Law Enforcement Digest

December 1997

HONOR ROLL

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466th Session, Basic Law Enforcement Academy - August 6th through October 29th, 1997

President:	David E. Dial - Kitsap County Sheriff's Office
Best Overall:	Erik M. Clarkson - Pierce County Sheriff's Office
Best Academic:	Erik M. Clarkson - Pierce County Sheriff's Office
Best Firearms:	John W. Grose - King County Department of Public Safety
Tac Officer:	Clark Wilcox - Renton Police Department

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Corrections Officer Academy - Class 258 - October 6th through October 31st, 1997

Highest Overall:	Mark A. McClanahan - Washington State Penitentiary
Highest Academic:	Thomas E. Bonnington - Grant County Jail Christopher D. Lopez - Washington State Reformatory
Highest Practical Test:	Douglas J. Fedderson - Washington State Penitentiary GiGi G. Parker - Spokane County Jail
Highest in Mock Scenes:	Christopher D. Lopez - Washington State Reformatory Mark A. McClanahan - Washington State Penitentiary
Highest Defensive Tactics:	Douglas J. Fedderson - Washington State Penitentiary

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Corrections Officer Academy - Class 259 - October 6th through October 31st, 1997

Highest Overall:	Duane M. Cawthon - McNeil Island Correctional Center
Highest Academic:	Duane M. Cawthon - McNeil Island Correctional Center
Highest Practical Test:	Duane M. Cawthon - McNeil Island Correctional Center
Highest in Mock Scenes:	Duane M. Cawthon - McNeil Island Correctional Center Jason K. Tackett - Washington Corrections Center
Highest Defensive Tactics:	Lawrence Eugene Shepard - Washington State Reformatory

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1997 SUBJECT MATTER INDEX

LED EDITOR'S NOTE: This is our annual LED subject matter index. It covers all LED entries from January 1997 through December 1997. Since 1988 we have published a twelve-month index each December. We have also published two multi-year subject matter indexes. In 1989, we published an index covering LED's from January 1979 through December 1988. In 1994, we published a five-year subject matter index covering LED's from January 1989 through December 1993. For each of the multi-year indexes, distribution was limited to one per agency due to the size of the index and attendant copying costs. In addition, the 1989-1993 cumulative index and current issues of the LED from January 1992 on (excluding January and February of 1993) are available on the CJTC Internet Home Page at: http://www.wa.gov/cjt.

ANIMAL CONTROL

Dangerous dog law does not establish a strict liability standard. State v. Bash and State v. Delzer, 130 Wn.2d 594 (1996) - Jan '97:12

ARREST, STOP AND FRISK

Fourth Amendment does not contain a bright-line "clear break" rule requiring that police tell traffic detainees that they are free to leave before police ask them for consent to search their vehicles; questions remain, however, regarding the lawfulness of such procedures. Ohio v. Robinette, 136 L.Ed.2d 347 (1997) - Feb '97:02

Probable cause for juvenile's arrest found in cumulative knowledge of all officers; also, Miranda waiver upheld despite "ADH" disorder. State v. Harrell, 83 Wn. App. 393 (Div. I, 1996) - March '97:14

Under Fourth Amendment "bright line" officer-safety rule, officers may automatically direct passengers to get out of any lawfully stopped motor vehicle. Maryland v. Wilson, 137 L.Ed.2d 41 (1997) - April '97:03

Check for arrest warrants during investigative contacts ok, but inventory search at jail violates bail-warrant rule of Gloria Smith. State v. Caldera, Hamilton, 84 Wn. App. 527 (Div. III, 1997) - May '97:05

One-week-old information re license suspension was reasonable suspicion for stop and probable cause to arrest; however, because car was locked before "seizure", it was off limits under "search incident" rule. State v. Perea, 85 Wn. App. 339 (Div. II, 1997) - June '97:02

Police agency practice of keeping a regularly updated list of local suspended drivers is a constitutionally permissible practice. State v. Harlow, 85 Wn. App. 557 (Div. III, 1997) - June '97:05

Terry stop didn't become arrest when officer grabbed suspect and told him he was "under arrest"; totality of facts don't equal arrest. State v. Lyons, 85 Wn. App. 268 (Div. III, 1997) - Aug '97:18

No "seizure" in officer's act of shining spotlight on possible suspect; Hodari D. rule applied where suspect did not submit to authority. State v. Young, 86 Wn. App. 253 (Div. II, 1997) - Sept '97:14

Extended seizure of jaywalker while warrant check conducted is disapproved on statutory grounds; constitutional issue reserved. State v. Rife, 133 Wn.2d 140 (1997) - Oct '97:03 (see note re legislative fix, this subtopic, below)

Officer's act of motioning driver of parked car to roll down window was not a "seizure"; precedent of Thorn guides court. State v. Knox, 86 Wn. App. 831 (Div. II, 1997) - Oct '97:12

"Pretext stop" theory rejected under State, Federal constitutions. State v. Ladson, 86 Wn. App. 822 (Div. II, 1997) - Oct '97:15

Legislation adopted in special September session to correct Rife's interpretation of RCW 46. Nov '97:03

ASSAULT AND RELATED OFFENSES

(Chapter 9A.36 RCW)

Consent theory could not be argued in assault case where punch thrown during pick-up basketball game. State v. Shelley, 85 Wn. App. 24 (Div. I, 1997) - June '97:14

Citizens have no right to use force against officers to resist unlawful arrest threatening only loss of freedom. State v. Valentine, 132 Wn.2d 1 (1997) - Aug '97:16

ASSISTED SUICIDE

No constitutional right to die; assisted suicide laws upheld. State of Washington v. Glucksberg, 1997 WL 348094 (1997) - Aug '97:11

CIVIL LIABILITY

Police officers may sue citizen complainants for defamation. Richmond v. Thompson, 130 Wn.2d 369 (1996) - Jan '97:09

Civil liability exposure for searching persons under unsupported warrant authorization for searching "any persons on the premises." Marks v. Clarke, 102 F.3rd 1012 (9th Cir. 1996) - April '97:08

Public duty doctrine does not protect DSHS from liability for failing to investigate report of child abuse; "legislative intent" exception applies. Yonker v. DSHS, 85 Wn. App. 71 (Div. I, 1997) - May '97:19

Public duty doctrine bars suit by drunk driver for her injuries; she was not in the class of victims that the legislature intended to protect. Alexander v. Walla Walla, 84 Wn. App. 687 (Div. III, 1997) - May '97:20

LEOFF II officers, like LEOFF I officers, still may sue their employers. Fray v. Spokane County, 85 Wn. App. 150 (Div. III, 1997) - June '97:11

Notice provided after execution of search warrant inadequate. Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) - Aug '97:14

Prison guards working for private contracting firms not entitled to qualified civil rights immunity; only public entities get any immunity. Richardson v. McNight, 138 L.Ed.2d 540 (1997) - Nov '97:04

COLLATERAL ESTOPPEL/RESJUDICATA

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**.** Barlindal v. City of Bonney Lake, 84 Wn. App. 37 (Div. II, 1996) - April '97:17

DSHS civil proceeding re overpayment does not bar criminal prosecution for same acts; however, duress/battered woman defense allowable**.** State v. Williams, 132 Wn.2d 248 (1997) - Nov '97:07

COMPROMISE OF MISDEMEANORS

Law re "compromise of misdemeanors" covers gross misdemeanors and misdemeanors. State v. Britton, 84 Wn. App. 146 (Div. I, 1996) - June '97:21

CONSPIRACY

Under "Wharton's rule", jury instruction on conspiracy to deliver controlled substances must refer to involvement of a third party. State v. Miller, 131 Wn.2d 78 (1997) - May '97:03

CORPUS DELICTI RULE

Corpus delicti of manslaughter not established in possible SIDS death; also, confession voluntariness and Miranda clarification addressed. State v. Aten, 130 Wn. 2d 640 (1996) - March '97:06

Corpus delicti of child molesting not established; also, court rejects state's request for replacement of traditional corpus delicti rule with "trustworthiness" standard for admissibility of confessions and admissions. State v. Ray, 130 Wn.2d 673 (1996) - March '97:11

CURFEW LAWS

San Diego juvenile curfew ordinance invalidated on constitutional grounds. Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997) - Aug '97:15

Bellingham juvenile curfew law ruled unconstitutional. State v. J.D., 86 Wn. App. 501 (Div. I, 1997) - Aug '97:23

DEADLY FORCE

Under Tennessee v. Garner, deadly force justified against fleeing felon where "substantial risk" of death or serious bodily harm in delaying capture**.** Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997) - Aug '97:11

DEFAMATION

Police officers may sue citizen complainants for defamation. Richmond v. Thompson, 130 Wn.2d 369 (1996) - Jan '97:09

DOMESTIC VIOLENCE

Clarification regarding mandatory arrest, discretionary arrest, no arrest for court order violations in domestic violence situations. Jacques v. Sharp, 83 Wn. App. 532 (Div. I, 1996) - Feb '97:14

Domestic violence -- *Jacques v. Sharp* and mandatory arrest vs. no arrest for court order violations; revisiting the issues and looking ahead. Jacques v. Sharp, 83 Wn. App. 532 (Div. I, 1996) -April '97:20

DOUBLE JEOPARDY; EXCESSIVE FINES

Drug forfeiture: constitutional excessiveness analysis examines both (1) instrumentality factors and (2) proportionality factors; also, homestead question addressed, gets pro-government ruling; and double jeopardy issue controlled by Ursery's pro-government ruling. Tellevik v. Real Property Known As 6717 100th St. S.W., 83 Wn. App. 366 (Div. II, 1996) - Feb '97:10

Forfeiture of crime profits under Criminal Profiteering Act not punishment under "double jeopardy" or "excessive fines" analysis. State ex.rel. Eikenberry v. Frodert, 84 Wn. App. 20 (Div. II, 1996) - Feb '97:13

Search of just-prowled vehicle ok as community caretaking search; also no double jeopardy problem in civil forfeiture, criminal conviction. State v. Lynch, 84 Wn. App. 467 (Div. III, 1997) - May '97:08

No double jeopardy in DUI prosecutions for DUI defendants previously issued probationary licenses in relation to the same incidents. State v. McClendon (and others), 131 Wn.2d 853 (1997) - Nov '97:09

Double jeopardy under Washington constitution is the same as under the Federal constitution - in rem civil forfeiture is not punishment and therefore such forfeitures d not bar criminal prosecution. State v. Catlett, 133 Wn.2d __ (1997) - Dec '97:18

DUE PROCESS

"Outrageous government conduct" claim by drug defendant successful in first-time-ever due process dismissal by State Supreme Court. State v. Lively, 130 Wn.2d 1 (1996) - Jan '97:07

Unreasonable preaccusatorial delay of approximately eight weeks in charging juvenile until after he passed age 18 requires dismissal of charges. State v. Frazier, 82 Wn. App. 576 (Div. II, 1996) - Feb '97:13

DUI law's two-hour rule re BAC's at 0.10% or above violates due process by impermissibly shifting proof of burden to defendant; prosecution must negate possibility of effect of post-driving alcohol consumption. State v. Crediford,130 Wn.2d 747 (1996) - March '97:03

Showup id procedure not impermissibly suggestive. State v. Shea, 85 Wn. App. 56 (Div. II, 1997) - June '97:07

Notice provided after execution of search warrant inadequate. Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) - Aug '97:14

DURESS DEFENSE

DSHS civil proceeding re overpayment does not bar criminal prosecution for same acts; however, duress/battered woman defense allowable. State v. Williams, 132 Wn.2d 248 (1997) Nov '97:07

ELECTRONIC SURVEILLANCE AND RECORDING

(Chapter 9.73 RCW)

Supervisor-approved officer-safety wire per RCW 9.73.210 fails for lack of specificity in two respects in regard to written request; but good faith compliance effort makes officer's independent testimony admissible. State v. Costello, 84 Wn. App. 150 (Div. III, 1996) - April '97:17

Supervisor-authorized tape recording of drug conversation may include multiple conversations which occur within 24-hour limit of RCW 9.73.230. State v. Forest, 85 Wn. App. 71 (Div. I, 1997) - May '97:18

Failure to re-Mirandize on tape invalidates recorded statement from arestee. State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) - Aug '97:20

California officers' failure to follow chapter 9.73 in recorded interrogation not attributed to Washington officers; Miranda ok. State v. Brown, 132 Wn.2d 529 (1997) - Oct '97:08

EVIDENCE

"Frye test" for novel scientific evidence continues to apply in Washington criminal cases; DNA "product rule" testimony admitted. State v. Copeland, 130 Wn.2d 244 (1996); State v. Cannon, 130 Wn.2d 313; (1996); State v. Jones, 130 Wn.2d 302 (1996) - Jan '97:11

PBT test result not admissible for any purpose without Frye hearing; however, the facts of (A) administration of the PBT test and (B) officer's failure to preserve results of PBT test do not taint subsequent BAC test. State v. Smith (Rodger), 130 Wn.2d 215 (1996) - Jan '97:13

Blood alcohol evidence taken by medical personnel after motor vehicle accident not subject to physician-patient privilege. State v. Smith (Lamar), 84 Wn. App. 813 (Div. I, 1997) - June '97:09

BB gun threat substantial step toward threat to use deadly weapon supporting conviction for attempted first degree kidnapping; victim statement to police 20 minutes after attempt "excited utterance". State v. Majors, 82 Wn. App. 843 (Div. I, 1996) - June '97:20

Child abuse hearsay held inadmissible where available child victim takes witness stand but does not describe acts of sexual contact. State v. Rohrich, 132 Wn.2d 472 (1997) - Oct '97:10

FIREARMS LAWS (Chapter 9.41 RCW) AND OTHER WEAPONS LAWS

ATF letters address new Federal gun bar re persons with convictions of "misdemeanor crime(s) of domestic violence." - Jan '97:20

Former firearms law made felon's unlawful possession of multiple firearms just one crime; current law would permit multiple counts. State v. Russell, 84 Wn. App. 1 (Div. II, 1996) - Jan '97:18

Firearms possession bar for prior convictions under RCW 9.41.040 does not have "knowledge of unlawfulness" element. State v. Reed, 84 Wn. App. 379 (Div. II, 1997) - April '97:11

BB gun threat substantial step toward threat to use deadly weapon supporting conviction for attempted first degree kidnapping; victim statement to police 20 minutes after attempt "excited utterance". State v. Majors, 82 Wn. App. 843 (Div. I, 1996) - June '97:20

1994 Federal gun law amendments -- restraining order restrictions - July '97:20

Brady rule for CLEO background checks on handgun buyers stricken. Prinz v. U.S., Mack v. U.S., 138 L.Ed.2d 914 (1997) - Aug '97:10

FREEDOM OF SPEECH

Injunction restraints on protesters at abortion clinics: floating buffer zones too restrictive, fixed buffer zones ok. Schenck v. Pro-Choice Network of Western New York, 137 L.Ed. 2d 211 (1997) - April '97:07

Adult entertainment ordinance upheld against constitutional attack. Ino Ino, Inc. v. Bellevue, 132 Wn.2d 103 (1997) - Nov '97:09

FORFEITURE LAW

(See also "Uniform Controlled Substances Act")

Drug forfeiture: constitutional excessiveness analysis examines both (1) instrumentality factors and (2) proportionality factors; also, homestead question addressed, gets pro-government ruling; and double jeopardy issue controlled by Ursery's pro-government ruling. Tellevik v. Real Property Known As 6717 100th St. S.W., 83 Wn. App. 366 (Div. II, 1996) - Feb '97:10

Forfeiture of crime profits under Criminal Profiteering Act not punishment under "double jeopardy" or "excessive fines" analysis. State ex.rel. Eikenberry v. Frodert, 84 Wn. App. 20 (Div. II, 1996) - Feb '97:13

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**.** Barlindal v. City of Bonney Lake, 84 Wn. App 135 (Div. II, 1996) - April '97:17

Real property not forfeitable if "growers" learn of police investigation and clear out before police actually discover grow operation. City of Everett v. Real Prop. Known As 4827 268th St. NW, Stanwood, Snohomish Cty, 86 Wn. App. 69 (Div. I, 1997) - Oct '97:17

HARASSMENT (Criminal)

Criminal harassment: victim may have reasonable fear of being harmed in manner other than precisely that described by perpetrator. State v. Savaria, 82 Wn. App. 832 (Div. I, 1996) - March '97:19

IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL

Implied consent-- obsessive compulsive disorder no defense to license revocation for refusal to take BAC test because disorder not physical. Medcalf v. DOL, 83 Wn. App. 8 (Div. II, 1996) - March '97:19; affirmed by State Supreme Court (see below under this index subheading)

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) - April '97:09

Where BAC device malfunctions, DUI suspects may be moved to another device for breath samples; new implied consent warnings not required. State v. Brokman, Dixon, 84 Wn. App. 848 (Div. II, 1997) - May '97:13

Blood alcohol evidence taken by medical personnel for medical purposes after motor vehicle accident not subject to physician-patient privilege. State v. Smith (Lamar), 84 Wn. App. 813 (Div. I, 1997) - June '97:09

Air Force security officer held to be "law enforcement officer" for purposes of implied consent law as undefined term gets a broad reading. Williams v. DOL, 85 Wn. App. 271 (Div. II, 1997) - Sept '97:07

Implied consent-- obsessive compulsive disorder no defense to license revocation for refusal to take BAC test, because disorder not physical. Medcalf v. DOL, 133 Wn.2d ___ (1997) - Dec '97:18

INDIAN/TRIBAL LAW ENFORCEMENT, JURISDICTION

State has nonconsensual jurisdiction over Indian tribal member's crime committed on trust land outside reservation boundaries. State v. Cooper, 130 Wn.2d 770 (1996) - April '97:12

Based on 1957 Nisqually tribe resolution, state had jurisdiction to try enrolled members of Nisqually tribe for conduct on reservation land. State v. Squally, 132 Wn.2d 333 (1997) - Nov '97:05

INFANCY DEFENSE

Infancy defense – RCW 9A.04.050 presumption of noncriminality for children between 8 and 12 gets pro-defense reading in sex offense cases. State v. James P.S., 85 Wn. App. 586 (Div. III, 1997) - Sept '97:16

INSANITY DEFENSE AND RELATED DEFENSES

Multiple personality disorder defense re absence of necessary mental state does not apply where alter personality had requisite mental state. State v. Jones, 82 Wn. App. 871 (Div. III, 1996) - March '97:20

INTERNET

Training Commission World Wide Web Home Page - Sept '97:21

INTERROGATIONS AND CONFESSIONS

(See also "Sixth Amendment and Related State Law Provisions")

Right to counsel under CrR 3.1: (A) was triggered by "custody" and (B) was violated; no prejudice found in violation, however. State v. Copeland, 130 Wn.2d 244 (1996) - Jan '97:03

"Right to silence" extends to pre-arrest situations; State cannot call to jury's attention defendant's post-contact, pre-arrest silence. State v. Easter, 130 Wn.2d 228 (1996) - Jan '97:13

Corpus delicti of manslaughter not established in possible SIDS death; also, confession voluntariness and Miranda clarification addressed. State v. Aten, 130 Wn.2d 640 (1996) - March '97:06

Corpus delicti of child molesting not established; also, court rejects State's request for replacement of traditional corpus delicti rule with "trustworthiness" standard for admissibility of confessions, admissions. State v. Ray, 130 Wn.2d 673 (1996) - March '97:11

Probable cause for juvenile's arrest found in cumulative knowledge of all officers; also, Miranda waiver upheld despite "ADH" disorder. State v. Harrell, 83 Wn. App. 393 (Div. I, 1996) - March '97:14

State did not make unlawful use of defendant's pre-arrest silence. State v. Lewis, 130 Wn.2d 700 (1996) - May '97:03

Objective custody trigger to Miranda; focus irrelevant, but warnings required prior to officer's questioning of 14-year-old in school office. State v. D.R., 84 Wn. App. 832 (Div. I, 1997) - May '97:10

Failure to re-Mirandize on tape invalidates recorded statement. State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) - Aug '97:20

Sixth Amendment rule regarding waiver of rights does not require that defendant first be advised of existence of pending charges. State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) - Aug '97:21

California officers' failure to follow Chapter 9.73 in recorded interrogation not attributed to Washington officers; content of Miranda warnings by California officers ok despite arguable ambiguity. State v. Brown, 132 Wn.2d 529 (1997) - Oct '97:08

JUVENILE JUSTICE

RCW 13.04.030 requirement of adult criminal prosecutions for 16-and 17-year-olds who commit violent crimes is not constitutionally defective. State v. Boot, 130 Wn.2d 553 (1996) - March '97:13

Law on juvenile transfer to adult prison held constitutionally valid. Monroe v. Soliz, 132 Wn.2d 414 (1997) - Oct '97:11

LEGISLATION 1997

Legislative updates: Part One, July '97:02-18; Part Two, Aug '97:02-07; Part Three (including index), Aug '97:02-07; Rife legislation note: Nov '97:03; Legislative update oversight corrected: Dec '97:19

LURING

"Luring" statute not unconstitutionally vague; evidence sufficient. State v. Dana, 84 Wn. App. 166 (Div. I, 1996) - June '97:13

OBSTRUCTING

(RCW 9A.76.020)

Off-duty police officers working private security became "public servants" and "peace officers" performing "official duties" when they investigated drug crime; obstructing, resisting convictions upheld. State v. Graham, 130 Wn.2d 711(1996) - Feb '97:06

Lie told to police officer is not "obstructing", but it is "providing a false or misleading statement to a public servant". State v. Williamson, 84 Wn. App. 37 (Div. II, 1996) - April '97:19

RAPE AND OTHER SEX OFFENSES

(Chapter 9A.44 RCW)
Forcibly entering would-be rape victim's car not "felonious" MV entry. State v. Maganai, 83 Wn. App. 735 (Div. II, 1996) - March '97:21

"Sexual exploitation of minor" provision in chapter 9.68A RCW does not include secretly videotaping a minor taking a bath. State v. Grannis, 84 Wn. App. 546 (Div. II, 1997) - July '97:18

Law on "sexual exploitation of a minor" held constitutional but gets narrow reading in hidden camera case. State v. Myers, 133 Wn.2d 26 (1997) and State v. Chester, 133 Wn.2d 15 (1997) - Oct '97:06

ROBBERY

(Chapter 9A.56 RCW)

Only one robbery count was justified for taking at cash register, although two restaurant employees were at the cash register. State v. Molina, 83 Wn. App. 144 (Div. I, 1996) - May '97:15

SEARCH AND SEIZURE

Community Caretaking Function Exception

Search of just-prowled vehicle ok as community caretaking search; also, no double jeopardy problem in civil forfeiture, criminal conviction. State v. Lynch, 84 Wn. App. 467 (Div. III, 1997) - May '97:08

Taking DUI arrestee to his home and forcibly entering his residence was a privacy violation, not part of a community caretaking function. State v. Dykstra, 84 Wn. App. 186 (Div. II, 1996) - June '97:17

Consent Search Exception

Hallucinating person held unable to give consent to search her purse. State v. Sondergaard, 86 Wn. App. 656 (Div. I, 1997) - Oct '97:20

Leach rule of all-parties-present consent applied to void search of home as to both nonconsenting cohabitant and consenting cohabitant. State v. Walker(s), 86 Wn. App. 857 (Div. II, 1997) - Nov '97:10

Exclusionary Rule

"Inevitable discovery" rule passes state constitutional test. State v. Richman, 85 Wn. App. 568 (Div. I, 1997) - Sept '97:19, Oct '97:19

Exigent Circumstances, Emergency Exceptions

Emergency justifies entry of unresponsive drugger's motel room; consent scope not exceeded in video review; no double jeopardy violation. State v. Davis, 86 Wn. App. 414 (Div. II, 1997) - Sept '97:08

Emergency justifies search of home for drugs following mom's OD. State v. Angelos, 86 Wn. App. 253 (Div. I, 1997) - Sept '97:12

Impound-inventory Exceptions to Warrant Requirement

Houser rule requiring "manifest necessity" for inventory searches of MV trunks not applicable where MV has trunk release button in interior. State v. (Ron) White, 83 Wn. App. 770 (Div. I, 1996) - Jan '97:15

Incident to Arrest (Motor Vehicle)

One-week-old information re license suspension was reasonable suspicion for stop and probable cause to arrest; however, because car was locked before "seizure", it was off limits under "search incident" rule. State v. Perea, 85 Wn. App. 339 (Div. II, 1997) - June '97:02

Under Stroud rule, lawful arrest of car's driver doesn't justify "incidental" search of purse held by passenger after she got out of car. State v. Seitz, 86 Wn. App. 865 (Div. II, 1997) -Nov '97:19

Jail Inventory

Check for arrest warrants during investigative contacts ok, but inventory search at jail violates bail-warrant rule of Gloria Smith. State v. Caldera, Hamilton, 84 Wn. App. 527 (Div. III, 1997) - May '97:05

Knock and Announce Requirement

No blanket rule of "no knock" entry for executing warrants to search for narcotics; case-by-case look at no-knock reasonableness required. Richards v. Wisconsin, 117 S.Ct. 1416 (1997) - Aug '97:07

Knock-and-announce rule met: plainclothes officers with search warrant not required to wait for permission to enter following face-to-face announcement. State v. Richards, 87 Wn. App. 285 (Div. I, 1997) - Nov '97:17

Particularity Requirement

Civil liability exposure for searching persons under unsupported warrant authorization for searching "any persons on the premises." Marks v. Clarke, 102 F.3rd 1012 (9th Cir. 1996) - April '97:08

Privacy Expectations

Possible constitutional recognition for Public Disclosure Act provision for requesting public utility records is discussed, but not resolved. In re Maxfield(s), 133 Wn.2d __ (1997) - Dec '97:16

Probable Cause

Civil liability exposure for searching persons under unsupported warrant authorization for searching "any persons on the premises." Marks v. Clarke, 102 F.3rd 1012 (9th Cir. 1996) - April '97:08

Affidavit fails to link property to meth lab activity, so warrant fails. State v. Gebaroff, 87 Wn. App. 11 (Div. II, 1997) - Nov '97:20

Scope of Consent to Search

Emergency justifies entry of unresponsive drugger's motel room; consent scope not exceeded in video review; no double jeopardy violation. State v. Davis, 86 Wn. App. 414 (Div. II, 1997) - Sept '97:08

Scope of Warrant Search

Allowable scope of warrant search defined by combined effect of -- (A) affidavit and (B) search warrant -- where they are physically attached and where warrant incorporates affidavit by reference. State v. Stenson, 132 Wn.2d 668 (1997) - Oct '97:08

Telephonic Warrant

Where telephonic search warrant recording fails, reconstruction of affidavit depends on judge's memory, not officer's memory. State v. Smith, (Thomas Whitcomb), 87 Wn. App. 254 (Div. I, 1997) - Nov '97:14

SEX OFFENDER REGISTRATION, RELEASE NOTIFICATION

Sex offender registration, notification provisions of Washington's version of "Megan's Law" survives constitutional challenge. Russell v. Gregoire, 124 F.3d 1079 (1997) - Nov '97:04

SEX PREDATORS

Kansas civil commitment law for sexual predators upheld. Kansas v. Hendricks, 117 S.Ct 2072 (1997) - Aug '97:10

Constitutional challenge to sex predator law ruled premature. McClatchey v. State, 133 Wn.2d 1 (1997) - Oct '97:12

SIXTH AMENDMENT AND RELATED STATE LAW PROVISIONS

(See also "Interrogations and Confessions")

Right to counsel under CrR 3.1: (A) was triggered by "custody" and (B) was violated; no prejudice found in violation, however. State v. Copeland, 130 Wn.2d 244 (1996) - Jan '97:03

Sixth Amendment rule regarding post-charge, pre-appearance waiver of rights does not require that defendant first be advised of existence of pending charges. State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) - Aug '97:21

SPEEDY TRIAL

Striker speedy trial/speedy arraignment rule does not apply while defendant out of state unless defendant incarcerated there. State v. Hudson, 130 Wn.2d 48 (1996), State v. Cintron-Cartagena, 130 Wn.2d 48 (1996) and State v. Stewart, 130 Wn.2d 351 (1996) - Jan '97:10

Nonincarcerated out-of-state time, and in-state time where State did not know whereabouts, don't count under Striker speedy trial rule (CrR 3.3). State v. Monson, 84 Wn. App. 703 (Div. III, 1997) - May '97:16

"Speedy trial" rule of CrR 3.3(g)(6) for persons incarcerated out of state -- State failed to exercise due diligence to bring defendant to trial. State v. Simon, 84 Wn. App. 460 (Div. I, 1996) - June '97:12

THEFT AND RELATED OFFENSES (Chapter 9A.56 RCW)

(See also "Robbery")

Clerk's multiple thefts from store registers on three separate days support three second degree theft convictions; "aggregation" statute does not require that the three charges be reduced to one charge. State v. Carosa, 83 Wn. App. 380 (Div. II, 1996) - March '97:17

Prosecutor can charge accused with trafficking in the same item of property which accused has been charged with stealing. State v. Michielli, 132 Wn.2d 229 (1997) - Oct '97:11

TRAFFIC

DUI law's two-hour rule re BAC's at 0.10% or above violates due process by impermissibly shifting proof burden to defendant; prosecution must negate possibility of effect of post-driving alcohol consumption. State v. Crediford,130 Wn.2d 747 (1996) - March '97:03

Helmet-less cyclists have no standing to challenge helmet statute for vagueness. City of Kennewick v. Henricks, 84 Wn. App. 323 (Div. III, 1996) - April '97:13

Felony eluding statute requires that pursuing officer be "in uniform." State v. Fussell, 84 Wn. App. 126 (Div. III, 1996) - April '97:19
"Felony eluding" statute requires proof pursuing officers in uniform. State v. Hudson, 85 Wn. App. 401 (Div. I, 1997) - Sept '97:19

"Felony eluding" charge stands even if pursuit initiated without cause. State v. Duffy, 86 Wn. App. 334 (Div. III, 1997) - Sept '97:20

Extended seizure of jaywalker while warrant check conducted is disapproved on statutory grounds; constitutional issue reserved. State v. Rife, 133 Wn.2d 140 (1997) - Oct '97:03

Aerial surveillance speed trap law not met by State's affidavit. State v. Smith (Jason W.), 87 Wn. App. 345 (Div. I, 1997) - Nov '97:21

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW), OTHER DRUG LAWS

Drug forfeiture: constitutional excessiveness analysis examines both (1) instrumentality factors and (2) proportionality factors; also, homestead question addressed, gets pro-government ruling; and double jeopardy issue controlled by Ursery's pro-government ruling. Tellevik v. Real Property Known As 6717 100th St. S.W., 83 Wn. App. 366 (Div. II, 1996) - Feb '97:10

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) - April '97:14

On constructive possession issue, jury must be instructed that presumption regarding possession of drugs is rebuttable. State v. Cantabrana, 83 Wn. App. 204 (Div. I, 1996) - June '97:16

UCSA upheld: no constitutional right to medicinal use of marijuana. Seeley v. State, 132 Wn.2d 776 (1997) - Oct '97:11

Reversal on due process grounds of school zone enhancement for delivering cocaine near downtown Seattle building with K-12 program. State v. Becker, 132 Wn.2d 54 (1997) - Nov '97:05

Double jeopardy under Washington constitution is the same as under the Federal constitution - in rem civil forfeiture is not punishment and therefore such forfeitures d not bar criminal prosecution. State v. Catlett, 133 Wn.2d __ (1997) - Dec '97:18

VAGUENESS DOCTRINE

"Luring" statute not unconstitutionally vague; evidence sufficient. State v. Dana, 84 Wn. App. 166 (Div. I, 1996) - June '97:13

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) POSSIBLE CONSTITUTIONAL RECOGNITION FOR PUBLIC DISCLOSURE ACT PROVISION FOR REQUESTING PUBLIC UTILITY RECORDS IS DISCUSSED, BUT NOT RESOLVED – In In re Maxfield(s), 133 Wn.2d ___ (1997), a splintered State Supreme Court reverses convictions of two defendants on grounds that either their state constitutional privacy rights (four justices take this view) or their statutory privacy rights (one justice takes this vies)were violated when a PUD employee, acting on his own initiative (though previously generally encouraged in this regard by local law enforcement officials), informed a local drug task force that there was high electrical consumption at the residence of Mark and Pamela Maxfield.

Article 1, section 7 of the Washington constitution provides as follows:

> No person shall be disturbed in his **private affairs**, or his home invaded, without **authority of law.**

Bolding added.

The Washington Supreme Court has held in several search and seizure sub-areas (e.g. garbage can privacy; thermal detection privacy; telephone toll records privacy; and car searches on probable cause and car searches incident to arrest) that the "privacy" language of article 1, section 7 of the Washington state constitution provides greater protection than the search and seizure language of the federal constitution's Fourth Amendment. The Maxfield case triggered discussion by the Court of both A) the "privacy" language of article 1, section 7, and B) its "authority of law" language. The questions remain unresolved after that discussion, however, as no clear majority emerges from the three opinions issued by the justices.

RCW 42.17.314 of the Washington Public Disclosure Act provides as follows:

> A law enforcement authority may not request inspection or copying of records of any person, which belong to a public utility district or a municipally owned electrical utility, unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this rule is inadmissible in any criminal proceeding.

Johnson Opinion: Four justices of the State Supreme Court (Johnson writing, joined by Smith, Alexander and Sanders) authors an opinion which asserts that this statute recognizes a limited "privacy" right in an individual's electrical consumption records. The Johnson opinion then states that the Legislature has provided constitutionally sufficient "authority of law" in the statute for police to access the records, but only if police comply with the statute. The Johnson opinion concludes that the Maxfields' constitutional rights were violated by the PUD employee's action of providing the usage information to the local drug task force, and that all fruits of the follow up task force investigation must be suppressed. The Johnson view is that a PUD employee can provide such information to police only if police have made a request under the statute.

Madsen's Opinion: Justice Madsen writes a lone opinion in which she concurs in the result (suppression) but not the rationale, of the majority. Adopting what appears to be the strongest civil libertarian view on the Court, Madsen argues that a statute generally should not be sufficient to establish state constitutional "authority of law." However, she goes on to say that in this particular case the Court need not address the constitutional issue. She sees this case as involving a simple statutory violation, and she would ground suppression solely in what she sees as a violation of the statute by the PUD employee.

Guy Opinion: Justice Guy writes a dissenting opinion joined by Dolliver, Talmadge and Durham. Guy's opinion disagrees with the result of suppression. He argues: 1) in response to the Madsen opinion, that the statutory limitation does not limit PUD employees, but limits only law enforcement employees; and 2) in response to the Johnson opinion, a) that the constitution does not protect a person's electrical consumption records; and b) that there should be no exclusion of evidence in any event unless law enforcement officials, rather than mere non-commissioned civilian employees of public agencies, as here, violate a law.

Result: Grant of personal restraint petitions of Mark and Pamela Maxfield; UCSA convictions vacated and charges dismissed.

LED EDITOR'S COMMENT: As noted above, because only four justices signed Justice Johnson's opinion, this case does not establish constitutional status for public utility consumption records. However, this case does open some significant questions. If the Johnson view eventually gets another vote and becomes the law of Washington, what other types of records or other investigative information would be subject to state constitutional privacy protection? For one example among many, are private utility electrical consumption records open to unrestricted police access? And for such records information, what kind of statutory mechanism will provide justification for law enforcement to obtain records for information? Only time, and the case-by-case development of state constitutional law, will tell.

(2) DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION IS THE SAME AS UNDER THE FEDERAL CONSTITUTION – IN REM CIVIL FORFEITURE IS NOT PUNISHMENT AND THEREFORE SUCH FORFEITURES DO NOT BAR CRIMINAL PROSECUTION – In State v. Catlett, 133 Wn.2d ___ (1997), the State Supreme Court rules, 5-4, that double jeopardy protection under the Washington constitution is no greater than under the federal constitution. Therefore, consistent with the U.S. v. Ursery, 135 L.Ed.2d 549 (1996) **Aug. '96 LED:11**, the Catlett majority rules the civil in rem forfeiture under RCW 69.50.505 is not punishment for purposes of the double jeopardy protections of the Washington constitution. Accordingly, the State may prosecute a person for the same illegal drug activity that provides the basis for civil forfeiture under RCW 69.50.505.

Result: Reversal of Division Three Court of Appeals ruling affirming Spokane County Superior Court dismissal order; case remanded for criminal prosecution.

(3) IMPLIED CONSENT – OBSESSIVE COMPULSIVE DISORDER NO DEFENSE TO LICENSE REVOCATION FOR REFUSAL TO TAKE BAC TEST BECAUSE DISORDER NOT PHYSICAL – In Medcalf v. Department of Licensing, 133 Wn.2d ___ (1997), agreeing with an earlier Court of Appeals decision in the case (see March '97 **LED** at 19), a 7-member majority of the State Supreme Court rejects a driver's claim that his condition of obsessive compulsive disorder (OCD) provided him with a defense to license revocation of his refusal to take a breath test following his lawful arrest for DUI.

The Supreme Court majority explains that past cases have held that a purely **mental** condition, whether voluntary or nonvoluntary, is not a defense for refusal to take a breath test. Purely mental conditions do not provide a defense because **the arresting officer must have an objective basis by which to ascertain whether the debilitating condition asserted actually exists such that the person is unable to make the decision whether to take the test. In other words, because mental conditions do not have objective manifestations, they do not provide a defense in "refusal" cases.**

Because there was no **physical** evidence in this case that Medcalf was unable to take the breath test, Medcalf's failure to respond to Officer Giuntoli's instructions on the taking the test was properly deemed a refusal to take the test, the majority holds. Medcalf's failure to give a response while he sat at the breath machine constituted a refusal, because: (1) he was given

the opportunity to respond, and (2) OCD, a **mental** condition, was irrelevant to his claimed lack of capacity to refuse the test.

Justice Madsen writes a separate concurring opinion in which she argues with the majority's result but not its reasoning. She argues that mental conditions should be considered in defense of refusal of BAC testing, but she asserts that Medcalf failed to present adequate medical testimony to support his case.

Justice Sanders writes a separate dissenting opinion in which: (1) he agrees with Madsen's view that mental disorders can qualify in defense of BAC refusal, and (2) he argues that Medcalf's case should be sent back to the trial court for the taking of more evidence regarding Medcalf's mental condition.

Result: Affirmance of Court of Appeals decision of which had affirmed Kitsap County Superior Court order, which in turn had affirmed DOL's revocation of Thomas R. Medcalf's driver's license.

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1997 LEGISLATIVE UPDATE ADDENDUM

LED EDITOR'S INTRODUCTORY NOTE: In the June, July, August and November LED's, we provided update information on 1997 Washington legislation. See the Sept. '97 LED at page 6-7 for a legislative update index. This month we address two 1997 legislative enactments passed during the regular session but not previously addressed in the LED. These two enactments address K-12 school safety concerns. The summaries below are largely taken (with minor edits) from the Final Bill Reports prepared by Legislative staff.

SCHOOLS – DISRUPTIVE STUDENTS AND OFFENDERS

CHAPTER 265 (EHB 1581) Effective Date: July 27, 1997

Amends RCW 13.40.160 to, among other things, extend the existing prohibition against a juvenile sex offender attending the same K-12 school as a victim of the offender to protect the victim's siblings as well.

Amends RCW 13.40.215 to expand the existing requirement that DSHS notify appropriate K-12 schools of the release or transfer of certain juvenile offenders to also require notification by DSHS when such offenders are transferred to group homes.

Amends RCW 28A.225.225 to allow a school district to refuse to accept a nonresident student if the student's disciplinary records indicate a history of violent or disruptive behavior or gang membership, or the student has been expelled or suspended from a public school for more than 10 consecutive days. Any readmission policy must apply uniformly to resident and nonresident students.

Amends RCW 28A.600.420 which previously prohibited only bringing actual firearms onto public school premises, public school-provided transportation, or other areas exclusively controlled by public schools. Now a school district also may suspend a student for up to one year if the student acts with malice and displays an instrument that appears to be a firearm on public school property, public school-provided transportation or other facilities when being used exclusively by public schools.

SCHOOL SAFETY IMPROVEMENTS; GANG FOCUS

CHAPTER 266 (ESSHB 1841) Effective Date: July 27, 1997

Disciplinary action for gang-related activity:

Adds a new section to chapter 28A.600 RCW to read as follows:

(1) A student who is enrolled in a public school or an alternative school may be suspended or expelled if the student is a member of a gang and knowingly engages in gang activity on school grounds.
(2) "Gang" means a group which: (a) Consists of three or more persons; (b) has identifiable leadership; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes.

Criminal gang intimidation:

Adds a new section to chapter 9A.46 RCW to read as follows:

A person commits the offense of criminal gang intimidation if the person threatens another person with bodily injury because the other person refuses to join or has attempted to withdraw from a gang, as defined in section 2 of this act [see above], if the person who threatens the victim or the victim attends or is registered in a public or alternative school. Criminal gang intimidation is a class C felony.

Criminal trespass:

Amends RCW 28A.635.020, the criminal trespass law for public school premises, to raise the classification of the crime from a misdemeanor to a gross misdemeanor.

Criminal history notification:

Adds a new section to chapter 13.04 RCW to read as follows:

(1) Whenever a minor enrolled in any common school is convicted in adult criminal court, or adjudicated or entered into a diversion agreement with the juvenile court on any of the following offenses, the court must notify the principal of the student's school of the disposition of the case, after first notifying the parent or legal guardian that such notification will be made:
  (a) A violent offense as defined in RCW 9.94A.030;
  (b) A sex offense as defined in RCW 9.94A.030;
  (c) Inhaling toxic fumes under chapter 9.47A RCW;
  (d) A controlled substances violation under chapter 69.50 RCW;
  (e) A liquor violation under RCW 66.44.270; and
  (f) Any crime under chapters 9A.36, 9A.40, 9A.46, and 9A.48 RCW.
(2) The principal must provide the information received under subsection (1) of this section to every teacher of any student who qualifies under subsection (1) of this section and any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record. The principal must provide the information to teachers and other personnel based on any written records that the principal maintains or receives from a juvenile court administrator or a law enforcement agency regarding the student.
(3) Any information received by a principal or school personnel under this section is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, U.S.C. Sec. 1232g et seq.

Discipline – Protective and procedural measures:

Adds a new section to chapter 28A.600 RCW to improve disciplinary procedures and also to establish the following protective and procedural measures:

…

(2) A student committing an offense under chapter 9A.36, 9A.46, or 9A.48 RCW when the activity is directed toward the teacher, shall not be assigned to that teacher's classroom for the duration of the student's attendance at that school or any other school where the teacher is assigned.

(3) A student who commits an offense under chapter 9A.36, 9A.40, 9A.46 or 9A.48 RCW, when directed toward another student, may be removed form the classroom of the victim for the duration of the student's attendance at that school or any other school where the victim is enrolled. A student who commits an offense under one of the chapters enumerated in this section against a student or another school employee, may be expelled or suspended.

(4) Nothing in this section is intended to limit the authority of a school under existing law and rules to expel or suspend a student for misconduct or criminal behavior.

(5) All school districts must collect data on disciplinary actions taken in each school. The information shall be made available to the public upon request. This collection of data shall not include personally identifiable information including, but not limited to, a student's social security number, name, or address.

Amends RCW 28A.635.060 to provide that if a student is suspended for damaging property belonging to the school, a contractor, a school employee, or another student, the student may not be readmitted until payment in full has been made for the damage, or until directed by the superintendent of schools. If the property damaged is a school bus, the student may not ride on the school bus until full payment is made or the superintendent of schools readmits the student. The school may continue to provide a work program in lieu of payment of money.

Amends RCW 28A.320.140 to provide that dress codes may prohibit wearing gang-related apparel, but the school must notify the students and parents of what clothing and apparel the school considers to be gang related and may not impose disciplinary action against a student without providing the notice.

Amends chapter 28A.320 RCW by adding a new section to allow school boards to adopt policies limiting possession of pagers and portable or cellular phones.

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UPDATE ON PERKINS V. CITY OF WEST COVINA

We digested the decision in Perkins v City Of West Covina, 113 F.3d 1004 (9th Cir. 1997) (holding that a police department was civilly liable under the federal civil rights act for failure to provide adequate notice about how to obtain return of property seized under a search warrant) in the August '97 **LED** at page 14. Since then, we have been promising to provide some suggested language for the notice for return of property, but a lack of time and fear of oversimplifying the matter has kept us from the task. Chris Bacha, legal advisor to City of Tacoma Police Department, and Craig Adams, legal advisor to Pierce County Sheriff's Office are working on forms to be used for this purpose. Your **LED** Editor has decided to wait to plagiarize and/or simply present whatever they develop. We will keep our **LED** readers posted.

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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

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