Law Enforcement Digest

SEPTEMBER 2001

HONOR ROLL

532nd Session, Basic Law Enforcement Academy – March 27th through August 1st, 2001

President: Trey Holden - Port Orchard Police Department
Best Overall: Matthew C. Nelson - Pasco Police Department
Best Academic: Matthew C. Nelson - Pasco Police Department
Best Firearms: Sam A. Masters - Yakima Police Department
Tac Officer: Detective Reid Weaver - Monroe Police Department

****

SEPTEMBER LED TABLE OF CONTENTS

****

ARTICLE: POSSESSION OF FIREARMS AND DANGEROUS WEAPONS BY PERSONS SUBJECT TO DV, OTHER COURT ORDERS – FEDERAL & STATE LAWS

***LED EDITORIAL NOTE:** The following article is adapted from an article by Pamela Loginsky for the newsletter of the Washington Association of Prosecuting Attorneys. Thank you to WAPA for allowing the LED to use the adapted article.*

WASHINGTON LAWS ADDRESSING COURT ORDERS AND DANGEROUS WEAPONS

An individual's ability to obtain or possess a firearm or other dangerous weapon may be restricted by any court when entering a no contact order, a protection order, a restraining order, or an anti-harassment order. Upon a showing that a party has used, displayed, or threatened to use a firearm or other dangerous weapon in a felony or other offense that makes the party ineligible to possess a firearm under the provisions of RCW 9.41.040, the court may require the party to surrender any firearm or other dangerous weapon, any concealed pistol license, and prohibit the party from obtaining or possessing any firearm or other dangerous weapon, and any concealed pistol license. See RCW 9.41.800(1).

Even absent a disqualifying conviction, a court entering a no contact order, a protection order, a restraining order, or an anti-harassment order may, upon a finding that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of an individual, require a party to temporarily surrender any firearm or other dangerous weapon and/or concealed pistol license and prohibit the party from obtaining the same for a period equal to or less than the duration of the order. See RCW 9.41.800(1).

A violation of the ownership or possession restrictions imposed by RCW 9.41.800 is a misdemeanor (see RCW 9.41.810), unless the party is also in violation of RCW 9.41.040, unlawful possession of a firearm in the first or second degree, in which case violation is a felony (see RCW 9.41.040(2)).

Possession or use of a firearm during the commission of a domestic violence offense may provide grounds for forfeiting the weapon even where no court order prohibited the offender from possessing a firearm at the time of the crime. See RCW 9.41.098. In addition, any

weapon that has been taken into police custody may lawfully be destroyed if the owner, after receiving proper notice that the weapon may be retrieved from the law enforcement agency, fails to act in a timely manner. See RCW 9.41.098; RCW 63.32.010; RCW 63.40.010.

When investigating crimes where there is a no contact order, a protection order, a restraining order, or an anti-harassment order, or when otherwise dealing with citizens who are respondents under such orders, law enforcement officers should make a special effort to determine whether or not there is a weapon present (we realize this likely goes without saying). If there is such an order and the respondent under that order is in possession of a weapon or other dangerous weapon, there is a fair likelihood that such possession may violate the terms of the order. In that case, if the subject voluntarily produces the firearm or other dangerous weapon, or the officers otherwise lawfully come across the weapon, the weapon will be subject to warrantless seizure as evidence under the "plain view" doctrine.

FEDERAL LAWS ADDRESSING COURT ORDERS AND FIREARMS

Additionally, even if the possession of a weapon is not a violation of state law, such possession may nonetheless violate federal law. A person subject to a "qualifying protection order" is generally prohibited under federal law from possessing any firearm or ammunition. See 18 U.S.C. § 922(d)(8). The elements of a "qualifying protection order" under this federal provision are:

1. **Hearing Has Occurred.** Defendant/Respondent received actual notice and had an opportunity to participate in a hearing on the order.
2. **Petitioner Is Intimate Partner.** Plaintiff/Petitioner is an "intimate partner" of the Defendant/Respondent (see 18 U.S.C. § 921(a)(32)), that is:
    a) a spouse of Defendant/Respondent;
    b) a former spouse of Defendant/Respondent;
    c) an individual who is a parent of a child of Defendant/Respondent; or
    d) an individual who cohabitates or has cohabited with Def./Respondent
3. **Future Conduct Is Restrained Under The Order.**
    a) The order restrains Defendant/Respondent from harassing, stalking, or threatening the intimate partner, child of the Defendant/Respondent, or child of the Defendant/Respondent's intimate partner; or
    b) The order restrains Defendant /Respondent from engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child.
4. **Threat To Physical Safety Found In Order Or Addressed In Order.**
    a) The order includes a finding that Defendant/Respondent represents a credible threat to the physical safety of the intimate partner or child; or
    b) The order, by its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

Note that the federal law's "notice/hearing" element would exclude all ex parte orders, and that the "intimate partner" element is narrower than Washington's definition of "family or household member" under RCW 10.99.020(1). On the other hand, officers should keep in mind that federal law in this subject area may be broader in some respects than Washington law, and that federal law overlaps with state law. Officers may find a citizen in possession of firearms or ammunition where the citizen is subject to a no contact order, a protection order, a restraining order, or an anti-harassment order, but the possession does not violate state law. In such cases, law enforcement officers should consult with their local prosecutors for assistance in

determining whether there is a violation of federal law and in making the appropriate referral to federal authorities.

Closing note: We previously addressed the above-discussed federal restraining order restrictions on firearms possession (including how the restrictions affect law enforcement officers subject to such orders) in the July 1997 LED at pages 20-21. Information in that July 1997 LED article is still current.

****

2001 LEGISLATIVE UPDATE -- PART THREE

LED Introductory Notes: This is Part Three of a three-part update of 2001 Washington legislative enactments of special interest to law enforcement. Part One appeared in the July LED and Part Two (along with an index of Parts One and Two) appeared in the August LED.

DNA TESTING AND EVIDENCE-PRESERVATION TO PROTECT CRIMINAL DEFENDANTS

CH 301 (SSB 5896) Effective Date: July 22, 2001
Regular Session

Modifies 2000 amendments addressed in the June 2000 LED, expanding RCW 10.37.050 to require that prosecutors consider DNA-testing requests by convicted persons in certain specified circumstances.

Of more direct consequence to law enforcement agencies is the following new language in RCW 10.73.170:

> (4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to the effective date of this act may not be destroyed before January 1, 2005.

The statute does not define "biological material." Nor does the term appear to have a generally accepted legal meaning. Government attorneys are studying the scope of this term and hence the reach of this 2001 amendment. We will advise LED readers on any developments in this regard.

This act also adds a new section to chapter 10.73 RCW, reading as follows:

> Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision.

SEX OFFENDERS AND SEX OFFENSES -- FACILITIES, RELEASE, CRIMINAL LAWS

Chapter 12 (3d ESSB 6151) Effective Date: Various
2d Extra Session (RCW Title 9A changes take effect 09/01/01)

Most of this act addresses siting and operation of facilities for certain classes of serious sex offenders, as well as conditions of release for such offenders. This LED entry does not address those provisions.

In addition, this act modifies a number of provisions in RCW Title 9A.

Section 354 amends RCW 9A.28.020 to add the following sex offenses to the list of crimes the "attempt" of which constitutes a Class A felony: child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, and rape of a child in the second degree.

Section 355 amends RCW 9A.36.021 to make "assault in the second degree" with "sexual motivation" a Class A felony.

Section 356 amends RCW 9A.40.030 to make "kidnapping in the second degree" with "sexual motivation" a Class A felony.

Section 357 amends RCW 9A.44.093 to make a person guilty of "sexual misconduct in the first degree" when: "the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student." This amendment to RCW 9A.44.093 defines "school employee" as follows: "An employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school."

Section 358 makes changes in RCW 9A.44.096 ("sexual misconduct with a minor in the second degree") parallel to those made to RCW 9A.44.093 by section 357 (see above).

Section 359 amends RCW 9A.44.100 to make "indecent liberties" a Class A felony when the crime is committed by forcible compulsion.

Section 360 amends section 1 of chapter 287, Laws of 2001 (see July 2001 LED at page 14) so that the newly created crime of "sexually violent predator escape" in chapter 9A.76 RCW is now defined as follows:

> (1) A person is guilty of a sexually violent predator escape if, having been committed to the department of social and health services as a sexually violent predator under chapter 71.09 RCW, he or she:
>
> (a) Escapes from custody;
>
> (b) Escapes from a commitment facility;
>
> (c) Escapes from a less restrictive alternative facility; or
>
> (d) While on conditional release and residing in a location other than at a commitment center or less restrictive alternative facility, leaves or remains absent from the state of Washington without prior court authorization:
>
> (a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility;
>
> (b) Having been found to be a sexually violent predator and being under an order of conditional release, the person leaves or remains absent from the state of Washington without prior court authorization; or
>
> (c) Having been found to be a sexually violent predator and being under an order of conditional release, the person: (i) without authorization, leaves or remains absent from his or her residence, place of employment, educational institution, or authorized outing; (ii) tampers with his or her electronic monitoring device or removes it without authorization; or (iii) escapes from his or her escort.
>
> (2) Sexually violent predator escape is a class A felony with a minimum sentence of sixty months, and shall be sentenced under section 303 of this act.

****

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

NO "PRETEXT" RULE FOR ARRESTS UNDER FOURTH AMENDMENT; BUT THERE IS ALMOST CERTAINLY A "PRETEXT ARREST" RULE UNDER WASHINGTON CONSTITUTION -- In Arkansas v. Sullivan, 121 S.Ct. 187 (2001), the U.S. Supreme Court holds that the Court's rejection of a "pretext stop" rule under the Fourth Amendment (see Whren v. U.S., 517 U.S. 806 (1996) **Aug 91 LED:09**) extends to arrests. Accordingly, the Sullivan

Court applies Whren, together with the Court's recent decision allowing arrests for minor offenses (see Atwater v. Lago Vista, 121 S.Ct 1536 (2001) **July 2001 LED:18**), in unanimously rejecting defendant's appeal arguing his arrest and search incident to that arrest on a minor offense was pretextual.

Result: Reversal of Arkansas Supreme Court decision suppressing evidence seized from Kenneth Andrew Sullivan; remanded to Arkansas courts for trial.

LED EDITORIAL NOTE: The Sullivan Court points out that the Arkansas Supreme Court was not free to ignore the U.S. Supreme Court's interpretations of the Fourth Amendment:

> **The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by Oregon v. Hass, 420 U.S. 714 (1975). There, we observed that the Oregon Supreme Court's statement that it could "interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" was "not the law and surely must be inadvertent error." We reiterated in Hass that while "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."**

LED EDITORIAL COMMENT: In State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05, the Washington Supreme Court made an "independent grounds" interpretation imposing a "pretext stop" prohibition under the Washington constitution's privacy protection in article 1, section 7. We assume that the Washington Supreme Court would also interpret article 1, section 7 as imposing a "pretext arrest" prohibition (though we are making an educated guess, and we can't be sure of the contours of such a rule).

****

NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

FELONY STOP AT GUNPOINT WAS NOT "ARREST"-- USE OF FORCE WAS REASONABLE, SO "TERRY" SEIZURE TESTED AGAINST "REASONABLE SUSPICION" STANDARD

U.S. v. Rousseau, ___ F.3d ___ (9th Cir. 2001) [2001 WL 765180]

Facts below: (Excerpted from the Court of Appeals opinion)

> [T]he Lane County Sheriff's Office ("LCSO") received a telephone call from Pamela Long in Eugene, Oregon, reporting that a man with a gun, later identified as Rousseau, had entered her apartment. Shortly thereafter, in responding to a dispatch with respect to the matter, LCSO Sergeant Byron Trapp observed a red sedan parked at a convenience store parking lot which he recognized as the vehicle the armed suspect reportedly occupied. Trapp also recognized an individual, who in fact was Rousseau, seated in the driver's seat of the red sedan as matching the description of the person reportedly in possession of the firearm. Trapp detained Rousseau and another individual, David Hutchinson, who also had been at Long's apartment and who was standing in the vicinity of the vehicle when Trapp arrived, at gunpoint until other officers arrived at the scene.
>
> After Rousseau and Hutchinson were handcuffed, another LCSO officer searched the red sedan for the reported firearm and located a loaded .9 mm semi-automatic pistol, with a round of ammunition in the chamber under the front

passenger seat. The officer found this firearm within approximately five minutes of the initial contact between Trapp and the suspects, and approximately eleven minutes after Long's 911 call.

Proceedings: Rousseau was charged and convicted in federal district court in Oregon on federal firearms charges (as a convicted felon in possession of a firearm).

ISSUE AND RULING: Did the seizure of Rousseau at gunpoint constitute an "arrest" requiring probable cause? (ANSWER: No, because the use of force was justified by safety concerns)

Result: Affirmance of U.S. District Court convictions of John Leonard Rousseau for federal firearms law violations.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> To determine whether a stop has turned into an arrest, a court must consider the "totality of the circumstances." In doing so, a court considers both the intrusiveness of the stop (the aggressiveness of the methods used by police and the degree to which the suspect's liberty was restricted) and the justification for using such tactics (whether the officer had sufficient basis to fear for his or her safety warranting a more intrusive action). "In short, [the court] decide[s] whether the police action constitutes a Terry stop or an arrest by evaluating not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances."
>
> The Supreme Court and this court have permitted limited intrusions on a suspect's liberty during a Terry stop to protect the officer's safety and have held that the use of force does not convert the stop into an arrest if it is justified by a concern for the officer's personal safety.
>
> In this case, the totality of the circumstances indicates that the officers initially conducted an investigatory stop on January 26, 1999, during which they discovered inculpatory evidence. Trapp, upon entering the parking lot, observed the red sedan reportedly occupied by the armed intruder and recognized that the individual in the driver's seat matched the description of the person reportedly in possession of a firearm. Further, Trapp had reason to believe that the occupant of the red sedan only minutes earlier had made an armed intrusion that constituted a burglary, attempted burglary, or attempted kidnapping. Moreover, Trapp was alone when he located Rousseau. Overall, Trapp was in a situation similar to that of the officers in [a prior Terry-based ruling] with respect to the suspects there as he had information that Rousseau was armed and therefore likely was dangerous.

[Citations omitted]

LED EDITORIAL NOTE: Washington appellate court decisions similarly hold that full felony stops (based on "reasonable suspicion") are not "arrests" (requiring probable cause justification) where officer-safety considerations support the level of force and restrictions used by officers. See, e.g., State v. Belieu, 112 Wn.2d 587 (1989) September 89 LED:17 and State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March 96 LED:09.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) NO EX POST FACTO VIOLATION IN WASHINGTON LEGISLATURE'S 1994 AND 1996 AMENDMENTS INCREASING FIREARMS LAW RESTRICTIONS -- In State v. Schmidt, State v. Ayers, 143 Wn.2d 658 (2001), two cases consolidated for appeal, the Washington Supreme Court rules 5-4 that, when the Washington Legislature amended RCW 9.41.040 in 1994

(extending the restrictions to rifles and shotguns) and 1996 (creating two degrees of the crime of unlawful firearms possession), the Legislature did not violate constitutional ex post facto restrictions. Accordingly, the Court rules that it is constitutionally permissible to apply the 1994 and 1996 amendments to firearms possession by the two defendants in these cases, each of whom had been convicted of a felony in the 1980's.

Result: Affirmance of Court of Appeals' decisions: 1) affirming Kitsap County Superior Court conviction of Zachary B. Schmidt for unlawful possession of a firearm in the first degree; and 2) reversal of Piece County Superior Court dismissal of seven counts of second degree unlawful possession of a firearm against Marlin L. Ayers.

(2) "EXCITED UTTERANCE" AND "MEDICAL DIAGNOSIS" HEARSAY-EXCEPTION RULINGS FAVOR PROSECUTION -- In State v. Woods, 143 Wn.2d 658 (2001), the Washington Supreme Court makes pro-State rulings in addressing two hearsay-exception questions. **[LED EDITORIAL NOTE: Many other issues were posed in this death penalty case, but we will address only the hearsay-exception issues in this LED entry.]**

PRELIMINARY NOTE REGARDING THE FACTUAL BACKGROUND OF THE CASE

Dwayne Anthony Woods brutally assaulted three women. Two of his victims died. One of those who died, Jade, initially appeared to be responding to treatment, but she later died at the hospital. The hearsay issues in the case concerned Jade's statements to a paramedic while en route to the hospital, as well as her statements at the hospital to a doctor, a nurse, and her father.

"EXCITED UTTERANCE" HEARSAY EXCEPTION ANALYSIS:

The Woods Court explains that the "excited utterance" hearsay exception has three related requirements: 1) a startling event or condition must have occurred; 2) the statement must have been made while the declarant was still under the stress or excitement caused by the startling event or condition; and 3) the statement must be related to the startling event or condition.

The Woods Court describes as follows the facts pertinent to the "excited utterance" issue:

> While en route to the hospital, Jade made several statements to Carol Ragland-Stone, a paramedic who was treating Jade in the ambulance. In response to questions from the paramedic about "what happened," Jade said she was hit "with a baseball bat." In response to the paramedic's question, "who did it," Jade responded, "a man named Dwayne." Ragland-Stone was permitted to testify at trial about these statements and also testified that Jade told her that she was sexually assaulted by "the person that hit her with the bat."
>
> When Jade's father arrived at the hospital, Jade told him that "around 7:30 [a.m.] she woke up to somebody holding a knife to her, jerked her out of bed, took her to another bedroom, showed her Venus, and said, `if you don't do exactly what I say, I'm going - you are going to end up looking just like your friend Venus.'" He also testified that while recounting what happened "she would stop and she went back and she says, `Dad, there was so much blood. There was blood everywhere.'" Jade also told her father that the assailant took her to Telisha and ordered Jade to, "`[c]ut her throat or I am going to kill you.'" The assailant, according to Jade, also insisted that Jade "help him go through . . . stuff in the closets," and he also took Jade's cash card and "forced her to give him her PIN number." Jade's father further testified that he asked "[d]id you know this person?" and Jade responded, "`[i]t was a guy that Venus had been going out with and his name was Dwayne.'"

The Woods Court, after extended analysis, rules that these statements fall within the "excited utterance" hearsay exception. Along the way, the Woods Court distinguishes prior decisions in State v. Chapin, 117 Wn.2d 681 (1992) **March 93 LED:06**, State v. Brown, 127 Wn.2d 749 (1995)

Aug 96 LED:15; and State v. Sharp, 80 Wn. App. 457 (Div. III, 1996) **Aug 96 LED:22** (these three decisions ruled against application of the "excited utterance" exception under the particular facts of those cases).

ANALYSIS RE "MEDICAL DIAGNOSIS" HEARSAY EXCEPTION

The Woods Court explains that the "medical diagnosis" hearsay exception under Evidence Rule (ER) 803(a)(4) permits testimony regarding declarations by persons who were being given treatment at the time of the statements, but only where the declarations were reasonably pertinent to the diagnosis or treatment.

The Woods Court describes as follows the facts pertinent to the "medical diagnosis or treatment" hearsay exception issue:

> During an examination of Jade by the emergency room physician, Dr. Edminster, Jade told him that she "was awakened by this person who apparently had gotten in bed with her and . . . had indicated to her that he wanted to have sex with her." Dr. Edminster testified that Jade also mentioned that Woods had "hauled her out of bed, took her into the room where Venus was, showed Venus to her and said, . . . `if you don't do what I tell you, you are going to end up in the same condition.'" Jade also told Dr. Edminster that when Telisha entered the trailer she was ordered to "stand up against the window and look out." He said that Jade told him that Telisha "was bound and that she [Jade] didn't actually see it happen, but she heard, you know, a thump like something getting hit hard." Finally, Jade told Dr. Edminster that she "did not actually see what happened" but she said she "heard the bat swing and heard it hit Telisha's head."
>
> When the emergency room nurse, Diane Bethel, conducted a rape examination on Jade later that day, Jade told Bethel that "she was awakened by someone that came into her room" and that he "wanted to have sex with her." Jade went on to tell Bethel that "he took her to another room and showed her a friend that had been assaulted." Jade also told Bethel that "she was hit with a baseball bat" and that the "assailant had two knives."

The Woods Court explains as follows its ruling that these statements by Jade fall within the "medical diagnosis or treatment" exception:

> It is clear from the record that the challenged statements were pertinent to either the physical or psychological treatment of Jade or Telisha. With respect to Jade's treatment, the emergency room physician testified that he needed to have an idea of what happened "the same way the patient knows the story" for the purpose of "arranging for like counseling after the fact because people are going to have a certain amount of post traumatic distress." It appears to us that it was "reasonably pertinent" to an assessment of Jade's need for counseling that during the attack she was subjected to viewing the beaten body of her friend Venus. Also, if Jade believed she heard Telisha get hit by a bat, we believe such an event would be relevant to addressing Jade's needs. Additionally, we believe, as did the trial court, that it appears reasonably pertinent to Telisha's treatment that her medical providers be apprised of the physical position she was in at the time when her attack occurred. As such, it was not erroneous for the trial court to admit Jade's statement regarding Telisha's attack. Cf. State v. Justiniano, 48 Wn. App. 572 (1987) (noting that "the statements made to the doctor by the mother are the equivalent of statements made by the child to the doctor and are admissible under ER 803(a)(4)").
>
> In sum, all of the statements made by Jade to Dr. Edminster and Bethel were reasonably pertinent to either immediate physical or eventual psychological

treatment of Jade, Telisha, or both. The trial court did not, therefore, abuse its discretion in admitting these statements pursuant to the "medical diagnosis" exception to the rule against the admission of hearsay.

Result: Affirmance of Spokane County Superior Court convictions of Dwayne Anthony Woods for two counts of aggravated first degree murder, one count of attempted first degree murder, and one count of attempting to elude a police vehicle; also, affirmance of death penalty (Justice Sanders files a lone dissent on the death penalty question, addressing issues not included in this LED entry).

(3) TERM, "MENTAL HEALTH," IN CRIMINAL HARASSMENT STATUTE HELD UNCONSTITUTIONALLY VAGUE AND OVERBROAD -- In State v. Williams, ___ Wn.2d ___, 26 P.3d 890 (2001), in a 5-3 ruling, the Washington Supreme Court holds that the term, "mental health," in the "criminal harassment" statute at chapter 9A.46 RCW is unconstitutionally vague and overbroad.

Result: Reversal of Division One Court of Appeals decision -- reported in the July 2000 LED at page 13 -- that had affirmed a King County Superior Court conviction of Chris Williams for misdemeanor harassment; case remanded for re-trial.

LED EDITORIAL NOTE: The Williams decision involves interpretation of RCW 9A.46.020 as it read prior to a 1997 amendment, but, because the 1997 amendment did not change the term, "mental health," the Williams decision applies to current version of the statute as well. The remaining portions of the statute are valid, so the Williams ruling means that it is only threats to "mental health" that are now removed from coverage by the criminal harassment statute.

(4) KNOWINGLY MAKING FALSE STATEMENT IN INSPECTION REPORT FILED WITH HEALTH DEPARTMENT CONCERNING A SEWAGE SYSTEM WAS NOT A VIOLATION OF RCW 40.16.030 -- In State v. Hampton, 143 Wn.2d 789 (2001), the Washington Supreme Court reverses a Court of Appeals decision, and holds that a document that is neither expressly nor impliedly contemplated by the Washington Legislature as a document permitted to be filed with a public office is not a document covered by RCW 40.16.030 (filing false instrument in a public office).

Accordingly, the Hampton Court rules that a false statement in a sewage inspection report filed by Charles Hampton, sanitarian with the Health Department, did not subject Hampton to liability under RCW 40.16.030. The report was not mentioned in a state statute nor was there any implication in a statute that the sewage inspection report was permitted to be filed with the Health Department. Even though there has been a longstanding practice in Lewis County of filing such reports with the Health Department, this does not make the reports subject to the statute.

Result: Reversal of Court of Appeals decision (see **Aug 2000 LED:09)** which had reversed the Lewis County Superior Court order setting aside a district court conviction of Charles R. Hampton under RCW 40.16.030.

(5) "BARRATRY" CHARGE COULD NOT BE PURSUED BY STATE AGAINST PRO SE SUBJECT OF TRAFFIC CITATION WHO HAD FILED SELF-STYLED "DEMAND FOR PARTICULARS" PAPERS ON CITING OFFICERS -- In State v. Sullivan, 143 Wn.2d 162 (2001), the Washington Supreme Court unanimously rules that a self-styled "demand for particulars" served on law enforcement officers by a person acting "pro se" (i.e., representing himself) in a traffic infraction case did not violate the criminal statute on "barratry."

The "barratry" statue at RCW 9.12.010 provides (underlining added) as follows:

> Every person who brings on his or her own behalf, or instigates, incites, or encourages another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit, or who serves or sends any papers or document purporting to be or resembling a judicial process, that is not in fact a judicial process, is guilty of a misdemeanor; and in case the person offending is an attorney, he or she may, in addition thereto be disbarred from practicing law within this state.

After extended analysis, Judge Smith's lead opinion for the Sullivan Court summarizes the Court's view that the statute is not unconstitutional, but that Sullivan's annoying and inartful pleadings did not run afoul of the barratry statute:

> A party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt. Respondent Sullivan has not met his burden of establishing that RCW 9.12.010 is unconstitutionally vague. RCW 9.12.010 is not unconstitutionally vague simply because the term "judicial process" is not defined. Its meaning need not achieve mathematical certainty, but is measured against the purpose of RCW 9.12.010 to proscribe the use of any paper or document purporting to be or resembling judicial process.
>
> The term "judicial process" lends itself to either a broad or narrow construction. There are no reasons in this case to justify a broad construction of the term. The question arises whether any construction of "judicial process" would include documents such as Respondent Sullivan's "Demand for Particulars," which he purported to serve upon the law enforcement officers who cited him for traffic infractions. It does not. We adapt from *Black's Law Dictionary* the definition of "judicial process" as "all acts of a court from the beginning to the end of its proceedings in a given cause--the writ, summons, mandate or other process used to inform parties of institution of court proceedings and notices to compel appearance and participation in civil or criminal cases under applicable statutes and rules of court."
>
> Respondent's "Demand for Particulars" did not constitute "judicial process" under the statute. The documents contained questionable and irrelevant citations of statutes and court rules, inartfully stated questions, were issued and signed by him and not by a judge, and requested responses direct to him. Acting pro se, Respondent imitated documents he perceived to be documents or pleadings that would be issued by a lawyer. He did not represent them as documents issued by a court or subject to judicial action.
>
> In bombarding the citing officers with documents demanding responses, Respondent ignored or disregarded the IRLJ which exclusively governs procedures applicable to his traffic infraction citations. He cannot excuse his noncompliance with the rules by claiming ignorance of them, nor by the fact he was acting pro se without the assistance of a lawyer. However much we may disapprove of Respondent's conduct in his traffic infraction cases, his crude and inept attempt to demand a "bill of particulars" nevertheless does not rise to the level of the criminal offense of barratry under RCW 9.12.010. The State of Washington necessarily must find some other method of addressing such uncontrolled and harassing behavior by parties charged with traffic infractions under the IRLJ.
>
> In this case, the trial court correctly determined that, as a matter of law, Respondent Sullivan's "Demand for Particulars" did not purport to be or resemble "judicial process." The trial court correctly dismissed with prejudice the charge of barratry against Respondent.

Result: Affirmance of decision of Kitsap County Superior Court, which upheld an order by the Kitsap County District Court, dismissing with prejudice the criminal charge of barratry against Kelly Russell Sullivan.

****

WASHINGTON STATE COURT OF APPEALS

FOR BAC TEST ON DUI ARRESTEE TO BE ADMISSIBLE, PRIOR WARNING OF THE RIGHT TO COUNSEL UNDER CrR 3.1 OR CrRLJ 3.1 MUST ADVISE OF RIGHT "AT THIS TIME"

State v. Templeton, ___ Wn. App. ___, 27 P.3d 222 (Div. I, 2001)

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

> Four cases are consolidated in this discretionary review. Each Respondent was stopped by a State Patrol officer, arrested for driving under the influence, given Miranda warnings, and transported to the police department. Each was advised of the right to talk to an attorney before answering any questions, and to have an attorney present during questioning. Each waived those rights. Each Respondent was also given implied consent warnings, and each agreed to submit to a breath test. After answering additional questions, each took the breath test. Once the test results were in hand, each was cited for DUI.
>
> In the cases against Templeton, Marsh, and Marginean, the district court suppressed the results of the breath test, holding the advisement of rights failed to satisfy CrRLJ 3.1. The Post court refused to suppress. On appeal, the superior court held that suppression was required in all four cases. We granted discretionary review, and affirm the superior court.

LED EDITORIAL NOTE: WSP has since changed its warnings to include a clause reading "you have the right to an attorney at this time." Presumably, these cases would have had different results under the revised WSP warnings.

ISSUES AND RULINGS: 1) Do the warnings to satisfy CrRLJ 3.1? (ANSWER: NO); 2) Did the failure to give adequate warnings prejudice the defendants? (ANSWER: Yes)

Result: Affirmance of King County Superior Court orders suppressing the BAC test results in the cases of John D. Templeton, Benjamin Marginean, James Marsh and Richard Post.

STATUS: The King County Prosecutor's Office has filed a petition asking the Washington Supreme Court to review the Court of Appeals decision.

ANALYSIS:

CrRLJ 3.1 of the court rules for courts of limited jurisdiction provides in relevant part as follows:

> 1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provide without charge.
>
> 2) 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.

CrR 3.1 of the court rules for superior court similarly provides in relevant part as follows:

1) When a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

2) 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 him or her in communication with a lawyer.

In these four consolidated cases, the King County Prosecutor's Office challenged the Supreme Court's authority to adopt these rules. The Templeton Court rejects that challenge in extensive analysis not addressed in this **LED** entry. The Templeton Court then turns to the questions of 1) whether the warnings given in these cases were improperly phrased, and, if not, 2) whether the erroneous warnings were prejudicial to these defendants. The Templeton Court answers yes to these two questions, analyzing the issues as follows:

1) Sufficiency of warnings

The State argues the advisement of rights in these cases was sufficient to comply with the rule, because Respondents were advised upon arrest of the right to counsel before answering any questions, and the right to have an attorney present during questioning. Numerous questions were asked before administration of the breath test. Given this sequence of events, the State argues Respondents were aware of their right to talk with an attorney before giving the breath sample.

Properly worded Miranda warnings may be sufficient to advise a person of the rule-based right to counsel even if the warnings do not mirror the language of the rule. If the warnings given here had adequately conveyed to Respondents their right to consult counsel before the breath test, then the warnings would have satisfied the rule. Unfortunately, they did not.

The State relies upon Juckett [100 Wn.2d 824 (1984)], which involved three defendants. The issue was whether or not JCrR 2.11 [now CrRLJ 3.1] requires a specific warning about the right to counsel before the breath test. One defendant received Miranda warnings immediately after she was arrested and before transport to the station; the content of those warnings is not clear from the court's opinion. The second defendant was given Miranda warnings that included the following: "[You] have the right at this time to an attorney of [your] own choosing and have him present . . . during questioning and the making of any statements." The third defendant was given no warnings until after he took the breath test. The court found that the first two defendants were adequately advised of their right to counsel under the rule, but the third was not. In holding the Miranda warnings satisfied [what is now CrRLJ 3.1], the Juckett court held, "if Miranda rights have already been given, it is not necessary to again tell defendant that he has a right to counsel to advise him whether or not he should take the Breathalyzer test."

It is apparent from the Juckett court's opinion and from its reasoning that the Miranda warnings for both defendants contained the language excluded here ("you have the right at this time"). In contrast, Templeton and the others were advised only that they had the right to counsel before or during questioning. This implies the right is limited to the context of questioning, and that when questioning ends, so does the right to counsel. The advice thus did not make clear that defendants had the right to talk to an attorney at this time - that is, prior

to the breath test. For that reason, the warnings given did not sufficiently advise the defendants of the right to counsel under CrRLJ 3.1.

2) Prejudice

The State argues that even if the warnings were inadequate, the inadequacy did not prejudice the Respondents. The State relies upon three cases that we find are either not helpful, or support suppression.

State v. Schulze, 116 Wn.2d 154 (1991) **April 91 LED:02** was a vehicular homicide case. Schulze was not advised of his CrRLJ 3.1 right to counsel before submitting to a blood alcohol test. The court found that although the rule had been violated, the evidence was not tainted because the test is mandatory in vehicular homicide cases, so attorney advice would have been irrelevant. Here, the tests were not mandatory and attorney advice would not have been irrelevant.

In State v. Trevino, 127 Wn.2d 735 (1995) **Jan 96 LED:03** a defendant was not advised of his right to counsel "as soon as feasible" after arrest. He was, however, so advised prior to submitting to the breath test, and spoke to an attorney before the test. The court held the evidence was not tainted because Trevino obtained the benefit the rule is designed to ensure -- that arrested persons are aware that they have the right to the assistance of counsel before they provide evidence which might tend to incriminate them.

Finally, in State v. Copeland, 130 Wn.2d 244 (1996) **Jan 97 LED:03**, a murder suspect claimed the police violated CrRLJ 3.1 by taking blood and hair samples when the defendant did not have access to an attorney. The court refused to order suppression, because police possessed a valid warrant, and counsel could not have advised Copeland to refuse. As in Schulze, the evidence was therefore not tainted by the violation.

These cases simply illustrate the reason for the rule in DUI cases. The transitory nature of the evidence the State seeks to take-and that the defendant has a right to preserve-justifies the requirement that a defendant be advised of his right to counsel before the evidence is lost. Here, failure to give the advice required by the rule was not harmless. Suppression was the proper remedy.

[Some footnotes and citations omitted]

LED EDITORIAL NOTE: On August 3, 2001, Division Two of the Court of Appeals ruled similarly that counsel-right warnings that do not include the phrase "at this time," or words of similar import, fail to properly advise under CrRLJ 3.1 and CrR 3.1. But Division Two held in the consolidated cases there that the error was non-prejudicial. The Court thus held that there was no prejudice to the CrRLJ 3.1 rights of Mark D. Dunn, Sygrid Wright, and Michael L. Roesch.

"GLORIA SMITH" RULE BARRING INVENTORY SEARCHES AT BOOKING ON BAILABLE ARREST WARRANTS DOES NOT LIMIT SEARCHES IN FIELD "INCIDENT TO ARREST," EVEN IF 2 SEARCHES OCCUR, AND 2ND IS DELAYED DUE TO PRISONER TRANSFER

State v. Ross, ___ Wn. App. ___, 26 P.3d 298 (Div. I, 2001)

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

Everett police officer Aaron Defolo saw a male, later identified as Ross, and a female leaving a known drug house. Officer Defolo asked them for their names and dates of birth. They provided the information and proceeded on their way.

He then ran their names through his computer, and learned that each had misdemeanor warrants from different jurisdictions out for their arrest.

Officer Defolo approached them again, advised them of the warrants, and placed them under arrest. He searched Ross incident to arrest, but did not reach inside the small coin pocket in Ross' pants because the officer had once discovered a razor blade in such a pocket.

The warrant for Ross' arrest was from the City of Lynnwood. In accordance with the Everett Police Department's ordinary procedure in such cases, Officer Defolo contacted dispatch and arranged to meet a Lynnwood police officer, who would take custody of Ross and transport him to the Lynnwood jail. Officer Defolo met Lynnwood police officer Wes Burns at an agreed location near the border between the City of Everett and the City of Lynnwood. Officer Defolo transferred Ross into Officer Burns' custody at the rendezvous point. At the time of transfer, Officer Defolo urged the officer to "check" Ross again before placing him in the patrol car. In compliance with his department's standard procedures, Officer Burns searched Ross before putting him into the patrol car. Inside the coin pocket of Ross' pants, Officer Burns discovered a piece of cellophane plastic containing a substance that the state crime lab later determined to be cocaine. Roughly 30-45 minutes elapsed between the arrest and the transfer and second search. The record does not reflect any of the activities of the two officers and the suspect between the arrest and the second search other than those described above.

Because Officer Burns had probable cause to arrest Ross for a felony after discovery of the suspected cocaine, he drove Ross to the Lynnwood Police Department. There, he interviewed him regarding the drug offense. He did not book Ross on the misdemeanor warrant. The Lynnwood Jail does not handle felons. Therefore, Officer Burns then took Ross to the Snohomish County Jail, and booked him there on possession of cocaine.

The State charged Ross with possession of a controlled substance, cocaine, in violation of RCW 69.50.401(d). Ross moved to suppress evidence of the cocaine as the fruit of an unlawful search. The trial court denied the motion, and a jury convicted Ross on the possession charge.

ISSUE AND RULING: Did the search incident to arrest conducted at the time of the Everett-Lynnwood P.D. prisoner transfer violate the Gloria Smith rule under RCW 10.31.030, which rule qualifiedly restricts booking-inventory searches following arrest on bailable warrants? (ANSWER: No, this was a lawful search “incident to arrest,” not a booking search)

Result: Affirmance of Snohomish County Superior Court conviction of Ralph Andrew Ross for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals decision)

RCW 10.31.030, provides, in pertinent part, that:

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

Ross argues that the statute implicitly requires suppression of any evidence that is gathered in violation of the statute. We note that the statute is silent on the question of searches associated with arrests done under its authority. We also note that Ross does not challenge on constitutional grounds either search by the two police officers.

Ross' sole argument is that Officer Defolo violated this statute by failing to take him "directly and without delay" to a place where he could post bail. This argument is based on the phrase contained in the second proviso of the statute. He argues that Officer Defolo should have driven him directly to the Snohomish County Jail so that he could post bail, rather than arranging for a transfer to Officer Burns for transport to the Lynnwood police station. What Ross characterizes as the "unwarranted" delay occasioned by the transfer is at the heart of his argument. And this argument is unsupported by the words of the statute.

Officer Defolo's actions in arranging to transfer custody of Ross were consistent with the purpose of RCW 10.31.030, which is to "provide a defendant with notice of the charge and the amount of bail as soon as possible after arrest so that the defendant may avoid incarceration by posting bail." [See State v. Smith, 56 Wn. App 145 (1989) **March 90 LED:12; Feb 91 LED:18.**] The statute does not require that the arresting officer take the suspect to the nearest place of detention. Accordingly, the statute did not obligate Officer Defolo to take Ross to the Snohomish County Jail. Instead, it simply required that he take Ross "directly and without delay" to a place where he could post bail. Officer Defolo complied with that statutory mandate. The Everett officer promptly arranged for Ross' transportation to the neighboring City of Lynnwood, the place of issuance for the outstanding warrant, for processing. We note that the transfer of custody between the two officers and second search occurred about thirty to forty-five minutes after Ross' arrest. This record shows nothing untoward occurred between the time of arrest, the initial search, the time in transit from the point of arrest to the rendezvous point, and the second search. And Ross does not argue otherwise. There is simply nothing in this record to suggest that the actions of the officers, individually or collectively, were inconsistent with the plain wording and spirit of the statute.

Ross argues that the search that revealed evidence of a serious criminal offense would not have occurred had Officer Defolo complied with the mandatory language of RCW 10.31.030 and taken him "directly and without delay" to the Snohomish County Jail and given him the opportunity to post bail. It may be true that the second search in this case would not have occurred under Ross' alternative. But it is also irrelevant because the officers complied with the statute.

Ross relies primarily on State v. Caldera, 84 Wn. App. 527 **May 97 LED:05** and State v. Smith, in which this Court held that RCW 10.31.030 requires suppressing the fruit of a jail inventory search if police fail to first provide the arrested person with the opportunity to post bail. Both cases are distinguishable.

In Smith, police arrested Smith on a warrant and performed an inventory search of her purse while reading her the warrant at the jailhouse. This Court concluded that the search was unlawful because police failed to comply with RCW 10.31.030 by not giving her a timely opportunity to post bail, and held that the trial court should have suppressed evidence discovered as a result of the booking search. Similarly, in the consolidated case of Caldera, police arrested both defendants on outstanding warrants and took them to jail. Before giving

them an opportunity to post bail, officers searched the defendants in the jail's sally port and discovered evidence of cocaine. This Court reaffirmed its holding in Smith, and held that the searches were unlawful because officers violated RCW 10.31.030 by searching the defendants prior to offering them the opportunity to post bail.

But this Court has expressly limited application of the rule in Smith and Caldera to inventory searches performed at the jail at the time of booking. State v. Jordan, 92 Wn. App. 25 (Div. II, 1998) **Feb 99 LED:09** Those cases, and the mandates of RCW 10.31.030, do not apply to searches that occur in the field incident to arrest. In Jordan, officers arrested Jordan two times based on outstanding warrants. They searched him at the scene of each arrest, and seized methamphetamine on both occasions. The trial court suppressed the evidence, concluding "that the searches violated RCW 10.31.030 because the officers did not read the warrant to Jordan or provide him an opportunity to post bail before the search." This Court reversed, recognizing that, under Smith, the applicability of RCW 10.31.030 depends upon the "timing" of the search. The Court concluded that Smith and Caldera

> do not apply to search as incident to arrest, but to inventory searches prior to booking the defendants into jail. To read RCW 10.31.030 to treat defendants arrested upon warrants differently at the time of arrest would lead to absurd results. RCW 10.31.030 does not permit the officer to take bail at the scene of arrest or even to have the warrant available at the time of arrest.

Here, because Officer Burns searched Ross prior to their arrival at the Lynnwood police station, Smith and Caldera do not apply. Officer Defolo did not violate RCW 10.31.030 by arranging for Officer Burns to take Ross to the Lynnwood police station.

[Some citations and footnotes omitted]

CONFIDENTIAL INFORMANT'S IDENTITY NEED NOT BE DISCLOSED WHERE NOT RELEVANT TO CASE OR NECESSARY FOR FAIR DETERMINATION OF CASE

State v. Lusby, 105 Wn. App. 257 (Div. III, 2001)

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

After neighbors complained of suspicious traffic coming in and out of Ms. Lusby's home in Asotin County, members of the Quad Cities Drug Task Force attempted to set up two controlled narcotics purchases at her home utilizing a confidential informant (CI). Although neither attempt was successful, the CI reported being able to enter Ms. Lusby's residence. The CI smelled burnt or burning marijuana and saw marijuana and two bongs, used for smoking marijuana, lying on the coffee table in the living room.

Based on the CI's observations and the reports from concerned neighbors, a search warrant was issued and served on Ms. Lusby at her residence. Forced entry was not required. Ms. Lusby was cooperative when sheriff's deputies and task force officers searched her home. Based on the evidence collected, Ms. Lusby was arrested and charged with various drug crimes.

When arrested, Ms. Lusby waived her right to remain silent and admitted that she sold drugs from her residence. Then, she supplied the officers with details of the drug operation. Ms. Lusby voluntarily relinquished the drugs, drug paraphernalia, and proceeds from recent drug sales to the officers.

> In February 1999, Ms. Lusby filed a motion to compel the identity of the CI. She believed the CI would be essential to her defense strategy at trial since she refused to sell drugs to that person. When the State informed her that it did not know the CI's identity, Ms. Lusby filed a motion to compel disclosure. After a hearing, the motion was denied.
>
> Ms. Lusby eventually entered into a plea agreement whereby she agreed to plead guilty to possessing marijuana with intent to deliver (count II), in exchange for dismissing count I and count III. At the plea hearing she verbally and in writing admitted that she supplemented her income with drug sales.

ISSUE AND RULING: Was disclosure of the CI's identity relevant to the case or necessary for its fair determination? (ANSWER: No, defendant admitted she was a drug dealer and therefore her theory for disclosure of the CI's identity contradicted that admission)

Result: Affirmance of Asotin County Superior Court conviction of Pat L. Lusby for possessing marijuana with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Generally, the government is not required to disclose the identity of an informant providing information related to criminal activity. However, a defendant's request for disclosure of the CI's identity at trial implicates constitutional issues of fundamental fairness and due process. When disclosure of a CI's identity is relevant and useful to the defendant, or if disclosure is essential to a fair determination of the case, then disclosure is warranted. If the trial court finds that either prong of the Roviaro test (relevant and useful to the defense or essential to a fair determination of the case) has been satisfied, then fundamental fairness requires disclosure. [See Roviaro v. U.S., 353 U.S. 53 (1957) -- LED Ed.]
>
> Ms. Lusby argues the CI's testimony was necessary to her defense because the CI had information that would disprove the intent to deliver portion of the possession charge. She contends the CI could testify that on two different occasions prior to the critical police search, the CI was told that drugs were not for sale at Ms. Lusby's residence. This argument might be persuasive except for Ms. Lusby's valid admission during the raid that she sold drugs of the type found in her home. This admission was repeated during the plea. As such, disclosure of the identity of the CI was not necessary under these facts. Given the above, we conclude the trial court did not abuse its discretion in denying Ms. Lusby's motion to compel disclosure of the CI.

[Some citations omitted]

****

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DEFENDANT WILL BE ALLOWED TO TRY TO ESTABLISH THAT STOP BY COLUMBIA GORGE "EMPHASIS PATROL" WAS PRETEXTUAL -- In State v. Rainey, ___ Wn. App. ___, __P.3d __ (Div. III, 2001) [2001 WL 747632], the Court of Appeals rules, in response to Ms. Rainey's appeal of her conviction for possession of marijuana and psilocybin mushrooms, that she must be allowed to try to establish that a stop during an "emphasis patrol" in the Columbia Gorge area was an unlawful pretextual seizure to search for illegal drugs.

Ms. Rainey's defense attorney did not file a suppression motion during the superior court proceedings. He also rejected her request to testify in her own defense in response to the

State's constructive possession theory. Under the circumstances, the defense attorney should have done both. For the attorney to fail to do so was to deprive Rainey of her Sixth Amendment right to competent counsel, the Court holds.

The Rainey Court describes as follows 1) the facts that were developed at Ms. Rainey's trial, interwoven with 2) the further factual allegations by Ms. Rainey in her appellate pleadings:

> Ms. Rainey and James Evinger are friends. Mr. Evinger invited Ms. Rainey to drive from their homes in the Tacoma area to the Columbia Gorge for a rock concert. Police stopped Mr. Evinger's Jeep, ostensibly because he did not have a front license plate. According to Ms. Rainey, numerous other cars were stopped; some were seized, some were released. According to her, "dozens of other vehicles, if not hundreds" were being searched at this stop. [A law enforcement officer] approached the Jeep and said he smelled marijuana. Mr. Evinger denied there was marijuana in the car.
>
> The [officer] ordered both Ms. Rainey and Mr. Evinger to get out of the Jeep. Both complied. The [officer] and Mr. Evinger then went back and forth with accusations and denials. The [officer] told Mr. Evinger there was marijuana in the Jeep; Mr. Evinger said there was not. Ms. Rainey, after listening to the exchange for some time, blurted out, "I'll show you where it's at." She then walked to the passenger side of the Jeep, opened the glove box, retrieved a baggie of marijuana, and shut the glove box. The [officer] saw another baggie in the glove box. He opened the glove box and found a baggie of psilocybin mushrooms.
>
> Ms. Rainey, in her personal restraint petition, claimed she had only learned of the presence of the marijuana when she retrieved a cigarette lighter from the glove compartment during the trip from western Washington. According to her, she immediately expressed her anger, but by that time they were already in eastern Washington. And she was stuck.
>
> [The officer] searched the Jeep. He found marijuana pipes. Mr. Evinger claimed all the drugs belonged to Ms. Rainey. But he later pleaded guilty to possession of marijuana in exchange for dismissal of the possession of psilocybin mushrooms charge. During his sentencing, and at Ms. Rainey's trial, he testified that the drugs were his.
>
> Ms. Rainey was charged with possession of marijuana, possession of psilocybin mushrooms, and possession of drug paraphernalia. She did not testify, although in her personal restraint petition she says she wanted to. The jury found Ms. Rainey guilty of possession of marijuana and psilocybin mushrooms.

The Rainey Court then summarizes as follows the facts and law surrounding the "pretextual stop" issue that the defense attorney should have presented to the trial court:

> A pretextual traffic stop violates article I, section 7, because it is a warrantless seizure. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. There is a fundamental difference between detaining a citizen to search for evidence of crimes and a stop to enforce the traffic code. "The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving."
>
> "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." If the court concludes that the search or seizure was unconstitutional, evidence resulting from the search or seizure must be suppressed.

> Here, according to Ms. Rainey, there were more than a dozen Washington state patrol officers and sheriffs deputies who were stopping cars on their way to the concert. One of the officers directing traffic was a drug recognition expert. And no traffic infraction was ever issued to Mr. Evinger.
>
> We do not pass upon her allegations, but merely conclude that if her allegations are correct, at least a motion should have been made to permit the trial judge to pass upon the propriety of these searches and the legal consequences which would flow if the search was pretextual by Ladson's reasoning.
>
> The State, during oral argument, argued vigorously that law enforcement must be given the tool of "emphasis patrols" in order to protect the public. It is correct.
>
> But the problem is not with emphasis patrols per se. Some are perfectly legal -- constitutionally compatible. For example, recently in Spokane the police and state patrol troopers set up emphasis patrols at various crosswalks around the city of Spokane to crack down on drivers who disregard crosswalks. Likewise, emphasis patrols are frequently used at locations where drivers are inclined to exceed the legal speed limit on a regular basis or drive under the influence of drugs or alcohol. And certainly sting operations calculated to apprehend both distributors and users of illegal drugs by the use of confidential informants or drug enforcement officers operating undercover are appropriate.
>
> The problem Ms. Rainey complains about here is that the emphasis patrol focused on narcotics, but the stop was for a traffic infraction. Thus, the initial contact, in Mr. Evinger's case for not having a front license plate, was, she argues, pretextual. And it is precisely this kind of police conduct that the majority of our state Supreme Court condemned in Ladson. "The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving."

[Some citations omitted]

Result: Reversal of Grant County Superior Court conviction of Christian Rainey for unlawful drug possession; case remanded for suppression hearing and re-trial.

****

NEXT MONTH

The October 2001 **LED** will include entries regarding:

1) State v. Vrieling, ___Wn.2d ___, __P.3d ___(2001) [2001 WL 892795] (August 9, 2001 decision of the Washington Supreme Court holds that, when a motor home is being operated on the roadways as a vehicle, all areas of the motor home openly accessible to an arrestee-occupant at the moment of arrest are subject to search “incident to arrest” under the “bright line” search-incident rule of State v. Stroud, 106 Wn.2d 144 (1986));

2) State v. Horrace, ___ Wn.2d ___, ___ P.3d ___(2001) [2001 WL 867896] (August 2, 2001 decision of the Washington Supreme Court holds that an officer’s observation during a traffic stop that a driver leaned over toward a non-violator, front-seat passenger while the officer was in his patrol car justified the officer’s frisk of that passenger after the officer arrested the driver for driving while suspended);

3) State v. Reynolds, ___ Wn. 2d ___, ___ P.3d ___ (2001) [2001 WL 811139] (July 19, 2001 decision of the Washington Supreme Court, in a passenger-at-traffic-stop-tried-to-toss-the-drugs-case, makes pro-state rulings/declarations regarding search and seizure issues of a) "abandoned personal property," b) an officer's authority to direct a vehicle passenger to remain in a vehicle during a traffic stop, and c) the "knowledge" standard under the MV search-incident rule of State v. Parker, 139 Wn.2d 486 (1999) Dec. 99 LED:13 limiting searches of personal effects known to belong to non-arrestee passengers);

4) State v. Barker, ___ Wn. 2d ___, 25 P.3d 423 (2001) (June 21, 2001 decision of the Washington Supreme Court reversing a Court of Appeals decision (previously reported in the April 2000 LED:08), but not overruling that Court's analysis which interpreted chapter 10.93 RCW and invalidated an Oregon officer's 1996 arrest of a DUI violator in Washington on grounds that the Washington CJTC had not yet approved the course of basic training attended by the Oregon officer -- note: both the facts (as to CJTC approval of training courses for Oregon and Idaho peace officers per chapter 10.93 RCW) and law (as to fresh pursuit authority of Oregon and Idaho officers under RCW 10.89.050 to pursue certain types of violators into Washington) have changed since 1996, such that the Supreme Court almost certainly would have upheld the arrest in Barker on two separate grounds had it occurred in 2001);

5) State v. Jackson, ___ Wn. App. ___, ___ P.3d ___ (2001) [WL 849762] (July 30, 2001 Court of Appeals decision interpreting the rule for MV "search incident to arrest" of State v. Parker, 139 Wn.2d 486 (1999) Dec. 99 LED:13, and holding that, where officers have custodially arrested a vehicle driver, and the MV occupants give conflicting or confusing information regarding ownership of certain personal effects in the vehicle's passenger area, officers may search those particular personal effects in an attempt to determine ownership of the items);

6) State v. Johnston, ___ Wn. App. ___. ___ P.3d ___ (2001) [2001 WL 849212] (July 20, 2001 decision of the Court of Appeals ruling that, at the moment of his arrest, a robbery suspect arrested near his vehicle did not have sufficient access to or control of the vehicle for officers to be justified in making a warrantless search of the vehicle incident to the arrest).

****

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC 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 more simply accessed through a separate link clearly designated. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction, as well as Evidence Rules) are accessible on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

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 many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, is at [http://slc.leg.wa.gov/]. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. Information about bills filed in the 2001 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the

Criminal Justice Training Commission's webpage is [http://www.wa.cjt], while the address for the Attorney General's Office webpage is [http://www/wa/ago].

****

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 Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; e mail [dtangedahl@cjtc.state.wa.us]. LED editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LED's from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.wa.gov/cjt].