Law Enforcement Digest

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HONOR ROLL

508th Session, Basic Law Enforcement Academy – February 24th thru June 29th, 2000

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

NO CHANGE IN MIRANDA RULE – U.S. SUPREME COURT REJECTS 1968 FEDERAL STATUTE WHICH ATTEMPTED TO OVERTURN MIRANDA – In Dickerson v. U.S., ___ S.Ct. ___ (2000) 2000 WL 807223, the U.S. Supreme Court rules 7-2 that the U.S. Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966) has sufficient constitutional underpinning that it may not be overruled by an Act of Congress.

In the majority opinion supporting its 5-4 Miranda decision in 1966, the U.S. Supreme Court said some things that indicated that the decision was not grounded in the constitution. This suggested that Congress could replace the Miranda rule with a different standard. In 1968, the U.S. Congress passed a federal statute providing that, so long as a custodial confession was "voluntary, considering the totality of the circumstances," the failure of police to Mirandize in a custodial interrogation would not require suppression of the confession in federal court. From 1968 to the time in the late 1990's when the Dickerson case arose, this federal statute was largely ignored in the federal courts. During that same period, the U.S. Supreme Court issued a number of additional opinions further suggesting the Miranda was not firmly grounded in the constitution.

In its 1999 decision in Dickerson, the 4th Circuit of the U.S. Court of Appeals applied the 1968 federal statute to rule that the absence of evidence that interrogating officers Mirandized the defendant did not require suppression of his custodial confession. The confession otherwise had been shown, in light of the totality of the circumstances, to have been voluntarily given, the 4th Circuit held. Now, the U.S. Supreme Court has overruled the 4th Circuit decision.

The U.S. Supreme Court majority notes in Dickerson that Miranda: A) is constitutionally based; and B) over the past 34 years, has become a rule of constitutional law firmly embedded in police practice and case law. For those reasons, the Dickerson majority finds the federal statute to be unconstitutional.

Result: Reversal of 4th Circuit Court of Appeals decision which had reversed a U.S. District Court suppression order; case remanded for trial.

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9TH CIRCUIT, U.S. COURT OF APPEALS

9TH CIRCUIT SPLITS FROM 10TH CIRCUIT AND MAYBE WASHINGTON COURTS IN GIVING PRIVACY PROTECTION TO TENT OF CAMPER SQUATTING ON FEDERAL LAND

U.S. v. Sandoval, 200 F.3d 659 (9th Cir. 2000)

Facts and Proceedings: (Excerpted from 9th Circuit opinion)

> In early 1997, state and federal officials began an investigation into marijuana growing in Idaho that led to the seizure of marijuana from sixteen growing sites ("grows") and the indictment of 18 defendants, including Sandoval. During the seizure of one of the grows, which was located on Bureau of Land Management ("BLM") land, federal agents entered a makeshift tent and found a medicine bottle bearing Sandoval's name. The tent was closed on all four sides, and the bottle could not be seen from outside. Before trial, Sandoval filed a motion to suppress, alleging that agents had entered the tent without a search warrant and that the evidence was therefore inadmissible. The district court denied the motion, holding that because the tent was on BLM land, Sandoval did not have a reasonable expectation of privacy. Therefore, the court concluded, a search warrant was not required, and the evidence was admissible.

ISSUE AND RULING: Under the Fourth Amendment, did the squatter-camper Sandoval have a reasonable expectation of privacy in his tent on Federal land? (ANSWER: Yes)

Result: Reversal of U.S. District Court (Idaho) conviction on drug and conspiracy charges.

ANALYSIS: (Excerpted from 9th Circuit opinion):

> To determine whether a warrantless search violates the Fourth Amendment, we must ask two questions: "[F]irst, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" Only if both the subjective and objective tests are met can we find that a Fourth Amendment interest has been violated.
>
> In this case, several factors indicate that Sandoval had a subjective expectation of privacy. First, the tent was located in an area that was heavily covered by vegetation and virtually impenetrable. Second, the makeshift tent was closed on all four sides, and the bottle could not be seen from outside. Third, Sandoval left a prescription medicine bottle inside the tent; a person who lacked a subjective expectation of privacy would likely not leave such an item lying around. The government counters that Sandoval could not have had a subjective expectation of privacy because he was growing marijuana illegally and was not authorized to camp on BLM land. However, we have previously rejected the argument that a person lacks a subjective expectation of privacy simply because he is engaged in illegal activity or could have expected the police to intrude on his privacy. See United States v. Gooch, 6 F.3d 673 (9th Cir.1993). "According to this view, no lawbreaker would have a subjective expectation of privacy in any place because the expectation of arrest is always imminent."

Sandoval's expectation of privacy was also objectively reasonable. In LaDuke v. Nelson, 762 F.2d 1318 (9th Cir.1985), we held that a person can have an objectively reasonable expectation of privacy in a tent on private property. In Gooch, we extended that holding to find a reasonable expectation of privacy in a tent on a public campground. Here, the tent was located on BLM land, not on a public campground, and it is unclear whether Sandoval had permission to be there. *[COURT'S FOOTNOTE: The district court assumed that Sandoval lacked authority to erect a tent on BLM land. However, it is unclear whether explicit permission was required.]* However, we do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land. *[COURT'S FOOTNOTE: The Tenth Circuit reached a different conclusion in United States v. Ruckman, 806 F.2d 1471 (10th Cir.1986). However, we find Judge McKay's dissent in that case more persuasive.]* Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights.

We note that in Zimmerman v. Bishop Estate, 25 F.3d 784 (9th Cir.1994), this court held that a squatter in a residential home did not have an objectively reasonable expectation of privacy because he had no legal right to occupy the home. However, we find Zimmerman distinguishable on two grounds. First, camping on public land, even without permission, is far different from squatting in a private residence. A private residence is easily identifiable and clearly off-limits, whereas public land is often unmarked and may appear to be open to camping. Thus, we think it much more likely that society would recognize an expectation of privacy for the camper on public land than for the squatter in a private residence.

Second, the facts of Zimmerman contrast starkly with the facts presented here. In Zimmerman, the appellants were asked on several occasions over the course of eight months to vacate the premises, and there was "no dispute of material fact regarding the ownership of the property or whether the [owners] acquiesced in the presence of the [appellants]." By contrast, though Sandoval did not obtain permission to camp on BLM land, he was never instructed to vacate or risk eviction, and the record does not establish any applicable rules, regulations or practices concerning recreational or other use of BLM land. Indeed, whether Sandoval was legally permitted to be on the land was a matter in dispute.

Because Sandoval had a subjective expectation of privacy and because that expectation was objectively reasonable, we conclude that the district court erred in denying Sandoval's motion to suppress. His conviction is REVERSED, and the case is REMANDED for a new trial.

LED EDITORIAL COMMENT: The 9th Circuit's Sandoval decision muddies the water for Washington's law enforcement officers. There are two Washington Court of Appeals decisions on somewhat related facts, but there are no Washington Supreme Court decisions on point.

In State v. Pentecost, 64 Wn. App. 656 (Div. III, 1992) Aug 92 LED:16, the Court of Appeals held that a trespassing camper on private land did not have a reasonable Fourth Amendment expectation of privacy in the campsite area around his tent. The Pentecost Court did not involve an investigatory search of the defendant's tent, so the Pentecost Court of Appeals did not have to address that issue.

In State v. Cleator, 71 Wn. App. 217 (Div. I, 1993) Jan 94 LED:17, the Court of Appeals held that trespassers on private property who had erected a tent there did not have a reasonable expectation of privacy protecting them against a warrantless police search of their tent. The term "trespasser" is apparently used in Pentecost and Cleator in the broad sense that the campers there did not have express authority to be on the land in question.

So what now is the advisable approach to search authority as to the tent or other makeshift abode of a person trespassing on private or public land? Even though the Ninth Circuit is the most-reversed of the Federal circuit courts, and even though the Sandoval Court limited its holding to that case's particular factual record concerning BLM land, Washington officers must try to follow Ninth Circuit interpretations while they stand. We think the Sandoval decision casts enough doubt on warrantless searches in "trespassing-camper" cases that officers probably should get a search warrant involving most government and private land situations, assuming officers cannot obtain valid consent and they are not presented with exigent circumstances.

Note also that a tent is personal property, and that officers with probable cause to search personal property may seize it and secure it while they contemporaneously seek a search warrant. Note further, however, that regardless of whether the Sandoval Court correctly answered the tent-search question, the authority of law enforcement officers to enter a campsite or to look inside a shelter is not authority to search closed, non-transparent containers inside such a shelter. Such closed containers should not be searched absent authority to do so under a search warrant or under recognized search warrant exceptions such as consent, search-incident-to-arrest, or exigent circumstances.

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BRIEF NOTE FROM THE 9TH CIRCUIT , U.S. COURT OF APPEALS

HUMBOLDT COUNTY SHERIFF'S DEPARTMENT SEEKS FURTHER REVIEW IN CASE INVOLVING USE OF PEPPER SPRAY TO UNLINK "PASSIVELY" RESISTING PROTESTORS-- In Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121 (9th Cir. 2000), a decision which we reported in the July 2000 LED at page 3, a three-judge panel of the Ninth Circuit of the U.S. Court of Appeals questioned law enforcement officers' use of pepper spray to overcome what the Court characterized as "passive" resistance by protesters whose arms were linked together with cylindrical, metal, "black bear" devices. Humboldt County Sheriff's Department has now moved the Court, in the alternative: (A) for rehearing in front of the original 3-judge panel which issued the above-referenced decision; or (B) for a hearing in front of an eleven-member panel of the Court (en banc review). We will keep LED readers posted on any further developments in the case.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

KNOWLEDGE OF LAW ENFORCEMENT OFFICER'S STATUS IS NOT ELEMENT OF ASSAULT THREE UNDER RCW 9A.36.031(1)(G) -- In State v. Brown, 140 Wn.2d 456 (2000), the State Supreme Court affirms a Court of Appeals decision in ruling that, in order to obtain a conviction for assault in the third degree under RCW 9A.36.031(1)(g), the State need not prove a defendant's knowledge of a law enforcement officer's status as an officer.

During an undercover buy gone bad, a drug dealer threatened a plain clothes officer with what appeared to be a handgun (but what was actually a cigarette lighter simulating a handgun). After identifying himself as an officer by showing his badge and by announcing his status, the

officer justifiably shot and injured the drug dealer. The drug dealer was later charged with assault in the third degree.

At trial, the jury was instructed that defendant could not be convicted of assault three under RCW 9A.36.031(1)(g) unless defendant knew the officer's status at the time of the assault. During deliberations, the jury asked the judge whether the assault three charge covered a situation where defendant began the assault without knowledge of the officer's status. The judge declined to further instruct the jury, and the jury ultimately convicted the defendant. Defendant appealed the trial court's refusal to give any further instruction.

The Court of Appeals for Division One affirmed, concluding that the judge's response to the jury's inquiry was irrelevant, because there is no statutory knowledge requirement. See State v. Brown, 94 Wn. App 327 (Div. I, 1999) **April 99 LED:09**. Now the State Supreme Court has affirmed the Court of Appeals decision, summarizing its ruling as follows:

> We conclude that knowledge that the victim is a law enforcement officer in the performance of official duties at the time of an assault is not an implied element of the crime of assault in the third degree under RCW 9A.36.031(1)(g). We agree with the conclusion of the Court of Appeals, Division I, that the State must prove that the victim was a law enforcement officer performing official duties at the time of the assault, but is not required to prove the defendant knew either that the victim was a law enforcement officer or that the victim was performing official duties at the time of the assault.

Justice Madsen writes a lone concurring opinion, arguing in vain that the jury was properly instructed that there is a knowledge requirement, and that the conviction should stand only because of that instruction. The end result of the Supreme Court's Brown decision, however, is that such an instruction need not be given in future trials under RCW 9A.36.031(1)(g).

Result: Affirmance of Court of Appeals decision which had affirmed a King County Superior Court conviction of Jason Brown, a/k/a Joseph Osell Palmer, of assault in the third degree.

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WASHINGTON STATE COURT OF APPEALS

4-HOUR DETENTION WAS UNLAWFUL ARREST WITHOUT PC; CONSENT TAINTED; INEVITABLE DISCOVERY EXCEPTION TO EXCLUSIONARY RULE DOES NOT APPLY

State v. Avila-Avina, 99 Wn. App. 9 (Div. I, 2000)

Facts and Proceedings:

Police responded at 7:30 p.m. to a shooting homicide. The dead victim's girlfriend told police two Hispanic brothers were the likely shooters. Police soon apprehended one of the brothers. A half-hour later, police stopped Avila-Avina, a Hispanic man who was walking outdoors in the vicinity. Police suspicions were aroused, because Avila-Avina was Hispanic and his footwear was thongs with no socks on a chilly evening. He identified himself and convinced them that he was not the other brother, but the officers' suspicions were further aroused when they learned that he lived in the apartment complex where the murder had occurred. The officers held Avila-Avina for over an hour until a Spanish-speaking interpreter arrived. Avila-Avina told the interpreter that he knew nothing of the shooting. The interpreter then left.

The officers continued to hold Avila-Avina for another three hours. A second interpreter then questioned Avila-Avina and obtained consent to search his car and apartment. In Avila-Avina's apartment, officers found bullets and a holster later linked to the gun used in the murder (that gun was later found elsewhere). In the car, officers found packaging for the bullets. Officers also found another gun, unrelated to the homicide, in Avila-Avina's apartment.

Some time later that evening, after Avila-Avina had consented to the search of his apartment and car, police lawfully found the murder weapon in the residence of one of the two suspects. A little later that evening, that suspect told police that Avila-Avina had supplied the gun used in the murder.

Ultimately, Avila-Avina was charged only with being an alien in possession of a firearm without an alien's firearm license. See RCW 9.41.170(1). Prior to trial, Avila-Avina moved to suppress the gun found in his apartment. The trial court denied his motion, ruling that, regardless of whether the four-hour detention of Avila-Avina was unlawful, the gun inevitably would have been discovered by lawful search.

ISSUE AND RULING: 1) Was the officers' continued detention of Avila-Avina for several hours after they learned his identity an unlawful arrest without probable cause? (ANSWER: Yes); 2) Was the consent to search by Avila-Avina free of the taint of the unlawful arrest? (ANSWER: No) ; 3) Is the gun nonetheless admissible under the "inevitable discovery" exception to the exclusionary rule? (ANSWER: No)

Result: Reversal of Whatcom County Superior Court conviction of Anibal Manuel Avila-Avina for violation of RCW 9.41.170(1).

ANALYSIS:

1) SEVERAL-HOUR DETENTION WITHOUT PC WAS UNLAWFUL ARREST

Assuming that Avila-Avina was lawfully detained initially under Terry v. Ohio, the Court of Appeals holds that the duration of the detention unreasonably exceeded its purpose and justification. Once the officers determined that Avila-Avina was not one of the brothers suspected of the murder, that he denied knowledge of the crime, and that they had no other objective basis for suspicion, they no longer had cause to continue to hold him.

2) CONSENT TAINTED BY UNLAWFUL ARREST

The Avila-Avina Court asserts that the defendant's consent to search his apartment and car, resulting in discovery of evidence giving rise to the charge of possessing a firearm without an alien firearms license, was improperly obtained by police exploitation of his illegal detention. The State gave no reasonable explanation for detaining defendant for several hours after the initial purpose of detention was satisfied.

3) INEVITABLE DISCOVERY EXCEPTION TO EXCLUSIONARY RULE NOT APPLICABLE

The Court of Appeals explains as follows its view that the "inevitable discovery" exception doesn't apply in this case:

> Evidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State can prove by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery, and the evidence would have been inevitably discovered under proper and predictable investigatory procedures. Because we find the second prong dispositive, we do not consider whether police acted reasonably in this case.
>
> Here, the trial court found in its written ruling that the evidence at issue would have inevitably been discovered because Avila-Avina "would have inevitably been contacted by officers, since his apartment was in extremely close proximity to the body of [the victim]." The State argues that the court correctly applied the doctrine because police independently discovered and arrested the murder suspects using proper procedures. The evidence would inevitably have come to light, according to the State, because one of the suspects then told police that he had obtained the gun from Avila-Avina's home. These assertions rest on an improper understanding of the inevitability prong of the inevitable discovery rule.

> The State rests its argument that police would have inevitably discovered the illegally obtained evidence on the fact that the murder suspect independently told police that Avila-Avina had supplied the gun used in the murder. This argument is also unpersuasive. The State has the burden of proving that police would have inevitably obtained the information from the murder suspect independently of the illegality. Yet police did not possess the information at the time of the illegality; [one of the officer's] admitted that the suspect did not claim the gun belonged to Avila-Avina until some time after Avila-Avina consented to the search. Moreover, police were not pursuing an alternative line of investigation into the crime for which Avila-Avina was charged and convicted, at the time of the illegality. Police had no independent reason to search Avila-Avina's apartment and car before he was detained, nor to believe that Avila-Avina was somehow involved in the murder or had committed a crime. The only evidence available to police at that time was a body at the apartment complex where Avila-Avina lived and Avila-Avina's presence on the road walking toward the murder scene. The State has not proven that the outcome here was inevitable at the time of the illegality; the State's argument rests on post hoc suggestions. Under these facts, we hold that the State has failed to prove that police inevitably would have obtained the evidence through independent legal means.

[Some citations and text omitted]

LED EDITORIAL COMMENTS:

1) BREVITY OF OUR SUMMARY OF FACTS MAY MISLEAD. Due to space limitations, we summarized the detailed factual description by the Court of Appeals in Avila-Avina, which description itself had some troubling gaps. LED readers may want to read the full text of the Avila-Avina opinion and compare our summary of the facts and analysis to that of the Court.

2) INEVITABLE DISCOVERY EXCEPTION TO EXCLUSIONARY RULE IS UNCLEAR. As we stated in our comments on State v. Reyes, 98 Wn. App. 631 (Div. II, 2000) in the April 2000 LED at page 12, case law relating to the "inevitable discovery" exception to the Exclusionary Rule does not appear to be consistent in its application. But whether there is consistency among such decisions is difficult to determine, because the decisions are so fact-specific and context-dependent. Those wishing to further research this issue may want to review the pro-State-flavored law review article by Donald Seaver, "Inevitable Discovery in Washington State and the Unreasonable 'Reasonableness' Requirement," 23 Seattle U. Law Review 431 (1999), and the annotation of cases at 81 ALR Fed 331.

We think that the Avila-Avina Court misapplied the inevitable discovery exception in this case. That is because, regardless of the unlawful extended detention of Avila-Avina in this case, the officers were going to learn in a few hours that one of the murder suspects admitted he had gotten the murder weapon from Avila-Avina. This admission would have supported a search warrant for Avila-Avina's apartment and car. Thus, under the doctrine's preponderance of evidence standard, it was inevitable that the other gun, the murder gun's holster, and the homicide-linked bullets and bullet-packaging would be discovered in Avila-Avina's apartment and car. We presume that prosecutors in close cases will continue to pursue the "inevitable discovery" exception which to date has received scant attention from the Washington Supreme Court. Officers, of course, should strive to comply with the court-made rules of search & seizure, and should not rely on the inevitable discovery exception to the Exclusionary Rule.

KNOWINGLY MAKING FALSE STATEMENT IN OFFICIAL REPORT FILED WITH HEALTH DEPARTMENT REGARDING SEWAGE SYSTEM IS FELONY VIOLATION OF RCW 40.16.030

State v. Hampton, 100 Wn. App. 152 (Div. II, 2000)

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

> In April 1994, Charles Hampton worked as a sanitarian for the Health Department. In this capacity, Hampton's duties included inspecting the installation and repair of sewage systems.
>
> On April 25, 1994, Hampton conducted a final inspection of William Forth's sewage disposal system at 191 Forth Road in Lewis County. On May 10, 1994, Hampton signed and submitted a final inspection form to the Health Department. An employee of the Health Department put the form into the Department's file and entered the information in its computer database. Hampton's submitted form incorrectly identified the designer of the sewage system and falsely stated that a required designer's certificate had been obtained.
>
> On September 18, 1998, the State charged Hampton with offering a false instrument for filing. The jury returned a guilty verdict. Defense counsel moved to arrest the judgment, arguing that the State failed to prove an element of the offense -- namely, it failed to show any statute or rule that required or permitted the filing of the final inspection form with the Health Department. The trial court agreed and arrested judgment.

ISSUE AND RULING: Did the State prove that the final inspection form filed by Lewis County Sanitarian, Hampton, was an instrument which "might be filed, registered or recorded…under any law of this state"? (ANSWER: Yes)

Result: Reversal of Lewis County Superior Court arrest of judgment on jury verdict of guilty; case remanded, presumably for entry of judgment and for sentencing.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 40.16.030, which makes it a felony to file a false instrument in a public office, provides:
>
> > Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.
>
> Here, it is undisputed that the final inspection form constituted an instrument within the meaning of the statute. Nor does either party challenge the finding that Hampton knowingly presented the false form to the Health Department to be filed, thereby satisfying the first element of the offense. The sole issue is whether the Health Department was authorized to accept Hampton's submission of the final inspection form for filing.
>
> To resolve this question, we interpret and decide the proper meaning of the statute's second clause, "which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States[.]" The parties agree that the clause requires proof that the defendant offered the false filing to a public office authorized to accept the document. For example, Hampton would not have been guilty had he filed the final inspection form with the police department, as the police department lacked authority to accept the form.
>
> But the parties disagree as to how to determine whether a public office is authorized to accept the document submitted for filing. The State contends that authorization

can be implied from statutory authority requiring the Health Department to oversee the sewer permit and installation process. Hampton counters that a regulation or statute must explicitly authorize the filing.

Under RCW 70.05.060, the Lewis County Board of Health established rules and regulations governing the construction and installation of sewage disposal systems. These regulations have the force of law. The stated purpose of the regulations was to protect the health, safety and welfare of the people of Lewis County, as sewage disposal regulation is necessary to control environmental pollution and the sources of communicable disease. The regulations govern all who construct or alter sewage systems within the county.

These rules required the Health Department to oversee the permit application process. This oversight included reviewing the permit application, issuing or denying permits, and conducting a final inspection prior to the backfilling of the excavations. The final inspection by a Health Department official was mandatory, and the applicant could not close the septic construction until the sewage system had been inspected and approved. If the final inspection identified any inadequacies in the system, the rules required the applicant to make all the necessary corrections and request another inspection. The Health Department could not sign the permit before the sewage system had been inspected and approved.

It follows that the Health Department was authorized to accept and file forms memorializing the inspection, for statutory authorization to regulate the sewer permit and installation process constitutes authorization for the Health Department to accept all documents relevant to the process. As observed by our Supreme Court, the Legislature's intent in enacting RCW 40.16.030 was to criminalize the offering of false instruments for filing in a public office where the government office would justifiably rely on the submission. State v. Price, 94 Wn.2d 810 (1980). **[LED EDITORIAL NOTE: Price involved falsified fish-receiving tickets filed with the former Department of Game.]**

In summary, the trial court erred in finding that the Health Department lacked statutory authority to accept Hampton's submission of the final inspection form for filing. The Health Department was statutorily required to oversee the sewage permit and installation process, and it had the authority to accept any documents relevant to that process. Such an interpretation furthers the intent of RCW 40.16.340, which seeks to criminalize the offering of false instruments for filing in a public office where the government would justifiably rely on the submission. Here, given that the Health Department oversaw the sewage permit and installation process, it justifiably relied upon the submission of the final inspection form, even if a regulation did not explicitly authorize the filing of the document.

RESTITUTION FROM THIEVING ATTORNEY MAY INCLUDE ATTORNEY FEES INCURRED BY VICTIM PURSUING A MALPRACTICE SUIT AGAINST THE ATTORNEY

State v. Christensen, 100 Wn. App. 534 (Div. I, 2000)

Facts and Proceedings:

Christensen pleaded guilty to eight counts of first degree theft and two counts of securities fraud. From one of the victims, Edith Sorenson, Christensen fraudulently took $143,282.81. Sorenson hired an attorney to sue Christensen. She eventually settled with Christensen's malpractice insurance carrier for $105,000. Her attorney deducted $42,381.38 in attorney fees and costs, leaving Sorenson with a net of $62,618.62 from the settlement. Sorenson later received $27,625.56 from the Washington State Bar Association Client Protection Fund. Thus, she recouped a total of $90,244.18.

The trial court ordered Christensen to pay Sorenson $53,038.63. That sum represents the difference between the amount of her loss and the amount already restored to her.

ISSUE AND RULING: The "American Rule" precludes an award of attorney fees to prevailing parties in civil litigation, absent express authority in statute, contract or a recognized equitable ground in common law. Does the "American Rule" bar restitution of the amount of attorney fees incurred by the victim of an attorney's theft of client funds? (ANSWER: No)

Result: Affirmance of King County Superior Court order of restitution against Nelson Christensen.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> In this case, Christensen's offense resulted in Sorenson's loss of property in the form of money. Sorenson's damages in the amount of $143,282.81 were easily ascertainable, and were clearly caused by Christensen's offense.
>
> Christensen contends, however, that his restitution obligation should be reduced by the $42,381.83 attributable to Sorenson's attorney fees and costs in the civil suit in which she recovered part of her loss through the settlement funded by Christensen's insurance. He contends the effect of the restitution order is to require him to pay Sorenson's attorney fees, in violation of the rule that attorney fees may not be awarded as part of the costs of litigation unless authorized by statute, contract or a recognized ground of equity.
>
> Whether attorney fees are a proper element of damages in an order of restitution was considered in State v. Martinez, 78 Wn. App. 870 (1995), a case Christensen cites for support. In Martinez, the defendant was convicted of arson for burning down his own house. The defendant, before he was identified as the arsonist, sued to collect on his insurance, causing his insurance company to incur attorney fees. In ordering restitution in the arson case, the trial court included the insurance company's attorney fees.
>
> The Martinez Court reversed the order requiring restitution of the insurance company's attorney fees. One reason was that the fees, incurred to defend against a fraudulent insurance claim, were not sufficiently causally related to the crime of arson. That aspect of the court's rationale does not support Christensen's argument, because unlike the insurance company in Martinez, Sorenson is a direct victim of the crime for which restitution is being ordered. In addition, however, the Martinez Court supported its decision by applying the "American rule". The court concluded broadly that "attorney fees and costs should not be recoverable as restitution in a criminal case." It is that aspect of the Martinez rationale on which Christensen relies.
>
> The Martinez Court's discussion of the "American rule" in civil cases was not necessary to justify its result. Because it is dicta, we need not apply it in the present case. We fail to see how a rule designed to regulate recovery of attorney fees in civil cases has any application in deciding an award of restitution in a criminal proceeding.
>
> The "American rule" governing attorney fees only precluded Sorenson from recovering her attorney fees as part of the costs of litigation in her civil suit against Christensen. Because she had to pay attorney fees to get any recovery at all in the civil suit, she remained considerably out of pocket with respect to the funds Christensen stole from her. The trial court, rightly concerned with making Sorenson whole, ordered Christensen to make up the shortfall. This was not an abuse of discretion under the restitution statute. Sorenson incurred the fees as a direct result of Christensen's offense. See State v. Wilson, 100 Wn. App. 44 (2000) **July 2000 LED:13** (distinguishing Martinez, and holding that a victim may recover attorney fees incurred as a direct result of the crime for which restitution is being ordered). As the trial court explained, Sorenson "would have received zero" without her attorney's efforts.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) NO EXCLUSION OF CONFESSION FOR POLICE VIOLATION OF VIENNA CONVENTION REQUIREMENT THAT GOVERNMENT TELL ARRESTED FOREIGN NATIONAL OF RIGHT TO CONSULATE NOTIFICATION – In State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000), the Washington Court of Appeals agrees with the Ninth Circuit of the U.S. Court of Appeals that suppression of evidence is not a proper remedy for violation of the rights of foreign nationals under the Vienna Convention.

Arguing that his defense attorney had provided "ineffective service" in his child molestation prosecution, defendant Martinez-Lazo argued that his confession should have been suppressed based on a violation of the Vienna Convention on Consular Relations. Division Three explains as follows that this argument fails because suppression is not a proper remedy for violation of the Vienna Convention:

> Article 36(1)(b) of the Vienna Convention on Consular Relations provides:
>
> > [I]f he so requests, the competent authorities of the receiving State [arresting State] shall, without delay, inform the consular post of the sending State [foreign national's State] if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.
>
> The Convention requires an arresting government to notify a foreign national who has been arrested or taken into custody of his or her right to contact consular officials.
>
> Here, the parties do not dispute that the Convention was violated. Thus, the issue becomes whether the trial court would have granted his motion to suppress if his trial counsel had raised Article 36.
>
> The Ninth Circuit has recently addressed the issue of whether suppression is the appropriate remedy for a violation of the Convention. United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) **May 2000 LED:12** (en banc). In Lombera-Camorlinga, the court held that "a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his right to consular notification." The court reasoned that the Convention was drafted three years before Miranda, and there was no basis to conclude that it had the purpose of protecting an individual's right against self-incrimination or right to counsel because these are "uniquely American rights." Furthermore, the court noted that the exclusionary rule is typically applicable only to constitutional violations, and not for statutory or treaty violations. Finally, the court deferred to the State Department's interpretation that a judicial remedy is inappropriate because the State Department has historically investigated violations of the Convention and worked with local law enforcement to ensure compliance, and because no other signatories to the Convention have permitted suppression under similar circumstances.

> The First Circuit has similarly concluded that the exclusion of post-arrest statements is not an appropriate remedy for a violation of the Convention. United States v. Li, 206 F.3d 56 (1st Cir. 2000) (en banc). In Li, the court found that the Convention did not create fundamental rights on par with those usually protected by the suppression of the evidence. The court then looked to the Convention's text and found that it did not address whether suppression is appropriate. Given the textual ambiguity, the court relied on nontextual sources, including the State Department's interpretation of the treaty, to conclude that suppression was not a remedy under the Convention.
>
> In light of Li and Lombera-Camorlinga, we hold that suppression is not a remedy available to Mr. Martinez-Lazo.

Result: Affirmance of Yakima County Superior Court order denying motion by Jose Martinez-Lazo to withdraw his plea of guilty to third degree child molestation.

LED EDITORIAL NOTE: As did the Ninth Circuit in the Lombera-Camorlinga case digested in the May 2000 LED, the Martinez-Lazo Court does not decide whether or not the Vienna Convention creates individual rights which are enforceable in some way other than by suppression of evidence.

(2) COURT CLERK MAY NOT ISSUE AN ARREST WARRANT WITHOUT JUDICIAL PARTICIPATION – In State v. Walker, ___ Wn. App. ___, 999 P.2d 1296 (Div. II, 2000), a 2-1 majority of the Court of Appeals rules under the Washington constitution, article 1, section 7, that a court clerk lacks authority under existing statutes and court rules to issue a warrant of arrest without judicial participation.

In 1996, pursuant to the practice of Tacoma Municipal Court, a deputy clerk at the court issued a warrant for defendant's arrest for failure to pay a fine or to appear. The clerk did this by rubber-stamping a court commissioner's facsimile signature on the warrant's signature line. Testimony in the Walker case, was that there was no written authorization from a court commissioner or court judge for issuance of a warrant by a clerk. There was evidence that a court commissioner had orally authorized this practice, but the trial court made the following findings in relation to the practice in the Tacoma Municipal Court:

> 10. There was no order signed by any municipal court commissioner authorizing the issuance of a warrant.
> 11. There was no order authorizing the warrant clerk to attach the commissioner's signature.

After issuance of the FTA warrant, police arrested Walker on that warrant. The police found cocaine on his person when they searched him incident to that arrest. Walker unsuccessfully challenged the warrant in a suppression motion, and he was convicted on unlawful possession of cocaine.

On appeal, as noted above, a majority of the Court of Appeals rules that, under the Washington constitution, article 1, section 7, neither search warrants nor arrest warrants may be issued without "authority of law." In this context, "authority of law" means a court rule or statute or constitutional provision, the Court says. The Walker majority concludes that no existing court rule, statute or constitutional provision authorizes a practice of issuance of warrants by court clerks without express authorization by a court commissioner or judge.

The majority opinion goes on to hold that the evidence must be excluded based on the unlawfulness of the warrant:

> The last question is whether the foregoing violation of Article I, §7, should be remedied by applying the exclusionary rule. As the State correctly points out, the United States Supreme Court would say no because of limitations it has placed on the exclusionary rule as a Fourth Amendment remedy. The question here, however, is not the remedy for a Fourth Amendment violation, but rather the remedy for a

> violation of Article I, §7. To date, the Washington Supreme Court has remedied all violations of Article I, §7, by applying the exclusionary rule. Indeed, it has declined even to consider limitations parallel to the federal ones when, as here, the State has not raised the issue at the trial court level. Accordingly, we conclude that the exclusionary rule applies here.

Judge Hunt dissents from the opinion of majority judges Morgan and Armstrong. She argues in vain that the arrest warrant should be upheld based on evidence in the record that a court commissioner had orally authorized the deputy clerk's practice of issuing FTA arrest warrants.

Result: Reversal of Pierce County Superior Court conviction of Keith Jerome Walker for possession of a controlled substance.

(3) WHEN CITATION HAS NOT BEEN ISSUED, NEITHER RELEASE AGREEMENT NOR A BAIL AGREEMENT TRIGGERS SPEEDY TRIAL CLOCK – In State v. Johnson, 100 Wn. App. 917 (Div. I, 2000), the Court of Appeals rules that release agreements and bail agreements do not by themselves trigger the speedy trial clock under Criminal Rule for Courts of Limited Jurisdiction (CrRLJ3.3).

In the two consolidated cases before the Johnson Court, police had arrested, booked and then released defendants, but the officers had not issued citations to the defendants. In one of the two cases, the arrest was for DUI, with booking and then release on bail. In the other case, the arrest was for resisting arrest and rendering criminal assistance, with booking and then release on personal recognizance. In each case, the arresting officer filled out and signed a citation, but the officer did not issue the citation to the arrestee, and the officer did not file the citation.

In State v. Bonafacio, 127 Wn.2d 482 (1995) **Jan 96 LED:07**, the Washington Supreme Court ruled that, where an officer issues but does not file a citation, the issuance of the citation triggers the speedy trial clock under CrRLJ 3.3. The Johnson Court explains as follows why the Bonifacio case does not apply to the two cases before it:

> A criminal charge not brought within the required time limit of the speedy trial court rule must be dismissed with prejudice. The interpretation of a court rule is a matter of law requiring de novo review. Application of a court rule to a particular set of facts is a question of law subject to de novo review.
>
> In Bonifacio, the officer issued a citation at the scene. Bonifacio was released from custody after signing the citation and promising to respond as directed on the notice. However, the portion of the notice which was to contain the date and time for Bonifacio's appearance was left blank, and the citation was never filed. Approximately four months later, the city attorney filed a complaint. The trial court granted Bonifacio's motion to dismiss, concluding that criminal proceedings had been initiated when the citation was issued, thus starting the time for trial under CrRLJ 3.3. The City appealed, arguing that an unfiled citation does not initiate criminal proceedings under CrRLJ 2.1(b)(6), which specifies that a citation and notice is deemed a lawful complaint when signed by the citing officer and filed with the court.
>
> The Washington Supreme Court rejected the City's argument and held that issuance of a citation, regardless of whether it is subsequently filed, starts the running of the speedy trial clock. The court construed CrRLJ 2.1(b)(6) with CrRLJ 2.1(d), which provides that the officer shall file the citation within 48 hours after issuance, and concluded that the mandatory filing requirement buttresses a conclusion that the criminal process is initiated by issuance of the citation. Elaborating on the policy reasoning behind its decision, the Court stated that

> [t]he issuance and receipt of a citation is not an insignificant intrusion on one's liberty. It is, therefore, important that the rule requiring the filing of citations, CrRLJ 2.1(d), be observed. If consequences do not flow from an officer's failure to file a citation within the time allotted, many persons who have been issued citations will be left in legal limbo, not knowing whether or not the citation they have received will lead to proceedings in court. Under the trial court's decision, greater fairness and efficiency is assured because persons who have been issued citations will generally know within forty-eight hours of the issuance of a citation whether it will lead to court proceedings.

Laurent and Johnson concede that their arresting officers did not actually issue a copy of the citation to them. However, they contend that Bonifacio controls because the signed release and bail agreements, which imposed conditions of release including the requirement to notify the court of any change of address or phone number, are functionally equivalent to issued citations. Laurent and Johnson argue that they never had a probable cause hearing within 48 hours following arrest as required by CrRLJ 3.2.1(a) and that it is only after this preliminary appearance that an accused may be exonerated from conditions of release. Consequently, they claim that they were continuously "held to answer" to the court, with the threat of criminal penalty in the event of noncompliance. Laurent also argues that any reasonable person in her position would have believed that charges had been filed, particularly because the portion of the release agreement that could have informed her that no charges had been filed was not checked. Johnson similarly argues that he was continually subject to conditions of release because the court kept his bail throughout the proceedings. Both defendants argue that this situation placed them in "legal limbo," a condition frowned upon by the Bonifacio Court.

The State argues that the time for trial clock cannot be triggered by Laurent's release agreement or by Johnson's bail agreement because those agreements cannot be construed as the functional equivalent of issued citations. The State contends that Bonifacio is readily distinguishable because there the court held that the speedy trial clock begins to run upon the issuance of a citation regardless of whether it is subsequently filed, whereas here a citation was never issued. The State argues that this distinction is significant because CrRLJ 2.1 provides the exclusive means by which a criminal action can be initiated, and that rule does not provide for initiation merely by releasing a suspect prior to the first court appearance. Furthermore, there is no statute, rule or case law to support the notion that a criminal proceeding can be initiated based upon the defendant's reasonable, if mistaken, belief that she has been charged with a crime. Therefore, there was no initiation of an action here, and the speedy trial rule is inapplicable. The State also argues that Laurent and Johnson were not "held to answer" because they were exonerated from conditions of release within 72 hours under CrRLJ 3.2.1(f).

The primary distinction between Bonifacio and the cases at bar is that Bonifacio's arresting officer clearly issued a citation to Bonifacio, whereas Laurent and Johnson never signed or received a copy of their citations. We agree with the State that this difference is significant. The Bonifacio Court held that the issuance and receipt of a citation initiated criminal proceedings and triggered the speedy trial clock because a court rule requires the filing of a citation within 48 hours after issuance. Consequently, the court reasoned Bonifacio was in legal limbo because criminal proceedings had been initiated, yet he had no way of knowing whether court proceedings would follow. The decision clearly turns on the court's conclusion that criminal proceedings had been initiated by the issuance of the citation.

We conclude that Bonifacio does not control the outcome of these cases, because we are not persuaded that release agreements or bail agreements are functionally equivalent to issued citations for purposes of triggering commencement of the speedy trial clock. CrRLJ 2.2 expressly defines three methods of initiating a criminal proceeding: filing a complaint, issuing a citation, or filing a citizen complaint. We decline the defendants' invitation to significantly expand the rule by adding release agreements and bail agreements as two additional options for initiation of an action. Furthermore, arresting officers may choose whether or not to issue a citation, but if they choose to do so they are required to file it. CrRLJ 2.1(b)(1) states that an arresting officer may serve a citation and notice to appear, and CrRLJ 2.1(d)(2) states that "[t]he citation and notice shall be filed with the clerk of the court within two days after issuance." Because Laurent and Johnson were never issued citations, there was no requirement to file them under CrRLJ 2.1(d), and no criminal action had been initiated, unlike Bonifacio.

Moreover, Laurent and Johnson were not continually "held to answer" to the court. Under CrRLJ 3.2.1(f)(1) and (2), the court can fix conditions of release, but those conditions are only in effect for 72 hours unless charges are filed or the suspect consents to a longer time frame. Given that the defendants were released prior to the filing of charges, the conditions imposed on Laurent and Johnson became unenforceable within 72 hours following their release. At that point, the defendants were free to move to have the conditions lifted and, in Johnson's case, the bail exonerated.

Johnson and Laurent contend that the conditions could not be lifted unless the State brought them before the court for a preliminary appearance. However, they were not entitled to a preliminary appearance at that stage in the proceedings. CrRLJ 3.2.1(d)(1) states that "any accused detained in jail must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Because Laurent and Johnson were booked and released, they were not entitled to a preliminary appearance.

We also disagree with the superior court's conclusion that Laurent was held to answer based on her reasonable belief that charges had been filed and that she remained subject to conditions. The time for trial clock should not be triggered by something as uncertain as a defendant's "reasonable belief." A defendant who believes that charges have been filed or that conditions of release remain may inquire as to the status of the case and move to have the conditions exonerated.

We conclude that neither a signed release agreement nor a signed bail agreement can trigger the requirements of the speedy trial rule where formal prosecution has not yet been initiated. To hold otherwise would necessitate extending Bonifacio significantly in a manner that would cast speedy trial analysis adrift without any statute or court rule moorings, leaving commencement of speedy trial beyond the court's control. The defendants' concerns regarding "legal limbo" are real and understandable, but artificial commencement of the speedy trial clock is not an appropriate remedy.

We reverse the order granting Laurent's motion to dismiss, and we affirm the denial of Johnson's motion to dismiss.

Result: Reversal of District Court and King County Superior Court dismissal of charges (resisting arrest and rendering criminal assistance) against Mary A. Laurent; affirmance of District Court and

King County Superior Court orders refusing to dismiss charge (DUI and DWLS Two) against Terry W. Johnson.

(4) NO-CONTACT ORDER IS "REQUIREMENT OF SENTENCE" BARRING ISSUANCE OF DISCHARGE CERTIFICATE FOR DEFENDANT -- In State v. Miniken, 100 Wn. App 925 (Div. I, 2000) the Court of Appeals rules that continuing compliance with a post-conviction, no-contact order is a "requirement of sentence" within the meaning of RCW 9.94A.220. Therefore, a defendant who has completed all other requirements of his sentence is not entitled to a discharge certificate restoring his civil rights while a non-contact order (in this case, a lifetime no-contact order) remains enforceable.

Result: Affirmance of Snohomish County Superior Court order denying certificate of discharge to first degree statutory rapist, John T. Miniken.

(5) NO VIOLATION OF RIGHT TO COUNSEL WHERE CRIMINAL DEFENSE ATTORNEY'S INVESTIGATOR ALSO ACTED AS PAID INFORMANT FOR LAW ENFORCEMENT ON UNRELATED MATTER -- In State v. Hunter, 100 Wn. App. 198 (Div. I, 2000), the Court of Appeals rejects a defendant's argument that his constitutional right to counsel was violated when a private investigator worked with the criminal defendant's defense team at the same time that the investigator was working as a paid informant for a law enforcement agency on an unrelated investigation.

The Hunter Court notes that the private investigator did not relate any confidential matters in Hunter's case to the prosecutor, to law enforcement personnel or to any other government authorities, and that such governmental authorities did not ask him to do so. Hunter's case was not affected by the private investigator's participation on his defense team.

On these facts, the private investigator was not barred from simultaneously working on unrelated law enforcement investigations, and the investigator was not required to disclose to defendant Hunter his dual employment.

Result: Affirmance of Snohomish County Superior Court order denying Tyrone Todd Hunter's motion to set aside his conviction and sentencing for second degree rape and fourth degree assault.

LED EDITORIAL NOTE: The Court of Appeals also expressly rejects a gratuitous suggestion by the Superior Court that the investigator should have disclosed his dual role to Hunter.

(6) "DAGGER" IS NOT AN UNCONSTITUTIONALLY VAGUE TERM -- In State v. Leatherman, 100 Wn. App. 318 (2000), the Court of Appeals rules that the term "dagger," as used in the sentencing statute at RCW 9.94A.125, is not void for vagueness.

In searching Kevin Leatherman incident to a lawful arrest, the police found cocaine and four weapons, two of which the officers characterized as "knives" and two of which they characterized as "daggers." Leatherman was convicted of possession of cocaine and the trial court enhanced his sentence under RCW 9.94A.125 on grounds he possessed deadly weapons while committing his drug possession crime. Under RCW 9.94A.125, Leatherman's sentence depended on whether any of the weapons were "deadly weapons." The Leatherman Court explains why the "deadly weapon" question turns on whether the instrument at issue was a "knife" or a "dagger:"

> The statute does not define the terms "dagger" or "knife." The State argued that the instrument was a dagger because it had a short, two-edged, pointed blade used for stabbing, meeting the dictionary definition of dagger. Leatherman argued that the instrument was a knife, which was not a per se deadly weapon because its blade was less than three inches long. Therefore, to impose a deadly weapon sentencing enhancement, the State would have to show that the knife had the capacity to inflict death and was used in a deadly manner during commission of the crime.

Leatherman argued that because he did not use the knife or resist arrest in any way, there should be no sentencing enhancement.

Leatherman argued RCW 9.94A.125 is unconstitutionally vague in its usage of the term “dagger.” The Leatherman Court explains its view to the contrary:

> RCW 9.94A.125 defines a deadly weapon as "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." The statute defines "any dagger" or "any knife having a blade longer than three inches" as deadly weapons per se. A knife with a blade less than three inches long is only a deadly weapon if used in a deadly manner. Leatherman's blade was less than three inches long and he did not use the weapon during the commission of the crime. Therefore, the sentencing enhancement should be imposed if the instrument is a dagger, but not if it is a knife.
>
> When a statute does not define a term, the court may ascertain the plain and ordinary meaning from the dictionary. Three different dictionary definitions for "dagger" include: "(a) weapon resembling a short sword, with usually a two-edged, sometimes a three-edged, sharp pointed blade, used for stabbing at close quarters;" "a short knife used for stabbing;" and "a short, swordlike weapon with a pointed blade and a handle, used for stabbing." Three dictionary definitions for "knife" include: "an instrument for cutting, consisting essentially of a thin, sharp-edged, metal blade fitted with a handle; dagger or short sword;" "a simple instrument used for cutting consisting of a sharp-edged usu. steel blade provided with a handle;" and "[a] cutting instrument consisting of a sharpedged blade of small or moderate size attached to a handle."
>
> The dictionary definitions agree on one point: a "dagger" is used for stabbing and a "knife" is used for cutting. The instrument at issue in this case has a straight blade of moderate length (two and three-quarters inches) fixed to a hilt. It is pointed and sharp-edged on two sides and is partially serrated on both sides near the base. The design of the instrument indicates that its primary purpose is for stabbing. Thus, it is clearly a dagger. Under the first prong of the vagueness test, the statute defines the offense with sufficient definiteness so that ordinary people could determine whether or not the instrument was a per se deadly weapon.
>
> Persons of ordinary intelligence would agree that Leatherman's blade was a dagger, designed for stabbing. The statute also survives the second prong of the vagueness test, because there are ascertainable standards of guilt to protect against arbitrary enforcement. It is commonly understood that a double-edged pointed blade such as Leatherman's is a dagger, even if it could also be used for cutting or sawing.
>
> We thus hold that RCW 9.94A.125 is not unconstitutionally vague as applied to the facts of Leatherman's case, as he has not carried his heavy burden of proof. Persons of ordinary intelligence would probably agree that Leatherman's instrument was a dagger because it was primarily designed for stabbing. The distinction between a knife and a dagger is sufficient here to protect against arbitrary enforcement.

[Footnotes and citations omitted]

Result: Affirmance of Snohomish County Superior Court conviction and enhanced sentence of Kevin C. Leatherman for possession of a controlled substance while armed with a dagger.

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NOTE: UNDER RCW 9.41.050(2), CPL HOLDER WHO IS PRESENTLY INSIDE VEHICLE MAY HAVE LOADED PISTOL ANYWHERE IN VEHICLE

A question is raised by officers from time to time regarding the less-than-crystal-clear language of RCW 9.41.050(2). The statute provides in relevant part:

> 2) A person shall not carry or place a loaded pistol in any vehicle unless the person has a license to carry a concealed pistol and: a) The pistol is on the licensee's person, b) the licensee is within the vehicle at all times that the pistol is there, or c) the licensee is away from the vehicle and the pistol is locked within the vehicle and concealed from view from outside the vehicle.

The recurring question is whether there is an implied "or" between subsection (2)(a) and subsection (2)(b), such that CPL holders who are inside their vehicles may have the pistol either a) on their persons or b) anywhere else in their vehicles (i.e., not on their persons). The answer is "yes."

While there is no reported Washington court decision on this question, the Washington Pattern Jury Instructions for criminal cases (WPIC's) interpret the law consistent with the "yes" answer above. Thus, WPIC 133.05.01 provides:

> To convict the defendant of the crime of carrying or placing a loaded pistol in a vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1) That on or about the _____ day of _____, 20__, the defendant carried or placed a pistol in a vehicle;
> 2) That the pistol was loaded;
> 3) [That the defendant did not have a license to carry a concealed weapon] [or] [That the pistol was not on the defendant's person] [or] [That the defendant was not within the vehicle at all times that the pistol was there] [or] [That the defendant was away from the vehicle and did not lock the pistol within the vehicle, concealed from view from the outside of the vehicle].

While not having the force of law, interpretations from the Washington Pattern Jury Instructions Committee have persuasive effect on the courts. The WPIC 133.05.01 interpretation squares with the grammar-based rule of statutory construction that when, in the enumeration of things in a statute, a conjunction (such as "or") is placed immediately before the last of the series of enumerated things, that same conjunction is understood as being placed between the previous enumerated things. See 73 AmJur 2d, Statutes § 241. In addition, the "rule of lenity" in favor of those accused of crimes supports the above-suggested interpretation under WPIC 133.05.01.

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NOTE: WASHINGTON'S SECRETARY OF STATE OFFERS GUIDANCE REGARDING INITIATIVE SIGNATURE-GATHERING ON PUBLIC, PRIVATE PROPERTY

We have received several inquiries in the past few months regarding the qualified rights of initiative signature-gatherers to engage in this activity on public or private property. Leading Washington cases on this subject are:

Alderwood Assoc. v. Washington Envtl. Council, 96 Wn.2d 230 (1981) (Washington Supreme Court holds, based on the initiative provision of the Washington State Constitution, that a large multi-store shopping mall is "the equivalent of a downtown area of other public forum," and, therefore, the mall's management must allow initiative signature-gatherers to set up somewhere inside the mall facility to gather signatures; injunctive relief is denied to the mall.)

Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wn.2d 413 (1989) (Washington Supreme Court holds that the free speech provision of the Washington State Constitution, unlike the initiative provision addressed in the Alderwood Mall case, does not give citizens a right to engage in wide-ranging speech activities on private property, including shopping malls; injunctive relief is granted the mall against a citizen group soliciting contributions and selling literature related to their cause.)

Initiative 172 v. Western Wash. Fair Assoc., 88 Wn. App. 579 (1997) (Washington State Court of Appeals holds that a private association operating a large fairground, though the fairground is a public forum, may impose reasonable time-of-day and location restrictions on initiative signature-gatherers; injunctive relief against the fair association is denied to initiative campaign.)

Waremart v. Progressive Campaigns, 139 Wn.2d 623 (1999) (Washington Supreme Court holds that a single grocery store, even a large one, is not like a multi-store shopping mall and is not "the equivalent of a downtown area or other public forum; therefore, the store's management is not required to allow initiative signature-gatherers inside the store to gather signatures; injunctive relief is granted to the store's owners.)

We refer our readers and their legal advisors to the summary of law in this thorny subject area set forth in the FAQ's portion of the Washington Secretary of State's Homepage at: [http://www.secstate.wa.gov/inits/initsfaq.htm]

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be accessed through a separate link clearly designated.

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington legislation and other state government information can be accessed at [http://access.wa.gov]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [http://www.leg.wa.gov/wsladm/ses.htm]. The text of acts adopted in the 2000 Washington legislature is available at the following address: [http://www.leg.wa.gov]; look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Kim McBride of the Criminal Justice Training

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