Law Enforcement Digest

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HONOR ROLL

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WASHINGTON STATE COURT OF APPEALS

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)

Facts: (Excerpted from Court of Appeals opinion)

> Perea drove a car while his license was suspended in the third degree. An officer who knew of the suspension from a records check performed seven days earlier recognized Perea and radioed another officer in a marked unit to stop Perea. The second officer, Officer Wise, caught up with Perea just as Perea pulled into the front yard of his house. Officer Wise activated his emergency lights as he pulled in behind Perea. Wise saw Perea turn and look in the direction of Wise's vehicle and then immediately step out of his vehicle and close the door very quickly. Officer Wise ordered Perea back to his vehicle, but Perea started to walk toward the house, also ignoring Wise's second order to return to his vehicle. By then the first officer had arrived and both officers advised Perea he was under arrest. The police captured, searched, and handcuffed Perea, confiscated his car keys and put him into the patrol car. Subsequently, one officer proceeded to verify by a records check that Perea's license was suspended while the other officer used Perea's car keys to unlock and search the car. A loaded pistol was found under the front seat armrest.

Proceedings:

Perea was charged with unlawful possession of a firearm. He moved prior to trial for suppression of the firearm on alternative grounds that: (1) the stop was unlawful; (2) the custodial arrest was unlawful; and (3) the search of his car incident to the arrest was unlawful. His motion was denied and he was convicted of unlawful possession of a firearm.

ISSUES AND RULINGS: (1) Did the officer's week-old information about the license suspension provide reasonable suspicion justifying the investigatory stop? (ANSWER: Yes); (2) Did the week-old information about the license suspension provide probable cause justifying the custodial arrest (ANSWER: Yes); (3) In light of the fact that Perea got out of and locked his car after observing the police car flashers, but before the officers did anything else to manifest their intent to seize him, and before he had complied with their directives to stop, was the locked car subject to a search incident to arrest under the "bright line" rule of State v. Stroud? (ANSWER: No) Result: reversal of Pierce County Superior Court conviction for unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) REASONABLE SUSPICION FOR STOP

> First, the detention was supported by well-founded suspicion. Lacking probable cause for arrest, police may briefly detain and question an individual if they have a well-founded suspicion based on objective facts that he is connected to actual or potential criminal activity. A reasonable or well-founded suspicion exists if the officer can " 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " At a minimum, the seven-day-old information formed such articulable facts. Officers may temporarily detain a suspect pending the results of a police headquarters radio check.

(2) PROBABLE CAUSE FOR ARREST

Perea contends that, because driving privileges suspended in the third degree can be reinstated within one week, the officers' information was stale; thus, he argues that arresting him without a current records-check was unlawful. "The test for 'staleness' is one of common sense; if the facts indicate information is recent and contemporaneous, then it is not 'stale.' " We hold that the week-old information was recent enough for the officer to form probable cause to arrest Perea at the moment the officer first saw him. Hence, the arrest was valid based upon probable cause. **[LED EDITOR'S COMMENT: We agree completely with the Court's ruling on the reasonable suspicion issue. However, while there may have been probable cause to arrest Perea for obstructing a Terry stop, because he ignored orders to stop walking away, we wonder whether probable cause to arrest for driving suspended was established. We recommend that, before an arrest is made for driving suspended, at least an attempt be made to confirm suspended license status where the information is seven days old.]**

(3) SCOPE OF SEARCH INCIDENT TO ARREST

When a search of a vehicle is conducted after an arrest, its scope should be analyzed according to the "bright-line" test adopted by our Supreme Court in State v. Stroud, 106 Wn.2d 144 (1986) **[Aug. '86 LED:01]**.

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant....

This bright-line rule applies even in situations devoid of risk to evidence or officers. The search of unlocked containers can occur after the driver has been removed to a police car and handcuffed, so long as the search is performed immediately thereafter. Had Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested, Stroud's bright-line rule would have permitted a search of the passenger compartment of the vehicle.

[E]ven though the rationale for the Stroud "bright-line" rule rests in part on traditional justifications that a suspect might easily grab a weapon or destroy evidence, the validity of a Stroud search does not depend on an arrestee being in the vehicle when police arrive or on the physical ability of an arrestee to reach into the vehicle.

In the instant case, an analysis of the facts compels a conclusion that the search was unreasonable. Perea's actions were not restricted by a seizure because he was not seized before he locked his car. California v. Hodari D., 499 U.S (1991) **[July '91 LED:01]** directly addresses the question of when a person has been "seized" for 4th Amendment analysis. The Court held that the seizure does not occur until the suspect submits to a show of authority or is physically touched by the officer. Even though the overhead lights were turned on while Perea was in his car, he was not seized then because he did not submit by remaining in or near his car. Further, we note that he was ordered to return to his car and he also resisted

that command. The seizure occurred only when the officers contacted and handcuffed Perea, so this seizure cannot have limited Perea's right to lock his car.

We have no basis to conclude that Perea acted unlawfully when he got out and locked his car. While Perea was not free to leave the scene, and by going toward his house he could have been charged with obstructing a public servant in the performance of his duties, this act does not diminish the lawfulness of the act of locking his car. Therefore, the officers were confronted with a car that was already lawfully locked at the time of seizure.

We could find no case where officers were permitted to enter a locked car to perform a search incident to arrest. This is not an exigent circumstances case, or a community caretaking case, or a seizure of evidence case. This is not a case where the defendant locked his car after seizure (either directly or by a remote device), or even after disobeying a direction of the police officer to remain inside his vehicle. **[LED EDITOR'S COMMENT: Apparently, the Court of Appeals would distinguish a case where the arrestee had stopped his car at the direction of the officer.]** Rather, this is a warrantless search of a lawfully parked and locked car, without probable cause. As such, it was not authorized by Stroud's bright-line rule, even though the defendant was validly arrested nearby.

The search was unlawful and the trial court erred by denying the motion to suppress.

[Footnotes, some citations omitted]

LED EDITOR'S COMMENT: We plan to provide additional commentary on the "search incident" issue in this case (Perea) and on the random license check issue touched upon in the next case (Harlow) in a future LED this year.

POLICE AGENCY PRACTICE OF KEEPING A REGULARLY UPDATED LIST OF LOCAL SUSPENDED DRIVERS IS A CONSTITUTIONALLY PERMISSIBLE PRACTICE

State v. Harlow, 1997 WL151981 (Div. III, 1997)

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

Omak Police Officer Andrew Ditzel kept a list of city residents who were believed to have suspended drivers' licenses. Officer Ditzel stopped Beverly Harlow when he saw her driving and remembered her name was on the list. She was arrested and booked into jail for driving while her license was suspended. Her motion to dismiss the citation was denied and she appeals, contending the maintenance of a suspended licenses list is an unconstitutional search and an unreasonable invasion of her private affairs. We affirm.

When Officer Ditzel began training as a police officer, his trainer, Officer Mike Marshall, was keeping a list of people who had suspended licenses. These were people Officer Marshall had personally cited for driving with suspended licenses. Officer Marshall gave the list to Officer Ditzel, who maintained the list by checking the names every week and adding new names as he cited drivers himself.

According to Officer Ditzel, he and Officer Marshall knew on sight each of the approximately 55 people on the list.

On February 16, 1995, Officer Ditzel saw Ms. Harlow driving. He had run a check on his list of suspended licenses the day before, and knew she was probably driving without a valid license. Ms. Harlow pulled into her driveway just as Officer Ditzel recognized her. He pulled in behind her and asked her to get back in her car while he ran a driver's check. When dispatch confirmed that she still had a suspended license, he arrested her.

Ms. Harlow was charged in district court with third degree driving while license suspended. RCW 46.20.021. Before trial, she moved to dismiss for lack of reasonable grounds to stop and detain her. The trial court applied Article I, Section 7 of the Washington Constitution and found that there is, at best, only a limited expectation of privacy in a driver's licensing record. The court also found that Officer Ditzel had prior knowledge, recently confirmed, that Ms. Harlow had a suspended license, and that this information was not obtained on a "fishing expedition." Accordingly, the court decided the officer had an articulable suspicion of illegal conduct that justified the stop and check of Ms. Harlow's driving status. The Superior Court of Okanogan County affirmed.

ISSUE AND RULING: Does police maintenance of a suspended license list through weekly checks of drivers' records violate state or federal constitutional restrictions on warrantless searches? (ANSWER: No) Result: affirmance of Okanogan County Superior Court conviction for third degree driving while license suspended.

ANALYSIS:

The Court of Appeals begins its constitutional analysis on the lawfulness of maintaining regularly updated suspended licenses lists by addressing the question of whether the state constitution provides greater protection than the federal constitution in this search and seizure subarea. The Court declares that the state constitution does provide greater protection than the federal, but that the state constitution does not bar the police practice of maintaining an updated list of suspended drivers. The Court analyzes the state constitutional issue in part as follows:

...motor vehicle records are kept by the State primarily for state use. Drivers are presumed to know that the records are available to the police as well as to employers, insurance carriers and others. Similarly, citizens have no reasonable expectation of privacy in warrants records, which are readily accessible by the police. It is not reasonable to believe a police officer will not have access to a driver's license record. Further, in this case the officers did not go on a fishing expedition. Only those people whom they had personally cited for driving with suspended licenses were placed on the lists. The records were not accessed to search for evidence of a crime, but merely to update the lists for accuracy.

We note that several jurisdictions recognize the authority of police to run random computer checks of passing vehicle licenses, without suspicion of criminal conduct. See, e.g., People v. Sampson, 255 Ill.App.3d 825, 827, 627 N.E.2d 772, 774, 194 Ill.Dec. 435 (1994) (computerized report that owner of vehicle has suspended

license is sufficient to justify temporary stop to check driver's license); Village of Lake in the Hills v. Lloyd, 227 Ill.App.3d 351, 591 N.E.2d 524, 169 Ill.Dec. 351 (1992) (random check of vehicle license reveals owner has revoked license; creates reasonable suspicion and stop is not random); State v. Lewis, 288 N.J.Super. 160, 671 A.2d 1126 (1996) (random license plate checks of passing vehicles; no expectation of privacy in vehicle license which is exposed to public view or in owner's driving record); State v. Owens, 75 Ohio App.3d 523, 525, 599 N.E.2d 859 (1991) (random investigatory check of license plate not an invasion of Fourth Amendment rights); and other cases cited in [Seattle v. Yeager, 67 Wn. App. 41 (Div. I, 1992) **Feb. '93 LED:10**]. Officer Ditzel was not running random checks here, however; the only people on his list were those he and Officer Marshall had personally cited and knew had suspended licenses. **[LED EDITOR'S COMMENT: This sentence does not imply that there is any constitutional restriction on conducting totally random checks of license plates; we will have more on this issue in a future LED.]** The records information was obtained pursuant to statutory authority, RCW 46.52.120, and provided articulable reason to stop and investigate Ms. Harlow's driving status.

Although Article I, Section 7 provides broader privacy protection than the Fourth Amendment, the blanket of protection covers only those privacy interests citizens have come to expect and should expect. The Fourth Amendment protects against unreasonable searches that intrude on a citizen's subjective and reasonable expectation of privacy. Driving records kept by the department of motor vehicles, like warrants records, are neither subjectively nor reasonably expected to be unavailable to police officers. We hold that Ms. Harlow's limited privacy interest in her driving record is outweighed by the State's vital interest in promoting highway safety by ensuring that only those qualified to drive do so.

[Footnote, some citations or parts of citations omitted]

SHOWUP ID PROCEDURE NOT IMPERMISSIBLY SUGGESTIVE

State v. Shea, 85 Wn. App. 56 (Div. II, 1997)

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

At about 3 a.m. on April 17, 1995, Jay Dereke Shea and an accomplice, Jonathan Jackson, broke into a truck and removed several pieces of stereo equipment. The victim of the crime, Michael McKay, watched the theft from his bedroom window 15 feet away and called the police on his cellular telephone.

McKay watched the suspects leave the scene and heard the sound of a loud car exhaust system. An officer arrived within minutes and was in the process of obtaining a description from McKay when a car drove by with a loud exhaust system. McKay identified the sound of the car and the officer pulled the car over. Two white males and several pieces of stereo equipment were found inside.

McKay was taken to where the suspects stood handcuffed on the side of the road and identified them. Jackson admitted to police that he and Shea had taken the items from McKay's truck and further told officers that additional items were in

Shea's car. McKay identified two stolen compact disc containers while standing outside the car.

At a CrR 3.6 hearing, Shea moved to suppress the "showup" identification, and in the alternative, to dismiss the charges. The trial court found that the "showup" identification, although suggestive, was proper under all the circumstances, including the time of day and denied the motion.

Shea was convicted by jury of theft in the second degree ...

ISSUE AND RULING: Did defendant meet his burden of proving that the "showup" identification procedure in this case was impermissibly suggestive? (ANSWER: No) Result: Pierce County Superior Court conviction of theft in the second degree affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Washington law on suggestive identification procedures evolved primarily from three U.S. Supreme Court cases...The defendant must show (1) that the procedure was unnecessarily suggestive; and, if so, (2) whether considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification. In the second step, the trial court considers the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.
>
> Under this analysis, Shea fails to demonstrate that, under the totality of the circumstances, there was a substantial likelihood of misidentification denying him due process. The presence of a suspect in handcuffs surrounded by police is not enough by itself to demonstrate that the procedure was flawed. **LED EDITOR'S NOTE: The Court of Appeals does not supply any other details as to how the showup ID procedure was conducted.]**
>
> Shea further fails to meet his burden under the five factors. First, McKay had ample opportunity to observe the suspects during the crime and devoted his full attention to watching them break into the truck. The record indicates that McKay saw the suspects break the rear window to enter the truck. In addition, he watched the suspects for about five minutes while they removed the stereo equipment from his truck. Although the area was not well lighted, there was at least a porch light to the side of the residence, and the truck's dome light was on. Moreover, the truck was parked only 15 feet from McKay's window.
>
> There is some dispute as to the description initially given by McKay to the police. The officer who initially spoke with McKay at his residence stated that the description was as follows:
>
> > They were two younger white males. He said late teens, early 20s. He said one or two--one of the two were [sic] wearing a hat, one was shorter, approximately 5'6", another he advised was approximately 5'8" or so, maybe 5' 9".

> All of this information did not, however, get passed to the officer who conducted the "showup," or included in the police report. In addition, one of the suspects lived within close proximity to McKay and was known by sight, but was not identified by name in the description.
>
> As to the last two factors, McKay immediately identified the suspects. In addition, he told the police at the time that he was "absolutely positive" that the two were the ones who broke into his truck. Finally, the "showup" occurred within 15 minutes of his original call to the police. The trial court properly denied Shea's motion in the alternative.

[Citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) BLOOD ALCOHOL EVIDENCE TAKEN BY MEDICAL PERSONNEL AFTER MOTOR VEHICLE ACCIDENT NOT SUBJECT TO PHYSICIAN-PATIENT PRIVILEGE -- In State v. Smith, 84 Wn. App. 813 (Div. I, 1997), the Court of Appeals rules that, where medical personnel took blood for treatment purposes from a driver involved in a motor vehicle accident, the physician-patient privilege did not bar the State from obtaining the blood and testing it for alcohol content.

Wilbur Lamar Smith told police following a single-car MVA that he had not been the driver of the vehicle. A passenger, Michael Frier, was paralyzed in the accident. Smith was taken to a hospital for treatment, and blood was taken there purely for treatment purposes. The blood sample still exists but has never been tested for alcohol content. Shortly after the night of the MVA, police and the prosecutor became convinced that Smith had lied to them earlier, and that he had in fact been the driver of the vehicle in the MVA.

Smith was charged with vehicular assault. Prior to the trial, the State sought to obtain the hospital blood sample for testing, but the trial court ruled that, even though blood could have been forcibly taken from Smith had he been arrested on probable cause the night of the serious injury accident (see the implied consent statute, RCW 46.20.308), the sample taken by medical personnel was not subject to the implied consent statute and was protected by the physician-patient privilege. After a hung jury resulted in a mistrial, the State obtained discretionary review in the Court of Appeals.

Now, the Court of Appeals has ruled that, while the blood sample was not subject to the implied consent statute (because not taken following an arrest), it was subject to seizure and testing by the State. Rather than establishing a “bright line” rule for the physician-patient privilege in this context, the Court of Appeals applies a balancing test. Here, the Court explains its balancing:

> The privilege’s purpose of encouraging full disclosure for proper medical treatment will not be promoted here because, in cases such as this, although a patient might resist treatment if he knew his blood alcohol content would be disclosed, the patient ordinarily would be under arrest and would have no right to refuse to have his blood tested or to keep the result confidential.

> Nor will maintaining confidentiality protect Smith from scandal or embarrassment. Any scandal or embarrassment related to his sobriety has likely already occurred from the fact of the charge against him. Furthermore, a blood test does not constitute an undue imposition on an individual's personal privacy. The benefits of applying the privilege to the blood sample, therefore, are minimal.
>
> In contrast, the public's interest in the full revelation of the facts in this case is high. The implied consent statute evinces the intent of the Legislature to "insure swift and certain punishment for those who drink and drive[,]" and the police had probable cause to believe that Smith had been drinking and driving. The public, therefore, has a strong interest in determining whether Smith was intoxicated. Moreover, given that Smith deliberately added to the confusion about who was driving, it would be unconscionable to allow him to benefit from his deception. Had he been forthright at the time of the accident, the State would have administered its own blood test.
>
> The public's interest outweighs the benefits of the privilege. We hold the privilege does not apply to the blood sample taken by the hospital, nor to any report of its alcohol content. The State should have been permitted to test the sample for the presence of intoxicants, and the results of those tests should have been admitted.

[Footnotes and citations omitted]

The Court of Appeals goes on to address the issue of whether Smith had waived the physician-patient privilege as to other medical information when he testified at his first trial regarding whether he was intoxicated at the time of the MVA. The Court rules that this testimony did waive the privilege, and that the privilege cannot be regained on re-trial.

Result: King County Superior Court order suppressing blood sample and medical records reversed; case remanded for further proceedings and re-trial.

(2) LEOFF II OFFICERS, LIKE LEOFF I OFFICERS, STILL MAY SUE THEIR EMPLOYERS -- In Fray v. Spokane County, 85 Wn. App. 150 (Div. III, 1997), the Court of Appeals for Division Three invalidates 1992 amendments to the Law Enforcement Officers' and Fire Fighters' Retirement Act (LEOFF), which amendments would have established employer immunity from negligence suits by LEOFF II officers (post 09/30/77 hires).

Ordinarily, injured workers may not sue their employers for mere negligence, only for intentional acts. That is because the Industrial Insurance Act governing most worker benefits claims provides immunity to employers from such negligence lawsuits.

However, the Court of Appeals asserts, up until 1992, the LEOFF statute in chapter 41.26 RCW had allowed both LEOFF I and LEOFF II officers to sue their employers for negligence. In 1992, in an attempt to eliminate the right of LEOFF II officers to bring such negligence lawsuits, the Legislature made a technical amendment in chapter 41.26 RCW.

A Spokane County deputy sheriff subsequently brought suit against the county, his employer, for negligence. The county claimed immunity from suit under the 1992 amendments to the LEOFF Act and under the general immunity provisions of the Industrial Insurance Act.

The trial court granted summary judgment to the county, but the Court of Appeals has reversed. The Court of Appeals rules that: (1) the 1992 amendments to the LEOFF Act were technically defective and of no effect; and (2) the general immunity provisions of the Industrial Insurance Act do not apply to LEOFF claims, whether such claims relate to LEOFF I or LEOFF II officers.

Result: reversal of Spokane County Superior Court summary judgment order for employer Spokane County; case remanded for trial.

(3) FIREARMS POSSESSION BAR FOR PRIOR CONVICTIONS UNDER RCW 9.41.040 DOES NOT HAVE "KNOWLEDGE OF UNLAWFULNESS" ELEMENT -- In State v. Reed, 84 Wn. App. 379 (Div. II, 1997), the Court of Appeals rejects Jimmy Reed's argument that RCW 9.41.040's bar on firearms possession for prior convictions should be read to include an implied element of knowledge of the unlawfulness of the possession of the firearm.

Reed had been convicted of a felony drug charge in 1984. At the time, his conviction barred him from possessing a handgun, but not a rifle or shotgun. In 1994, the Legislature broadened the bar of RCW 9.41.040 on firearms possession to include all firearms. The next year, 1995, Reed was arrested for felony harassment and subsequently charged with that offense, as well as violation of RCW 9.41.040 for possession of a .22 caliber rifle. On Reed's argument for an implied element of knowledge of unlawfulness of possession, the Court of Appeals finds no support in the legislation for this argument. The Reed Court also points out that "ignorance of the law is no excuse."

Result: affirmance of Cowlitz County Superior Court conviction of unlawful possession of a firearm by a felon.

(4) "SPEEDY TRIAL" RULE OF CR R 3.3(g)(6) FOR PERSONS INCARCERATED OUT OF STATE -- STATE FAILED TO EXERCISE DUE DILIGENCE TO BRING DEFENDANT TO TRIAL -- In State v. Simon, 84 Wn. App. 460 (Div. I, 1996), the Court of Appeals rules that the State of Washington failed to meet the "good faith and due diligence" requirements of the special "speedy trial" rule for charged persons incarcerated in other states' prisons.

On January 6, 1994, William Terrell Simon was charged with first degree robbery in Whatcom County Superior Court. At the time he was known to be in jail in an Oregon county, and also known to be facing charges in Oregon, as well as very serious charges in California. The Whatcom County prosecutor decided to wait until the California case had been tried before taking action to bring Simon to trial in Washington. Simon was convicted on the pending Oregon charge in the Oregon courts in March 1994, and sentenced to 30 months in prison there. The California case was dismissed in December of 1994, but the Whatcom County prosecutor did not learn of that fact until December of 1995.

Under these basic facts, the Court of Appeals rules: (1) that the State of Washington properly deferred initially to the Oregon and California prosecutors; but (2) that once the Oregon prosecution was completed and California prosecution was dismissed, the State of Washington was required to exercise due diligence under the speedy trial rule of CrR 3.3 and the Interstate Act on Detainers (chapter 9.100 RCW). The State of Washington's obligation to exercise due

diligence included a continuing requirement to timely inquire with the Oregon and California authorities as to Simon's availability to stand trial in Washington, the Court holds.

The Court of Appeals says that a one-month delay in making the inquiry might be acceptable under the rule. The Court declines to specify the exact period of delay which would be acceptable. However, the Court declares that "the failure to make any inquiries for nearly a year is not [due diligence]."

Result: Whatcom County Superior Court ruling on speedy trial rule reversed; first degree robbery charges reversed.

RELATED CASE NOTE: The Simon case focuses on a prior case interpreting CrR 3.3 in relation to persons incarcerated out of state -- State v. Anderson, 121 Wn.2d 852 (1993) Jan. '94 LED:07.

(5) "LURING" STATUTE NOT UNCONSTITUTIONALLY VAGUE; EVIDENCE SUFFICIENT -- In State v. Dana, 84 Wn. App. 166 (Div. I, 1996), the Court of Appeals upholds against a constitutional challenge the "luring" statute. Defendant had asked the Court of Appeals to strike down as vague or overbroad the prohibition under RCW 9A.40.090 against "luring" or "attempting to lure" a person under age 16 or a developmentally disabled person "into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle..."

The facts and trial court proceedings in Dana are described by the Court of Appeals as follows:

> In October 1993, Dana stopped his car in Edmonds near a McDonald's restaurant and spoke to two girls, A.K. and C.F. They were 12 and 11 years old, respectively. Dana and the girls had never met before.
>
> He first mumbled something that they could not understand. The girls testified at trial that he then asked them if they would like to get into his car. The girls saw that he was wearing a leather jacket, a gold chain around his neck, and no shirt. C.F. testified that she saw that Dana was also wearing only a red jockstrap pulled over to one side, partially exposing his genitals. At trial, she confirmed that a pair of red bikini underpants that police obtained during a search of Dana's residence closely resembled what Dana was wearing during their encounter. A.K. was unable to see what Dana was wearing below his waist.
>
> When Dana asked them to get into his car, C.F. was so shocked that she dropped the french fries she had bought at the nearby McDonald's. Both girls then moved away from the car and returned to C.F.'s home to notify their parents about the incident.
>
> Dana testified at trial that he had spoken to the girls to ask directions to the nearby Farmers Insurance Agency. He denied that he had asked them to get into his car or that he had exposed his genitals to them.
>
> The State charged Dana with two counts of luring a child in violation of RCW 9A.40.090. Dana waived his right to a jury trial. The trial court convicted him on both counts.

RCW 9A.40.090 establishes the crime of luring, as well as an affirmative defense, currently reading as follows in relation to luring minors:

> A person commits the crime of luring if the person:
>
> (1)(a) Orders, lures, or attempts to lure a minor... into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle:
> (b) Does not have to consent of the minor's parent or guardian ... ; and
> (c) Is unknown to the child ...
> (2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the
> defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor ...
> (3) For purposes of this section:
> (a) "Minor" means a person under the age of sixteen;...
> (4) Luring is a class C felony.

Defendant Dana appealed his luring convictions: (1) on constitutional grounds and (2) sufficiency-of-the-evidence grounds. The Court of Appeals thoroughly analyzes and then rejects Dana's constitutional arguments of (A) void-for-vagueness, (B) overbreadth, and (C) lack of "police power" for the Legislature to enact the luring proscription.

Then, turning to Dana's sufficiency-of-the-evidence argument, the Court of Appeals explains why this argument fails as well:

> In appeals based on the sufficiency of the evidence, this court's inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.'"* A reviewing court "need not *itself* be convinced beyond a reasonable doubt." For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence and all inferences that can be reasonably drawn from it.
>
> Here, the trial court concluded that the combination of the invitation and the defendant's exposure of his genitals constituted luring for the purposes of the statute. The statute includes the act of attempting to lure. Thus, even though the girls were upset, rather than enticed, by Dana's exposure of his genitals when he invited them to get into the car, his conduct nevertheless fell within the prohibitions of the statute. We believe that a rational trier of fact could have found beyond a reasonable doubt that Dana attempted to lure A.K. and C.F. into his automobile.

[Footnotes, citations omitted]

Result: affirmance of Snohomish County Superior Court convictions (two counts) for luring.

(6) CONSENT THEORY COULD NOT BE ARGUED IN ASSAULT CASE WHERE PUNCH THROWN DURING PICK-UP BASKETBALL GAME -- In State v. Shelly, 85 Wn. App. 24 (Div. I, 1997), the Court of Appeals rejects an assault defendant's argument that he should have been allowed to argue a "consent" theory to the jury. Jason Shelley was a University of Washington football player who was playing a pick-up basketball game on a UW intramural basketball court. Shelley punched a fellow player (breaking his jaw in three places) under circumstances which Shelley later described at trial as self defense, but which the recipient of the punch described as an unprovoked assault.

At Shelley's trial the judge gave the jury a self-defense instruction, but the judge refused Shelley's request for an instruction on a consent defense to assault. Shelley's argument on appeal was that, by playing basketball and engaging in rough play during the game, the recipient of the punch consented to the assault. The prosecutor argued that consent can never be a defense to assault during a game, unless the assault is "within the rules of the game."

The Court of Appeals rejects the positions of both parties, ruling that consent can be a defense to an assault committed outside the rules of a game, but that such a defense could not be asserted in this case because the punch was not a "reasonably foreseeable hazard" of playing pick-up basketball. The Court explains:

> Rollin M. Perkins on Criminal Law explains:
>
> The test is not necessarily whether the blow exceeds the conduct allowed by the rules of the game. Certain excesses and inconveniences are to be expected beyond the formal rules of the game. It may be ordinary and expected conduct for minor assaults to occur. However, intentional excesses beyond those reasonably contemplated in the sport are not justified.
>
> Instead, we adopt the approach of the Model Penal Code which provides that:
>
> > (2) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
> > ....
> >
> > (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.
>
> The State argues the law does not allow "the victim to 'consent' to a broken jaw simply by participating in an unrefereed, informal basketball game." This argument presupposes that the harm suffered dictates whether the defense is available or not. This is not the correct inquiry.
>
> The correct inquiry is whether the conduct of defendant constituted foreseeable behavior in the play of the game. Additionally, the injury must have occurred as a by-product of the game itself. In construing a similar statutory defense, the Iowa court required a "nexus between defendant's acts and playing the game of basketball." In State v. Floyd [Iowa case decision], a fight broke out during a basketball game and the defendant, who was on the sidelines, punched and

severely injured several opposing team members. Because neither defendant nor his victims were voluntarily participating in the game, the defense did not apply because the statute "contemplated a person who commits acts during the course of play, and the exception seeks to protect those whose acts otherwise subject to prosecution are committed in furtherance of the object of the sport." As the court noted in Floyd, there is a "continuum, or sliding scale, grounded in the circumstances under which voluntary participants engage in sport ... which governs the type of incidents in which an individual volunteers (i.e., consents) to participate[.]"

The New York courts provide another example. In a football game, while tackling the defendant, the victim hit the defendant. After the play was over and all of the players got off the defendant, the defendant punched the victim in the eye. The court in People v. Freer [New York case decision] held that this act was not consented to:

> Initially it may be assumed that the very first punch thrown by the complainant in the course of the tackle was consented to by defendant. The act of tackling an opponent in the course of a football game may often involve "contact" that could easily be interpreted to be a "punch". Defendant's response after the pileup to complainant's initial act of "aggression" cannot be mistaken. Clearly, defendant intended to punch complainant. This was not a consented to act.

As a corollary to the consent defense, the State may argue that the defendant's conduct exceeded behavior foreseeable in the game. Although in "all sports players consent to many risks, hazards and blows," there is "a limit to the magnitude and dangerousness of a blow to which another is deemed to consent." This limit, like the foreseeability of the risks, is determined by presenting evidence to the jury about the nature of the game, the participants' expectations, the location where the game has been played, as well as the rules of the game.

Here, taking Shelley's version of the events as true, the magnitude and dangerousness of Shelley's actions were beyond the limit. There is no question that Shelley lashed out at Gonzalez with sufficient force to land a substantial blow to the jaw, and there is no question but that Shelley intended to hit Gonzalez. There is nothing in the game of basketball, or even rugby or hockey, that would permit consent as a defense to such conduct. Shelley admitted to an assault and was not precluded from arguing that the assault justified self-defense; but justification and consent are not the same inquiry.

[Footnotes, citations omitted]

Result: King County Superior Court conviction of second degree assault affirmed.

(7) ON CONSTRUCTIVE POSSESSION ISSUE, JURY MUST BE INSTRUCTED THAT PRESUMPTION REGARDING POSSESSION OF DRUGS REBUTTABLE -- In State v. Cantabrana, 83 Wn. App. 204 (Div. I, 1996), the Court of Appeals rules that a trial court judge improperly instructed the jury on the issue of constructive possession of drugs which had been found in defendant's residence.

In significant part, the trial court's instructions, after explaining the concept of constructive possession, told the jury that:

> "the State must prove beyond a reasonable doubt that the defendant exercised *dominion and control over the premises where drugs were found.*"

The Court of Appeals explains why this instruction was defective:

> It is important to distinguish cases involving claims of improper jury instructions from cases involving claims of insufficient evidence. This the Ponce court failed to do. When the sufficiency of the evidence is challenged on the basis that the State has only shown dominion and control over premises, and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs. The problem with [the trial court's instructions] in this case is that they failed to inform the jury that the inference is, in fact, rebuttable. Indeed, [the trial court's instructions] compelled the jury to find dominion and control over the drugs if it found dominion and control over the premises. It is not a crime to have dominion and control over premises where drugs are found. Instead, dominion and control over premises in which police discover drugs is but one factor in determining whether the defendant had dominion and control, *i.e.*, constructive possession, over the drugs themselves.

[Some citations omitted]

Result: reversal of King County Superior Court conviction for possession of heroin and cocaine with intent to deliver; case remanded for re-trial.

(8) TAKING DUI ARRESTEE TO HIS HOME AND FORCIBLY ENTERING HIS RESIDENCE WAS A PRIVACY VIOLATION, NOT PART OF A COMMUNITY CARETAKING FUNCTION -- In State v. Dykstra, 84 Wn. App. 186 (Div. II, 1996), the Court of Appeals rejects the State's argument that police officers were performing a community caretaking function when they forcibly entered Michael K. Dykstra's home after transporting him home following a DUI arrest.

The Court of Appeals describes a situation where, following Dykstra's 2 a.m. DUI arrest and BAC testing (he blew a .20), two police officers transported him to his home. The transport was made over his protest. He had told the officers that he preferred to have a friend come to the station to get him. When the officers arrived at Dykstra's home, they insisted on going inside the home with him, over his insistence that they leave, and over his protest that he would sleep on his porch rather than let him enter his home. The Court of Appeals opinion asserts that the officers were persistent that they needed to go inside with Dykstra, and at some point one of the officers told Dykstra, "I know that you have marijuana in your house and I am not leaving until you go in your house."

Finally, after considerable discussion and stalling by Dykstra, he agreed to go in his home through the back door. The back door was located in an area ordinarily accessible to the public. What happened next is described by the Court of Appeals as follows:

> When the officers continued to insist that they would not leave until he went inside, Dykstra finally agreed to go in. [The officers] accompanied him onto the three to

> four feet wide back porch. Dykstra attempted to keep the door as closed as possible so they could not see inside when he entered; nevertheless, from their vantage point on the porch, both [the officers] testified that they observed what appeared to be a bag of marijuana across the room on the kitchen counter.
>
> Dykstra claims that [the officer in charge] then jerked the door open and entered without permission. [The officer in charge] disputed this, saying that Dykstra left the door wide open and invited them in. When asked if there was any more marijuana in the house, Dykstra walked into a bedroom, removed eight marijuana plants drying on a rope suspended from the ceiling and turned them over to the officers. Some time later, [the officer in charge] produced a "permission to search" form, which Dykstra signed at 3:51 a.m. Dykstra claims that he signed it out of fatigue, anger and frustration, unaware of its contents.
>
> During their search of the residence, officers found additional marijuana and paraphernalia. About 45 minutes after entering the premises, they arrested Dykstra for possession of marijuana in excess of 40 grams and transported him back to the police station, where they informed him of his Miranda rights.

[Officers' names deleted]

Dykstra was charged with possession of marijuana, but the trial court suppressed the evidence on grounds that the warrantless entry of his home was unjustified. Now the Court of Appeals has affirmed the trial court suppression ruling on state and federal constitutional privacy grounds. In response to the State's argument that the police officers here were simply exercising their well-established authority to approach a residence through open access routes to the residence and to enter an unenclosed porch to go to the door, the Court of Appeals asserts:

> Relying on State v. Seagull, 95 Wn.2d 898 (1981) [**Nov. '81 LED:02**], the State contends that a person does not have a legitimate expectation of privacy in impliedly open accessways to a residence. It argues that [the officers] had a right, "as any citizen would, to walk up to the porch, whether that was on the night in question, the day before, or the day after." To say that the public has an implied right, despite the homeowner's protests, to climb onto a back porch at 3 a.m., yank the door out of the home-owner's hand, and enter the dwelling, exceeds the bounds of reasonableness. We agree with the trial court that [the officers] exceeded their caretaking functions and invaded Dykstra's privacy when they insisted upon exiting their vehicles and accompanying Dykstra inside his residence.

[Officers' names deleted]

Result: affirmance of Grays Harbor County Superior Court suppression order and dismissal of charges.

LED EDITOR'S COMMENT: For purposes of legal analysis, one must assume in this case, as in any given case, that the facts described by the Court of Appeals are true, regardless of what actually may have happened at Dykstra's residence on October 23, 1993. With that assumption, we agree that the Court of Appeals made the right constitutional ruling, though its legal analysis fails to break down the facts to explain what part of the officers' conduct was permissible and what part violated Dykstra's constitutional rights. The Court

of Appeals in effect has ruled that this case fails the gut reaction test, and we agree. We write this comment because we fear that defendants in future cases will argue that the Dykstra decision supports their view that telling an officer to "get off the property" immediately transforms the officer's previously lawful presence on the property into unlawful presence. That is not the law.

The problem in Dykstra was the totality of unusual police actions for which the State lacked a very good explanation. The police may have been reasonable in driving Dykstra home over his protest, but their alleged express motive for doing so (to discover his marijuana), which would be irrelevant under most search and seizure inquiries, is relevant in reviewing the State's claim that entry was justified under the "community caretaking rationale."

Also, once the police arrived at Dykstra's house, their authority was limited. While officers may approach a residence using accessways impliedly open to the public, and while they need not immediately withdraw from such an otherwise open area when an occupant of the premises objects to their presence, they must act reasonably and withdraw from the private property after having completed their lawful actions (e.g., talking to a suspect or witness, making a Terry stop or an arrest). Here, it appears that the officers stayed on the premises long after they no longer had any reasonable basis for being there.

Where lines are to be drawn on this particular question is what we are most concerned about. To sum up our comments, based on our research of search and seizure law, we think Dykstra will be read narrowly as a rejection of a "community caretaking" theory, and that it will be restricted to its very peculiar facts. We do not believe that Dykstra undermines either of the following propositions: (1) police may routinely walk up to someone's door through accessways impliedly open to the public, and (2) police need not withdraw immediately every time a person protests their presence. Some criminal defense attorneys no doubt will try to distort Dykstra with a contrary interpretation.

Finally, if officers see marijuana inside a private area while positioned outside the protected area ("open view"), they need consent, exigent circumstances, or a search warrant to justify entry to seize the evidence. Here, while noting that there was testimony to the contrary from the officer, the Court of Appeals asserts that, upon seeing marijuana inside Dykstra's residence from his position on the porch, one of the officers forced entry without consent. Apparently, there were no exigent circumstances when the warrantless entry was made, and the entry would be unlawful for that reason alone.

(9) 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" -- In State v. Majors, 82 Wn. App. 843 (Div. I, 1996), the Court of Appeals rejects defendant's arguments: (1) that the evidence against him did not support his conviction for attempted first degree kidnapping; and (2) that certain hearsay statements to the police by the victim should not have been admitted as "excited utterances" in the trial.

(1) Sufficiency of the evidence of substantial step toward threat to use deadly force

The facts relating to the sufficiency-of-the-evidence issue are as follows: Defendant had slowed his car alongside the 15-year-old female victim, a stranger to him, who was walking alongside the

road. Defendant (who had previously confided to a girlfriend, now ex-girlfriend, his plan to kidnap and sexually assault a young woman) pointed a BB gun at the victim and said: "[t]his is a real ...gun. Get in the car now or I'll blow your head off." (At trial the victim testified that she thought at the time that the gun might be a BB gun because it resembled one owned by her brother and because the bore looked too small to shoot bullets.) Before defendant could do anything further, another car approached from behind defendant's car, and defendant drove away.

In its analysis of the sufficiency-of-the-evidence issue, the Court of Appeals implies that, if defendant had successfully completed a kidnapping, he could not have been convicted of the completed crime of first degree kidnapping because the weapon he was using to make his threats was not actually a deadly weapon. However, he could be convicted of **attempted** first degree kidnapping, the Court holds, because his actions constituted a "substantial step" toward using a deadly weapon to achieve abduction through threats.

(2) "Excited utterance"

The facts relating to the excited utterance issue were as follows: Immediately after the defendant drove away, the victim told her story to the couple in the car who had inadvertently foiled the attack. The couple then took the victim to the nearby home of her aunt, and the victim told her aunt about the incident. Then the victim called 911 from her aunt's home and reported the incident.

Next, approximately twenty minutes after the incident had occurred, an officer arrived at the aunt's home and took a report from the victim. The officer who took the report later testified that the victim was "nervous, shaking a little bit, and her speech was rapid." The Court of Appeals holds that it was not an abuse of discretion in this non-jury trial for the trial court judge to rule that, under these facts, the statement given to the officer qualified as an excited utterance. In significant part, the Court's analysis is as follows:

> Over defense objection, the trial court permitted police officer Miller to repeat statements made to him by C.H. under the "excited utterance" exception to the hearsay rule. This exception allows the use of statements made while under the stress of events surrounding the crime. C.H. described the circumstances of the crime, including Majors' automobile license number, to Miller approximately twenty minutes after the incident but after first speaking to the Anderson's, her aunt, and the 911 operator. When she spoke to Miller, C.H. was "[n]ervous, shaking a little bit, [and] her speech was rapid."
>
> To qualify for admissibility as an excited utterance, it is not enough that the declarant spoke with the witness while under the influence of the startling event. The trial court must also focus on whether there has been any chance of "fabrication, intervening influences, or the exercise of choice or judgment." Here, the court's ruling was supported by evidence of C.H.'s "visibly shaken" demeanor, her youth and the relatively small amount of time between the incident and the declaration. On the other hand, the value of the hearsay testimony was reduced by the opportunity for intervening influences. In those twenty minutes, C.H. spoke with the Anderson's, rode with them to look for her brother, then drove to her aunt's house, where she spoke with the aunt and the 911 operator.

> We review the trial court's decision to admit the evidence under an abuse of discretion standard. We do not find an abuse of discretion here, particularly because this was a bench trial in which the court is presumed to give evidence its proper weight. Furthermore, the statement was cumulative of other testimony, including C.H.'s own, and the Anderson's', who witnessed C.H. speaking to Majors, saw her frightened and shocked demeanor, and recorded Majors' license plate number.

Result: affirmance of Snohomish County Superior Court conviction for attempted first degree kidnapping.

(10) LAW RE "COMPROMISE OF MISDEMEANORS" COVERS GROSS MISDEMEANORS -- In State v. Britton, 84 Wn. App. 146 (Div. I, 1996), Division One of the Court of Appeals rejects the State's argument that the statute allowing "compromise of misdemeanors" does not apply to gross misdemeanors.

Curtis Britton, a first-time offender, was charged with third degree theft for stealing a pack of cigarettes from a grocery store. Britton paid $150 to the grocery store, and the store then requested of the trial court that the court dismiss the charge under chapter 10.22 RCW, the statute on compromise of misdemeanors. The trial court dismissed the charge over the State's objection, and the State appealed.

The Court of Appeals rejects the State's argument that the following statutory language in RCW 10.22.010 does not cover both gross misdemeanors and simple misdemeanors:

> When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in RCW 10.22.020, except when it was committed:
>
> (1) By or upon an officer while in the execution of the duties of his office;
>
> (2) Riotously;
>
> (3) With an intent to commit a felony; or
>
> (4) By one family or household member against another as defined in RCW 10.99.020(1) and was a crime of domestic violence as defined in RCW 10.99.020(2).

RCW 10.22.020 provides the procedure by which compromise of a misdemeanor is effected. The prosecutor does not have veto power over this process. It is a matter of judicial disretion based on a written request by the victim. Prosecution is barred on any misdemeanor which has been compromised. After reviewing the history and purpose of the misdemeanor compromise statute, the Court of Appeals concludes that even though RCW 10.22.010 (set forth above) does not expressly mention gross misdemeanors, the Legislature intended that they be included in the compromise scheme.

Result: affirmance of Snohomish County Superior Court decision affirming District Court dismissal order.

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LEGISLATIVE UPDATE NEXT MONTH

Next month's LED will be devoted almost entirely to an update of legislation enacted during the 1997 Washington State legislative session. The effective date for most of the legislation (i.e., enactments without special "effective date" provisions) is July 27, 1997.

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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.