Law Enforcement Digest

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HONOR ROLL

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WASHINGTON STATE COURT OF APPEALS

COURT UPHOLDS WARRANTLESS, DELAYED, PROBABLE CAUSE SEIZURE OF RAPIST'S SHOES FROM THE JAIL'S INMATE-PROPERTY ROOM

State v. Cheatam, ___ Wn. App. ___, 51 P.3d 138 (Div. II, 2002)

Facts and Proceedings below:

Police obtained a warrant to search a rape suspect's home. Listed in the warrant were Cheatam's shoes, as officers sought to match a pair of his shoes with a shoeprint found at the outdoor crime scene. Defendant Cheatam was at home and was arrested during the execution of the search warrant. He was booked into jail upon the officers' completion of the search.

Officers seized a pair of shoes during the search, but the tread of neither of those shoes matched the crime scene shoeprint. Four days after the search under the warrant, a detective went to the jail property room and retrieved the shoes that Cheatam had been wearing when he was arrested and booked into jail. The tread on those shoes was similar to that of the shoeprint at the crime scene.

Cheatam moved to suppress the shoes. The trial court denied his motion, and a jury convicted Cheatam of first degree rape committed while armed with a deadly weapon.

ISSUE AND RULING: 1) Was the seizure and inspection of the shoes covered by the search warrant for the search of Cheatam's residence? (ANSWER: No, the warrant for a search of Cheatam's residence did not support the delayed seizure of the shoes, several days later, from the jail's inmate-property room); 2) Was the warrantless seizure of the shoes from the property room lawful? (ANSWER: Yes, Cheatam had no privacy interest in his shoes at the time that the warrantless, probable cause seizure and inspection occurred).

Result: Affirmance of Pierce County Superior Court conviction of Jerry Dawayne Cheatam for first degree rape while armed with a deadly weapon.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Scope of search warrant was exceeded when officers later retrieved shoes from jail property room

> Whether a search exceeds the scope of a warrant depends on a common sense reading of the warrant.
>
> The written search warrant here specifically included the incident number for M.M.'s rape case and indicated that police were looking for a shoe matching a photograph of a shoeprint left at M.M.'s crime scene. Although the shoe was at Cheatam's home at the time the police executed the search warrant, the police never seized the shoes. Nor did police seize the shoes when Cheatam was booked. As Cheatam asserts, once the shoes were placed in the inmate property room and not the evidence room, it fell outside the scope of the search warrant. The time for police to seize Cheatam's shoes was at the home or during arrest. Thus, police seized Cheatam's shoes without a warrant.

2) Cheatam had no reasonable expectation of privacy from police making warrantless retrieval of item from jail property room (at least where, as here, probable cause to search existed)

[T]he police's seizure of Cheatam's shoes was lawful if, under the Fourth Amendment, Cheatam did not have a legitimate expectation of privacy in his property held in the inmate property room, and under article I, section 7, his shoes were not a part of his private affairs.

The United States Supreme Court has held, under the Fourth Amendment, that a defendant has no reasonable expectation of privacy in property jail personnel seize from a defendant upon arrival after a lawful arrest. United States v. Edwards, 415 U.S. 800 (1974). That a substantial period of time has elapsed between the arrest and subsequent administrative processing is without consequence.

The result is also the same when jail personnel do not physically take the defendant's property until some time after his incarceration. Thus, where police have lawful custody of the defendant and the clothing the defendant wears, if it becomes apparent that the clothing is evidence of the crime the defendant is being held for, police are entitled to take, examine, and preserve the defendant's clothing for use as evidence, just as they are normally permitted to seize evidence of a crime when lawfully encountered.

It is clear that under Edwards, Cheatam can find no protection under the Fourth Amendment. Consequently, review of Cheatam's privacy interest is limited to an examination under our state constitution.

It is undisputed that a defendant does not have a legitimate expectation of privacy in their shoe tread pattern. What a person voluntarily exposes to the general public is not considered part of a person's private affairs.

In State v. Simpson, 95 Wn.2d 170 (1980), our Supreme Court held that where police arrested a defendant on a warrant charging him with first degree forgery, police could not use the vehicle's key, which it had inventoried and placed in a property box, to unlock the vehicle and check the vehicle's identification number to determine whether the vehicle was stolen, when the vehicle was legally parked and not in police custody. The court in Simpson did not determine that the key was within Simpson's privacy rights -- it was concerned with the interior of the locked vehicle.

Similar to the defendant in Simpson, police arrested Cheatam for an unrelated rape. However, Cheatam's shoes, which he wore when he was in custody, were in the jail's custody, not Cheatam's; thus, they were not within the purview of his private affairs. Nor did Cheatam have a reasonable expectation of privacy in his shoes at that time. Cheatam did not secure his shoes in anyway from the view of others and did not take any action to keep them within his private affairs.

In addition, Cheatam could not have had a reasonable expectation of privacy in the property room, which also is clearly not a part of his private affairs. The room was unlocked and accessible by jail personnel. That the jail distributed to its staff a reminder that inmate property would not be released, except by the inmate's request or court order, is inconsequential. The reminder's purpose was not developed on the record and is not available for review.

Thus, while the State has the burden of proving an exception to the warrant requirement, Cheatam had the burden as the person asserting an unlawful search or seizure under article 1, section 7 of proving a disturbance

of his or her private affairs. Cheatam has not shown a reasonable privacy interest and has not shown a disturbance of his private affairs; thus, his argument fails. *[Court's footnote: Furthermore, although police did not have a proper search warrant to seize Cheatam's shoes, and Cheatam did not have a privacy interest in his shoes while they were in police custody and in the inmate property room, police did have probable cause to seize Cheatam's shoes. Thus, police could seize Cheatam's shoe from the property room and inspect it without obtaining a warrant.]*

[Some text and citations omitted]

LED EDITORIAL COMMENT: It is not settled in case law in Washington or in other jurisdictions whether officers must have probable cause in order to justify a delayed, warrantless inspection of items that were previously taken from a prisoner merely for safekeeping as part of the booking process. However, it is safest legally for officers to assume that PC is required for such "second looks." It is also probably advisable for officers to consider seeking a search warrant before making a significantly more intrusive search or testing of such property-room items than was made of such items during the initial inventory process. See discussion in Professor LaFave's leading treatise on search-and-seizure law at section 5.3 of the treatise. As always, we urge consultation with agency legal advisors and local prosecutors on these and other search-and-seizure questions.

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

State v. Vermillion, ___ Wn. App. ___, 51 P.3d 188 (Div. I, 2002)

Facts: (Excerpted from Court of Appeals opinion)

On July 2, 1998, near the end of the business day, a white male in his 50's with gray hair and wearing light-colored clothing and gloves robbed a downtown Seattle bank located on 4th Avenue between Pike and Pine Streets. The robber, who was carrying a package, handed a note to the teller indicating that the package contained a bomb and that he would detonate the bomb if the teller told anybody that a robbery was in progress, or if anyone followed him from the bank. The teller gave the robber a bag containing money, a confidential tracking device, and bait money. The robber then left the bank with the bag, leaving the package containing the alleged bomb at the teller's window. The teller activated the tracking device and promptly called the police, giving them a physical description of the robber. Within moments, several officers converged on the area, some of them in patrol cars that were equipped to locate the tracking device.

The tracking device broadcast a radio signal that led police to Mr. Vermillion, who fit the physical description of the robber except that he was wearing dark clothing and was not wearing gloves. Three officers stopped Mr. Vermillion near the crosswalk at 4th and Pine. One of the officers patted Mr. Vermillion down for weapons and discovered a bag tucked into his waistband containing several thousand dollars, the tracking device, which was still operating, and the bait money. Mr. Vermillion was placed under arrest and his pockets were searched. The note used in the robbery was found in one of his pockets.

The Seattle Police Explosives Squad evacuated the bank building, cordoned off the block surrounding the building, and sent a robot into the bank. The robot moved the package to the floor, and opened it. Cameras showed the package to contain a bundle of rolled up paper. A member of the bomb squad, wearing a

bomb suit, entered the bank to determine whether a bomb was hidden in the bundle. There was no bomb.

Proceedings below:

The State charged Vermillion with robbery in the first degree and with threats to bomb or injure property. Vermillion requested a "Frye hearing" regarding admissibility of science-based evidence regarding the tracking of the device. He also moved to suppress evidence obtained as part of the Terry stop, claiming that the officers did not have "reasonable suspicion" justifying such a seizure. The trial court denied his motion, and he was convicted on both charges.

ISSUE AND RULING ON APPEAL:

1) Does the "Frye test" for admissibility of novel scientific evidence apply to evidence regarding the bank robbery tracking device? (ANSWER: No, the tracking system does not involve a novel scientific theory); 2) Did the officers have objective justification constituting "reasonable suspicion" justifying the Terry stop of Vermillion? (ANSWER: Yes)

Result: Reversal on an issue not addressed here (denial of Vermillion's right to represent himself) of King County Superior Court convictions of Marvin Vermillion for first degree robbery and for threats to bomb property; case remanded for re-trial.

ANALYSIS:

1) Confidential Tracking Device – No Frye Hearing Required

[T]he trial court was not required to hold a Frye hearing before determining that the evidence obtained by the use of the confidential tracking device would be admitted at trial. First of all, the tracking system does not involve a novel scientific theory. See State v. Hayden, 90 Wn. App. 100 (1998) **[May 98 LED:16 (Hayden held that Frye did not apply to digitally enhanced fingerprint evidence -- LED Eds.)]** (if evidence does not involve a novel scientific theory or principle, a Frye inquiry is unnecessary). The tracking system employs common technology involving the transmission and reception of radio signals between the tracking device, receiving unit, and transmission towers. Furthermore, use of the system only required objective observation of information relayed from the tracking device to the receiving unit, analogous to other scientific devices that are not subject to Frye. See, e.g., City of Bellevue v. Lightfoot, 75 Wn. App. 214 (1994) (affirming that police traffic radar evidence is not subject to a Frye analysis); State v. Noltie, 57 Wn. App. 21 (1990), aff'd, 116 Wn.2d 831 (1991) (finding that the colposcope is in general use in the medical community and is no more a novel device or scientific process subject to the Frye standard than binoculars or a weak microscope).

The record reflects that police witnesses properly authenticated the system by showing that it was working properly at the time police located the device on Mr. Vermillion's person. Detective Gary Nelson testified that the device, when activated, emits a radio signal on a confidential frequency to stationary towers located throughout the greater Seattle area, which in turn relay the signal to the command center, which in turn relays the signal to patrol vehicles that are equipped with mobile units. The mobile units enable officers in those vehicles objectively to locate the device by means of a digital indicator, and to determine how close the device is to the vehicle based on the strength of the radio signal and the pitch and volume of an auditory signal. The system had been in use nationally for about nine years, and by the Seattle police for about three and a half years. Qualified experts testified that the system is regularly checked and the mobile units are regularly calibrated to insure operational accuracy. If a tracking device is not working properly, it emits no signal at all, and since

the system uses a confidential frequency police will not accidentally track a signal broadcast by something other than the tracking device. Here, the device led officers directly to Mr. Vermillion, who was near the scene of the robbery and who generally fit the robber's description. We affirm the trial court's ruling admitting the evidence without first conducting a Frye hearing, and its determination that the system was working properly when the device led police to Vermillion.

2) Investigatory Stop and Protective Frisk Lawful

The final issue concerns the investigatory stop and frisk of Mr. Vermillion by which the bag containing money, the tracking device and bait money was found on his person. The general prohibition against warrantless searches and seizures is subject to a few jealously guarded exceptions, one of which is the investigatory Terry stop. We do not need to consider the State's contention that there was a sufficient basis for a Terry stop even without the evidence of the tracking device, because that evidence was properly admitted. The cumulative evidence of the tracking device, Mr. Vermillion's proximity to the robbery, and his physical description gave the officers sufficient reasonable suspicion to justify their investigatory stop of Mr. Vermillion. It was lawful for the officers to frisk Mr. Vermillion for weapons, because robbery is a crime of violence that poses a threat to others, including pursuing police.

Although we reverse Vermillion's conviction and remand for a new trial because his right to self-representation was violated, we affirm the trial court's CrR 3.6 rulings admitting the evidence obtained by use of the tracking device and refusing to suppress evidence obtained as the result of the stop and frisk.

[Some citations omitted]

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, ___ Wn. App. ___, 51 P.3d 143 (Div. II, 2002)

Facts and Proceedings below:

According to the testimony of Deputy Sheriff Terrill Larson, John Thompson asked Larson to arrest his son James Thompson on an outstanding arrest warrant that was related to the failure to pay child support. *[Court's footnote: John Thompson died before the suppression hearing.]* John Thompson also told Larson that he suspected his son was engaging in illicit drug activity.

Larson confirmed that Thompson had an outstanding arrest warrant for failure to appear for a show cause hearing in superior court. The bench warrant indicated that Thompson had failed to appear at a contempt review hearing.

Later that day, Larson and his partner went to John Thompson's Fox Island property where Thompson was living in a 22-foot travel trailer. There were also two buildings on the property, the main house with attached garage and a detached boathouse.

Larson knocked on the travel trailer door and announced, "This is the Sheriff's

office, I have a warrant for James [sic] arrest." Larson heard movement and scuffling inside the trailer that he did not believe were related to opening the door. After about 10 seconds, Larson opened the door. Larson immediately saw Thompson and ordered him out of the trailer, handcuffed him and later placed him in the patrol car.

Meanwhile, Larson saw another man, later identified as Eric Sund inside. Larson ordered Sund out, patted him down for weapons, and then asked him to leave. At this point, Sund either asked Larson to retrieve his coat from inside the trailer or asked if he could do so.

Larson stepped inside the trailer to retrieve the jacket and in the three seconds it took to do this, he smelled a strong chemical odor like paint thinner, he saw a glass container with a white crystalline substance through the open door of the oven, and he observed foil with a white powder and glass smoking pipes. Based on his experience, Larson was concerned that there was a methamphetamine lab on the premises.

When Larson stepped out, Sund had disappeared. Consequently, Larson went toward the main house where the senior Thompsons lived to look for Sund and to tell John Thompson about his son's arrest. Larson testified that he wanted to arrest Sund because he had been in the trailer where Larson observed the suspicious items.

The senior Thompsons said that no one had come to the house and John Thompson asked Larson to search the attached garage. Larson found no one in the garage and he then asked John Thompson about the detached boathouse. John Thompson said that it was his, that Thompson used it, and replied, "Please do," when Larson asked if he could look inside.

Larson did not find Sund in the boathouse but, in a living area on the second floor, he found items consistent with a methamphetamine lab. Larson then asked the senior Thompsons to sign a consent form for a search of the boathouse, which they did. Larson did not ask Thompson for consent.

In response to a call from Larson, Deputy Harms, a clandestine lab investigator, came to the property, spoke with Larson, entered the trailer to verify that the oven was off, looked into a burn barrel and burn piles on the property that contained evidence of a methamphetamine lab, checked the safety of a corroded propane tank in front of the trailer, and looked inside the boathouse. After determining that the property appeared to be a "fairly safe environment," he secured the premises and returned the next day with a search warrant.

The State charged Thompson with one count of unlawful manufacture of a controlled substance, methamphetamine. RCW 69.50.401(a)(1)(ii). Thompson moved to suppress the evidence obtained following his arrest. The trial court denied the motion and subsequently convicted Thompson in a bench trial on stipulated evidence and imposed a drug offender sentencing alternative.

ISSUES AND RULINGS: 1) Where the arrest warrant was triggered by defendant's "mere" failure to appear for a show cause hearing for child support obligations, did the officer violate RCW 10.31.040 or the rule of Payton v. New York in ordering defendant out of his travel trailer to arrest him on that warrant? (ANSWER: No, the law does not distinguish among types of arrest warrants in this context); 2) Was the arresting officer justified under the "community caretaking" rationale in entering the arrestee's travel trailer to retrieve the arrestee's jacket? (ANSWER: Yes, rules a 2-1 majority); 3) Were the searches of the outdoor burn barrel and burn piles by

the meth-lab-investigation-specialist justified under the "emergency exception"? (ANSWER: Yes); 4) Was the warrantless search of the boathouse justified based on the consent of defendant Thompson's father, owner of the boathouse? (ANSWER: Yes, and it also was justified under the "emergency exception"); 5) Was the trial court correct that the "inevitable discovery" exception to the exclusionary rule would apply to the evidence seized in the boathouse search? (ANSWER: Yes).

Result: Affirmance of Pierce County Superior Court conviction of James Ross Thompson for unlawful manufacture of a controlled substance.

ANALYSIS BY MAJORITY:

1) Arrest at trailer doorway was justified based on arrest warrant issued for failure to appear at child support hearing

In key part, the majority's analysis of the arrest-at-the-trailer-doorway issue is as follows:

> Thompson alleges that his arrest was for a civil matter and, consequently, Deputy Larson lacked authority under the "knock and wait" statute to open his trailer door to make the arrest. See RCW 10.31.040. Thus, Thompson challenges both the arrest and the subsequent searches.
>
> The "knock and wait" statute provides: "To make an arrest *in criminal actions*, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance." RCW 10.31.040 (emphasis added). Under the statute, before a nonconsensual entry, police officers must "(1) announce their identity, (2) announce their purpose, (3) demand admittance, (4) announce the purpose of their demand, and (5) be explicitly or implicitly denied admittance." The statute applies whenever officers seek to enter the premises without valid permission.
>
> Thompson does not argue that the officers did not comply with the procedures in RCW 10.31.040. Rather, he asserts that because his arrest warrant resulted from his failure to appear for a show cause hearing on child support obligations, he was subject only to civil contempt proceedings under RCW 7.21 for his non-compliance. Therefore, Thompson concludes, he was not arrested in a "criminal action."
>
> Thompson's arrest warrant apparently was issued under RCW 26.18.050 . . . A contempt action under RCW 7.21, which the trial court has authority to use to enforce a support order, may involve remedial or punitive sanctions. RCW 7.21.030 (remedial sanctions); RCW 7.21.040 (punitive sanctions).
>
> Even if we could determine that it is more likely that an arrest under RCW 26.18.050 would lead to a *civil* contempt action under RCW 7.21 rather than to a criminal proceeding, the record does not provide a basis for the officers to make this conclusion at the time of the arrest. The bench warrant states:
>
> > TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETING:
> >
> > WHEREAS, [an] Order of Court has been entered directing the Clerk of the above entitled Court to issue a warrant for the arrest of the above named respondent, JAMES ROSS THOMPSON, [identifying information];
> >
> > You are hereby commanded to forthwith arrest the said JAMES ROSS THOMPSON for failure to appear at the Contempt Review Hearing and bring him into Court to be dealt with according to law. Bail is to be set in open Court.

> Thus, although the warrant for Thompson's arrest could have resulted in either a civil or a criminal contempt action, we decline to require officers at the scene of an arrest to anticipate the nature of any resulting court proceeding. As the officers had a duty to arrest once they knew of the warrant and there is no evidence of bad faith, the officers did not unreasonably use the "knock and wait" statute under the facts of this case.
>
> We further note that there is no showing that the arrest here violated constitutional protections. See Payton v. New York, 445 U.S. 573 (1980) ("[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."); State v. Williams, 142 Wn.2d 17 (2000) **[Dec 00 LED:14]** (defendant could not successfully challenge police entry into his home to serve arrest warrant and defendant has no additional privacy protections when he is arrested in home of third person who consents to police entry).

[Some citations omitted]

2) Entry of trailer to retrieve jacket was justified as "community caretaking"

In key part, the Thompson majority's analysis of the "community caretaking" issue is as follows:

> Thompson argues that even if his arrest was valid, i.e., that the "knock and wait" statute applied, Larson's subsequent three-second entry into the trailer to retrieve Sund's jacket was an unconstitutional search. It was during this entry that Larson smelled a strong chemical odor and observed the suspicious object through the open oven door.
>
> The community caretaking function allows for limited invasion of fourth amendment privacy rights when necessary to render aid or assistance or make routine checks on health and safety. But the dissent contends that the community caretaking function is not applicable here because there was no evidence that anyone was in danger or that Sund or Thompson had a weapon. We believe this is too narrow a reading of the community caretaking function.
>
> The evidence here indicates that Larson was in a somewhat rural location executing an arrest warrant for a person who, according to the arrestee's father, was probably engaged in illicit drug activity. The arrestee lived in a small trailer but did not immediately open the door; while Larson waited there were unexplained sounds of movement and shuffling. Two men then appeared from inside.
>
> Given these circumstances, it was reasonable for Larson to deny Sund permission to re-enter the trailer where he might gain access to a weapon. Clearly, Larson could have told Sund to leave without his jacket. But instead, Larson offered to step inside the door and grab the jacket that was within reach.
>
> The evidence shows that Larson subjectively believed Sund needed help in obtaining his jacket, a reasonable person in this situation would have the same belief, and it was necessary to enter the trailer to retrieve the jacket. And the trial court found that the oven door was open and the item in the oven was in plain view. Thus, Larson's brief entry was within his community caretaking authority.
>
> When police initiate such encounters for "noncriminal noninvestigatory purposes," we determine the admissibility of evidence gained therefrom by balancing "'the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" Given Larson's exceedingly brief entry during which he took no

improper steps and saw only what was in plain view, and given the additional circumstances discussed above, the scales tip in favor of admitting the fruit of Larson's momentary incursion into Thompson's privacy. Accordingly, Larson's entry was not an unconstitutional search.

[Citations omitted]

Judge Armstrong dissents on this issue.

3) Emergency search of burn barrel and burn piles

On the emergency search issue, the Thompson majority explains:

> Thompson challenges Deputy Harms's search of the burn barrel and burn piles, arguing that the trial court erred in concluding that the evidence recovered was in open view. He argues (1) that the evidence recovered was the fruit of Larson's unlawful search of the trailer; and (2) that the search was unlawful because the barrel and burn piles were not within the trailer's curtilage. But the search is valid under the emergency exception to the warrant requirement.
>
> > [W]hen premises contain persons in imminent danger of death or harm; objects likely to burn, explode or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat, police may search those premises without first obtaining a warrant.
>
> State v. Downey, 53 Wn. App. 543 (1989).
>
> To justify application of the emergency exception, the State must show that: "(1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed." Here, Harms testified that he was called regarding a possible methamphetamine lab and was asked to do an "assessment" of the premises to determine, in part, "what the dangers to anybody that may have come in contact with the lab are." As part of that assessment, he checked the trailer's oven and the propane tank in front of the trailer, looked in the burn barrel and burn piles on the property, and looked in the boathouse. Once he determined that the premises appeared safe for the moment, he stopped his search and secured the premises until he had a search warrant.
>
> Given Harms's experience with methamphetamine labs and the potential danger to the officers, to the Thompsons' property, and to the Thompsons themselves, these limited actions were reasonable. See State v. Downey, 53 Wn. App. 543 (Div. I, 1989) (upholding search of residence where officers were dispatched to investigate an overpowering ether odor; officers knew that ether could be extremely volatile and explosive, the home was in a residential area where an explosion would have dire consequences, and officers did not know whether anyone incapacitated by the fumes remained in residence).

[Some citations omitted]

4) Third-party consent by defendant's father to a search of the shared boathouse

The Thompson majority explains as follows that the boathouse search was justified by third-party consent and likely was also lawful as an emergency search as well:

> [T]he trial court erred in concluding that the senior Thompsons could not unilaterally consent to the search of the boathouse. See State v. Walker, 136 Wn.2d 678 (1998) **[Jan 99 LED:03]**. The evidence satisfies the three requirements for establishing a consensual warrantless search: "(1) the consent

must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent." When there are cohabitants, Washington courts follow the "common authority" rule:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is *reasonable to recognize that any of the co-inhabitants has the right to permit the inspection* in his own right and that *the others* have assumed the risk that one of their number might permit the common area to be searched.

State v. Mathe, 102 Wn.2d 537 (1984)

We recently reviewed the Washington cases addressing the common authority rule to determine "whether one cohabitant of a residence may consent to an officer's entering the common living area of the residence, without the consent of a second cohabitant who is present nearby." State v. Hoggatt, 108 Wn. App. 257 (2001) **[Nov 01 LED:08]**. See, e.g., Walker (upholding admission of evidence against wife who consented to search of home even though husband was present at time and did not consent to search; wife's consent would not be valid against husband but remained valid against her); State v. Leach, 113 Wn.2d 735 (1989) (search invalid where girlfriend of business owner consented to search but officers apparently did not obtain consent of defendant owner although he was present at time; consent of cohabitant remained valid "only while the [other] cohabitant is absent"); Mathe, (search invalid where officers obtained consent to search from the residence's owner but did not get consent from the defendant who rented and had exclusive control over the room searched in the residence).

The Hoggatt court concluded that the cases distinguish between: "(1) a searching officer's initial entry into the area of a home into which visitors are customarily received (e.g., the living room) and (2) a searching officer's intrusion into parts of the home into which visitors are not customarily received (e.g., a couple's bedroom)." This distinction is based on the assumption of risk theory espoused in Matlock and in Mathe. The court thus characterized the ultimate question as: "Does one cohabitant of a home assume the risk that an officer will enter that part of the home customarily used to receive guests (e.g., the living room), based only on the consent of a different cohabitant?" The court answered yes even though the defendant was present at the time.

Here, where all three Thompsons apparently had control over the boathouse, Thompson assumed the risk that his parents would consent to police entry without his consent even though he was present at the time of the entry. And Thompson's efforts to distinguish Hoggatt by emphasizing that the boathouse was not "a common area where guests were routinely invited to enter," are not persuasive.

The boathouse, while not an area for receiving "guests" on a regular basis is an area where one cohabitant might receive a visitor without the other cohabitant's consent even when the other cohabitant is present. For instance, the senior Thompsons could have invited visitors into the boathouse to use the landscaping items to do work on the property, including the tractor that they stored there. This makes the boathouse more similar to the living room in Hoggatt than to the bedroom of a residence. Given the nature of the boathouse, Thompson assumed the risk that his parents would consent to police entry into the building.

> Thus, the senior Thompsons could unilaterally consent to the search and Larson could properly rely on their consent.
>
> Finally, the State contends that in addition to the valid consent for the boathouse search, Deputy Harms properly entered the boathouse based upon an emergency situation. As discussed above in regard to the burn barrel and burn piles, the State's contention has merit. John Thompson had reported to the officer that his son was doing something in the boathouse, and the officers had already found possible methamphetamine laboratory equipment in other areas associated with Thompson.

[Some citations omitted]

5) Inevitable discovery

The Thompson majority agrees under the following analysis with the trial court's conclusion that it was inevitable the officers would have lawfully searched the boathouse under a search warrant:

> Under the inevitable discovery doctrine, the State must prove by a preponderance of the evidence that "the police did not act unreasonably or in an attempt to accelerate discovery, and [that] the evidence would have been inevitably discovered under proper and predictable investigatory procedures." "[T]he rule allows neither speculation as to whether the evidence would have been discovered, nor speculation as to how it would have been discovered."
>
> Here, given that we find the police activity prior to the boathouse search to be valid, the police would have inevitably discovered the evidence in the boathouse. Larson's observations in the trailer and Harms's search of the burn barrel and burn piles provided probable cause for a search warrant for the property. Thus, "proper and predictable investigatory procedures" would have led to the discovery of the evidence in the boathouse.

[Citations omitted]

WHERE COUNTY JAIL PERSONNEL RECEIVED REASONABLE NOTICE THAT A JAIL DETAINEE MAY NOT BE THE PERSON DESCRIBED IN AN ARREST WARRANT, COUNTY HAD DUTY UNDER 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, ___ Wn. App. ___, 51 P.3d 837 (Div. II, 2002)

Facts: (Excerpted from Court of Appeals opinion)

Facts in Stalter:

> On Saturday, August 9, 1997, [a] Washington State Trooper stopped Kevin Stalter for a driving infraction and arrested him under authority of a warrant for Robert Stalter. The warrant did not indicate any aliases for Robert but a dispatcher informed [the trooper] that Robert was known to use the alias "Kevin."
>
> Stalter told [the trooper] that he was not Robert and explained that Robert was his brother. Further, Stalter was 4 inches taller, 27 pounds heavier, had a different eye color, and had a different birth date than the person described in the warrant. Nonetheless, [the trooper] transported Stalter to the Pierce County Jail and the jail, relying on [the trooper]'s assurance that the detainee was in fact Robert Stalter, booked him under the name of Kevin Stalter.
>
> Stalter told the booking officer two or three times that he was not Robert, again explaining that Robert was his brother. The booking officer had never seen anyone so adamant about not being the person named in the warrant and called

a senior officer for assistance. The senior officer told Stalter that he would be booked and then it was up to IDENT *[Court's footnote: IDENT is a County department that maintains a fingerprint and photograph database of arrestees.]* or the courts to determine who he was.

Jail staff escorted Stalter to court two days later for arraignment. There, Robert Stalter's probation officer informed the court that the detainee was not Robert Stalter. The court then ordered Stalter released.

Facts in Brooks:

On Friday, October 9, 1998, [a police officer] stopped David W. Brooks Jr. for a traffic violation and subsequently arrested him under a warrant out of North Carolina. Brooks had the same name, was the same race and gender, and had the same birth date as the person named in the warrant.

Brooks immediately told the officer that he had never been to North Carolina and was not the person named in the warrant. He continued to assert misidentification as the officer transported him to the Fife Police Station. At the station, a dispatcher confirmed the warrant and informed the officer that North Carolina wanted to extradite Brooks.

Brooks subsequently was transferred to the Pierce County Jail where he continued to claim misidentification. In response, the booking officer told Brooks that they would do a "positive identification" and would release him if what he said was true.

Brooks was fingerprinted, photographed, and transferred to a holding cell. The officer escorting Brooks to the holding cell again told him that there would be a positive identification and that he would be released if what he said was true.

On October 12, the Monday following his arrest, Brooks appeared in court. He informed his assigned counsel that he was not the person named in the warrant, but, according to the transcript from the hearing that day, Brooks' counsel did not advise the court of the misidentification claim.

The court ordered that Brooks be held without bail and set a court date for November 12. According to Brooks' declaration, he did not have an opportunity to speak to the court. Following the hearing, Brooks' assigned counsel told him that he had to obtain private counsel, which Brooks did.

Also on October 12, the Law Enforcement Support Agency (LESA) *[Court's footnote: LESA is the agency, funded jointly by the Pierce County Sheriff Department and the Tacoma Police Department, that is responsible for processing all fugitive warrants for the City of Tacoma and the County, including the Fife Police Department.]* notified North Carolina that Brooks was in custody; on October 14, it notified North Carolina that Brooks had refused to waive extradition. LESA then requested certified copies of the warrant, photographs, and fingerprints. These did not arrive until November 2, after LESA had submitted a second request at the prosecutor's behest.

At some point, Brooks told a corrections officer about the misidentification and he provided the officer with various unspecified legal documents. But neither this officer nor any other County employee contacted Brooks about his misidentification claim until after November 2, when someone from the jail took a second set of fingerprints.

On November 3, IDENT compared Brooks' fingerprints with the North Carolina fingerprints and determined that Brooks was not the person named in the warrant. The prosecutor immediately moved for his release, which the court granted.

Proceedings below:

Stalter sued multiple parties on multiple theories (only the false imprisonment and the negligence theories against the County are addressed in this decision). Brooks sued the County for false imprisonment, negligence and for federal civil rights violations.

The Pierce County Superior Court granted summary judgment to the county in each case.

ISSUES AND RULINGS ON APPEAL:

1) Do the factual allegations in these two cases support common law causes of action against the county for negligence? (ANSWER: Yes, the jail detainees could establish the elements of a negligence based upon: a) county's duty to verify ID, b) breach of that duty and c) injury due to that breach); 2) Do the factual allegations support common law causes of action for false imprisonment? (ANSWER: Yes); 3) Do the factual allegations in the Brooks case support a federal civil rights suit for a constitutional due process violation? (ANSWER: No)

Result: Reversal of Pierce County Superior Court order granting summary judgement to Pierce County on negligence and false imprisonment theories; affirmance of summary judgement for Pierce County on constitutional action; case remanded for trial on negligence and false imprisonment claims.

Status: Pierce County has petitioned for Washington Supreme Court review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Negligence claims

To sustain a negligence claim, a plaintiff must present evidence showing: (1) the existence of a duty; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause.

a. Duty

It is clear that an arresting officer has a duty to make a reasonable effort to confirm the identity of a person detained under a warrant if there is any doubt as to the detainee's identity. But the question here is whether that same duty extends to the agency that takes custody of the detainee from the arresting officer or agency.

Stalter and Brooks also rely [in addition to other arguments] on Tufte v. City of Tacoma, 71 Wn.2d 866 (1967), to argue that the County had a duty to release them once it knew or should have known they were not the persons named in the warrants.

In Tufte, the Tacoma Police arrested and detained Tufte at the city jail for being intoxicated; meanwhile, they ignored ever increasing evidence that the cause of Tufte's suspicious behavior was diabetes, not imbibing. Tufte sued the City and a jury found in his favor.

On appeal, the city argued that it was not liable because the arrest was lawful. But the Supreme Court affirmed the jury verdict, holding that the initial justification for taking Tufte into custody evaporated once the City knew or should have known that this justification no longer existed; it then had a duty to release

him from confinement.

The County argues that the Tufte holding applies only to an *arresting* agency's liability. We disagree. By approving of the initial arrest and then finding the continued detention to be increasingly unreasonable as the City received more information, the Tufte Court emphasized the City's custodial function, as opposed to its arresting function.

Tufte is persuasive authority for the proposition that a detention facility does not have blanket immunity from liability for false imprisonment. In other words, jail authorities cannot merely ignore evidence indicating an erroneous detention and point to some other participant in the detention or justice system as the responsible party.

We conclude that once jail management is on notice that it may be holding a detainee under authority of a warrant erroneously, it has a duty, at a minimum, to investigate further. This is consistent with the practical realities of the situation. By definition, a detainee lacks access to community resources. Thus, jail administration is often in the best position to discover and resolve misidentification issues.

b. Breach

Both Stalter and Brooks have presented sufficient evidence to create a question of fact as to breach.

The summary judgment record shows that Stalter asserted misidentification, he did not match the physical description on the warrant, and he told the booking officer and others that the person they wanted was his brother. The record also shows that the booking officers could easily have retrieved Robert Stalter's records and resolved the identity issue. Despite this, the County did not vary from its regular procedures. Whether this response was appropriate is an issue of fact for the jury.

Brooks also has presented sufficient facts to raise a question of fact as to the reasonableness of the County's response. He alleged that he repeatedly asserted he was not the person named in the warrant; that jail personnel told him his identity would be verified and he would be released if he was the wrong person; that jail personnel processed his fingerprints and photographs in the usual manner, by sending them to IDENT to check for any existing matches; and that no one made an official notation of his misidentification claim. The reasonableness of this response is a question of fact for the jury.

Further, even after Brooks' initial court appearance, he continued to assert misidentification. We see no basis to cut off the County's potential liability for Brooks' wrongful continued detention as of the date of the Court hearing where, as here, there is evidence that the County's actions potentially contributed to a delay in Brooks' release. Again, the reasonableness of the County's response is a question of fact for the jury.

c. Injury and Causation

The question of proximate cause is for the jury unless the facts are undisputed and there is only one logical inference. Here, a jury could find that if the booking officer or his supervisor had examined Robert Stalter's booking file and allowed [the trooper], the arresting officer, an opportunity to review the file, Stalter would

have been released immediately rather than two days later. Similarly, a jury could find that the County's failure to note that Brooks was asserting misidentification on his booking materials, to timely follow up on the information it requested from North Carolina, or to take other steps to verify Brooks' identity contributed to his continued detention. Thus, the trial courts erred when they dismissed the negligence claims.

2) False imprisonment claims

"An arrest or imprisonment is false if it is unlawful." "Unlawful imprisonment is the intentional confinement of another's person, unjustified under the circumstances." Violation of one's right of personal liberty or restraint without legal authority are "[t]he gist" of an action for false imprisonment. The issue here is whether Stalter and Brooks have raised a question of material fact as to whether their restraint was justified under the circumstances.

The County first asserts that the "lawfulness of [the Appellants'] arrests . . . speaks to the lawfulness of their subsequent imprisonment." It also asserts that because the officers had probable cause to arrest Brooks and because the court apparently found probable cause to detain him, his false imprisonment claims fail. We disagree.

Although probable cause is generally a defense to false imprisonment, lawful arrest does not necessarily "foreclose consideration of facts surrounding the subsequent imprisonment. "'It is the general, if not the universal, rule that, when a person is arrested and placed in jail, and is detained there for more than a reasonable time, the detaining [agency] is liable in an action for damages.'"

As established in Tufte, an initial justification for the detention does not necessarily shield the County from claims of false imprisonment based on the erosion of that justification over time. Further, the plaintiff in a false imprisonment claim must show merely that the defendant intended to confine the plaintiff, not that the defendant intended to do so without legal authority.

[Baker v. McCollan, 442. U.S. 137 (1979)] held that a claim for false imprisonment is not sufficient to establish a constitutional violation. But Baker did not address whether a detainee could assert a claim for false imprisonment under state law. Here, a jury could find that the County detained Stalter or Brooks beyond a reasonable time. Thus, the trial courts erred when they dismissed the false imprisonment claims.

3) Brooks' constitutional claim

Brooks asserts a violation of his Fourteenth Amendment Due Process rights under § 1983. He argues that the County's policy or practice of not identifying detainees who assert misidentification led to his prolonged detention in violation of his Due Process rights.

To establish a § 1983 claim, Brooks must:

> (1) identify a specific policy or custom; (2) demonstrate that the policy was sanctioned by the official or officials responsible for making policy in that area of the [County's] business; (3) demonstrate a constitutional deprivation; and (4) establish a causal connection between the custom or policy and the constitutional deprivation.

The absence of evidence of any of these elements requires dismissal of the action.

The question here is whether Brooks has demonstrated a constitutional deprivation. The Fourteenth Amendment does not protect against all deprivations of liberty; it protects only against deprivations of liberty accomplished "without due process of law. Thus, Brooks must establish a question of fact as to whether he was afforded adequate procedural process.

Because Brooks was arrested under a warrant issued in another state, the Uniform Criminal Extradition Act, Chapter 10.88 RCW, governs the required process. Brooks was entitled to a hearing as soon as possible after his arrest, which he received. RCW 10.88.330(1). Because he did not waive extradition, he was also entitled to challenge his extradition by means of a writ of habeas corpus and the court was required to provide him with sufficient time to do so. RCW 10.88.290.

Although Brooks asserts that the County's actions delayed his release, he does not claim a violation of the statutory process related to a fugitive warrant. Nor does he show a violation of the County's policies and practices regarding verification of a detainee's identity. Finally, . . . a state law tort claim alone cannot be the basis of a § 1983 claim. Accordingly, Brooks fails to establish a constitutional deprivation, and the trial court properly dismissed his § 1983 claim.

Thus, we affirm the dismissal of Brooks' § 1983 claim, reverse the summary judgment dismissal of Stalter's and Brooks' negligence and false imprisonment claims, and remand those claims for trial.

[Some text, citations and footnotes omitted]

AFFIDAVIT ESTABLISHED PC 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, ___ Wn. App. ___, 51 P.3d 830 (Div. II, 2002)

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

In September 1999, Wible took his laptop computer to the Tacoma CompUSA for repair. Weeks later, while repairing the computer, William Yarwood, a CompUSA employee, noticed some of Wible's computer files named "11yr.01, 11yr.02, 11yr.03." Yarwood viewed some of these files and saw what he believed to be child pornography. He also saw a folder named "young teens" and two video files named "8 year old Rape" and "8 year old Smile." Yarwood's supervisor, Reginald Mathusz, viewed two or three of the images and contacted the Tacoma Police Department. Neither Yarwood nor Mathusz viewed the two video files.

Detective Richard Voce swore out an affidavit in support of a search warrant to seize and search Wible's computer. In his affidavit, Voce identified the felony of possession of depictions of minors engaged in sexually explicit conduct, in violation of RCW 9.68A.070, of which he complains. But a superior court judge issued a search warrant, based on Voce's affidavit, that specified second degree child rape and second degree child molestation as the crimes that Voce complained about. When the search warrant was sought, Voce's affidavit was attached to it.

Detective Voce executed the search and returned Wible's computer to CompUSA. After Wible picked up his computer, police officers arrested him for violating RCW 9.68A.070.

The trial court denied Wible's motion to suppress. After a bench trial on stipulated facts, a superior court judge found Wible guilty of five counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation.

LED EDITORIAL NOTE: Some additional facts regarding the contents of the affidavit and the warrant are set out in the analysis portion of the opinion below. However, nowhere in the opinion does the Court of Appeals set forth the specific language in the warrant describing the items to be seized and searched.

ISSUES AND RULINGS: 1) Did the affidavit establish probable cause through its description of the report from the computer repairman? (ANSWER: Yes); 2) Where the warrant's designation of the crime under investigation erroneously failed to match the affidavit's designation of the crime under investigation, but the warrant otherwise explicitly described the item to be searched and adequately limited the scope of the search of that item, did the affidavit fail to establish probable cause or did the warrant fail to meet the particularity requirement of the constitution? (ANSWER: No, the warrant was supported by PC, and it met particularity requirements.)

Result: Affirmance of Pierce County Superior Court convictions of Alvin Chester Wible III on five counts of possessing depictions of minors engaging in sexually explicit conduct with sexual motivation.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Informant basis of information and informant credibility

Affidavits relying on information from citizen informants must:

> (1) set forth the underlying factual circumstances from which the informant makes his conclusions so that a magistrate can independently determine the reliability of the manner in which the informant acquired his information and (2) set forth facts from which the officer can conclude the informant is credible and his information reliable.

In short, the affidavit must establish the informant's basis of knowledge and reliability. Here, the affidavit included the following information from the citizen informant:

> On the 19th of October, 1999, your affiant was contacted via the telephone by Reggie Mat[husz], who is an employee for CompUSA, located at 4028 Tacoma Mall Blvd., in the City of Tacoma, County of Pierce, Washington.
>
> Mr. Mat[husz] related that on the 21st of September 1999, a Compaq computer was brought to their repair facility for service[.] The repair order was partially completed by the male who brought the computer in for the repair. . . . The male gave the following information, for contact, Wible, Alvin III, with an address . . . in the City of Roy. . . .
>
> The necessary parts were ordered, and received. A second employee, William Yarwood, installed the parts as needed. It was at that time that Mr. Yarwood observed numerous files on the

> computer. The files had names . . . of "11 year old", and . . . there were at least 4 . . . under that name, as well as a folder titled "young teens". Mr. Yarwood also saw two video files named "8 Year old Rape", and "8 year old Smile". Mr. Yarwood and Mr. Mat[husz] did not view these video files, however they did observe several of the images, and those images were those of young girls. Mr. Mat[husz] related that the images of the young girls appeared to him to be under the age of 14, and those images were in sexual of nature [sexual in nature].

Wible argues that the affidavit lacked sufficient facts regarding the informant's conclusion that the images were of children under the age of 14 and definition of "sexual in nature". His argument is unpersuasive.

The affidavit contained facts sufficient to satisfy the basis of knowledge prong. First, an informant's personal observations can satisfy the knowledge prong. Here, both the citizen informant (Mathusz) and his colleague (Yarwood) viewed the images on Wible's computer and concluded that they depicted minors and were sexual in nature.

Second, "[f]acts that, standing alone, would not support probable cause can do so when viewed together with other facts." Likewise, a magistrate may "draw reasonable inferences from the facts and circumstances set forth in the supporting affidavit." Here, the affidavit included the names of several files ("11 year old", "8 year old Rape", and "8 year old Smile") and a folder ("young teens") on Wible's computer. These names support that the image and video files on Wible's computer depicted minors and bolster the informant's conclusions. Similarly, the file names "8 year old Rape" and "8 year old Smile" give context and meaning to the informant's definition of "sexual in nature". The word "rape" obviously has sexually explicit connotations. See RCW 9.68A.011(3) (defining "[s]exually explicit conduct"). In addition, "sexual" has several meanings, including: "[O]f or relating to the sphere of behavior associated with libidinal gratification[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2082 (1969). Furthermore, the detective-affiant stated that in his experience, computer images of child pornography are often cataloged by interest or subject matter. In short, the informant's firsthand knowledge, together with the file names, satisfied the basis of knowledge prong.

The affidavit also satisfied the reliability prong because named citizen informants, like Mathusz, are presumed reliable.

2) Probable cause and particularity questions in light of warrant's failure to name the correct crime or to match the affidavit in that regard

Next, Wible challenges the superior court's probable cause determination. He points out that the affidavit specified the crime of possession of depictions of minors engaged in sexually explicit conduct, but the warrant specified second degree child rape and second degree child molestation. Wible contends that the affidavit does not include facts indicating that child rape and molestation occurred. His argument fails.

First, the constitution does not require "that the crime under investigation be named in the complaint or affidavit for search warrant." Similarly, the superior court criminal rules governing search warrants do not require that the offense specified in the affidavit match that in the warrant. See CrR 2.3(c). Second, as discussed below, the warrant sufficiently informed Wible of the place to be

searched and the items to be seized. Third, a ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown. The same holds true for clerical errors. Fourth, the investigating detectives discovered and corrected the clerical error, albeit after Wible's arrest.

Wible erroneously relies on State v. Riley, 121 Wn.2d 22 (1993) **July 93 LED:10**, for the proposition that the crime must be named in the warrant. The warrant in Riley authorized the seizure of:

> any fruits, instrumentalities and/or evidence of a crime, to-wit:
>
> notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.

But the warrant did not state the crime of computer trespass, the offense under investigation, or any other crime. Against this backdrop, the court made the following statement:

> A search warrant that fails to specify the crime under investigation *without otherwise limiting the items* that may be seized violates the particularity requirement of the Fourth Amendment.
>
> The Fourth Amendment mandates that warrants describe with particularity the things to be seized. When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable. In such cases, the search must be circumscribed by reference to the crime under investigation; otherwise, the warrant will fail for lack of particularity.

This case is inapposite because, as we discuss below, the warrant here meets the particularity requirement because of its descriptive itemization. Thus, the warrant need not identify the crime under investigation. Additionally, it is clear that the warrant contains a scrivener's error -- not only does the warrant recite the wrong crime, while setting forth elements of the correct crime, it also sets forth the wrong date in its recitation. The warrant states that Voce appeared on 14 August 1999, yet the attached affidavit, the clerk's date stamps, and the judge's verification set forth dates in October 1999, when Voce actually appeared. Thus, the error in both the name of the crime and the date of Voce's complaint are clerical errors and may be disregarded.

Finally, Wible argues that the warrant violated the particularity requirement of the Fourth Amendment. Courts evaluating alleged particularity violations distinguish between inherently innocuous items, such as Wible's computer, and inherently illegal property, such as controlled substances. Innocuous items require greater particularity. In addition, search warrants listing items protected by the First Amendment require the highest degree of particularity -- scrupulous exactitude. Scrupulous exactitude takes two forms: (1) the warrant must specifically describe the materials to be seized, and (2) the exceptions to the warrant requirement are narrowly construed.

Contrary to Wible's argument, the warrant was not overly broad and the police did not have unbridled discretion. For example, the warrant specified Wible's computer, by serial number and physical location, as the place to be searched and narrowed the scope of the search to images depicting children engaged in sexually explicit activity, as defined by RCW 9.68A.011(3). Consequently,

> this is not a situation where the warrant authorized the seizure of a broad category of materials without specifying the crime under investigation. Furthermore, a search warrant for child pornography satisfies particularity if it limits the seizable items by stating specifically in the warrant the type of material that qualifies as child pornography. See State v. Perrone, 119 Wn.2d 553 (1992) **Nov. 92 LED:04** ("Defendant maintains that the language of RCW 9.68A.011, if used in a search warrant to describe materials sought, would be sufficiently particular. This is so[.]") Thus, the warrant satisfied the particularity requirement.

[Some text, citations and footnotes omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WARNING ON WSP'S IMPLIED CONSENT FORM SURVIVES CHALLENGE TO ITS (1) "IN VIOLATION OF" LANGUAGE AND (2) EXPLANATION OF CRIMINAL SANCTIONS – In Pattison v. DOL, ___ Wn. App. ___, 50 P.3d 295 (Div. I, 2002), the Court of Appeals rules in several license-revocation cases consolidated for appeal that the warnings on the Washington State Patrol implied consent form are consistent with RCW 46.20.308 (2). The Court ruled that it is not misleading to include in the warning accurate information about the loss of license that will occur as the result of a criminal conviction.

The WSP implied consent warnings that were challenged in consolidated cases read as follows:

> You are now advised that you have the right to refuse this breath test; that if you refuse, your license, permit, or privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by any qualified person of your choosing and that your refusal to take the test may be used in a criminal trial; and
>
> You are further advised that your license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of your breath is 0.08 or more, if you are age 21 or over, or 0.02 or more if you are under age 21; or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504.

The licensees in these consolidated cases unsuccessfully argued that these warnings failed to conform to RCW 46.20.308(2). The licensees claimed that, among other things: 1) the warnings' reference to "in violation of" suggest that a mere arrest for (not a conviction of) the referenced crimes would trigger loss of license, and 2) the explanation of the criminal sanctions in the WSP warnings are not required by statute and are somehow misleading.

Result: Reversal of King County Superior Court decisions that had reversed DOL orders of suspension and revocation in the consolidated cases; reinstatement of DOL administrative orders against Kimberlee A. Pattison, Zachary A. Cornfoot, and Kelly D. Norman.

Status: A petition for review has been filed by the driver. The Washington Supreme Court will decide whether to grant review some time early in 2003.

(2) SEATTLE ORDINANCE BARRING POSTING OF NOTICES ON CITY-OWNED PROPERTY, INCLUDING UTILITY POLES, HELD OVERBROAD IN VIOLATION OF WASHINGTON CONSTITUTION'S PROTECTION OF FREE SPEECH – In Seattle v. Mighty Movers, ___ Wn. App. ___, 51 P.3d 152 (2002), the Court of Appeals agrees with the violator of a City of Seattle ordinance prohibiting posting of notices on city-owned property, including utility poles that the ordinance is overbroad in its restriction on use of a traditional public forum (the poles), and that the ordinance therefore violates the Washington constitution's protection of free speech.

The Mighty Movers Court rejects the City's proffered bases for the ordinance: utility worker safety, traffic safety and aesthetics. The Court also rejects the City's argument that there are multiple alternative channels of communication, including eleven kiosks placed around the City of Seattle.

The Mighty Movers Court concludes its opinion by summarizing its holding and its severance ruling on the ordinance as follows:

Overbreadth holding

> We hold that the portion of a publicly owned pole which is located on or adjacent to a street or sidewalk in the City of Seattle within the reach of pedestrians and which has traditionally been used for posting is a traditional public forum. Because none of the City's cited interests are justified by banning all posting on this portion of publicly owned poles, the ordinance is not narrowly tailored to serve a compelling government interest. It therefore sweeps within its grasp, constitutionally protected speech. We hold that the anti-posting ordinance is overbroad and therefore is an unconstitutional restriction on free speech.

Severance ruling

> A law is overbroad in its entirety only if there is no way to sever its unconstitutional applications. The ordinance bans posting on "traffic control device[s], utility pole[s] [and] lamp post[s]". SMC 15.48.100. Each of these categories includes some poles, which are part of the traditional public forum identified above. Therefore, we invalidate as unconstitutional the application of the ordinance to the pole portion of the traffic control devices, utility poles and lamp posts. *[Court's footnote: We do not preclude the City from enacting time, place and manner restrictions which are appropriate to poles which are part of the traditional public forum we have identified. The City may also enact different restrictions, appropriate to signs on poles not part of the traditional public forum.]* We can and do sever these provisions from the balance of the ordinance.

[Citations omitted]

Result: Reversal of King County Superior Court decision that had upheld the City of Seattle's anti-posting ordinance.

(3) IN COUNTERFEIT CURRENCY CASE, "INTENT TO DEFRAUD" IS HELD TO MEAN SAME THING AS "INTENT TO INJURE" IN FORGERY STATUTE – In State v. Simmons, ___ Wn. App. ___, 51 P.3d 828 (Div. II, 2002), the Court of Appeals rules that the phrases "intent to defraud" and "intent to injure" in the forgery statute at RCW 9A.64.020 effectively mean the same thing for purposes of the fact situation in this case. Accordingly, the Simmons Court upholds jury instructions that did not treat these terms as alternative means of committing forgery. The defendant's conviction for forgery should stand, as there was evidence of "intent to injure" and "intent to defraud" under the following facts and proceedings:

> Simmons was detained in the Forks Jail, Clallam County. While in the booking area, he noticed that another man being booked had ripped up a twenty-dollar bill and thrown it into a wastebasket. Simmons retrieved the bill and taped it back together, but he did not turn it over to authorities. Instead, he kept the reconstructed bill and, together with another twenty-dollar bill, placed it with his personal property.
>
> Three or four months later, Simmons was transported to the Lewis County Jail. When transport staff Brian Bradford began to issue a receipt for Simmons' money transferred by check from the jail in Forks, Simmons indicated that he had another forty dollars among his papers in his personal property. Simmons

retrieved the two twenty-dollar bills, with the reconstructed bill folded into the second bill, and handed them to Bradford. Bradford separated them just far enough to see that there were two twenty-dollar bills, then placed them in an envelope and listed them along with the check from the Forks Jail.

Jennifer Teitzel processes deposits to inmate accounts. She received Simmons' envelope. When she unfolded the bills, she looked at the torn bill that had been taped back together, thought "the color seemed off, . . . felt like tape on the front and back," saw that there was not any tape on the back of the bill, tested the bill with a "counterfeit pen," and reported it to her supervisor. Expert analysis later confirmed that the bill was counterfeit.

The State charged Simmons with forgery. At trial, Simmons testified that he did not know that the bill was counterfeit. At the end of the trial, the court asked for Simmons' objections to the court's proposed instructions and his exceptions to those instructions he had proposed but the court declined to give. Simmons' counsel stated that he had no objections to the jury instructions. The jury found him guilty.

Result: Affirmance of Lewis County Superior Court conviction of Jeffrey Rosander Simmons for forgery.

(4) UNDER CIRCUMSTANCES OF PRE-TRIAL COMPETENCY HEARING, DEFENDANT DID NOT HAVE A DUE PROCESS RIGHT TO CROSS-EXAMINE A CHILD WITNESS IN THAT HEARING – In State v. Maule, ___ Wn. App. ___, 51 P.3d 811 (Div. I, 2002), the Court of Appeals rejects a child molestation defendant's argument that his constitutional right to due process was violated when his attorney was not allowed to cross-examine a child victim-witness in a pre-trial competency hearing.

Due process is a flexible concept, the Maule Court explains. Under the facts of this particular case, the questioning of the seven-year-old molestation victim by the prosecutor was adequate to establish her competency to testify at trial. The Maule Court also concludes that the trial court ruling was supported by the fact that defense counsel's proffer of questions for cross-examination would not have established incompetency.

Result: Affirmance of King County Superior Court convictions of Donald Maule for first degree child molestation and for sexual exploitation of a minor.

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ORDER FORMS FOR SELECTED RCW PROVISIONS

Order forms for 2001 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 new website at [http://legalwa.org/] includes Washington State Supreme Court opinion from 1969 to the present. It also includes links to the full text of the RCW, WAC, and 70 Washington city and county municipal codes. 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].