Law Enforcement Digest

December 2002

HONOR ROLL

551st Session, Basic Law Enforcement Academy – June 25th through October 30th, 2002

President:	Damian J. Smith – Edmonds Police Department
Best Overall:	David D. Johnson – Arlington Police Department
Best Academic:	David D. Johnson – Arlington Police Department
Best Firearms:	Thomas M. Collins – Brier Police Department
Tac Officer:	Officer Mike O'Neill – Olympia Police Department

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2002 LED SUBJECT MATTER INDEX

LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2002 through December 2002. Since 1988 we have published a twelve-month index each December. Since establishing the LED as a monthly publication in 1979, we have published three multi-year subject matter indexes. In 1989, we published a 10-year index covering LED's from January 1979 through December 1988. In 1994, we published a 5-year subject matter index covering LED's from January 1989 through December 1993. In 1999, we published a 5-year index covering LED's from January 1994 through December 1998. We plan another 5-year index in 2004 covering 1999-2003. The 1989-1993 cumulative index, the 1994-1998 cumulative index, and monthly issues of the LED from January 1992 on are available via a link on the Criminal Justice Training Commission's Internet Home Page at: http://www.cjtc.state.wa.us.

ACCOMPLICE LIABILITY (RCW 9A.08.020)

Accomplice liability statute's "knowledge" element clarified in drive-by murder case; also, bribery law does not preclude plea-bargain for testimony. State v. Sarausad, 109 Wn. App. 824 (Div. I, 2001) – Nov 02:20

Accomplice-liability instruction prejudicially failed to explain knowledge-of-intended-crime element properly. State v. Grendahl, 110 Wn. App. 905 (Div. III, 2002) – Nov 02:22

ARREST, STOP AND FRISK

It may be ok to routinely ask vehicle passengers for ID, so long as the "request" is not a "demand" (1980 Larson case given narrow reading). State v. Rankin, 108 Wn. App. 948 (Div. I, 2001) – Jan 02:04

To defend officer's stop based on "stolen vehicle" dispatch, prosecutor must establish reliability of WACIC information. State v. O'Cain, 108 Wn. App. 542 (Div. I, 2001) – Jan 02:13

Officers responding to report of armed assault just committed acted reasonably in making felony stop of suspects identified by victim at scene. McKinney v. City of Tukwila, 103 Wn. App. 391 (Div. I, 2000) – Jan 02:14

Terry stop-and-frisk ok where officers suspected open-liquor-container violation in public area, and officers were outnumbered. State v. Bailey, 109 Wn. App. 1 (Div. I, 2001) – Feb 02:04 (LED Ed. Note: But see State v. Duncan entry below)

Terry v. Ohio "totality of the circumstances" test for "reasonable suspicion" clarified as U.S. Supreme Court criticizes Ninth Circuit's "divide-and-conquer" approach to facts. U.S. v. Arvizu, 122 S.Ct. 744 (2002) – April 02:02

Warrant to arrest felon released pending appeal constitutionally may be based on less than probable cause. State v. Fisher, 145 Wn.2d 209 (2001) – April 02:14

In license revocation proceeding, DOL correctly ruled that radar-based traffic stop was lawful despite lack of foundational evidence regarding reliability of radar. Clement v. DOL, 109 Wn. App. 371 (Div. I, 2001) – April 02:18

DOL administrative hearing judge's earlier determination in administrative proceeding that officer lacked justification for traffic stop does not preclude court from revisiting that question in superior court criminal proceeding. State v. Vasquez, 109 Wn. App. 310 (Div. III, 2001) April 02:19 – Status: This case is on review in the Washington Supreme Court.

No Terry seizures based on mere "reasonable suspicion" are allowed for non-traffic civil infractions. State v. Duncan, 146 Wn.2d 166 (2002) – June 02:17

Custodial arrest for driving while suspended upheld even though officer did not follow local policy by checking with jail before arresting and conducting search incident to arrest; also, suspect's locking his truck after he was arrested did not preclude search-incident of truck. State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) – June 02:19.

Community caretaking function justified detaining 12-year-old long enough to call his mother; also, follow-up frisk before transport declared to be reasonable. State v. Acrey, 110 Wn. App. 769 (Div. I, 2002) – July 02:16. Status: This case is on review in the Washington Supreme Court.

Officer had probable cause to arrest for DUI based on totality of circumstances; also, officer's questioning of suspect during stop was not custodial, and hence Miranda warnings were not required. City of College Place v. Staudenmaier, 110 Wn. App. 841 (Div. III, 2002) – July 02:19

Officer's stop of vehicle to check unreadable "trip permit" not justified. State v. Byrd, 110 Wn. App. 259 (Div. I, 2002) – July 02:23

Random consent requests under drug interdiction program on intercity buses in Florida – no Fourth Amendment "seizure" occurred, and consent to search was voluntary, even though officers did not advise of right to not answer questions or of right to refuse consent. U.S. v. Drayton and Brown, 122 S. Ct. 2105 (2002) – Sept 02:02

Driver's furtive gesture as he pulled over during traffic stop held not to be objectively reasonable justification for "car frisk" where, after hearing driver's explanation for movement, officer left driver in car while doing a radio check, and officer did not check inside car or call for back-up until after driver had successfully completed FST's. State v. Glossbrener, 146 Wn.2d 670 (2002) – Sept 02:07

No "Frye hearing" was necessary to admit evidence re bank robbery tracking device; also, the tracking evidence, plus other facts, justified stop-and-frisk under reasonable suspicion standard of Terry v. Ohio. State v. Vermillion, 112 Wn. App. 844 (Div. I, 2002) – Oct 02:04

Beware if arrestee says: "I'm not the guy on the warrant" -- where county jail personnel received reasonable notice that detainee may not be person described in an arrest warrant, county had duty per common law negligence and false imprisonment theories to take reasonably timely steps to verify the identity of the detainee. Stalter v. State, Brooks v. Pierce County, 113 Wn. App. 1 (Div. II, 2002) – Oct 02:13

Court rules that there was PC to arrest defendant for using drug paraphernalia; Court also rules that paraphernalia was in "open view." State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) -- Nov 02:05

ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)

"Custodial assault": juvenile inmates in juvenile institutions are subject to the same narrow self-defense rule that limits use of force by citizens who resist arrest and that limits adult prisoners who use force against correctional officers in adult facilities. State v. Garcia, 107 Wn. App. 545 (Div. II, 2001) – Jan 02:22

Under "assault one" statute, repeatedly kicking victim in the head can be "force or means likely to produce death or great bodily injury." State v. Pierre, 108 Wn. App. 378 (Div. I, 2001) – Feb 02:23

Drive-by shooting statute – evidence held insufficient to convict because facts involved "walk-by" (not "drive-by") shooting. State v. Locklear, 146 Wn.2d 55 (2002) – Aug 02:03

BIGAMY

Wrongful intent held to be an element of bigamy. State v. Seek, 109 Wn. App. 876 (Div. I, 2002) – April 02:17

BURGLARY (Chapter 9A.52 RCW)

Burglary conviction upheld because defendant either had no permission to enter apartment or exceeded any limited permission he may have received. State v. Gohl, 109 Wn. App. 817 (Div. I, 2001) – March 02:07

Fenced backyard part of "building" under first-degree burglary statute. State v. Wentz, 110 Wn. App. 70 (Div. III. 2002) – April 02:16. Status: Review is pending in the Washington Supreme Court.

"Indecent exposure" held to be "crime against a person" under burglary statute. State v. Snedden, 112 Wn. App. 122 (Div. III, 2002) – Aug 02:25

CIVIL LIABILITY (AND POLICE COUNTERSUITS)

Ninth Circuit must reconsider its "excessive force" decision in case involving officers using pepper spray to try to force compliance from mechanically interlocked, civilly disobedient, "passive" resistors. County of Humboldt v. Headwaters Forest Defense, 122 S.Ct. 24 (2001) – Jan 02:02. Status: After the Ninth Circuit again ruled against the County of Humboldt on reconsideration (see 276 F.3d 1125 (9th Cir. 2002)), the County again petitioned for review in the U.S. Supreme Court, and on November 4, 2002, the U.S. Supreme Court denied review.

Officers responding to 911 report of armed assault acted reasonably in making felony stop of suspects identified as such by victim at scene. McKinney v. City of Tukwila, 103 Wn. App. 391 (Div. I, 2000) – Jan 02:14

County's 911 operators made no promises that would subject county to civil liability under "special relationship" exception to "public duty" doctrine. Bratton v. Welp, 106 Wn. App. 248 (Div. III, 2001) – Jan 02:15

Court finds "failure to enforce" exception to "public duty doctrine" applies in part in case of attack by allegedly "dangerous dogs." King v. Hutson, 97 Wn. App. 590 (Div. III, 1999) – Jan 02:17

No civil liability in 911 "failure to protect" case, because dispatcher promised only that police would respond, and they did. Sinks and Stock v. Russell, 109 Wn. App. 299 (Div. II, 2001) – Feb 02:13. Status: Review is pending in the Washington Supreme Court.

Sgt. McCarthy's win in countersuit is upheld by unpublished Ninth Circuit decision. Cross v. City of Port Orchard (and others), 2001 WL 1609759 – April 02:11

"911" operator's statements to callers raise fact-question such that civil suit must go to trial on "special relationship" exception to "public duty doctrine." Bratton v. Welp, County of Spokane, 105 Wn.2d 572 (Div. III, 2002) – April 02:12

Beware if arrestee says: "I'm not the guy on the warrant" -- where county jail personnel received reasonable notice that detainee may not be person described in an arrest warrant, county had duty per common law negligence and false imprisonment theories to take reasonably timely steps to verify the identity of the detainee. Stalter v. State, Brooks v. Pierce County, 113 Wn. App. 1 (Div. II, 2002) – Oct 02:13

Handcuffing inmate for seven hours to hitching post in hot Alabama sun without regular breaks held to be cruel and unusual punishment. Hope v. Pelzer, 122 S.Ct. 2508 (2002) – Nov 02:02

CORPUS DELICTI RULE

Where the only evidence of "delivery" was the heroin seller's confession, the corpus delicti of "delivery of drugs by someone" was not met in fatal heroin O.D. case. State v. Bernal, 109 Wn. App. 150 (Div. II, 2001) – Feb 02:05

Pre-crime statements of defendant help establish corpus delicti of murder. State v. Pietrzak, 110 Wn. App. 670 (Div. III, 2002) – Nov 02:14

Corpus delicti established for taking motor vehicle without permission. State v. C.M.C., 110 Wn. App. 285 (Div. I, 2002) – Nov 02:15

DEFERRED PROSECUTION

Only one deferred prosecution per person per lifetime under RCW 10.05.010; also, no "ex post facto" constitutional violation in 1998 amendment. City of Walla Walla v. Topel, 104 Wn. App. 816 (Div. III, 2001) – Feb 02:23

Only 1 deferred prosecution permitted per lifetime under RCW 10.05.010. State v. Gillenwater, 110 Wn. App. 741 (Div. I, 2002) – Sept 02:21

DOMESTIC VIOLENCE (ALSO NO-CONTACT ORDERS)

Evidence that defendant phoned home of person protected by no-contact order and talked to protected person's spouse was enough to support conviction for violation of no-contact order. State v. Ward, Baker, 108 Wn. App. 621 (Div. I, 2001) – Feb 02:18

DV no-contact order entered at arraignment may be extended at time of sentencing. State v. Schultz, 146 Wn.2d 540 (2002) – Sept 02:14

Court may not issue mutual civil anti-harassment orders under chapter 10.14 RCW unless both parties file petitions. Hough v. Stockbridge, ___ Wn. App. ___, 54 P.3d 192 (Div. II, 2002) – Nov 02:16

DOUBLE JEOPARDY

No double jeopardy problem in prosecuting Tulalip tribal member (previously convicted in tribal court) in Cowlitz county for illegally hunting there. State v. Moses, 145 Wn.2d 370 (2002) – April 02:15

DUE PROCESS

Under circumstances of pre-trial competency hearing, defendant did not have a constitutional due process right to cross-examine a child witness in that hearing. State v. Maule, 112 Wn. App. 887 (Div. I, 2002) – Oct 02:25

DURESS (RCW 9A.16.060)

Duress is not available as a defense to a charge of attempted murder. State v. Mannering, 112 Wn. App. 268 (Div. II, 2002) – Sept 02:14

EQUAL PROTECTION

Firearm sentencing statute violates constitutional equal protection standard in enhancing penalty for short-barreled shotguns, but not for machine guns; but Court also holds that an unloaded firearm is still a firearm. State v. Berrier, 110 Wn. App. 639 (Div. II, 2002) – Sept 02:16

ESCAPE (RCW 9A.110-130) AND RELATED CRIMES

Felony-probationer who ran following his arrest on a probation-violation warrant committed first degree escape under RCW 9A.76.110. State v. Walls, 106 Wn. App. 792 (Div. III, 2001) – Feb 02:09

Leaving holding cell without permission was not "escape two" where defendant was being held there for a reason other than an arrest for an offense. State v. Hendrix, 109 Wn. App. 622 (2001) – March 02:13

EVIDENCE LAW

Confrontation clause not violated by admission of hearsay under child sexual abuse law (RCW 9A.44.120) and under "medical diagnosis" exception (ER 803(a)(4)). State v. Kilgore, 107 Wn. App. 160 (Div. II, 2001) – Feb 02:15

Hearsay not admissible under RCW 9A.44.120 where child did not understand difference between lie and truth at time she made out-of-court statement. State v. C.J., 108 Wn. App. 790 (Div. III, 2001) – Feb 02:18

State's "surveillance location privilege" argument rejected. State v. Darden, 145 Wn.2d 612 (2002) – May 02:08

"Excited utterance" hearsay exception met where rape victim reported rape to boyfriend, despite the fact that she was for a brief period thereafter reluctant to go to the police with her report. State v. Lawrence, 108 Wn. App. 226 (Div. I, 2001) – Aug 02:18

State wins on "excited utterance" and "photo montage" issues in case where officer was shot during a traffic stop, and officer was later interviewed and asked to review montage. State v. Ramires, 109 Wn. App. 749 (Div. III, 2002) – Aug 02:20

No "Frye hearing" was necessary to admit evidence re bank robbery tracking device; also, the tracking evidence, plus other facts, justified stop-and-frisk under reasonable suspicion standard of Terry v. Ohio. State v. Vermillion, 112 Wn. App. 844 (Div. I, 2002) – Oct 02:04

Under circumstances of pre-trial competency hearing, defendant did not have a due process right to cross-examine a child witness in that hearing. State v. Maule, 112 Wn. App. 887 (Div. I, 2002) – Oct 02:25

Because blood tests were performed in Oregon, the law of Oregon controls on evidentiary privilege question; also, defendant loses due process argument regarding failure to preserve blood. State v. Donahue, 105 Wn. App. 67 (Div. II, 2001) – Nov 02:18

EXPLOSIVES (Chapter 70.74 RCW)

State cannot convict for possessing explosives or attempted possession thereof despite: 1) defendant's possession of empty gas can and bottle stuffed with gauze; plus 2) his admission re intent to make and use Molotov cocktail. State v. Wiggins, 113 Wn. App. 209 (Div. III, 2002) – Nov 02:17

FIREARMS LAWS (Chapter 9.41 RCW) AND OTHER WEAPONS LAWS

Under RCW 9.41.040 (3), there could be no restoration of gun rights on 1975 robbery conviction despite 1984 dismissal of case under RCW 9.95.240. Nakatani v. State, 109 Wn. App. 622 (Div. I, 2001) – March 02:10

Knowledge of presence of gun is not an element of CPL law at RCW 9.41.050. Seattle v. Briggs, 109 Wn. App. 484 (Div. I, 2002) – Aug 02:21

Felon in possession of rifle not allowed to argue he was misled by CCO's advice that he could have rifle, because he had subsequently been warned by police to the contrary. State v. Locati, 111 Wn. App. 222 (Div. III, 2002) – Aug 02:21

Firearm sentencing statute violates equal protection in enhancing penalty for short-barreled shotguns, but not for machine guns; but an unloaded firearm is still a firearm. State v. Berrier, 110 Wn. App. 639 (Div. II, 2002) – Sept 02:16

Attorney General Opinion -- AGO 2002 No. 4 Addresses Some Aspects Of The Meaning Of "Conviction" Under RCW 9.41.040 -- LED Provides Clarification On One Point – Sept 02:22

FORCE, USE OF BY LAW ENFORCEMENT OFFICERS

Ninth Circuit must reconsider its excessive force decision in case involving officers using pepper spray to try to force compliance from mechanically interlocked, civilly disobedient, "passive" resistors. County of Humboldt v. Headwaters Forest Defense, 122 S.Ct. 24 (2001) – Jan 02:02. Status: After the Ninth Circuit again ruled against the County of Humboldt on reconsideration (see 276 F.3d 1125 (9th Cir. 2002)), the County again petitioned for review in the U.S. Supreme Court, and on November 4, 2002, the U.S. Supreme Court denied review.

FORFEITURE

Forfeiture hearing was timely, but $58,300 cash in girlfriend's car was not subject to forfeiture under RCW 69.50.505, because there was no PC as to illegal-drugs connection (drug-sniffing dog's alert to cash must be discounted on this record). Valerio v. Lacey Police Department, 110 Wn. App. 163 (Div. II, 2002) – May 02:12

FORGERY (RCW 9A.60.020)

Signing a fictitious name to a charge slip without authorization from the account holder is "forgery" under RCW 9A.60.020. State v. Daniels, 106 Wn. App. 571 (Div. I, 2001) – Feb 02:11

Driver who signed a false name on a traffic citation committed forgery. State v. Richards, 109 Wn. App. 648 (Div. II, 2001) – March 02:08

In counterfeit currency case, "intent to defraud" is held to mean same thing as "intent to injure" in forgery statute, RCW 9A.64.020. State v. Simmons, 113 Wn. App. 29 (Div. II, 2002) – Oct 02:24

FREEDOM OF ASSOCIATION (FIRST AMENDMENT)

Despite form as nonprofit private club, adult entertainment facility was in fact a "commercial premises" constitutionally subject to city ordinance. City of Shoreline v. Club for Free Speech Rights, 109 Wn. App. 696 (Div. I, 2001) – March 02:19

FREEDOM OF SPEECH (FIRST AMENDMENT)

Federal statute banning virtual child pornography held to be overbroad in violation of free speech protection of the Federal constitution. Ashcroft v. The Free Speech Coalition, 122 S.Ct. 1389 (2002) – June 02:17

Ordinance of Ohio village requiring non-commercial door-to-door solicitors and canvassers to obtain, carry, and show-on-resident's-demand a solicitor's permit held to violate First Amendment. Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton (Ohio), 122 S. Ct. 2080 (2002) – Sept 02:07

Seattle ordinance barring posting of notices on city-owned property, including utility poles, held overbroad in violation of state constitution's free speech clause. Seattle v. Mighty Movers, 112 Wn. App. 904 (Div. I, 2002) – Oct 02:23

HARASSMENT (Chapter 9A.46 RCW) (See also "Domestic Violence")

Evidence held sufficient to prosecute for telephone harassment. State v. Lansdowne, 118 Wn. App. 882 (Div. III, 2002) – Aug 02:15

Court may not issue mutual civil antiharassment orders under chapter 10.14 RCW unless both parties file petitions. Hough v. Stockbridge, ___ Wn. App. ___, 54 P.3d 192 (Div. II, 2002) – Nov 02:16

IDENTITY THEFT (RCW 9.35.020)

"Identity theft" evidence held sufficient to support conviction. State v. Baldwin, 111 Wn. App. 631 (Div. I, 2002) – Nov 02:12

IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL, DRUGS

Under-age drinking driver loses challenges to: (1) sworn report of DUI breath test, and (2) advisement as to reason for arrest. DOL v. Grewal, 108 Wn. App. 815 (Div. I, 2001) – Jan 02:22

In license revocation proceeding, DOL may hold that radar-based traffic stop was lawful despite lack of foundational evidence regarding reliability of radar. Clement v. DOL, 109 Wn. App. 371 (Div. I, 2001) – April 02:18

DOL administrative hearing judge's earlier determination in administrative proceeding that officer lacked justification for traffic stop does not preclude court from revisiting that question in superior court criminal proceeding. State v. Vasquez, 109 Wn. App. 310 (Div. III, 2001) – April 02:19 Status: This case is on review in the Washington Supreme Court.

Driver was subject to blood-testing under implied consent statute where he: 1) failed FST's, 2) blew under .07 on breath test, and 3) admitted recently taking prescribed amitriptyline. State v. Baldwin, 109 Wn. App. 516 (Div. III, 2001) – Sept 02:18

For blood alcohol test result to be admissible, blood sample must be shown to have been preserved with enzyme poison. State v. Bosio, 107 Wn. App. 462 (Div. III, 2001) – Sept 02:19

Warning on WSP's implied consent form survives challenge to its (1) "in violation of" language and (2) explanation of criminal sanction. Pattison v. DOL, 112 Wn. App. 670 (Div. I, 2002) – Oct 02:23

Non-cooperation with breath testing held to constitute "refusal" under implied consent law; court also holds that there is no enforceable right to an attorney in implied consent administrative hearings. Ball v. DOL, 113 Wn. App. 193 (Div. II, 2002) – Nov 02:09

INCEST (RCW 9A.64.020)

Sexual contact with one's natural child is "incest" even if one had previously relinquished parental rights to facilitate child's adoption. State v. Hall, 112 Wn. App. 164 (Div. II, 2002) – Sept 02:14

INDIANS AND LAW ENFORCEMENT

County sheriff's office had no jurisdiction to execute search warrant for tribal government records relating to tribal employee. Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893 (9th Cir. 2002) – April 02:10

No double jeopardy problem in prosecuting Tulalip tribal member (previously convicted in tribal court) in Cowlitz county for illegally hunting there. State v. Moses, 145 Wn.2d 370 (2002) – April 02:15

INTERROGATIONS AND CONFESSIONS (ALSO SEE "SIXTH AMENDMENT")

"Public safety" exception to Miranda warnings requirement not met where officer's pre-frisk question to suspect did not mention a safety concern. State v. Spotted Elk, 109 Wn. App. 253 (Div. III, 2001) – Feb 02:07

Prosecutor erred by asking officer to testify as to what attorney-invoking defendant had said when Mirandized. State v. Curtis, 110 Wn. App. 6 (Div. III, 2002) – April 02:20

Officer had probable cause to arrest for DUI based on totality of circumstances; also, officer's questioning of suspect during stop was not custodial, and hence, even if officer had probable cause to arrest suspect during such questioning, Miranda warnings were not required. City of College Place v. Staudenmaier, 110 Wn. App. 841 (Div. III, 2002) – July 02:19

INTIMIDATING A WITNESS (RCW 9A.72.110)

Intimidating a witness – only indirect "threats" need be proved, even if defendant did not intend that the "threats" be communicated to the "target." State v. Anderson, 111 Wn. App. 317 (Div. III, 2002) – Aug 02:12

JURISDICTION (CRIMINAL)

U.S.-Canadian border, not 49th parallel, controls criminal jurisdiction in Washington. State v. Norman, 145 Wn.2d 578 (2002) – Aug 02:05

Criminal jurisdiction in Washington: while incarcerated, with the help of others located in Washington, Alaska prisoner committed Washington crime of theft of federal disability benefits. State v. Leffingwell, 106 Wn. App. 835 (Div. II, 2001) – Sept 02:15

LEGISLATIVE UPDATE (2002)

Part One – 2002 Legislative Update -- May 02:02-05

Part Two – **2002 Legislative Update --** June 02:02-16

Part Three – **2002 Legislative Update --** July 02:01-17

Legislative Index -- June:02-14-15 **(Note: A few additions were made to Part Three after the Index was published in June)**

Correction Note Re Child Passenger Restraint Law – Aug 02:02

LINEUPS, PHOTO IDENTIFICATIONS AND SHOWUPS

Photo montage where just one of the pictures met the victim's description of a buck-toothed person with wide gaps between his buck teeth was improperly suggestive, but in-court identification was reliable anyway. State v. Kinard, 109 Wn. App. 508 (Div. III. 2001) – March 02:15

State wins on "excited utterance" and "photo montage" issues in case where officer was shot during a traffic stop, and he was later interviewed and asked to review montage. State v. Ramires, 109 Wn. App. 749 (Div. III, 2002) – Aug 02:20

Photo montage was not impermissibly suggestive, because the differences between defendant's photo and the other photos were only "minor." State v. Vickers, 107 Wn. App. 960 (Div. II, 2001) – Aug 02:20

LOSS OF, DESTRUCTION OF, OR FAILURE TO PRESERVE EVIDENCE

Because blood tests were performed in Oregon, the law of Oregon controls on evidentiary privilege question; also, defendant loses due process argument regarding failure to preserve blood. State v. Donahue, 105 Wn. App. 67 (Div. II, 2001) – Nov 02:18

MALICIOUS MISCHIEF (RCW 9A.48.070-100)

"Property of another" held under former malicious mischief statute to include community property destroyed by a community member. State v. Coria, 146 Wn.2d 631 (2002) – Sept 02:13

MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Assault cannot serve as the predicate felony under Washington's felony-murder statute. State v. Andress, ___ Wn.2d ___, ___ P.3d ___ (2002) – Dec 02:16

OBSTRUCTING (RCW 9A.76.020) AND RELATED OFFENSES

Evidence sufficient to support convictions for 1) resisting arrest and 2) obstructing. State v. Ware, 111 Wn. App. 738 (Div. III, 2002) – Aug 02:22

PORNOGRAPHY

Federal statute banning virtual child pornography held to be overbroad in violation of free speech protection of the U.S. constitution. Ashcroft v. The Free Speech Coalition, 122 S.Ct. 1389 (2002) – June 02:17

PUBLIC RECORDS LAW; RIGHT OF ACCESS TO COURT RECORDS AND PROCEEDINGS

Precedent of Dawson v. Daly does not protect against disclosure of performance evaluations of city manager. Spokane Research and Defense Fund v. Spokane, 99 Wn. App. 452 (Div. III, 2000) – Feb 02:21

Personal e-mails on government computer are public records, but the e-mails may be exempt from disclosure as "personal information." Tiberino v. Spokane County, 103 Wn. App. 680 (Div. III, 2000) – Feb 02:22

PUBLIC HOUSING

Public housing authorities may evict tenants based on drug violations that are committed by others without the tenants' knowledge. H.U.D. v. Rucker, 122 S.Ct. 1230 (2002) – June 02:16

RAPE AND OTHER SEX OFFENSES (Primarily Chapter 9A.44.RCW)

"Vagina" under "sex offenses" chapter, RCW 9A.44, includes "labia minora;" also, 1986 statutory rape conviction is a "strike" under "two strikes" law. State v. Delgado, 109 Wn. App. 61 (Div. I, 2001) – Feb 02:15

Rape conviction upheld: evidence of victim's mental incapacitation supports jury's rejection of defendant's claim that he had consenting sex with extremely drunk woman. State v. Al-Hamdani, 109 Wn. App. 599 (Div. I, 2002) – Sept 02:17

RESISTING ARREST (RCW 9A.76.040)

Evidence sufficient to support convictions for 1) resisting arrest and 2) obstructing. State v. Ware, 111 Wn. App. 738 (Div. III, 2002) – Aug 02:22

RESTITUTION

Insurance company has right to restitution in juvenile offender sentencing. State v. A.M.R., 108 Wn. App. 9 (Div. I, 2001) – March 02:20

Under direct-cause analysis, 12-year-old who possessed stolen car must pay restitution for damage caused by his 9-year-old brother. State v. Donahoe, 105 Wn. App. 97 (Div. III, 2001) – Sept 02:21

Juvenile Code authorizes sentence of restitution for victim's counseling costs in relation to assault in the fourth degree. State v. J.P., 111 Wn. App. 105 (Div. I, 2002) – Sept 02:22

Running of interest on restitution cannot be delayed by sentencing court. State v. Claypool, 111 Wn. App. 473 (Div. III, 2002) – Sept 02:22

Insurance company can be entitled to restitution in juvenile sentencing. State v. A.M.R., T.J.Z., 147 Wn.2d 91 (2002) – Nov 02:05

ROBBERY (Chapter 9A.56 RCW)

Robbery-one statute's element, "display what appears to be a…deadly weapon," is not met by mere evidence of a statement by defendant that he has a deadly weapon hidden on his person, unless such statement is accompanied by at least a physical gesture indicating the location of the alleged hidden weapon. State v. Scherz, 107 Wn. App. 427 (Div. III, 2001) – Feb 02:19

SEARCH AND SEIZURE

Abandoned Property

Police search of jacket left by arrestee at scene of arrest held unlawful -- State's theories of abandoned property and inventory search rejected. State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) – March 02:02

Community Caretaking Function

"Community caretaking function" did not justify thorough search of home for identification documents relating to apparent suicide victim. State v. Schroeder, 109 Wn. App. 30 (Div. II, 2001) – Jan 02:09

Division One attempts to untangle "automatic standing" cases; Court also rejects State's arguments on impound, community caretaking and consent. State v. Kypreos, 110 Wn. App. 612 (Div. I, 2002)– May 02:20

Court majority favors State on five issues: 1) Payton-entry/order-to-exit-for-arrest-on-contempt-warrant; 2) "community caretaking" entry of residence to retrieve arrestee-resident's jacket; 3) emergency search for meth lab indicators; 4) third party consent to search shared boathouse; and 5) inevitable discovery. State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) – Oct 02:07

Consent Search Exception

Based on the totality of the circumstances, a person known by officers to be without a key to an apartment lacked "apparent authority" to consent to police entry of the apartment. State v. Holmes, 108 Wn. App. 511 (Div. I, 2001) – Jan 02:05

Escapee-murderer who was a guest at an apartment loses challenge to 1) police entry to arrest him on warrant and 2) police search of apartment's common areas -- the entry and search both were lawful because they were based on the hosts' consent. State v. Thang, 145 Wn.2d 630 (2002) – May 02:05

Division One attempts to untangle "automatic standing" cases; Court also rejects State's arguments on impound, community caretaking and consent. State v. Kypreos, 110 Wn. App. 612 (Div. I, 2002) – May 02:20

Brother's consent to search locked room in his home was a valid third party consent. State v. Floreck, 111 Wn. App. 135 (Div. II, 2002) – July 02:22

No Ferrier warnings were required where officers were merely asking resident for permission to come in and talk to her grandson; Court holds consent voluntary and also holds scope of consent not exceeded. State v. Khounvichai, 110 Wn. App. 722 (Div. I, 2002) Aug 02:08. – Status: The Ferrier-consent issue in this case is now on review in the Washington Supreme Court.

Random consent requests under drug interdiction program on intercity buses in Florida – no Fourth Amendment "seizure" occurred, and consent to search was voluntary, even though officers did not advise of right to not answer questions or of right to refuse consent. U.S. v. Drayton and Brown, 122 S. Ct. 2105 (2002) – Sept 02:02

Court majority favors State on five issues: 1) Payton-entry/order-to-exit-for-arrest-on-contempt-warrant; 2) "community caretaking" entry of residence to retrieve arrestee-resident's jacket; 3) emergency search for meth lab indicators; 4) third party consent to search shared boathouse; and 5) inevitable discovery. State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) – Oct 02:07

Corrections To Typos In Warrant At Scene

Officer's on-scene correction of typo in telephonic search warrant to allow search for "methamphetamine" was ok; also, Court rejects defendants' challenges based on scope-of-search, pre-warrant entry of property, and purported "knock-and-talk." State v. Dodson, Cardwell and Harnden, 110 Wn. App. 112 (Div. III, 2002) – May 02:15

Entry Of Private Premises To Arrest (Payton/Steagald Rules)

Escapee-murderer who was a guest at an apartment loses challenge to 1) police entry to arrest him on warrant and 2) police search of apartment's common areas, where entry and search both were based on hosts' consent. State v. Thang, 145 Wn.2d 630 (2002) – May 02:05

"Payton Rule" limiting residential entry to make an arrest cannot be ignored; probable cause to arrest does not by itself justify warrantless, non-consenting, non-exigent entry. Kirk v. Louisiana, 122 S.Ct. 2458 (2002) – Sept 02:05

Court majority favors State on five issues, including issues relating to Payton-entry/order-to-exit-for-arrest-on-contempt-warrant and "community caretaking" entry of residence to retrieve arrestee-resident's jacket. State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) – Oct 02:07

Exigent and Emergency Circumstances

Although nearby unattached garage was not covered by search warrant that officers were executing at house, exigent circumstances justified their warrantless entry of the garage; officers did not "create" exigency. U.S. v. Ojeda, 276 F.3d 486 (9th Cir. 2002) – April 02:07

Court majority favors State on five issues, including issue whether emergency search for meth lab indicators was justified. State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) – Oct 02:07

Exclusionary Rule (see also Standing)

Court majority favors state on five issues, including issue of "inevitable discovery." State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) – Oct 02:07

Impound/inventory

Police search of jacket left by arrestee at scene of arrest held unlawful -- State's theories of abandoned property and inventory search rejected. State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) – March 02:02

Division One attempts to untangle "automatic standing" cases; Court also rejects State's arguments on impound, community caretaking and consent. State v. Kypreos, 110 Wn. App. 612 (Div. I, 2002) – May 02:20

Incident to Arrest (Motor Vehicle)

Custodial arrest for driving while suspended upheld even though officer did not follow local policy by checking with jail before arresting and conducting search incident to arrest; also, suspect's locking his truck after he was arrested did not preclude search-incident of truck. State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) – June 02:19

Driver arrested on warrant had "automatic standing" to challenge search of his girlfriend-passenger's purse under Parker search-incident rule. State v. Jones, 146 Wn.2d 328 (2002) – July 02:11

Where "arresting" officer told suspended-driving "arrestee" before searching vehicle that, following the search, the officer was going to transport, book and release the driver, the "arrest" was "custodial" and the search of the vehicle was a valid "search incident" despite jail policy against booking on such "nonviolent misdemeanor charges." State v. Clausen, ___ Wn. App. ___, ___ P.3d ___ (Div. II, 2002) 2002 WL31263151 – Dec 02:17

Where officer "arrested" a suspended driver based on both (1) his suspended-license status and (2) a misdemeanor warrant, the arrest was "custodial" for "search incident" purposes even though, following the vehicle "search incident": (a) the officer learned that the warrant was "not extraditable," and (b) upon learning the status of the warrant, a sergeant directed the officer to cite and release the driver. State v. Balch, ___ Wn. App. ___, 55 P.3d 1199 (Div. II, 2002) – Dec 02:19

Knock-and-Announce Requirement

5-4 decision for State on exigent circumstances, knock-and-announce issues; majority opinion avoids "open view" question concerning officer looking through small windowsill-level gap in motel room curtain. State v. Cardenas, 146 Wn.2d 400 (2002) – July 02:07

Omission Of Facts By Officer – Affiant (Reckless? Intentional?)

Omission of non-material facts from search warrant affidavit not fatal to probable cause determination on warrant. State v. Gore, 143 Wn.2d 288 (2001) -- Jan 02:03

Court rules for State on search-warrant-PC and omissions-from-affidavit issues; Court also rules that separate warrant was not required for installation and tracking of Global Positioning System tracking devices, but implies warrant may be required in future cases. State v. Jackson, 111 Wn. App. 660 (Div. III, 2002) – Aug 02:17

Particularity Requirement

Affidavit established probable cause to search computer for child porn through its description of report from computer repairman; also, clerical error in warrant referencing wrong crime was not fatal to warrant's validity, because warrant adequately described items to be seized and searched. State v. Wible, 113 Wn. App. 18 (Div. II, 2002) – Oct 02:19

Privacy Expectation, Scope of Constitutional Protections

Officer's on-scene correction of typo in telephonically obtained search warrant to allow search for "methamphetamine" was ok; also, Court rejects defendants' challenges based on scope-of-search, pre-warrant entry of property, and purported "knock-and-talk." State v. Dodson, Cardwell and Harnden, 110 Wn. App. 112 (Div. III, 2002) – May 02:15

5-4 decision for State on exigent circumstances, knock-and-announce issues; majority opinion avoids "open view" question concerning officer's look into room through small windowsill-level gap in motel room window curtain. State v. Cardenas, 146 Wn.2d 400(2002) – July 02:07

Court rules for State on search-warrant-PC and omissions-from-affidavit issues; Court also rules that a separate warrant was not required for installation and tracking of Global Positioning System tracking devices, but Court implies warrant may be required in other cases. State v. Jackson, 111 Wn. App. 660 (Div. III, 2002) – Aug 02:17

Court upholds both: (1) warrantless, delayed, probable cause seizure of rapist's shoes from the jail's inmate-property room; and (2) warrantless inspection of those shoes. State v. Cheatam, 112 Wn. App. 778 (Div. II, 2002) – Oct 02:02

Court rules that there was PC to arrest defendant for using drug paraphernalia; Court also rules that paraphernalia was in "open view." State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) -- Nov 02:05

Probable Cause To Search

Omission of non-material facts from search warrant affidavit not fatal to probable cause determination on warrant. State v. Gore, 143 Wn.2d 288 (2001) -- Jan 02:03

Thein distinguished – evidence in car suggesting driver was marijuana dealer, along with other evidence, including driver's admissions to officer, adds up to PC to search residence. State v. McGovern, State v. King, 111 Wn. App. 495 (Div. II, 2002) – July 02:13

Facts add up to PC to search motel room where local resident with drug-arrest history checked into motel and received multiple phone calls and multiple visitors. State v. Tarter, 111 Wn. App. 336 (Div. III, 2002) – Aug 02:06

Court rules for state on search-warrant-PC and omissions-from-affidavit issues; Court also rules that separate warrant was not required for installation and tracking of Global Positioning System tracking devices, but implies warrant may be required in future cases. State v. Jackson, 111 Wn. App. 660 (Div. III, 2002) – Aug 02:17

Affidavit established probable cause to search computer for child porn through its description of report from computer repairman; also, clerical error in warrant referencing wrong crime was not fatal to warrant's validity, because warrant adequately described items to be seized and searched. State v. Wible, 113 Wn. App. 18 (Div. II, 2002) – Oct 02:19

Under Thein's probable cause standard, general statements about the habits of sex offenders failed to establish PC to search personal computer; also, computer was not subject to search just to counter a possible alibi. State v. Nordlund, 113 Wn. App. 171 (Div. II, 2002) – Nov 02:08

Probationer, parolee searches

Fourth Amendment does not prohibit warrantless, reasonable suspicion-based search of probationer's residence by California law enforcement officer pursuing criminal investigation; Washington law may yield a different result. U.S. v. Knights, 122 S. Ct. 587 (2001) – Feb 02:03

Scope of Search Under Warrant

Officer's on-scene correction of typo in telephonically obtained search warrant to allow search for "methamphetamine" was ok; also, court rejects defendants' challenges based on scope-of-search, pre-warrant entry of property, and purported "knock-and-talk." State v. Dodson, Cardwell and Harnden, 110 Wn. App. 112 (Div. III, 2002) – May 02:15

Court upholds both: (1) warrantless, delayed, probable cause seizure of rapist's shoes from the jail's inmate-property room; and (2) warrantless inspection of those shoes. State v. Cheatam, 112 Wn. App. 778 (Div. II, 2002) – Oct 02:02

Standing

Division One attempts to untangle "automatic standing" cases; Court also rejects State's arguments on impound, community caretaking and consent. State v. Kypreos, 110 Wn. App. 612 (Div. I, 2002) – May 02:20

Driver arrested on warrant had "automatic standing" to challenge search of his girlfriend-passenger's purse under Parker search-incident rule. State v. Jones, 146 Wn.2d 328 (2002) – July 02:11

SELF DEFENSE

"Custodial assault": juvenile inmates in juvenile institutions are subject to same narrow self-defense rule that limits use of force by citizens who resist arrest and that limits adult prisoners who use force against correctional officers in adult facilities. State v. Garcia, 107 Wn. App. 545 (Div. II, 2001) – Jan 02:22

Evidence in murder prosecution insufficient to support self defense theory. State v. Read, 147 Wn.2d 238 (2002) – Nov 02:04

SENTENCING (See also "Restitution")

"Vagina" under "sex offenses" chapter, RCW 9A.44, includes "labia minora;" also, 1986 statutory rape conviction is a "strike" under "two strikes" law. State v. Delgado, 109 Wn. App. 61 (Div. I, 2001) – Feb 02:15

In sentencing proceeding, community corrections officer may testify to disagreement with prosecutor's plea bargain, but investigating law enforcement officer may not. State v. Sanchez, State v. Harris, 146 Wn.2d 339 (2002) – Aug 02:06

Cocaine seller's "school bus stop" sentence enhancement upheld over his objections to method of designation and recognizability of "bus stop." State v. Sanchez, 104 Wn. App. 976 (Div. III, 2001) – Sept 02:15

Firearm sentencing statute held to violate constitutional equal protection standard in enhancing penalty for short-barreled shotguns, but not for machine guns; but Court holds on statutory interpretation question that an unloaded firearm is still a firearm. State v. Berrier, 110 Wn. App. 639 (Div. II, 2002) – Sept 02:16

SEX OFFENDER REGISTRATION, RELEASE NOTIFICATION

In failure-to-register case, sex offender must be allowed to put on evidence alleging faulty filing practices in sheriff's office. State v. Prestegard, 108 Wn. App. 14 (Div. II, 2001) – Feb 02:18

SPEEDY TRIAL/SPEEDY ARRAIGNMENT

Striker/Greenwood CrR 3.1 speedy trial period runs while defendant is in another county's jail awaiting sentencing following a guilty plea there. State v. Huffmeyer, 145 Wn.2d 52 (2001) – Jan 02:04

Striker/Greenwood speedy trial rule not violated in vehicular assault prosecution, even though state could have obtained defendant's current address earlier from court papers on a separate DUI incident. State v. Hilderbrandt, 109 Wn. App. 46 (Div. III, 2001) – Jan 02:20

Idaho resident who commuted into Washington to work, but did not spend his nights in Washington, was not a Washington resident for purposes of the Striker/Greenwood speedy trial/speedy arraignment rule; also, evidence supports felony-eluding conviction. State v. Treat, 109 Wn. App. 419 (Div. III, 2001) – March 02:18

Speedy trial/speedy arraignment rule of Striker/Greenwood violated where prosecution was delayed on one of the two crimes arising from same criminal episode. State v. Kindsvogel, 110 Wn. App. 750 (Div. III, 2002) – Sept 02:21

THEFT AND RELATED OFFENSES (Chapter 9A.56 RCW) (See also "Robbery")

Theft (from mom) by deception – evidence sufficient to convict. State v. Mora, 110 Wn. App. 850 (Div. III, 2002) – Sept 02:15

Theft convictions against escrow company president upheld. State v. Grimes, 110 Wn. App. 272 (Div. I, 2002) – Sept 02:16

TRAFFIC (Title 46 RCW) (See also "Implied Consent")

Citizen's intentional act of driving off from traffic stop with officer hanging from driver-side window was "accident" for purposes of hit-and-run statute. State v. Silva, 106 Wn. App. 586 (Div. I, 2001) – Jan 02:19

In "physical control" prosecution, affirmative defense for moving motor vehicle off the roadway not applicable if someone else does the moving. State v. Votava, 109 Wn. App. 529 (Div. III, 2001) – March 02:17. Status: Review is pending in the Washington Supreme Court.

Expert testimony that defendant was in "crash phase" of meth intoxication at time of accident helps to support conviction for vehicular assault. State v. McNeal, 145 Wn.2d 253 (2002) – April 02:14

TRESPASS (Chapter 9A.52 RCW)

Criminal trespass at public housing facilities – if there are no lease provisions to contrary, a previously "trespassed" guest has a limited right to be on premises at tenant's invitation. State v. Blunt, 146 Wn.2d 561 (2002) – Aug 02:03

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW), OTHER DRUG LAWS

Where the only evidence of delivery was the heroin seller's confession, the corpus delicti of "delivery of drugs by someone" was not met in fatal heroin O.D. case. State v. Bernal, 109 Wn. App. 150 (Div. II, 2001) – Feb 02:05

Medical marijuana law gets first reading -- defendant fails to meet standards for 1) "valid documentation" or 2) "60-day supply." State v. Shepherd, 110 Wn. App. 544 (Div. III, 2002) – May 02:08

Forfeiture hearing was timely, but $58,300 cash in girlfriend's car was not subject to forfeiture under RCW 69.50.505, because there was no PC as to illegal-drugs connection (drug-sniffing dog's alert to cash must be discounted on this record). Valerio v. Lacey Police Department, 110 Wn. App. 163 (Div. II, 2002) – May 02:12

Evidence discovered during traffic stop held sufficient to support convictions for 1) manufacturing meth and 2) possessing meth with intent to manufacture or deliver. State v. McPherson, 111 Wn. App. 747 (Div. III, 2002) – Aug 02:22

Drug evidence discovered during traffic stop held sufficient to support convictions for 1) possessing meth with intent to deliver and 2) manufacturing meth. State v. Zunker, 112 Wn. App. 130 (Div. III, 2002) – Aug 02:23

VOYEURISM (RCW 9A.44.115)

Up-skirt videotaping and photographing in public places such as shopping malls does not violate state voyeurism statute. State v. Glas, ___ Wn.2d ___, 54 P.3d 147 (2002) – Nov 02:03

WILDLIFE PROTECTION

Conclusive presumption for bag-limit violations in Fish & Wildlife statute prohibiting "commercial fishing without a license" held unconstitutional. State v. Mertens, 109 Wn. App. 291 (Div. II, 2001) – Feb 02:14. Status: Review is pending in the Washington Supreme Court. (**LED** Ed. Note: The 2002 Washington Legislature made a correcting amendment to the statute at issue in Mertens.)

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

(-) ASSAULT CANNOT SERVE AS THE PREDICATE FELONY UNDER WASHINGTON'S FELONY-MURDER STATUTE – In State v. Andress, ___ Wn.2d ___, ___ P.3d ___ (2002), the Washington Supreme Court rules 5-4 that, under Washington's felony-murder statute (RCW 9A.32.050), assault cannot serve as the predicate felony for a second degree felony-murder prosecution.

The facts and trial court proceedings in the case are described by the Andress Court as follows:

> Andress became involved in a fight outside a bar with Eric Porter and Edwin Foster. After the fight had continued for a time, Porter saw Foster stumble off holding his chest, and a little later Porter realized that both he and Foster had been stabbed by Andress. Foster died from the stabbing. The State charged Andress with second degree intentional murder and second degree felony murder with assault in the second degree as the predicate felony, arising from the stabbing of Foster, and first degree assault, arising from the stabbing of Porter; the information alleged that Andress committed each of these offenses while armed with a deadly weapon. In an amended information, the State dropped the second degree intentional murder alternative, leaving only the second degree felony murder charge predicated on assault as the underlying felony. The jury found Andress guilty of second degree felony murder (Foster) and second degree assault (Porter). The jury also returned a deadly weapon verdict on each count.

RCW 9A.32.050 provides in part (Italics added by LED Eds.) :

> (1) A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or
>
> *(b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants . . . .*

At issue in this case was whether subsection (1)(b) includes the causing of a death where the death occurs during the course of a felony assault. Even though the statutory language does not appear to exclude felony-assaults, the Andress majority concludes that the Legislature did not intend to include felony-assault as the predicate felony under the statute.

Result: Andress's personal restraint petition granted and case remanded to King County Superior Court for re-sentencing on the remaining conviction for second degree assault with a deadly weapon.

Status: At LED deadline, the King County Prosecutor was planning to file a motion for reconsideration.

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WASHINGTON STATE COURT OF APPEALS

WHERE "ARRESTING" OFFICER TOLD SUSPENDED-DRIVING "ARRESTEE" BEFORE SEARCHING VEHICLE THAT, FOLLOWING THE SEARCH, THE OFFICER WAS GOING TO TRANSPORT, BOOK AND RELEASE THE DRIVER, THE "ARREST" WAS "CUSTODIAL" AND THE SEARCH OF VEHICLE WAS A VALID "SEARCH INCIDENT" DESPITE JAIL POLICY AGAINST BOOKING ON SUCH "NONVIOLENT MISDEMEANOR CHARGES"

State v. Clausen, ___ Wn. App. ___, ___ P.3d ___ (Div. II, 2002)

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

> On July 18, 2001, Kalama Police Officer Steven Parker ran the license plates on a parked vehicle and discovered that the vehicle's owner, Brian Clay Clausen, had a suspended driver's license. Two days later, Parker and Officer Christopher Harvin observed Clausen driving the vehicle, pulled him over, and confirmed that his license was suspended.
>
> Following Kalama Police Department policy, they arrested Clausen for third degree driving without a license and impounded his vehicle. Harvin then conducted an inventory search of the vehicle. He discovered methamphetamine, marijuana, and drug paraphernalia in the vehicle.
>
> The State charged Clausen with possession of methamphetamine; possession of marijuana; use of drug paraphernalia; and third degree driving with a suspended or revoked license. Arguing that the search was not a valid search incident to arrest because he was not under custodial arrest, Clausen moved to suppress the evidence discovered during the search.
>
> The testimony at the suppression hearing revealed that on the day of the arrest the Cowlitz County Jail had surpassed its maximum capacity and, barring special circumstances, was not booking detainees arrested for nonviolent misdemeanors. The jail had notified the local police agencies when it entered this status several months earlier. If an officer presented a detainee to the jail on a nonviolent misdemeanor charge, the shift sergeant determined whether the jail would book the person. Generally, the jail would not book the detainee unless the person posed some type of threat to the community.
>
> Parker testified that although he was generally aware that the jail had not been booking detainees charged with nonviolent misdemeanors, he did not specifically verify whether the jail was on this status until after he arrived at the jail with Clausen. Clausen testified that when Parker initially arrested him, he said that they were going to impound his vehicle, book him, and then release him.
>
> The trial court denied the suppression motion and subsequently convicted Clausen on all charges after a bench trial on stipulated facts.

ISSUE AND RULING: Where an officer arrests a suspended drivers' license violator, and, before searching the driver's vehicle incident to that arrest, tells the driver that, after the search, the officer will transport the driver to the local jail for booking and release, has the officer made a custodial arrest that justifies a search of the person and of the vehicle passenger area "incident to arrest," even though the local jail has a policy against "booking" on such non-violent misdemeanors? (ANSWER: Yes)

Result: Affirmance of Cowlitz County Superior Court conviction of Brian Clay Clausen: 1) for possession of methamphetamine and marijuana; 2) for use of drug paraphernalia; and 3) third degree driving with a suspended or revoked license.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Relying on State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) **Oct 98 LED:12**, Clausen contends that the search incident to arrest exception to the search warrant requirement does not apply here because he was not under *custodial* arrest at the time of the search due to the jail's status. We disagree.
>
> Under both the federal and state constitutions, warrantless searches are presumed invalid unless the State can establish that the search falls under one of the carefully drawn and jealously guarded exceptions to the warrant requirement. One exception to the warrant requirement is the search incident to arrest exception. State v. Stroud, 106 Wn.2d 144 (1986). Under this exception, an officer may conduct a warrantless search of an arrestee and the area that was within the arrestee's immediate control at the time of a valid custodial arrest.
>
> In McKenna, we held that once an officer issues a citation in lieu of arrest and releases a detainee, his authority to conduct a search incident to arrest ends. We did not hold that the jail's status in any way affected the officer's authority to place the defendant under custodial arrest or that a search prior to the defendant's release was invalid.
>
> As was the case here, in McKenna, the county jail was refusing to book detainees arrested for nonviolent misdemeanors due to overcrowding. But unlike the officer in McKenna, here Parker clearly manifested his intent to place Clausen under custodial arrest when he told Clausen that he was under arrest and that he would be released *after* he was booked.
>
> Although the definition of "custodial arrest" is not precise, the testimony here shows that Clausen was under custodial arrest at the time of the search. *See* State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) **June 02 LED:19** (defendant under custodial arrest despite jail's booking policy where officer told defendant he was under arrest, defendant exited his vehicle, officer handcuffed defendant and placed him in patrol car); McKenna, 91 Wn. App. at 562 (arrest was noncustodial where officer issues citation in lieu of arrest and released defendant). Because Clausen was under custodial arrest, the search of his vehicle was a valid search incident to arrest and the trial court did not err when it denied Clausen's motion to suppress.

[Some citations omitted]

LED EDITORIAL NOTE: **In the January 2003 LED or February 2003 LED, we will provide a commentary on the issues addressed in Clausen decision above and the Balch decision below.**

WHERE OFFICER "ARRESTED" A SUSPENDED DRIVER BASED ON BOTH (1) HIS SUSPENDED-LICENSE STATUS AND (2) A MISDEMEANOR WARRANT, THE ARREST WAS "CUSTODIAL" FOR "SEARCH INCIDENT" PURPOSES EVEN THOUGH, FOLLOWING THE VEHICLE "SEARCH INCIDENT": (A) THE OFFICER LEARNED THAT THE WARRANT WAS "NOT EXTRADITABLE," AND (B) UPON LEARNING THE STATUS OF THE WARRANT, A SERGEANT DIRECTED THE OFFICER TO CITE AND RELEASE THE DRIVER

State v. Balch, ___ Wn. App. ___,___ P.3d ___ (Div. II, 2002)

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

> One evening in November of 1999, police officer Gerald Swayze stopped Gary Balch for speeding. When Swayze did a driver's check, he learned that Balch's license was suspended and that he had an outstanding misdemeanor warrant in Lewis County. Police dispatch initially advised Swayze that the warrant was "extraditable." *[COURT'S FOOTNOTE: The intrastate transfer of prisoners is not formally referred to as extradition. Because the concepts are sufficiently similar and the terminology for intrastate transfers inconsistent, we use the term extradition.]* According to the trial court's unchallenged finding of fact, Swayze arrested Balch at this time.
>
> Swayze then handcuffed Balch and placed him in the patrol car. Swayze testified that he arrested Balch both because of the warrant and the suspended license violation. He then addressed his attention to Balch's passenger, Naomi Huggins. Balch's supervisor, Sergeant McLane, arrived when Swayze was checking Huggins's license, but he did not participate in the search. Swayze searched Balch's vehicle and found a container with marijuana *[COURT'S FOOTNOTE: Swayze did not realize until after Balch was released that the container with the marijuana also contained cocaine. During his trial testimony he explained that after citing and releasing Balch, he opened a wrapped-up piece of paper that was in the container with the marijuana and found a white powdery substance that was later tested to be cocaine]* in a trash bag on the floorboard of the passenger's side of the car. Swayze read Balch his rights and questioned him about the drugs.
>
> Five to ten minutes after initially saying the Lewis County warrant was extraditable, dispatch informed Swayze that it was not. The record is not clear on exactly when Swayze received the correction, but it was after Balch was handcuffed, placed in the patrol car, and after his car had been searched.
>
> Swayze then told Sergeant McLane about the outstanding warrant and the marijuana. Sergeant McLane directed Swayze to issue Balch a citation and release him.
>
> At the suppression hearing Balch argued that Port Angeles Police Department policy dictates that only the sergeant on duty decides whether to make a custodial arrest on a misdemeanor charge or to issue a citation. The trial court rejected the argument.
>
> The trial court held that "Officer Swayze testified that his intent was to arrest and book the Defendant, i.e. a custodial arrest . . . . Swayze manifested his intent by placing the Defendant in the back of his patrol car" prior to the search of Balch's vehicle. Swayze testified that his practice is to book a suspect when the crime is third degree driving while license suspended.

On Sergeant McLane's orders, Balch was cited that night for the license and marijuana offenses. He was charged the next month with two counts of possession of a controlled substance (to wit: less than 40 grams of marijuana and cocaine) and one count of third degree driving while license suspended.

Just before trial the State dropped the suspended license charge because the Department of Licensing mailed the notice to the wrong address. The jury convicted Balch of two counts of unlawful possession of a controlled substance.

ISSUE AND RULING: Was the arrest of Balch a "custodial" arrest justifying the search of Balch's car incident to the arrest, where the officer arrested Balch based on both a misdemeanor warrant and the suspended status of Balch's drivers' license, even though, following the search, the officer learned that the warrant was designated "not extraditable," and a sergeant, upon learning (post-search) the non-extraditable status of the warrant, directed the officer to cite and release the driver? (ANSWER: Yes)

Result: Affirmance of Clallam County Superior Court conviction of Gary Len Balch for unlawful possession of a controlled substance (two counts).

ANALYSIS: (Excerpted from Court of Appeals opinion – subheads revised by LED Eds.)

(1) Balch was under custodial arrest when the search occurred

Balch argues that police may search incident to a lawful custodial arrest, but that they may not search incident to a lawful *noncustodial* arrest, citing State v. McKenna, 91 Wn. App. 554 (1998) **Oct 98 LED:12**.

Here, as below, Balch argues that his arrest was not custodial because (a) Swayze did not have the authority to book Balch under Port Angeles Police Department policy, and (b) Balch was cited and released after the search instead of being booked.

Balch relies heavily on this court's decision in McKenna. In that case, a Kelso police officer stopped a motorist for suspicion of false license tags; as a result of the computer check the officer discovered additional grounds to arrest the driver (including an outstanding arrest warrant for driving without a license). The officer knew that the Cowlitz County jail was overcrowded and refusing to book anyone only arrested for a nonviolent misdemeanor. He therefore cited McKenna and her passenger and told them they were "free to go." The car, however, was impounded, so the officers offered McKenna a ride, provided she allow them to search her duffel bag (in which she had placed some items from the car before it was impounded). She agreed, and after finding drug paraphernalia, the officers ordered McKenna to empty her pockets; she presented a film canister with methamphetamine inside. We held the search invalid because it occurred *after* McKenna was released, so even if it had been a custodial arrest "so that it could support a search-incident at some earlier point in time, it cannot support a search-incident *after McKenna had been told she was free to go*."

In McKenna we expressly did not reach the issue presented here:

> [N]othing herein means that a trial court must suppress evidence when an officer (a) arrests a defendant with probable cause to make a custodial arrest; (b) conducts a search contemporaneous

> with the arrest; but (c) for objectively manifested reasons arising after the search (e.g., being called to another, more pressing emergency), does not actually take the defendant into custody. We have no occasion to consider such a situation in deciding this case.

McKenna, 91 Wn. App. at 564.

The facts in McKenna distinguish it from this case. In McKenna, officers knew that due to jail overcrowding, they were not going to book the defendants on the charges for which they had probable cause. And in McKenna, the search occurred *after* the officers told the defendant that she was released from those charges. Here, Swayze arrested Balch on the Lewis County warrant and for third degree driving while license suspended. He handcuffed him, placed him into his patrol car, and then searched the interior of Balch's vehicle, finding marijuana. It was only after dispatch advised Swayze and Sergeant McLane, who arrived on the scene following Balch's arrest, that the Lewis County warrant was not extraditable that Sergeant McLane overrode Swayze's decision and ordered him to cite and release Balch instead of booking him.

Here the arrest was supported by probable cause and was not contrary to law. We agree with the trial court that Balch's arrest was custodial.

(2) Post-search release was not significant

A lawful search incident to arrest need not follow an arrest, so long as the search and the arrest are reasonably closely related in time and place. State v. Smith, 88 Wn.2d 127 (1977). *See also* State v. Harrell, 83 Wn. App. 393 (1996) **March 97 LED:14** (as long as probable cause exists at time of search, it may be considered search incident to arrest even if it occurs shortly before arrest); State v. Smith, 119 Wn.2d 675 (1992) **Nov 92 LED:04** (delay of 17 minutes between arrest and search of "fanny pack" incident to arrest not unreasonable, where delay resulted from officer's reasonable actions designed to secure premises and to protect herself and the public).

But an officer must have probable cause to arrest before making a warrantless search incident to custodial arrest; the fruits of the search cannot justify the arrest. In McKenna, this court observed that "[t]he right to search incident to a lawful custodial arrest, once acquired, terminates *no later than* when the officer announces that the arrestee will be released rather than booked." The announcement that Balch would be released came after the completion of the search incident to his arrest, when Sergeant McLane and Swayze learned they had been misinformed and that the warrant was not extraditable.

Swayze had probable cause to arrest Balch on the Lewis County warrant and for driving with a suspended license. *[COURT'S FOOTNOTE: Swayze also believed he had cause to arrest on the Lewis County warrant, until he learned it was not extraditable.]* Balch's subsequent release, following correction of the warrant status information, did not affect the validity of the search incident to his previous lawful custodial arrest. *See also* State v. Garcia, 35 Wn. App. 174 (1983) (holding inventory search of arrestee's wallet incident to his booking valid, even though arrestee subsequently released from custody after spending a short time in a cell).

> Here, Balch's speeding provided justification for the stop, the outstanding warrant and his suspended driver's license provided probable cause for his custodial arrest and triggered Stroud's bright line rule. *See* Stroud, 106 Wn.2d 144 (1986) (allowing search of passenger compartment but not locked containers when incident to lawful custodial arrest). Balch's arrest on an outstanding misdemeanor warrant and for driving with a suspended license was lawful, and the search incident to his arrest was proper. The fact that he was released prior to being booked, when the officers subsequently learned that the warrant was nonextraditable, did not alter the custodial character of Balch's arrest. Therefore, the evidence recovered during the search was admissible at Balch's trial.

[Some citations omitted]

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ORDER FORMS FOR 2002 SELECTED RCW PROVISIONS

Effective November 15, 2002, order forms for 2002 selected RCW provisions of interest to law enforcement are available on the Criminal Justice Training Commission website on the "Professional Development" page. The direct link to the order form is [http://www.wa.gov/cjt/forms/rcwform.txt].

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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. A website at [http://legalWA.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links 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 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 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. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. 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 home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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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 [ledemail@cjtc.state.wa.us]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do 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.cjtc.state.wa.us].