# Law Enforcement Digest

May 1997


## HONOR ROLL

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**458th Session, Basic Law Enforcement Academy - January 7 through April 1, 1997**

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|---|---|
| President: | Frank Smith - Kittitas County Sheriff's Office |
| Best Overall: | Derrick A. Isackson - Edmonds Police Dept. |
| Best Academic: | Patricia A. Larkin - Tacoma Police Dept. |
| Best Firearms: | Jason U. Wills - Renton Police Dept. |
| Tac Officer: | J.R. Hall - King County Department of Public Safety |
| Asst. Tac Officer: | Tom Furrer - Lacey Police Dept. |

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**Corrections Officer Academy - Class 247 - March 3 through March 28, 1997**

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|---|---|
| Highest Overall: | Edward J. Heffernan, Jr. - Pacific County Jail |
| Highest Academic: | Priscilla Ann Hannon - Whitman County Jail |
| Highest Practical Test: | JoAnne Ahlene Hunter - Klickitat County Jail |
| | Wade R. Hanson - Clallam Bay Corrections Center |
| Highest in Mock Scenes: | Edward J. Heffernan, Jr. - Pacific County Jail |
| Highest Defensive Tactics: | Erin A. Johnsrud - Washington State Penitentiary |

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**Corrections Officer Academy - Class 248 - March 3 through March 28, 1997**

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|---|---|
| Highest Overall: | Kevin Duane Starcher - Washington State Reformatory |
| Highest Academic: | Kevin Duane Starcher - Washington State Reformatory |
| Highest Practical Test: | Lester Wayne Schneider - Olympia Correctional Center |
| | Donald Stuart Witmer - Bellevue City Jail |
| Highest in Mock Scenes: | Todd D. McComas - King County Department of Adult Detention |
| | Kevin Duane Starcher - Washington State Reformatory |
| | Michael Charles Stauffer - Lincoln County Jail |
| | Pauline "Pauli" Wesen - Cedar Creek Corrections Center |
| Highest Defensive Tactics: | Duane Evan Olsen - Benton County Corrections |

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## BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

**(1) UNDER "WHARTON'S RULE", JURY INSTRUCTION ON CONSPIRACY TO DELIVER CONTROLLED SUBSTANCES MUST REFER TO INVOLVEMENT OF A THIRD PARTY** -- In State v. Miller, 131 Wn.2d 78 (1997), the State Supreme Court rules that defendant's conviction for conspiracy to deliver marijuana must be reversed because the jury instructions did not explain to the jury that such a conspiracy-to-deliver agreement must include the involvement of a third party.

The Supreme Court explains that, ordinarily under Washington law, where two persons agree to engage in illegal conduct and carry out the agreement by committing the crime, they can be prosecuted and punished separately for conspiracy and the completed crime. However, for certain transactional crimes, such as illegal drug delivery, a conspiracy charge will not stand unless either (a) a third person is involved in the agreement or (b) two participants in the agreement intend delivery to a third party. This rule for transactional crimes and certain other crimes is a Washington variation on a common law concept known as "Wharton's Rule."

In the Miller case, the trial court instructions on the conspiracy charge did not make any reference to involvement of a third person in the conspiracy. Neither did the instructions refer to intent to deliver to a third party. That defect in the instructions was prejudicial to defendant, the Supreme Court holds, and requires reversal of his conspiracy conviction.

Result: Mason County Superior Court conviction for conspiracy to deliver a controlled substance reversed (unpublished Court of Appeals decision affirming the Superior Court conviction also reversed); defendant's additional conviction for possession of a controlled substance in a correctional facility was not appealed and is not affected by the Supreme Court's decision.

**(2) STATE DID NOT MAKE UNLAWFUL USE OF DEFENDANT'S PRE-ARREST SILENCE** -- In State v. Lewis, 130 Wn.2d 700 (1996), a majority of the State Supreme Court gives a pro-State interpretation of the rule it announced in State v. Easter, 130 Wn.2d 228 (1996) **Jan. '97 LED:13**. Easter held generally that, in the prosecution's case-in-chief, the State is not permitted to introduce evidence of defendant's pre-arrest silence.

In Lewis, a detective in a rape case was asked by the prosecutor in the State's case-in-chief if the detective had engaged in any telephone conversations with defendant prior to defendant's arrest. The detective responded: (1) that he had talked to defendant by phone; (2) that defendant had told the detective that he was innocent; and (3) that the detective had then told defendant that, if defendant was innocent, with a brief explanation of his innocence; then he should come in to the station to talk to the detective. The detective was not asked to expand

further on this conversation, and he did not offer any information about whether defendant ever came into the station or talked to the detective prior to his arrest.

The trial court found no violation of defendant's Fifth Amendment right to silence in the detective's description of the conversation. A majority of the State Supreme Court agrees under the following analysis:

> Since we have concluded that pre-arrest silence is not admissible as substantive evidence of an accused's guilt, the question becomes whether Lewis's silence was used as evidence of his guilt. A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions. However, we conclude that is not what occurred in this case. The detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments. The officer did not make any statement to the jury that Lewis's silence was any proof of guilt. The only thing the detective told the jury is that the defendant told him that "those women were just at my apartment and nothing happened, and they were both just cokeheads," and that "[Lewis] was trying to help them is what he said." This is consistent with Lewis's later testimony. Unlike the officer's testimony in the Easter case, which included the officer's opinion that Mr. Easter was hiding his guilt with his silence, the officer in this case made no comment on Lewis's silence. The only statement he made was that Lewis had told him he was innocent.
>
> There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence. A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. That did not occur in this case.
>
> ...Given the brief and ambiguous testimony of the detective, we conclude the trial court did not abuse its discretion in denying the motion for a mistrial. We affirm the conviction.

[Some citations, footnotes omitted]

In a concurring opinion, Justice Madsen, joined by Justice Alexander, asserts the majority should have found instead that the detective's testimony was in fact an impermissible comment on defendant's pre-arrest silence, but that this was harmless error.

Result: King County Superior Court conviction of Ricky Lee Lewis for rape affirmed (degree not specified in Court's opinion).

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## WASHINGTON STATE COURT OF APPEALS

**CHECK FOR ARREST WARRANTS DURING INVESTIGATIVE CONTACTS OK, BUT INVENTORY SEARCH AT JAIL VIOLATES BAIL-WARRANT RULE OF GLORIA SMITH**

State v. Caldera, Hamilton, 84 Wn. App. 527 (Div. III, 1997)

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

> *State v. Caldera.* On April 15, 1995, a police officer saw Carmen Caldera exiting a car parked in a parking lot. The lot has "no trespassing" signs at both entrances; police are authorized to enforce the "no trespassing." An officer contacted Mr. Caldera, asked for identification and ran a warrant check. The warrant check showed an outstanding misdemeanor warrant for Mr. Caldera in Benton County. Mr. Caldera was told about the warrant and arrested. The officer patted down Mr. Caldera and took him to the Benton County Sheriff's Office where he was transferred to the Benton County Jail.
>
> At the Benton County Jail, an officer searched Mr. Caldera in the jail sally port. The officer found a plastic bag with a white powdery substance, which later proved to be cocaine, in Mr. Caldera's right sock. After police conducted the search, they booked Mr. Caldera into jail, read the warrant which provided the amount for bail, and gave him an opportunity to post bail. Before trial, Mr. Caldera moved to suppress the evidence found in the search. The court denied Mr. Caldera's motion and on stipulated facts found Mr. Caldera guilty of possession of a controlled substance, cocaine.
>
> *State v. Hamilton.* On May 26, 1995, while investigating a shoplifting incident, a police officer contacted Eric Hamilton at his home. After running a warrant check and discovering an outstanding warrant on Mr. Hamilton, the officer arrested Mr. Hamilton. The officer told Mr. Hamilton of the warrant but did not read him the warrant or inform him of his right to post bail. The officer patted Mr. Hamilton down and transported him to the Benton County Jail. There, another officer searched Mr. Hamilton in the jail's sally port. The officer found a small plastic container in Mr. Hamilton's pocket which Mr. Hamilton admitted was cocaine. Mr. Hamilton was taken into the booking area and given a copy of the warrant which stated the amount of bail. Before trial, Mr. Hamilton moved to suppress the cocaine. The court denied the motion and on stipulated facts found him guilty of possession of a controlled substance, cocaine.

ISSUES AND RULINGS: (1) Were the warrant checks lawful incidents of the police investigative contacts? (ANSWER: Yes); (2) Were the jail booking inventory searches unlawful under the Gloria Smith rule which generally requires that no booking search occur until the bail-warrant arrestee has an opportunity to post bail? (ANSWER: Yes). Result: Reversal of Benton County Superior Court convictions of Carmen Caldera and Eric Lee Hamilton for cocaine possession.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Warrant Check

> Warrant checks for outstanding warrants during valid criminal investigations are reasonable routine police procedures. Here, both officers were investigating potential criminal activity. Mr. Caldera was trespassing. Mr. Hamilton was

allegedly shoplifting. The officers properly conducted a warrant check during their investigations.

(2) Inventory Of Personal Effects At Jail

*Validity of search.* Mr. Caldera and Mr. Hamilton next challenge the validity of the search in the jail's sally port before being read the warrants and given the opportunity to post bail.

> RCW 10.31.030 provides in part:
>
> > The officer making an arrest must inform the defendant that he acts under authority of a warrant, and must also show the warrant: PROVIDED, That if the officer does not have the warrant in his possession at the time of arrest he shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement: PROVIDED FURTHER, That any officer making an arrest under this section shall, if the person arrested wishes to deposit bail, take such person directly and without delay before a judge or before an officer authorized to take the recognizance and justify and approve the bail....

In [State v. Gloria Smith, 56 Wn. App. 145 (Div. III, 1989) **March '90 LED:12; Feb. '91 LED:18**], we considered whether the police violated RCW 10.31.030 by conducting an inventory search before showing the defendant the warrant for her arrest and giving her an opportunity to post bail. Police arrested Ms. Smith on an arrest warrant. At the jail, they conducted an inventory search of her purse while reading her the warrant. We held that the search was unlawful because police did not give her a timely opportunity to post bail. Mr. Caldera's and Mr. Hamilton's situations are identical to Ms. Smith's. Neither was given an opportunity to post bail before being searched.

The state relies on State v. Harris, 66 Wn. App. 636 (1992) [**Jan '93 LED:13]** for its argument that exigent circumstances required the searches before allowing them to enter the booking area. We dismissed a similar argument in Smith. The search could have occurred at the time of arrest. Police could have watched the defendant while he or she tried to obtain bail. The statute requires that an officer read an arrest warrant in his possession at the time of the arrest or, if not in his or her possession then as soon as possible. If a defendant wishes to post bail, the officer must give the defendant an opportunity to do so without delay. When the language of the statute is clear, we must give effect to its provisions.

We reverse the trial court and dismiss the charges against Mr. Caldera and Mr. Hamilton.

**LED EDITOR'S COMMENT: After Division Three issued its decision in the Gloria Smith case eight years ago, we were critical of the Court's interpretation of RCW 10.31.030, as well as the Court's failure to at least discuss U.S. v. Edwards, 415 U.S. 800 (1974), a U.S. Supreme Court decision which allowed a search under similar circumstances as an**

**extension of the permissible search "incident to arrest". However, we also explained then that the decision was the law until overruled (note that the State Supreme Court denied review of the Gloria Smith decision), and we therefore suggested that the problem created by the decision could be avoided by more thorough searching "incident to arrest" at or near the time and place of the arrest. See Feb. '91 LED:18.**

**In 1992, three years after the Gloria Smith decision had been announced by Division Three, Division One issued an opinion in State v. Harris, another bail-warrant-arrest case. The Harris opinion arguably was inconsistent in one respect with the opinion in Gloria Smith. In Harris (see Jan. '93 LED:13), the police had arrested Harris on a bail warrant and searched him before placing in a holding cell. There was a dispute over whether the arresting officer had advised Harris of the bail element of the warrant, and there was also a dispute over whether Harris had asked to call his mother to come to the jail and post bail.**

**One element of the prosecutor's argument justifying the search of Harris' person explained that jail security needs demand that even a person making arrangements to post bail on a warrant generally must be placed in a holding cell pending the posting of bail. As the Court of Appeals acknowledged in Harris, there are "many reasons why it may be impractical to hold arrestees [anywhere other than in a holding cell] ... including lack of personnel to supervise them." A jail facility arguably can justify search in this circumstance based on the same considerations that, under well-established Fourth Amendment doctrine, justify inventorying the person and personal effects of any other person placed in a jail cell (those considerations are (i) jail security, (ii) protection of the prisoner's personal property, and (iii) protection of the jail from a prisoner's later claims of lost or stolen personal property).**

**However, in Harris, the prosecutor was also able to argue from the facts of that case that arrestee Harris was a gang member, and from the arresting officer's past experience with gang members, the officer could reasonably believe Harris to be carrying some sort of weapon. Division One found the gang membership to provide an exigent circumstance, at least for the very limited purpose of justifying the placement of Harris in a holding cell. Thus, by finding exigent circumstances, Division One was able to avoid squarely addressing the correctness of Division Three's Gloria Smith ruling, which had appeared to reject the idea of a broad "holding cell exception" to its no-search rule. The Gloria Smith opinion had suggested that persons waiting for their bail money to arrive could be "watched" rather than placed in a holding cell.**

**Division One upheld the search in Harris. Review was not sought in the State Supreme Court. Thus, we are left with either: (A) inconsistencies between the opinions of Division One in Harris and Division Three in Gloria Smith/Caldera, or (B) distinguishable fact situations, or (C) both. Division Three's opinion in Caldera digested above did not attempt to distinguish Harris, thus suggesting that Division Three views the decisions as being inconsistent in some respect.**

**At LED deadline, the prosecutor's petition for review to the State Supreme Court was pending in the Caldera case. We hope that the State Supreme Court grants review and ultimately rules: that bail warrant arrestees may be placed in a holding cell while arrangements are being made to post bail; and that anyone placed in a cell, holding cell or otherwise, is subject to search for jail security purposes.**

**Having stated our views about how we hope the State Supreme Court resolves the Gloria Smith issue, we note again that the court decisions discussed in this comment do not affect an officer's authority to search a person at the time and place of making a custodial arrest. Whether the custodial arrest is made on a warrant or on probable cause, a thorough search of the arrestee's person and personal effects may be made at that time, prior to transport to the jail or police station.**

**SEARCH OF JUST-PROWLED VEHICLE OK AS COMMUNITY CARETAKING SEARCH; ALSO NO DOUBLE JEOPARDY PROBLEM IN CIVIL FORFEITURE, CRIMINAL CONVICTION**

State v. Lynch, 85 Wn. App. ___ (Div. III, 1997)

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

> On the night of March 9, 1994, Mr. Lynch parked his 1989 Chevrolet Astro van on a street near the Ridpath hotel. At around 9 p.m., a Ridpath employee observed several youths breaking into the vehicle. She called the police, and Officer Eric Olsen of the Spokane Police Department responded.
>
> Officer Olsen checked the van, which had "Spokane Punchboard" painted on the side of it, and found the sliding door was unlocked. When he opened the door, he saw bags of pull tabs. He testified it appeared the bags had been gone through or ransacked -- they were "jumbled all over."
>
> In an attempt to identify the vehicle's owner, Officer Olsen opened the van's front passenger door to look for registration documents. The first thing he saw was a cellular phone on the console with a checkbook visible beneath it. Officer Olsen moved the phone and picked up the checkbook, assuming it belonged to the van's owner and would have a name, address, and telephone number in it. He immediately noticed a baggy of bindles the checkbook had hidden from view. From his police experience, Officer Olsen knew that bindles commonly are used to package cocaine. He field tested the white powder inside one of the bindles and obtained a positive result for that drug.
>
> As Officer Olsen conducted the field test, a man approached him, told him he knew the owner of the van and offered to go get him. In a short time, he returned with Mr. Lynch. Officer Olsen explained that he had entered the vehicle to find the owner's name and had discovered the bindles. He arrested Mr. Lynch, searched him incident to the arrest, and seized another bindle from Mr. Lynch's coat pocket.
>
> The State charged Mr. Lynch with possession of cocaine. The Spokane police chief also instituted an in rem civil proceeding to forfeit the van and other items seized from Mr. Lynch at the time of his arrest. The chief obtained a decree of forfeiture on May 3, 1994, based on a finding the van was used to facilitate the crime of possession. The decree followed a hearing at which Mr. Lynch contested the forfeiture. Mr. Lynch also unsuccessfully moved in the criminal

prosecution to suppress the cocaine Officer Olsen found in the van. He was convicted of possession on October 7, 1994, on stipulated facts.

Mr. Lynch appealed his conviction. While his appeal was pending, he moved the superior court to vacate the judgment and sentence and dismiss the possession charge on the ground the prior forfeiture constituted punishment for the same offense. As such, he argued the subsequent criminal conviction violated the state and federal constitutions' prohibition against double jeopardy. The superior court granted the motion on March 13, 1995. Thereafter, Mr. Lynch's appeal was dismissed, the State appealed the order vacating the conviction, and Mr. Lynch cross appealed the court's denial of his motion to suppress.

ISSUES AND RULINGS: Was the officer's search of the van valid as a community caretaking search? (ANSWER: Yes) Result: Reversal of Spokane County Superior Court vacation of conviction for possession of controlled substances; conviction reinstated.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Lynch contends Officer Olsen did not act reasonably when he entered Mr. Lynch's vehicle to look for documents identifying the owner. Other less intrusive means of identifying the owner existed. First, Officer Olsen could have obtained the owner's name through a computer check, then contacted him to determine whether he wanted the police to secure the van. Second, the vehicle also had "Spokane Punchboard" painted on the side, but Officer Olsen did not attempt to call that business because of the lateness of the evening. Either approach would have been less intrusive than entering the van itself.

The courts have recognized that police officers acting in their "community caretaking function" sometimes perform services in addition to enforcement of the penal laws. When an officer makes a reasonable and good faith search in the course of such as service, evidence of a crime he or she discovers during the search arguably is admissible. "[I]f 'an officer has probable cause to believe that a vehicle has been the subject of burglary, tampering, or theft, he may make a limited entry and investigation, without a search warrant, of those areas he reasonably believes to have been affected and of those areas he reasonably believes might contain evidence of ownership.' " 3 Wayne R. LaFave, *Search and Seizure* § 7.4(e) at 568 (1996) (quoting Model Rules for Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles, rule 302(A)(1974)).

The facts of our case...support the officer's actions. Here, we had an eyewitness to what appeared to be a vehicle prowling of Mr. Lynch's van. In investigating that report, Officer Olsen looked inside for evidence indicating the vehicle had been disturbed. He found pull tabs spread in disarray over the back seat and floor. Hence, Officer Olsen's reaction that the owner should be notified appears reasonable, as does his reaching for the checkbook, an obvious source for identifying the owner. [T]he alternative of checking the vehicle's license number is apparent from the advantage of hindsight, but is not necessarily a proper "gauge by which to judge the officer's actions."

> Officer Olsen's search of the van was pursuant to his community caretaking function and was reasonable under the circumstances present in this case. The facts support an exception to the warrant requirement, and the court properly admitted the cocaine into evidence. We affirm the trial court's denial of Mr. Lynch's motion to suppress.

[Some citations omitted]

NOTE RE DOUBLE JEOPARDY ISSUE: The Court of Appeals also holds that it did not violate the double jeopardy protections of either the state or the federal constitution for the government to pursue both civil forfeiture of the van and criminal prosecution. The double jeopardy issue is controlled by the United States Supreme Court decision in U.S. v. Ursery, 135 L.Ed. 2d 549 (1996), reported in the Aug. '96 **LED** at page 11.

**OBJECTIVE CUSTODY TRIGGER TO MIRANDA; FOCUS IRRELEVANT, BUT WARNINGS REQUIRED PRIOR TO OFFICER'S QUESTIONING OF 14-YEAR-OLD IN SCHOOL OFFICE**

State v. D.R., 84 Wn. App. 832 (Div. I, 1997)

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

> D.R., a 14-year-old eighth-grader, was charged with engaging in sexual intercourse with his 13-year-old sister, M.R. During the trial, the State presented the testimony of J.K., who said he had seen D.R. and M.R. having what he believed to be sexual intercourse in June or July of 1994.
>
> The State also presented the testimony of [a] Sheriff's detective, who interviewed D.R. the next September in the assistant principal's office at the child's school. A social worker and the assistant principal also were present during the interview. [The] detective was dressed in plain clothes; his gun was not visible. [The] detective told D.R. he did not have to answer questions, but he did not give D.R. the Miranda warnings because he concluded the child was not in custody. The detective told D.R. he and the social worker had spoken to M.R. earlier. At the time of the interview, [the] detective viewed D.R. as the "focus subject of the investigation." The detective conceded that his questions were "leading," and that he may have told D.R. : "We know already because [M.R.] told us."
>
> D.R. testified he was summoned to the assistant principal's office, where [the] detective showed him his badge and told him he was not required to answer questions. D.R. said the detective did not tell him he was free to leave, nor did he believe he was free to leave, based in part on his previous experience in the assistant principal's office. He testified the detective confronted him by saying, "[W]e know you've been havin' sexual intercourse with your sister...." D.R. also testified that at the time he did not know what incest was, and he did not know it was illegal for him to engage in sexual intercourse with his sister.
>
> The trial judge concluded that, although he was a "little concerned about [the] coercive environment" of the interview, D.R. was not in custody because 'he did not even feel that he was talking about criminal violations. May be [sic][he] could get in trouble with the principal or somebody but not the law." [The] detective

> then was permitted to testify that D.R. had admitted having consensual sexual intercourse with M.R. between December 1993 and June 1994.
>
> D.R. denied making the statements to [the] detective and denied having intercourse with M.R. He testified it was J.K. who was having intercourse with M.R., and that he interrupted them.
>
> The trial court found it was clear there was an act of sexual intercourse involving M.R. that day, and the only factual question was whether D.R. or J.K. was involved. The court found J.K.'s testimony credible, and found D.R. guilty of incest.

ISSUE AND RULING: Was D.R. in "custody" for Miranda when the detective questioned him in the school office? (ANSWER: Yes) Result: Grant County Juvenile Court conviction of first-degree incest reversed, and case is remanded for possible re-trial.

ANALYSIS:

The Court of Appeals begins its legal analysis by explaining the Miranda warnings trigger, and then explaining that the only pertinent issue in this case is whether D.R. was in "custody":

> The Miranda rule applies when "the interview of examination is (1) custodial (2) interrogation (3) by a state agent." Unless a defendant has been given the Miranda warnings, his statements during police interrogation are presumed to be involuntary.
>
> It is undisputed that [the] detective was a state agent, that he interrogated D.R., and that the detective did not give the child the Miranda warnings. The question therefore is whether D.R. was in custody for Miranda purposes during [the] detective's questioning.
>
> The Miranda safeguards apply "as soon as a suspect's freedom of action is curtailed to **a 'degree associated with formal arrest.**'" Whether a defendant was in custody for Miranda purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed."...It thus is irrelevant whether the police had probable cause to arrest the defendant...whether the officer subjectively believed the suspect was or was not in custody...or even whether the defendant was or was not psychologically intimidated.
>
> Whether there was probable cause to arrest D.R. is not a factor in the analysis, nor is it relevant that [the] detective believed D.R. was not in custody or that D.R. subjectively believed he was free to leave or even understood the potential consequences of his conversation. The sole question is whether a 14-year-old in D.R.'s position would have "reasonably supposed his freedom of action was curtailed."

[Citations omitted; bolding added by **LED** Ed.]

The Court of Appeals then notes that two Oregon decisions, Loredo and Killitz, involved similar questioning by officers in school settings. The Oregon courts found to be significant in those

cases whether the officers had advised the students that they were free to leave. Then the D.R. court concludes its Miranda custody analysis:

> The facts of Loredo are strikingly similar to those in this case. The most significant difference is that D.R. was not told he was free to leave, a factor on which the Oregon court relied heavily in both Loredo and Killitz. We agree this factor is significant, and conclude that D.R. was in custody, in light of [the] detective's failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation. [The] detective was required to formally advise D.R. of his rights under Miranda, and the trial court erred in admitting D.R.'s inculpatory statements.

**LED EDITOR'S COMMENT: We think that the Court of Appeals probably got it right in the D.R. case. The custody test for the Miranda trigger is a purely objective one -- whether a reasonable person in the circumstances would believe his or her freedom was curtailed to a degree associated with a formal arrest (see bolded language above in excerpt from opinion). Police probable cause or "focus" is irrelevant, except to the extent, as here, that the officer's suspicions and evidence are communicated to the suspect through accusatory, leading questions. See California v. Stansbury, 128 L.Ed.2d 293 (1994) July '94 LED:02 (communicating your evidence could convey idea that person is "in custody", and this is a factor to be considered on the Miranda custody question).**

**Nor is the fact that the person being questioned is not free to leave dispositive. Terry stop general questioning or traffic accident questioning without more does not trigger a warnings requirement. What is difficult to define and what the cases tend to gloss over, is what the U.S. Supreme Court had in mind when it spoke of curtailing of freedom "to a degree associated with a formal arrest". Arguably, a trip to the principal's office, as here, is not analogous to the restrictions on freedom in a formal arrest. However, here, in light of the suspect's youth, the fact that the suspect was directed to go to the assistant principal's office, the officer's leading and accusatory questions, and the officer's failure to advise the suspect that he was free to leave at any time, we agree with the Court of Appeals. In this setting the "naturally coercive nature of the school and principal's office environment" made for an objectively custodial setting requiring Miranda warnings prior to any interrogation.**

**WHERE BAC DEVICE MALFUNCTIONS, DUI SUSPECTS MAY BE MOVED TO ANOTHER DEVICE FOR BREATH SAMPLES; NEW IMPLIED CONSENT WARNINGS NOT REQUIRED**

State v. Brokman, Dixon, 84 Wn. App. 848 (Div. II, 1997)

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

> During separate incidents in 1991, Brokman and Dixon were arrested for driving while under the influence of intoxicating liquor. Each was given appropriate implied consent warnings before providing breath samples for analysis by a malfunctioning DataMaster. In both cases, the DataMasters produced test results, but the test results were invalid because the DataMasters registered external standards below those required by WAC 448-13-050. Because the

DataMasters malfunctioned, each defendant was moved to another location where, without renewed implied consent warnings, he provided additional breath samples for analysis by a functioning DataMaster. The second tests produced valid results. Both district courts denied motions to suppress the results of the second tests. In denying the defendants' motions, the district courts relied on City of Sunnyside v. Sanchez, 57 Wn. App. 299 (1990) **[June '90 LED:12]** (officer has authority to complete test). The defendants were subsequently convicted of driving while under the influence. The respective superior courts reversed both convictions, finding in both cases that the State exceeded its lawful authority by giving second tests, i.e., by measuring more than two valid breath samples from each defendant.

ISSUES AND RULINGS: (1) Did the officers have authority to test the DUI suspects until they obtained a valid test? (ANSWER: Yes); (2) Where multiple tests are required due to a malfunctioning device, are new implied consent warnings required before testing on alternative devices? (ANSWER: No) Result: reversal of Pierce County Superior Court orders which had reversed District Court DUI convictions; DUI convictions of Robert Brokman and Larry W. Dixon reinstated.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) POWER TO CONDUCT ADDITIONAL TESTS

Brokman and Dixon contend that the officers did not have the authority to conduct additional tests after each defendant provided two breath samples for analysis by a malfunctioning DataMaster. They argue that because the WAC defines a test as consisting of at least two breath samples "sufficient to allow two separate measurements," WAC 448-13-050, they satisfied the requirements by providing two breath samples that were measured.

In Sanchez, Division Three held that an officer has the authority under RCW 46.20.308 to direct the testing of a suspect's breath until the test is complete, even assuming the breath samples were sufficient to allow measurements of their alcohol content. In Sanchez, the test was not complete when the defendant provided breath samples for analysis by an apparently malfunctioning DataMaster. Brokman and Dixon argue that Sanchez is distinguishable from their cases because in Sanchez no measurements were obtained whereas here the tests were complete when two measurements were obtained, even though the measurements were invalidated by external standard simulator solution tests. Brokman and Dixon make a distinction without a difference. There is no principled basis for distinguishing between a malfunctioning DataMaster that fails to obtain a measurement and a malfunctioning DataMaster that produces an invalid measurement. Because the purpose of the test is to achieve accurate results, we hold that RCW 46.20.308 and the administrative protocol permit multiple breath samples to be taken until a valid test occurs as defined by the protocol approved by the state toxicologist. As previously stated, under RCW 46.20.308 a test must be a valid test -- an invalid test does not satisfy RCW 46.20.308. No test occurs until a valid test occurs. To conclude that the State loses its statutory authority to conduct a valid test after two breath samples are provided for analysis by a malfunctioning DataMaster would be inconsistent with

the plain language of RCW 46.20.308, which contemplates consent to a "test or tests," and would be inconsistent with the ultimate purpose behind the administrative protocol, which is to achieve an accurate test result.

(2) NO NEED FOR ADDITIONAL WARNINGS

In Dixon's case, the superior court determined that the valid test results should have been suppressed on an alternative basis that implied consent warnings were not given a second time before Dixon provided breath samples for analysis by a functioning DataMaster. Neither the statute nor the implementing administrative code expressly limits implied consent to a set number of breath samples taken or DataMasters used. In fact, the possibility of multiple tests and thus multiple breath samples is contemplated by the plain language of the statute. See RCW 46.20.308. The protocol required by RCW 46.20.308 and approved by the state toxicologist provides assurance that the breath test conducted on the DataMaster machine will be accurate and reliable. Because multiple tests are contemplated by the plain language of RCW 46.20.308, and the taking of multiple breath samples necessitated by malfunctioning equipment is consistent with the statutory purpose of achieving a valid, accurate, and reliable measurement, there is no need for further implied consent warnings merely because initial tests do not meet the standards of WAC 448-13-050. We hold that under RCW 46.20.308 a person is deemed to have given consent to a valid, accurate, and reliable test or tests of the person's breath or blood by the statutorily and administratively defined methods, and that renewed implied consent warnings are not necessitated by any disruption in the tests caused by a malfunctioning DataMaster.

[Some citations and one footnote omitted]

**ONLY ONE ROBBERY COUNT WAS JUSTIFIED FOR TAKING AT CASH REGISTER ALTHOUGH TWO RESTAURANT EMPLOYEES WERE AT THE CASH REGISTER**

State v. Molina, 83 Wn. App. 144 (Div. I, 1996)

Facts: (Excerpted from Court of Appeals opinion)

Molina and Ruiz robbed a fast food restaurant. Ruiz pointed a gun at the manager, Schneider, and forced him to walk to the back office, open the safe, and hand him money (count 1). **[LED EDITOR'S NOTE: Count 1's conviction was not at issue on this appeal and is affirmed.]** While Ruiz was occupied with the manager, Molina pointed a gun at Reichmuth, the cook, and ordered her to open the cash registers and empty the contents into his bag. Reichmuth had no duties related to money and no access to the cash registers. Because Reichmuth could not comply, her supervisor stepped forward with the register keys and followed Molina's orders (counts 2 and 3).

Proceedings: Molina was charged with and convicted of three counts of first degree robbery.

ISSUES AND RULINGS: Under double jeopardy principles, could Molina lawfully be convicted on two counts of robbery for threatening both the cook and the supervisor while ordering the

supervisor to empty the till? (ANSWER: No) Result: reversal of one count of three Snohomish County Superior Court convictions of first degree robbery; affirmance of other two counts.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The constitutional prohibition against double jeopardy prevents multiple punishment for the same crime. Washington uses the "same evidence" test to determine whether multiple punishment place a defendant in double jeopardy. Under this test, double jeopardy occurs where the offenses are identical both in fact and in law. Because counts 2 and 3 are identical in law - both are first degree robberies - we must determine whether they are the same in fact.
>
> When robbery occurs in a commercial establishment, multiple counts are identical in fact when the victims exercise joint control over the property taken but there is no separate taking from each individual. To hold otherwise would unjustly base the number of convictions on the number of employees present during a robbery. Multiple convictions are proper where a bank robber takes money from each of several tellers. In contrast, a single taking from multiple victims may justify multiple counts where the victims each owned an undivided share in the property. Here, Molina took their employer's property from two employees, but took it only once. Therefore, the State relied on the same fact - the single taking - to prove both crimes. Because Molina committed only one robbery, we reverse and remand to strike the extra count.

[Footnotes and citations omitted]

**NONINCARCERATED OUT-OF-STATE TIME, AND IN-STATE TIME WHERE STATE DID NOT KNOW WHEREABOUTS, DON'T COUNT UNDER STRIKER SPEEDY TRIAL RULE (Cr.R 3.3)**

State v. Monson, 84 Wn. App. 703 (Div. III, 1997)

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

> In July 1980 and again in March 1981, Mr. Monson was charged in district court with two separate counts of second degree rape. RCW 9A.44.050(1)(a). Warrants were filed for both complaints in the intrastate and interstate police computer systems. At the time the first warrant was issued, Mr. Monson was on probation for a second degree assault conviction. His failure to comply with the probation conditions led to the January 1981 issuance of an additional warrant for parole violation. Due to the age of these complaints and warrants, the district court files have been destroyed.
>
> Mr. Monson had quit his job at Kaiser Aluminum and moved to Montana by August 1980. During the next decade, he worked as a truck driver, ranch hand and construction worker, and lived in several states. After efforts to serve him in 1980 and 1981, little was done to find him until 1984-85, when Spokane police again told his parents and other relatives about the warrants. From January 1990 until September 1992, he lived in Anacortes and Oak Harbor, Washington, and carried a Washington identification card. He moved to his father's New York

> State resort in September 1992. Later that month, he was detained by United States Customs agents at the Canada/New York border on the outstanding Spokane County warrant. At that time, a New York officer contacted the Spokane County Sheriff's Department and was told the department would not extradite. Mr. Monson was released from custody.
>
> About 17 months later, in February 1994, a detective from Spokane contacted the New York police and informed them Washington was ready to extradite Mr. Monson. New York officers arrested him and he was extradited to Spokane. On August 15 and September 20, 1994, the State filed informations in Spokane County Superior Court charging Mr. Monson with the July and August 1980 second degree rapes and he was arraigned. Subsequently, Mr. Monson moved for dismissal on the grounds his CrR 3.3 and constitutional speedy trial rights had been violated. He argued the speedy trial period should have begun running when he was detained in New York in 1992 and Washington refused to extradite him. The trial court denied the motion and ruled the speedy trial period was not triggered because Mr. Monson was not amenable to process while he was in New York.

[Footnotes omitted]

ISSUE AND RULING: Did the State exercise due diligence under Criminal Rule 3.3 (the Striker rule) in bringing defendant before the court for his first appearance? (ANSWER: Yes). Result: Case remanded to the Spokane County Superior Court for prosecution on two counts of second-degree rape.

ANALYSIS: Under the speedy trial rule of CrR 3.3, as well as under the State Supreme Court decision in State v. Striker , and subsequent court decisions interpreting CrR 3.3, if a long delay occurs in bringing a defendant to court for his first appearance following the state's filing of a complaint or information, the speedy trial period starts at the time the information or complaint was filed. However, any period of time during which the State exercised good faith and due diligence in bringing defendant to court does not count under CrR 3.3.

On the facts relative to Monson's time spent out of state, the Court notes that the State Supreme Court has held that time spent in a non-incarcerated status out of state never counts against the State under CrR 3.3. See e.g. State v. Stewart, 130 Wn.2d 351 (1996) **[Jan. '97 LED:10]**. As to the occasion in 1992 when Monson had been temporarily detained by custom's agents in New York, the Court holds that this mere temporary detention while the State of Washington was asked whether it wanted to extradite did not count against the State. The due diligence requirement of CrR 3.3 as interpreted in Striker does not require that the State of Washington extradite a non-incarcerated person on an outstanding warrant.

On the facts relative to Monson's time spent in the State of Washington between January 1990 and September 1992, the Court explains:

> Even if we accept Mr. Monson's assertion that the State's failure to bring him to trial during this time was not his fault, the record shows the State made several good faith efforts from 1980 on to notify him he was wanted and to serve the warrant. In particular, Mr. Monson's relatives were notified and the warrant was put both on the intrastate and the interstate computer systems. In 1980, Mr.

> Monson was ordered as conditions of probation to meet monthly with his probation officer and not to leave the county without written permission. He did not comply with these conditions. The fact that a state agency issued him an identification card sometime around 1990 does not reflect a lack of due diligence. All in all, the State's efforts to find and arrest Mr. Monson constituted due diligence, preventing application of the Striker rule.

**LED EDITOR'S NOTE: The Court of Appeals also rejects defendant's additional argument that his constitutional speedy trial rights had been violated.**

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## BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

**(1) SUPERVISOR-AUTHORIZED TAPE RECORDING OF DRUG CONVERSATION MAY INCLUDE MULTIPLE CONVERSATIONS WHICH OCCUR WITHIN 24-HOUR LIMIT OF RCW 9.73.230** -- In State v. Forest, 85 Wn. App. ___ (Div. I, 1997), the Court of Appeals rejects a drug-dealer's interpretation of RCW 9.73.230.

A King County Police Commander had authorized narcotics officers under RCW 9.73.230 to conduct one-party consent recording of conversations with a suspected drug-dealer. Under this statute for supervisor-authorized one party consent recording, the authorization was valid for 24 hours (subject to the possibility, not pertinent here, of two 24-hour extensions upon further supervisor-authorization).

In executing the authorized recording, an informant working with the unit made a recorded telephone call to the suspect to arrange a meeting. Then, still within the 24-hour period covered by the authorization, the informant met with the suspect, and the conversation in that meeting was recorded.

Defendant, Michael Todd Forest, was charged with delivery of a controlled substance. Prior to trial, he moved to suppress the tape recording of the face-to-face meeting, arguing that the statute permits the recording of only one conversation per authorization. The trial court rejected Forest's suppression motion, and he was convicted in a jury trial.

On appeal Forest argued that RCW 9.73.230 refers in the singular to "communication" and "conversation", and, therefore, police are not permitted to record multiple conversations within the statute's 24-hour period. In part, the Court of Appeals rationale for rejecting Forest's argument is as follows:

> We conclude that the Legislature did not intend to limit agency authorizations to one conversation per authorization. First, such a limitation would lead to absurd results, in contravention of a cardinal principle of statutory construction. As the State argues, and Forest acknowledges in his reply brief, drug transactions frequently involve multiple conversations to finalize the location of the sale. Under Forest's analysis, every time a suspect says in a recorded conversation that he or she would rather move a few blocks away to complete a transaction, the police would be prohibited from recording the completed transaction. This scenario would frustrate the express intent of the Legislature to enhance drug prosecutions by enacting the agency authorization statute. Furthermore, if agency

> authorizations can encompass only one conversation, most recording of drug transactions would have to occur under judicial authorizations. This is again because most drug transactions involve several contacts before the parties finalize a location. Such a result would render the agency authorization statute essentially superfluous, clearly contrary to the expressed legislative intent.
>
> In addition, the statute authorizes the police to record "communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction." It would be anomalous to permit the police to record communications of additional persons but prohibit them from recording multiple conversations by the same person concerning a particular drug transaction.
>
> Finally, the authorization in this case expressly contemplates two conversations, one by telephone to arrange the transaction and one in person to finalize it. It would be a triumph of form over substance to require the police to obtain separate authorizations for the single transaction in question here. We decline to do so.

[Footnotes, citations omitted]

Result: affirmance of King County Superior Court conviction for delivery of a controlled substance.

**(2) PUBLIC DUTY DOCTRINE DOES NOT PROTECT DSHS FROM LIABILITY FOR FAILING TO INVESTIGATE REPORT OF CHILD ABUSE; "LEGISLATIVE INTENT" EXCEPTION APPLIES** -- In Yonker v. DSHS, 85 Wn. App. ___ (Div. I, 1997), the Court of Appeals rules that a child-victim and her mother are not barred by the "public duty doctrine" from bringing a civil action against DSHS for failing to adequately investigate the mother's report to DSHS for possible sexual abuse by the child's father.

Under the law governing negligence lawsuits, a party is not liable to another unless the party owes a duty of care to the other and causes injury to the person through a breach of the duty. When a plaintiff sues the government for not providing protection from third parties, the government is generally held to not have a duty to the individual plaintiff but to have only a general, non-actionable obligation to the public. The general rule as to lack of specific duty for failure of the government to provide protection from harm by third parties is known as the "public duty doctrine".

One exception to the "public duty doctrine" is the "legislative intent" exception. This exception applies if the Legislature has clearly demonstrated its intent through a statutory scheme to protect a particular group of victims. This exception to the public duty doctrine has been addressed in such cases as: (1) police failure to stop a person from driving drunk (Bailey v. Forks, 108 Wn.2d 262 (1987) **August '87 LED:12**) and (2) police responsibility to arrest within a certain time period for certain domestic violence assaults (Donaldson v. Seattle, 65 Wn. App. 661 (Div. I, 1992) **Nov. '92 LED:19**).

In Yonker, the Court of Appeals rules that the Legislature intended to protect victims of child abuse when it placed certain special responsibilities on DSHS to investigate reports of child abuse (see chapter 26.44 RCW). Accordingly, the Yonker Court holds that a mother and her child may

pursue a lawsuit against DSHS for failure to investigate the mother's reports to DSHS of sexual abuse of the child by the child's father.

Result: Whatcom County Superior Court summary judgment ruling for DSHS reversed; case remanded for trial.

**LED EDITOR'S COMMENT: It is our guess that the Yonker Court's rationale for applying for "legislative intent" exception to DSHS for failure to investigate suspected child sexual abuse may open law enforcement agencies to similar civil suits. RCW 26.44 imposes various powers and duties on law enforcement agencies regarding reporting and investigation of child abuse matters. Failure by a law enforcement agency to carry out these statutory powers and duties to protect a legislatively protected class of victims would arguably subject the agency to a civil suit under the above-discussed exception to the "public duty doctrine."**

CROSS REFERENCE NOTE: See the next **LED** entry in this issue for another "public duty doctrine" ruling.

**(3) PUBLIC DUTY DOCTRINE BARS SUIT BY DRUNK DRIVER FOR HER INJURIES; SHE WAS NOT IN THE CLASS OF VICTIMS THAT THE LEGISLATURE INTENDED TO PROTECT** -- In Alexander v. Walla Walla, 84 Wn. App. 687 (Div. III, 1997), the Court of Appeals agrees with a trial court ruling which threw out a lawsuit against certain Walla Walla area police agencies. A drunk driver had sued the agencies for failing to prevent her from driving drunk.

Mary Alexander had become intoxicated while drinking for many hours at the home of acquaintances. When a domestic dispute arose between the acquaintances, police were called to the home. Ms. Alexander briefly talked to the responding officers outside the home (there was significant dispute about what was said and observed in these communications). Then she got into her car and drove off as the responding officers went to the home to handle the domestic matter.

The domestic dispute investigation was uneventful. However, as the officers were talking to Ms. Alexander's acquaintances inside the home, they learned over the radio that Ms. Alexander had been involved in an accident. She had driven her car into the back of a parked van on a nearby street.

She sued the law enforcement agencies and the officers for their failure to keep her from driving and injuring herself. In response, the law enforcement agencies and the officers made a claim of immunity under the "public duty doctrine" (see Yonker **LED** entry immediately above discussing that doctrine -- the doctrine generally bars suits by victims for the failure of the government to protect them from third parties). Ms. Alexander offered two theories under which she would be excepted from the bar of that doctrine.

First, she relied upon the State Supreme Court decision in Bailey v. Forks, 108 Wn.2d 262 (1987) **August '87 LED:12**. In Bailey v. Forks, relying on various laws relating to alcohol consumption, the State Supreme Court held that the "**legislative intent exception"** allowed an innocent third party MVA victim of a drunk driver to sue a law enforcement agency for the failure of the agency to prevent a known intoxicated person from continuing to drive. However, the Alexander Court holds that the legislative intent exception doesn't apply in Ms. Alexander's case because: (1) there was no evidence that the officers had knowledge that Ms. Alexander was going to drive after she

talked to them; and, more importantly, (2) the Legislature did not intend to protect drunk drivers from themselves. Only the innocent victims of drunk drivers are within the scope of the legislative protection, the Alexander Court holds.

Second, Ms. Alexander relied on the "special relationship exception", which allows a person to sue for the government's failure to protect the person from third parties where the following three requirements are met:

> (1) direct contact or privity between the public official and the injured plaintiff that sets the latter apart from the general public, (2) express assurances given by the public official, and (3) justifiable reliance by the plaintiff on those assurances.

The Alexander Court rejects this theory, finding no evidence of any express assurance by police to Ms. Alexander that she could or should drive away drunk.

Result: affirmance of Walla Walla County Superior Court order for summary judgment dismissing the lawsuit.

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## NEXT MONTH

The June '97 **LED** will address, among other recent appellate court decisions, the ruling of Division Two of the Court of Appeals in State v. Perea, 1997 WL 114579 (Div. II, 1997). In Perea the Court of Appeals has held that police lacked authority to search a vehicle incident to a lawful custodial arrest where: (1) a patrol officer with probable cause to make a custodial arrest pulled in behind a driver who was parking his car; (2) the patrol officer activated his flashers; and (3) the driver immediately exited and locked his car.

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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.