# Law Enforcement Digest

March 1997


## HONOR ROLL

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**456th Session, Basic Law Enforcement Academy - October 31 1996- January 30, 1997**

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|---|---|
| President: | Andrew M. McCurdy - Port of Seattle PD |
| Best Overall: | Andrew M. McCurdy - Port of Seattle PD |
| Best Academic: | Andrew M. McCurdy - Port of Seattle PD |
| Best Firearms: | Franck T. Trainor - Seattle PD |
| Tac Officer: | Michelle Bennett |
| Asst. Tac Officer: | J.R. Hall |

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**Corrections Officer Academy - Class 243 - January 3- January 31, 1997**

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|---|---|
| Highest Overall: | Scott Richard Baker - Chelan County Regional Jail |
| Highest Academic: | Neil J. Rogers - King County Department of Adult Detention |
| Highest Practical Test: | Michelle L. Polinsky - King County Department of Adult Detention |
| Highest in Mock Scenes: | Sandra Lee English - Redmond Police Department |
| | Scott Richard Baker - Chelan County Regional Jail |
| Highest Defensive Tactics: | Scott Richard Baker - Chelan County Regional Jail |

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

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|---|---|
| Highest Overall: | David J. Griffith - Airway Heights Correctional Center |
| Highest Academic: | Scott J. Anderson - Airway Heights Correctional Center |
| Highest Practical Test: | Bryan H. Kelly - Airway Heights Correctional Center |
| Highest in Mock Scenes: | Jolayne A. Christner - Airway Heights Correctional Center |
| | Darla L. Kitchens - Airway Heights Correctional Center |
| | David J. Griffith - Airway Heights Correctional Center |
| Highest Defensive Tactics: | John M. Gillotte - Airway Heights Correctional Center |

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## WASHINGTON STATE SUPREME COURT

**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)

Facts:

The defendant and the prosecution stipulated at trial to the following facts to resolve the question of defendant's guilt or innocence:

> (1) On October 21, 1993, defendant Gregory Crediford operated a motor vehicle in Whatcom County, Washington.
>
> (2) WSP Trooper Kenneth VanKooten had probable cause to arrest Crediford for driving while under the influence of alcohol.
>
> (3) At 5:15 a.m., within two hours of the defendant's operation of a motor vehicle, the defendant had .16 percent by weight of alcohol in his blood as accurately analyzed in compliance with the laws of the State of Washington.

Proceedings:

Based solely on the above stipulated facts, the Whatcom County District Court found Crediford guilty of DUI. After the Superior Court had affirmed the conviction, Crediford sought further review in the Court of Appeals, but the Court of Appeals ultimately transferred the appeal to the State Supreme Court for decision.

Throughout all stages of the case, Crediford based his defense on a purely legal attack on certain provisions of RCW 46.61.502, which currently provides in pertinent part (note: the statute has been amended since the time of Crediford's arrest, but the changes do not affect the analysis in this case, so we set out the current language to avoid confusion):

> (1) A person is guilty of driving while under the influence of intoxicating liquor...if the person drives a vehicle within this state:
>
> (a) And the person has, **within two hours after driving**, an alcohol concentration of 0.10 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506;...
>
> ...
>
> (3) It is an **affirmative defense** to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence **that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood**

> **to cause the defendant's alcohol concentration to be 0.10 or more within two hours after driving**. ...

[ Bolding added by LED Editor; the bolded language in subsection (1)(a) will be referred to in this LED entry as the "**two-hour rule**", and the bolded language in subsection (3) will be referred to as the **"affirmative defense"** to the two-hour rule.]

ISSUES AND RULINGS: (1) Does the DUI statute's two-hour rule exceed the state Legislature's police power? (ANSWER: No, rules a 6-3 majority); (2) Does the DUI statute's two-hour rule create an unconstitutional conclusive presumption? (ANSWER: No, rules an apparent 6-3 majority); (3) Does the affirmative defense provision of the DUI statute's two-hour rule violate due process requirements by impermissibly shifting away from the prosecution the burden of proof on an element of the DUI charge, i.e. that there was no post-driving alcohol consumption affecting the excessive BAC reading? (ANSWER: Yes, agree seven justices, with the other two declaring that the Court should not have addressed this issue). Result: reversal of Whatcom County Superior Court decision which had affirmed a District Court DUI conviction.

STATUS: Prosecution's motion for reconsideration pending in the State Supreme Court.

ANALYSIS:

Overview: The nine justices of the Supreme Court split their vote, with four justices signing one opinion (ALEXANDER OPINION), three signing another (SANDERS OPINION), and two signing a third opinion (DURHAM OPINION). The split voting leaves open to debate among legal analysts the current state of the law under the two-hour rule. However, from a police officer's point of view, the safest way to read the split decisions is to assume that: (1) the affirmative defense provision has been stricken from the statute; and (2) the two-hour rule contains an "implied element", subject to proof by the prosecution beyond a reasonable doubt. The implied element which the prosecution must prove is that the defendant's BAC was not materially affected by any alcohol consumption between the time of driving and the time of BAC testing.

Alexander Opinion (Four Votes): Justice Alexander writes the lead opinion, joined by Justices Dolliver, Smith, and Guy. Alexander rejects Crediford's "police power" and "irrebuttable presumption" challenges to the two-hour rule. However, Alexander then declares that the affirmative defense provision under the two-hour rule violates constitutional due process requirements because it shifts the burden of proof on an element of the crime to the DUI defendant.

The Alexander opinion explains its ruling as to impermissible burden-shifting by first quoting what the statute terms as an "affirmative defense". Subsection (3) (as set forth above in the "proceedings" section of this LED entry) places the affirmative burden on defendant to establish:

> ...that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.10 or more within two hours after driving. ...

Alexander's opinion next accepts Crediford's claim that there is an implied element in the two-hour rule variation of DUI under subsection (1)(a). The implied element is that the alcohol that was in

the driver's system when he was operating his vehicle was sufficient to cause that driver's blood alcohol to exceed 0.10 at the time of testing.

Having assumed such an implied element, Alexander then notes the well-established constitutional principle that the Legislature cannot shift the burden of proof on any element of a crime from the prosecution to the defendant. Accordingly, Alexander's opinion declares that subsection (3)'s affirmative defense provision must be stricken from the statute:

> In our view, because RCW 46.61.502(3) requires a defendant to disprove a necessary element of the offense, thus effectively placing the burden on that defendant to prove his or her innocence, it is violative of the Due Process Clause of the United States Constitution.

Thus, the Alexander opinion concludes that the two-hour rule is constitutional, but that it requires that the prosecution prove beyond a reasonable doubt the implied element of the absence of effect on the excessive BAC reading of post-driving alcohol consumption, if any. Finally, the Alexander opinion concludes by declaring that the facts in the stipulation of the parties (as set forth above in the "facts" section of this LED entry) are inadequate to prove the State's case beyond a reasonable doubt. That is, the stipulated facts don't show that the alcohol that was in Crediford's system when he was operating his vehicle was sufficient to cause his BAC to exceed 0.10 at the time of testing:

> As recited above, the stipulated facts indicate only that the officer "had probable cause" to arrest Crediford and that the officer obtained a reading of Crediford's blood alcohol at .16 percent within two hours after Crediford had been driving. **Significantly, the stipulation contains no information about whether the officer placed Crediford in custody under observation during the less than two-hour period.** Based solely on the stipulation, we can say as a matter of law that **the State failed to prove, beyond a reasonable doubt, that the concentration of alcohol in Crediford's blood, as measured within two hours of driving, was not affected by alcohol he consumed after he drove**. [Bolding added by LED Editor.]

Sanders Opinion (Three Votes): Justice Sanders writes an opinion joined by Justices Johnson and Madsen. Justice Sanders would have ruled the entire two-hour rule of subsection (1)(a) of RCW 46.61.502 to be unconstitutional for a variety of reasons, some of which are expressly rejected in the Alexander opinion, and some of which are not considered by Alexander.

However, while disagreeing with the Alexander opinion that an implied element can be read into the statute, the Sanders opinion does agree with that part of the Alexander opinion which states that the affirmative defense of subsection (3) unconstitutionally shifts the burden of proof. Sanders thus agrees with Alexander that the law is unconstitutional to the extent that it requires the defendant to prove that the 0.10+ BAC reading was affected by alcohol consumed after driving; instead, the government must prove beyond a reasonable doubt the absence of such effect.

Durham Opinion (Two Votes): Justice Durham writes an opinion joined by Justice Talmadge. The Durham opinion: (A) agrees with the Alexander opinion's rejection of all but one of Crediford's constitutional theories considered in that opinion; (B) does not address the additional constitutional theories addressed only in the Sanders opinion; and (C) asserts that the Court

should not have addressed the theory of impermissible burden-shifting because Crediford failed to preserve the theory when he made his motion at the trial court level.

**LED EDITOR'S COMMENT: Because the State Supreme Court must still decide whether to grant or deny the prosecution's motion for reconsideration, the Crediford decision is not yet final. However, such motions are almost never granted in the appellate courts, so we must assume that Crediford is the law. Unfortunately, because of the split voting and the conflicting analysis in the three opinions, there is some debate in the legal community regarding whether there is in fact an implied element in a two-hour rule DUI case, as posited in Justice Alexander's opinion. We assume that there is such a requirement.**

**From the perspective of law enforcement officers, assuming such an implied element in BAC cases should have little impact on their DUI enforcement practices. The only thing that we can suggest is that now every police report in such cases should address the fact, if true, that the defendant did not consume and did not have access to alcohol while in the officer's custody prior to taking the BAC test.**

**We have conferred with the deputy prosecutor currently handling the Crediford appeal in the State Supreme Court, and he added the following advice emphasizing the fundamentals of DUI enforcement. Officers should assume that every DUI case will be tried without a BAC. Officers are therefore urged to document all of "the physicals", as well as all of the incriminating statements of the arrestee. The deputy prosecutor placed particular emphasis on the documentation of the incriminating statements of intoxicated drivers. Everything that shows that the driver was under the influence of intoxicants should be documented.**

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## BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

**(1) CORPUS DELICTI OF MANSLAUGHTER NOT ESTABLISHED IN POSSIBLE SIDS DEATH; ALSO, CONFESSION VOLUNTARINESS AND MIRANDA CLARIFICATION ADDRESSED --** In State v. Aten, 130 Wn. 2d 640 (1996), The Washington State Supreme Court has affirmed a Court of Appeals decision (reported in the April '96 LED at 20) holding that there was insufficient evidence in the possible SIDS death circumstances of this case to establish the corpus delicti of manslaughter in the second degree. Under the corpus delicti rule, defendant Aten's admissions of guilt could not lawfully be admitted at trial; her conviction is therefore reversed. The Supreme Court also addresses additional issues of (1) voluntariness of Aten's confession and (2) police compliance with Miranda's requirement that questioning stop when an assertion of the right to counsel is made during custodial interrogation.

### (1) Corpus Delicti

A four-month-old baby died during the night while under the care of Vicki Jo Aten, an adult baby-sitter. In an autopsy the next day, a pathologist concluded that the child had died by suffocation from Sudden Infant Death Syndrome (SIDS) or acute respiratory failure.

Initially, Aten had made no admissions of responsibility for the death to the police investigator and others. However, a few days later, and over the course of the next several days thereafter, Aten made varying admissions of guilt (I smothered her with a pillow/I suffocated her with my hand) to various people (the child's mother/a doctor/investigating police officers).

Aten was eventually charged with second degree manslaughter. At trial, she objected under the corpus delicti rule to the admissibility into evidence of the admissions of guilt she had made to various persons. The only medical evidence suggesting corroboration that the child had died through criminal means was that of the pathologist. However, the pathologist testified only to possibility, not probability, of criminality. He conceded that there was no way to tell whether the child had been suffocated through human hands or instead had died of SIDS without human intervention.

The trial court judge rejected Aten's corpus delicti argument, and she was convicted of second degree manslaughter in a jury trial. The Court of Appeals, Division Two, reversed on grounds that the corpus delicti of the crime had not been established. See 79 Wn. App. 79 (Div. II 1995) **April '96 LED:20.** Now the State Supreme Court has affirmed the Court of Appeals decision, holding that there was no corroboration of death caused by criminal means.

The Supreme Court begins its legal analysis by saying the following things about applicability the corpus delicti rule in the context of a prosecution for manslaughter in the second degree:

> "*Corpus delicti"* literally means "body of the crime." In a homicide case, the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act. The corpus delicti can be proved by either direct or circumstantial evidence.
>
> In this state, confessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the corpus delicti and must be corroborated by other evidence. Washington courts often cite the traditional statement of the "corpus delicti rule" as in *State v. Meyer,* [37 Wn.2d 759 (1951)] which provides:
>
> > The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti,* but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.
> >
> > The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.
> >
> > ...
>
> The death of the infant Sandra proves the first element of the corpus delicti - the fact of death. The question then becomes whether the independent evidence corroborating Respondent's confessions or admissions supports a reasonable

> and logical inference that the child's death was caused by a criminal act. Respondent was charged with second degree manslaughter. The criminal act charged under RCW 9A.32.070(1) is causing death by criminal negligence. Criminal negligence occurs when one "fails to be aware of a substantial risk that a wrongful act may occur" and that unawareness "constitutes a gross deviation from the standard of care that a reasonable [person] would exercise in the same situation." The corroborating evidence in this case must then support a reasonable and logical inference that Respondent acted in a manner which showed lack of awareness of a substantial risk that a wrongful act might occur and that lack of awareness constituted a gross deviation from reasonable care which resulted in the death of the infant Sandra...
>
> "*Prima facie"* in this context means there is "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved. The evidence need not be enough to support a conviction or send the case to the jury. But, as the rule indicates, if no such evidence exists, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial.
>
> A majority of jurisdictions follow the traditional corpus delicti rule. The rule arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge. "This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual." The corpus delicti rule protects defendants from unjust convictions based upon confessions alone which may be of questionable reliability...

[Footnotes and citations omitted]

Next, the majority opinion in Aten discusses the evidence in this and in other significant Washington cases, including State v. Lung, 70 Wn.2d 365 (1967). Lung was a decision in a second degree murder case which declared that the corpus delicti **"must be consistent with guilt and inconsistent with a hypothesis of innocence."** The Aten Court then explains its conclusion that the corpus delicti of second degree manslaughter was not established as to the death of the baby Sandra:

> The totality of independent evidence in this case does not lead to the conclusion there is a "reasonable and logical" inference that the infant Sandra died as a result of criminal negligence and that that inference is not the result of "mere conjecture and speculation."
>
> The diagnosis of SIDS (Sudden Infant Death Syndrome) as the cause of death in this case is inconsistent with a conclusion that the infant died as a result of a criminal act by Respondent. SIDS is defined as "the sudden death of any infant or young child which is unexpected by history and in which a thorough postmortem examination fails to demonstrate an adequate cause for death." SIDS is the leading cause of death for apparently healthy infants who are between the ages of one week and one year. It usually occurs with infants

> between two and six months of age. In this case, like most babies who die from SIDS, Sandra was an apparently healthy four-month-old infant. SIDS deaths usually occur in the winter months and during the night. Here, Sandra died in January, a winter month, and also during the night.
>
> In light of applicable law and the facts of this case, we reasonably conclude there was insufficient evidence independent of Respondent's statements to establish the corpus delicti. The Court of Appeals was correct in reversing Respondent's conviction.

[Footnotes and citations omitted]

Finally, the majority opinion briefly discusses the question of whether the corpus delicti rule should be retained:

> The corpus delicti rule has been criticized by courts and legal commentators. At least one writer has warned of the hazards of applying the corpus delicti rule in cases such as this one. Some legal commentators suggest the rule should be abandoned altogether. Instead of the traditional corpus delicti rule, federal courts have adopted the more relaxed rule that the independent corroborating evidence must only tend to establish the trustworthiness of the confession. An increasing number of state courts have followed this trend. We are not among them.

[Footnotes and citations omitted]

In a lone dissent on the corpus delicti issue, Justice Talmadge: (1) notes his view that the corpus delicti rule should be abandoned by the Court (he explains that view in depth in State v. Ray digested below in this LED at 11; and (2) explains why he believes that the corpus delicti of manslaughter two was established in this case.

(2) Voluntary Confession

On an issue which became moot with the Court's corpus delicti ruling, the majority rejects Aten's claim that her confession was not voluntary. Aten had made this claim based on the fact that she had been taking anti-anxiety medication and was suffering from anxiety, grief, and depression when she was questioned by police. However, the Court notes that the evidence was: (A) that Aten was competent, oriented, and articulate at the time of questioning; and (B) that the police made no threats or improper promises to Aten. The majority finds the confession to have been voluntary. There is no concurring or dissenting opinion on this issue.

(3) Equivocal Attorney Request

The majority briefly addresses another issue also made moot by its corpus delicti ruling -- whether police investigators violated the "initiation of contact" rule of Edwards v. Arizona, 451 U.S. 477 (1981). Under Edwards, once a person in custody asserts the right to counsel during a custodial interrogation, police must cease any attempt at questioning and they may not initiate contact with the defendant to attempt further interrogation, so long as the suspect remains in continuous custody. [*See LED article -- "'Initiation of Contact' Rules Under the Fifth and Sixth Amendments." April '93 LED:2-10. Updated versions of this LED article are available on*

*request to the LED Editor*.] The Aten majority finds no violation of Aten's rights under the Edwards rule.

After the interrogating officer advised Aten of her rights and asked if she wished to talk, she stated: "I really do, but I think I better have an attorney present just to see if maybe, ah, I might be messing up somewhere along the line." The officer immediately stopped the interrogation effort, telling Aten he could not talk to her any further about the death of baby Sandra. Aten immediately asked some questions which the officer answered. Aten then asked that the interrogation resume, and, after she waived her Miranda rights orally and in writing, the interrogation resumed.

The Aten majority finds no violation of the Edwards "initiation of contact" rule under these facts. The majority asserts that the officer legally could have attempted to clarify Aten's wishes in light of her equivocal waiver, but that he also was legally permitted to immediately stop all questioning, thus treating her equivocal statement as an assertion of her right to counsel until she initiated contact to resume the interrogation. Then, when she asked to go ahead with the interrogation, the officer was permitted to secure her waiver and to question her.

In a concurring opinion, Justice Madsen (joined by Justice Durham, Johnson and Alexander), asserts that in its ruling on the equivocal waiver issue the majority overlooked the U.S. Supreme Court decision in Davis v. U.S., 512 U.S. 452 (1994) **Sept. '94 LED:02**. In Davis, the U.S. Supreme Court held that where Davis was being interrogated following his waiver of rights, and he made an equivocal statement about his right to counsel halfway through the interrogation, the interrogating officers had no duty to clarify his wishes or to stop the questioning.

**LED EDITOR'S COMMENT ON EQUIVOCAL MIRANDA WAIVER ISSUE: We think that neither of the two opinions on the equivocal waiver issue help clarify the law in this area. First, we don't believe the Davis exception applies where the person is equivocal about exercising the right to an attorney at the outset of an interrogation session. In that circumstance, the equivocal answer must be clarified by interrogating officers, or there is no waiver. Second, as to the Davis case's post-waiver, mid-interrogation, equivocal remarks about the right to counsel, we will repeat the comment we made on Davis in the September '94 LED:**

> **While we have not expressly said so in our past LED articles on the Edwards rule, we have long stated the view in our classroom updates that where a person being lawfully interrogated makes an ambiguous statement which could be interpreted as an assertion of the right to counsel or right to silence, the officers should cease questioning and try to clarify the suspect's desires re: counsel or cessation of questioning. See generally our discussion in our April '93 LED article -- "'Initiation of Contact' Rules Under the Fifth and Sixth Amendments." April '93 LED:2-10. While Justice O'Connor's opinion for the majority in Davis makes our view appear overly conservative, we are sticking to it for several reasons.**
>
> **First, as Justice O'Connor points out in the text of her opinion...the clarification approach will prevent situations from arising where, in hindsight, trial judges view as a "clear request for counsel" what the**

**interrogating officer felt at the time was an ambiguous request at best. Second, our Washington courts may impose a stricter standard, either through (A) an "independent grounds" reading of the Washington constitution or (B) an interpretation of the Rules of Court.**

**To date, our appellate courts have read the state constitution and the Federal constitution to be identical in regard to restrictions on interrogations. See State v. Earls, 116 Wn.2d 364 (1991) May '91 LED:02. However, we have some fear that an issue like this one could be used by a majority of our state court to depart from Miranda standards established by the U.S. Supreme Court. As for the Rules of Court, some restrictive readings of the "Right to counsel" provision in the Criminal Rules for Courts of Limited Jurisdiction, CrRLJ 3.1 [and Criminal Rule 3.1] have been made in recent years. [See, for example, State v. Trevino, 127 Wn.2d 735 (1995) Jan. '96 LED:03.] It seems a bit of a stretch, but we see some risk that this state's appellate courts could use the right-to-counsel provision of CrRLJ 3.1 [and CrR 3.1] to impose a requirement that police clarify ambiguous mid-questioning assertions of rights (and, much worse from our point of view, to thereafter use the Court Rules as a basis for imposing other additional limits on interrogations).**

**(2) 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 --** In State v. Ray, 130 Wn.2d 673 (1996), the State Supreme Court rules that a trial court judge erred in admitting a defendant's confession into evidence where the corpus delicti of the crime of child molesting was not established by evidence independent of his confessions and admissions.

Eric Steven Ray had confessed immediately to his wife and later to police investigators that, during the night in question, he had placed his three-year-old daughter's hand on his penis. On the night of the alleged incident, Ray also placed an emergency call to his sexual deviancy counselor. During the investigation, the child made some hearsay statements about the incident. However, the trial judge subsequently determined that the child was not competent to testify, and that the child's hearsay statements to investigators were not admissible under any hearsay exceptions.

Ray was charged with child molesting, but the trial court ultimately dismissed the charges. The trial court ruled that the corpus delicti of child molesting had not been established by the State. The Court of Appeals affirmed the dismissal, and the State appealed to the State Supreme Court, which has now affirmed the dismissal by the Court of Appeals.

The lead opinion for the Supreme Court begins its legal analysis in Ray by rejecting the State's request that the Court replace the traditional corpus delicti rule with the relaxed federal "trustworthiness" standard for admissibility of confessions and admissions. Then the lead opinion turns to the corpus delicti standard for a child molesting case, explaining as follows:

> First degree child molestation consists of a person having, or causing another person under the age of 18 to have,

> sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
>
> RCW 9A.44.083(1). Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).
>
> To establish a corpus delicti of first degree child molestation, the State had to establish, independent of Defendant's confession, that touching of the sexual organs occurred between Defendant and L.R.

Then the lead opinion in Ray discusses past Washington appellate court decisions where the criminal element of sexual contact has been held to be established for purposes of the corpus delicti rule. Sufficient corroboration has been established through evidence of such things as: (1) injuries to the victim; (2) non-victim-witness statements about defendant's behavior; (3) defendant's own testimony at trial, along with victim's testimony; and (4) a child-victim's testimony about acts. (Presumably, though not stated by the court, admissible child hearsay would also suffice.)

The lead opinion then explains as follows its view that the evidence in the Ray case does not establish the corpus delicti of the crime of child molesting:

> These facts suggest that *something* out of the ordinary occurred, but it is a leap in logic to conclude that any kind of criminal conduct occurred, let alone the specific conduct of first degree child molestation. Defendant's emergency call to this sexual deviancy therapist is inconclusive; one's placing an emergency call to a therapist shows that the patient is disturbed by something, but the unrest could be caused by unfulfilled urges, nightmare, or a subjective sense of guilt.
>
> The sparse facts surrounding Ray's getting a glass of water for his daughter fail to rule out Ray's criminality or innocence. *See Aten,* [above at 6-11, this LED]. ("[*C*]*orpus delicti* is *not* established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause."). Even though Ray speculatively could have molested L.R., and even though he had the opportunity to do so, the mere opportunity to commit a criminal act, standing alone, provides no proof that the defendant committed the criminal act. Without any evidence, direct or circumstantial, that Ray molested L.R., the State has failed to establish the corpus delicti, and Ray's confession was properly excluded by the trial court.

[Some citations omitted]

In a lone concurring opinion, Justice Talmadge argues in vain that the public policy reasons for the strict requirements of the corpus delicti rule no longer are valid. He argues that the rule should be abandoned by the Court, as it has been in the federal courts and by many states, and that a more relaxed "trustworthiness" rule substituted.

Result: Affirmance of Court of Appeals order affirming King County Superior Court order dismissing first degree child molesting charges against Eric Steven Ray.

**LED EDITOR'S COMMENT REGARDING THE FUTURE OF THE CORPUS DELICTI RULE: Many legal commentators have criticized the corpus delicti rule, as the Court notes in the Aten and Ray decisions addressed above in this LED. We don't think that the State Supreme Court will change its mind and abandon the rule in the near future. However, the Washington Legislature appears to have the power to modify the rule.**

**(3) RCW 13.04.030 REQUIREMENT OF ADULT CRIMINAL PROSECUTIONS FOR 16-AND 17-YEAR-OLDS WHO COMMIT VIOLENT CRIMES IS NOT CONSTITUTIONALLY DEFECTIVE** -- In State v. Boot, 130 Wn.2d 553 (1996), the State Supreme Court interprets and then holds to be constitutional RCW 13.40.030(1)(e)(iv), which brings certain violent felonies committed by 16- and 17-year-old offenders under the exclusive original jurisdiction of the adult criminal court.

This statute's requirement of adult criminal court prosecutions for certain violent felonies committed by 16- and 17-year-olds was enacted in 1994. The Supreme Court interprets the statute's effect as being automatic, i.e. neither requiring nor permitting a declination hearing or similar hearing in juvenile court. In addition, the Supreme Court rejects a multi-faceted constitutional challenge to the statute.

Result: Remand to Yakima County Superior Court for adult criminal court prosecutions against: (1) Jerry J. Boot on one count each of first degree premeditated murder and first degree felony murder, and (2) Carlos Julian Cornejo for two counts of first degree robbery and three counts of first degree kidnapping.

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## WASHINGTON STATE COURT OF APPEALS

**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)

Facts:

Fire Investigator Joy Veranth was investigating an incident involving the exploding of a molotov cocktail when she heard over the radio that one of her juvenile suspects was being sought by a police officer, Jeffrey R. Dixon, for investigation of domestic violence. Fire Investigator Veranth called Police Officer Dixon and asked him to hold the suspect for her if he made contact. Shortly thereafter, Dixon did contact one of the two juvenile suspects, Jason V. Harrell.

The Court of Appeals describes what happened next:

> As he usually does for officer safety purposes, Dixon patted Harrell down prior to placing him in the back of his patrol car to wait for Veranth. The officer had noticed that the right pocket of Harrell's jacket, which Harrell was now wearing, bulged in a way that seemed unusual and, when Dixon's hand came in contact with it, felt what he described as a small, hard, long and oval object among a number of other items in the pocket. His immediate concern was that it was a weapon, possibly the barrel of a small gun. When Dixon removed the item from

> Harrell's pocket, it appeared to him to be a homemade bomb several inches long wrapped in black electrical tape with something that resembled a firecracker fuse extending from one end. After patting Harrell down, Dixon handcuffed him because, based on their prior contacts, he felt uncomfortable placing Harrell in the back of the patrol car without handcuffs. Dixon testified that he did not subjectively intend to place Harrell under arrest at that time but intended only to detain him until Veranth arrived.
>
> When Veranth arrived, Harrell was transferred from the back of Dixon's patrol car to the front seat of Veranth's car where Veranth questioned him. Veranth did not remove the handcuffs because she does not carry a weapon. She asked Harrell whether he was comfortable and whether he had ever been advised of his rights before. He responded affirmatively to both questions. Veranth read Harrell his Miranda rights from a standard card, explaining each one as she read. She noticed that he followed the words on the card with his eyes as she read. Veranth testified that Harrell indicated he understood his rights and that he was very forthcoming in describing the fire incident. At no time did he request a lawyer or indicate that he did not want to speak with her. After he told her what had happened once, Veranth asked him if she could record his statement. He answered without any hesitation that she could. He then repeated what he had told her for the tape recorder. After Harrell completed his statement, Dixon removed the handcuffs.

Proceedings: (Excerpted from Court of Appeals opinion)

> Harrell was charged with first degree reckless burning, possession of an incendiary device, and possession of an explosive device. At the fact finding hearing, Harrell moved to suppress both his custodial statements and the evidence seized as a result of the search. The trial court found that both the search and the custodial interrogation were lawful and denied both motions. The court found Harrell guilty of possession of an incendiary device and of an explosive device but dismissed the charge of first degree reckless burning.

ISSUES AND RULINGS: (1) Did Officer Dixon have probable cause to arrest Harrell, thus justifying the search of his pocket? (ANSWER: Yes); (2) Did Harrell give a valid waiver of his Miranda rights? (ANSWER: Yes) Result: Affirmance of King County Superior Court adjudications of Harrell (as juvenile) for possession of an incendiary device and possession of an explosive device.

ANALYSIS:

(1) Probable cause to arrest/search incident to arrest

The Court of Appeals explains as follows why it upholds the search of Harrell's pocket as a lawful search incident to arrest:

> Searches and seizures must be supported by probable cause whether or not a formal arrest has been made. . . [W]hen officers conduct a joint investigation, the cumulative information possessed by all the officers may be considered in assessing whether the police had probable cause to arrest. For that reason, we

need not limit our examination of the facts to those within the personal or subjective knowledge of the arresting officer.... As long as probable cause exists at the time of the search, the search may be considered a search incident to arrest even if it occurs shortly before an arrest. The need to remove weapons which might be used to assault an officer and prevent destruction of evidence justifies a search incident to arrest.

Here, three witnesses had identified Harrell to Investigator Veranth as one of the two boys in the immediate vicinity of the explosion when it occurred. Two saw Harrell light something and one saw him throw something just moments before the explosion. The witnesses had also told Veranth that Harrell and his companion hurried out of the park immediately after the explosion. Veranth heard over the radio that Dixon was responding to a domestic violence call involving Richmond, who had been identified by the same witnesses as the second boy in the park. She then told Dixon of the arson investigation and asked him to hold either Harrell or Richmond in connection with that investigation if he found them.

Under these facts, Officer Dixon had probable cause to believe that Harrell had committed the offense of possession of an incendiary device. Although Officer Dixon did not subjectively consider Harrell under arrest when he detained him, the search was nevertheless a valid search incident to arrest because probable cause to arrest Harrell for that offense existed at the time he conducted the search.

[Citations omitted]

(2) Miranda waiver by juvenile with ADH Disorder

The Court of Appeals begins its analysis of the Miranda waiver issue as follows:

Harrell next argues that the trial court erred in admitting his statement to the police. He asserts that he lacks the ability to understand and to knowingly and intelligently waive his Miranda rights because he suffers from attention deficit hyperactivity disorder (ADHD) and a learning disability. In determining whether a juvenile's confession is voluntary, a court must consider the totality of the circumstances, including the juvenile's age, experience, education, background, intelligence and capacity to understand the warnings given, the nature of those rights and the consequence of waiving those rights. In Dutil v. State, 93 Wn.2d 84 (1980), the Supreme Court explained:

> Studies which the petitioners have called to our attention indicate that juveniles often do not understand the full import of the exercise or waiver of their constitutional rights. This is not surprising. Indeed, we would be surprised if many adults can be said to have such comprehension. As this court held in State v. Aiken, 72 Wn.2d 306 (1967), the test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions. If a juvenile

> understands that he has a right, after he is told that he has that right, and that his statements can be used against him in a court, the constitutional requirement is met.
>
> The fact that a juvenile receives low scores on aptitude tests is a factor to be considered but does not necessarily render a confession inadmissible.

[Some citations omitted]

The Court then goes on to explain why it rejects both : (1) Harrell's claim that his attention deficit hyperactivity disorder (ADHD) prevented him from understanding his rights, and (2) his claim that the officers were unduly coercive in their methods. Not only was the ADHD evidence not compelling, but Harrell's solid performance as a witness for himself in trial court was inconsistent with his claim. As to the claim of undue coercion, the Court of Appeals finds no support for the claim; the fact that Harrell was in handcuffs during the questioning did not compel the conclusion that he was coerced into waiving his rights, the Court concludes.

**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)

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

> Marcella Carosa, a checkout clerk on the graveyard shift of a supermarket, had access to the store's cash registers and their detail tapes. When money was discovered missing from several registers, management confronted Carosa, who admitted taking the money during her work shifts by processing false refunds.
>
> The cash registers printed detail tapes that recorded the date, time, and amount of each sale or refund. Carosa's duties included changing these detail tapes on each register at the end of the business day. The registers also generated hourly readings showing the total amount of transactions, but not the individual transactions. Carosa was also responsible for collecting these hourly readings.
>
> The hourly tapes showed that more money was paid out in refunds than was brought in during several hours on various shifts worked by Carosa. The detail tapes, which would have shown the individual refund amounts, however, were missing. As a result, the State could not prove that Carosa had taken more than $250 in any one refund; the State could prove, from the hourly readings, that on three different days she had taken more than $250 over the course of her shift. Accordingly, the State charged Carosa with three counts of second degree theft.
>
> At the close of the State's case, Carosa moved to dismiss the three counts, arguing that the evidence failed to show that any individual refund exceeded $250. The court denied this motion. Carosa then moved to dismiss the second and third theft counts, arguing that because the thefts were part of a common plan or scheme, the State could file only one felony theft count under RCW

9A.56.010(12)(c). The court also denied this motion. [Carosa was then convicted of three counts of second degree theft.]

ISSUES AND RULINGS: (1) Was there sufficient evidence to support three separate second degree theft convictions? (ANSWER: Yes); (2) Was the State required to apply the "aggregation" rule and charge Ms. Carosa with only one count of second degree theft? (ANSWER: No) Result: Kitsap County Superior Court convictions for second degree theft (three counts) affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Sufficiency of evidence for three charges

> Carosa argues that the felony charges should have been dismissed because the evidence did not establish that she had taken more than $250 in any one refund. She maintains that each refund was a separate theft and, therefore, she engaged in multiple misdemeanor thefts during each work shift, not a single felony theft...A person is guilty of second degree theft if he or she steals between $250 and $2,500. RCW 9A.56.040. Theft of less than $250 constitutes third degree theft, a misdemeanor offense. RCW 9A.56.050.

> The rule is that "[w]hen several articles of property are stolen by the defendant from the same owner at the same time and at the same place, only one larceny is committed." Under this rule, the State may charge a shoplifter with a single theft for taking clothes located in different parts of the store.

> Here, Carosa took various amounts of less than $250 through false refunds, accumulating more than $250 total on each of three different work shifts. The fact that she found it more convenient to process several smaller refunds rather than one large refund does not transform her single theft into multiple small thefts. Accordingly, we hold that the evidence was sufficient to establish that Carosa committed a single larceny at the same time and place, on three different work shifts, each constituting second degree theft. The trial court, therefore, properly denied Carosa's motion to dismiss for insufficient evidence.

(2) Nonapplicability of "aggregation" statute

> Carosa then contends that because she committed multiple misdemeanor thefts pursuant to a common plan or scheme, the State was required to aggregate the thefts into a single felony count under RCW 9A.56.010(c). We disagree.

> The State did not prosecute Carosa under the theory that she committed multiple misdemeanors that could be aggregated into one felony under the statute. Rather, the State prosecuted Carosa for a single theft of more than $250 on each of three different days. As we have already decided, Carosa's conduct each day fit the definition of a single felony theft, i.e., taking from the same victim at the same time and place. Accordingly, Carosa was properly charged with three counts of second degree theft.

[Some citations, one footnote omitted]

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## BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

**(1) IMPLIED CONSENT-- OBSESSIVE COMPULSIVE DISORDER NO DEFENSE TO LICENSE REVOCATION FOR REFUSAL TO TAKE BAC TEST BECAUSE DISORDER NOT PHYSICAL** -- In Medcalf v. DOL, 83 Wn. App. 8 (Div. II, 1996), the Court of Appeals rejects a driver's claim that his condition of obsessive compulsive disorder (OCD) provided him with a defense to license revocation for his refusal to take a breath test following his lawful arrest for DUI.

The Court of Appeals explains that past cases have held that a **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**. The Court then notes:

> Because there was no **physical** evidence that Medcalf was unable to take the breath test, Medcalf's failure to respond to Officer Giuntoli's instructions on taking the test was properly deemed a refusal to take the test. The State correctly points out that 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 capacity to refuse the test. [Bolding added by LED Ed.]

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

**(2) CRIMINAL HARASSMENT: VICTIM MAY HAVE REASONABLE FEAR OF BEING HARMED IN MANNER OTHER THAN PRECISELY THAT DESCRIBED BY PERPETRATOR** -- In State v. Savaria, 82 Wn. App. 832 (Div. I, 1996), the Court of Appeals holds that, under the criminal harassment statute (chapter 9A.36 RCW), a victim's reasonable fear of harm need not be that the precise threat made by the perpetrator will be carried out.

According to the testimony of the alleged victim, she had been Savaria's girlfriend, and Savaria was angry over her expected role as a witness in his upcoming prosecution. While he was awaiting prosecution for assaulting her and for violation of a no-contact order she had obtained, Savaria allegedly threatened to kill her with a gun. At trial for this threat, the would-be victim testified that when she heard the threat to kill her with a gun she was unsure that Savaria would kill her, but she was definitely afraid that he would hurt in some manner, based on her knowledge of his instability.

The Court of Appeals looks at the language in the harassment statute which requires that any threat otherwise covered by the law "places the person threatened in reasonable fear that the threat will be carried out." (Emphasis added by LED Ed.) Recognizing that the statute's language could be read to require that the victim's fear must be that he or she will come to the precise harm or suffer the precise manner of attack described in the perpetrator's words, the Court of Appeals rejects such an interpretation as illogical and contrary to legislative intent.

Instead, the Court of Appeals holds that the threat violates the statute so long as it instills a reasonable fear in the target of the threat that any of the statutorily proscribed harms will occur. Thus, a threat to kill which reasonably instills any of the following fears covered expressly under RCW 9A.46.020 will be covered:

...fear of bodily injury in the future to the person threatened or to any other person...
...fear that physical damage will be caused to the property of any person other than the threatener...
...fear that the person threatened or any other person will be subjected to physical confinement or restraint...
...fear that the threatener will substantially harm the person threatened or another with respect to his or her physical or mental health or safety...

The Court of Appeals concludes that the victim's claimed fear regarding the threat by Savaria was sufficient to make a case of harassment under RCW 9A.46.020.

Result: King County Superior Court convictions for harassment and intimidating a witness reversed on grounds not addressed here (admissibility of new evidence and jury instruction issues); case remanded for retrial.

**(3) MULTIPLE PERSONALITY DISORDER DEFENSE RE ABSENCE OF NECESSARY MENTAL STATE DOES NOT APPLY WHERE ALTER PERSONALITY HAD REQUISITE MENTAL STATE** -- In State v. Jones, 82 Wn. App. 871 (Div. III, 1996), the Court of Appeals for Division III rejects defendant/appellant's claim that the evidence did not establish the required mental state for indecent liberties (defendant committed the assault against a three-year-old foster daughter).

In a non-jury trial, defendant Cheryl Jones had presented the testimony of an expert witness who proved to the satisfaction of the trial court that: (1) Jones suffered from multiple personality disorder (MPD); (2) she committed her act of sexual contact on the victim at a time when she was in an alter personality known as "Cat"; (3) her core personality did not know what "Cat" was doing; but (4) her alter personality of "Cat" knew what she was doing when the events occurred. The trial court then held that these facts supported a holding that Jones acted knowingly, and therefore that she was guilty of indecent liberties.

The Court of Appeals affirms the trial court conviction, implying that, so long as the alter personality has the requisite mental state, then a defendant suffering from MPD is deemed to have the alter personality's mental state, regardless of whether the core personality is aware of the conduct in question.

Result: Chelan County Superior Court conviction for indecent liberties affirmed.

**(4) FORCIBLY ENTERING WOULD-BE RAPE VICTIM'S CAR NOT "FELONIOUS" MV ENTRY** -- In State v. Maganai, 83 Wn. App. 735 (Div. II, 1996), the Court of Appeals rules that, where defendant forced his way into a woman's car and pulled her out in an attempt to rape her, defendant could not be convicted of attempted first degree rape because he did not "feloniously" enter her vehicle.

The pertinent portion of the Court of Appeals analysis is as follows:

> Maganai contends that his actions did not constitute the offense of first degree rape because he did not *feloniously* enter DT's automobile. The State asks us to interpret "felonious entry" as including any criminal entry, whether a felony or misdemeanor offense.
>
> RCW 9A.44.040(1)(d) provides: "(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: . . . (d) *Feloniously* enters into the building or vehicle where the victim is situated." (Emphasis added.) Two statutes penalize the wrongful entry into a vehicle: RCW 9A.52.095, vehicle prowling in the first degree (entry into a motor home); and RCW 9A.52.100, vehicle prowling in the second degree (entry into a motor vehicle other than a motor home). Vehicle prowling in the first degree is punishable as a statutory felony. Second degree vehicle prowling is punishable as a gross misdemeanor.
>
> According to the dictionary, the term "felonious," as used in RCW 9A.44.040(1)(d), is ambiguous. It can have both the specific meaning offered by Maganai, (1) "of, relating to, or having the quality of a felony," or (2) the more general meaning, "being against the law," forwarded by the State. WEBSTER'S THIRD NEW INT'L DICTIONARY 836 (1966).
>
> We applied the narrower interpretation in *State v. Thompson*, 71 Wn. App. 634 (1993). There we said that a "felonious entry" is an entry that is "burglarious" as opposed to "lawful or trespassory." The *Thompson* case involved a charge of first degree rape. The victim invited Thompson to spend the night in her home, but she did not invite him into her bedroom. Later that evening, Thompson forcibly entered the victim's bedroom and forced her to have sex with him. On appeal, Thompson argued that his entry into the bedroom was not felonious and, therefore, could not support his first degree rape conviction.
>
> Looking to legislative intent behind the burglary statute and the definition of the term "building", this court found that the unauthorized entry into a room in a single occupancy residence was not a burglary under Washington law and, therefore, could not serve as the predicate offense for a first degree rape conviction. Moreover, we noted that, even without the legislative history, application of the rule of lenity would require the ambiguity in the statute to be resolved in favor of the defendant.
>
> In the present case, Maganai entered DT's Jeep, a motor vehicle, during the attempted rape. Although the Legislature has defined the burglarious entry into a motor *home* as a felony, it chose to define a second degree car prowl as only a misdemeanor. Therefore, Maganai did not commit a felony when he broke into DT's car.

[Some citations omitted]

Result: Pierce County Superior Court conviction for first degree attempted rape vacated. Case remanded for resentencing for second degree attempted rape.

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## NEXT MONTH

In last month's LED, we stated that this month we would revisit the issues addressed in our article: "Clarification regarding mandatory arrest, discretionary arrest, no arrest for court order violations in domestic violence situations." See February, 1997 LED at pages 14-21. Due to time constraints and other considerations, we have put off to the April LED our revisiting of this subject area.

In addition, the April LED will contain entries on the two recent appellate decisions, among others: (1) State v. Rivard, 131 Wn. 2d___(1996) (reversing a Court of Appeals decision [see entry on Rivard Court of Appeals decision in **Sept. '96 LED:14**] and holding that, under certain circumstances, independent of the implied consent statute, the police may obtain lawful consent to a blood test from a driver not under arrest); and (2) Henricks v. City of Kennewick, 927 P.2d 1143 (Div. III, 1996) (holding that a motorcycle operator not wearing any headgear has no standing to challenge the constitutionality of the motorcycle helmet law).

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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.

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

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

Facts: (Excerpted from Court of Appeals opinion)

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

Proceedings:

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

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

The jury convicted McReynolds on one of the counts.

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

STATUTE AT ISSUE:

RCW 69.50.506(c) provides:

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

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 69.50.401 makes delivery of a controlled substance unlawful, except as authorized by statute. RCW 69.50.506(c) is a statutory exception for authorized state, county or municipal officers engaged in the lawful performance of their duties. To invoke the statutory immunity of RCW 69.50.506(c), Mr. McReynolds had to establish (1) he was an authorized officer (2) engaged in the lawful performance of his duties. He could not do that. Mr. McReynolds acknowledged in writing his understanding that he was not a police officer, did not have any legal authority, did not have authority to violate any criminal law to gather information or provide confidential informant services, and could not engage in any cocaine transactions except under specific direction by a LEAD Task Force detective.
>
> Mr. McReynolds concedes there is no direct authority supporting his argument that a confidential informant or agent of the police should be covered by the statute, but asserts the argument is supported by analogy. He contends that if a confidential informant or agent of the police acting at the direction of the police must comply with constitutional safeguards when conducting a search, . . . then in appropriate circumstances they should also enjoy police immunity granted by statutes such as RCW 69.50.506(c).
>
> Mr. McReynolds' analogy is flawed. Mr. McReynolds. . .was not acting at the direction of the police when he delivered cocaine. He was given explicit written and verbal warnings not to possess, sell or deliver drugs except as specifically directed by a LEAD Task Force detective; he ignored those warnings at his own risk.
>
> It is not necessary to address whether a confidential informant is entitled to a privileged activity instruction based on RCW 69.50.506(c), because Mr. McReynolds was not prosecuted for a drug transaction in which he was acting at the direction of the police. Mr. McReynolds' proposed instruction based on RCW 69.50.506(c) was not warranted by the evidence, nor, based as it is upon his subjective belief, is it an accurate statement of the law.

[Some citations omitted]

**( ) BB GUN THREAT WAS THREAT TO USE "DEADLY WEAPON" SUPPORTING CONVICTION FOR ATTEMPTED FIRST DEGREE KIDNAPPING; VICTIM'S STATEMENT TO POLICE 20 MINUTES AFTER ATTEMPTED KIDNAPPING WAS "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 that Majors threatened 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's automobile license number, to Miller approximately twenty minutes after the incident but after first speaking to the Andersons, 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 Andersons, 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 Andersons', who witnessed C.H. speaking to Majors, saw her frightened and shocked demeanor, and recorded Majors's license plate number.

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

**( ) JURY INSTRUCTION ON VOLUNTARY INTOXICATION NOT NECESSARILY REQUIRED EVEN THOUGH SOME WITNESSES TESTIFY THAT DEFENDANT WAS "INTOXICATED" AT TIME OF OFFENSE** -- In State v. Gabryschak, 83 Wn. App 249 (Div. I, 1996), the Court of Appeals rejects defendant's argument that the jury should have been given an instruction on "voluntary intoxication" at his trial for felony harassment and third-degree malicious mischief.

Defendant Gabryschak was arrested for malicious mischief for kicking in a door. While being driven to the police station, he threatened to kill the transporting officer. Grabryschak was charged with third degree malicious mischief (for kicking in the door) and felony harassment (for threatening the transporting officer).

At trial, Gabryschak did not testify, nor did he call any witnesses. However, one of the involved police officers testified that, at the time of the arrest and transport, Gabryschak appeared to be "intoxicated" or "very intoxicated." The trial court declined to instruct the jury on "voluntary intoxication". Gabryschak was ultimately convicted on both counts.

In pertinent part, the Court of Appeals analysis of whether the trial court should have given the jury a voluntary intoxication instruction is as follows:

> When a voluntary intoxication instruction is sought, the defendant must show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime

charged. Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be "substantial evidence of the effects of the alcohol on the defendant's mind or body"...

A defendant is not required to present expert testimony to establish that he or she was too intoxicated to form the necessary mental state. Indeed, a defendant may exercise his or her right to refrain from testifying at trial and to rest at the close of the State's case without presenting defense testimony, and still be entitled to a voluntary intoxication instruction, so long as the evidence presented by the State and elicited by the defense during cross examination of the State's witnesses contains substantial evidence of the defendant's drinking and of the effects of the alcohol on the defendant's mind or body. Although affirmative evidence presented by a defendant may ordinarily be more effective, nothing prohibits a defendant from attempting to persuade the trier of fact of his or her inability to form the requisite mental state because of intoxication, by means of cross-examining the State's witness.

Here, ample evidence that Gabryschak was intoxicated was elicited from the State's witnesses during cross examination. Nevertheless, we find no evidence in the record for which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged. At best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated.

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state. *See, e.g., State v. Rice,* 102 Wn.2d 120 (1984) (intoxication instruction necessary where there was evidence that the defendants drank beer all day, ingested between two and five Quaaludes, spilled beer and were unable to hit Ping-Pong balls, and one of the defendants was so drunk that he did not feel it when he was struck by a car); *State v. Brooks,* 97 Wn.2d 873 (1982) (instruction proper where there was evidence that the defendant drank beer, whiskey, and rum for two days, ate a spider and washed it down with whiskey, and had glassy eyes and slurred speech); *State v. Jones,* 95 Wn.2d 616, (1981) (instruction required where there was evidence that the 15-year-old defendant drank between nine and eleven beers before the incident, had glassy eyes and slurred speech, and had been put into the "drunk tank" after his arrest).

In contrast with these cases, the evidence in Gabryschak's case shows that he responded consistently to the officers' requests to see and speak to the occupants of the apartment - he consistently refused, indicating that he fully understood the nature of the requests; he tried to break and run while being escorted to the police car, indicating that he was well aware that he was under arrest; he leaned up against the back of Officer Anderson's seat and spoke with conviction into her ear while threatening to kill her once released from jail, indicating that he was fully aware of his destination. No testimony reflects that Gabryschak's speech was

> slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he as unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states-with knowledge in the case of the felony harassment charge, and with malice in the case of the malicious mischief charge. We are, therefore, satisfied that the trial court did not err by rejecting the voluntary intoxication instruction.

[Some citations and footnotes omitted]

Result: Affirmance of Whatcom County Superior Court convictions for felony harassment and third degree malicious mischief.

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

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

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

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

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

**( ) LAW ALLOWING "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 gross misdemeanors as well as 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).

After reviewing the history and purpose of the misdemeanor compromise statute, the Court of Appeals concludes that even though RCW 10.22.010 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.

**( ) DOL'S IMPROPER WORDING OF DRIVER LICENSE REVOCATION NOTICE IRRELEVANT WHERE DEFENDANTS HAD MOVED WITHOUT INFORMING DOL** -- In State v. Storhoff, 84 Wn. App. 80 (Div. II, 1996), in three consolidated cases, the Court of Appeals rules that defendants who had moved without notifying DOL of their change of address were not allowed to challenge the erroneous wording of their drivers' license revocation notices. The DOL revocation notices had understated the time period allowed for appeal of a DOL revocation decision. The Court of Appeals holds, however, that persons who move without advising DOL of their change of address cannot show any causal connection between: (1) the improperly worded notice, which they never received, and (2) their failure to appeal timely.

Result: Kitsap County District Court and Superior Court orders suppressing orders of revocation against Douglas Storhoff and Jeffrey S. Oropesa reversed, and cases remanded for trial; revocation case against Virgil Tucker remanded for further suppression hearings and possible trial.

**( ) TELEPHONIC THREAT TO DISPATCHER TO BURN DOWN STORE NOT PROTECTED SPEECH** -- In State v. Edwards, 84 Wn. App. 5 (Div. II, 1996), the Court of Appeals rejects defendant's two challenges to his conviction for making a threat in violation of RCW 9.61.160. RCW 9.61.160 provides as follows:

> It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

Defendant conceded on appeal that the evidence showed that he had called the local police department and had stated to the dispatcher that he was going to burn down a local department store if the employees of the store harassed his family. He had stated to the dispatcher that this was not a threat but a fact. However, defendant argued on appeal that his threat had been either too contingent in nature or not serious enough to qualify under the statute. The Court of Appeals finds no legal support for defendant's proposed interpretation of the statute.

Defendant also argued that the statute was unconstitutional as applied to his statement to the E-911 dispatcher. Relying on the State Supreme Court decision in Seattle v. Huff, 111 Wn.2d 923 (1989**) Nov. '89 LED:06** (holding a portion of a Seattle telephone harassment ordinance to be overly broad in violation of free speech rights), defendant argued that free speech rights protected his statement to the dispatcher. However, the Court of Appeals distinguishes RCW 9.61.160 from the Seattle ordinance at issue in Huff. RCW 9.61.160 is drawn narrowly enough to meet First Amendment requirements, Division Two holds.

Result: Skamania County Superior Court conviction for telephone harassment in violation of RCW 9.61.160 affirmed.

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

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

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

The Court of Appeals affirms, ruling that where, as here, a law enforcement agency was involved in a search and seizure which has been held unlawful in criminal proceedings, the police agency

is barred from re-trying the search-and-seizure issue in a subsequent civil forfeiture proceeding. It is irrelevant for purposes of this "collateral estoppel" bar that the law enforcement agency's attorney was not able to control the criminal litigation, the Court of Appeals declares.

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

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

Defendant Robert S. Russell was a convicted felon on the day when police found him to be in possession of two firearms. Based on Russell's possession of two firearms, the trial court convicted Russell for two violations of the firearms possession prohibition of RCW 9.41.040. The Court of Appeals reverses the trial court, determining the former firearms law to be ambiguous and resolving the ambiguity in Russell's favor.

One factor in the Court of Appeals decision is that, after the date of Russell's offense, the 1995 Washington Legislature amended RCW 9.41.040 to provide in a new subsection (7) that "[e]ach firearm unlawfully possessed under this section shall be a separate offense", subjecting those unlawfully possessing multiple firearms to multiple separate convictions and consecutive sentences. The Court of Appeals indicates that this change in statutory language supports the view that unlawful possession of multiple firearms was just a single offense prior to the 1995 change in RCW 9.41.040.

Result: One of two Lewis County Superior Court convictions for unlawful firearms possession reversed; case remanded for resentencing.

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

**( ) DATAMASTER BREATH TEST QAP MAY BE PROVEN THROUGH REPLACEMENT TECHNICIAN --** In State v. Walker, 83 Wn. App. 89 (Div. II, 1996), the Court of Appeals rejects two DUI defendants' argument that the certificated quality assurance reports on the machines used to test their breath alcohol content were not properly admitted in evidence.

In each of two unrelated DUI trials, the defendant challenged admission of a BAC test on grounds that the State did not call as a witness the technician who had actually conducted the quality assurance procedure (QAP) on the machine. The technician had retired prior to trial, so the State called as a witness another qualified technician who was custodian of the pertinent QAP records and testified to the contents of the records.

Defendants argued on appeal that under the express terms of the applicable court rule (CrRLJ 6.13(c)) only the actual technician who did the QAP can testify as to the contents of the records. The Court of Appeals rules that, while the wording of CrRLJ 6.13(c) might appear to support defendants' arguments, the QAP records were properly admitted through testimony of the replacement technician based on the business records hearsay exception.

Result: Pierce County District Court DUI convictions of Michael J. Walker and Gregory E. Lewis upheld.

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

RCW 46.61.024 provides:

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

[Emphasis added]

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

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

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

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

The Court of Appeals finds the wording of the "obstructing" charge to be defective based on case law under the former obstructing statute. The Williamson Court interprets the "obstructing" statute case law as holding that only conduct, not mere lies, can "hinder, delay or

obstruct" a public servant; thus, one who lies to a public servant does not "hinder, delay or obstruct" the public servant, the Court declares. Accordingly, the Court of Appeals holds that the charging document on Williamson's obstructing charge was fatally defective.

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

**LED EDITOR'S COMMENT: We must assume that the Williamson Court's analysis is correct. Therefore, under current RCW provisions, the only appropriate state law charge for lying to a law enforcement officer in circumstances such as these is under RCW 9A.76.175 -- "providing a false or misleading material statement to a public servant".**

**1996 FEDERAL GUN LAW AMENDMENTS REVISITED--COURT ORDER RESTRICTIONS**

In the December 1996 LED and the January 1997 LED, we addressed the new restrictions on delivery, receipt, ownership or possession under federal firearms laws for a person convicted at any time in a state of federal court of a "misdemeanor crime of domestic violence." An additional restriction under federal law, not addressed in the December and January LED's, is the bar adopted in 1994, on persons who are subject to certain court orders protecting persons in domestic relationships.

The 1994 amendments to federal firearms laws barred delivery, receipt, ownership, or possession with respect to any person who:

> [I]s subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such an intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and
>
> (B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;...

18 U.S.C. §§ 922(d)(8) and 922(g)(8).

The term "intimate partner" is defined at 18 U.S.C. § 921(a)(32) as follows:

> The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

The language which appears in Washington DV forms restraining persons from "causing physical harm, bodily injury, etc." appears to fit § 922(d)(8)(B)(ii) and §922(g)(8)(ii). Thus, a person subject to a domestic violence or harassment order obtained by an "intimate partner" (as defined by federal law) with such restraining language would be subject to the federal firearms restriction while the order was in effect.

However, it must be noted that under federal law, as set forth above, the firearms restriction does not apply to "temporary orders" for protection which are issued ex parte, i.e., without notice to the respondent. It should also be noted that, while there is some controversy on the following point, the restraining order prohibition of federal law does not apply to law enforcement officers and military personnel carrying firearms in the course of their duties. It does apply to such persons in certain off-duty circumstances. NOTE THAT THE 1996 CONGRESS TOOK A DIFFERENT APPROACH TO THIS ISSUE WHEN IT ADOPTED THE PROHIBITION RELATED TO MISDEMEANOR CONVICTIONS FOR CRIMES OF DOMESTIC VIOLENCE. THIS BAR DOES APPLY TO LAW ENFORCEMENT AND MILITARY PERSONNEL WHETHER THEY ARE ON OR OFF DUTY.