest Overall:	David J. Griffith - Airway Heights Correctional Center
Highest Academic:	Scott J. Anderson - Airway Heights Correctional Center
Highest Practical Test:	Bryan H. Kelly - Airway Heights Correctional Center
Highest in Mock Scenes:	Leslie A. Heineman - Airway Heights Correctional Center
Highest Defensive Tactics:	John M. Gillotte - Airway Heights Correctional Center

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UNITED STATES SUPREME COURT

UNDER FOURTH AMENDMENT "BRIGHT LINE" OFFICER-SAFETY RULE, OFFICERS MAY DIRECT PASSENGERS TO GET OUT OF ANY LAWFULLY STOPPED MOTOR VEHICLE

Maryland v. Wilson, 1997 WL 65726 (1997)

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

> At about 7:30 p.m. on a June evening, Maryland state trooper David Hughes observed a passenger car driving southbound on I-95 in Baltimore County at a speed of 64 miles per hour. The posted speed limit was 55 miles per hour, and the car had no regular license tag; there was a torn piece of paper reading "Enterprise Rent-A-Car" dangling from its rear. Hughes activated his lights and sirens,

signaling the car to pull over, but it continued driving for another mile and a half until it finally did so.

During the pursuit, Hughes noticed that there were three occupants in the car and that the two passengers turned to look at him several times, repeatedly ducking below sight level and then reappearing. As Hughes approached the car on foot, the driver alighted and met him halfway. The driver was trembling and appeared extremely nervous, but nonetheless produced a valid Connecticut driver's license. Hughes instructed him to return to the car and retrieve the rental documents, and he complied. During this encounter, Hughes noticed that the front-seat passenger, respondent Jerry Lee Wilson, was sweating and also appeared extremely nervous. While the driver was sitting in the driver's seat looking for the rental papers, Hughes ordered Wilson out of the car.

When Wilson exited the car, a quantity of crack cocaine fell to the ground. Wilson was then arrested and charged with possession of cocaine with intent to distribute. Before trial, Wilson moved to suppress the evidence, arguing that Hughes' ordering him out of the car constituted an unreasonable seizure under the Fourth Amendment. The Circuit Court for Baltimore County agreed, and granted respondent's motion to suppress. On appeal, the Court of Special Appeals of Maryland affirmed, ruling that Pennsylvania v. Mimms [434 U.S. 106 (1977)] does not apply to passengers. The Court of Appeals of Maryland denied [review].

ISSUE AND RULING: Does the "bright line" officer-safety rule of Pennsylvania v. Mimms that a law enforcement officer may automatically direct the driver to get out of any lawfully stopped motor vehicle extend to passengers in any such vehicle as well? (ANSWER: Yes) Result: lower court suppression order reversed; case remanded for trial.

ANALYSIS: (Excerpted from U.S. Supreme Court majority opinion)

In Mimms, we considered a traffic stop much like the one before us today. There, Mimms had been stopped for driving with an expired license plate, and the officer asked him to step out of his car. When Mimms did so, the officer noticed a bulge in his jacket that proved to be a .38-caliber revolver, whereupon Mimms was arrested for carrying a concealed deadly weapon. Mimms, like Wilson, urged the suppression of the evidence on the ground that the officer's ordering him out of the car was an unreasonable seizure, and the Pennsylvania Supreme Court, like the Court of Special Appeals of Maryland, agreed.

We reversed, explaining that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasions of a citizen's personal security;" and the reasonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,'"...on the public interest side of the balance, we noted that the State "freely concede[d]" that there had been nothing unusual or suspicious to justify ordering Mimms out of the car, but that it was the officer's "practice to order all drivers [stopped in traffic stops] out of their vehicles as a matter of course" as a "precautionary measure" to protect the officer's safety. We thought it "too plain for argument" that this justification--officer safety--was "both legitimate and weighty."

In addition, we observed that the danger to the officer of standing by the driver's door and in the path of oncoming traffic might also be "appreciable."

On the other side of the balance, we considered the intrusion into the driver's liberty occasioned by the officer's ordering him out of the car. Noting that the driver's car was already validly sopped for a traffic infraction, we deemed the additional intrusion of asking him to step outside his car "de minimis." Accordingly, we concluded that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures"...

We must therefore now decide whether the rule of Mimms applies to passengers as well as to drivers. On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or a passenger. Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71, 33 (1994). In the case of passengers, the danger of the officer's standing in the path of oncoming traffic would not be present except in the case of a passenger in the left rear seat, but the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.

On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

We think that our opinion in Michigan v. Summers, 452 U.S. 692 (1981) **[Sept. '81 LED:01]** offers guidance by analogy here. There the police had obtained a search warrant for contraband thought to be located in a residence, but when they arrived to execute the warrant they found Summers coming down the front steps. The question in the case depended "upon a determination whether the officers had the authority to require him to re-enter the house and to remain there while they conducted their search." In holding as it did, the Court said:

> "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk

> of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."
>
> In summary, danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passenger out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
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> > *[Court's Footnote: Maryland urges us to go further and hold that an officer may forcibly detain a passenger for the entire duration of the stop. But respondent was subjected to no detention based on the stopping of the car once he had left it; his arrest was based on probable cause to believe that he was guilty of possession of cocaine with intent to distribute. The question which Maryland wishes answered, therefore, is not presented by this case, and we express no opinion upon it.]*

DISSENT:

Justices Kennedy and Stevens dissent, expressing concerns about civil liberties. Noting that the officer in this case in fact had a reasonable basis (furtive gestures during the pursuit) for ordering the passenger out of the car, they argue that the majority should not have created the same "bright line" rule for passengers as the Court had created for drivers in the Mimms decision. Justice Kennedy's separate dissenting opinion ends with the following constitutional thought:

> Most officers, it might be said, will exercise their new power with discretion and restraint; and no doubt this often will be the case. It might also be said that if some jurisdictions use today's ruling to require passengers to exit as a matter of routine in every stop, citizen complaints and political intervention will call for an end to the practice. These arguments, however, would miss the point. Liberty comes not from officials by grace but from the Constitution by right.

LED EDITOR'S COMMENT: The Washington Court's have not interpreted the state constitution on this issue as yet, so Washington officers can assume the Wilson is good law for now. However, Washington officers would be well-advised to exercise this power, in the words of Justice Kennedy, "with discretion and restraint." Also, if officers observe furtive gestures or other objective indicators of suspicion before ordering a driver or passenger out of a vehicle, they should of course document these articulable suspicions in their reports.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

INJUNCTION RESTRAINTS ON PROTESTERS AT ABORTION CLINICS: FLOATING BUFFER ZONE TOO RESTRICTIVE, FIXED BUFFER ZONES OK -- In Schenck v. Pro-Choice Network of Western New York, 1997 WL 65718 (1997), a majority of the United States

Supreme Court strikes down a part of a Federal district court's injunctive order placing restraints on abortion protesters at abortion clinics in western New York State.

Representatives of abortion doctors and clinics filed a complaint, seeking an injunction from the district court restraining Paul Schenck, Dwight Saunders, and Pro-Choice Network of Western New York from engaging in blockades and other illegal conduct at abortion clinics. After hearings were held, the district court ultimately imposed an injunction against the protesters.

Among other things, the injunction banned "demonstrating within fifteen feet...of...doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of [clinic] facilities" (these restrictions are referred to in the majority opinion of the Supreme Court as **"fixed buffer zones"**], or "within fifteen feet of any person or vehicle seeking access to or leaving such facilities" [these restrictions are referred to in the majority opinion as **"floating buffer zones"**]. Another provision in the injunction allowed two sidewalk counselors inside the fixed and floating buffer zones, but it required them to "cease and desist" their counseling immediately if a counselee told them to stop.

A majority of the U.S. Supreme Court holds that the restrictions creating **floating buffer zones** around pedestrians and vehicles burden more speech in the public arena involved than is necessary to serve the relevant government interests. Such **floating buffer zones** prevent abortion protesters -- except for the occasional tolerated sidewalk counselor-- from communicating a message from a normal conversational distance or handing out leaflets on the public sidewalks. Only a record of abuses beyond that established in this case would justify the extraordinary measure in this public forum of the **floating buffer zones.**

The Supreme Court majority does uphold the **fixed buffer zones**, and the related restrictions on counselors around the clinic doorways, driveways, and driveway entrances. The evidentiary record in this particular case established that these restrictions were necessary to ensure that pedestrians and vehicles could enter and exit the clinic property and parking lots safely and without undue interference with their freedom of movement.

Result: federal district court injunction reversed in part, affirmed in part; case remanded for further proceedings.

LED EDITOR'S COMMENT: The Schenck decision addresses only the power of the courts, under the factual circumstances presented, to establish rules governing protester behavior (e.g., zones of protection) through injunctions. Schenck does not provide much guidance on what specific protester conduct would be criminal (e.g., trespass, assault, disorderly conduct, etc.) in any particular situation.

Your LED Editor does not claim any expertise on these particular matters. Readers should consult their assigned legal advisors with any questions about obtaining injunctions, negotiating agreed rules of behavior with protesters, or enforcing the criminal laws in particular situations. In this regard, we note that, based on its Schenck decision, the U.S. Supreme Court vacated court orders in cases which had arisen in Phoenix, Arizona and Lakewood, Colorado. Washington law enforcement agencies with questions in this subject area may wish to consult the Phoenix or Lakewood police agencies, as well as checking with such national police organizations as the International Association of Chiefs of Police.

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NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

CIVIL LIABILITY EXPOSURE FOR SEARCHING PERSONS UNDER UNSUPPORTED WARRANT AUTHORIZATION FOR SEARCHING "ANY PERSONS ON THE PREMISES"-- In Marks v. Clarke, 102 F.3rd 1012 (9th Cir. 1996), the Ninth Circuit Court of Appeals makes a number of rulings in this long-running § 1983 civil rights case which addresses 1986 searches by Spokane-area law enforcement agencies at residences of several members of the Gypsy Church of the Northwest. This brief LED note about this civil suit addresses only one of the rulings of the Ninth Circuit handed down in December of 1996-- the Court's holding that it was a violation of clearly established Fourth Amendment doctrine for officers to obtain and execute warrants authorizing them to search all persons present during search warrant execution.

The search warrants in the Marks case expressly authorized searches of "any persons on the premises" and had been approved by a deputy prosecutor and a judge. However, the supporting affidavits did not provide the necessary support for the extraordinary provision to search "all persons", the Court holds. Clearly established Fourth Amendment case law required such support, the Court also holds. Accordingly, the officers who had obtained the warrants were not entitled to qualified immunity for searching persons solely on the basis of the "any persons" provisions of the search warrants. Officers who had not been involved in the obtaining of the warrants, but only in their execution, were entitled to qualified immunity, however.

To briefly summarize the facts: Investigating officers had conducted controlled sales of purportedly stolen property at two residences of the Marks', the targets of their investigation of a suspected fencing operation. The warrant-obtaining, affiant-officers' supporting affidavits for warrants to search the two premises described these controlled sales. The affidavits declared that the officers were seeking permission to search **the occupants of the premises for purposes of officer safety**. However, the warrant authorizations went beyond this request to direct the officers to search **"any persons on the premises."** Many persons were present on the premises when the warrants were executed, and many persons, of all ages, were subjected to personal searches.

On appeal in the civil case, one of the law enforcement agencies' arguments was that each of the residences was a "den of thieves", and that this justified the "any persons" search clause. However, the Ninth Circuit doesn't find sufficient justification in the affidavits to support this characterization of the residences. The Court declares that an "all persons present" search authorization will not be justified for "a raid on any family home where innocent family members or friends might be residing or visiting." The Ninth Circuit suggests in the following passage some of the limited circumstances in which a warrant authorization to search "all persons present" might be justified:

> An all persons present warrant might be appropriate for a different kind of locale--for example a building or apartment used as a crack house, a barn used as a methamphetamine lab, or a warehouse used exclusively as storage place for arms. Here, however, large numbers of family members, including children, were, as the officers might have expected, present before and during the search.

Result: rulings by United States District Court for the Eastern District of Washington affirmed in part, reversed in part; case remanded for further proceedings.

LED EDITOR'S NOTE: This decision is consistent with the Washington Court of Appeals rulings in: State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95 LED:05 (striking down "all vehicles present" provision in search warrant for lack of justification in the supporting affidavit); and State v. Carter, 79 Wn. App. 154 (Div. II, 1995) November '95 LED:10 (striking down "all persons present" provision in search warrant for lack of justification in the supporting affidavit). Rivera and Carter involved only suppression decisions in criminal cases, but the Marks decision illustrates that civil liability can result from relying on such provisions in the absence of the necessary, and difficult to establish, supporting authority in the affidavit.

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WASHINGTON STATE SUPREME COURT

WHERE DRIVER NOT UNDER ARREST FOLLOWING MVA, POLICE MAY LAWFULLY REQUEST DRIVER'S CONSENT TO BLOOD TEST WITHOUT IMPLIED CONSENT WARNINGS

State v. Rivard, 131 Wn.2d 63 (1997)

Facts:

A City of Spokane police officer contacted James D. Rivard at the scene of an 11:40 p.m. accident in which Rivard's motor vehicle had struck a skateboarder. The skateboarder had been seriously injured and had been taken to the hospital. The officer considered Rivard to be a suspect in a vehicular assault investigation.

Because Rivard was suspected of this felony crime, the officer considered Rivard not free to leave the scene of the investigation, but he did not place Rivard under arrest (more facts regarding the nature of the custody at the scene are provided below in the "Analysis" section under "Issue 2"). After reading Rivard his Miranda rights, the officer asked Rivard if he would consent to a blood test for alcohol content. The officer did not read Rivard the implied consent warnings, nor did the officer separately mention Rivard's right to additional independent tests on his own.

Rivard agreed to submit to a blood test. After the officer transported Rivard to a local hospital, Rivard signed a waiver form stating that he "consented of his free will to allow [the] Law Enforcement Agency to obtain a Legal Blood Sample." He submitted to the test and was then allowed to leave.

Proceedings:

The skateboarder-victim later died, and Rivard was charged with vehicular homicide. However, prior to trial, a superior court judge granted Rivard's motion to suppress the blood test, ruling that, prior to any testing, Rivard should have been given implied consent warnings, including an advisement about his right to additional testing. A trial ensued without evidence on the blood testing. After the jury in superior court could not reach a verdict, a mistrial was declared. The State obtained review in the Court of Appeals on the suppression issue, but the Court of Appeals affirmed. See State v. Rivard, 80 Wn. App. 633 (Div. III, 1996) **Sept. '96 LED: 14.**

ISSUES AND RULINGS: (1) When a driver has been involved in a serious injury accident, and that driver has not been arrested, may an officer lawfully obtain voluntary consent to blood alcohol

testing of the driver without first providing the driver with implied consent warnings, including the advisement of the right to additional independent testing? (ANSWER: Yes); (2) Was Rivard in fact under arrest at the scene in this case, thus triggering the requirements of the implied consent statute? (ANSWER: No) Result: reversal of Court of Appeals affirmance of Spokane County Superior Court suppression ruling; case remanded for retrial with blood test in evidence.

ANALYSIS:

ISSUE 1: Consent To Blood Test By Person Not Under Arrest

Under subsections (1) and (2) of RCW 46.20.308 (the implied consent statute), where a law enforcement officer has probable cause to believe that a person has been driving under the influence of alcohol or drugs, the officer may arrest that person. The officer may then ask the driver to take a consenting breath alcohol test, but in such event, the officer must provide the driver with the implied consent warnings which include an advisement about the right to have additional tests administered by any qualified person of the driver's choosing, as provided in RCW 46.61.506.

Under subsection (3) of RCW 46.61.308, an arresting officer may take blood, without the consent of the driver, under certain circumstances specified in the statute as follows:

> ...If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which another person has been injured and there is a reasonable likelihood that such other person may die as a result of injuries sustained in the accident, a breath or blood test may be administered without the consent of the individual so arrested.

Washington case law establishes that, even in the circumstances listed under subsection (3) of RCW 46.20.308, where forcible blood testing is permitted, the arrested driver must be advised of the right under RCW 46.61.506 to additional tests.

In its decision last year in this case, Division Three of the Court of Appeals concluded that a driver like Rivard "should not lose...[the implied consent warning] right because he cooperated and was not arrested." However, in its unanimous reversal of Division Three, the State Supreme Court declares that neither the statutory language nor the case law interpreting that language supports the Division Three decision.

The State Supreme Court instead rules broadly that, if a person not under arrest voluntarily consents to a blood or breath test for drugs or alcohol, the results of that test will be admissible in evidence.

ISSUE 2: "Arrest" vs. "Investigatory Seizure"

The core of the Supreme Court's fact-intensive analysis of whether Rivard was in fact "arrested" at the scene, and therefore entitled to warnings about his right to additional tests, is as follows. The Court first notes that the standard is a purely objective, reasonable person, test. Then the

Court turns to the facts to determine if a reasonable person in Rivard's situation would have believed that he or she was under arrest:

> He was not subjected to restraints commonly associated with an arrest. He was initially approached by [the officer] in a public area near a telephone booth near the scene of the accident. While he was asked not to leave, he was not physically apprehended, restrained, handcuffed, placed in the police vehicle, nor driven to the police station. At no point did any of the officers draw their weapons. Indeed [Rivard] telephoned his father and was able to consult with him and have him present during his conversations with [the officer]. The only event which might conceivably be associated with an arrest was that [Rivard] was read his Miranda rights. That event alone does not constitute an arrest.

Footnotes and citations omitted.

LED EDITOR'S COMMENT: We assume that this case will be of very limited applicability. We believe that, whenever investigating officers develop the triggering probable cause under the implied consent statute, their best approach will be to formally arrest the suspect and to provide the necessary warnings before any breath or blood testing.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

STATE HAS FULL NONCONSENSUAL CRIMINAL JURISDICTION OVER INDIAN TRIBAL MEMBER'S CRIME WHICH WAS COMMITTED ON TRUST LAND OUTSIDE RESERVATION BOUNDARIES -- In State v. Cooper, 130 Wn.2d 770 (1996), the State Supreme Court rejects a child molester's argument that, as a member of the Nooksack Tribe, he could not be prosecuted in state court for his criminal acts occurring on trust land outside the Nooksack Reservation. Trust land refers to a parcel of land held by the United States in trust for an individual or group of Indians. Over 200 such parcels are found in Washington State outside the boundaries of recognized Indian Reservations.

Prior to 1953, all criminal offenses by Indians in Indian country were subject to only federal or tribal jurisdiction. In 1953, the U.S. Congress enacted Public Law 280 permitting Washington, among other states, to assume jurisdiction over Indian country by statute. In 1963, the Washington Legislature amended chapter 37.12 RCW to assert nonconsensual civil and criminal jurisdiction over all Indian country with certain exceptions. The essence of the 1963 law's exception for criminal jurisdiction was that the State would not have jurisdiction over crimes committed by Indians on tribal lands or allotted lands within an established Indian reservation, (the 1963 law did assume civil and criminal jurisdiction over fee lands within the reservation). The 1963 Legislation in effect assumed jurisdiction over all crimes committed by Indians outside the reservation.

In 1968, the U.S. Congress adopted the Indian Civil Rights Act of 1968 ("1968 ICRA"). The 1968 ICRA required tribal consent for all future assumptions of state jurisdiction over Indian country ("Indian country" includes trust land, like that in this case, outside a reservation.) This

1968 federal legislation was not retroactive. Hence, it did not invalidate Washington's 1963 legislation assuming criminal jurisdiction, among other things, over Indian trust land outside reservation boundaries.

In 1973, the United States recognized the Nooksack Tribe and established a small reservation that did not include the trust parcel where Cooper committed a crime. Cooper, however, argued that the Nooksack Tribe had not consented to state jurisdiction anywhere, and he used this as an argument to avoid the 1963 nonconsensual assumption of state jurisdiction over off-reservation trust parcels.

The State Supreme Court concludes from this history that since 1963 the State of Washington has had criminal jurisdiction over all crimes committed by Indians outside the boundaries of Indian reservations. Because defendant Cooper's act of child molestation occurred on land outside a reservation, and he was subject to the State's jurisdiction over crimes assumed in 1963, he was subject to State jurisdiction, even though that property was Indian trust land.

The Court rejects Cooper's citation to a magazine article about such jurisdiction, recognizing that the article was describing the rules for jurisdiction over crimes on trust lands within the boundaries of a reservation:

> If a tribe has not requested or consented to the assumption of state jurisdiction, the title status [of] the property where the offense was committed determines state authority to prosecute. If the property is tribal or allotted land within the reservation and is either held in trust by the United States or subject to a restriction against alienation imposed by the United States, the Washington courts do not have jurisdiction.

[Emphasis added by LED Ed.]

The Court also rejects an argument by Cooper that his case is supported by the State Supreme Court decision in State v. Sohappy, 110 Wn.2d 907 (1988). **Oct '88 LED:09**. In Sohappy, the State Supreme Court had ruled that an "in lieu" fishing site was trust land within an established reservation (the Yakima reservation) for purposes of the 1963 Washington law (RCW 37.12.010). The Cooper Court explains that its ruling in Sohappy was narrowly limited to the facts of that case and was based in part on an earlier federal court ruling as to the same "in lieu" fishing site. The Cooper Court explains further:

> Sohappy does not, as Cooper suggests, hold that "reservation" includes all lands held in trust for the benefit of Indians. The court's holding is clearly limited to the in-lieu fishing site in question. As the State points out, Cooper's interpretation would render the phrase "within an established Indian reservation" totally meaningless. If the term "reservation" in RCW 37.12.010 included all Indian lands outside the formal boundaries of established reservations, then the exception would swallow the rule.

Result: Kim E. Cooper's Whatcom County Superior Court conviction of first-degree child molesting affirmed.

LED EDITOR'S NOTE: Precedential value: The Cooper case offers a clear rule for almost all crimes that occur on off-reservation "trust parcels" by recognizing the full

assumption of state jurisdiction in 1963. The analysis might change: (1) if the trust parcel was established after 1968; (2) if the crime involves treaty fishing or hunting, which was not within the jurisdiction offered to states under Public Law 280; or (3) if the crime is in the nature of civil regulation. Acknowledgment: Your LED Editor does not claim expertise on Indian Law. Help in drafting this LED entry was provided by an Assistant Attorney General in the Fish and Wildlife Division of the Attorney General's Office.

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WASHINGTON STATE COURT OF APPEALS

HELMET-LESS CYCLISTS HAVE NO STANDING TO CHALLENGE HELMET STATUTE

City of Kennewick v. Henricks, 84 Wn. App 323 (Div III, 1996)

Facts and Proceedings:

Joseph Henricks and Jospeh Diven were cited in 1995 for failure to wear motorcycle helmets pursuant to RCW 46.37.530. Both men admitted that they were not wearing any type of helmet when they were stopped and the citations were issued.
However, the Benton County District Court dismissed their citations, holding that the statute was unconstitutionally vague. The City of Kennewick appealed to the Superior Court, which reversed, finding that an administrative provision made the statute sufficiently definite.

ISSUE AND RULING: Did Henricks and Diven have standing to challenge the constitutionality of the motorcycle helmet law? (ANSWER: No) Result: Affirmance of Benton County Superior Court decision reversing district court dismissal of citations; citations reinstated.

ANALYSIS: RCW 46.37.530 (1)(c) makes it unlawful for any person to operate or ride upon a motorcycle ... unless wearing upon his or her head a protective helmet of a type conforming to rules adopted by the state patrol.... The helmet must be equipped with either a neck or chin strap which shall be fastened securely while the motorcycle ... is in motion." RCW 46.37.530(2) authorizes the state patrol "to adopt and amend rules ... concerning the standards and procedures for conformance of rules adopted for ... protective helmets."

In State v. Maxwell, 74 Wn.App. 688 (Div. III, 1994), the Court of Appeals ruled that the motorcycle helmet statute violated due process requirements because it was too vague. To cure the vagueness problem, the WSP amended its regulation (WAC 204-10-040). See the **December '94 LED at pages 20-21**, setting forth the amended WAC regulations.

In Henricks, the district court below had held that the WSP amendments to WAC 204-10-040 did not cure the vagueness problems under the Maxwell ruling. Next, the superior court in Henricks disagreed with district court, holding that the WSP amendments had sufficiently clarified the law.

Now, the Court of Appeals has ruled it need not address these vagueness issues. Henricks and Diven lacked standing to challenge the law, the Court of Appeals holds:

> RCW 46.37.530(1)(c) unambiguously requires motorcycle riders to wear "protective helmets." Although Mr. Henricks and Mr. Diven argue the statute only

vaguely identifies what types of helmets satisfy the requirement, they cannot dispute that the statute clearly requires helmets of some type. This requirement is the "hard core" of the statute. Therefore, because they were wearing no helmets at the time of the citations, Mr. Henricks and Mr. Diven lack standing to claim vagueness as to the rules relating to acceptable types of helmets.

DRUG DEALER WHO CLAIMED TO BE ACTING AS A POLICE INFORMANT WHEN HE DELIVERED COKE TO THIRD PARTY LOSES ARGUMENT THAT HE WAS ENTITLED TO IMMUNITY UNDER RCW 69.50.506(C); CI AGREEMENT CONTRADICTS THEORY

State v. McReynolds, 80 Wn. App. 894 (Div. III, 1996)

Facts: (Excerpted from Court of Appeals opinion)

> In May 1992 Mr. McReynolds walked into the Zillah police station and volunteered his services to the LEAD Task Force. He told Detectives Ron Shepard and Mike Everts he wanted to help rid the Buena and Toppenish areas of drug activity by working for them as a confidential informant. They questioned him regarding the whereabouts of several fugitives wanted in connection with illegal drug transactions and arranged to meet with him again a week or two later. In the interim, Mr. McReynolds called the detectives with information about two of the fugitives.
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> At Mr. McReynolds' second meeting with Detectives Shepard and Everts, on May 26, they recruited him as an informant and had him read and sign two documents: (1) a consent to have his conversations recorded and (2) an admonishment advising him he is not a police officer, is not to violate any law to gather information, and shall not possess, sell or deliver drugs except as specifically directed by a LEAD Task Force detective. The detectives directed Mr. McReynolds to look for drug sources and gather information, but warned him not to use or sell drugs, or become involved in any drug deals. Mr. McReynolds told them he knew a cocaine dealer named Sandy Clark, and he would try to recruit her as an informant or discover her drug source.
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> During approximately the same period, Stan Rolison also approached the task force. He explained he had a drug problem and had unsuccessfully tried everything to beat his addiction; he now wanted to burn his drug connection bridges and help get the drug dealers off the streets. The task force signed him on as a confidential informant, and Detectives Shepard and Everts worked with him. Mr. Rolison identified Mr. McReynolds (known to him only as Randy) as a possible drug dealer in Buena.
>
> Detectives Shepard and Everts decided not to have Mr. McReynolds make any buys for them; instead, they set up a sting operation targeting Mr. McReynolds. On June 2 and 3, 1992 Mr. Rolison contacted Mr. McReynolds under the direction and supervision of the task force, and took delivery of cocaine four times.

Proceedings:

McReynolds was charged with four counts of delivering cocaine based on the four occasions when he allegedly sold cocaine to Rolison. The trial judge rejected McReynolds' proposed jury instruction on statutory immunity which read:

> Delivery of a controlled substance is lawful or excused if when the delivery occurs, the Defendant believes that he is acting as an agent of any authorized state, county, or municipal officer, engaged in the lawful performance of his duties.

The jury convicted McReynolds on one of the counts.

ISSUE AND RULING: Was McReynolds entitled to his proposed jury instruction on statutory immunity? (ANSWER: No) Result: Yakima County Superior Court conviction for delivery of cocaine affirmed.

STATUTE AT ISSUE:

RCW 69.50.506(c) provides:

> No liability is imposed by this chapter upon any authorized state, county or municipal officer, engaged in the lawful performance of his duties.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 69.50.401 makes delivery of a controlled substance unlawful, except as authorized by statute. RCW 69.50.506(c) is a statutory exception for authorized state, county or municipal officers engaged in the lawful performance of their duties. To invoke the statutory immunity of RCW 69.50.506(c), Mr. McReynolds had to establish (1) he was an authorized officer (2) engaged in the lawful performance of his duties. He could not do that. Mr. McReynolds acknowledged in writing his understanding that he was not a police officer, did not have any legal authority, did not have authority to violate any criminal law to gather information or provide confidential informant services, and could not engage in any cocaine transactions except under specific direction by a LEAD Task Force detective.
>
> Mr. McReynolds concedes there is no direct authority supporting his argument that a confidential informant or agent of the police should be covered by the statute, but asserts the argument is supported by analogy. He contends that if a confidential informant or agent of the police acting at the direction of the police must comply with constitutional safeguards when conducting a search, . . . then in appropriate circumstances they should also enjoy police immunity granted by statutes such as RCW 69.50.506(c).
>
> Mr. McReynolds' analogy is flawed. Mr. McReynolds. . .was not acting at the direction of the police when he delivered cocaine. He was given explicit written and verbal warnings not to possess, sell or deliver drugs except as specifically directed by a LEAD Task Force detective; he ignored those warnings at his own risk.
>
> It is not necessary to address whether a confidential informant is entitled to a privileged activity instruction based on RCW 69.50.506(c), because Mr.

> McReynolds was not prosecuted for a drug transaction in which he was acting at the direction of the police. Mr. McReynolds' proposed instruction based on RCW 69.50.506(c) was not warranted by the evidence, nor, based as it is upon his subjective belief, is it an accurate statement of the law.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) SUPERVISOR-APPROVED OFFICER-SAFETY WIRE PER RCW 9.73.210 FAILS FOR LACK OF SPECIFICITY IN TWO RESPECTS IN WRITTEN REQUEST; BUT GOOD FAITH COMPLIANCE EFFORT MAKES OFFICER'S INDEPENDENT TESTIMONY ADMISSIBLE -- In State v. Costello, 84 Wn. App. 150 (Div. III, 1996), the Court of Appeals applies the good faith exception to the exclusionary rule under chapter 9.73 RCW, as interpreted by the State Supreme Court in State v. Jimenez, 128 Wn.2d 720 (1996) **May '96 LED:03**.

In Jimenez, police drug investigators had made an in-agency application to a supervisor for an evidentiary recording under RCW 9.73.230. The officers in Jimenez failed to identify the officers to be involved in the tape recording and monitoring activity. Based on an exclusionary exception at RCW 9.73, the Jimenez Court held that the usual rule that police violation of the chapter 9.73 RCW bars even independent and unaided police recollections of the conversations at issue does not apply where police made a good faith effort to get supervisor authorization of their written application under the statute.

The facts in Costello are analogous to those in Jimenez, the Court of Appeals holds. Drug investigators applied to a lieutenant in their agency under RCW 9.73.210 for authority to wear a wire solely for officer-safety purposes to aid in their investigation of Marc D. Costello. The application was deficient, the Court of Appeals ultimately holds, both (1) because it failed to specify which officers would be participating in the recording and monitoring activity, and (2) because the application failed to give sufficient specifics regarding the safety risks posed in the investigation related to Costello. However, the Court of Appeals holds that the officers had made a good faith effort to comply with the application requirement.

Applying the Jimenez good faith exception to these facts, the Costello Court holds that the officer who was called to testify had lawfully testified regarding his visual observation of the transaction and his unaided memory of the conversation with Costello. Because there was a good faith effort to comply with the authorization requirement and because the testimony was unaided by the tape recording, the officer's testimony was admissible.

Result: Franklin County Superior Court conviction for delivery of a controlled substance affirmed.

LED EDITOR'S COMMENT: We plan to further address the substantive questions in the Costello case in a future LED. For now, we would suggest that in some cases it may be more difficult to justify an officer-safety wire under RCW 9.73.210 (requiring individualized reasonable suspicion regarding safety) than it is to justify an evidence-gathering recording

under RCW 9.73.230 (requiring probable cause as to certain kinds of expected drug conversations or communications). Consult your prosecutor or legal advisor.

(2) CITY BARRED UNDER DOCTRINE OF COLLATERAL ESTOPPEL FROM CIVIL ACTION FORFEITING FIREARMS WHERE COUNTY PROSECUTOR HAD PREVIOUSLY LOST SUPPRESSION MOTION IN CRIMINAL PROCEEDINGS RE SEIZURE OF THOSE FIREARMS -- In Barlindal v. City of Bonney Lake, 84 Wn. App. 135 (Div. II, 1996), the Court of Appeals rules that a city police agency was barred from trying to civilly forfeit firearms because the county prosecutor's office had previously lost on a criminal court suppression motion challenging the legality of the seizure of the firearms.

A joint operation of police officers from the City of Bonney Lake and from the Pierce County Sheriff's Office had searched George Barlindal's home under a search warrant for methamphetamines. The warrant search had yielded both the illegal drugs and over 200 firearms and miscellaneous other items. Barlindal successfully challenged the warrant on grounds of failure of the supporting affidavit to establish probable cause. Criminal charges were dismissed, and the State did not appeal that ruling.

Later, the City of Bonney Lake sought, under the firearms laws and the Uniformed Controlled Substances Act, to forfeit the firearms seized under the search warrant. The Pierce County Superior Court ordered the City to return the firearms to Barlindal, holding that the City was barred under the collateral estoppel doctrine from re-litigating the issue of legality of the original search under the warrant.

The Court of Appeals affirms, ruling that where, as here, a law enforcement agency is involved in a search and seizure which has been held unlawful in criminal proceedings, the police agency is barred from re-trying the search-and-seizure issue in a subsequent civil forfeiture proceeding. It is irrelevant for purposes of this "collateral estoppel" bar that the law enforcement agency's attorney in the subsequent civil action was not able to control the prior criminal litigation, the Court of Appeals declares.

Result: Affirmance of Pierce County Superior Court order directing the City of Bonney Lake to return Barlindal's firearms.

(3) FORMER FIREARMS LAW PROVISION MADE FELON'S UNLAWFUL POSSESSION OF MULTIPLE FIREARMS JUST ONE CRIME -- In State v. Russell, 84 Wn. App. 1 (Div. II, 1996), the Court of Appeals gives the defendant the benefit of the doubt in interpreting the former firearms law provision prohibiting from firearms possession persons with certain prior disqualifying convictions.

Defendant Robert S. Russell was a convicted felon on the day when police found him to be in possession of two firearms. Based on Russell's possession of two firearms, the trial court convicted Russell for two violations of the firearms possession prohibition of RCW 9.41.040. Russell argued that he could be convicted on only one count under the former law, regardless of the number of weapons he had possessed unlawfully. The Court of Appeals reverses the trial court, determining the former firearms law to be ambiguous and resolving the ambiguity in Russell's favor.

One factor in the Court of Appeals decision is that, after the date of Russell's offense, the 1995 Washington Legislature amended RCW 9.41.040 to provide in a new subsection (7) that "[e]ach

firearm unlawfully possessed under this section shall be a separate offense", subjecting those unlawfully possessing multiple firearms to multiple separate convictions and consecutive sentences. The Court of Appeals indicates that this change in statutory language supports the view that unlawful possession of multiple firearms was just a single offense prior to the 1995 change in RCW 9.41.040.
Result: One of two Lewis County Superior Court convictions for unlawful firearms possession reversed; case remanded for resentencing.

LED EDITOR'S NOTE: Under the current version of RCW 9.41.040, of course, multiple convictions can be obtained for unlawful possession of multiple firearms.

(4) FELONY ELUDING STATUTE REQUIRES THAT PURSUING OFFICER BE "IN UNIFORM" -- In State v. Fussell, 84 Wn. App. 126 (Div. III, 1996), the Court of Appeals reverses defendant's felony eluding conviction under RCW 46.61.024 on grounds that the record failed to show that the pursuing officers were in uniform.

RCW 46.61.024 provides:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. **The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.**

[Emphasis added]

The record in this case showed that the officers were on duty and in a marked patrol car, but it did not show that they were in uniform. For that reason defendant's felony eluding conviction cannot stand, the Court holds.

Result: Grant County Superior Court conviction for felony eluding reversed, and case dismissed.

(5) LIE TOLD TO POLICE OFFICER IS NOT "OBSTRUCTING", BUT IT IS "PROVIDING A FALSE OR MISLEADING STATEMENT TO A PUBLIC SERVANT" -- In State v. Williamson, 84 Wn. App. 37 (Div. II, 1996), the Court of Appeals holds that the State's charging document was inadequate in charging defendant under former RCW 9A.76.020(3) with "hinder[ing], delay[ing], or obstruct[ing] a public servant." Along the way, the Court of Appeals indicates that the only charge authorized under current Title 9A RCW for lying to a law enforcement officer is that of "providing a false or misleading statement to a public servant" under RCW 9A.76.175.

Defendant Williamson had been arrested as a suspected minor in possession of a firearm. He gave a false name to the arresting officer, and police officers then spent over half an hour determining defendant's true name. Defendant was charged with being a minor in possession of a firearm and with obstructing a public servant under the former RCW 9A.76.020 (the charging document declared that Williamson did "hinder, delay or obstruct" a public servant).

The Court of Appeals finds the wording of the "obstructing" charge to be defective based on case law under the former obstructing statute. The Williamson Court interprets the "obstructing" statute case law as holding that only conduct, not mere lies, can "hinder, delay or obstruct" a public servant; thus, one who lies to a public servant does not "hinder, delay or obstruct" the public servant, the Court declares. Accordingly, the Court of Appeals holds that the charging document on Williamson's obstructing charge was fatally defective.

Result: Pierce County Superior Court conviction for obstructing a public servant reversed; conviction by same court for minor in possession of a firearm affirmed.

LED EDITOR'S COMMENT: Although we believe that there was a solid argument to the contrary under prior law, we recommend, for purposes of enforcement under current law, that officers assume that the Williamson Court's analysis is correct. Therefore, under current RCW provisions, it should be assumed that the only appropriate state law charge for lying to a law enforcement officer in circumstances such as these is under RCW 9A.76.175, which provides:

> **A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.**

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DOMESTIC VIOLENCE-- *JACQUES V. SHARP* AND MANDATORY ARREST VS. NO ARREST FOR COURT ORDER VIOLATIONS; REVISITING THE ISSUES AND LOOKING AHEAD

Introduction. In the December 1996 LED, we digested the Division One Court of Appeals decision in Jacques v. Sharp, 83 Wn. App. 532 (Div. I, 1996) **Dec. '96 LED:18-21**, a controversial decision in a civil suit. In Jacques the Court of Appeals held to be unlawful an arrest by Seattle officers of a person who knowingly violated a provision in a Domestic Violence Protection Act (DVPA) order (see chapter 26.50 RCW). The violated provision had prohibited the respondent from entering a certain Seattle neighborhood. The Court of Appeals held that the DVPA did not give the issuing court authority to make criminal a violation of this sort of provision in a DVPA order (holding that this was not a "restraint" provision within the meaning of the DVPA and hence was enforceable only by the contempt-of-court process). The State Supreme Court has since denied review of the Jacques decision.

We followed up the December '96 LED entry on Jacques v. Sharp with a February 1997 LED article entitled, "Clarification regarding mandatory arrest, discretionary arrest, no arrest for court order violations in domestic violence situations." In that article, we attempted to address the arrest authority/responsibility of law enforcement with respect to knowing violations of orders issued under the DVPA, as well as orders issued under: chapter 10.99 RCW (criminal harassment), chapter 26.09 RCW (dissolution), chapter 26.10 RCW (child custody), chapter 26.26 (parentage), chapter 26.44 (child abuse), and chapter 10.14 (civil anti-harassment); also critical to the analysis was a consideration of the relationship of RCW 10.31.100 to these other statutes.

In the February article, we promised to revisit the issue in the March '97 LED, but in the March '97 LED, we put off our revisitation until this month. We revisit the issue this month, but only briefly, as we don't have much to add to our February '97 article at this point.

Legislative fix? It is generally agreed among law enforcement, prosecutorial, and domestic violence advocates that clarifying legislation is needed. Among other things, such legislation would coordinate the provisions in the various RCW chapters, would clarify the authority of issuing courts to make criminal the violation of restraining and other provisions of orders, and would clarify what constitutes a violation of such provisions. However, there was not sufficient time prior to the 1997 legislative session to take the necessarily careful and comprehensive approach to this project. Therefore, this will almost certainly be a project of the above-mentioned entities and others for the 1998 legislative session.

Current concerns. Since we wrote our February 1997 article, we have not gotten much feedback. We hope that law enforcement officers do not read into our article a suggestion that they err on the side of not arresting those respondents for whom arrest is mandated by law. We urge all law enforcement agencies to seek legal advice from city attorneys, county prosecutors, and in-house legal advisors on the duty to protect and on the answer to such questions as: "What constitutes 'contact' which would violate a 'no contact' order issued under chapter 10.99 RCW or chapter 26.50 RCW?" "Do phone calls and letters from a respondent which do not communicate threats nonetheless constitute prohibited 'contacts' for which arrest is mandatory?"

Future LED entries. We promise to continue to address this important topic as we learn of legal developments. Please let us know of any questions, comments, or concerns by writing to us at 900 Fourth Avenue, Suite 2000, Seattle, WA 98164-1012.

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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.