Law Enforcement Digest

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REVISITING ILLINOIS V. CABALLES FOR LED EDITORIAL COMMENTS ON THE IMPLICATIONS FOR WASHINGTON OFFICERS OF THE U.S. SUPREME COURT'S FOURTH AMENDMENT RULING ADDRESSING THE USE OF DRUG-SNIFFING DOGS AT ROUTINE TRAFFIC STOPS

A. Introduction

In last month's LED, we digested the U.S. Supreme Court decision in Illinois v. Caballes, 125 S.Ct 834 (2005) **March 05 LED:03**. In Caballes, the U.S. Supreme Court held that, where a routine traffic stop was not extended in duration beyond the time necessary to issue a warning ticket, another officer's use of a narcotics-detection dog to sniff the exterior of the unoccupied stopped vehicle, while the driver sat with the officer who made the stop, did not trigger application of the Fourth Amendment. Therefore, "reasonable suspicion" justification was not required for using the dog to investigate for possible presence of illegal drugs in the stopped vehicle.

The Caballes case touches on two major, controversial areas of Search and Seizure law. For state and local Washington law enforcement officers who must comply with both the Fourth Amendment of the federal constitution and the ever-evolving article 1, section 7 of the Washington constitution, the two areas of law remain more unsettled after Caballes than they do for federal officers and for state and local officers in those states where constitutional restrictions are exclusively under the Fourth Amendment. There are several problematic Washington decisions that suggest that aggressive actions by Washington officers based on Caballes will be held unconstitutional under "independent grounds" interpretation of the Washington constitution, resulting in suppression of evidence. Complicating matters further is that the published Washington case decisions in these subject areas, particularly the decisions from the Washington Supreme Court, are few, thus leaving a number of gaps that make it very difficult to state with any certainty the black-letter rules for police investigative behavior under the Washington constitution.

The subject areas that we discuss below in our comments are complex, and our effort to compress the analysis into a few pages may oversimplify or mislead. As always, we urge officers to consult their local prosecutors and legal advisors on the matters discussed in our comments.

The first major area of Search and Seizure law addressed in Caballes is that concerning whether criminal investigative use of a of a canine to gather information through sniffing constitutes a search or a seizure.

The second major area of Search and Seizure law addressed in Caballes is that relating to whether, during a routine traffic stop, an officer may lawfully change the scope of investigation or extend the duration of the stop in order to pursue a hunch or suspicion that falls short of "reasonable suspicion" (per Terry v. Ohio) regarding suspected criminal activity unrelated to the traffic stop.

The Caballes majority opinion from the U.S. Supreme Court holds, under the Fourth Amendment: (1) that no search occurred in the use of the drug-sniffing dog to sniff a car during a traffic stop; and (2) that, where only the scope of the investigation, and not the duration of the investigation, was expanded by the use of the dog without "reasonable suspicion," no violation of the rule of Terry v. Ohio occurred.

As already noted, in both areas of law, decisions from Washington courts suggest that Washington's appellate courts are likely to rule more restrictively under article 1, section 7, but the Washington case law is far from fully developed as yet, so we can only offer educated guesses. And, until those as-yet-only-guessed-at rulings are made, officers who have the support of their agencies and prosecutors risk only suppression of evidence under the Washington constitution if they apply the Caballes approach in the use of drug-sniffing dogs at traffic stops.

B. Warrantless search issue

1. Fourth Amendment

The last previous U.S. Supreme Court decision involving a canine sniff was in 1983 in the Place case. In its 1983 Place decision, the Supreme Court held that a dog sniff of luggage taken from a drug suspect did not constitute a "search" for purposes of the Fourth Amendment. The Place Court based this ruling on the fact that a drug-sniffing dog detects only contraband, so legitimate privacy rights of the innocent will never be violated by the sniff.

Under the analysis in the Caballes majority opinion extending the Place rationale to the facts in Caballes (random sniff of empty car during traffic stop), it appears to us that a majority of the U.S. Supreme Court would permit officers, without a warrant or consent or exigent circumstances, to take a drug-sniffing dog anywhere that the officers had authority to access without a warrant, even to the front door of a home or through a motel corridor. BEWARE: This is speculation, of course, as the U.S. Supreme Court has yet to look at a case involving investigative dog-sniffs at residences. More importantly, a Washington Court of Appeals' decision held in 1998 that taking a drug-sniffing dog to a home without authority of a warrant is an unlawful search. See discussion below in Part B.2. of our comments.

We doubt, however, that the U.S. Supreme Court would allow random/suspicionless sniffs of persons, as that would involve not only privacy concerns, but it would also implicate liberty/dignity-related interests. To avoid implicating this latter concern, we would think that officers trying to operate within the Fourth Amendment rule of Caballes would want to get the driver out of a stopped vehicle before conducting a random drug sniff of the vehicle during a routine traffic stop (as well as striving to meet the duration-limit of the ruling). That is because, in assessing the liberty-intrusion issue, one must consider the decision of the Ninth Circuit of the U.S. Court of Appeals in B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999) **Dec 99 LED:12** and similar rulings in other jurisdictions.

In Plumas, the Ninth Circuit held that random or blanket warrantless use of a drug-sniffing dog to sniff K-12 school children violates the Fourth Amendment. While the Plumas ruling will eventually need to be reassessed in light of the Caballes decision and has never been addressed by the U.S. Supreme Court, we believe that it is more than likely that the Ninth Circuit holding in Plumas against random sniffs of persons will be upheld by the U.S. Supreme Court. Finally, if there are passengers in a vehicle, an officer wishing to do a Caballes dog sniff under the Fourth Amendment during a routine traffic stop might wish to avoid the Plumas issue by asking the passengers to step from the vehicle before doing the sniff of the vehicle. For Washington officers, however, that would not generally be an option because State v. Mendez, 137 Wn.2d 208 (1999) **March 99 LED:04** holds under the Washington constitution that officers must have a "heightened awareness of danger" before directing passengers to stay in or get out of a vehicle during a routine traffic stop.

2. Article 1, section 7 of the Washington constitution

Division One of the Washington Court of Appeals held in State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) **Nov 98 LED:05**, in an "independent grounds" interpretation of article 1, section 7 of the Washington constitution, that officers need a search warrant before taking a drug-dog to the front door of a home to sniff for a marijuana grow operation (even though the officers could lawfully have gone there without the dog and without a warrant, and used their human senses of smell). The Dearman Court distinguished the circumstances of that case from the circumstances of several Washington Court of Appeals decisions that applied the rationale of the U.S. Supreme Court's 1983 Place decision to allow non-warrant investigative dog-sniffs of packages, and, in one case, a safety deposit box. The Washington Supreme Court denied the State's petition for discretionary review of the Court of Appeals decision in Dearman, and thus we do not have the benefit of the Washington Supreme Court's analysis of the dog-sniff issue there. Indeed, the Washington Supreme Court has never issued a decision addressing the lawfulness of investigative dog-sniffs of any kind. However, we believe that it is generally agreed among Washington legal analysts (including prosecutors and police legal advisors) that -- in light of other Washington precedents from the Washington Supreme Court under article 1, section 7, particularly those protecting the sanctity of residences -- the Washington Supreme Court is unlikely to overrule Dearman.

The prosecutor in the Dearman case made an alternative argument to his no-search argument. He noted that courts in some other states have allowed use of drug-sniffing dogs outside residences where officers have "reasonable suspicion" before going to the premises with the dog. The Court of Appeals completely ignored that argument in its written decision in Dearman, so it remains to be seen whether the "reasonable suspicion first" argument has any viability under article 1, section 7 of the Washington constitution, whether that approach is applied to searches of residences, of vehicles, or of individuals. While using a "reasonable suspicion" standard to justify a warrantless action outside of the Terry stop context seems somewhat illogical, several other states have utilized the "reasonable suspicion" standard in a variety of factual contexts. We would not be surprised if Washington's Supreme Court were to eventually adopt that middle-ground approach to dog-sniffs under article 1, section 7, at least in some factual circumstances.

The Court of Appeals' analysis in Dearman was focused on the sanctity of the home. There are no Washington cases addressing lawfulness of investigative drug-dog sniffs at traffic stops. Whether the Washington appellate courts will view a drug-dog sniff of a car at a routine traffic stop as being more like a drug-dog sniff outside a home (see Dearman) or more like a drug-dog sniff of an unattended container or safety deposit box (see the other Washington Court of Appeals' decisions discussed in Dearman) remains to be seen. If Washington officers, with blessing of their agencies and prosecutors/legal advisors, decide to take their chances that Caballes applies in Washington and that Dearman does not extend to traffic stop situations, they would be well advised to try to match the basic facts of Caballes -- get the driver out of the vehicle before conducting the random dog-sniff and (assuming no drug-dog alert occurs) not extending the duration of the stop beyond the time it takes to write the ticket.

Finally, it should be noted that under both the Fourth Amendment and under article 1, section 7 of the Washington constitution any restrictions on use of drug-sniffing dogs do not apply where officers already have authority to search under a warrant or under one of the recognized exceptions to the warrant requirement.

C. Seizure issue – expanding the investigation during a routine traffic stop

1. Fourth Amendment

Federal courts interpreting the Fourth Amendment had not been consistent prior to Caballes as to whether officers, without reasonable suspicion as to illegal drugs, may expand the scope of

the traffic stop to investigate possible drug possession, so long as the officers do not thereby unreasonably extend the duration of the stop. Caballes appears to hold that, so long as the duration of the stop is not extended, it does not matter that the scope of the investigation is changed. No doubt criminal defense attorneys and others will argue that this reads the decision too broadly even under the Fourth Amendment.

Major categorical scope-of-investigation-"expanding" actions of officers during routine traffic stops that have been challenged under the Fourth Amendment by criminal defendants include: 1) records checks; 2) questioning the driver and other vehicle occupants about possible criminal activity unrelated to the traffic stop; 3) seeking consent to search the vehicle; and, as in Caballes, 4) using drug-sniffing dogs to investigate for possible drugs in the stopped vehicle. Our best guess as to status of the Fourth Amendment case law, after Caballes, is that none of these things violate the Fourth Amendment if the officer does not substantially extend the duration of the traffic stop in pursuing these activities. If the stop is substantially extended in duration (i.e., by more than a few minutes) by the officer's action, however, we think that there is probably a Fourth Amendment violation. Our guess is that different judges interpreting the Fourth Amendment might allow different "fudge-factors" on the duration restriction in this context. For Washington officers, the picture is even more murky.

2. Article 1, section 7 of the Washington constitution

1) *Random or blanket records checks* during traffic stops are expressly permitted by statute (RCW 46.61.021). We are certain that the Washington appellate courts will not consider such checks to be an impermissible expansion of the scope of the investigation (partly because there are officer-safety considerations). However, there is no doubt a reasonable-duration limit on holding a traffic stop detainee while waiting for records information, just as there is under the Fourth Amendment. The issue of constitutional limits on running records checks was addressed by Division One of the Washington Court of Appeals in State v. Rife, 81 Wn. App. 258 (Div. I, 1996) **Aug 96 LED:17**. The Court of Appeals ruled that a delay of from five to ten minutes to run a warrants check did not violate either the Fourth Amendment or article 1, section 7. The Washington Supreme Court reversed that decision, but exclusively on statutory grounds, not addressing the constitutional issues. See State v. Rife, 133 Wn.2d 146 (1997) **Oct 97 LED:03**.

RCW 46.61.021 was quickly amended by the Legislature after the Washington Supreme Court decided Rife. See **Nov 97 LED:03**. The Washington Legislature expressly authorized records checks during routine traffic stops, so what remains of Rife is a Court of Appeals' decision that holds that a reasonably limited delay to run a records check is not a constitutional violation. What the Court of Appeals' analysis in Rife means for purposes of analysis of other duration and scope-of-investigation questions has not been explored in any other Washington cases. For instance, when Division Two of the Court of Appeals addressed in its 1993 Cantrell decision the lawfulness of asking about illegal drugs and asking for consent during a routine traffic stop, the Court did not consider the constitutional implications of extending a traffic stop to do a records check. See discussion of Cantrell below.

2) *Questioning the driver* about whether there are weapons in the vehicle may be permissible for officer-safety on a relatively routine basis, and also, asking *the driver* a question or two about the driver's travel plans (where he came from and where he is going) probably will be permitted as being incidental to the traffic stop. But notwithstanding whatever argument that might be squeezed out of the Court of Appeals' decision in Rife, we think that the Washington appellate courts are likely to follow the approach of Division Two of the Court of Appeals in State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) **Oct 93 LED:21**, and therefore generally prohibit officers from asking the other types of questions without reasonable suspicion to support expanding the scope of the investigation.

The Cantrell case began with a routine traffic stop. During the stop, the officer developed a hunch that there might be illegal drugs in the vehicle. The Court of Appeals held, based apparently on the Fourth Amendment, that the officer, who was without reasonable suspicion as to presence of illegal drugs, acted unconstitutionally by changing the scope of the investigation in asking whether there were illegal drugs in the vehicle and then proceeding to ask for consent to search (see further discussion of the consent-request aspect of the case below). Even though Cantrell was purportedly decided under the Fourth Amendment and is subject to a credible challenge under the Fourth Amendment, we feel that there is little chance of getting the rule of that case overruled in the Washington courts in a future case. We believe that the Cantrell decision will be adopted by the Washington appellate courts as an interpretation of article 1, section 7 of the Washington constitution at some point. Thus, we feel that it is probably impermissible, during the processing of the traffic violation, to ask about illegal drugs, or to even ask a long laundry list of seemingly innocuous questions to try to determine if, on the totality of the circumstances, there is reasonable suspicion that there are illegal drugs in the vehicle. Even if the officer could somehow convince the court that the officer did not unreasonably extend the duration of the stop in asking these questions, there would likely be a scope-of-investigation problem under the Washington constitution, based on the reasoning of Cantrell.

Questioning *passengers* without reasonable suspicion that they have violated a law (such as the seat belt law) is even more problematic in light of the prohibition under article 1, section 7 of the Washington constitution against even asking for identification from passengers. See State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**.

3) *Asking the driver for consent* to search the vehicle also has both duration and scope-of-investigation problems. As noted, in Cantrell the Court of Appeals held that asking about drugs and then asking for consent impermissibly changed the scope of the investigation during a routine traffic stop without justification.

We provided a two-page article discussing Cantrell and related cases in the **October 96 LED** at pages 19-21. The article also discussed the then-recent decision of Division Three of the Washington Court of Appeals in State v. Henry, 80 Wn. App. 544 (Div. III, 1995). The article suggested that, if officers are going to test the limits of their authority and attempt to get consent to search in routine traffic stop circumstances where they lack "reasonable suspicion" as to drugs, they should use a "clear break" method before asking about drugs and before requesting consent to search. The "clear break" approach is along the following lines (modified here from our **October 1996 LED** commentary to incorporate a reference to the Ferrier, no-knock consent-search rule):

> The officer expressly informs the detainee, after the detainee signs the ticket, that he or she is free to go and need not talk with the officer further, but that the officer is concerned about something, and would like to ask a couple of questions. Then, if the detainee does not object, the officer poses questions in a non-coercive manner that ask whether there are illegal drugs in the vehicle (or something along those lines), and then the officer proceeds to a consent request that (because this is sort of a knock-and-talk on wheels) meets the requirements of State v. Ferrier, 136 Wn.2d 103 (1998) **Oct. '98 LED:02**.

4) Despite the fact that the officer in Caballes did not have reasonable suspicion as to illegal drugs, the U.S. Supreme Court upheld bringing a *drug-sniffing dog* to sniff the vehicle while the warning was being issued. We think that the law of investigative dog-sniffing and of duration-and-scope-limitations on traffic stops in Washington is so murky that Washington officers who do not want their cases to end up in the Washington Supreme Court would be well-advised to not use drug-sniffing dogs at routine traffic stops unless the officers first have reasonable suspicion that

there are illegal drugs in the vehicle. However, as we indicated above, no Washington case expressly says so, and officers with support from their agencies and prosecutors may choose to take the aggressive approach used by the officers in the Caballes case. Such an approach is not a Fourth Amendment violation. Officers who take the Caballes approach, however, should not extend the duration of the traffic stop, and generally should not use the approach when there are passengers in the vehicle.

One additional concern for Washington officers in the bringing of drug-sniffing dogs to "routine traffic stops" is the anti-pretext rule created in an independent grounds reading of article 1, section 7 of the Washington constitution in State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. In Ladson, the Washington Supreme Court held that the Washington constitution, unlike the Fourth Amendment, imposes a pretext stop prohibition the violation of which can be proven through either: (1) subjective evidence (showing the officer had a pretextual motive to use a minor traffic violation to investigate a serious criminal matter) or (2) objective evidence (showing the officer didn't follow normal or standard practices and procedures for that officer in deciding to make the stop). For instance, Washington officers who would bring drug-sniffing dogs to vehicles that the officers have stopped for driving six MPH over the limit, as did the Illinois officer in Caballes, are likely to face pretext-stop challenges along with the other challenges addressed in this LED commentary.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

"RECKLESS MANNER" UNDER VEHICULAR HOMICIDE AND VEHICULAR ASSAULT STATUTES MEANS "DRIVING" IN A RASH OR HEEDLESS MANNER, INDIFFERENT TO THE CONSEQUENCES – In State v. Roggenkamp, ___ Wn. 2d ___, 106 P.3d. 196 (2005) the Washington Supreme Court rules 7-2 that the term "in a reckless manner" in the vehicular homicide and vehicular assault statutes is not defined by language in the reckless driving statute reference "willful or wanton disregard for the safety of persons or property," but instead is defined by the definition established in case law under the vehicular homicide and vehicular assault statutes – "driving in a rash or heedless manner, indifferent to the consequences."

Result: Affirmance of King County Juvenile Court convictions of Michael Roggenkamp for vehicular assault (two counts) and vehicular homicide (one count); affirmance of Clark County Superior Court convictions of Jason Ray Clark for vehicular assault (three counts).

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WASHINGTON STATE COURT OF APPEALS

RANDOMLY CHECKING GUEST REGISTERS OF MOTELS HELD LAWFUL UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION

State v. Jorden, ___ Wn. App. ___, ___ P.3d ___, 2005 WL 419590 (Div. II, 2005)

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

> The Golden Lion Motel is in Lakewood, Washington. When a guest checks in, an employee fills out a guest registration form and photocopies the guest's driver's license or other picture identification. The form and the photocopy are then retained at the front desk.

As part of a program called the "Lakewood Crime-Free Hotel Motel Program," the Golden Lion allows deputies from the Pierce County Sheriff's Department to randomly view its guest registry. By running the names through a law enforcement computer, the deputies then check for outstanding warrants. The deputies act without individualized suspicion, probable cause, or a search warrant.

On March 15, 2003, Deputy Reynaldo Punzalan went to the Golden Lion, viewed its guest registry, and ran the names for warrants. He found that one of the names, Timothy Jorden, had two outstanding warrants. Punzalan and other deputies went to Jorden's assigned room and knocked. When a woman opened the door, the deputies entered and arrested Jorden. [*Court's footnote: Although Jorden notes that the police entered "without permission," he does not argue that their entry was without consent. The apparent reason is that police with a valid warrant need not obtain consent. See RCW 10.31.040; State v. Alldredge, 73 Wn. App. 171 (1994).]* On a table in the room, the deputies saw cocaine, which they seized. [*Court's footnote: The deputies also seized a firearm that Jorden later pled guilty to possessing unlawfully. Jorden does not separately challenge from firearm conviction, so we omit it from the text.]*

ISSUE AND RULING: Did the deputy violate the privacy protections under article one, section seven of the Washington constitution by randomly reviewing the guest register of the motel? (ANSWER: No)

Result: Affirmance of Pierce County Superior Court conviction of Timothy Enrique Jorden for possessing cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Article I, § 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." We agree with both parties that Article I, § 7 should be analyzed independently of the Fourth Amendment to the United States Constitution. We do not consider the Fourth Amendment, which the parties agree permits the police to do what they did here.

Given the wording of Article I, § 7, we must determine whether, when police view a motel guest's registration form at the motel's front desk, they disturb the guest's "private affairs." "This determination is not 'merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold." It requires an assessment of "the nature and extent of the information that police learn about a person's personal contacts and associations" and "the extent to which the subject matter is voluntarily exposed to the public." The defendant has the burden of showing that his "private affairs" were disturbed in a way that implicates Article I, § 7.

The Washington Supreme Court has applied these principles in several cases. The court has held, for example, that the police disturb a person's "private affairs" by searching his or her garbage, by viewing his or her long distance phone records, or by stopping his or her car at a roadblock established to detect and arrest intoxicated drivers. On the other hand, the court has held that the police do not disturb a person's "private affairs" by viewing his or her power consumption records [*Court's footnote: In re Personal Restraint of Maxfield, 133*

Wn.2d 332 (1997) ***Dec 97 LED:16***] or his or her Department of Licensing driver's record [*Court's footnote: State v. McKinney, 148 Wn.2d 20 (2002* ***Jan 03 LED:05****)*].

Except possibly for power consumption records, these holdings can be distinguished by ascertaining the degree to which the intrusion is likely to reveal affairs conducted in private, as opposed to affairs conducted in public. Garbage, phone records, and stopping a car are likely to disclose much about what goes on inside the home or car. Driving records compile activities that have transpired in public.

Conversely, these holdings cannot be distinguished by analyzing whether the intrusion will reveal a person's name, address, or date of birth. That was likely in each of the cases just discussed, yet some went one way and some went the other.

Based on these observations, we hold that when the police viewed Jorden's motel registration form, they did not disturb his "private affairs" within the meaning of Article I, § 7. Although no one put Jorden's registration form (or even a sample form) into evidence here, we infer that it showed that he had checked in, his room number, and the information on his driver's license or other photo ID (e.g., name, address, date of birth, physical description and picture, driver's license number). Checking into the motel was a very public act that anyone could observe, and thus was not a "private affair," just as walking to his room and any later exits or re-entries were not "private affairs." His physical description and appearance were open to the public and thus not a "private affair." He did not have a reasonable expectation of privacy in his name or, at least under the circumstances here, in his address or date of birth. As far as our record indicates, the registration form said nothing that would reveal private activities inside the room. Jorden bore the burden of showing that his "private affairs" had been disturbed, and he did not sustain that burden here.

The parties cite and debate RCW 19.48.020, but it does not help here. Although it requires that registration records be maintained, it neither creates nor refutes a privacy interest in such records.

Based on the foregoing, we conclude that the police did not intrude into Jorden's "private affairs" within the meaning of Article I, § 7, and that the trial court did not err by denying his motion to suppress.

[Footnotes and citations omitted]

LED EDITORIAL NOTE: In a footnote, the Jorden Court notes that the Ninth Circuit of the U.S. Court of Appeals previously ruled that randomly checking motel registration records does not violate the Fourth Amendment. See U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000) October 2000 LED:04.

QUESTIONING OF DUI SUSPECT ON THE STREET HELD TO NOT BE A "PRIVATE CONVERSATION" UNDER CHAPTER 9.73 RCW, AND THEREFORE ANY VIOLATION OF IN-CAR RECORDING STATUTE IS HELD NOT TO PRECLUDE ADMISSION OF AUDIOTAPE INTO EVIDENCE; ALSO, TELLING SUSPECT HE IS BEING "RECORDED" WITHOUT SPECIFYING "AUDIO" RECORDING, HELD SUFFICIENT WARNING UNDER RCW 9.73.090 IN-CAR RECORDING PROVISIONS

Lewis v DOL, ___ Wn. App. ___, 105 P.3d 1029 (Div. I, 2005)

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

Department of Licensing v. Lewis

Around 1:00 a.m. on December 12, 2002, Officer Douglas Faini of the Auburn Police Department observed Steven Lewis driving over the speed limit. He saw Lewis turn quickly into a restaurant parking lot without signaling and throw a beer can out of the window just before he stopped. A video camera mounted in Officer Faini's police car made audio and video recordings of the conversation between Faini and Lewis.

Officer Faini approached Lewis' truck and began talking to him. Lewis was totally unresponsive and visibly intoxicated. Officer Faini called for additional officers to help arrest Lewis, who would not get out of his truck. After repeated warnings with no response from Lewis, another officer used a taser to get him out of the truck. At this point the officers handcuffed Lewis, and Officer Faini arrested him and placed him in the police car.

At the police station, Officer Faini read Lewis the statutory implied consent warnings. Lewis refused to take a breath test. Based on Officer Faini's sworn report, DOL revoked Lewis' driver's license for two years. Lewis contested the revocation at a DOL administrative hearing, where he moved to suppress all the State's evidence because Officer Faini violated his privacy act rights by not advising him he was being recorded. The hearing examiner upheld the revocation, finding that Officer Faini had advised Lewis that he was being recorded. Lewis appealed this decision to King County Superior Court, which overturned the revocation. It ruled that substantial evidence did not support DOL's finding that Officer Faini advised Lewis about the recording, and that the privacy act's exclusionary rule required suppression of all evidence before the hearing examiner.

State v. Higgins

On the evening of October 20, 2001, based on a witness's report of erratic driving, State Trooper S.M. Cheek began following the car Kenneth Higgins was driving. After observing sustained weaving, Trooper Cheek activated his lights and pulled Higgins over. A video camera mounted in Cheek's police car made audio and video recordings of the conversation between Trooper Cheek and Higgins.

When Trooper Cheek approached the driver's side window, his first statement to Higgins was "I want to let you know you're being recorded." Higgins responded to Trooper Cheek's questions but when he refused to perform field sobriety tests, Trooper Cheek arrested Higgins on suspicion of DUI. After putting Higgins in the police car, Trooper Cheek read him his Miranda rights and asked "Do you understand these rights? I'm going to remind you that you are being recorded." When they arrived at the police station, Officer Cheek took Higgins inside, and neither of them appears on the video portion of the recording again. But the audio portion of the recording continued during their conversation inside the station.

> On May 14, 2003, the King County District Court granted Higgins' motion to suppress the recording and all evidence obtained during the recording. Higgins argued that Trooper Cheek violated his privacy act rights by not properly advising him he was being recorded. The State appealed to the King County Superior Court, which reversed the district court's suppression order and remanded for a ruling consistent with its conclusion that the conversations were not private, or if they were, that Trooper Cheek complied with the advisement requirement in RCW 9.73.090(1)(c).

ISSUES AND RULINGS: 1) Chapter 9.73 RCW generally prohibits single-party-consent recording of "private conversations." The phrase "private conversations" is not defined in the statute, but case law defines the phrase to mean " '... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.' " RCW 9.73.090(1)(c) authorizes in-car police audio and video recording in certain circumstances. Where RCW 9.73.090(1)(c) applies to police conversations with a DUI suspect on the street, is the conversation "private" such that failure to comply with RCW 9.73.090(1)(c) requires suppression of evidence relating to the conversation/questioning? (ANSWER: No)

2) RCW 9.73.090(1)(c) requires that an officer who is making a recording advise any person being recorded that "a sound recording is being made." The WSP Trooper in the Higgins case advised Higgins: "I want to let you know you're being recorded." Was the advisement adequate even though the Trooper did not use the phrase "sound recording?" (ANSWER: Yes)

Result: Reversal of King County Superior Court's reversal of DOL license revocation as to Steven A. Lewis; affirmance of King County Superior Court's reversal of District Court's dismissal of DUI chare against Kenneth D. Higgins.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> I. *Does the Privacy Act Apply?*
>
> Washington's privacy act prohibits intercepting or recording any private conversation or communication without the consent of all persons involved. Any information obtained in violation of this rule is inadmissible in Washington courts. RCW 9.73.090 exempts law enforcement personnel from the prohibitions of the general rule in certain instances. The exemption at issue here is the in-car video provision, RCW 9.73.090(1)(c). It creates an exception for "[s]ound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles," provided the recordings meet specified conditions.
>
> The general exemption language and the in-car video provision read as follows:
>
> > (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:
> >
> > .....
> >
> > (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that

> makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device which makes a recording pursuant to this subsection (1)(c) may only be operated simultaneously with the video camera. No sound recording device may be intentionally turned off by the law enforcement officer during the operation of the video camera.
>
> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the incident or incidents which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.
>
> A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

The Legislature has never defined "private" in the context of the Act, but we did so in State v. Forrester, [21 Wn. App. 855 (1978)] Relying on the dictionary definition, we held that the term meant " '... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.' " In determining whether a conversation is private, we consider the subjective intent of the parties involved. We also consider additional factors "bearing on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication; the location of the communication and the presence of potential third parties; and the role of the nonconsenting party and his or her relationship to the consenting party."

Both Lewis and Higgins concede, as they should, that their conversations with the arresting officers were not private under this definition.

Rather, they argue that when the Legislature enacted the in-car video provision, it expanded the Act to include non-private traffic stop conversations not exempted by that provision. In other words, they assert that if an in-car recording is not exempt, the captured conversation is per se covered by the Act regardless of whether it is private. DOL and the State respond that the in-car video provision does not expand the coverage of the Act to include non-private communications.

Lewis and Higgins argue that the Act applies *per se* to traffic stop conversations where the sound portion is recorded by a police car-mounted video camera unless the officer complies with the statutory conditions for an exemption. They argue that Washington case law already established that a roadside traffic stop was not private, *[Court's footnote: See Clark, 129 Wn.2d 211 (1996)* ***July 96***

LED*:07** *(holding that "conversations on public streets between the defendants and a stranger who happened to be an undercover police informant" are not private); State v. Bonilla, 23 Wn. App. 869, (1979) (conversations with police dispatcher are not private); State v. Flora, 68 Wn. App. 802 (Div. I, 1992)* ***July 93 LED:17 *(when arrestee recorded interaction with officer during arrest, court held the exchange was not private)]* and thus the Legislature had no reason to create an exception for roadside traffic stops under existing law. They maintain that the Legislature would not have enacted the in-car video provision unless it believed that the exceptions it contains were necessary because traffic stop conversations would otherwise fall within the scope of the Act. Finally, they assert that the State's interpretation of the statute renders RCW 9.73.090(1)(c) superfluous.

The State argues that in enacting the in-car video language, the Legislature did not change the established rule that the Act protects only private communications and conversations. It asserts that the provision established a "safe harbor" which allows police to record traffic stop communications without fear that a court would later determine that they were private and exclude them. It contends that rather than broadening the Act, the provision creates a new exception by defining limited conditions under which police can record even a private conversation without violating the Act and risking suppression of the evidence.

Lewis and Higgins do not point to anything in the statute or its legislative history supporting their contention that in enacting the in-car video provision, the Legislature implicitly created an entire class of non-private communications that are *per se* covered by the Act. Because the Act only covers "private" communications, the proviso in turn can only cover "private" communications. Nothing in RCW 9.73.090's plain language or legislative history indicates that the Legislature intended to protect non-private communications from recording or interception. If the Legislature wanted to effect such a major change in the scope of the privacy act, it would say so explicitly. We "will not assume that the Legislature would effect a significant change in legislative policy by mere implication."

Lewis and Higgins nonetheless assert that the provision becomes superfluous and meaningless unless the Legislature intended that traffic stop communications be protected by the Act. They rely on the Washington Supreme Court's reasoning in State v. Wanrow, [88 Wn.2d 221 (1977)]. There, the court held that the exemption in RCW 9.73.090(1)(a) for incoming phone calls to emergency personnel had no purpose unless the Legislature believed those calls were otherwise covered by the Act. It stated that "to interpret the privacy statute so that no portion of it is superfluous or insignificant, we must conclude that such telephone calls would fall within RCW 9.73.030(1) but for their exclusion by RCW 9.73.090."

But the Legislature responded to Wanrow by amending RCW 9.73.090(1)(a) to effectively nullify Wanrow's holding. Later, in State v. Clark, the Washington Supreme Court did not follow its analysis in Wanrow, but instead addressed the threshold issue of whether the conversations were private. It did not reach the question whether the recording qualified for an exemption because it held that the conversations were not private. This portion of Wanrow is no longer good law.

We agree with the State's argument that its interpretation does not render the in-car video provision superfluous or meaningless. RCW 9.73.090(1) expands an

exemption from the privacy act by allowing sound recordings of *private* conversations as long as the recordings are made in accordance with the statutory conditions. This is a legitimate legislative purpose. The amendment was designed to permit the police to record a traffic stop conversation even if a court later ruled the conversation was private and the Act applies. This interpretation does not render the provision superfluous or meaningless, and it is supported both by the plain language and legislative history of the provision. Contrary to Lewis' and Higgins' argument that the provision reflects an intent to give traffic stop conversations more protection under the privacy act, a review of the legislative history leads to the opposite conclusion. For example, the House report states:

> People pulled over for a traffic stop have a lower expectation of privacy than situations involving wiretaps. Allowing sound recordings in this context will help ensure officer safety, provide an important evidentiary tool, and create a checks and balances system for officer conduct.

In passing the in-car video provision, the Legislature intended "to provide a very limited exception to the restrictions on disclosure of intercepted communications."

The Legislature enacted the provision with the expectation that it would facilitate broader use of sound recordings in traffic stop situations where potentially private conversations occurred. [*Court's footnote: For example, it would allow police to record a conversation between two passengers in the car even though the passengers intended the conversation to be private if the officer complied with the statutory conditions. The content of the "private" conversation could then be offered in a court proceeding.]* As Lewis and Higgins acknowledge, sound recordings of non-private traffic stop communications were already allowed prior to 2000. If the Legislature intended to expand the ability of police to audio record traffic stop communications, it had to allow recording of certain private communications because public communications could already be recorded. The in-car video provision dictates the conditions under which law enforcement can record a traffic stop conversation even though the communication may be "private."

Section 9.73.090(1) clearly states that the Act's general rule, RCW 9.73.030, does *not apply* in certain "instances." The general rule prohibits the interception or recording of private communications. In the designated instances where the general rule does not apply, private communications may be intercepted or recorded. The in-car video provision is simply one of those instances in which police may record private traffic stop communications. It does not change the rule that the Act covers only private communications.

To adopt Lewis' and Higgins' interpretation would require us to infer the Legislature intended to make a significant change in the scope of the Act. But nothing in the text of the Act or its legislative history indicates that the Legislature intended the in-car video provision to change the rule that the Act covers only private communications, and we cannot infer that it did. Thus, the threshold determination in any privacy act claim remains whether a given communication is "private." Because the communications at issue here were not private, the in-car video provision does not apply.

II. *Advisement Requirement Under In-car Recording Provisions*

Higgins argues that the in-car video provision requires that police use specific language when advising the driver that the officer is making an audio recording. Although unnecessary to our holding, we discuss the issue to provide clarification for the lower courts and law enforcement.

One of the conditions of the in-car video provision requires that the law enforcement officer advise

> any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video. [RCW 9.73.090(1)(c)]

Trooper Cheek advised Higgins: "I want to let you know you're being recorded." Higgins argues that Cheek had to advise him that a "sound" recording was being made. The district court agreed with him, holding that the "legislative intent and clear and unambiguous language of RCW 9.73.090 mandates the officer inform a defendant a 'sound recording' is being made and the advice made part of the taped record. Both are absent here." The State argues that no specific language is required and that Trooper Cheek's statement properly informed Higgins he was being sound recorded. As stated above, Washington courts have not interpreted RCW 9.73.090(1)(c).

Although the statute requires that the officer inform the detained person that a sound recording is being made, it does not dictate what language an officer must use. If the Legislature wanted to require officers to use only specific words, it could have said so. The context of the advisement requirement supports our ruling that Officer Cheek's advisement was sufficient.

The in-car video provision also explicitly states that a video recording without sound requires no notice. The State argues that the Legislature used the word "sound" simply to distinguish between an audio recording and a video recording. The Legislative history supports the State's argument. In interpreting a statute, we may consider the differences between sequential drafts of a bill. The third version of the in-car video provision was the first to contain the advisement requirement, stating only that the officer must advise that a "recording is being made." There is no mention of "sound," and this version also did not reference video recording. The fourth and final version of the provision was the first time the advisement requirement included the word "sound." It was also the first time the Legislature included language to clarify that no advisement was necessary for video recordings. This demonstrates that the reason the Legislature used the word "sound" was to differentiate between recordings which require notice and those that do not. Nothing in any of the drafts of the amendment indicates that the Legislature wanted to require that officers use specific words in advising a detainee.

The plain language and legislative history of the advisement requirement indicates that the advisement need only include language that would put a reasonable person on notice that the conversation was being sound recorded.

> The State argues that the language Trooper Cheek used put Higgins on notice that he was being sound recorded. While including the word "sound" or "audio" would be more explicit, we agree that it is not necessary. In fact, it might have a misleading effect because a driver could interpret the statement to mean there was no video recording.
>
> A reasonable person would know that the statement "you're being recorded" means they are being videotaped or audio taped or both. Even if Higgins assumed he was only being videotaped, a claim he does not make, it is common knowledge that sound typically accompanies video recordings. We hold that a reasonable person would understand that the statement "you are being recorded" includes sound.

[Some citations omitted]

WARRANTLESS SEARCH OF TRUCK HOPPER FOLLOWING STAGED GARBAGE PICKUP VIOLATES ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION UNDER THE GARBAGE-CAN PRIVACY RULE OF STATE V. BOLAND

State v. Sweeney, ___ Wn. App. ___, ___ P.3d ___, 2005 WL 353246 (Div. III, 2005)

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

> Thomas Sweeney was charged with manufacturing methamphetamine while armed with a firearm. The charges arose after police served a warrant and discovered a methamphetamine laboratory in the closet of Mr. Sweeney's bedroom. The warrant was based on evidence uncovered during a search of Mr. Sweeney's garbage can.
>
> The charges resulted from an investigation conducted by [a detective] of the Spokane County Sheriff's Department. As part of this investigation, [the detective] contacted the City of Spokane Refuse Department and expressed his desire to obtain the garbage collected at Mr. Sweeney's address. The detective requested that this garbage be placed in an empty truck hopper so that he would be able to inspect the garbage.
>
> Peter Borg, a city refuse collector, was assigned to assist the detective by obtaining the garbage to be searched. Mr. Borg usually worked as a floater, but on this date he was assigned to collect garbage from Mr. Sweeney's address and three other houses. Mr. Borg was instructed to use a semi-automated truck. This type of truck does not automatically mix all of the garbage; instead, the driver must push a lever. In contrast, the automated trucks automatically dump all collected garbage into a common container.
>
> Accompanied by the detective, Mr. Borg collected the garbage from the first three houses near Mr. Sweeney's address. Mr. Borg was then instructed to clean out the hopper. With the hopper empty, Mr. Borg then picked up the garbage from Mr. Sweeney's address and dropped it into the hopper. The detective instructed Mr. Borg to drive the truck to the end of the block. Once there, [the detective] searched through the garbage and removed several items. Contrary to department policy, Mr. Borg did not report the detective for going through the garbage, even though garbage collectors are routinely instructed to report persons who do so.
>
> After [the detective] went through the garbage, Mr. Borg cycled the remainder of the garbage into the truck's container and then went to his supervisor for his next

job assignment. Mr. Borg did not complete the rest of the route by Mr. Sweeney's house, but, instead, was sent out on a recycling route.

During his search of the garbage, [the detective] found evidence of iodine, pseudoephedrine, and matchbooks with striker plates missing. Based on his training, [the detective] believed this evidence indicated that Mr. Sweeney was manufacturing methamphetamine. Accordingly, a warrant was obtained to search Mr. Sweeney's residence.

At the suppression hearing, Mr. Sweeney argued that the warrantless search of the garbage was unlawful and that this unlawful search invalidated the subsequent search warrant issued for his residence. When the court concluded that the search of the garbage was unlawful, the court entered an order terminating the case. The State appeals.

ISSUE AND RULING: Did the search of the garbage truck hopper following the staged pickup of Sweeney's garbage violate Sweeney's privacy rights under article 1, section 7 of the Washington constitution as interpreted in State v. Boland, 115 Wn.2d 571 (1990)? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court orders suppressing the evidence and dismissing charge of manufacturing methamphetamine against Thomas Allen Sweeney.

Status: The prosecutor has petitioned the Washington State Supreme Court for discretionary review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Article I, section 7 of the Washington State Constitution provides that: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Consequently, when considering an alleged violation of a privacy interest, Washington courts ask whether the State has unreasonably intruded into a person's private affairs.

In addressing this question, the court must consider the person's subjective expectation of privacy and whether this expectation is one that a citizen of this state is entitled to hold.

The issue here is whether an individual has a privacy interest in garbage collected from the curb by a municipal garbage collector that is intentionally kept separate from other garbage on the collection route and then immediately made available for law enforcement to search. The seminal Washington case discussing an individual's privacy interest in garbage placed by the curb is State v. Boland, 115 Wn.2d 571 (1990).

In Boland, the Washington Supreme Court held that Washington Constitution article I, section 7 provides greater protection of a person's privacy interest in his or her garbage than its federal counterpart, the Fourth Amendment. Mr. Boland placed his garbage in a covered container for collection at the curb. On four occasions, police officers came to the Boland residence at night and emptied the contents of the garbage can into a plastic bag and took the contents to the police station. Based on the evidence obtained from the collected garbage, police obtained a search warrant for Mr. Boland's residence.

The Boland court concluded that under these facts, law enforcement had unreasonably intruded on Mr. Boland's private affairs. The court concluded that

"average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion." The court further noted that Mr. Boland's trash "was in his can and sitting on the curb in expectation that it would be picked up by a licensed garbage collector." Significantly, the court determined that this fact "leads us to the conclusion that it falls squarely within the contemplated meaning of a 'private affair.' " Furthermore, the court concluded that the usual exceptions to the warrant requirement--plain view and exigency--also applied to garbage cans.

Here, Mr. Sweeney placed his garbage in a covered can at his curb. And, like Mr. Boland, Mr. Sweeney had the reasonable expectation that his garbage would be collected by a licensed garbage collector.

The State argues that Mr. Boland had no privacy interest in the garbage once it was collected from his curb by a licensed garbage collector. In other words, the State asserts that the court need not make an inquiry into the defendant's expectation because the privacy interest attaches to the garbage and ceases to exist once the garbage is collected. To support this argument, the State relies on two Division Three cases, State v. Rodriguez, 65 Wn. App. 409 (1992) **Oct 92 LED:06**; State v. Hepton, 113 Wn. App. 673 (2002) **Feb 03 LED:15**; and language in the Boland dissent.

Rodriguez and Hepton are distinguishable. In Rodriguez, this court concluded that Mr. Rodriguez had no privacy interest in garbage placed in the community dumpster serving his apartment complex. Similarly, this court concluded that Mr. Hepton had no privacy interest in garbage he placed on a neighbor's property.

In the Boland dissent, the minority read the majority's decision to conclude that "garbage in the can retains a privacy interest requiring a search warrant." The minority also concluded that the majority decision "does not require that once the trash is out of the can it be commingled before a warrantless search can occur." Accordingly, the minority reasoned that the majority decision created a distinction where "[p]olice merely have to wait until the trash is carried a few feet further than the curb and is emptied into the collection bin of the garbage truck before engaging in a warrantless search."

We believe the Boland minority mischaracterizes the majority opinion. The majority opinion, applying Washington law, focused on the citizen's expectation of privacy and the reasonableness of the governmental intrusion into Mr. Boland's private affairs. The majority opinion should not be read as a statement that this privacy interest attaches to the garbage and then ceases to exist once the garbage is placed in the can. Moreover, the Boland majority did not consider the issue of commingling or the question as to the nature of a warrantless search after the garbage is collected by a garbage collector.

This reading of Boland is supported by a Division One case, State v. Graffius, 74 Wn. App. 23 (1994) **Oct 94 LED:18**. In Graffius, the court concluded that a police officer's intentional look into a partially-open garbage can placed on the curtilage was not an unreasonable intrusion into Mr. Graffius's privacy. The court did not limit its inquiry to the question of whether Mr. Graffius had placed his garbage in the can. Instead, the court examined whether the officer had legitimate business to enter the curtilage and whether the items discovered were in plain view. Graffius, like Boland, demonstrates that the privacy right at issue here must be evaluated in terms of the reasonableness of the expectation of

> privacy and the reasonableness of the governmental intrusion. Accordingly, this privacy right is not limited by the location of the garbage or the act of placing the garbage in the can.
>
> We need not address the questions associated with the commingling of garbage after it is taken from the curb because Mr. Sweeney's garbage was not commingled with other garbage. Here, Mr. Sweeney had a reasonable expectation that his garbage would be collected from his curb, mixed with other garbage, and taken to a refuse facility. He did not have an expectation that his garbage would be collected separately, taken a block away, and made available for inspection by a law enforcement officer. Applying Boland to the facts here, there was an unreasonable intrusion by the government into Mr. Sweeney's private affairs.

[Some citations omitted]

LED EDITORIAL COMMENT: As noted above, the prosecutor has requested discretionary review by the Washington Supreme Court in Sweeney. Practicalities of evidence-gathering aside, a more favorable analysis might have been applied if the detective had not directed the garbage truck driver to deviate from following his usual route and using his usual equipment. Officers seeking to test the boundaries of Boland would be well-advised to coordinate with their local prosecutors in advance of taking action.

ELECTRONIC INTERCEPT-AND-RECORD ORDER UNDER PRIVACY ACT (RCW 9.73) WAS SUPPORTED BY A SHOWING THAT OTHER NORMAL INVESTIGATIVE PROCEDURES WOULD BE "UNLIKELY TO SUCCEED"

State v. Johnson, ___ Wn. App. ___, 105 P.3d 85 (Div. II, 2005)

Facts and Proceedings below:

The defendant's brother, Sean Correia, testified at trial that he witnessed a bludgeoning murder committed by his sister, Sophia Johnson. The victim was Sophia's mother-in-law. Mr. Correia's further testimony was that after the murder he and his sister (Johnson) tried to get rid of all of the evidence of the murder.

The police investigation of the murder led them to Mr. Correia. When police questioned him, he admitted his involvement in the burglary that preceded the murder and in the cover-up of the burglary and murder. Mr. Correia agreed to allow police to record telephone conversations between himself and his sister, Sophia. The police applied for a court order to allow the recording. The application of RCW 9.73.090 and 9.73.130 provided in relevant part as follows:

> 17. A statement of the relevant facts concerning the investigation of Sophia S. Johnson has been set forth above. Normal investigative procedures have not been tried because it appears that Sophia Johnson has provided false statements to the investigators regarding her involvement in this case and she is likely to engage Mr. Correia in a conspiracy to cover up their involvement in the murder. The investigation will be greatly enhanced with the ability to record the conversations occurring between Correia and Johnson and any discussion, which they may have about the defendant's recent activities. Such a record of statements would be far superior to the circumstantial physical evidence and would tend strongly to corroborate existing information. Utilization of the electronically recorded conversation will present the clearest and most accurate record of what is discussed between Correia and Johnson as those discussions

> bear upon Johnson's own criminal liability under and would become evidence in any prosecution thereunder.

The superior court approved the application, and police obtained some incriminating evidence when they recorded a phone conversation between the defendant (Sophia) and her brother (Mr. Correia).

Sophia Johnson was charged with the murder. Prior to trial, she moved unsuccessfully to suppress the recording. She was convicted of first degree felony murder after a jury trial.

ISSUE AND RULING: Did the application for court authorization to conduct the interception and recording of the phone conversation satisfy RCW 9.73.130(3)(f) which requires in this context a showing that "other normal investigative procedures" would be "unlikely to succeed if tried"? (ANSWER: Yes)

Result: Reversal of Clark County Superior Court first degree felony murder conviction of Sophia S Johnson on grounds not addressed in this **LED** entry (improper removal by the trial court of a juror and improper communication by the bailiff with jurors during deliberations); case remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under RCW 9.73.130(3), an application for authorization to record communications or conversations must include [among other things]:
>
> > A particular statement of the facts relied upon by the applicant to justify his belief that an authorizations should be issued, including:
> >
> > ....
> >
> > (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.
>
> A judge issuing an intercept order has considerable discretion to determine whether the statutory safeguards have been satisfied. State v. Cisneros, 63 Wn. App. 724 (1992) **May 92 LED:13**. We do not review the sufficiency of the application de novo. Rather, we will affirm if the facts set forth in the application are minimally adequate to support the court's determination.
>
> The showing required of law enforcement under RCW 9.73.130(3)(f) is not one of absolute necessity. But police must either "try or give serious consideration to other methods and explain to the issuing judge why those other methods are inadequate in the particular case." State v. Manning, 81 Wn. App. 714 (1996) **Sept 96 LED:14.** Mere boilerplate language is antithetical to this particularity requirement.
>
> In this case, the application contains more than boilerplate recitals--it reflects consideration of other techniques and informs the court of the likelihood of their inadequacies. The application establishes that attempting to elicit information from Johnson through police interviews would be futile because she was not forthcoming regarding her involvement in the case. She informed police that she was expecting to meet Mrs. Johnson for lunch on January 10, 2002, but made no mention of the fact that she was present at Mrs. Johnson's home at the time of the murder. Additionally, the application establishes that normal investigative

> techniques to locate and seize items related to the crime would likely fail because Johnson had worked with Mr. Correia to conceal and destroy any evidence linking her to the murder. Mr. Correia informed police that Johnson had entered and returned from Mrs. Johnson's residence with full garbage bags, which she asked him to dispose of; thrown "something" from the window of Mrs. Johnson's van as they exited the scene of the murder; and concealed their bloody clothing. In light of the fact that we determine whether the facts supporting an application to record are *minimally adequate* to support the court's determination, the application was sufficient to support the order authorizing the interception and recording of Johnson's conversation.

[Some citations omitted]

LED EDITORIAL NOTE: This case did not involve the 1989 amendments to chapter 9.73 RCW allowing single-party consent-agency-authority interceptions under RCW 9.73.210 and 9.73.230. The latter sections allow agency-authorized interceptions in specified drug-investigation circumstances. There is no requirement under either of those sections of the statute that a showing of impracticability of other investigative methods be shown. Only court-authorized interceptions under RCW 9.73.130 and 9.73.090 require the kind of showing that was the subject of this appeal.

EXECUTION OF ANTICIPATORY SEARCH WARRANT HELD UNLAWFUL BECAUSE ANTICIPATED TRIGGERING EVENT – ILLEGAL DRUGS BEING TAKEN INTO RESIDENCE FOLLOWING CONTROLLED DELIVERY – NEVER OCCURRED

State v. Nusbaum, ___ Wn. App. ___, ___ P.3d ___, 2005 WL 468877 (Div. II, 2005)

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

> In February 2003, United States Customs Inspectors in Miami, Florida intercepted a package sent from Lima, Peru, that was addressed to David Nusbaum at his residence on Bainbridge Island, Washington. Customs officers opened the package and found 120 flunitrazepam tablets. Flunitrazepam is a Schedule IV controlled substance in Washington. WAC 246-887-170.
>
> Customs turned the package over to [a] WestNET [West Sound Narcotics Enforcement Team] Detective, who then applied for a warrant to search Nusbaum's residence. In the complaint for search warrant, [the detective] stated that WestNET detectives intended to use a field supervisor from the shipping company to make a controlled delivery of the package containing the pills to Nusbaum's residence. [The detective] stated that before delivery, WestNET would have a technician install a radio device in the package. The device was designed to emit a tone that would speed up when the package was opened. [The detective] explained that WestNET detectives would monitor this tone and once the package was opened, they would serve the warrant on the residence.
>
> [The detective] also asked permission to serve the warrant even if the package was not opened in a timely manner or if there was a technological malfunction. In addition, he asked permission to serve the warrant if "the utilization of the installed device is not practical due to equipment malfunction during or after the installation of the device." Nevertheless, he stated that "[t]he warrant would only be served, provided that the package containing the flunitrazepam is delivered to the residence ... and [is] accepted by David Nusbaum or another unknown person at the residence acting on his behalf."

[The detective] opined that "[b]ased upon the facts listed in this affidavit, your affiant has probable cause to believe, and does, in fact, believe, that there is evidence, fruits, and/or instrumentalities of violations of the Uniformed Controlled Substances Act in and on the premises and/or vehicles" at Nusbaum's property. [The detective] also requested permission to search for weapons and ammunition, among other enumerated items, including papers and records related to the sale ordering, transporting, purchase, possession, and distribution of flunitrazepam. The judge signed the warrant authorizing a search of Nusbaum's residence.

The issued warrant did not state that it was an anticipatory or contingent warrant; it did not state that it could be served only if the pills were delivered and accepted; and it did not describe the controlled delivery plan that [the detective] outlined in the complaint. Instead, it authorized an immediate search of Nusbaum's residence based on probable cause that there was "evidence, fruits, and/or instrumentalities" of a violation of the Uniformed Controlled Substances Act at his house, and that evidence was "presently being kept, stored, or possessed" on or about the premises.

A few days later, a detective from WestNET dressed as a delivery person arrived at Nusbaum's residence and met Nusbaum on the front porch. Nusbaum testified that he signed for the package without having seen it first. The officer then started to hand the package to Nusbaum but, according to Nusbaum, as soon as his fingers touched the package, the detective "yanked it back, said he needed to get a receipt on the ground, which was about 30 feet away from the front door of the house." Nusbaum followed him to retrieve the receipt, at which time several Special Weapons and Tactics (SWAT) agents jumped out from behind the bushes. Nusbaum never opened the package or took it inside his residence. Officers arrested Nusbaum outside his residence. The officers served the warrant, searched the residence, and found additional pills of flunitrazepam, "a fair size quantity of marijuana," several rifles, and a couple of handguns. (Nusbaum informs us that police confiscated 22 firearms total: 14 rifles and shotguns and 7 handguns.)

Later, Nusbaum pleaded guilty to one count of possession of a controlled substance (flunitrazepam). Then Nusbaum moved under CrR 2.3(e) for return of the firearms seized during the search of his residence. The State moved for forfeiture of the firearms. After a hearing, the court denied Nusbaum's motion and granted the State's motion to forfeit the firearms. The court found that the package was "delivered" to the residence, that Nusbaum "accepted" it on the front steps of his home, and that probable cause supported the warrant. The court also ruled that because the firearms were inside his home and he was arrested "on the steps" of his house, Nusbaum possessed and controlled the weapons for purposes of RCW 9.41.098. *[Court's footnote: RCW 9.41.098(1)(d) authorizes the court to order forfeiture of a firearm that is possessed by or under the control of a person when he commits or is arrested for committing a felony.]*

ISSUE AND RULING: Where the anticipated triggering event under the anticipatory search warrant – someone at the residence accepting the package and taking it into the residence – never occurred, was the search of the residence lawful? (ANSWER: No)

Result: Reversal of Kitsap County Superior Court conviction of David Alan Nusbaum for felony possession of a controlled substance, Flunitrazepam; and remand to Superior Court to enter an order allowing Nusbaum to disposes of the seized firearms without personally taking possession

of them. **[LED EDITORIAL NOTE: The Nusbaum Court's analysis of the forfeiture issue is not addressed in this LED entry.]**

ANALYSIS: (Excerpted from Court of Appeals opinion)

> A search warrant application must state the underlying facts and circumstances on which it is based. State v. Thein, 138 Wn.2d 133 (1995) **Aug 99 LED:15**. Probable cause exists if the affidavit supporting the warrant presents facts sufficient for the issuing magistrate to reasonably infer that criminal activity is occurring or that contraband exists at the place to be searched; thus, we look for a nexus between the criminal activity or contraband and the place to be searched. An officer's unsupported conclusions or speculations are not enough. But an issuing magistrate may draw reasonable inferences from the surrounding circumstances. Whether facts set out in an affidavit are sufficient to conclude that probable cause exists is a question of law; thus, our review is de novo.
>
> Here, the nexus between the flunitrazepam and the Nusbaum residence was dependent on delivery and acceptance of the package. In particular, the complaint stated that the warrant "*would only be served,* provided that the package containing the flunitrazepam is delivered to [Nusbaum's] residence." A warrant that is " 'conditioned upon future events which, if fulfilled, would create probable cause' " is an anticipatory warrant. State v. Gonzalez, 77 Wn. App. 479 (1995) **Aug 95 LED:16**. Assuming the warrant here was a valid anticipatory warrant, it was conditioned on delivery and acceptance of the package; without this, the issuing magistrate could not reasonably infer that criminal activity would occur in or contraband would exist at Nusbaum's residence. Because the officers did not deliver and Nusbaum did not accept the package, the condition was not met and the warrant was invalid. *[Court's footnote: The State does not contend that the condition was met when Nusbaum briefly touched the package on his front porch. If Nusbaum's touch had satisfied the condition, then the condition was insufficient to establish probable cause because until Nusbaum or someone took the package into the home, the issuing magistrate had no reason to believe that criminal activity was occurring or contraband existed in the home.]*
>
> But the State argues that delivery of the package is irrelevant because the issuing magistrate had probable cause to believe "there would be evidence of the drug order in the house."
>
> Probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home. [Thein] And an officer's general conclusions about drug dealers' habits are, standing alone, insufficient to justify a search of a suspected drug dealer's home. [Thein] (holding that broad generalizations do not alone establish probable cause) State v. Olson, 73 Wn. App. 348 (1994) **March 95 LED:15** (stating "[a]n officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation").
>
> Absent the condition of delivery and acceptance, the issuing magistrate had only [the affiant detective]'s conclusory opinion that he believed "there is evidence, fruits, and/or instrumentalities of violations of the Uniformed Controlled Substances Act in and on the premises and/or vehicles described above." He then asked for and got permission to search for:

> Any and all: Flunitrazepam ... records books, research products ... [d]rug paraphernalia ... United States currency ... [e]vidence of occupancy ... receipts of real property transactions ... letters of credit, bank drafts ... money wrappers ... [t]elephone books and/or address books ... phone answering devices ... electronic equipment ... photographs or video recordings ... items used for surveillance.
>
> But [the detective] offered no specific facts to support his belief; he merely recited the familiar "drug dealers' habits" language, which alone is insufficient. [Thein]. Therefore, we find that the warrant was invalid and the search was illegal.

LED EDITORIAL COMMENTS: Evidence seized under an anticipatory search warrant will be admissible if: 1) the supporting affidavit shows that a future criminal event is probably going to occur; 2) the supporting affidavit shows a probable cause link to the anticipated criminal activity and the residence to be searched, and 3) the affidavit and the warrant each expressly identify the triggering anticipatory event (see U.S. v. Grubbs, 377 F.3d 1072 (9th Cir. 2004) Oct 04 LED:04). In the case of controlled substances packages intercepted and then transmitted in a controlled delivery, the affidavit and warrant must also show that the drugs are going to be taken into the target residence, as opposed to merely being delivered to a P.O. Box (see State v. Goble, 88 Wn. App. 503 (Div. II, 1997) Jan 98 LED:15). Finally, per the ruling in Nusbaum, the triggering event, i.e., the taking of the drug package into the residence by someone at the residence, must actually occur.

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ATTORNEY GENERAL OPINION ADDRESSES RESPONSIBILITY OF COUNTY JAILS TO ACCEPT FOR BOOKING PERSONS ARRESTED BY WSP AND OTHER STATE LAW ENFORCEMENT OFFICERS (AGO 2004 No. 4)

In a formal Attorney General Opinion, AGO 2004 No. 4, issued December 23, 2004, the Washington Attorney General answered as follows several questions posed by a county prosecutor relating to the responsibility of county jail to accept for booking persons arrested and presented at the jail by Washington State Patrol officers or other state employees with law enforcement powers --

1. A county sheriff, as supervisor of the county jail, is required to accept arrestees presented at the jail for booking and housing pending disposition of charges, whether the arrestees are presented by county officers, by state patrol officers, or by other state employees with criminal law enforcement responsibilities.

2. The county sheriff does not have authority to (1) limit the hours during which the county jail will accept arrestees presented for booking by state officers, or (2) limit the number of arrestees that can be presented during a stated time period.

3. RCW 43.135.060 does not require the state to reimburse counties for the cost of booking or housing arrestees presented at the county jail by state patrol officers or other state employees, since this practice is neither a “new program” nor an “expansion of an existing program.”

The Attorney General Opinion can be accessed in its entirety at --

http://www.atg.wa.gov/opinions/2004/opinion_2004_4.htm

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.://www.ca9.uscourts.gov/] and clicking on "Opinions." Federal statutes can be accessed at [http://www.://www4law.cornell.edu/uscode]

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 2004, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 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].