Law Enforcement Digest

January 2002

HONOR ROLL

537th Session, Basic Law Enforcement Academy – July 17th, 2001 through November 21st, 2001

President: William Koonce - Lynnwood Police Department
Best Overall: Einar E. Espeland - Snohomish County Sheriff's Office
Best Academic: Gregory A. Rock - Enumclaw Police Department
Best Firearms: Kevin M. Cays - Bothell Police Department
Tac Officer: Officer Brett Hatfield - Federal Way Police Department

****

JANUARY LED TABLE OF CONTENTS

****

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

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 – In County of Humboldt v. Headwaters Forest Defense, 122 S.Ct. 24 (2001), the U.S. Supreme Court has vacated a decision by the Ninth Circuit Court of Appeals and has remanded the case for further consideration. In Headwaters, the Ninth Circuit had held that law enforcement officers were not entitled to qualified immunity where the officers, as part of an agency plan, used pepper spray to try to force civilly disobedient, passive resistors to release themselves from interlocking metal devices. The vacated Ninth Circuit decision is officially reported at 240 F.3d 1185. It was digested in the July and August 2000 LEDs. The U.S. Supreme Court's three-sentence directive (not an opinion supported by legal analysis) vacates the Ninth Circuit decision and directs the lower federal courts to reconsider this case in light of the U.S. Supreme Court's recent opinion in Saucier v. Katz, 121 S.Ct. 2151 (2001).

Saucier, like Headwaters, was a civil rights "excessive force" case. The U.S. Supreme Court indicated in Saucier that the lower courts throughout the country have been allowing too many cases to go to juries where qualified immunity for the law enforcement officers should preclude the cases from going to trial. The Saucier Court instructed the lower federal courts faced with law enforcement claims of qualified immunity in civil rights cases to carefully separate and consider in this order the following two questions: (1) Do the facts alleged show that the officer's conduct could have violated a constitutional right? (2) If so, would it have been clear to a

reasonable officer that the officer's conduct was unlawful in the situation that the officer confronted? (In an "excessive force" case, this second question translates into whether the officer made a reasonable mistake in light of established case law in determining the level and type of force that was legally permitted under the circumstances.)

In both Saucier and Headwaters, the Ninth Circuit blurred the distinct boundaries between these two questions. Therefore, the lower courts must reconsider the qualified immunity questions in those cases.

Result: Remand to the Ninth Circuit of the U.S. Court of Appeals for a new determination on the Humboldt County officers' claims of qualified immunity.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) OMISSION OF NON-MATERIAL FACTS FROM SEARCH WARRANT AFFIDAVIT NOT FATAL TO PROBABLE CAUSE DETERMINATION ON WARRANT – In State v. Gore, 143 Wn.2d 288 (2001), the Washington Supreme Court holds in a case involving a serial rapist that it was not fatal to the probable cause determination under a search warrant (for defendant's saliva, blood, and photograph) that the officer-affiant failed to include in the supporting affidavit that: (1) a witness to an abduction-attempted-assault had failed to identify the suspect in a photomontage, and (2) the victim in a separate incident involving an abduction-rape failed to select the suspect from a photomontage.

The Supreme Court rules that, in light of the very limited opportunities of the witness and victim to observe the suspect's face, and in light of the other information in the affidavit (including admissions by the defendant in one of the two matters) clearly establishing that the defendant was in the area at the time of the crimes, the defendant could not establish that these omitted facts were material to the probable cause determination. Also, the other probable cause information in the affidavit was strong. Accordingly, the Supreme Court holds, based on the totality of the circumstances in this case, that it was not error for the trial court judge to decline to hold a hearing to determine whether the officer-affiant intentionally or recklessly omitted the facts at issue. Inclusion of these omitted facts in the affidavit would not have negated probable cause anyway, the Supreme Court holds.

Result: Affirmance of Snohomish County Superior Court convictions of Paul C. Gore for first degree rape (two counts) and attempted first degree rape (two counts).

LED EDITORIAL COMMENT: The Supreme Court's Gore opinion contains five pages of detailed, fact-based analysis explaining why the Court believes the omitted PC information was not material/relevant to the PC determination. We have only briefly described that analysis above. Readers who want the full context may want to go to a law library to read the full analysis (because the decision was issued more than 90 days ago, it is no longer available on the Washington courts' web site). Meanwhile, we offer the following suggestions on the general subject of omitting facts from search warrant affidavits: (1) when in doubt as to whether certain information -- whether exculpatory or inculpatory -- is relevant on the PC question, include the information in the affidavit; and (2) even if you are personally not in doubt as to whether the information is relevant, if you think there is any chance that someone else might have reasonable doubts, it is a very good idea (both for civil liability protection and for exclusionary rule purposes) to let the prosecutor's office make the decision on whether the information should be included.

(2) STRIKER/GREENWOOD CrR 3.1 SPEEDY TRIAL PERIOD RUNS WHILE DEFENDANT IS IN ANOTHER COUNTY'S JAIL AWAITING SENTENCING FOLLOWING A

GUILTY PLEA THERE -- In State v. Huffmeyer, ___ Wn.2d ___, 32 P.3d 996 (2001), the Washington Supreme Court rules that the speedy trial rule (CrR 3.3) requires that, where a defendant pleads guilty to charges (or, presumably, is convicted) in one county and then remains incarcerated there awaiting sentencing, the prosecutor in another county must act with due diligence and good faith under the time limits of CrR 3.3 to bring the defendant to trial on charges pending in that other county.

Result: Affirmance of Court of Appeals decision (digested in November 2000 LED at 19) that had affirmed the dismissal by the Kitsap County Superior Court of charges against Chad T. Huffmeyer for possessing stolen firearms.

****

WASHINGTON STATE COURT OF APPEALS

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, ___ Wn. App. ___, 33 P.3d 1090 (Div. I, 2001)

Facts:

In each of two separate cases consolidated for appeal purposes (involving defendants Rankin and Stabb), officers pulled over a car for a minor traffic violation. In each case, in addition to demanding the license of the driver, the officer requested, but did not demand, identification from the passenger. In the case involving defendant Stabb, illegal drugs in possession of the passenger, Kevin Stabb, came into plain view when Stabb emptied a pocket trying to find his driver's license or other ID. Stabb was eventually arrested for possession of illegal drugs.

In the Rankin case, the passenger (Rankin) gave the officer an identification card. The officer wrote down the information and gave the card back to Rankin. Saying he would "be right back," the officer then returned to his patrol car to run the information on the driver and passenger. When the officer got a warrant hit on Rankin, the officer arrested Rankin with the help of backup. Methamphetamine was found in a search incident to arrest.

Proceedings below:

In the prosecution of Stabb, the trial court denied defendant's suppression motion in which he claimed he had been illegally seized, and the trial court convicted Stabb of possession of cocaine. In Rankin, the trial court granted defendant's suppression motion on grounds he had been unlawfully seized (without reasonable suspicion) at the point when the officer asked him for ID.

ISSUE AND RULING: During a vehicle stop for a minor traffic violation, may an officer make a mere request (not a demand) for ID from a passenger as to whom there is no reasonable suspicion of a violation of law? (ANSWER: Yes, such a mere "request" does not constitute a "seizure" under the state or federal constitutions)

Result: Affirmance of King County Superior Court conviction of Kevin D. Stabb for possession of cocaine; reversal of suppression order of the Snohomish County Superior Court in the case of James Bruce Rankin, and remand to Superior Court for trial.

ANALYSIS: As to a pedestrian in a public place, it does not constitute a "seizure," and hence "reasonable suspicion" of a law violation is not required, for an officer to merely request identification. The question in the Rankin cases is whether the same rule applies to passengers in vehicles stopped for minor traffic violations.

In State v. Larson, 93 Wn.2d 638 (1980) the Washington Supreme Court ruled that an officer unlawfully seized a vehicle passenger (without reasonable suspicion) when the officer checking

out an illegally parked car sought ID from a passenger. The Larson Court suppressed marijuana that came into plain view when the passenger responded to the ID inquiry by opening her purse. The Larson Court did not describe in detail the officer's words or all of the other circumstances under which the officer asked for the ID. Worse yet, the Larson majority opinion is confusing for those trying to determine where the constitutional-seizure-line is drawn, as that 1980 opinion variously refers to the officer "requesting ID," "asking for ID," and "requiring ID."

The Rankin opinion interprets Larson as precluding officers only from "requiring" or "demanding" ID from passengers who are not suspects. Citing a recent Division Three decision in State v. Cook, 104 Wn. App 186 (Div. III, 2001) **March 2001 LED:07**, the Rankin Court equates a passenger in a vehicle to a pedestrian, and the Rankin Court concludes that no seizure occurred in either of the two cases before it, because the officer merely "requested" ID. The Rankin Court says that one should consider: 1) the officer's words ("Can I see your driver's license or proof of identification?" was the non-seizure request posed to Stabb); 2) the officer's tone of voice and manner; 3) the officer's position when the request was made; and 4) the officer's other actions that might constitute a show of force. If a reasonable innocent person would feel free to terminate the encounter, to refuse to answer the request, or to leave, then no seizure has occurred, the Rankin Court indicates. Under the facts of the two cases before it, the Court of Appeals concludes neither passenger would reasonably have believed that he was required to produce ID.

NO "APPARENT AUTHORITY" FOR PERSON KNOWN TO BE WITHOUT KEY TO AN APARTMENT TO CONSENT TO POLICE ENTRY OF THE APARTMENT

State v. Holmes, 108 Wn. App. 511 (Div. I, 2001)

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

> Late on the night of September 28, 1999, a Seattle police officer stopped Cynthia Gilbert for speeding. A strong odor of alcohol emanated from her car, and the officer observed a snifter of alcohol next to a baggie containing what appeared to be crack cocaine. The officer arrested Gilbert, and in the search incident to arrest, found approximately 31 grams of cocaine bagged in small increments and $2,500 in small bills. Gilbert told the officer that in a few weeks, she was scheduled to begin a 10-year sentence for federal drug trafficking.
>
> Gilbert wanted to work out a way to remain free until she reported to federal prison. She professed she was simply a delivery person, and offered to take the officer to the dealer, whom she identified as Jesse Holmes. She alleged Holmes possessed several ounces of cocaine, and that he shared her apartment in Lake City, where he could then be found. Gilbert's only evidence of her residence there was an old phone bill addressed to her at the Lake City address. Gilbert produced paperwork that verified her story about her pending federal incarceration; a computer check also verified that the Lake City address was one with which Gilbert had "some sort of history of contact or had used that address in the past."
>
> Gilbert signed a consent to search. At approximately 2:00 A.M., at least four officers accompanied Gilbert to the Lake City apartment. At the door, Gilbert revealed she did not have a key. She "came up with an excuse why she didn't have keys to the apartment. . . . She said something about losing them or something." Gilbert told police they should just knock, and Holmes would come to the door. Gilbert then knocked. The door was answered by a Ms. Foy. The arresting officer asked to speak with Holmes. Foy invited the police inside and indicated Holmes was in the back bedroom. *[Court's footnote: Ms. Foy's status as either guest or co-resident is not clear; no issue was raised as to her authority*

to invite the officers into the apartment.] Because Gilbert had told them Holmes had access to a weapon, two officers went to secure him. Holmes and a woman were in his bedroom. One of the officers escorted Holmes to the living room and informed him of his rights; the other observed a crack pipe and other drug paraphernalia in his room. The arresting officer told Holmes that Gilbert said he was dealing drugs. Agitated, Holmes denied the allegations, saying he was an addict, not a dealer, and that any cocaine in the apartment was for personal use. The officer counseled Holmes to calm down, and told him "if that's true, then all we're looking at is just a possession case for you." Because Holmes and Foy indicated Gilbert did not currently reside there, the officer obtained consent from Holmes and Foy. The officers searched the apartment and recovered two grams of cocaine, which Holmes admitted belonged to him.

After Holmes was transferred to the precinct, the officers escorted Gilbert to an address in Seattle for which she did have keys, mail, and belongings, and from which they recovered substantial quantities of cocaine and cash. Holmes was charged with possession of cocaine. He moved to suppress the evidence against him on grounds the search of his apartment was unlawful because Gilbert lacked authority to consent. The court admitted the evidence, holding that the officers' belief in Gilbert's apparent authority to consent was reasonable and that no search occurred until after Holmes consented. Following a stipulated trial, Holmes was found guilty as charged.

ISSUE AND RULING: Under the totality of the circumstances, including the fact that Gilbert had no key to the apartment, was it reasonable for the officers to believe Gilbert had joint access or control over the apartment, and that she therefore had "apparent authority" to consent to their entry into the apartment? (ANSWER: No)

Result: Reversal of King County Superior Court order denying suppression of evidence against Jesse James Holmes for possessing cocaine.

ANALYSIS:

1) Ferrier "knock-and-talk rule

The Holmes Court characterizes this case as a "knock-and-talk" consent search case governed by the rule of State v. Ferrier, 136 Wn. 2d 103 (1998) **Oct 98 LED:02**. Under Ferrier, officers may obtain consent for a "knock-and-talk" search only if, at the point of entry of the premises, officers advise the resident of: 1) the right to refuse consent, 2) the right to restrict the scope of the search, and 3) the right to retract the consent at any time.

The Holmes Court notes that the consent request that the officers made to Holmes once inside the apartment did not include all three Ferrier warnings, but the Court states conclusorily that, if Gilbert had apparent authority to consent to the initial police entry of the apartment, then there would be no violation of Ferrier. **[LED Editorial Note: One has to read between the lines, but presumably, the Holmes Court bases this conclusory statement on the fact that Gilbert had signed a consent-to-search form containing all three of the warnings required by Ferrier.]**

2) Apparent authority question

the Holmes Court explains as follows its determination that the officers were not reasonable in their belief that Gilbert had authority to consent to their entry of the apartment:

A third party may consent to a search if he or she possesses "common authority over or other sufficient relationship to the premises or effects sought to be

inspected." Common authority exists where there is "mutual use of the property by persons generally having joint access or control for most purposes."

It is undisputed that Gilbert did not actually have such authority. But the Fourth Amendment is satisfied by consent from someone who appears to have authority, so long as police have a reasonable belief in the authority of the person giving consent. Illinois v. Rodriguez, 499 U.S. 117 (1990)

As with other factual determinations bearing upon search and seizure, whether officers reasonably believe in a third person's authority to consent is judged against an objective standard. The question is whether "the facts available to the officer at the moment [would] 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises."

Under sound application of the apparent authority rule, police are required to make reasonable inquiries when they find themselves in ambiguous circumstances. In Rodriguez, the Supreme Court cautioned that officers may not always take third-party consent at face value: "Even when the (consent) is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." Circumstances here certainly suggested ample room for doubt. To begin with, the information indicating Gilbert lived at the Lake City apartment was limited to Gilbert's statement that she lived there with Homes, her possession of an envelope addressed to her there (the record does not reveal the postmark date), and a computer report that she had been associated with that address in the past. Other information indicated an urgent need for further inquiry.

The unusual circumstances of the stop, the contraband found in Gilbert's car, her pending report to federal prison, her obvious need to deflect attention from her newest crime, and her haste in "cooperating," all strongly demanded caution. In addition, the arresting officer testified that there was something "odd" when Gilbert responded to his question about cocaine by saying she was living in Lake City. But we need not determine whether the officers' initial belief in Gilbert's authority was reasonable, because once at the apartment door, Gilbert was unable to produce a key. Access and permission to enter are the hallmarks of common authority. Possession of a key is a strong indication of access and permission to enter, and that the third party exercises control over the premises for most purposes. In the seminal case discussed above, Rodriguez, the defendant's girlfriend, who had lived with him until a month before and told officers she still lived there, unlocked the door with her key and gave officers permission to enter. In another case by the same name, United States v. Rodriguez, the Seventh Circuit held the defendant's wife's possession of a key to the premises was sufficient to give her apparent authority, even though her estrangement from her husband may have deprived her of actual authority. While we have not attempted an exhaustive review of all consent cases, the State has not cited (and we have been unable to discover) a single case holding a third party's consent effective where the third party had no means of access.

We do not hold that inability to gain immediate access necessarily defeats apparent authority. But given the other circumstances here, Gilbert's lack of a key should have alerted the police to the necessity of further inquiry. We hold it was not objectively reasonable for police to believe that Gilbert had authority to consent to a search of Holmes' apartment. The initial entry was therefore

unlawful under Ferrier, and Holmes' later consent was ineffective to validate the search. The trial court erred in failing to suppress the evidence.

[Some citations omitted]

LED EDITORIAL NOTE:

The King County Prosecutor's Office handled the Holmes case. Members of the appellate team in that office have provided us with the following non-exhaustive checklist to guide officers in their determination of whether individuals have "joint access or control" over a place or item such that those individuals have authority to consent to a search:

Residence:

1. **Does the address on their driver's license (or other ID) match the residence?**
2. **Do records from DOL match the residence?**
3. **Do they have a key or other access device (alarm code, access code, garage door opener…)?**
4. **Do they have mail with the listed address on it?**
5. **Is their name on the mailbox?**
6. **Do they know the layout of the inside?**
7. **Are they already in the home?**
8. **Do they have their own room?**
9. **Do the neighbors (or landlord) of the residence know the person?**
10. **Can they give a coherent description of their present connection to the residence?**

Car:

1. **Are they driving the car?**
2. **Do DOL records match up?**

In general:

1. **What is their motive for giving you consent?**
2. **Have they lied to you?**
3. **Have they signed the consent form listing them as the owner?**
4. **Does their criminal history have any prior crimes of dishonesty?**
5. **If any of the above factors are not established, does their explanation for it make sense? (example: different name on mailbox because "just moved 2 days ago"… signs of a recent move)**
6. **Focus should be on the person's current connection with the residence or car**

If the situation is ambiguous, you must continue to make inquiries until you are convinced the person has authority to consent.

"COMMUNITY CARETAKING FUNCTION" DID NOT JUSTIFY THOROUGH SEARCH OF HOME FOR IDENTIFICATION DOCUMENTS RELATING TO APPARENT SUICIDE VICTIM

State v. Schroeder, ___ Wn. App. ___, 32 P.3d 1022 (Div. II, 2001)

Facts: (Excerpted from Court of Appeals opinion)

> On November 30, 1999, at approximately 5:45 p.m., Bremerton Police Department (BPD) Officers [1] and [2] responded to Schroeder's 911 call of a shooting at her house. Upon their arrival, Schroeder directed them to a bedroom where they found Donald McKeithan, whom Schroeder identified by name and as

her "longtime boyfriend" and roommate. They had no reason to believe that Schroeder's identification was not reliable.

McKeithan was lying face down on the floor with a pistol clutched in his right hand. He had shot himself but was still alive and "bleeding from the mouth and eyes." Medics arrived soon after but were unable to save McKeithan's life. Schroeder told [Officer 2] that McKeithan had previously attempted suicide and had recently seemed depressed.

[Officer 2] asked Schroeder if McKeithan had identification; she said that he had lost his wallet somewhere in the house.

Schroeder was crying, emotionally upset, and kept trying to enter the bedroom. [Officer 2] kept her out because it was a "pretty gruesome" scene inside. [Officer 2] told her that the coroner and a crime scene detective would be arriving later to process the suicide scene. He also told her that they would be looking around for McKeithan's identification. [Officer 2] suggested she leave the scene and Schroeder went to a friend's house accompanied by the police chaplain.

While waiting for the crime scene detective and the coroner to arrive, [Officer 2] was responsible for securing and maintaining the integrity of the scene. This included identifying the deceased and completing a standard BPD "death scene checklist" to gather information that might explain why the person committed suicide. This required looking at items at the death scene, such as delivered mail and phone messages, that might help establish time of death.

When [Officer 3 from the BPD crime scene division] arrived, a neighbor approached and told [Officer 3] that he believed drug activity had been going on in Schroeder's house because of the volume of foot and vehicle traffic for brief periods of time.

[Officers 2 and 3] proceeded to search for "primary identification" belonging to McKeithan. "Primary identification" meant a driver's license, military identification, or a Washington state identification card. Under BPD's procedures and training, verbal identification was not considered identification for purposes of processing a suicide scene. Because a driver's license has a photograph, full name and date of birth, it is "better than" other identification documents. Obtaining primary identification is very important for purposes of next of kin notification.

[Officer 2] searched McKeithan, checking his jeans pockets, but he did not find any identification. He testified that this was not a "thorough" search. [Officers 2 and 3] then searched the bedroom where McKeithan died, looking in locations where they believed a wallet might be found. They looked "on tops of dressers," "through papers . . . scattered about," and inside the closet; they did not open any drawers. Then they moved to the kitchen area.

In the hallway adjacent to the kitchen, two to four coats hung on a coat rack. [Officer 3] reached inside the pocket of a black, synthetic leather-type jacket and found a "small zip-lock baggie," with 3/4 ounce of a substance later determined to be methamphetamine. [Officer 2] testified that the search for primary identification ceased at that point because "it became a crime scene," once the methamphetamine was found. At approximately 9:45 p.m., based on the baggie of methamphetamine, BPD narcotics [Officer 4] requested a telephonic search warrant to search the residence for evidence of narcotics. The judge granted the

warrant at 10:00 p.m. Execution of the warrant resulted in the discovery of 1½ pounds of methamphetamine in 50 to 60 packages.

Meanwhile, at approximately 9:50 p.m., personnel from the coroner's office arrived on the scene. When they searched McKeithan's body, they found his wallet with picture identification in his back jeans pocket.

Proceedings below: The trial court denied Schroeder's motion to suppress the 3/4 ounce of methamphetamine from the coat and the 1½ pounds of methamphetamine found using the warrant. She was convicted of possession of methamphetamine with intent to deliver.

ISSUE AND RULING: Under the totality of the circumstances, was the thorough search of defendant's residence for identification documents relating to the apparent suicide victim objectively and subjectively justified as a non-criminal investigatory search under the "community caretaking function"/"emergency aid" exception to the constitutional search warrant requirement? (ANSWER: No, the officers went beyond the scope of what was reasonable under the circumstances.)

Result: Reversal of Kitsap County Superior Court conviction of Delayne Schroeder for possession with intent to deliver methamphetamine; remanded for dismissal with prejudice.

ANALYSIS: A law enforcement officer is permitted to conduct a warrantless, non-investigative search in an "emergency aid" circumstance under the officer's "community caretaking function." The "emergency aid" exception to the constitutional search warrant requirement applies when: 1) the officer subjectively believes that someone likely needs assistance for health or safety reasons, 2) a reasonable person in the same situation would similarly believe that there is a need for assistance, and 3) there is a reasonable basis to associate the need for assistance with the place searched.

The Schroeder Court rules that the "emergency aid exception," in light of the E-911 call of Ms. Schroeder, justified the initial police entry into the residence to check on the status of Mr. McKeithan. After the officers learned that Mr. McKeithan was dead of an apparent suicide, however, and after Ms. Schroeder had told them his identity, the officers were subject to significant constitutional restrictions as to what they could do to process the suicide scene, the Schroeder Court holds.

Neither the "emergency aid exception," the "health-and-safety-check" exception (the boundaries of which the Schroeder Court does not explain) nor any other justification under "community caretaking function" justified the thorough search the officers made of the residence for documentary ID relating to the suicide victim. Citing both the Washington constitution (article 1, section 7) and the U.S. Constitution (Fourth Amendment), the Schroeder Court explains as follows the Court's rejection of the State's argument:

> Here, to support its contention that the search of Schroeder's home was justified, the State relies on the fact of police training and assisting the coroner, although not as agents of the coroner or as deputy coroners. It argues that the BPD officers were performing a community caretaking function by processing the suicide scene -- more specifically, searching for primary identification of the deceased -- because: (1) the BPD officers provide needed assistance to the coroner's office which is scarce in resources, and (2) the collection of accurate identification furthers the public interest underlying RCW 68.50.300. This statute provides:
>
> > **Release of information concerning a death.** (1) The county coroner, medical examiner, or prosecuting attorney having jurisdiction may in such official's discretion release information

> concerning a person's death to the media and general public, in order to aid in identifying the deceased, when the identity of the deceased is unknown to the official and when he does not know the information to be readily available through other sources.
> (2) The county coroner, medical examiner, or prosecuting attorney may withhold any information which directly or indirectly identifies a decedent until either;
> (a) notification period of forty-eight hours has elapsed after identification of the decedent by such official; or
> (b) The next of kin of the decedent has been notified.
> During the forty-eight hour notification period, such official shall make a good faith attempt to locate and notify the next of kin of the decedent.

The State argues that obtaining identification allows the coroner to notify the deceased's next of kin before the information about the suicide is released to the media. The State further argues that proper identification during the 48-hour period serves the legislative intent of preventing the victim's next of kin from learning about the suicide from the media and, thus, the public interest in accurate, speedy identification of the suicide victim outweighs the individual's freedom from a search of personal papers and effects in one's home.

The State urges this court to reach the same conclusion the trial court did, i.e., the officers acted reasonably and in good faith when they searched the house for McKeithan's primary identification, performing their community caretaking function of helping the coroner's office process the suicide scene. In relying on RCW 68.50.300, the State ignores other authorized means of identification under RCW 68.50.330. This provision specifically recognizes establishing identity by (1) visual means, (2) fingerprints, (3) or other identifying data, and (4), if these fail, then by a dental examination. RCW 68.50.330. Thus, identifying the deceased plainly is the coroner's duty, which he can accomplish by many methods. The State also ignores the plain method at their disposal of ordering a license from the Department of Licensing (DOL) based on the information given by the deceased's cohabitant, Schroeder. The question becomes: "Was the search for identification so compelling that it overshadowed the privacy of the homeowner?" We answer no.

When police enter to render aid to a person believed to be in need of medical assistance, they may examine the body. 3 Wayne R. LaFave, Search & Seizure § 6.5(e), at 386 (3rd ed. 1996). Further, "the police need not close their eyes to objects of evidentiary value which are in the immediate vicinity of the body." [citing LaFave]

[In State v. Kinzy, 141 Wn.2d 373 (2000) **Sept. '00 LED:07**, the Court said]:

> Once the [community caretaking function] exception does apply, police may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter have been fully dispelled.

Kinzy applied the exception to the police's encounter with a juvenile on a public street in a high narcotics trafficking area and accompanied by older males known to be narcotics users. The Kinzy court held that the officers' initial questioning of

the youth to determine if she needed help was justified, but grabbing the juvenile when she tried to walk away constituted an unlawful seizure.

Two key facts distinguish this case from cases that have upheld a warrantless search under the community caretaking exception. One, the zip-lock baggy seized from inside a coat pocket was not in plain view. Two, the emergency or exigency (McKeithan's need for medical attention) had ended.

We recently decided two cases under the emergency aid exception: State v. Johnson, 104 Wn. App. 409 (2001) **April 2001 LED:09**, and State v. Gibson, 104 Wn. App. 792 (2001) **May 2001 LED:17**. In Johnson, the police responded to a domestic violence report. Once inside the house, the police immediately smelled marijuana; the domestic violence victim told the officer she and the defendant had been smoking marijuana. The defendant then consented to a search of the house; the officers found marijuana paraphernalia and a green substance that looked like marijuana in a coffee grinder. Johnson held that the entry was justified under the emergency exception, and that the officers acted reasonably by "conduct[ing] a brief walk-through search to look for other victims."

In Gibson, the police responded to a report that a babysitter was smoking marijuana. When the officers first entered the defendant's (babysitter's) house, she led them to a bedroom and showed them some marijuana. Then, after the children were secured, the defendant disappeared from the officers' sight for three to five minutes. Becoming concerned, the officers searched and found her in a bedroom emptying marijuana from bags into a pile. The trial court concluded that the exigency ended when the officers found the first batch of marijuana and secured the children and, thus, no exigent circumstances justified following her down the hallway and into the bedroom. We disagreed and held that the second limited search was justified because "the exigent circumstances had not ended."

In this case, several reasons compel our holding. First, the exigency that justified the BPD officers' entry into Schroeder's house ended when McKeithan died. Second, the community caretaking function of waiting at the scene of the suicide for the coroner, while the cohabitant of the premises was grief-stricken and absent, did not include searching the premises or performing the coroner's job. Third, a less intrusive method, other than searching the premises, to establish identification of the deceased was available through the DOL. Fourth, the search here was not a plain view search and was more intrusive than Johnson and Gibson; it went beyond the person of the deceased into other rooms and areas not in plain view, i.e., inside coat pockets. Finally, it is unlikely that a warrant would have been granted to search the premises for a misplaced driver's license of the deceased where there were other methods of obtaining identification, e.g., fingerprints, DOL, personal identification to corroborate the cohabitant.

We hold that the search of the coat in the hallway was unlawful. It exceeded any scope deemed permissible or reasonable under the community caretaking function. The evidence should have been suppressed.

[Some citations omitted]

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) TO DEFEND OFFICER'S STOP BASED ON "STOLEN VEHICLE" DISPATCH, PROSECUTOR MUST ESTABLISH RELIABILITY OF WACIC INFORMATION – In State v. O'Cain, 108 Wn. App. 542 (Div. I, 2001), the Court of Appeals rules that, while an officer's stop based on a

WACIC "stolen vehicle" report can be justified based on evidence showing collective knowledge of other law enforcement personnel (including dispatch personnel as part of the police-team), the government failed in the suppression hearing in this case to establish the reliability of the information upon which the "stolen vehicle" dispatch was based.

The O'Cain Court implies that its decision should not discourage officers from making stops and arrests on WACIC information. But the decision does make the job of prosecutors at suppression hearings more demanding. The O'Cain Court suggests in the following discussion that there are at least two ways to show the reliability of WACIC information at hearing:

> The State's burden to establish reliability of its dispatches regarding stolen automobiles is not particularly onerous, and there is more than one way that the burden can be satisfied. Presenting testimony regarding the procedures utilized by WACIC might be one way – assuming that such procedures are designed to enhance reliability and actually work that way most of the time. We also note that hearsay is admissible in a suppression hearing. Thus, the trial deputy [prosecutor] could have asked [the detective] appropriate questions to elicit the source of the information and the factual basis underlying the stolen vehicle report – information we suspect that [the detective] could have provided, in light of his responses to the questions which were, in fact, asked – and information which likely would have shown the collective knowledge of the police at the time of the stop. But that is not what happened in this case, and here, unlike [in State v. Sandholm, 96 Wn. App. 846 (Div. I, 1999) Nov. 99 LED:11 (where damage to driver's side door handle and to trunk lock sufficiently corroborated WACIC report to meet PC standard)], there is no physical evidence or other type of evidence in the record to corroborate the reliability of the dispatch.

Result: Reversal of King County Superior Court conviction of James M. O'Cain for unlawful possession of a firearm in the first degree.

LED EDITORIAL NOTE: We plan to revisit O'Cain next month. Others are working on a "stock" affidavit that will explain why WACIC procedures ensure reliability of the information in the system. We will share that information in the LED.

(2) OFFICERS RESPONDING TO REPORT OF ARMED ASSAULT JUST COMMITTED ACTED REASONABLY IN MAKING FELONY STOP OF SUSPECTS IDENTIFIED BY VICTIM AT SCENE – In McKinney v. City of Tukwila, 103 Wn. App. 391 (Div. I, 2000), the Court of Appeals holds that officers acted reasonably in carrying out an investigatory stop and therefore cannot be held civilly liable to the plaintiffs.

The facts, excerpted from the Court's opinion, are as follows:

> In the early afternoon of August 29, 1997, Steve Herrick reported a residential burglary in progress, that the suspect had a gun, that the suspect had hit him in the head with the gun, and that the suspect tried to steal Herrick's car. Herrick's friend, Robert Milan, chased the suspect and wrestled him to the ground in a nearby park. Tukwila police officers arrived on the scene and apprehended the suspect, Johnny Ray Stewart, at gunpoint.
>
> McKinney, his seven-year old son Ethan, and Trahan were leaving the city park to get out of harm's way when the police officers apprehended Stewart nearby. Because the victim, Milan, suggested that the Appellants, who were starting to leave, might possibly be involved, one officer ordered other officers to stop the Appellants. Police officers conducted a high-risk investigatory stop of the Appellants: they pointed their service weapons at the Appellants in their car, ordered the adults out of the car and prone to the ground, handcuffed them, and frisked them. After ascertaining that the Appellants were not involved, they were released. The total time that the Appellants were detained was approximately 10 minutes.

The McKinneys sued the officers, alleging civil rights violations, and also making claims for false arrest, assault and battery, defamation, and a violation of Washington's law against discrimination. The trial court granted summary judgment to the officers, dismissing the lawsuit. The Court of Appeals affirmed the dismissal, finding that the officers acted reasonably based on information received at the scene from the victim. Officers responding to a victim's report of a violent, armed attack just committed, as here, generally can rely on the victim's report as to who was involved, and officers also may generally employ felony-stop procedures to detain such alleged perpetrators at the scene for investigation.

Result: Affirmance of King County Superior Court order on summary judgment dismissing plaintiffs' lawsuit.

(3) COUNTY'S 911 OPERATORS MADE NO PROMISES THAT WOULD SUBJECT COUNTY TO CIVIL LIABILITY UNDER "SPECIAL RELATIONSHIP" EXCEPTION TO "PUBLIC DUTY" DOCTRINE -- In Bratton v. Welp, 106 Wn. App. 248 (Div. III, 2001), the Court of Appeals rules that a trial judge erred in failing to dismiss a civil suit against Spokane County in a case where the County's 911 operators took calls regarding a neighborhood dispute that escalated from a series of disturbances over time to a fatal shooting. Because the 911 operators did not make any promises of immediate police dispatch to the scene, the "special relationship" exception to the "public duty doctrine" was not established. Therefore the "public duty doctrine" applied to bar a negligence lawsuit against the county by the victim's family.

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

> Escalating tensions between Mr. Welp and the Bratton family resulted in gunfire in a residential neighborhood of Spokane County on January 11, 1997. The shots fired by Mr. Welp seriously wounded Ms. Bratton. Mr. Brown witnessed the shooting while he was on the phone with the 911 operator reporting Mr. Welp's threat. He dropped the phone and tried to protect his sister from further gunfire by lying across her body. Shortly after the shooting, Ms. Bratton's husband and son arrived at the scene. Mr. Welp was arrested, charged, and subsequently found guilty of the crime and is currently serving his prison sentence.
>
> The Bratton family filed a complaint for damages naming Mr. Welp and the City as co-defendants. The complaint was later amended to include Spokane County. The basis of the claim was that the City's police department and the County's 911/Crime Check operators were negligent and failed to exercise reasonable care in protecting the Bratton family from the criminal activity of Mr. Welp. The disputed claim, for summary judgment purposes, alleged that the County owed the Bratton family a duty to protect them because a special relationship existed between the Bratton family and the 911 operators. The Bratton family asserts that the special relationship arose as a result of the 911 operators' long-standing knowledge of Mr. Welp's violent tendencies as well as the express assurances that the police would be dispatched to provide assistance in the event that Mr. Welp threatened them.
>
> Ms. Bratton initiated contact with the 911 system and police officers regarding Mr. Welp's actions on more than one occasion in the weeks leading up to the shooting incident. Sometime around Christmas 1996 Ms. Bratton called 911 to report that Mr. Welp had stolen a battery from her hospitalized mother's car. On January 4, 1997, Mr. Welp and Ms. Bratton got into a verbal and physical battle over a car parked on the street. During this altercation, Mr. Welp threatened to shoot Ms. Bratton and her entire family, and the police were once again summoned to Ms. Bratton's mother's house. After diffusing Mr. Welp's anger, a police officer informed Ms. Bratton that if Mr. Welp caused her family any more trouble the police would come back and arrest him. Ms. Bratton's mother died that same night.

> Ms. Bratton and Mr. Brown organized and held an estate sale at their mother's home on January 11, 1997. Mr. Brown and his wife were helping customers when, from next door, Mr. Welp began to verbally assault Mr. Brown. Knowing that the police had informed the family that Mr. Welp would be arrested the next time he caused trouble, Mr. Brown went into the house to call 911.
>
> [A 911 operator] took Mr. Brown's call. She took down the information Mr. Brown relayed then made the professional decision to classify the call as a neighborhood disturbance. Apparently this is not a high priority call so [the operator] transferred the call to Crime Check. Because no one immediately answered the call, Mr. Brown thought he had been disconnected and called the Crime Check number. [The same 911 operator] answered Mr. Brown's Crime Check call. She again took down the information, but did not correctly input the address into the computer. Because there was no verification that Mr. Welp was in possession of a weapon at that time, [the operator] told Mr. Brown to stay away from Mr. Welp and call back if a weapon was seen.
>
> About 20 minutes later Ms. Bratton arrived to assist with the estate sale. She and Mr. Welp began to argue so Mr. Brown went back into the house to call 911. As he spoke with the operator, Mr. Welp opened fire on Ms. Bratton in the front yard. Mr. Brown threw down the phone to go help his sister. His wife redialed 911 and gave the phone back to him. The operator then correctly inputted the address into the system and police and emergency vehicles were on the scene within minutes.

Legal analysis:

The first element of a negligence action is "duty" on the part of the party sued. When liability of a government agency is at issue, the "public duty doctrine" bars the lawsuit unless the duty breached by the government is owed to the individual harmed, not just owed broadly to the general public. Four exceptions to the public duty doctrine are recognized under Washington law: 1) the special relationship exception; 2) the failure-to-enforce-a-statute-intended-to-protect-certain-classes-of-victims exception; 3) the legislative intent exception; and 4) the rescue exception.

This case involved plaintiffs' theory for application of the "special relationship exception," which has three requirements: 1) direct contact between the public employee and the injured plaintiff; 2) express assurances by the public employee; and 3) justifiable and detrimental reliance by the plaintiff on those assurances. See Torres v. City of Anacortes, 97 Wn. App 64 (Div. I, 1999) **Jan 2000 LED:10**.

In 911 lawsuits, plaintiffs suing the government entity generally must establish: 1) that they received assurances that help had been dispatched, and 2) that they relied on such assurances, resulting in their injury at the hands of a third party criminal perpetrator. See Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07;** Noakes v. City of Seattle, 77 Wn. App. 694 (Div. I, 1995) **Oct 95 LED:21**.

The Bratton Court dismisses the 911 lawsuit because plaintiffs could not establish that the dispatcher had made any assurances on which the victim had relied to her detriment (nor had other 911 dispatchers made such assurances when they had received prior calls regarding the ongoing neighborhood dispute).

Result: Reversal of Spokane County Superior Court order denying summary judgment to Spokane County (this appeal did not involve the plaintiffs' pending actions, arising from the same incident, against the shooter and against the City of Spokane).

(4) COURT FINDS "FAILURE TO ENFORCE" EXCEPTION TO "PUBLIC DUTY DOCTRINE" APPLIES IN PART IN CASE OF ATTACK BY ALLEGEDLY "DANGEROUS DOGS" - In King v. Hutson, 97 Wn. App. 590 (Div. III, 1999), the Court of Appeals addresses a lawsuit brought against a county sheriff's office, among others, arising from an attack on a woman by her neighbors' dogs.

The King Court holds that the "failure to enforce" exception to the "public duty doctrine" does not apply to the failure of the sheriff's office to confiscate any of the dogs ***prior to*** the attack, but that an issue of fact exists as to whether the county had a statutory duty to confiscate one of the dogs ***after*** the attack.

Facts: (Excerpted from Court of Appeals opinion)

> For most of this decade, Charles Hutson and the Kings were neighbors, residing in Stevens County. During the early 1990s, Mr. Hutson owned 10 to 14 dogs. His work took him away from home for days at a time, and the Kings said he left his dogs unleashed and without adequate food. The dogs frequently came onto the Kings' property, and were aggressive. They chased the Kings' children and on more than one occasion killed a barnyard animal. Mr. King stated he telephoned the Stevens County Sheriff's Office between a half-dozen and a dozen times during this period, to complain about the dogs. He went to the sheriff's office in person on December 28, 1993 and on January 12, 1994. At the time of his second visit, he requested that the sheriff send Mr. Hutson a warning letter. On January 17, the sheriff wrote to Mr. Hutson, informed him that his neighbor had complained about his "aggressive" dogs, and warned him that if his dogs attacked the Kings' children he would face criminal charges.
>
> From February 1994 until February 1997, Mr. King did not contact the sheriff's office about Mr. Hutson's dogs. In June 1994, DeLinda Jones had moved in with Mr. Hutson, and she and Mr. King shot and killed most of the dogs over the next few months. In 1997, Ms. Jones and Mr. Hutson owned only two dogs. One of the dogs, Timmy, was a mixed breed Australian shepherd and weighed between 30 and 40 pounds. The Kings believed Timmy was the sole surviving member of the pack of dogs Mr. Hutson had allowed to roam in the early 1990s. Mr. Hutson and Ms. Jones had also acquired Keesha, a Caucasian Mountain Dog that weighed 80 to 100 pounds.
>
> On the afternoon of February 17, 1997, Mrs. King left her house to feed her chickens. She encountered Keesha and Timmy outside in her yard with Ms. Jones's daughter, Barbery. Keesha jumped on Mrs. King, knocked her against her van, and latched onto her arm. The dog then dragged her around to the back of the van. At the same time, Timmy was nipping at her. Keesha still had her by the arm and was shaking her. Barbery was screaming, and Mrs. King's son Jake came to the door. When he saw the situation, he went for his shotgun and killed Keesha. Timmy ran away. Mrs. King suffered severe and disfiguring injuries to her arm that required hospitalization, and also several bites to her back and legs that she attributed to Timmy.
>
> Following this attack, Mr. King went to the sheriff's office. He demanded that "something" be done. He spoke to a deputy who asked why he was making such a big deal about a dog bite. Mr. King said he "basically started to come unglued." But another officer intervened, and promised Mr. King that Timmy would be quarantined. The deputies then referred Mr. King to the county prosecutor. While Mr. King was in the prosecutor's office, the prosecutor called Mr. Hutson and told him that if it was a criminal act he could be arrested.
>
> After the prosecutor's phone call, Mr. Hutson tied up Timmy for about two weeks. A sheriff's deputy visited him over a month later and asked whether Mr. Hutson was willing to turn Timmy over to the sheriff's office to be destroyed. He refused. The deputy said Mr. Hutson told him he had given Timmy away. The Kings subsequently sold their business and moved out of Stevens County. They stated they could no longer live in their home, knowing that Timmy was still roaming their neighborhood and that Stevens County would do nothing to protect them.

Proceedings below:

The Kings sued Mr. Hutson, Ms. Jones, and Stevens County. The claims against the County were based on the County's alleged "negligent and outrageous conduct, [in] failing to take action both before and after the February 17, 1997 attack upon Patricia King." The trial court granted summary judgment to the County on all claims against the County.

Legal analysis:

"The public duty doctrine generally provides that, to recover from a governmental entity in tort, a party must show that the entity breached a duty it owed to the injured person as an individual rather than an obligation it owed to the public at large." [Citation omitted]. Four exceptions to the public duty doctrine are recognized under Washington law: 1) the special relationship exception; 2) the failure-to-enforce-a-statute-intended-to-protect-certain-classes-of-victims exception; 3) the legislative intent exception; and 4) the rescue exception. The exception relevant to this case is the failure-to-enforce exception. This exception "applies when a government agent responsible for enforcing a statutory requirement possesses actual knowledge of a statutory violation, fails to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the Legislature intended to protect." [Citation omitted]

The Kings contended in this case that the County owed them a duty under RCW 16.08. RCW 16.08.100(1) provides that the animal control authority of a county shall immediately confiscate any dangerous dog if the dog is not registered as a dangerous dog, its owner has not secured liability insurance, the dog is not maintained it in a proper enclosure, or if the dog is outside the enclosure or the owner's dwelling and is not under the physical restraint of a responsible person. RCW 16.08.070(2) defines "dangerous dog" as:

> [A]ny dog that according to the records of the appropriate authority, (a) has inflicted severe injury on a human being without provocation on public or private property, (b) has killed a domestic animal without provocation while off the owner's property, or (c) has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans or domestic animals.

The Kings contended that Timmy was a dangerous dog that had killed their animals in the past, and that the sheriff had a duty to confiscate him even ***before*** he attacked Mrs. King. However, the King Court notes that "the records of the appropriate authority" in this case, the sheriff, did not include a report that Mr. Hutson's dogs killed the Kings' animals, Timmy did not fit the statutory definition of "dangerous dog" prior to February 1997. Thus, the Court holds that "superior court properly granted the County's motion for summary judgment on the issue of whether the County had a duty to confiscate Timmy before he attacked Mrs. King. Absent that duty, the County is not liable for the injuries Mrs. King suffered on February 17, 1997."

The Court of Appeals goes on, however, to consider the County's actions ***after*** the attack on Mrs. King. The Court notes that a "1994 letter to Mr. Hutson, sent at Mr. King's request, is part of the records of the sheriff's office, and supports an inference that all the dogs Mr. Hutson owned at that time were "potentially dangerous." Specifically, they had a "known propensity" to make unprovoked attacks - one of the statutory definitions of "potentially dangerous." RCW 16.08.070(1). Under the statute, the dogs would qualify as "dangerous" if they again bit, attacked or endangered the safety of humans or domestic animals, the King Court says.

The King Court states that "Mr. King's earlier reports to the sheriff's office about the threatening behavior of his neighbors' dogs, and evidence that Timmy was part of that pack, create a reasonable inference that Timmy also engaged in that behavior." The inference is sufficient to support a trier of fact finding he was a "potentially dangerous" dog that qualified as "dangerous" when he attacked Mrs. King in February 1997." Thus, the Court holds that "[e]vidence Mr. King reported the attack on his wife to the sheriff, and evidence the County did not confiscate Timmy, raise material issues concerning the County's liability to the Kings under the failure to enforce exception to the public duty

doctrine. We therefore reverse that portion of the summary judgment that dismissed the County from any liability to the Kings after the 1997 attack."

Along the way, the King Court rejects the Kings' claim for outrage, stating that the County's failure to confiscate Timmy as a "dangerous dog" after the 1997 attack cannot reasonably be considered to be extreme and outrageous conduct.

Result: Affirmance of the portion of Stevens County Superior Court order on summary judgment dismissing the claims for the injuries sustained in the attack, and for outrage, but reversing that portion of the judgment dismissing the claims for liability arising ***after*** the attack; case remanded for trial on the latter question.

(5) 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 -- In State v. Silva, 106 Wn. App. 586 (Div. I, 2001), the Court of Appeals rejects defendant's argument that his intentional act (driving off from a traffic stop with an officer hanging from his driver-side window) could not qualify as an "accident" for purposes of Washington's hit-and-run statute at RCW 46.52.020.

Defendant Silva tried to flee from a traffic stop once he realized that one of the officers knew that Silva was wanted for a forgery Silva had committed a few minutes earlier. The Silva Court describes as follows the facts of the traffic "accident" and chase that ensued:

> Bothell police officer [A] stopped Silva because the car he was driving had expired license tabs. Officer [A] asked for Silva's driver's license, registration, and proof of insurance. Silva explained that he did not have any of those, and verbally gave her a false name and date of birth. Officer [A] ran two computer checks using the information Silva provided, but found "no record" of such a person. Moments later, officers [B] and [C] arrived at the scene.
>
> As officers [A] and [B] were examining a day planner Silva produced from the car, officer [C] approached them and said, "He's a suspect in a …" or "He's wanted for..." Silva, who was in the car, started the engine. Officer [B] ran to the driver's side door and reached through the open window to turn the ignition off. As he reached for the ignition, the car "[t]ook off at a high rate of speed" with officer [B]'s arms still inside the driver's window. Officer [B] testified that he grabbed the steering wheel and pulled his legs up to avoid falling underneath the car. He ordered Silva to stop the car, but Silva refused. Silva continued to accelerate, and the car began heading across the road toward a parked vehicle. Afraid of being crushed between the two vehicles, officer [B] pushed himself off of the car and slid to a stop in the gravel. He sustained an abrasion that required medical attention. Silva sped away without stopping.
>
> Officer [A] gave chase in her patrol car, with the emergency lights and sirens activated. While in pursuit, she saw Silva drive through a four-way stop, watched him weave in and out of traffic, and observed other cars "going off the road" to avoid his vehicle. Officer [A] continued the chase, which took place at high speeds in a residential neighborhood, until a sergeant instructed her to stop.

The Silva Court finds justification in dictionary definitions of "accident" to reject defendant's argument against application of RCW 46.52.020. The Court also cites decisions from other states interpreting hit-and-run statutes to include intentional acts of defendants or victims (e.g., a driver who does not stop when a passenger jumps from a moving vehicle and is injured). But probably most important to the Silva Court was the damage that Silva's theory would do to the purpose of the hit-and-run statute. The Silva Court thus explains:

> The Legislature designed the statute "to punish hit-and-run drivers involved in accidents resulting in either property damage or injury to some person," and to

> provide "immediate assistance to those injured." To construe the term as Silva suggests and conclude that an incident arising from intentional conduct is not an "accident", would frustrate the Legislature's intent to prevent drivers from escaping liability for their acts and to provide immediate help for those injured. Moreover, such a construction would lead to the absurd result that a person could intentionally injure another person with a car and drive away "without fear of violating the statute."

[Footnotes and citations omitted]

Result: Affirmance of Snohomish County Superior Court convictions of Matthew G. Silva for hit-and-run, for attempting to elude a pursuing police vehicle, and for forgery.

(6) STRIKER/GREENWOOD SPEEDY TRIAL RULE NOT VIOLATED IN PROCEEDINGS ON VEHICULAR ASSAULT PROSECUTION, EVEN THOUGH GOVERNMENT COULD HAVE OBTAINED DEFENDANT'S CURRENT ADDRESS EARLIER FROM COURT PAPERS ON A SEPARATE DUI INCIDENT – In State v. Hilderbrandt, ___ Wn. App. ___, 33 P.2d 435 (Div. III, 2001), the Court of Appeals rules, 2-1, that the State did not violate a vehicular assault defendant's speedy trial rights under Criminal Rule 3.3. The majority judges rule that the Spokane County Prosecutor and the police acted with good faith and due diligence in trying to locate defendant, and therefore that the charges need not be dismissed for the delay in arraigning defendant Hilderbrandt on a pending vehicular assault complaint.

Under State v. Striker, 87 Wn.2d 820 (1976) and State v. Greenwood, 120 Wn.2d 585 (1993), the Striker/Greenwood rule under the time lines of CrR 3.3 requires that the State act with due diligence and good faith in locating and bringing a charged defendant before the trial court for arraignment after a criminal complaint is filed. Defendant Hilderbrandt argued that the State had two different ways that it could have located him during the period at issue in this case.

First, Hilderbrandt pointed out that the address on his driver's license was that of his mother in Colville, Washington. He argued that, while he no longer lived with his mother during the time in question, she still lived at that address, and she would given his new address to anyone who asked her. The Hilderbrandt majority opinion explains as follows why the majority judges do not accept this argument:

> [T]he Spokane Police Department acted in good faith on December 29, 1999 when it called on the Stevens County Sheriff's Office to assist in locating Mr. Hilderbrandt on this motor vehicle related charge. A Stevens County deputy told the Spokane Police Department that he had checked the Old Dominion address and that Mr. Hilderbrandt's parents lived there. And, he believed Mr. Hilderbrandt was in the Stevens County area still, and he would continue to look for him. In these circumstances, the Spokane Police Department was justified in giving Stevens County authorities some time to find Mr. Hilderbrandt. And, the six weeks that lapsed before the Stevens County Sheriff's Office arrested Mr. Hilderbrandt was a reasonable time for the Department to wait before it made further inquiries of Stevens County and/or re-directed its efforts to locate him.

Second, defendant Hilderbrandt argued that his current Spokane address was a matter of court record in a pending, unrelated case in Spokane County District Court, and therefore the Spokane County Prosecutor and/or the police should have been able to find him. The Hilderbrandt majority opinion rejects this argument under the following analysis:

> In addition, Mr. Hilderbrandt was arrested in Spokane on August 12, 1999 on a municipal charge of driving while license suspended. That charge listed his correct address on Rambo Road. And, he appeared in Spokane County District Court on November 10 and December 18, 1999, and on January 12, 2000, on a driving under the influence charge brought by Spokane County. The court sent notices regarding that charge to his correct address. Mr. Hilderbrandt would have this court impute knowledge of his Spokane County address to the State based upon the fact that he

had appeared in Spokane County District Court on other charges around this time and had received notices from the district court at his correct address. He relies upon State v. Day, 46 Wn. App. 882 (1987). There, the court held that "[t]he personnel of the court, the prosecutor's office and the police or sheriff's office must be treated as one entity when determining if there was knowledge of the defendant's whereabouts." In Day, a juvenile suspect returned to Yakima after an absence and contacted the detective in charge of his case. The court imputed the knowledge of the detective to the court for speedy trial purposes.

However, subsequent Supreme Court opinions limit the reach of Day's holding. In State v. Hackett, 122 Wn.2d 165 (1993), the court concluded that "the requirement of the rule that the defendant's presence be made known to the court on the record means tell it to the judge and tell it in a way that puts it on the record."

Here, Mr. Hilderbrandt did not update his driver's license to reflect his new address. The fact that court personnel had his correct address with respect to separate, unrelated charges, does not mean they had actual notice of his correct address for the vehicular assault charge. The courts handle thousands of cases each year. Mr. Hilderbrandt has not shown how court personnel in this case could efficiently identify other charges pending against him and compare addresses. We will not impute knowledge in these circumstances.

[Some citations omitted]

Result: Affirmance of Spokane County Superior Court conviction of Chad Dennis Hilderbrandt for vehicular assault.

(7) "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 -- In State v. Garcia, 107 Wn. App. 545 (Div. II, 2001), the Court of Appeals rules that, in order to establish lawful self-defense, a juvenile defendant prosecuted for custodial assault was required to show that he was in actual, imminent danger of serious injury or death when he used force against a juvenile corrections officer.

Washington case law long has held that self-defense in police-arrest situations (whether or not the arrest is lawful) is different from self-defense in citizen-to-citizen situations. Even where an arrest is unlawful, an arrestee may use force against an arresting officer only where "the arrestee is actually about to be seriously injured or killed." On the other hand, one citizen may use force in response to unlawful use of force by another citizen whenever it is apparent to the first citizen that the second citizen is about to injure him.

In State v. Bradley, 141 Wn.2d 731 **Dec 2000 LED:21**, the Washington Supreme Court held that Washington's restrictive rule limiting citizens' use of force in arrest situations also applies to situations where adult prisoners use force against correctional officers in adult correctional facilities. Now, the Court of Appeals holds in Garcia that this same restrictive self-defense rule applies to juveniles who use force against correctional/security officers in juvenile incarceration facilities.

Result: Affirmance of Lewis County Superior Court conviction of Javier Garcia for custodial assault.

(8) UNDER-AGE DRINKING DRIVER LOSES CHALLENGES TO: (1) SWORN REPORT OF DUI BREATH TEST, AND (2) ADVISEMENT AS TO REASON FOR ARREST -- In DOL v. Grewal, ___ Wn. App. ___, 33 P.3d 94 (Div. I, 2001), the Court of Appeals rejects a driver's appeal of his license revocation under the implied consent statute. Grewal unsuccessfully challenged DOL's standard form sworn report of his breath test following his arrest for driving under the influence and being under the age of 21. He was also unsuccessful in his challenge to the trooper's advisement of the law on under-age drinking and driving, which the trooper provided along with implied consent warnings.

1) Sufficiency of information on DOL's standard form breath test report

After arresting Grewal for underage drinking and administering a breath test yielding results of 0.052 and 0.055, a WSP trooper filled in all of the information required by a DOL standard form sworn report of the breath testing. The trooper then sent the report to DOL. When DOL initiated license revocation procedures, Grewal challenged the sufficiency of the report, arguing that the trooper should have added statements (1) that the breath test was lawful and (2) that the test instrument was a BAC Verifier Datamaster, even though neither of these items of information is called for by the DOL form. The Grewal Court finds no support in the implied consent statute for Grewal's argument, and therefore the Court rejects the argument.

2) Adequacy of advisement re law on under-age drinking and driving given in conjunction with implied consent warnings

In salient part, the Grewal Court's analysis on the advisement issue is as follows:

> In addition to the warnings required by the implied consent statute, Grewal was informed that he was arrested for [violation of] RCW 46.61.503, "[b]eing under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol". He was not informed that violation of this provision required proof that his blood alcohol concentration was more than 0.02, but less than 0.08.
>
> …
>
> Grewal argues that the implied consent warnings he received were inaccurate and misleading and prejudiced his ability to make an informed decision about whether to submit to a breath test. He asserts that the warning as given led him to believe that he was guilty of the offense if the breath test result indicated any quantum of alcohol in his system.
>
> Grewal provides no authority for the proposition that informing a DUI suspect of the RCW section and description of the offense he was arrested for renders the implied consent warnings inaccurate or misleading. Grewal was provided with a description of the offense derived directly from the statute. He cites no cases which suggest that it is misleading to inform a suspect of the offense they are arrested for, unless they are also informed of the elements of that offense. We conclude that the information provided to Grewal: that he was under arrest for violating RCW 46.61.503, being under 21 and driving or being in actual physical control of a motor vehicle after consuming alcohol, was not inaccurate or misleading.
>
> Moreover, even if the warnings were inaccurate or misleading, Grewal cannot demonstrate that he was prejudiced. He asserts that it is "obvious" that the misleading warning prejudiced his ability to make an informed decision, but does not explain how his decision was affected. Since he chose to submit to the test while under the impression that he would be guilty of the offense if there was any amount of alcohol in his system, it is difficult to imagine how knowledge that the alcohol concentration had to be between 0.02 and 0.08 would have influenced him to make a different choice.

[Some citations omitted]

Result: Reversal of Whatcom County Superior Court decision which had reversed DOL's revocation of the driver's license of Sukhjiwan Grewal.

****

NEXT MONTH

The February 2002 LED will include, among other entries: 1) an update on the O'Cain decision which is digested in this month's LED at page 15; 2) a summary on the December 10, 2001 U.S.

Supreme Court decision in U.S. v. Knights, 2001 WL 1560882 (holding that it was lawful for a California law enforcement officer to act on reasonable suspicion of a crime to conduct a warrantless, investigatory search of the residence of a felon who was on probation under a court order that the felon must submit to search at any time, with or without a search warrant or arrest warrant or reasonable cause, by any probation officer or law enforcement officer); and 3) a summary of the November 21, 2001 decision of Division Two of the Court of Appeals in State v. Mertens, 2001 WL 1519427 (holding that the definition of "acts for commercial purposes" found in RCW 77.15.110(1)(c) is unconstitutional because it creates an impermissible, conclusive presumption that a person who exceeds the possession or bag limits for personal use by more than a multiplier of three "acts for commercial purposes").

****

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) 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 web site is [http://www.wa.cjt], while the address for the Attorney General's Office web site 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].