WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

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HONOR ROLL

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469th Session, Basic Law Enforcement Academy - October 8th, 1997 through January 8th, 1998

President:	Richard M. Thrasher - Department of Natural Resources
Best Overall:	Gordon J. Alves - Anacortes Police Department
Best Academic:	Stephen A. Davey - Oroville Police Department
Best Firearms:	Kevin M. Engelbertson - Lewis County Sheriff's Office
Tac Officer:	Cedric Gonter - Auburn Police Department

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Corrections Officer Academy - Class 260 - November 10th through December 12th, 1997

Highest Overall:	Karen Kristine Malella - McNeil Island Corrections Center
Highest Academic:	Greg E. Bolton - Washington Corrections Center for Women
Highest Practical Test:	James G. Childers - McNeil Island Corrections Center
	Jerry A. Lawrence - Washington Corrections Center
	Steve L. Nagy - Enumclaw City Jail
Highest in Mock Scenes:	Karen Kristine Malella - McNeil Island Corrections Center
Highest Defensive Tactics:	Gregg S. Curtis - King County Department of Adult Detention

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Corrections Officer Academy - Class 261 - November 10th through December 12th, 1997

Highest Overall:	Michael L. Jackson - Whatcom County Jail
Highest Academic:	Dawn M. Schneider - McNeil Island Corrections Center
Highest Practical Test:	Troy V. Elerick - King County Department of Adult Detention
	Thomas A. Gow - Kittitas County Corrections
	Michael L. Jackson - Whatcom County Jail
	Dawn M. Schneider - McNeil Island Corrections Center
	Larry C. Tingley - Washington Corrections Center
Highest in Mock Scenes:	Richard Dean Callahan - Washington Corrections Center for Women
	Brandon M. Fausett - Washington State Reformatory
	Thomas A. Gow - Kittitas County Corrections
	Michael L. Jackson - Whatcom County Jail
	Dawn M. Schneider - McNeil Island Corrections Center
	Richard Shumate - Auburn City Jail
	Joshua J. Tuckett - Washington Corrections Center
Highest Defensive Tactics:	William John Smith - Washington State Reformatory

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WASHINGTON STATE COURT OF APPEALS

CAR PASSENGER WHO DISOBEYED ORDER TO GET BACK IN CAR LAWFULLY ARRESTED

State v. Mendez, 88 Wn. App. ___ (Div. III, 1997) 947 P.2d 256

Facts: (Excerpted from Court of Appeals opinion)

> Sixteen-year-old Efrain Mendez was a passenger in a car stopped by police for a stop sign violation. The driver and Mr. Mendez immediately got out of the car. Following police protocol, the approaching officer twice ordered Mr. Mendez to get back in the car. Instead of doing this, he initially walked and then ran away. After a brief chase, he was caught and arrested for obstructing an officer. A search incident to the arrest turned up a marijuana pipe, which Mr. Mendez admitted was his after being advised of his Miranda rights.
>
> Mr. Mendez was charged with obstructing a public servant and possessing drug paraphernalia. He moved to suppress … arguing he was illegally seized …. At the combined suppression and adjudication hearing, the police officers acknowledged they did not suspect Mr. Mendez of any criminal activity. They testified it was departmental policy, their number one rule, to keep all occupants of a stopped vehicle inside the vehicle for officer safety.
>
> When Officer Hartman was asked how Mr. Mendez hindered and delayed him in his official duties by simply walking away, he testified he felt Mr. Mendez was putting both officers in danger and at risk by leaving the scene. When asked why, Officer Hartman suggested there could have been weapons present because "these guys appeared to be in a gang, based on their clothing--" and he had known gang members to carry weapons. Previously, Officer Hartman had testified Mr. Mendez was wearing: "Regular clothes, baggy clothes. I don't recall the color or specifics."
>
> Officer Hensley recalled that Mr. Mendez, when he first turned around after being told to get back in the car, had looked at him and "with his hands just kind of fumbled with his shirt, or jacket, whatever he had on." Officer Hensley did not testify that he felt in any personal danger from Mr. Mendez, although he called for a backup as a safety precaution because he was left alone with three people in the car when Officer Hartman took off in hot pursuit. When Officer Hensley was asked if Mr. Mendez's flight hindered him in his processing of the traffic citation, he testified the only thing that might have been a hindrance was the fact his attention was divided and he might not have focused on the driver as fully as he otherwise would have. Officer Hensley acknowledged there would have been not even that slight hindrance to issuing the citation had Officer Hartman simply allowed Mr. Mendez to walk away and not given chase. ***[LED EDITOR'S QUESTIONS: Isn't there always some risk that the walkaway passenger will double back? Should this safety concern be brought out in a suppression hearing?]***
>
> The court found Mr. Mendez guilty of obstructing the police officers and possessing drug paraphernalia.

ISSUES AND RULINGS: 1) Does a law enforcement officer have authority under the Fourth Amendment to automatically order a passenger to get back in a car during a traffic stop?

(ANSWER: Yes); 2) Was the arrest of Mendez for "obstructing" lawful where the arrest was solely based on Mendez's failure to comply with the officer's order to get back in the car? (ANSWER: Yes). Result: Affirmance of Yakima County Superior Court juvenile court adjudications for obstructing and for possessing drug paraphernalia.

ANALYSIS:

(1) Fourth Amendment authority to order disembarking passenger back into car in traffic stop

The Court of Appeals begins its analysis of the Fourth Amendment issue by explaining that, usually, a warrantless search or a seizure must be grounded in attendant justifying circumstances. In a very few categorical situations, however, the U.S. Supreme Court has allowed police to make searches or seizures based on "bright line" rules, not on attendant justifying circumstances. The Mendez Court then analyzes the case before it in light of two U.S. Supreme Court decisions giving police automatic authority to issue directives to a vehicle occupant to step out of the vehicle during a traffic stop:

> [In Maryland v. Wilson, 137 L.Ed.2d 41 (1997) **[April '97 LED:03]** the U.S. Supreme Court] decided the police could reasonably require all passengers to exit after a routine traffic stop as a matter of departmental policy for officer's safety. In a prior case, Pennsylvania v. Mimms, 434 U.S. 106 (1977), the court held that the police may order the driver out of the car during a routine traffic stop. The 1997 Wilson decision extended this so-called "bright-line rule" to passengers. After citing recent statistics for officer assaults and homicides that have occurred during traffic pursuits and stops, the court stated:
>
> > [A]s a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car.
>
> Consequently, the Court concluded "[w]hile there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal."
>
> Mr. Mendez argues that Wilson does not apply to his case because the Supreme Court expressly declined Maryland's invitation to "hold that an officer may forcibly detain a passenger for the entire duration of the stop." Additionally, he notes that the Supreme Court expressly accepted the police's rationale for ordering passengers out of the car which was to deny them access to any possible weapons concealed in the car. Mr. Mendez states he was walking away from the car and posed no real danger to the police. The distinctions Mr. Mendez draws with Wilson are valid. In fact, there is no evidence in this record that he posed any real danger to the police. Moreover, empowering police to order passengers to remain in a vehicle stopped for a traffic offense may be a greater intrusion upon our personal liberty than authorizing police to order passengers out of the vehicle. **However, as noted in Wilson, passengers at routine traffic stops present some danger to the police. This danger increases when the police cannot exercise reasonable control over their location by requiring them either to remain in the car or to exit the car. We conclude the benefit of increased**

police protection outweighs the intrusion to passengers. We hold the police lawfully ordered Mr. Mendez to remain in the car.

[Some citations omitted, bolding added by **LED** Ed.]

(2) Obstructing arrest

The Mendez Court quickly disposes as follows of the "obstructing" question:

> Mr. Mendez was charged with obstructing a public servant. Mr. Mendez contends a person does not commit the crime of obstructing a police officer by leaving the officer's presence without permission unless the officer has grounds to detain him. … Because we have determined that the police command to get back in the car was reasonable and lawful, Mr. Mendez's conduct hindered, delayed, and obstructed the police officers in their investigation of the traffic offense. His flight gave them reasonable cause for the arrest. State v. Hudson, 56 Wn. App. 490 **[April '90 LED:16 – LED Editor's Note: Hudson involved flight from a lawful Terry stop.]**

[Citations omitted]

NO STATE OR FEDERAL CONSTITUTIONAL VIOLATION IN VEHICLE "FRISK"

State v. Larson, 88 Wn. App. ___ (Div. I, 1997) 946 P.2d 1212

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

> The trial court's undisputed findings of fact establish that State Trooper David Scherf observed the defendant, Larry Larson, speeding in his pickup truck on Interstate 5 near Lynnwood. With lights flashing, Trooper Scherf maneuvered directly behind Larson, but Larson neither pulled over nor slowed down. Trooper Scherf observed Larson leaning forward and making movements toward the floorboard of his truck. After traveling some distance through a construction zone, Larson left the freeway and eventually stopped in a hotel parking lot.
>
> At Trooper Scherf's direction, Larson got out of his truck. Trooper Scherf placed himself between Larson and the truck, patted down Larson's outer clothing, and was careful not to allow Larson back in the truck. Trooper Scherf then stuck his head in the cab of the truck through the open door to visually inspect the area around the driver's seat. It is undisputed that this intrusion and visual inspection inside the truck cab constituted a warrantless search.
>
> In a pocket hanging down in front of the driver's seat, Trooper Scherf saw a syringe, blackened spoon and a cotton ball. Upon picking them up, he saw and opened a paper bindle containing heroin. Trooper Scherf arrested Larson for drug possession. Larson waived his Miranda rights and admitted the heroin was his.

> Trooper Scherf testified at the suppression hearing that if he had not found the drug-related items, he would have had Larson get back in the truck and would have proceeded with the usual activities involved in a traffic stop for speeding.
>
> The trial court denied Larson's motion to suppress evidence of the contraband discovered when the trooper put his head inside the open door of the truck. Larson was convicted for possession of a controlled substance in a bench trial on stipulated facts.

ISSUE AND RULING: In its 1983 decision in Michigan v. Long, the U.S. Supreme Court held under the Fourth Amendment that, during a Terry stop of a vehicle stopped for a traffic infraction, an officer who reasonably suspects that there is a weapon inside the vehicle may, for safety purposes only, conduct a limited protective search of the passenger compartment of the vehicle. DOES THE WASHINGTON CONSTITUTION SIMILARLY PERMIT A LIMITED PROTECTIVE SEARCH IN THIS SITUATION? (ANSWER: Yes) Result: Affirmance of Snohomish County Superior Court conviction for possession of a controlled substance.

ANALYSIS:

The Larson Court begins its analysis of the first issue by explaining that the Fourth Amendment of the U.S. Constitution clearly permits a vehicle frisk for officer safety purposes under these circumstances:

> The United States Supreme Court, in Michigan v. Long, [463 U.S. 1032 (1983)] upheld as valid under the Fourth Amendment a search involving similar facts. Under the fourth amendment to the United States Constitution, it is clear that a reasonable concern for officer safety, sufficient to justify the search of an automobile incident to a Terry stop, may arise even in circumstances where a lone driver is outside the automobile and has no immediate access to the car. Larson relies instead on the Washington State Constitution, art. 1, § 7, to argue the search of his truck violated his right not to be disturbed in his private affairs without authority of law.

Then, the Larson Court states the basic standard for vehicle frisks under the Washington Constitution, a standard which appears identical to the standard under the Fourth Amendment:

> Under the Washington Constitution, a valid Terry stop may include a search of the interior of the suspect's vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events.
>
> The trial court concluded the search was necessary to officer safety. The court found Trooper Scherf "had reason to believe Defendant might be armed following the bending motion he had observed in the truck, and the length of time it took Defendant to pull over." Larson contends his movements inside the car, even if they did give rise to a reasonable concern for officer safety, did not justify a search inside the truck once he had stepped outside and no longer had immediate access to the vehicle.

Next, the Court engages in a lengthy discussion of the Washington State Supreme Court's 1986 decision in State v. Kennedy, 107 Wn.2d 1 (1986), a case in which the State Supreme Court permitted a vehicle frisk based on a vehicle driver's similar furtive gestures from the driver of the vehicle being pulled over in a traffic stop. The only real difference in facts between Kennedy and the Larson case was that the vehicle in Kennedy had a front seat passenger, while defendant Larson had no passengers. After a lengthy discussion of the Kennedy decision [omitted here], the Larson Court explains its view that the Kennedy decision supports the "frisk" of Larson's car:

> In the present case, as in Kennedy, the officer observed the driver making furtive movements as if placing a weapon under the seat. As in Kennedy, the trooper, after stopping the vehicle, had the driver step outside where he could be prevented from reaching back into the car while they continued their discussion. But unlike the facts in Kennedy, there was no other passenger in the car. Larson asks us to find this distinction dispositive, and hold Trooper Scherf's intrusion into the interior of the truck was unnecessary to assure his safety because even if there was a weapon inside, no one had access to it.
>
> We do not find the distinction dispositive because here the stop was made for a different purpose than in Kennedy. In Kennedy, the purpose of the stop was to conduct an investigation. In the present case, the purpose of stopping Larson was to cite him for speeding, a minor traffic infraction. In stopping a vehicle for a minor traffic infraction, a police officer is authorized and expected to "detain that person for a reasonable period of time necessary to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." The certificate of license registration, by law, must be carried in the vehicle for which it is issued. Typically, this document is kept within the passenger compartment rather than on the driver's person. It was therefore reasonable for Trooper Scherf to anticipate that as he continued to carry out the traffic stop, sooner or later he would have to permit Larson to return to the truck to retrieve documents. Because Larson would then have had access to any weapon he might have concealed inside before getting out, the protective search to discover such a weapon was not unreasonably intrusive.
>
> As in Kennedy, the purpose of such a search is "to discover whether the suspect's furtive gesture hid a weapon". The scope of the search, therefore, is limited to the area of the vehicle defined by the suspicious movements observed by the officer. It is not coterminous with a search incident to arrest.
>
> Because Trooper Scherf's concern for his safety was objectively reasonable, he acted lawfully in searching inside the truck, and his search was properly limited in scope. The drug paraphernalia was in plain view. The trial court did not err in refusing to suppress the evidence.

[Some citations omitted]

CIVIL COMMITMENT SEIZURE AND SEARCH JUSTIFIED BY MAN'S VIOLATILE BEHAVIOR

State v. Dempsey, 88 Wn. App. ___ (Div. III, 1997) 947 P.2d 265

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

> Around 5:00 a.m. on March 18, 1995, Officer Frank Scalise responded for the second time to a call from the home of Mr. Dempsey's parents. Mr. Dempsey had threatened his parents, and they feared for their safety. Mr. Dempsey himself had twice called the police earlier that night, once from a restaurant and again later from the home. He believed "they" were circling in passing cars and were going to kill him. During Officer Scalise's earlier response to the home, Mr. Dempsey had admitted using methamphetamine within the past month and marijuana within the past week. He denied using anything in the last 48 hours. Officer Scalise had attempted to resolve the situation by suggesting that everyone go to bed.
>
> On his second visit, Officer Scalise observed Mr. Dempsey to be paranoid, volatile, verbally abusive and physically aggressive. At one point, he had to be restrained by police from assaulting his father. Officer Scalise decided to take Mr. Dempsey to Sacred Heart Medical Center for an involuntary mental health evaluation. Officer Scalise searched Mr. Dempsey before putting him in the patrol car and felt a large folding knife in his pants pocket. The officer reached into the pocket to remove the knife and immediately recognized a large bindle. Officer Scalise confirmed by field test that the bindle contained methamphetamine and arrested Mr. Dempsey for possession. Mr. Dempsey's motion to suppress the bindle was denied and he was convicted [of possession of methamphetamine].

ISSUES AND RULINGS: 1) Was the civil commitment search unlawfully pretextual? (ANSWER: No); 2) Was the scope of the civil commitment search reasonable? (ANSWER: Yes) Result: Affirmance of Spokane County Superior Court conviction for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Nonpretextual civil commitment search

> Washington's civil commitment statute, RCW 71.05, authorizes a police officer to take a mentally deranged person into emergency civil custody to obtain a professional evaluation of the person's mental state, if the officer reasonably believes there is a substantial and imminent likelihood the person will harm himself or others. RCW 71.05.150(4)(b); State v. Mason, 56 Wn. App. 93 (1989) **[March '90 LED:10]**. A search associated with such an emergency civil commitment falls under the emergency exception to the warrant requirement. State v. Lowrimore, 67 Wn. App. 949 (1992)) **[March '93 LED:15]**. This exception permits a warrantless search in the exercise of the police "community caretaking" function. State v. Loewen, 97 Wash.2d 562 (1982).
>
> Mr. Dempsey argues that his civil detention was pretextual. He points to the fact that, on discovery of the drugs, he was immediately arrested for possession and transported to jail, not to an evaluation facility. He contends this shows that the true motive for Officer Scalise's second visit was to search for evidence of Mr. Dempsey's recent drug use (use he had admitted) and the civil detention was merely a pretext.

The State responds that the pretext doctrine is no longer viable in Washington. This argument is based on recent Washington and federal cases subjecting probable cause for an investigative search to a purely objective standard and eliminating the subjective motivation of the arresting officer from consideration.

However, the medical emergency search must be distinguished from an investigative search for evidence of a crime. Unlike the purely objective analysis of probable cause required for an investigative search, the medical emergency exception requires that the search be actually motivated, both subjectively and objectively, by a perceived need to render aid. Likewise, an emergency civil detention must be supported by an objectively reasonable belief that the mental derangement creates an imminent likelihood of harm. **[Court here cites Lowrimore case. LED Ed.]**

The State must prove both the subjective and objective elements. The primary motivation must not be to arrest and seize evidence.

The relevant statutory language calls for the reasonable perception of "a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm...." RCW 71.05.020(3)(b). Once the basis for an involuntary commitment is established, authority for a protective search is implied by statute. Evidence discovered in furtherance of a caretaking function is admissible.

Mr. Dempsey was out of control on March 18, 1995. He agrees he was out of control. He was sufficiently distraught to call police twice for protection from imaginary homicidal pursuers. His parents were sufficiently afraid for their physical safety to call police. Mr. Dempsey tried to assault his father in front of the police. All attempts to calm Mr. Dempsey and defuse the situation had failed. This substantial evidence amply supports the court's finding that it was reasonable for Officer Scalise to believe that Mr. Dempsey was a substantial and imminent threat to himself and others. Officer Scalise could therefore legally seize Mr. Dempsey and seek a professional evaluation of his mental state.

Once the controlled substance was found in his possession, there was probable cause for arrest. From that point forward, RCW 71.05.150(4)(b) was no longer the operative procedure.

(2) Scope of civil commitment search

A search incident to a civil detention is not limited by Terry considerations. In a Terry stop, the only purpose for the search is to protect the officer from immediate harm while he completes his investigation. A civil custody search, on the other hand, has the primary purpose of protecting, not the officer, but the affected individual and others who may come into contact with him while rendering aid. The search here falls into the "emergency situation" exception to the warrant requirement. This exception permits a warrantless search to whatever extent is objectively reasonable to carry out the police caretaking function, given the circumstances reasonably perceived by the officer at the scene at the time. During

an intervention, the officer may search for any dangerous instrumentality. There need only be "some reasonable basis to associate the emergency with the place searched."

Here, Mr. Dempsey was in an acutely paranoid state. He perceived threats to himself from every passing car. It was reasonable for Officer Scalise to search for weapons before exposing himself and others to close contact with Mr. Dempsey. Moreover, the officer was not bound to limit his search to weapons. He had an obligation to identify and remove anything with which Mr. Dempsey might harm himself or others, including street drugs.

Evidence of drug violations discovered in the course of an emergency search is admissible provided the search was reasonably justified by the emergency situation.

The search of Mr. Dempsey was lawful and not limited to a pat down. We therefore do not reach his final issue that the search exceeded the "plain touch" expansion of the pat-down weapons search.

The evidence of drug possession was properly obtained pursuant to a lawful search, and the motion to suppress was properly denied.

[Citations omitted]

10-YEAR OLD'S CRIMINAL CAPACITY IN FIRE-SETTING CASE SHOWN BY HISTORY OF PAST ACTS AND LECTURES, PLUS OTHER EVIDENCE OF AWARENESS THAT CONDUCT WAS WRONG

State v. J.F., 87 Wn. App. 787 (Div. I, 1997)

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

On July 3, 1995, while serving as volunteer house-watchers for the Enumclaw police department, Arthur and Sandy Beane heard voices coming from behind an abandoned house. Arthur Beane saw two young boys pushing their bicycles away from the house. He asked them to stop, and they complied. The boys, J.F. and his [11-year old] cousin, told Beane that they knew they weren't supposed to be on the property, but were just looking around "to see what the bigger kids were doing." The cousin told Beane that a mattress was on fire on the second floor of the house and that he and J.F. had tried to put it out. While the cousin was telling Beane about the fire, J.F. repeatedly ordered him to be quiet.

Police officers arrived and called the fire department. One of the officers asked the boys if they had matches, lighters, or the like. J.F. pulled a butane lighter from his pocket and told the officer he had found it in an alley. At the police station, J.F.'s cousin told an officer that J.F. lit the mattress with the lighter he took from his pocket. J.F. eventually prepared a written statement in which he admitted setting the mattress on fire.
J.F. was charged with second degree reckless burning. Because of J.F.'s age, the court held a capacity hearing. The court heard testimony of Arthur Beane, J.F.'s mother, J.F.'s elementary school principal, and a public educator for the Enumclaw fire department. The court concluded that the State established that J.F. had the capacity to understand that the conduct of which he was accused was wrong and that he knew the conduct was wrong. J.F. was arraigned and entered a plea of not guilty. Subsequently, he changed his plea to guilty.

[**LED EDITOR'S NOTE: Other pertinent facts are set forth in the" analysis" portion of the Court's opinion below.]**

ISSUE AND RULING: Was there sufficient evidence to establish J.F.'s criminal capacity to commit reckless burning in the second degree? (ANSWER: Yes) Result: Affirmance of King County Superior Court juvenile adjudication of reckless burning in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 9A.04.050 establishes a statutory presumption of incapacity where a child is between 8 and 12 years old. This presumption applies in juvenile proceedings. The State has the burden of rebutting the presumption of incapacity by clear and convincing evidence.
>
> We agree with the court in State v. Linares, 75 Wn. App. 404, (1994) **[Sept '95 LED:16]**, that a juvenile's understanding of the legal prohibition and legal consequences of his or her conduct is not the sine qua non for determining whether he or she appreciates the wrongfulness of the conduct. The nature of the crime is, however, relevant to this determination. "The more intuitively obvious the wrongfulness of the conduct, the more likely it is that a child is aware that some form of societal consequences will attach to the act."
>
> Here, the record shows that J.F. learned about the wrongfulness of setting fires at least as early as age seven. Lisa Lapsansky, the public educator for the Enumclaw fire department, testified that in 1992, J.F.'s mother brought him to the fire station with concerns about his curiosity with fires. At that meeting, Lapsansky conducted a "child interview" with J.F., who was seven years old at the time. Lapsansky instructed J.F. on fire safety matters including "what you should do if you find matches or lighters, who should use matches or lighters, what are their uses, good fires, bad fires, and then, of course, some ways they can protect themselves as far as if they get fire on their clothes." Lapsansky met with J.F. again in October, 1994, after J.F. was found with a lighter at school and had lit a cigarette. Again, Lapsansky reviewed fire safety information with J.F., including a discussion about "good fires, bad fires."
>
> Children typically learn at an early age about the dangers of setting fires. Here, J.F. was taken to the fire station and subjected to two one-on-one lectures on fire safety within three years of his setting fire to the mattress. In light of this, by the time J.F. set the mattress on fire, a rational trier of fact could conclude that the wrongfulness of his conduct was intuitively obvious to him.
>
> Other factors besides the nature of the crime that are relevant in determining whether the child knew the act he or she was committing was wrong are:
>
> > (1) whether the child evinced a desire for secrecy, (2) the child's age, (3) prior conduct similar to that charged, (4) any consequences that attached to that conduct, and (5)acknowledgment that the behavior is wrong and could lead to detention.
>
> J.F. and his cousin showed a desire for secrecy during their meeting with the Beanes. For example, shortly after encountering Arthur Beane, both boys asked him whether he was a police officer. Even more indicative of J.F.'s desire for secrecy is the fact that while J.F.'s cousin was describing the fire to Arthur Beane, J.F. repeatedly told him to "shut up."
>
> The next Linares factor is the child's age. J.F. was 10 years old at the time of the incident and therefore in the middle of the range of ages to which the presumption of incapacity attaches. We find that J.F.'s chronological age does not weigh one way or the other in determining his capacity. Nor do we find that the fact that J.F. was diagnosed with attention deficit disorder changes the capacity determination. J.F.'s mother testified that this condition causes him to act on impulses without thinking of the consequences. He had not had his

medication to control this condition on the day of the incident. There was, however, no evidence to indicate that J.F. was functioning at less than a normal intellectual or cognitive level on that day or that missing his medication rendered him unable to understand that his conduct was wrong. Based upon the evidence in the record before us, we find that J.F.'s attention deficit disorder has no bearing on the capacity determination.

J.F. had previously engaged in conduct similar to that charged, another Linares factor. When he was seven years old, he set fire to some leaves. Two years later, J.F. was found in possession of a lighter at school. He lit a cigarette, but did not then start any other fire.

Consequences attached to both of these prior incidents. Although she could not recall the specifics, J.F.'s mother testified that after the first incident, when J.F. was seven years old, she punished him, either by grounding him or sending him to his room, "or something like that." J.F. told Lapsansky that after this incident, his mother spanked him and sent him to his room. As another consequence of this behavior, J.F. was taken to the fire department to listen to Lapsansky's fire safety lecture. After the second incident, when J.F. was found in possession of the lighter, he was suspended from school and taken once again to meet with Lapsansky for more fire safety education.

The last Linares factor is whether the juvenile acknowledged that the conduct was wrong. However, "a child's after-the-fact acknowledgment that he or she understood that the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence." This is because, after, for example, punishment by a parent or interrogation by a police officer, the wrongfulness of the conduct has become obvious to the child and is not indicative of the child's awareness of the wrongfulness of his or her act at the time it was committed.

In the present case, J.F. acknowledged to Arthur Beane that it was wrong for him and his cousin to be on the property and in the abandoned house. But, rather than admitting the wrongfulness of setting a fire, J.F. denied any responsibility. J.F. did not acknowledge the wrongfulness of his conduct until he entered a guilty plea. The timing of this is similar to the children's acknowledgments in K.R.L. and Linares, after the fact.

Had the evidence not supported the other Linares factors, the presumption of incapacity would not have been overcome solely by J.F.'s after-the-fact acknowledgment. In light of the other evidence, however, we find that a rational trier of fact could have found capacity by clear and convincing evidence. The disposition is affirmed.

[Court's Footnote: We reject the State's argument that J.F. waived his right to challenge the court's determination of capacity by pleading guilty. Capacity is a jurisdictional issue and was not a matter with which J.F. was charged in the information. Capacity was not waived when J.F. entered his guilty plea to the charge.]

[Some citations and footnotes omitted]

NO DUE PROCESS PROBLEMS IN SCHEDULING OF FORFEITURE HEARING

In re the Forfeiture of One 1988 Black Chevrolet Corvette, etc., 88 Wn. App. ___ (Div. I, 1997)

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

Joel Rae sold cocaine to a police informant on October 19, 1994. He arrived at the sale location in his 1988 black Chevrolet Corvette. The car was seized on January 5, 1995, and on that date Rae was served with notice of intent to forfeit the vehicle under RCW 69.50.505. On January 11, 1995, he notified the sheriff's office of his claim of ownership and right to possession as required by RCW 69.50.505(e). Because Rae notified the seizing

agency of his claim within 45 days of the seizure, he became entitled to a "reasonable opportunity to be heard as to the claim or right." RCW 69.50.505(e). The matter was referred to a hearing examiner. See RCW 69.50.505(e). On March 30, 1995, 78 days after Rae's request, the hearing examiner scheduled a prehearing conference for May 3, 1995. The full hearing was held on June 8, 1995, and the vehicle forfeited.

ISSUE AND RULING: Does RCW 69.50.505 or the constitutional right to due process require commencement of a full adversarial hearing within 90 days of the time that a property owner notifies a seizing agency of his claim? (ANSWER: No) Result: Affirmance of Snohomish County Superior Court decision upholding forfeiture of Joel Rae's 1988 Corvette.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 69.50.505 generally provides for the forfeiture of property used to facilitate the sale, delivery or receipt of controlled substances, or of property that is the proceeds of such activity. Subsection (b) of the statute sets forth the procedures for forfeitures. Seizure of the property is by warrant or it may be without process if incident to an arrest or a search under a search warrant. Notice of intent to forfeit the property must be given to the owner of the property, and those with any interest in the property, by the agency seizing it within 15 days of the seizure. If no person contests the forfeiture it is deemed forfeited. If contested in writing, a hearing is held before the chief law enforcement officer of the seizing agency or his or her designee. A person asserting a claim may remove the matter to a court of competent jurisdiction within 45 days after notifying the seizing agency of his or her claim. Otherwise, the hearing before the seizing agency and any appeal therefrom is under RCW 34. In cases involving personal property, the burden of producing evidence shall be on the person who claims possession or right to the property.

The APA requires the agency to commence the proceeding within 90 days. RCW 34.05.413(5) provides that "[a]n adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted." These provisions meet the requisites of due process unless Rae can show prejudice.

In United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, [461 U.S. 551 (1983)] the Supreme Court upheld the forfeiture of personal property in a case where the hearing was held over 18 months after the seizure. The court adopted a balancing test similar to those applied in speedy trial claims and also said that "there is no obvious bright line dictating when a postseizure hearing must occur." We adopt that reasoning for this case. It is both appropriate and consistent with the recent decisions of our state Supreme Court regarding real property forfeitures.

The United States Supreme Court analogized the length of time between a seizure and the initiation of the forfeiture hearing to the question of undue delay encompassed in the right to a speedy trial. The factors to be considered in such an inquiry are: (1) The length of the delay; (2) the reason for the delay; (3) the claimant's assertions of his right to a hearing; and (4) whether the claimant suffered any prejudice.

Here, the length of the delay, if any, was short, as the hearing began within 78 days of the request for hearing and concluded within 111 days. Any delay resulted largely from compliance with the APA as applied to the civil forfeiture statute. Other than being deprived of his property for a few additional days prior to the hearing, Rae has not shown prejudice to his case. The delay did not hamper his defense in any way. In fact, although the car was apparently seized improperly, the court found on other independent facts that the car should be forfeited. That result has not been challenged.

> On the facts of this case, the statutory procedures provided the requisite due process. But, this is not to say that other fact patterns might not give rise to a valid claim for more timely proceedings, or that the mere scheduling of a prehearing conference will indefinitely toll a claimant's right to a timely hearing in accordance with the balancing test set forth above.

"NO DUTY TO RETREAT" INSTRUCTION REQUIRED DESPITE FACTS SUGGESTING THAT DEFENDANT MAY HAVE BEEN INITIAL AGRESSOR IN FATAL FIGHT

State v. Wooten, 87 Wn. App. 821 (Div. I, 1997)

Facts: (Excerpted from Court of Appeals opinion)

> Hansen drove Stringer to Wooten's house to look for Robert Stark, a man that both Stringer and Wooten had been dating. Wooten and Hansen engaged in a fight outside of the house. At some point during the fight, Hansen threatened to kill Wooten, telling Wooten that she was going to "smoke" her. Wooten went inside, and Hansen and Stringer returned to Hansen's car. Wooten came back outside with a gun, approached the car, pointed the gun through the driver's side window, and fired it. The bullet hit [and killed] Stringer. Hansen did not believe that Wooten was actually trying to shoot anyone.
>
> Wooten claimed that the gun belonged to Stark, and that she was not familiar with guns. She explained that the threat to kill her was of great concern because Hansen was involved with gangs and was known to carry guns. She went back outside to try to cool things down so she would not have to fear retaliation. She brought Stark's gun with her in case she needed to defend herself. Wooten claimed that she saw Hansen reach for what she thought was a gun, so she fired what she intended to be a warning shot.

Proceedings: (Excerpted from Court of Appeals opinion)

> At trial Wooten argued self defense. The jury was instructed that self defense justifies a homicide when "the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer ... at the time of ... the incident." Force was defined as necessary when "no reasonably effective alternative ... appeared to exist and ... the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time." The jury was also instructed that the State had the burden of proving that homicide was not justifiable beyond a reasonable doubt.
>
> Wooten requested a "no duty to retreat" instruction, stating that a person has no duty to retreat from a place the person has a right to be and that a person may stand his or her ground and use lawful force to defend against an attack when the person has a reasonable belief that he or she is being attacked. The trial court declined to give the instruction, ruling that such an instruction was not supported by the evidence.

ISSUE AND RULING: Was Wooten entitled to a "no duty to retreat" instruction despite the evidence that suggested that Wooten was the initial aggressor? (ANSWER: Yes) Result: Reversal of Wooten's King County Superior Court convictions of second degree murder and second degree felony murder; remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Wooten argues that the trial court's refusal to give [a "no duty to retreat"] instruction prevented her from fully arguing her theory of self defense and relieved the State of its burden of disproving her defense. She argues that without the instruction, the jury could infer from the other instructions that self defense was inapplicable because it could conclude

that leaving the area where the vehicle was parked would have been more reasonable than her use of force. We agree.

A defendant is entitled to a "no duty to retreat" instruction when the evidence shows that the defendant was assaulted in a place where he or she had a right to be. A "no duty to retreat" instruction need not be given, however, when it is unnecessary to the defendant's case theory and when it would be superfluous because the issue of retreat was not raised or the facts show that the defendant was in retreat.

Although the State's theory focused on identifying Wooten as the initial aggressor throughout this altercation, Wooten's theory was self defense. *[Court's Footnote: We disagree with the State's contention that the only issue in this case was the identity of the initial aggressor. While the State argued that Wooten's altercation with Hansen had three distinct phases in which Wooten was always the initial aggressor, Wooten argued that Hansen was the initial aggressor and that she responded to Hansen's threats in self defense.]* As in Williams, a "no duty to retreat" instruction was necessary for Wooten to argue that theory. A reasonable jury could have believed Wooten's testimony that (1) Hansen's threat meant that she would have been shot in the near future, (2) she thought that it was necessary to return outside to diffuse the situation, and armed herself to do so out of fear of Hansen, and (3) based upon Hansen's actions at her car, Wooten reasonably believed that Hansen was about to shoot her. But without a "no duty to retreat" instruction, the jury could have concluded that self defense was nevertheless not applicable because flight was a reasonably effective alternative to Wooten's use of force. Because such a conclusion was possible, the failure to give this instruction was error.

Such an error may be harmless if the court is convinced beyond a reasonable doubt that the jury would have reached the same result absent an instructional error, which was trivial, formal or merely academic. As in Williams [State v. Williams, 81 Wn. App. 738 (Div. I, 1996) **Nov '96** LED:20] because a reasonable juror could have concluded that flight was a reasonable alternative to Wooten's use of force precluding a finding of self defense, we hold that the failure to give this instruction was not harmless error. Accordingly, we reverse Wooten's conviction.

KIDNAP EVIDENCE SUFFICIENT TO SUPPORT CONVICTION

State v. Ong, 88 Wn. App. ___ (Div. II, 1997) 945 P.2d 749

Facts: (Excerpted from Court of Appeals opinion)

One morning, Steven Ong went to the house of his friend, Christina Sero, and asked to borrow a car. When Sero said she would first have to take her seven-year-old daughter, Christina, to school, Ong offered to do that for her. The school was four blocks away, and Ong had driven Christina there at least once before. Sero also asked Ong if he could give Christina two dollars for a field trip. According to Sero, Ong said "he had it."

Ong and Christina left Sero's residence around 9:00 A.M. At 2:30 P.M., Sero learned that Christina had never arrived at school. At trial, the school principal testified that Christina was absent that day.

Sero immediately called the police. Charlene Barnes, Ong's mother, was also told, and she started looking for her son. Around 6:30 P.M., Barnes found Ong and Christina walking on East Sequim Bay Road. Barnes warned Ong that the police were looking for him, drove him "a little ways" up the road, and returned Christina to Sero.

Ong testified that he had agreed to drive Christina to school and give her two dollars for the field trip. But because he kept his cash in a car near Chicken Coop Road, Ong drove there

first. Ong explained that although he lived with his mother, he stored his "illegal things" in the car. When asked if "illegal things" included drugs, he said, "Um, that's a possibility."

Ong testified that his storage car is parked on a dirt logging road about one hour from Sero's residence. Sero characterized the area as wooded and remote. Ong called it a "good hiding place" that the police did not know about. While driving on the logging road for two or three miles, Ong claimed the car got stuck in some mud. He spent an hour or so trying to extract the car, then the battery died.

Ong decided to walk to a friend's house to use his phone, although he admitted to passing several phones along the way. During the walk, Ong and Christina cut through some "rough terrain and Christina wasn't happy." After his mom picked up Christina, Ong walked around in the woods and came upon a house. He admitted to stealing some tools and a truck from the house.

Proceedings: Ong was convicted in a jury trial of: 1) second degree kidnapping, 2) delivery of a controlled substance (on facts not excerpted above relating to something he gave to the child), 3), second degree burglary (for breaking into the house and stealing items), and 4) taking a motor vehicle without permission (for stealing the truck). **[LED EDITOR'S NOTE: the controlled substances conviction is reversed by the Court of Appeals for trial error not addressed below. The burglary and taking motor vehicle convictions were apparently not challenged by defendant on appeal. We excerpt analysis only on the kidnapping issue below.]**

ISSUE AND RULING: Was there sufficient evidence of abducting to support Ong's kidnapping conviction? (ANSWER: Yes) Result: Affirmance of Clallam County Superior Court conviction for second degree kidnapping; reversal of controlled substances conviction on grounds not addressed in this **LED** entry.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A person commits second degree kidnapping by intentionally abducting another person under circumstances not amounting to first degree kidnapping. RCW 9A.40.030(1). " 'Abduct' means to restrain a person by ... secreting or holding him in a place where he is not likely to be found...." RCW 9A.40.010(2). " 'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(1). "Restraint is 'without consent' if it is accomplished by ... any means including acquiescence of the victim [under 16 years old] ... and if the [victim's] parent ... has not acquiesced." RCW 9A.40.010(1).
Sero testified that Ong only had her permission to drive seven-year-old Christina to school, four blocks from Sero's home. Instead, Ong drove Christina to a remote location he described as a "good hiding place" that the police did not know about. This was a material deviation, both in time and distance, from the trip for which Ong had permission. Further, the jury could have found that the "good hiding place" was a place where Christina was not likely to be found. Finally, Christina was completely under Ong's control during the trip and the jury could have found that this substantially interfered with her liberty. We conclude that the evidence is sufficient to convict Ong of second degree kidnapping.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "AUTOMATIC STANDING" RULE APPLIED; IMPOUNDMENT OF SUSPENDED DRIVER'S VEHICLE HELD IMPROPER – In State v. Coss, 87 Wn. App. 891 (Div. III, 1997), the Court of Appeals applies the "automatic standing" rule to exclude evidence seized from a vehicle during an inventory conducted following impoundment of a suspended driver's vehicle.

Kimberly Kay Coss was one of two passengers in a vehicle stopped by an officer late at night for a cracked taillight. The officer impounded the vehicle but did not take the driver into custody. In an inventory of vehicle's contents incidental to the impound, the officer found illegal drugs under the passenger seat in which Ms. Coss had been sitting at the time of the stop. Ms. Coss admitted that the illegal drugs belonged to her.

The trial court upheld the admissibility of the illegal drugs following a suppression hearing, and Ms. Coss was convicted for possession of the drugs. However, on appeal, the Court of Appeals rules, 2-1, that Ms. Coss had automatic standing to challenge the search of the vehicle, that the impoundment was unlawful, and, therefore that the drugs seized in the inventory must be suppressed.

Automatic standing analysis by Coss majority: In a 1960 case, the U.S. Supreme Court created the "automatic standing" rule under the Fourth Amendment to allow a person who did not have a privacy interest in an area searched by police (such as Ms. Coss, who was a mere passenger in the vehicle) to have "automatic standing" to challenge the search, if the person was charged with a possession crime. In 1980, the U.S. Supreme Court abandoned the "automatic standing" rule, and the U.S. Supreme Court has since allowed only those whose privacy rights are violated to challenge a search, regardless of whether the crime has a possession element.

Since that time, the Washington appellate courts have struggled with the question of whether an independent grounds reading of the Washington constitution, article 1, section 7, requires an "automatic standing" rule. The Coss majority declares that in State v. Carter, 127 Wn.2d 836 (1995) **Jan '96 LED:07** the State Supreme Court ruled that automatic standing is indeed required under an independent grounds interpretation of the Washington constitution. Because Ms. Coss was charged with a possessory offense, the Coss majority declares, she had automatic standing to challenge the impoundment of the vehicle even though she had been a mere passenger with no privacy interest in the vehicle.

Coss majority's analysis of the impoundment issue under RCW 46.20.435: The Coss majority analyzes the impound issue as follows:

> Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, all seizures must be reasonable. Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody. State v. Reynoso, 41 Wn. App. 113 (1985) [**Oct '85 LED:06**]. The reasonableness of a particular impoundment must be determined from the facts of each case. Three circumstances justify impounding a vehicle: (1) as evidence of a crime; (2) as part of the police "community caretaking function," if removal of the vehicle is necessary; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed a traffic offense for which the Legislature has authorized impoundment.
>
> At issue in this case is whether the impoundment of Ms. Laposa's vehicle, which was authorized by statute, was reasonable. The State contends that since Ms. Laposa was operating the vehicle while her license was suspended, the police officer was justified in impounding the car pursuant to former RCW 46.20.435(1). That statute provided: "Upon determining that a person is operating a motor vehicle ... with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420, a law enforcement officer may immediately impound the vehicle that

the person is operating. "*[Court's footnote: This statute is now codified at RCW 46.55.113 (1997) and provides: "[A] police officer may take custody of a vehicle and provide for its prompt removal to a place of safety under any of the following circumstances:*
"…
"(7) Upon determining that a person is operating a motor vehicle … with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420."

In Reynoso, this court found that the use of the word "may" in former RCW 46.20.435(1) suggests that police officers are to exercise discretion when deciding to impound a vehicle. "Discretion necessarily involves sound judgment based upon the particular facts and circumstances confronting the officer." Further, it is clear that former RCW 46.20.435 was meant to prevent a continuing violation of RCW 46.20.021. Accordingly, "[i]f a validly licensed driver is available to remove the vehicle, a reason to impound must be shown." Officer Griffen never inquired whether one of Ms. Laposa's passengers had a valid driver's license and would be willing to remove the vehicle. Since the statute at issue was meant to prevent the continuing violation of driving with a suspended license, allowing one of Ms. Laposa's passengers to drive the vehicle would have accomplished that goal.

The trial court concluded that this alternative would have been equivalent to allowing Ms. Laposa to drive the vehicle once Officer Griffen was no longer present. There is no support for this allegation. Further, the record does not show that Officer Griffen even considered this alternative. Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, if feasible, to obtain a name from the driver of someone in the vicinity who could move the vehicle; and then reasonably conclude from this deliberation that impoundment is proper. Officer Griffen's testimony at the suppression hearing reveals that he only considered arresting Ms. Laposa or impounding the vehicle. There is no evidence that Officer Griffen considered any other alternatives.

It is clear from the record that a reasonable alternative to impoundment existed. A validly licensed passenger in Ms. Laposa's vehicle could have driven the vehicle from the traffic stop, thereby preventing a continued violation of RCW 46.20.021. This course of action would not be the equivalent of allowing Ms. Laposa to drive the vehicle. Accordingly, the impoundment was unreasonable and thus unlawful. There was no justification for the inventory search and the evidence should have been suppressed.

[Some citations omitted]

Coss dissent on automatic standing issue. Dissenting Judge Brown disagrees with the majority's assertion that the State Supreme Court resolved the automatic standing issue in its 1995 Carter decision. Judge Brown goes on to argue that the automatic standing rule should be rejected under the Washington constitution.

Coss dissent on impoundment issue. Judge Brown also disagrees with the majority on the impoundment issue, arguing that the Court should defer to the trial court's common sense determination that turning the car over to a passenger where the driver remained with the vehicle was the same as turning the vehicle over to the driver.

Result: Reversal of Spokane County Superior Court conviction for possessing a controlled substance.

LED EDITOR'S COMMENTS RE REYNOSO AND POSSIBLE DISTINCTIONS

1. WAS REYNOSO CORRECTLY DECIDED IN 1985? The Coss Court relies solely on its 1985 decision in the Reynoso case for the proposition that, despite the existence of a statute (formerly RCW 46.20.435, presently RCW 46.55.113) saying, without limitation, that police may do so, the constitution does not permit police to impound a vehicle operated by a suspended or revoked driver if there is a reasonable alternative to impoundment. The State Supreme Court has never directly addressed this Reynoso proposition. Note further, however that the State Supreme Court did not qualify its statement in State v. Simpson, 95 Wn.2d 70, 189 (1980) when it said that impoundment may be done "if the driver has committed one of the traffic offenses for which the Legislature has specifically authorized impoundment." We have always had our doubts that Reynoso was correct; and we are aware of caselaw in California and New York holding that statutes giving police discretion to impound vehicles operated by suspended or revoked drivers may be carried out by police without going through "reasonable alternatives" consideration. Nonetheless, Reynoso has been on the books since 1985, it has not been overruled, and the pertinent statutory language has not been changed, so it seems futile for your LED Editor to keep railing against the decision. ..So we resort to our old saw: Check with your legal advisor and/or prosecutor for direction on your impound options with drivers who are in suspended, revoked or other unlicensed status as expressly addressed in RCW 46.55.13. ... Look also for proposed pro-enforcement legislative amendments in 1998 which may help on this issue.

2. WHAT ABOUT CLIFFORD'S "CONTINUING VIOLATION" EXCEPTION TO REYNOSO? In State v. Clifford, 57 Wn. App. 124 (1990) June '90 LED:07, Division Three apparently established a "continuing violation" exception to its Reynoso "reasonable alternatives" rule under the traffic impound statute. In Clifford, an officer had knowledge of several occasions over a month-long period when Clifford, a constitutionalist, had been stopped and found to be driving without a valid license. Distinguishing the facts of Reynoso (where the officer had knowledge only of the present offense of driving without a valid license), Division Three held that the officer had clear evidence that Clifford was committing a "continuing" violation of the statutorily designated licensing laws, and that this was a valid reason to impound the vehicle. How far does the Clifford "continuing violation" extend? What if officers learn from a stopped driver, pre-impound, that the driver had been continuously driving for some time in suspended or revoked status, or in such other unlicensed status as is addressed by the impound statute? Unfortunately, there are no cases since Clifford explaining what evidence might establish the "continuing violation" exception.

(2) EVIDENCE SUFFICIENT TO PROVE CONSTRUCTIVE POSSESSION OF COCAINE FOUND IN APARTMENT – In State v. Tadeo-Mares, 86 Wn. App. 813 (Div. III, 1997), the Court of Appeals rejects defendant Tadeo-Mares's argument that the State did not prove his possession of cocaine.

The cocaine had been found in the small, 220-square-foot apartment on which he had shared rent and living space with another man for at least the preceding five weeks. When police had executed a search warrant on the apartment, they found incriminating evidence (marked money) on the roommate's person, but they found no incriminating evidence on the person of Tadeo-Mares. However, in the apartment's only (and

hence obviously shared) bathroom, the officers found a plastic medicine bottle containing 16 tied-corner baggies filled with what later proved to be 10.7 grams of uncut cocaine.

The Court of Appeals rules that the evidence established that Tadeo-Mares had dominion and control over the area searched, and this placed him in constructive possession of the premises. His possession of the premises was sufficient to support the trial court's finding that Tadeo-Mares was in possession of the cocaine, the Court of Appeals holds.

Result: Affirmance of Grant County Superior Court conviction for possession of cocaine with intent to deliver.

(3) FIREARMS CONVICTION UPHELD BASED ON CONSTRUCTIVE POSSESSION EVIDENCE; BUT "DANGEROUS WEAPONS" CONVICTION BASED ON PROXIMITY TO THROWING STAR LACKS SUFFICIENT EVIDENCE – In State v. Echeverria, 85 Wn. App. 777 (Div. III, 1997), the Court of Appeals addresses issues relating to defendant's appeal from convictions for possession of a firearm by a minor (RCW 9.41.040(1)(e)) and possession of a dangerous weapon (RCW 9.41.250).

Following a vehicle stop and arrest, a police officer lawfully checking the driver's side of the front seat area of the vehicle saw in plain view a pistol only partially under the seat. The officer testified that about three inches of the barrel extended from under the seat. In reaching for the gun, the officer found a metal throwing star under the seat. The driver, Jose Echeverria, was ultimately convicted of: (1) possession of firearm by a minor; (2) furtively carrying a dangerous weapon; and (3) driving a motor vehicle without a valid operator's license. Echeverria appealed the first two convictions on grounds of insufficient evidence.

Firearms Charge: the Court of Appeals has no trouble finding sufficient evidence to support the firearms possession conviction, explaining as follows:

> RCW 9.41.040 makes it a class C felony for a person under the age of 18 to own, possess or control a firearm, except under specific circumstances not applicable in this case. Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found. The ability to reduce an object to actual possession is an aspect of dominion and control. Given the unchallenged finding the gun was in plain sight at Mr. Echeverria's feet and the reasonable inference that he therefore knew it was there, a rational trier of fact could find Mr. Echeverria possessed or controlled the gun that was within his reach.

[Citations omitted]

Dangerous Weapons Charge: The Court of Appeals finds three defects in the "dangerous weapons" conviction. First, the Court of Appeals explains that the evidence did not even support the trial court's determination of "constructive possession" of the metal throwing star. The officer's testimony did not reflect that the throwing star would have been in Echeverria's view at any time. Echeverria's story was unrebutted that he had been driving someone else's car and did not know about the throwing star. In light of the throwing star's hidden position, Echeverria could not be found to be in constructive possession of it. "Close proximity alone is not enough" for constructive possession, the Court of Appeals declares.

Second, one cannot be convicted under the "dangerous weapons" statute for mere constructive possession, the Court of Appeals declares. Citing a State Supreme Court decision in State v. Myles, 127 Wn.2d 807 (1995) **Feb '96 LED:10,** the Court of Appeals explains that there must be evidence in a "dangerous weapons" case that the defendant carried the weapon hidden on his person.

Third, the Court of Appeals questions whether a throwing star is one of the weapons covered by RCW 9.41.250.

Result: Reversal of Franklin County Juvenile Court adjudication of guilt under dangerous weapons statute (RCW 9.41.025); affirmance of adjudications of guilt under firearms statute (RCW 9.41.949(1)(3)) and under NVOLOP statute (RCW 46.20.021).

(4) OFFICER CAN'T CHOOSE TO PURSUE GRIEVANCE OF SUSPENSION WHERE HE HAS ALREADY ALLOWED A CIVIL SERVICE COMMISSION ORDER TO BECOME FINAL – In Civil Service Commission of the City of Kelso v. City of Kelso, 87 Wn. App. 907 (Div. II, 1997), the Court of Appeals holds that, where a police officer lost his appeal of a disciplinary suspension before a local civil service commission and did not take an appeal to superior court (thus allowing the civil service commission order to become final), the officer then was not permitted to pursue appeal of the same disciplinary action a grievance procedure under a labor contract. The Court of Appeals indicates that an officer does have a right to demand that the grievance procedure be followed rather than the civil service procedure. However, the Court holds that if, as here, the officer appeals to the civil service commission and allows the commission's order to become final, that is the end of the matter.

Result: Affirmance of Cowlitz County Superior Court order affirming civil service commission's 10-day suspension.

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NEXT MONTH

The March '98 LED will include entries on: (1) Kalina v. Fletcher, 1997 WL 756635 (1997) (a December 10, 1997 decision of the U.S. Supreme Court limiting prosecutorial immunity from civil immunity where a deputy prosecutor is acting as a complaining witness in relation to the execution of a certification of probable cause as to a charging document); (2) State v. Armenta and Cruz, 123? Wn.2d ___ (1997) (a 12/24/97 Washington Supreme Court decision holding that an officer did not have "reasonable suspicion" to "seize" two suspects by placing their large wads of money in his vehicle while he investigated their activity); (3) City of Bremerton v. Spears, ___ Wn.2d ___ (1998) (a 01/08/98 Washington Supreme Court decision upholding the motorcycle helmet statute, as implemented by WSP administrative regulation, against a constitutional challenge); (4) State v. Nelson, 88 Wn. App. ___ (Div. III, 1997) (a December 16, 1997 decision of the Washington Court of Appeals holding that the Stroud "bright line" rule for searches of vehicles incident to arrest of occupants does not extend to a purse of a disembarking passenger who was ordered by the police to leave the purse in the vehicle); and (5) State v. Kirkpatrick, 88 Wn. App. ___ (Div. II, 1997) (a December 31, 1997 decision of the Washington Court of Appeals apparently holding that CrR 3.1(c)(2) requires that, where an arrestee terminates an interrogation by asking for an attorney, the interrogating officer must take reasonably prompt steps to facilitate consultation with an attorney).

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