Law Enforcement Digest

March 1998

HONOR ROLL

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470th Session, Basic Law Enforcement Academy - November 4th, 1997 through February 5th, 1998

President:	Donyelle D. Frazier - King County Sheriff's Office
Best Overall:	Cynthia M. Sampson - King County Sheriff's Office
Best Academic:	Cynthia M. Sampson - King County Sheriff's Office
Best Firearms:	William R. Hibbs - Coupeville Police Department
Tac Officer:	Mike Sbory - Tacoma Police Department

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Corrections Officer Academy - Class 262 - January 5th through January 30th, 1998

Highest Overall:	Robin K. Reinke - Cowlitz County Jail
Highest Academic:	Robin K. Reinke - Cowlitz County Jail
Highest Practical Test:	Robin K. Reinke - Cowlitz County Jail
Highest in Mock Scenes:	Dennis P. Jordan - Airway Heights Corrections Center
Highest Defensive Tactics:	Sonja L. Granstrom - Whatcom County Jail

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Corrections Officer Academy - Class 263 - January 5th through January 30th, 1998

Highest Overall:	Erik C. Schuster - Kittitas County Corrections
Highest Academic:	James M. Neuschwander - Washington State Penitentiary Deborah J. West - Cowlitz County Jail
Highest Practical Test:	Anthony James Ewald - Kirkland City Jail
Highest in Mock Scenes:	Pamela S. Miller - Pacific County Jail
Highest Defensive Tactics:	Deborah J. West - Cowlitz County Jail

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NOTE: BLEA COMMANDER JOB ANNOUNCEMENT

On December 31, 1998, Lt. Mike Painter will conclude his assignment with the Criminal Justice Training Commission as Commander of the Basic Law Enforcement Academy. The Training Commission is now accepting applications for the BLEA Commander position. See the full job announcement at pages 22 through 24 of this month's **LED**.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) DOUBLE JEOPARDY ARGUMENTS AGAINST "CIVIL" SANCTIONS VIRTUALLY ELIMINATED – In Hudson v. United States, 118 S.Ct. 488 (1997), the U.S. Supreme Court uses a banking law "civil penalty" to close the door on most double jeopardy arguments regarding the application of both civil and criminal sanctions against law violators. The Hudson decision recognizes that the Supreme Court's 5th Amendment double jeopardy ruling in U.S. v. Halper, 490 U.S. 435 (1989) **Nov '89 LED:05** had the unintended result of spawning multiple challenges against many types of civil sanctions, including civil penalties, as well as license suspensions and

revocations. The Hudson ruling will make it virtually impossible for a law violator to prove that a sanction labeled "civil" by the Legislature is "criminal" for double jeopardy purposes.

In U.S. v. Ursery, 135 L.Ed.2d 549 (1996) **Aug '96 LED:11**, the U.S. Supreme Court had already undone part of the mischief of the Halper ruling by holding that civil forfeiture against property is not a criminal sanction, and therefore does not trigger double jeopardy protection. The Washington Supreme Court ruled consistently with Ursery under the State Constitution in State v. Catlett, 133 Wn.2d 355 (1997) **Dec '97 LED:18**. Now the Hudson decision has eliminated most of what remained of Halper's double jeopardy analysis.

The Hudson Court does note, however, that its ruling on double jeopardy does not affect "excessive fines" analysis under the 8th Amendment. See **Aug '96 LED:11** and **Feb '97 LED:10** for discussion of "excessive fines" issue as that issue relates to forfeiture cases.

Result: Affirmance of 10th Circuit Court of Appeals decision reinstating an indictment dismissed by a district court on double jeopardy grounds.

(2) DEPUTY PROSECUTOR NOT ABSOLUTELY IMMUNE FROM CIVIL RIGHTS SUIT FOR CERTIFYING PROBABLE CAUSE ON CHARGING DOCUMENT – In Kalina v. Fletcher, 118 S.Ct. 502 (1997), the U.S. Supreme Court applies its rule on prosecutorial civil immunity adversely to a King County Deputy Prosecutor. The deputy prosecutor had certified probable cause on a burglary charge. It turned out that two of the facts were wrong. Before the error was discovered by the prosecutor's office, the plaintiff had been arrested and jailed. After he was cleared and released, he sued the deputy prosecutor, among others.

Under the caselaw interpreting the civil rights statutes, prosecutors have absolute immunity from suit when they are acting as advocates, but only qualified immunity when they are not.
The Court rules that the deputy prosecutor was acting as a witness, not an advocate, when she filed the certificate of probable cause. A police officer or any other competent witness can complete such a document, the Court notes, and this means that the act is not pure prosecutorial advocacy.

Result: Affirmance of Federal Ninth Circuit Court of Appeal; case remanded to Federal District Court for trial.

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WASHINGTON STATE SUPREME COURT

TERRY SEIZURE HELD TO BE UNLAWFUL BECAUSE WITHOUT REASONABLE SUSPICION

State v. Armenta, State v. Cruz, 134 Wn.2d ___ (1997) [948 P.2d 1280]

Facts Re Seizure Issue: (Excerpted from Supreme Court opinion)

> On October 9, 1994, at approximately 11:00 a.m., petitioners Huberto Armenta and David Cruz approached Prosser Police Officer G.J. Randles at a truck stop in Prosser and asked him if he knew of an auto mechanic that could repair their car. Randles was in uniform. Although Spanish is their native language, Armenta and Cruz spoke to Officer Randles in English. Randles told Armenta and Cruz that he

was not aware of any mechanics who would be available on Sunday, but offered to look at their car himself. Armenta and Cruz accepted his offer and Randles followed them to their car. They mentioned at some point that they were traveling from Idaho to Seattle.

On the way to the vehicle, Officer Randles asked Armenta and Cruz for identification "to tell dispatch where [he was]." According to Randles, "This was standard operating procedure ... intended for officer safety." Armenta gave Randles an Arizona driver's license bearing his true name. Cruz told Randles that his name was "Luis Perez," indicating that he had lost his wallet in Idaho and did not currently have any identification on his person.

Officer Randles noticed a bulge in one of Cruz's pockets and, consequently, asked him if it was a wallet. Consistent with his prior statement, Cruz said "no" and took out "[a] wad of money with a $20 bill on top, wrapped with a rubber band." Randles then asked Cruz how much money he had. Cruz said he had $1,000. When Randles asked Cruz where he got the money, he said that he had just cashed a paycheck that he received for working on "a ranch in Seattle." Cruz was not, however, able to produce a pay stub and he could not recall the name of the ranch at which he allegedly had been employed. Armenta then voluntarily produced three more bundles of money, each with a $20 bill on top and wrapped with a rubber band, saying that he had three bundles of $1,000 each. When Randles asked Armenta where he got the money, Armenta said that he had just sold a car. Armenta did not, however, have a receipt or a copy of the bill of sale, and he had in his possession the title to the car he claimed to have sold.

At that point, Officer Randles "called in" for a "driver's check" of the names Armenta and Cruz had given him. The dispatcher notified Randles that the car was registered to Armenta, that Armenta's Arizona driver's license had been suspended, and that Armenta had only an identification card in Washington. The dispatcher told Randles that there was no record of a "Luis Perez." Randles then "called dispatch for back-up" and placed the bundles of money in his patrol car "for safe keeping." He asked Armenta if any drugs or weapons were in the vehicle. Armenta said "no." Randles then asked Armenta if he could search the vehicle, saying "something to the effect of 'Do you mind if I take a look? You do not have to let me.' " Armenta said "something to the effect of 'No, go ahead, I don't mind.' " Officer Randles did not read Armenta his Miranda rights before asking to search the vehicle.

Randles found a pack of cigarette rolling papers in the vehicle's passenger compartment. As he continued to search, he noticed Cruz standing on the other side of the car holding an open pocket knife with a two-and-a-half- to three-inch-long blade. Officer Randles "asked" Cruz for the knife and conducted a weapons pat down of Armenta and Cruz. Randles then said "something to the effect of 'Do you mind if I take a look in the trunk? You do not have to let me.' " Armenta said "something to the effect of 'No, go ahead, I don't mind.' "

Beneath a spare tire, Randles found a binocular case. Inside it were 50 to 70 clear plastic baggies containing a white powder that he suspected was cocaine. Randles then placed Armenta and Cruz under arrest and transported them to jail. Laboratory tests later determined that the binocular case contained approximately 260 grams of cocaine.

> Officer Randles later obtained a warrant to search Armenta's vehicle. He found a piece of plastic containing "a black tar substance believed to be heroin." Another officer who assisted in the search "discovered a marijuana cigarette on the vehicle's console.

Proceedings: Armenta and Cruz (who had confessed following arrest) were charged with possession of a controlled substance with intent to deliver. Each moved to suppress, and the trial court granted the motions on grounds that the officer had seized the defendants prior to developing "reasonable suspicion," and that everything that developed after that was the fruit of the unlawful seizure.

ISSUE AND RULING: 1) Were Armenta and Cruz "seized" for Fourth Amendment purposes at the point when the officer took the rolls of money and placed them in his patrol car? (ANSWER: Yes); 2) Did the officer have reasonable suspicion to justify this seizure of Armenta and Cruz? (ANSWER: No, rules a 6-3 majority). Result: Reversal of Court of Appeals decision which in turn had reversed a Benton County Superior Court suppression order – suppression ruling thus reinstated.

ANALYSIS BY MAJORITY

1) Seizure issue

In support of its view that Armenta and Cruz were seized at the moment when the officer placed the roll of bills in his patrol car, the majority opinion explains in part:

> In our judgment, a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention. We find this reasoning particularly appropriate to the circumstances here, where the police officer requested the identification for some purpose other than investigating criminal activity. It is significant, also, that Armenta and Cruz initiated the contact with Officer Randles, then prolonged it by accepting his offer to assist them with their car. In sum, we are satisfied that Officer Randles' actions in requesting identification from Armenta and Cruz and conversing with them would not have led a reasonable person in Cruz's position to conclude that he was not free to leave or terminate the contact with Officer Randles. There was, therefore, no seizure at that point.
>
> We believe, though, that the Court of Appeals was correct in concluding that a seizure occurred when Officer Randles placed Armenta and Cruz's money in his patrol car. Reasonable persons in their position would have realized at that point that they were not free to leave.

2) Reasonable suspicion issue

The majority begins its analysis of the reasonable suspicion issue by summarizing the State's view and stating the majority's disagreement with that view:

> The State asserts that the inconsistent answers Armenta and Cruz gave to Officer Randles' questions, the fact that the two men possessed a significant amount of money, the manner in which they were carrying this money, and their failure to produce identification gave rise to a reasonable suspicion that they were dealing in controlled substances. As noted above, the Court of Appeals agreed with this argument. We do not. **[See Nov. '96 LED:05.]**

The majority then proceeds to explain its view that the facts of this case were too innocuous to rise to the level of reasonable suspicion of criminal conduct. **LED EDITOR'S NOTE:** We will not excerpt or summarize the majority's extensive, fact-based and procedure-based discussion; nor will we comment on whether we think the majority was correct on this close issue. Instead, we will note in the **LED Editor's Comment** below the Court's discussion of limitations on police officer extensions of Terry stops to, among other things, seek consent to search.

DISSENT:

In a dissenting opinion, Justice Talmadge, joined by Justices Guy and Durham, argues that the officer did have reasonable suspicion.

LED EDITOR'S COMMENT: The majority opinion in Armenta talks with approval of the Court of Appeals decision in State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct '93 LED:21. In Cantrell, the Court of Appeals disapproved an officer's extension of a traffic infraction stop to ask the detainees for consent to search their car. The facts in Armenta are not on point to those in Cantrell, but we would like to restate our October '96 LED (pp 19-21) comments about the "seizure" law ramifications of Cantrell and related cases. Our view is that the following two alternatives are available as constitutionally lawful consent-request approaches in this context:

1) **CLEAR BREAK APPROACH**

Upon completion of the ticketing process, the officer expressly informs the detainee after the detainee signs the ticket that he or she is (a) free to go, and (b) need not talk further, but that the officer is concerned about certain other matters and would like to ask a question or two. Then, posing questions in a non-coercive manner, the officer asks whether there are drugs, alcohol, or weapons in the vehicle (or the like), and then proceeds to a consent request if suggested by the answers or other circumstances. **[OR]**

(2) **IN-THE-PROCESS APPROACH**

During the process of inquiry on the infraction matter and before completion of the ticketing process, the officer expressly informs the detainee that a ticket will be issued for a particular violation (this helps preclude argument later that the consent was leveraged by the implication that the ticket can be avoided by cooperation), and the officer next says that the officer wishes to ask a few questions about certain other matters. Then, posing questions in a non-coercive manner, the officer asks whether there are drugs, alcohol, or weapons in the vehicle (or the like), and then proceeds to a consent request if suggested by the answers or other circumstances. Regardless of what is found in the consent search, the officer should process the traffic infraction to completion (maybe by submitting a report on the infraction to the prosecutor).

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

CHALLENGE TO WASHINGTON MOTORCYCLE HELMET LAW FAILS, FOR NOW – In City of Bremerton v. Spears, 134 Wn.2d ___ (1998), [949 P.2d 347], the State Supreme Court upholds

the motorcycle helmet statute (RCW 46.37.530), as implemented by WSP regulations (WAC 204-10-040), against a federal constitutional challenge. The unsuccessful challenge was primarily grounded in a claim that the statute and regulations are constitutionally void for vagueness.

Result: Affirmance of Kitsap County Superior Court decision upholding a) constitutionality of helmet law and b) five infractions against John Spears.

LED EDITOR'S COMMENT: This is not the last word on challenges to the helmet laws, but we're getting close. Future litigants may still raise state constitutional issues or other theories, but the tenor of this decision suggests that such challenges will likely fail.

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WASHINGTON STATE COURT OF APPEALS

SPLIT OF AUTHORITY: DOES STROUD RULE PERMIT SEARCH OF PURSE OF NONARRESTED PASSENGER ORDERED (A) TO STEP OUT OF MV AND (B) TO LEAVE PURSE IN MV? DIVISIONS TWO AND THREE OF COURT OF APPEALS SAY "YES," "NO"

State v. Nelson, 89 Wn. App. ___ (Div. III, 1997) [948 P.2d 1314]

State v. Hunnel, 89 Wn. App. ___ (Div. II, 1998)

Facts and Proceedings in Nelson and Hunnel:

Two very recent decisions from Divisions Two and Three of the Court of Appeals are in direct conflict with each other on the scope of the "bright line" rule for search of a motor vehicle incident to the arrest of an occupant of the vehicle. Each case involved the same general fact situation.

In each of the cases, the driver of a vehicle was lawfully stopped by police and eventually lawfully arrested, thus triggering police authority to search the passenger area of the vehicle "incident to the arrest." Next, in each case, the arresting officers directed a passenger to step out of the vehicle but to leave her purse in the vehicle. Finally, in each case, when the officers searched the vehicle's passenger area, they found illegal drugs in the purse that they had ordered be left inside the vehicle.

Drug possession charges were filed against Anna E. Hunnel and Lisa Marie Nelson in the respective county superior courts. The Benton County Superior Court held the purse search to be unlawful and suppressed the evidence against Ms. Nelson; the Kitsap County Superior Court denied suppression and convicted Ms. Hunnel.

ISSUE AND RULING: Does the "bright line" rule of State v. Stroud for motor vehicle searches incident to arrest permit a search of a non-arrested passenger's purse where the non-arrested passenger has been ordered (a) to get out of the vehicle and (b) to leave her purse inside the vehicle? (ANSWER: "No," says Division Three in Nelson; "Yes," says Division Two in Hunnel); Result: Affirmance of Benton County Superior Court suppression order in Nelson; affirmance of Kitsap County Superior Court conviction for possession of controlled substances in Hunnel.

ANALYSIS:

1. Same starting place in each case.

Both Divisions begin at the same starting place in their legal analysis. Each recognizes that the leading cases under the federal and state constitutions have established "bright line" rules to guide police in conducting a motor vehicle search incident to arrest of a vehicle occupant.

In New York v. Belton, 453 U.S. 454 (1981) **Sept '81 LED:03,** the U.S. Supreme Court established a "bright line", per se, rule for search of a motor vehicle incident to arrest of an occupant. The Belton decision held that, immediately following a custodial arrest of an occupant of a vehicle, as an "incident" of the arrest, police may automatically search all areas of the vehicle's passenger compartment, as well as all compartments and all containers in that area, but police may not search the vehicle's trunk.

In State v. Stroud, 106 Wn.2d 144 (1986) **Aug '86 LED:01,** the State Supreme Court held in essence that Belton's "bright line" rule applies under article 1, section 7 of the Washington State Constitution, except that the Washington rule on such motor vehicle searches does not allow searches of locked containers or locked compartments located in the passenger area.

From this similar starting place, however, the two courts take different paths, leading them to different results.

2. The Nelson Court's anti-search analysis

In Nelson, Division Three of the Court of Appeals concludes under the following analysis that the purse which had been ordered left in the vehicle did not come within the "bright line" search authority of Belton and Stroud:

> The State contends the search of Ms. Nelson's purse was justified as part of the search of the passenger compartment incident to the arrest of a passenger. In State v. Seitz, 86 Wn. App. 865 **[Nov '97 LED:17]** the court held that the search of the defendant's purse where the purse was not in the automobile at the time the automobile was searched, but was on the defendant's person, was not justified when the police lacked a reasonable, articulable suspicion that the defendant was involved in criminal activity. The court stated:
>
> > *The valid arrest of a driver justifies a search of the car's passenger compartment, not including locked containers. The valid arrest of a passenger justifies a search of the car's passenger compartment, not including locked containers. The valid arrest of either the driver or passenger justifies a search of a purse found in the car, and without so holding, we assume this is true regardless of whether the purse belongs to the driver or the passenger. It is our view, however, that the valid arrest of a driver does not justify the search of a purse known to belong to a passenger, where the purse is not in the car at the time of the search, but rather is on the passenger's person and the passenger is outside the car*
>
> Since Seitz, this court found the search of a passenger's purse, voluntarily left in the car after the arrest of the driver, to be valid. State v. Parker, 88 Wn. App. 273 (1997) **[Jan '98 LED:12]**. The court distinguished Seitz, because Ms. Parker left her purse in the car, while Ms. Seitz kept her purse with her when she left the car. The distinction is based upon the amount of control the non-arrested person maintains over his or her personal property. When the person maintains control over the personal property and there are no furtive movements indicating he or she is trying to hide something, the police are not allowed to search the property.

> In order to do a pat-down search of a person, the police must be able to point to specific and articulable facts creating an objectively reasonable belief that a suspect is armed and presently dangerous. Thus, if the police do not believe a person presents a danger, they cannot search the person and their clothing. This would include a purse they are carrying. Although Ms. Nelson was not carrying her purse, she was prevented from doing so by Officer Maynard. Up to the time she exited the truck, she had kept control of the purse by keeping it between her legs. Although the State argues she was not told to leave the purse in the truck, the court chose to believe she was so instructed.

[Some citations omitted]

3. The Hunnel Court's pro-search analysis

Division Two's decision in Hunnel was made five weeks after Division Three's decision in Nelson. The Hunnel Court agrees with the Nelson Court that correct decisions were made in the purse search cases of Seitz **[Nov '97 LED:17]** and Parker **[Jan '98 LED:12]** (see excerpted Nelson analysis above). However, the Hunnel Court concludes that it is lawful for police to search a purse in the general circumstance where police take control over the purse while the purse is still in the vehicle:

> Belton held that, for purposes of a workable "bright-line" rule, all containers within the passenger compartment of an automobile are accessible to an arrestee. Thus, for purposes of a search incident to an arrest, all such containers are under the "control" of that arrestee. Belton did not require the police to ascertain that the arrestee be in actual control, either exclusive or joint, of a container before it could be searched. Similarly, Stroud did not limit container searches to those under the control of the arrestee. To do so, would blur the "bright-line" rule, and return the police to "{w}eighing the totality of circumstances," the notion found unworkable in Stroud. Furthermore, even a purse under the control of a non-arrested occupant of the car is, under the Belton-Stroud rationale, accessible to the arrested occupant for weapons or to hide evidence. Thus, we conclude that "control" is irrelevant to the issue of what is a searchable container under Belton and Stroud. We recognize that the "bright-line" rule encroaches upon the privacy rights of innocent passengers. But the Washington State Supreme Court has acknowledged that the privacy rights of such passengers must yield to the needs of law enforcement in car-stop situations. Anna Hunnel also contends that she was illegally seized when Deputy Smith retained her identification card by ordering her to keep her purse in the car. She is correct that the seizure of her identification card was an "immobilization" or detention. But, as we have already discussed, if Deputy Smith had the right to search Anna Hunnel's purse incident to the arrest of Mr. Hunnel, the deputy necessarily had the right to seize the purse immediately following that arrest. Moreover, the incidental seizure of Anna Hunnel's identification card caused no harm to her beyond that caused by the seizure of her purse. The drugs in her purse were not found as the result of the seizure of her identification card, but of the purse. Thus, any additional detention of Anna Hunnel by the seizure of her identification card caused no harm.
>
> In conclusion, we hold that Hunnel's purse was a searchable container in the car pursuant to Belton and Stroud, that the officer's right to search the purse arose at the time of the arrest, and, therefore, the officer's seizure of the purse by ordering it left in the car was proper.

LED EDITOR'S COMMENT: The Nelson/Hunnel scenario obviously presents a close question under the Stroud/Belton rule. The Hunnel decision provides solid support for including within the scope of the "bright line" search authority all containers over which police have taken control before they containers have been removed from the vehicle. However, in light of the conflicting Nelson ruling, officers can anticipate challenges on this issue. Officers should expect to be questioned by defense counsel as if the bright line rule did not apply to purses in the Nelson/Hunnel situation. Thus, officers should record in reports and be prepared to answer as to any case-specific safety concerns they had at the point when they searched the purse.

CrR 3.1 (c)(2) REQUIRES THAT OFFICER HELP WITH ATTORNEY CONTACT WHEN SUSPECT ENDS INTERROGATION WITH REQUEST FOR ATTORNEY

State v. Kirkpatrick, 89 Wn. App. ___ (Div. II, 1997) [948 P.2d 882]

Facts: A detective arrested Jonathan Kirkpatrick as a murder suspect at a police department in another county. The murder had occurred several months earlier. Defendant waived his Miranda rights and talked to the detective for about 90 minutes, generally denying responsibility for the crime but making certain admissions. Ultimately, Kirkpatrick asked if he could leave, and the detective said "no." Kirkpatrick then requested a lawyer and the detective terminated the questioning.

There was a telephone available at the police station, but the detective did not make any effort to instruct Kirkpatrick on the availability of a phone. Instead, the detective loaded Kirkpatrick into a patrol car for the several-hour drive back to the county of the murder. During the drive, Kirkpatrick initiated several conversations with the detective, who told Kirkpatrick that the detective could not talk to him because Kirkpatrick had requested a lawyer. Kirkpatrick said he didn't want a lawyer and then made a broader confession. After the car trip ended at the home police station, Kirkpatrick made a taped confession following Miranda warnings and waiver.

Proceedings: Kirkpatrick was charged with murder. Prior to trial, Kirkpatrick's attorney sought on a fairly vague theory to suppress the confessions made to the detective, both during the car trip and after the car trip. The trial court denied the suppression motion. At trial the evidence of Kirkpatrick's guilt was very strong. In addition to the evidence which Kirkpatrick had sought to suppress, there was testimony from several eyewitnesses, as well as Kirkpatrick's own admission to the detective in the initial interrogation prior to transport, and Kirkpatrick's statements to acquaintances in the months while he was at large following the murder.

ISSUE AND RULING: Did Kirkpatrick's trial attorney give him ineffective assistance when trial counsel failed to raise a challenge to admission of Kirkpatrick's confessions based on the court rule at CrR 3.1(c)(2)? (ANSWER: Yes, but there was no prejudice in the defective performance, because the other evidence of his guilt was clear). Result: Affirmance of Lewis County Superior Court conviction for murder in the first degree. Status: Defendant has filed a petition for review.

ANALYSIS: CrR 3.1(c)(2) provides as follows:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

This rule has been applied in the past primarily in DUI/implied consent circumstances. In that context, the Washington courts have held that, if a DUI arrestee has requested an attorney following implied consent and Miranda warnings, the police must take affirmative reasonable steps to try to put the arrestee in contact with an attorney prior to administration of the BAC test.

The issue in this case was whether: (a) CrR 3.1(c)(2) applies in all custodial interrogation contexts; (b) the court rule required that the detective take steps to try to put Kirkpatrick in touch with an attorney following his request for an attorney in the initial interrogation; and (c) defendant's trial attorney was ineffective in failing to raise the CrR 3.1(c)(2) issue at the time of the suppression hearing. The Court of Appeals says, "yes," to all of the above, but the Court then concludes that there was no prejudice to defendant in the error of his attorney.

The Rights Issue. The Court asserts on the basic "rights" issue:

> While CrR 3.1(c)(2) appears similar to the Miranda warning, it actually serves a different purpose. CrR 3.1(c)(2) is designed "to provide a meaningful opportunity to contact a lawyer."
>
> The Miranda warning, on the other hand, is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants. Therefore, the Miranda warning is only "an important first step toward informing the person of the nature of his right to the assistance of counsel." "[T]he fact that a warning valid within the meaning of Miranda has been made should not in itself be considered to fulfill the requirement of a formal offer [of counsel pursuant to CrR 3.1(c)(2)]."
>
> We conclude that [the officers] did not follow the clear language of CrR 3.1(c)(2). Although the rule does not require the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so. E.g., City of Bellevue v. Ohlson, 60 Wn. App. 485 (1991) (officer made six attempts to telephone arrestee's attorney); City of Seattle v. Wakenight, 24 Wn. App. 48 (1979) (officer telephones public defender and gives arrestee phone book and access to phone). But here, the officers made no effort to contact an attorney when Kirkpatrick first requested one at the Port Angeles Police Department. Had they done so, we presume a lawyer would have told Kirkpatrick to remain silent: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49 (1949).

[Some citations omitted]

The Waiver Issue. Then the Court turns to the issue of whether Kirkpatrick waived his rights under CrR 3.1(c)(2). The Court finds no evidence that Kirkpatrick waived his right to access to an attorney.

The Harmless Error Issue. Finally, the Court of Appeals explains its view that the violation of Kirkpatrick's rights under CrR 3.1(c)(2) was harmless error. The Court recounts overwhelming evidence, particularly in the testimony of 1) the detective who took the initial admissible statement, 2) eyewitnesses, and 3) acquaintances who had heard Kirkpatrick talk about the murder while he was at large in the months afterwards.

LED EDITOR'S COMMENT:

The Kirkpatrick decision is not yet final because it is subject to further possible review, but it tends to support the following two suggestions:

1) If a person in custody requests counsel in response to Miranda warnings or terminates a custodial interrogation with a request for counsel (as opposed to a mere assertion of the right to remain silent), then the officer should ask if the arrestee wants to talk to an attorney at the time. If the arrestee says "no," then the officer has no further obligation regarding the counsel request, other than to honor it by not initiating or re-initiating interrogation so long as the arrestee remains in continuous custody. And if the arrestee does want to talk to counsel right away, then the officer should make a reasonable and contemporaneous effort to get the arrestee to a telephone to allow contact with an attorney, just as the officer would do if the officer were processing a similar request for an attorney consult in the DUI arrest, pre-BAC testing situation. AND

2) If an officer becomes aware that there has been a violation of the access-to-counsel requirement of CrR 3.1(c)(2), then the officer should not assume that any subsequent initiation of contact by the "wronged" arrestee cures the error. Instead, to try to cure the taint of the earlier failure to follow up on the request for an attorney, the officer should inquire of any such arrestee whether that contact-initiating arrestee now wants an *immediate* consult with an attorney. If the arrestee does want to talk to an attorney right away, then the officer should try, as indicated above, to help effect an immediate contact with an attorney, again, just as the officer would do with a similar request in the DUI arrest, pre-BAC testing situation. On the other hand, if the arrestee declines the correcting offer to try to facilitate an immediate attorney consult, then, if the officer wants to interrogate, the officer should fully warn the suspect and obtain an express waiver before proceeding with interrogation.

For a full discussion of the Fifth and Sixth Amendment restrictions on initiating contacts with Miranda-invoking arrestees (Fifth Amendment) and counsel-asserting charged defendants (Sixth Amendment), see our "Initiation of Contact" article and charts in the April and May 1993 LED's.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "INTIMIDATING A WITNESS" INCLUDES THREATS BEFORE INVESTIGATION BEGINS – In State v. James, 88 Wn. App. 812 (Div. II, 1997), the Court of Appeals rejects defendant's argument that he could not be convicted of "intimidating a witness" under RCW 9A.72.110 for threats he made to a witness, immediately after his commission of the crime, and before the police began their investigation, to induce the witness not to report a crime.

The James Court points out that in State v. Wiley, 57 Wn. App. 533 (Div. I, 1990) **[Sept '90 LED:11]** the Court of Appeals interpreted the former version of RCW 9A.72.110 as not including pre-investigation threats. However, in response to Wiley, the 1994 Washington Legislature amended the statute by adding subsection (d) to more clearly cover pre-investigation threats. RCW 9A.72.110 was tightened up even further in 1997 and now provides (with bolding added) as follows:

(1) A person is guilty of intimidating a witness if a person attempts to:

(a) Influence the testimony of that person;
(b) Induce that person to elude legal process summoning him or her to testify;
(c) Induce that person to absent himself or herself form such proceedings;
(d) **Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation relevant to a criminal investigation or the abuse or neglect of a minor child.**

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
(ii) Threat as defined in RCW 9A.04.110(25).

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;
(ii) A person whom the actor believes may be called as a witness in any official proceeding; or
(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(c) "Former witness" means:

(i) A person who testified in an official proceeding;
(ii) A person who was endorsed as a witness in an official proceeding;
(iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or
(iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony.

Result: Affirmance of Pierce County Superior Court conviction of Thalmers Ray James for intimidating a witness.

(2) ELECTRONIC HOME DETENTION NOT "JAIL" TIME FOR PURPOSES OF SPEEDY TRIAL RULE – In State v. Perrett, 86 Wn. App. 312 (Div. II, 1997), the Court of Appeals rules that pre-trial time spent on electronic home monitoring (EHM) is not "jail" time for purposes of the

"speedy trial" rule of CrR 3.3. Thus, the 60-day "speedy trial" rule for those in "jail" does not apply to those on EHM status.

The Court of Appeals distinguishes an earlier decision in State v. Parker, 76 Wn. App. 747 (Div. III, 1995) **Aug '95 LED:22**. The Parker Court held that violation of EHM conditions can constitute the crime of "escape" under Chapter 9A.76 RCW. The Parker analysis involved a different statutory term and scheme, the Court of Appeals holds in Perrett.

Result: Reversal, on grounds not addressed here, of Mason County Superior Court conviction for second degree assault with a deadly weapon; remanded for re-trial.

(3) MARIJUANA GROWER MUST PAY RESTITUTION FOR DAMAGE TO RENTAL HOUSE – In State v. Coe, 86 Wn. App. 84 (Div. II, 1997), the Court of Appeals for Division Two rejects a convicted marijuana grower's challenges to a restitution order directing him to pay $38,322 for severe damage to rental property due to mold, mildew and dry-rot. Defendant argued unsuccessfully in the alternative: 1) that marijuana-growing is a victimless crime, and hence that no restitution order is allowed; and 2) that restitution should be paid out of approximately $87,000 in funds forfeited to the state under civil forfeiture laws.

Result: Affirmance of Pierce County Superior Court conviction and sentence for manufacturing a controlled substance.

(4) IN CIVIL FORFEITURE CASE, CLAIMANT BARRED BY COLLATERAL ESTOPPEL RULE FROM RE-ARGUING SUPPRESSION ISSUE PREVIOUSLY LOST IN CRIMINAL CASE – In City of Des Moines v. $81,231, 87 Wn. App. 689 (Div. I, 1997), the Court of Appeals applies the collateral estoppel rule asserted in Barlindal v. City of Bonney Lake, 84 Wn. App. 135 (Div. II, 1996) **April '97 LED:17**. That rule bars a party in a forfeiture case from re-litigating an issue litigated in a criminal case involving that same party.

In Barlindal, the Court of Appeals had held that the City of Bonney Lake was barred from trying to civilly forfeit firearms seized by the police department, because the county prosecutor's office had previously lost a criminal court suppression motion which had successfully challenged the legality of the seizure. Now, in City of Des Moines, the Court of Appeals has applied the collateral estoppel rule in the reverse situation. Because Colleen Gray, the property claimant in the City of Des Moines case, had lost on a suppression motion regarding the legality of police search of her apartment and seizure of cash in a criminal case, she was bound by that ruling when the issue was presented in subsequent forfeiture proceedings. The Court of Appeals holds further that it did not matter that Colleen Gray's appeal of the criminal court suppression ruling was still pending at the time of the forfeiture proceedings. The parties were bound by that ruling until and unless it was reversed on appeal.

Result: Affirmance of King County Superior Court order in favor of the City of Des Moines on its forfeiture claim.

(5) ACCOMPLICE, AS KNOWING AID IN CRIME, HAS PRINCIPAL'S SPECIAL MENTAL STATE IN "MALICIOUS HARASSMENT" AS WITH OTHER CRIMES – In State v. Robertson, Lewis, and Jack, 88 Wn. App. 836 (Div. I, 1997), the Court of Appeals rejects the arguments of three defendants convicted of malicious harassment as accomplices in a racially motivated assault initiated by B.J., their acquaintance. B.J. was an African American female who initiated an assault by hurling racial epithets at a Caucasian female and then by punching her. Defendants Robertson, Lewis, and Jack – B.J.'s acquaintances – were present when the assault began. After B.J. had knocked the victim down, B.J. and her three acquaintances took turns kicking and punching the victim, as well as slamming the victim's head on the pavement. Only B.J. made racial epithets during the assault.

Ordinarily, if the principal participant in a crime has the specific mental state prohibited by a crime, accomplices in the crime are guilty if they knowingly assist in the commission of crime, even if the accomplices don't have the specific mental state required of the principal. Defendants Lewis, Robertson, and Jack argued in this case that the ordinary rule should not apply in a malicious prosecution case, because aspects of the right to freedom of speech are involved. However, the Court of Appeals rejects their argument. Making accomplices liable for participating in crimes where the principal selects the victim from a protected class will discourage only criminal conduct, not protected speech, the Robertson Court declares.

Result: Affirmance of King County Superior Court juvenile adjudications for third degree assault and malicious harassment against Robertson, Lewis, and Jack.

(6) VICTIM CANNOT "CONSENT" TO VIOLATION OF DVPA ORDER – In State v. DeJarlais, 88 Wn. App. 297 (Div. II, 1997), the Court of Appeals addresses several issues in rejecting a defendant's appeal from his convictions for 1) violation of a domestic violence protection order and 2) third degree rape. We will address only the protection order issue in this **LED** entry.

Defendant argued in regard to his conviction for violation of a protection order that, after the protection order had become effective, the victim had consented to his presence in the residence. The Court of Appeals rejects defendant's argument that the jury should have been instructed on his consent defense. After explaining the rationale for its decision (statutory language and public policy), the Court of Appeals concludes by summarizing its ruling:

> All persons affected by protection orders are served by a clear rule of enforcement, which removes any doubt of the legal implications in violating the terms of a protection order. Furthermore, the parties may protect their rights by petitioning the court to remove the order if there has been a change in circumstances. For these reasons and those expressed above, the proper rule is that only the court from which a protective order issued may rescind the order, and the actions of the victim do not act as a waiver of its effectiveness. We do not rule on any other defenses, other than consent, which may be available. Therefore, the trial court did not err when it refused to give DeJarlais's proposed instruction.

Result: Affirmance of Pierce County Superior Court convictions for violation of a protection order and third degree rape.

(7) ASSAULT OF SECURITY GUARD BY SHOPLIFTER IS ASSAULT THREE – In State v. Johnston, 85 Wn. App. 549 (Div. III, 1997), the Court of Appeals rules that there was sufficient evidence to support a conviction for third degree assault against defendant. Barbara Ann Johnston was the getaway car driver who helped her accomplice, Mr. Zimmerman, to escape from being detained for a grab-and-run shoplifting. The security guard had grabbed Ms. Johnston through Ms. Johnston's open car door window, but the security guard had fallen to the ground as Ms. Johnston drove off with her accomplice, Mr. Zimmerman, as her passenger. The Court of Appeals explains:

> Under RCW 9A.36.031(1)(a), a person is guilty of assault in the third degree if he or she assaults another with intent to prevent or resist the lawful apprehension or detention of himself, herself, or another person.
>
> Ms. Johnston first argues the State did not prove beyond a reasonable doubt that her detention was lawful because there was no evidence that she was committing or attempting to commit theft or shoplifting. Her argument is flawed. Regardless whether detention of Ms. Johnston would be lawful, she could be found guilty if the evidence established she assaulted Ms. VanHorn with intent to prevent the lawful apprehension or detention of Mr. Zimmerman. RCW 9A.36.031(1)(a).
>
> Store security personnel are permitted to detain a suspected shoplifter in a reasonable manner if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting. State v. Miller, 103 Wn.2d 792 (1985); **[Aug '85 LED:16]** RCW 9A.16.080; RCW 4.24.220. There is no question that Ms. VanHorn had "reasonable grounds to believe" Mr. Zimmerman was "committing or attempting to commit theft or

> shoplifting" and that apprehension or detention of him was lawful. Given the defendants' admissions that Ms. Johnston knew what Mr. Zimmerman was doing and was there to drive the getaway car, and that she accelerated and drove away when he told her to do so, the evidence is sufficient to show she intended to prevent his apprehension or detention.
>
> Ms. Johnston next argues the State did not prove that she assaulted Ms. VanHorn because there is no evidence of intentional harmful touching. She asserts Ms. VanHorn's injuries resulted from her "dropping off" the car as it drove off, not from any force that Ms. Johnston put in motion. Again, her argument is flawed.
>
> Washington recognizes three definitions of assault, one of which is an unlawful touching with criminal intent, or actual battery. The evidence is sufficient to show Ms. Johnston committed an assault by battery through use of an indirect force or a force applied through an intervening agency - her car. The jury could reasonably infer from the evidence that Ms. Johnston intentionally touched or struck Ms. VanHorn's arm with the car frame upon acceleration (because the arm extended into the car through the open window, the car could not move forward without striking it). Or it could reasonably infer that Ms. Johnston intentionally removed the car, which Ms. VanHorn was leaning against, and thereby caused her to fall to the ground. In either instance the jury could reasonably infer that the contact - with the car frame or the ground - was harmful or offensive.

[Citations omitted]

Result: Affirmance of Spokane County Superior Court convictions of third degree assault against Barbara Ann Johnston and George Zimmerman.

(8) EVIDENCE SUFFICIENT TO CONVICT FOR DELIVERY OF COCAINE – In State v. Gill, 85 Wn. App. 672 (Div. II, 1997), and in several unrelated cases consolidated for appeal purposes, the Court of Appeals for Division Two rejects defendants' arguments that they could not be convicted of delivery of a controlled substance where the actual substance that they had delivered to an apparent purchaser had never been recovered by the police, and therefore had never been tested.

In each of the cases, the circumstantial evidence that the defendant had delivered a controlled substance was along the following lines: Through binoculars, experienced narcotics officers observed defendants engaged in transactions with apparent purchasers. Money was exchanged by the purchasers for something that appeared (through could not be determined with certainty) to be packets of cocaine (in two of the cases) and heroin (in one of the cases). The transactions took place in areas often frequented by peddlers of these illegal drugs, and each occurred in a manner consistent with such transactions. When the officers arrested the defendants, they each had some illegal drugs on them, as well as cash in amounts consistent with having just made drug sales.

The above facts provide sufficient evidence to support a conviction for delivery of an illegal drug, the Court of Appeals holds.

Result: Affirmance of Pierce County Superior Court convictions under UCSA for delivery.

(9) EXCLUSIONARY RULE FOR MIRANDA VIOLATION DOES NOT BAR TESTIMONY FROM FOLLOWUP INTERROGATOR WHO DID MIRANDIZE OR FROM WITNESSES THAT FOLLOWUP INTERROGATOR LOCATED BASED ON HIS MIRANDIZED INTERROGATION – In State v. Dods, 87 Wn. App. 312 (Div. II, 1997), the Court of Appeals follows federal precedent in ruling that, where there was no question as to the voluntariness of the suspect's statements, one officer's failure to give Miranda warnings in taking an initial, earlier custodial statement did not require exclusion of either: 1) the follow-up interrogator's testimony regarding a second statement (which **was** Mirandized) taken just a short while after the Miranda-violative first statement was taken, or 2) a witness statement from a witness located through information derived from the second statement.

In Oregon v. Elstad, 470 U.S. 298 (1985) **June '85 LED:10**, the U.S. Supreme Court ruled that, where an initial custodial statement taken by police without required Miranda warnings is otherwise voluntary, the general presumption is that there need be no exclusion of voluntary statements obtained in a follow-up

custodial interrogation in which Miranda warnings are given. And in Michigan v. Tucker, 417 U.S. 433 (1974), the U.S. Supreme Court ruled that where a witness was identified on the basis of a voluntary statement obtained in a custodial interrogation with inadequate Miranda warnings, the statement was inadmissible, but the testimony of the witness identified as a result of the Miranda-violative interrogation was not subject to exclusion. The Dods Court applies Elstad and Tucker to uphold admissibility of the testimony: 1) of the second interrogator and 2) of the witness who had been identified by that second interrogator.

Result: Affirmance of Mason County Superior Court conviction for public indecency.

(10) "CUSTODIAL INTERFERENCE" EVIDENCE HELD SUFFICIENT – in State v. Pesta, 87 Wn. App. 515 (Div. I, 1997), the Court of Appeals rejects defendant's narrow interpretation of one subsection of the custodial interference statute. The Court broadly interprets subsection (2) of RCW 9A.40.060. That subsection defines the crime of custodial interference by a parent to include the act of intentionally depriving the other parent of visitation rights as established by a court-ordered parenting plan. The Pesta Court holds that a under subsection (2) a "court-ordered parenting plan" includes a proposed parenting plan that has been adopted by court order as an effective temporary parenting plan.

Result: Affirmance of Snohomish County Superior Court conviction of Sherlee Pesta for custodial interference.

(11) ACCOMPLICE LIABILITY IN CHILD ASSAULT CASE CANNOT BE BASED ON OMISSION OR FAILURE OF FOSTER PARENTS TO CARRY OUT CIVIL DUTY TO PROTECT CHILD – In State v. Jackson, 87 Wn. App. 801 (Div. I, 1997), the Court of Appeals reverses felony-murder convictions for two foster parents, finding instructional error which impermissibly allowed the jury to find accomplice liability for assault based on foster parents' failure to carry out their legal duty to prevent harm to their foster child.

A three-year-old foster child died under circumstances which strongly indicated that the child had suffered physical abuse over the final several weeks of her life. Both foster parents were tried for felony-murder with assault on the child as the predicate felony. In instructing the jury on accomplice liability, the trial judge instructed that one can be an accomplice if, among other things, one "aids" a person in committing a crime under the following definition of "aid":

> The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime**. Unless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so.**

[Bolding by **LED** Editor]

The jury convicted, but on appeal the Court of Appeals has reversed by a 2-1 vote. The majority holds that there is no basis in the definition of "accomplice" liability at RCW 9A.08.020 to make omission to act a basis for accomplice liability in the factual context of this case. Thus, although a parent clearly has a civil law responsibility not to knowingly fail to protect a child from harm by the other parent or by others, a parent or other guardian cannot be held criminally liable as an accomplice for failing to meet this duty. Accordingly, the Jackson majority reverses the second degree felony-murder convictions of the Jacksons.

Result: Reversal of King County Superior Court second-degree murder convictions of Michael A. Jackson and Laurinda J. Jackson; case remanded for re-trial.

(12) LEOFF II OFFICERS, LIKE LEOFF I OFFICERS, MAY SUE THEIR EMPLOYERS AS WELL AS COLLECTING WORKERS' COMPENSATION BENEFITS – In Elford v. City of Battle Ground, 87 Wn. App. 229 (Div. II, 1997), the Court of Appeals for Division Two agrees with the Court of Appeals for Division Three that, due to invalidity of 1992 amendments of the LEOFF statutes, LEOFF II (post-09/30/77 hires) law enforcement officers, like LEOFF I officers, may sue their employers for negligence, even if such LEOFF II officers have obtained workers' compensation benefits. See the Division Three decision at Fray v. Spokane

County, 85 Wn. App. 150 (Div. III, 1997) **June '97 LED:11**. Result: Reversal of Clark County Superior Court order dismissing lawsuit; case remanded for trial. Status of issue: The Fray case is currently under review in the State Supreme Court where oral argument was heard in January 1998; Elford is also pending in the State Supreme Court awaiting the outcome of Fray.

(13) NO MENTAL STATE ELEMENT IN FIREARMS POSSESSION STATUTE – In State v. Semakula, 88 Wn. App. 719 (Div. I, 1997), the Court of Appeals rejects defendant's argument that the bar of RCW 9.41.040 on possession of firearms by felons requires proof that defendant knew that he was prohibited from possessing a firearm.

Defendant, who had a prior second degree burglary conviction as a juvenile, was convicted in 1996 for violation of the 1995 version of RCW 9.41.040 barring possession of firearms by convicted felons. In part, defendant based his argument for a mental state element in RCW 9.41.040 on the provision in RCW 9.41.047 requiring that persons convicted of felonies be advised of the prohibition on possession of firearms. The Court of Appeals is unconvinced, concluding that RCW 9.41.040 is a "strict liability" crime except to the extent that a person unwittingly in possession of a firearm (for example, a gun placed in defendant's luggage by another person without defendant's knowledge) could escape liability on the ground that he or she did not know he or she was in possession of a firearm.

The Semakula decision by Division One of the Court of Appeals thus agrees with the Division Two ruling in State v. Reed, 84 Wn. App. 379 (Div. II, 1997) **June '97 LED:11**. The Reed Court pointed out that "ignorance of the law is no excuse."

Result: Affirmance of King County Superior Court conviction of Timothy M. Semakula for unlawful possession in the first degree.

(14) "FAILURE TO RETURN FROM FURLOUGH," NOT "ESCAPE," SHOULD HAVE BEEN CHARGED BECAUSE SPECIFIC STATUTE CONTROLS OVER GENERAL – In State v. Smeltzer, 86 Wn. App. 818 (Div. III, 1997), the Court of Appeals for Division Three agrees with the appealing defendant that, under the facts of his case, he should have been charged under the specific statute prohibiting "failure to return from furlough" (RCW 72.66.060), not under the general statute prohibiting "escape" (RCW 9A.76.110).

Larry Keith Smeltzer failed to return from a weekend furlough granted after he had been sentenced to state prison (for 12 months and 1 day) for manufacturing marijuana. He was later arrested on a bench warrant. After he was charged and convicted of first degree escape, he appealed. He argued that his case was controlled by the rule of statutory interpretation under which the more specifically applicable statute prevails over the more general statute. The Court of Appeals agrees, holding that, at the time that Smeltzer failed to return, he qualified as a resident of state prison, even though he had not yet set foot inside the prison walls. Accordingly, he should have been charged under the more specific statute prohibiting failure to return from furlough.

Result: Reversal of Stevens County Superior Court conviction for first degree escape; case remanded for further proceedings, presumably for trial under the more specifically applicable statute.

(15) FAILING TO REPORT TO WORK CREW DUTY PER CRIMINAL SENTENCE IS "ESCAPE" – In State v. Guy; State v. Ammons, 87 Wn. App. 238 (Div. II, 1997), the Court of Appeals rules that a defendant who fails to report to work crew duty to which he has been sentenced following a criminal conviction is guilty of "escape."

The Court of Appeals points out that the term "escape from custody" in chapter 9A.76 RCW must be read in light of the definition of "custody" in that chapter. "Custody" includes "any period of service on a work crew." RCW 9A.76.010(1). The Court rules that it does not matter whether a defendant sentenced to work crew duty a) reports to a work crew and walks away; or b) as here, simply fails to ever report to work crew duty. Either act constitutes "escape," the Court holds in these consolidated cases.

Result: Affirmance of Clark County Superior Court first degree escape convictions of Troy Lee Guy and Joey Allen Ammons.

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NEXT MONTH

The April '98 **LED** will include an entry on State v. Thomas, 89 Wn. App. ___ (Div. III 1998), (a January 22, 1998 Court of Appeals decision that a Spokane-area criminal justice policy against arresting certain minor criminal offenders did not limit police custodial arrest authority.)

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Phone 206 464-6039; Fax 206 587-4290; Address 900 4th Avenue, Suite 2000, Seattle, WA 98164-1012; E Mail [johnw1@atg.wa.gov]. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice. LED's from January 1992 forward are available on the Commission's Internet Home Page at: http://www.wa.gov/cjt.

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JOB ANNOUNCEMENT IN FULL: BLEA COMMANDER'S OPENING

MEMORANDUM

To: Law Enforcement Executives

From: Sharon M. Tolton, Deputy Director

Subject: Basic Law Enforcement Academy Commander's Opening

On December 31, 1998, Lieutenant Mike Painter will conclude his assignment with the Training Commission as the Commander of the Basic Law Enforcement Academy. We are now accepting applications from prospective candidates who meet the minimum qualifications for this position. This opening provides an excellent opportunity for candidates seeking personal and professional development by providing a challenging and dynamic work environment. Qualified applicants will be eligible for an assignment to the FBI National Academy in Quantico, VA.

The position of Commander reports directly to the Deputy Director of the Training Commission, is responsible for the daily administration of the Academy, and serves as a liaison between and Academy and client agencies. The 3 year term of assignment will run from January 1, 1999 to December 31, 2002, inclusive of a short overlap period to effect a seamless transition.

Candidate minimum qualifications include being a law enforcement officer holding the full time rank of Lieutenant (traditional rank structure) or higher, a minimum of five years supervisory (Sergeant or higher) experience, and demonstrated team building, organizational, and administrative skills. Candidates should posses a Bachelors Degree, experience that support the position's job duties (on reverse), and be prepared to meet the entrance requirements of the FBI National Academy. Qualified candidates will engage in a competitive selection process with a final ranking provided to the Executive Director, who is the appointing authority.

Candidates must attach a letter from their agency head endorsing their candidacy and supporting a three year assignment to the Training Commission. Salary and benefits paid to the selected individual during the term of their assignment will be reimbursed to the employing agency on a monthly basis pursuant to a written contract between the Training Commission and the employing agency.

If you have any questions or desire further information, please feel free to contact me at (206) 439-3740, ext. 245. In the interim, I ask that interested candidates mail or fax me their application packets to my office by **March 31, 1998.** The packet should include: a cover letter if interest; agency endorsement letter; resume; two additional letters of recommendation.

The B.L.E.A Commander assignment is an exceptional opportunity for personal growth and development as well as additional professional recognition to the employing agency of the individual selected. The Training Commission thanks you in advance for your commitment in this application process towards a selection which ultimately benefits all participating agencies in Washington State.

JOB DESCRIPTION
COMMANDER - BASIC LAW ENFORCEMENT ACADEMY

1. Oversee and supervise all Basic Law Enforcement Academy (Academy) training and clerical staff;

2. Liaison and coordinate between Commission representatives and the Academy;

3. Ensure that Commission approved changes to the Academy program are implemented and carried out by staff;

4. Conduct monthly graduation exercises of the Academy;

5. Supervise the selection of professional personnel for assignment to the Academy instructional staff;

6. Develop contracts for Academy services and ensure their compliance;

7. Ensure that appropriate documentation is forwarded to the Commission at the conclusion of each Academy session;

8. Propose changes to Academy curriculum for review by the Commission;

9. Review instructor and program evaluations and forward same to Deputy Director;

10. Coordinate interviews by local media;

11. Answer questions from agency heads regarding specific recruits;

12. Coordinate and supervise the curriculum, personnel, and budgets for all external or regional Academies;

13. Develop and manage Basic Law Enforcement Academy budget;

14. Serve as Academy representative to CJTC Management Team;

15. Make recommendations to Executive Director regarding personnel actions affecting staff and recruits assigned to Academy;

16. Make recruit selections, from an applicant pool, for assignment to the Academy;

17. Prepare reports and provide presentations, regarding Academy activities, to the Commission and other interest groups.