Law Enforcement Digest

December 1998

HONOR ROLL

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483rd Session, Basic Law Enforcement Academy - August 12th through November 4th, 1998

President:	Shane Gardner - Clark County Sheriff's Office
Best Overall:	Joseph G. Kolp - Pierce County Sheriff's Office
Best Academic:	Joseph G. Kolp - Pierce County Sheriff's Office
Best Firearms:	Joseph G. Kolp - Pierce County Sheriff's Office
Tac Officer:	Laurie Macrea - Department of Fish and Wildlife

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Corrections Officer Academy - Class 278 - Spokane Session, September 3rd through October 1, 1998

Highest Overall:	Richard Ridgeway - Airway Heights Corrections Center
Highest Academic:	Lars Kanikeberg - Airway Heights Corrections Center
Highest Practical Test:	Richard Ridgeway - Airway Heights Corrections Center
Highest in Mock Scenes:	Laura Coleman - Washington State Penitentiary Scott Kenoyer - Spokane County Jail
Highest Defensive Tactics:	Dalene Kersey - Spokane County Jail

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1998 SUBJECT MATTER INDEX

LED EDITOR'S NOTE: This is our annual LED subject matter index. It covers all LED entries from January 1998 through December 1998. Since 1988 we have published a twelve-month index each December. In the past 20 years, we have also published two multi-year subject matter indexes. In 1989, we published an index covering LED's from January 1979 through December 1988. In 1994, we published a five-year subject matter index covering LED's from January 1989 through December 1993. We plan a new five-year index covering LED's from January 1994 through December 1998; it should be ready by early 1999. The 1989-1993 cumulative index, the 1994-1998 cumulative index (when completed), and current issues of the LED from January 1992 on (excluding January and February of 1993) are available on the CJTC Internet Home Page at: http://www.wa.gov/cjt.

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Search can't be justified as "incident to arrest" if the search follows an officer's objectively manifested decision not to make a custodial arrest. State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) - Oct 98:12

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Challenge to Washington motorcycle helmet law fails, for now. City of Bremerton v. Spears, 134 Wn.2d 141 (1998), - March 98:08

Crediford's "implied element" holding confirmed in DUI case. City of Seattle v. Norby and City of Seattle v. Burdge, 88 Wn. App. 545 (Div. I, 1997) - May 98:14

"Juvenile" means "under the age of 21" for purposes of statutory license-revocation scheme of RCW 46.20.265. Davis v. DOL, 90 Wn. App. 370 (Div. III, 1998) - May 98:17 [Review is pending in the State Supreme Court]

Bicyclist in crosswalk is pedestrian whether on or off bike. Pudmaroff v. Allen, 89 Wn. App. 928 (Div. I, 1998) - Nov 98:13 [Review is pending in the State Supreme Court]

UNIFORM CONTROLLED SUBSTANCES ACT, OTHER DRUG LAWS

Evidence sufficient to prove constructive possession of cocaine found in apartment. State v. Tadeo-Mares, 86 Wn. App. 813 (Div. III, 1997) - Feb 98:20

Evidence sufficient to convict for delivery of cocaine. State v. Gill, 85 Wn. App. 672 (Div. II, 1997) - March 98:19

Computer disk is "map" for purposes of "school bus stop" UCSA sentence enhancement. State v. Nunez-Martinez, 90 Wn. App. 250 (Div. II, 1998) - May 98:14

"Drug house" statute's "use" prong requires proof of use by persons other than the defendants. State v. Fernandez, 89 Wn. App. 292 (Div. I, 1997) - May 98:19

Selling illegal drugs to two buyers in sequence, but at same time and place, is only one crime for sentencing purposes. State v. Williams, 135 Wn.2d 365 (1998) - Sept 98:14

Marijuana possessor's defense of religious freedom rejected; also, his defense of unwitting possession restricted. State v. Balzer, 91 Wn. App. 44 (Div. II, 1998) - Nov 98:14

Marijuana weight includes water if plant is "wet" when seized. State v. Kazeck, 90 Wn. App. 830 (Div. II, 1998) - Nov 98:15

PUD park is "public park" for purposes of UCSA enhanced sentencing. **S**tate v. Gordon, 91 Wn. App. 415 (Div. III, 1998) - Nov 98:19

Stop, frisk, and conviction for possession with intent to deliver upheld. State v. Miller, 91 Wn. App. 181 (Div. II, 1998) - Dec 98:18

VAGUENESS DOCTRINE

Archeological resource preservation act not void-for-vagueness. State v. Lightle, 88 Wn. App 470 (Div. III, 1997) - May 98:16

San Juan County ordinance against motorized personal watercraft survives attack. Weden v. San Juan County, 135 Wn.2d 678 (1998) - Oct 98:10

Stalking law held constitutional. State v. Lee, 135 Wn.2d 369 (1998) - Oct 98:11

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WASHINGTON STATE COURT OF APPEALS

ARSONIST LOSES ON STANDING, CHAIN-OF-CUSTODY, AND CORPUS DELICTI

State v. Picard, 90 Wn. App. 890 (Div. II, 1998)

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

> As they purportedly returned from a trip to Oregon, a fire destroyed the residence where Picard and his mother lived. Fire officials determined during their initial investigation that a portable electric heater left in a closet in the mother's bedroom ignited nearby combustibles, causing the destructive fire. Fire officials concluded that the fire occurred accidentally; they took the portable heater without a warrant or consent and placed it in storage. An insurance company subsequently paid Picard's mother her insurance claim.
>
> Picard eventually told his father that he "set the house on fire" and told his brother that he "took a Benda torch ... through the house and lit different spots of the house on fire." Eventually, Picard's admissions reached investigators, who reopened the case. Investigators uncovered incriminating evidence that they could not have discovered at the scene of the fire. Picard and his mother moved many of their personal valuables out of the house eight days before the fire. Approximately one and a half hours before the fire was reported to authorities, Picard's mother's credit card was used to purchase gasoline at a gas station located 46 minutes from the residence. The insurance company paid Picard's mother $81,677 for the structure, yet 12 months before the fire Picard's mother listed the residence for sale at $46,000. The assessed value of the property only months before the fire was $26,019. A forensic investigator, examining the heater for the first time in a laboratory, concluded that, before the fire, someone removed the heater's protective grill and placed combustible materials between the heating element and the grill. At trial, Picard denied the accusations against him and presented expert testimony that the evidence was consistent with an accidental fire. A jury convicted Picard of first degree arson.

ISSUES AND RULINGS: 1) Did Picard establish standing to challenge the seizure of a portable heater from his mother's bedroom closet despite his failure to establish a possessory interest in the heater or a reasonable expectation of privacy in the contents of her bedroom? (ANSWER: No); 2) Should the portable heater have been excluded from evidence due to the failure of the State to establish an unbroken chain of custody over the heater? (ANSWER: No, an adequate foundation for its admission was otherwise established); 3) Should Picard's admissions of guilt to his father and brother have been excluded from evidence under the corpus delicti rule; i.e., did the State fail to establish the corpus delicti of arson independent of Picard's admission? (ANSWER: No, the corpus delicti of arson was established by the circumstantial evidence) Result: Affirmance of Kitsap County Superior Court conviction of first degree arson.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Standing

> Seizure of personal property by a fire department implicates the Fourth Amendment because the fire department is acting under governmental authority and because the seizure may invade the owner's legitimate possessory interest in the property. The warrantless entry of fire officials into a burning building is a lawful exception to the Fourth Amendment's warrant requirement. "A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze." Once in the building, fire departments do not need a warrant to remain for a reasonable time

thereafter to investigate the origin, cause and circumstances of the fire, and the extent of the loss.

Picard acknowledges that a defendant must have standing to challenge an unlawful search or seizure under the federal and state constitutions. [T]he defendant has the burden of showing that he is entitled to constitutional protection, which includes the burden of showing that a privacy or possessory interest was invaded, that government agents participated in the invasion, and that he has standing to contest the invasion.

The trial court found that Picard resided in an upstairs bedroom of the residence while his mother resided in a bedroom on the main floor. There were at least five portable heaters in the house, some of which Picard may have purchased and others his mother may have purchased. One heater was permanently located on the main floor near the closet in his mother's bedroom. Although Picard had unrestricted access to most parts of the residence, he did not reside in that room and would normally knock on the bedroom door before entering if the door was closed. Picard did not use his mother's bedroom for living purposes in her absence.

Picard does challenge the trial court's conclusions of law, which state that the trial court was "unable to conclude" that Picard had an ownership or possessory interest in the portable heater located near the closet in his mother's bedroom, or that Picard had a legitimate and reasonable expectation of privacy in the contents of his mother's bedroom or in the contents of her bedroom closet. The trial court's findings that Picard "normally knocked on the door to his mother's bedroom, if the door was closed, prior to entering the bedroom" and that Picard "did not use [his mother's] bedroom ... for living purposes in his mother's absence" support the trial court's conclusions. Picard lacks standing to challenge the seizure of the heater.

2) Chain-of-custody/Foundation for evidence

Picard contends that there was a lack of foundation to admit the portable heater into evidence. He argues that his conviction should be overturned because the storage facility holding the heater was accessible to many people and because an unbroken chain of custody was not established. The State responds that admission of the heater was proper because it was satisfactorily identified and because a sufficient chain of custody was established.

A sufficient foundation for the admission of evidence may be established even without proof of an unbroken chain of custody. "Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." "A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party." The record shows that the lead investigator identified the heater at trial and testified that it was substantially in the same condition as it was when he picked it up at the scene of the fire. Picard's contention is without merit.

3) Corpus delicti of arson

The "corpus delicti rule" states:

> 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.

> "'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."

> "The corpus delicti of the crime of arson consists of two elements: (1) that the building in question burned; and (2) that it burned as a result of the willful and criminal act of some person." Corpus delicti can be proved by either direct or circumstantial evidence. Opportunity and convincing proof of motive on the part of the accused to burn a residence are circumstances that may establish that the building burned as the result of the willful and criminal act of some person. In State v. Despain, 152 Wash. 488 (1929), the defendant owned a dwelling that burned. The dwelling and its contents were insured for $1,900; their value, however, was approximately $1,000. The court held that the incendiary origin of the fire, proof of motive in the form of overinsurance, the defendant's presence, and the absence of anyone else were sufficient to establish the guilt of the defendant. Here, the burned house, the testimony of the State's forensic expert that the heater was rigged by a human to ignite combustibles, the movement of valuables out of the house just before the fire, the fact of overinsurance, and Picard's proximity to the fire establish the corpus delicti of the crime of arson.

[Some citations omitted]

STOP, FRISK, CONVICTION FOR POSSESSION WITH INTENT TO DELIVER UPHELD

State v. Miller, 91 Wn. App. 181 (Div. II, 1998)

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

> At approximately 3:45 a.m. on August 17, 1994, Officer Michael McCroskey of the Centralia Police Department was on patrol in downtown Centralia in a high crime area when he observed Miller and Tony Hickman arguing. He said that Miller and Hickman were yelling and screaming at each other, that Hickman's back was against a wall, and that Miller's finger was pointing in Hickman's face. McCroskey and Reserve Officer Scott Megeysi approached Miller and Hickman to make sure the argument did not escalate into "something physical."
>
> As the officers approached, Miller attempted to leave and enter a nearby apartment building. Hickman walked away in a different direction. McCroskey, who followed Miller, told Miller to stop, that he needed to speak with him. Miller did not stop. Instead, he attempted to open the locked entrance to the apartment building. McCroskey then told Miller to turn around so that he could see his hands. In response, Miller put his hands in his coat pockets. McCroskey then "assisted" Miller in placing his hands on the wall, and frisked him for weapons.

During the frisk, McCroskey felt what he believed to be a knife on Miller's waist. Because Miller tried to turn around, McCroskey handcuffed him as a safety measure before removing the knife for inspection. A continued patdown produced a tin canister, about three inches by four inches and a half-inch deep. Concerned that the canister might contain a weapon, the officer opened it. Inside there were ten small plastic bindles of suspected methamphetamine and some marijuana. In his search of Miller's person, McCroskey also found $96 and a notebook containing names and what the officer termed "monetary marks."

ISSUES AND RULINGS: 1) Did the officer have sufficient basis to seize and then frisk Miller? (ANSWER: Yes); 2) Was there sufficient evidence to support Miller's convictions of possession of marijuana and methamphetamine with intent to deliver? (ANSWER: Yes) Result: Affirmance of Lewis County Superior Court convictions (two counts) of possession of marijuana and methamphetamine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals decision)

1) Justification for seizure and frisk

In this instance, the State relies primarily upon the "Terry stop" exception to the Fourth Amendment warrant requirement. Terry v. Ohio, 392 U.S. 1, (1968). This exception allows an officer to stop-and-frisk when: (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purpose. State v. Collins, 121 Wn.2d 168 (1993) **[July '93 LED: 07]**.

Under the first prong, an officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information. The Terry court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." In this case, McCroskey's contact of Miller was appropriate; McCroskey was seeking to maintain the status quo while he determined whether or not violence was about to erupt between Miller and Hickman.

Under the second prong, "[a] reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.' " The Washington Supreme Court has stated that " '[c]ourts are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing." ' " [citing Collins] Here, the officer's frisk was prudent. McCroskey had a founded, reasonable suspicion that Miller was armed and dangerous. McCroskey's suspicion was based upon Miller's attempt to flee the area, his refusal to turn around and to remove his hands from his pockets, the time of night, and the high crime area in which the incident was occurring.

The third prong of the test limits the scope of the frisk to that necessary to preserve officer safety. The search must be limited to a frisk for weapons. If an officer feels an object that may be a weapon, he or she may withdraw it for examination. The frisk leading to the discovery of Miller's knife was the fruit of a valid protective search, as McCroskey, already suspicious of Miller for the reasons described above, had cause to fear for his safety.

Further, McCroskey testified that he has seen, in training, containers similar to that on Miller's person capable of holding a .22 caliber Derringer pistol. This allowed McCroskey to examine the container's contents under the auspices of a protective search. Based upon these considerations, we conclude McCroskey did not exceed the proper scope of a Terry stop when he opened the canister to check for a weapon.

Thus, the drugs discovered on Miller were the fruits of a legal stop-and-frisk. The trial court did not err when it denied Miller's motion to suppress the knife and the canister as evidence.

2) Sufficiency of evidence of "intent to deliver"

Under RCW 69.50.401(a), it is unlawful for any person to possess a controlled substance with intent to deliver. It is clear in this case that Miller had possession of marijuana and methamphetamine. He argues, however, that the evidence was insufficient to prove his intent to deal the substances.

Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, there is sufficient evidence to prove beyond a reasonable doubt that Miller had intent to deliver the drugs. McCroskey found drugs packaged in amounts appropriate for individual use, approximately 25 empty plastic bindles, a list with names, numbers and "monetary marks" on it, $96, and a knife. When considered along with McCroskey's testimony on the significance of such items, this evidence is sufficient to establish, beyond a reasonable doubt, Miller's intent to deliver drugs.

Thus, the trial court did not err in convicting Miller of possession of marijuana and methamphetamine with intent to distribute.

[Some citations omitted]

LED EDITOR'S COMMENT: In addressing the Terry stop issue, the Court of Appeals quotes from a 1972 U.S. Supreme Court decision which contained language talking about an officer's authority to make a justified "approach" (or "contact") of a person. This is somewhat misleading language under the current case law on the "Terry stop" doctrine. Officers do not need any factual justification to approach or contact a citizen. Officers need reasonable suspicion of criminal activity only to make a "seizure" of the person.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DIVISION TWO OF COURT OF APPEALS TAKES BROADER VIEW REGARDING PRIEST-PENITENT CONFIDENTIAL COMMUNICATIONS PRIVILEGE THAN DOES DIVISION ONE – In State v. Martin, 91 Wn. App. 621 (Div. II, 1998), Division Two of the Court of Appeals interprets the priest-penitent privilege of RCW 5.60.060(3) more broadly than did Division One of the Court of Appeals in State v. Buss, 76 Wn. App. 780 (Div. I, 1995) **Aug 95 LED:22.**

After Scott Anthony Martin's infant child died, possibly from being shaken violently, Martin's mother contacted a preacher to counsel her adult son. The preacher and the son met on three occasions, but on all three occasions Martin's mother, and sometimes other people, were present during a part of the communications.

Prior to Martin's trial for second degree murder, the trial court held hearings in relation to the preacher's communications. Ultimately, the trial court held, based in large part on the Buss decision, that the priest-penitent privilege did not apply. The trial court then ordered the preacher to be held in contempt for refusing to disclose the communications.

RCW 5.60.060(3) provides:

> A member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

On appeal by Martin and the preacher, the State argued that the trial court was correct in holding the priest-penitent privilege unavailable. The state argued that: 1) the "course of discipline" of the preacher's religion in the Martin case (the Evangelical Reformed Church of Tacoma) does not "enjoin" its members to make individual, private confessions of sin; 2) Martin was not a member of the preacher's church, or any other church and hence was not himself "enjoined" by a church doctrine to make a confession; and 3) Martin's conversations with the preacher were not confidential, because other people, including Martin's mother, were present during the conversations. The first two of the three arguments were based on the decision of Division One in the Buss case in 1995.

In Buss, Division One had found the priest-penitent privilege to be quite narrow and to be inapplicable to a confession made to a "non-ordained church counselor," because: a) the church counselor was not ordained, b) the counseling session was not a formal "sacrament of confession," and c) the confessing defendant was not a church member who was himself controlled by church doctrines of confession. The Martin Court disagrees with the Buss Court's narrow reading of the priest-penitent statute in all three respects.

The Martin Court holds that, so long as a clergy member is directed by his or her religion to receive confidential communications, including confessions, and to provide spiritual counsel, then the privilege applies to such confidential communications, even if the confessor is not a member of the clergy member's denomination or of any other organized religion. Thus, the Martin Court holds the confession to qualify under RCW 5.60.060(3) with one qualifying question: Were the communications "confidential?" As with other such privileges (e.g., doctor-patient, attorney-client, spouse-spouse) the communications are not protected if other persons, not necessary to the communications, are present when the statements are made.

The Martin Court is unable to determine from the trial court record: A) who was present when various communications were made by Martin to the preacher, and B) whether one of the persons, e.g., Martin's mother, was "necessary" to some or all of the communications (under the various privileges for confidential communications, confidentiality is not destroyed by the presence of a third person if the person is needed in the communications, such as a legal secretary transcribing attorney-client communications). Therefore, the Court of Appeals remands the case to the trial court to hold hearings on these "confidentiality" questions.

Result: Reversal of Pierce County Superior Court contempt order; case remanded to trial court for more hearings on privilege issue and then for trial.

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NEXT MONTH

In the January 1999 **LED**, we will address, among other recent decisions: 1) the State Supreme Court's October 22, 1998 decision in State v. Walker, 1998 WL 743520 (reversing a Court of Appeals decision reported in the November 97 **LED** at page 10, and holding that exclusion of evidence is not required as to a consenting cohabitant even though police violate the Leach rule requiring that consent to search fixed premises be obtained from all cohabitants present at the time of the request or search); 2) the Division Three Court of Appeals decision in State v. Peterson, 1998 WL 726830 (Div. III, 1998) (holding that an officer's decision to impound a passenger-less vehicle being driven by a suspended driver was lawful under the totality of the circumstances – and distinguishing the case on its facts from the 1985 Division Three decision in State v. Reynoso, 41 Wn. App. 113 (Div. III, 1985) and the 1997 Division Three decision in State v. Coss, 87 Wn. App. 891 (Div. III, 1997) **Feb 98 LED:17)**; 3) developments under Initiative 692, the Medical Marijuana Initiative, which has an effective date of December 3, 1998; and 4) developments under chapter 203, Laws of 1998, which authorizes cities and counties to adopt local ordinances directing impoundment of cars driven by suspended and revoked drivers.

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