Law Enforcement Digest

DECEMBER 2005

585th Basic Law Enforcement Academy – July 6, 2005 through November 9, 2005

President: Rodney Wright – King County Sheriff's Office
Best Overall: Ronald Doersch – Snohomish County Sheriff's Office
Best Academic: Ronald Doersch – Snohomish County Sheriff's Office
Best Firearms: Ronald Doersch – Snohomish County Sheriff's Office
Tac Officer: Officer William Shepard – Des Moines Police Department

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2005 LED SUBJECT MATTER INDEX

2005 LED SUBJECT MATTER INDEX -- LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2005 through and including this December 2005 LED. Since 1988 we have published an annual index each December. Since establishing the LED as a monthly publication in 1979, we have published four multi-year subject matter indexes. In 1989, we published a 10-year index covering LEDs from January 1979 through December 1988. In 1994, we published a 5-year subject matter index covering LEDs from January 1989 through December 1993. In 1999, we published a 5-year index covering LEDs from January 1994 through December 1998. In 2004, we published a 5-year index covering LEDs from January 1999 through December 2003. The 1989-1993 cumulative index, the 1994-1998 cumulative index, the 1999-2003 index, as well as monthly issues of the LED starting with January of 1992 are available on the "Law Enforcement Digest" page of Criminal Justice Training Commission - - go to CJTC Internet Home Page at: http://www.cjtc.state.wa.us and click on "Law Enforcement Digest".

ARMED-WITH-A-DEADLY-WEAPON SENTENCE ENHANCEMENT (RCW 9.94A.602)

Armed-with-a-deadly-weapon evidence held sufficient to support sentencing enhancement under RCW 9.94A.602 in relation to convictions for burglary and theft. State v. Willis, 153 Wn.2d 366 (2005) - March 05:08

Sentencing enhancements for being armed while committing crime of unlawful possession of a controlled substance does not have proof "element" of knowledge of presence of firearm. State v. Barnes, 153 Wn.2d 378 (2004) - March 05:11

Armed-with-a-deadly-weapon sentence enhancement not justified where driver in constructive possession of methamphetamine could not reach the gun without moving from driver's seat to passenger seat. State v. Gurske, 155 Wn.2d 134 (2005) – November 05:08

ARREST, STOP AND FRISK

Vehicle operator's advance consent to search vehicle was voluntary; but police seizure of passenger at gunpoint was not justified, and passenger's consequent abandonment of illegal drugs was involuntary. State v. Reichenbach, 153 Wn.2d 126 (2004) - January 05:02

Fourth Amendment does not restrict law enforcement use of dog to sniff at exterior of car at traffic stop if duration of stop not extended by sniffing, even though this sniffing may have expanded scope of traffic stop investigation; different rule might apply under Washington state constitution's article 1, section 7. Illinois v. Caballes, 125 S.Ct. 834 (2005) - March 05:03

Aggressive "felony stop" measures were justified by reasonable safety concerns and did not convert Terry seizure into an arrest. U.S. v. Sandoval, 390 F.3d 1077 (9th Cir. 2004) - March 05:06

Vehicle stop upheld based solely on registered owner's suspended driver's license status – pre-stop corroboration of the statutorily recognized reasonable suspicion that the driver is the suspended registered owner ordinarily is not required. State v. Phillips, 126 Wn. App. 584 (Div. III, 2005 – June 05:07

Idaho law on interstate fresh pursuit justified WSP trooper's pursuit and seizure of DUI suspect at Idaho hospital based on reasonable suspicion; also probable cause that was developed in the ongoing investigation justified a subsequent blood test. In re Richie, 127 Wn. App. 935 (Div. III, 2005) – August 05:11

Rankin's restriction against asking non-violator motor vehicle passengers for identification documents also bars asking such non-violator passengers for name, date of birth and area of residence. In re Brown, 154 Wn.2d 787 (2005) – September 05:17

Citizen informant and his report of a possible crime (gun possession by a youth) held not reliable and hence seizure is held unlawful where officers made seizure based on dispatch report of a 911 phone caller who gave his name and reported that a person he believed to be 17 years old was carrying a handgun. State v. Hopkins, 128 Wn App. 855 (Div. II, 2005) – October 05:09

Rankin rule does not prohibit officers from requesting ID or requesting identifying information from a person who is inside a parked car that is not the subject of a stop or other seizure. State v. Mote, __ Wn. App. __, 120 P.3d 596 (Div. I, 2005) – November 05:10

Washington Supreme Court's 2004 ruling in Green case barring custodial arrest for failure to transfer title is extended by Court of Appeals to Terry stop to investigate on reasonable suspicion. State v. Walker, __ Wn. App. __, 119 P.3d 399 (Div. III, 2005) – November 05:22. Status: The prosecutor has requested Washington Supreme Court review.

ATTEMPT (RCW 9A.28.020)

Defendant may be convicted of attempted possession of child pornography based upon the defendant's possession of materials that appear to be child pornography but may in fact not depict actual minors. State v. Luther, 125 Wn. App. 176 (Div. I, 2005) - March 05:21. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

BURGLARY (Chapter 9A.52 RCW)

As a "continuing offense," violation of a DV no-contact order held to be predicate offense justifying burglary charge. State v. Spencer, 128 Wn. App. 132 (Div. I, 2005) – December 05:21

CHILD PORNOGRAPHY (See "SEXUAL EXPLOITATION OF CHILDREN")

CIVIL LIABILITY

"Public duty doctrine" precludes agency civil liability in 911-response case where dispatcher never was able to communicate with hang-up 911 caller and therefore no

"special relationship" was created. Cummins v. Lewis County, 124 Wn. App. 247 (Div. II, 2004) - January 05:11. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

Federal civil rights lawsuit – regardless of the specific offense that officers identify at the time of arrest or booking, the known facts giving probable cause for a lawful arrest as to any crime will support the arrest for purposes of defending against section 1983 civil rights action under qualified immunity doctrine. Devenpeck v. Alford, 125 S.Ct. 588 (2004) - February 05:02

Federal civil rights lawsuit -- officer who shot suspect because he appeared to be a danger to bystanders and to other officers as he was attempting to flee is held entitled to qualified immunity in section 1983 civil rights action. Brosseau v. Haugen, 125 S.Ct. 596 (2004) - February 05:06

Based on agency relationship created under interlocal cooperation agreement, Snohomish county sheriff's office can be civilly liable for acts of "SNOPAC" in E911 case involving issues of "failure to protect" and "public duty doctrine". Harvey v. County of Snohomish (and others), 124 Wn. App. 806 (Div. I, 2004) - March 05:20. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

Under the particular facts of the case, search warrant for deadly weapons and evidence of gang membership justified officers in keeping occupants of target residence in handcuffs for duration of search; also, the officers' asking an occupant questions about immigration status did not render detention unlawful under the fourth amendment. Muehler v. Mena, 125 S.Ct. 1465 (2005) – May 05:02

Ninth circuit expands its "deadly force" definition to include force that creates "substantial risk of serious bodily injury;" court states that other federal circuit courts apply the same "deadly force" definition. Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005) – June 05:04

San Jose officers are denied qualified immunity in civil rights case because 1) they seized much more evidence during warrant searches than was "reasonable"; and 2) they shot some dogs due to lack of a prior reasonable plan for entry into the perimeter. San Jose Charter of the Hells Angles Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005) – August 05:08

For purposes of section 1983 civil rights action, there is no federal constitutional due process right to have police enforce a restraining order. Town of Castle Rock, Colorado v. Gonzales, 125 S.Ct. 2796 (2005) – September 05:02

California officers not entitled to qualified immunity on excessive force, deceiving-of-magistrate claims. Baldwin v. Placer County, 405 F.3d 778 (9th Cir. 2005) –September 05:06

Section 1983 civil rights action against police agency upheld in failure-to-protect case on grounds that police increased the risk by giving assault victims a "false sense of security." Kennedy v. City of Ridgefield, 411 F.3d 1134 (9th Cir. 2005) – September 05:12. Status: The City of Ridgefield is seeking further review.

"Vienna Convention on Consular Rights" – Civil liability held to be possible for police violation of this treaty. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) – November 05:02

COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES (RCW 9.68A.090)

Evidence held sufficient to support convictions for harassment and for communication with a minor for immoral purposes; search warrant withstands challenges based on tests for probable cause, particularity and staleness. State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) **–** May 05:15. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

DANGEROUS WEAPONS (RCW 9.41.280)

Juvenile student's 16-inch dagger with 10-inch blade held to be "dangerous weapon" under RCW 9.41.280, statute prohibiting "dangerous weapon" on K-12 school premises. State v. J. R., 127 Wn. App. 293 (Div. I, 2005) – December 05:21

DEFRAUDING OF PUBLIC UTILITY (Chapter 9A.61 RCW)

Evidence of "tampering" and of "furtherance of other crime" held sufficient to support conviction for first degree "defrauding of public utility." State v. Silva, 127 Wn. App.148 (Div. I, 2005) – August 05:19

DUE PROCESS

In failure-to-use-fish-guard case, State wins on issues of: 1) "open view," 2) Miranda-custody, and 3) seizing-of-property-without-prior-hearing. State v. Creegan, 123 Wn. App. 718 (Div. III, 2004) - January 05:13

Drivers' license suspensions based on conviction of certain criminal offenses are held constitutional. City of Redmond v. Bagby, 155 Wn.2d 59 (2005), and City of Bremerton v. Hawkins, 155 Wn.2d 107 (2005) – October 05:07

ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)

Mother violated privacy act, chapter 9.73 RCW, when she used speakerphone function to intercept a phone conversation between her daughter and her daughter's boyfriend. State v. Christensen, 153 Wn.2d 186 (2004) - February 05:09

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, 125 Wn. App. 666 (Div. I, 2005) – April 05:09. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

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, 125 Wn. App. 443 (Div. II, 2005) – April 05:18

One-party consent tape recording of victim's Oregon-to-Washington call admissible because call was made from Oregon, recording occurred in Oregon, and recording was instigated exclusively by an Oregon officer not acting in concert with Washington officers. State v. Fowler, 127 Wn. App. (Div. II, 2005) – August 05:17

Lewis rule applies to officers' activation of patrol car audio-video recording device – chapter 9.73 does not require suppression because street conversations are not "private." State v. Kelly, 127 Wn. App. 54 (Div. I, 2005) – August 05:23. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

EVIDENCE LAW

Confession suppressed under Evidence Rule 410 – nature and extent of prosecutor's participation in police interrogation gave defendant reasonable belief he was engaged in plea negotiation. State v. Nowinski, 124 Wn. App. 617 (Div. I, 2004) - February 05:17

For purposes of meeting hearsay exception for "excited utterance," the hearsay itself can be the evidence used to establish that the startling event occurred. State v. Young, 123 Wn. App. 854 (Div. I, 2004) - February 05:22; March 05:21.

Two rulings: 1) Miranda waiver and confession were "voluntary"; and 2) while trial judge should not have allowed detective to give opinion testimony that defendant had given "inconsistent" answers during interrogation, the judge's error was "harmless". State v. Saunders, 120 Wn. App. 800 (Div. II, 2004) - March 05:14

29-month-old child's statement to doctor held admissible under "medical diagnosis" hearsay exception and not "testimonial" under Crawford's Sixth Amendment "confrontation clause" interpretation. State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (Div. II, 2005) – June 05:11

"Frye test" not met for physician assistant's expert testimony that child victim's statement alone showed that sexual abuse occurred. State v. Dunn, 125 Wn. App. 582 (Div. III, 2005) – June 05:16

Prosecutor should not have elicited testimony of detective and of doctor regarding their assessment of the credibility of alleged victim of child sex abuse. State v. Kirkman, 126 Wn. App. 97 (Div. II, 2005) – June 05:18

Police officers' testimony regarding jail booking records was properly admitted under statutory "business records" exception to hearsay rule. State v. Iverson, 126 Wn. App. 329 (Div. I, 2005) – June 05:19

FIREARMS LAW (Chapter 9.41 RCW)

Proof of knowledge that weapon (short-barreled shotgun) is illegal to possess is not necessary to support conviction for possession of unlawful firearm. State v. Williams, 125 Wn. App. 335 (Div. II, 2005) - March 05:22; Aug 05:24. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

"Washout" provisions of sentencing laws irrelevant to question of whether person has predicate "conviction" under "unlawful possession of a firearm" law; also, juvenile adjudication is "conviction" under RCW 9.41.040, and the Legislature's expanding of RCW 9.41.040 did not violate due process protections. State v. Sweeney, 125 Wn. App. 77 (Div. III, 2005) - March 05:22

Conviction in foreign country does not count as a conviction under federal felon-in-possession-of-firearm law. Small v. U.S., 125 S.Ct 1752 (2005) – August 05:04

FIRST AMENDMENT (FREEDOM OF SPEECH)

San Diego police officer who marketed sex video featuring himself as a stripping and masturbating officer is not entitled to First Amendment free speech protection against firing. City of San Diego v. Roe, 125 S.Ct. 521 (2004) - February 05:09

GENERAL [COURT] RULE 31

Note: General Rule 31 for Washington courts protects privacy by limiting information provided in court filings. - January 05:23

HARASSMENT (Chapter 9A.46 RCW)

Evidence held sufficient to support convictions for harassment and for communication with a minor for immoral purposes; search warrant withstands challenges based on tests for probable cause, particularity and staleness. State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) **–** May 05:15. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

IMPLIED CONSENT AND RELATED LAW (RCW 46.20.308)

Evidence of driver's refusal to take breath test is admissible as evidence of guilty knowledge even where breath test, if taken, would not have been admissible. State v. Cohen, 125 Wn. App. 220 (Div. I, 2005) March 05:21

INTERROGATIONS AND CONFESSIONS (See also topical entry on "Vienna Convention on Consular Relations" below)

In failure-to-use-fish-guard case, State wins on issues of: 1) "open view," 2) Miranda-custody, and 3) seizing-of-property-without-prior-hearing. State v. Creegan, 123 Wn. App. 718 (Div. III, 2004) - January 05:13

Confession suppressed under Evidence Rule 410 – nature and extent of prosecutor's participation in police interrogation gave defendant reasonable belief he was engaged in plea negotiation. State v. Nowinski, 124 Wn. App. 617 (Div. I, 2004) - February 05:17

Stationhouse questioning of 17-year-old held "custodial" for Miranda purposes, but court's opinion fails to provide a description of all of the facts relevant to determining Miranda "custody". State v. Daniels, 124 Wn. App. 830 (Div. II, 2004) - March 05:12

Two rulings: 1) Miranda waiver and confession were "voluntary"; and 2) while trial judge should not have allowed detective to give opinion testimony that defendant had given "inconsistent" answers during interrogation, the judge's error was "harmless". State v. Saunders, 120 Wn. App. 800 (Div. II, 2004) - March 05:14

Miranda waiver did not go stale in fourteen hours; re-Mirandizing was not required. U.S. v. Rodriguez-Preciado, 399 F.3d 1118 (9th Cir. 2005) – May 05:07

Confession held "voluntary" despite arguably improper police-interrogator assertion to suspect that "whoever talks first will get the best deal"; also "accomplice" status established by evidence of presence-plus. State v. Trout, 125 Wn. App. 403 (Div. III, 2005) – May 05:09

Sixth Amendment's initiation-of-contact restriction is not triggered by a tribal court arraignment. U.S. v. Charley, 396 F.3d 1074 (9th Cir. 2005) – August 05:06

Miranda warnings were ok without a fifth warning regarding the "right to stop answering questions at any time." In re Dwayne Anthony Woods, 154 Wn.2d 400 (2005) – August 05:10

Game agent's approach to home via back driveway was lawful, and he had "open view" of elk carcass in poaching suspect's open garage; unlawfulness of agent's subsequent warrantless entry to seize carcass is irrelevant; and Miranda warnings were not required for non-custodial questioning. State v. Posenjak, 127 Wn. App. 41 (Div. III, 2005) – August 05:14

Officer's introductory remarks prior to Mirandizing custodial suspect did not destroy the effectiveness of the warnings. Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005) – September 05:15

In a ruling that may eventually be reviewed by the Washington Supreme Court, Division One of the Court of Appeals holds that an ambiguous Miranda "invocation" does not require police to interrupt their interrogation to ask clarifying questions. State v. Walker, State v. Garrison, __ Wn. App. __, 118 P.3d 935 (Div. I, 2005) – November 05:19

On reconsideration, court again holds that officer's questioning of suspect during a DV investigative stop—where officer told suspect he would be detained until officer could "clear it up" -- was custodial. State v. France, ___ Wn. App. ___, 120 P.3d 654 (Div. II, 2005) – December 05:17

JAIL OPERATIONS

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) - April 05:23

JUVENILE LAW (Title 13 RCW)

All juvenile participants in joyriding crime are jointly and severally liable under Juvenile Act for all restitution. State v. Hiett, 154 Wn.2d 560 (2005) – November 05:09

LEGISLATIVE UPDATES FOR 2005

2005 WASHINGTON LEGISLATIVE UPDATE – PART ONE – June 04:01

2005 WASHINGTON LEGISLATIVE UPDATE – PART TWO (WITH INDEX) – July 05:19

2005 LEGISLATIVE UPDATE REVISITED - August 05:03

LINEUPS, SHOWUPS AND PHOTO ID PROCEDURES

Lineup was not impermissibly suggestive even though defendant was distinguishable from others by his black eye and by the orange color of his jail uniform. State v. Ratliff, 121 Wn. App. 642 (Div. II, 2004) - March 05:17

LOSS, FAILURE TO PRESERVE, DESTRUCTION OF EVIDENCE

Prosecutorial misconduct of withholding exculpatory evidence from defense held 1) to be so egregious as to require dismissal of charges and 2) to bar re-trial. State v. Martinez, 121 Wn. App. 21 (Div. III, 2004) - March 05:19

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

Washington Supreme Court rejects Legislature's attempt to make retroactive its reversal of Court's 2002 interpretation in Andress of second degree felony murder statute. In Re Hinton, 153 Wn.2d 853 (2004) – August 05:09

PUBLIC DISCLOSURE ACT

Where a violation of the Public Disclosure Act is found, the trial court need not assess the penalty per record, but must assess a per day penalty for each day a record is wrongfully withheld. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421 (2004) - January 05:06

Police report requested by child-victim's father is not exempt under Public Disclosure Act, but is subject to redaction of highly offensive information. Koenig v. City of Des Moines, 123 Wn. App. 285 (Div. I, 2004) - January 05:16

Under Washington's Public Disclosure Act, citizens do not have right to sift agency files to check for documents that agency credibly declares do not exist; also, agency is not required to create documents. Sperr v. City of Spokane & County of Spokane, 123 Wn. App. 132 (Div, III, 2004) – January 05:22

RESTITUTION

All juvenile participants in joyriding crime are jointly and severally liable under Juvenile Act for all restitution. State v. Hiett, 154 Wn.2d 560 (2005) – November 05:09

ROBBERY (RCW 9A.56.190 - 210)

Evidence that fleeing shoplifter grabbed store clerk during vehicular getaway was sufficient to support conviction for first degree robbery. State v. Decker, 127 Wn. App. 427 (Div. I, 2005) – August 05:21

SEARCH AND SEIZURE (WITH, WITHOUT WARRANT)

Abandonment

Vehicle operator's advance consent to search vehicle was voluntary; but police seizure of passenger at gunpoint was not justified, and passenger's consequent abandonment of illegal drugs was therefore involuntary. State v. Reichenbach, 153 Wn.2d 126 (2004) - January 05:02

Administrative Search

No Fourth Amendment violation occurred in random selection of airline passenger for handheld magnetometer wand scanning. U.S. v. Marquez, 410 F.3d 612 (9th Cir. 2005) – August 05:06

Fourth Amendment held to require express statutory authority or court rule authority for administrative search warrant -- in civil case arising from a warrant search by Renton code compliance enforcement team, Supreme Court rules that there was no authority for lower court's issuance of administrative search warrant. Bosteder v. City of Renton, 155 Wn.2d 18 (2005) – November 05:07

Agent of law enforcement

PUD workers held to be acting in concert with and hence as agents of police; therefore, check at residence for diversion of power held to be unlawful government search. State v. Orick, __ Wn. App. __, 120 P.3d 87 (Div. II, 2005) – December 05:15

Anticipatory search warrants

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, 126 Wn. App. 160 (Div. II, 2005) – April 05:20

Border search rules under Fourth Amendment

Federal border agents do not need reasonable suspicion under Fourth Amendment to justify removing and disassembling car's gas tank in search at international border. U.S. v. Flores-Montano, 124 S.Ct. 1582 (2004) – June 04:05

Consent

Vehicle operator's advance consent to search vehicle was voluntary; but police seizure of passenger at gunpoint was not justified, and passenger's consequent abandonment of illegal drugs was involuntary. State v. Reichenbach, 153 Wn.2d 126 (2004) - January 05:02

Emergency, exigent circumstances exception(s) to warrant requirement

Prosecutorial misconduct of withholding exculpatory evidence from defense held to be so egregious as to require dismissal of charges and to bar re-trial. State v. Martinez, 121 Wn. App. 21 (Div. III, 2004) - March 05:19

Chrisman rule is applied to entry with a non-arrestee – trial court failed to make sufficient findings of officer-safety needs where officer entered apartment to follow a non-arrestee apartment resident who was going to a bedroom to retrieve a purse for a fellow apartment resident who had been arrested outside. State v. Kull, 155 Wn.2d 80 (2005) – November 05:03

Entry-to-arrest (Payton Rule)

Payton rule violated where suspect arrested without warrant from inside his small trailer after he opened door while lying on his bed. U.S. v. Quaempts, 411 F.3d 1046 (9th Cir. 2005) – September 05:04

Exclusionary Rule

"Independent source" rule applied: evidence seized under a search warrant is held admissible despite an unlawful police entry into a motel room - - after police had developed probable cause to search, but before they had applied for a search warrant. State v. Spring, 128 Wn. App. 398 (Div. I, 2005) – June 05:16

Officer's inadvertent attaching of wrong list of items to be seized results in overbroad search warrant, but evidence held admissible because the items actually seized were on the list of items that had been approved for seizure by the magistrate who issued the search warrant. U.S. v. Sears, 411 F.3d 1124 (9th Cir. 2005) – September 05:13

"Independent source" exception to exclusionary rule applies under article I, section 7 of Washington constitution. State v. Gaines, 154 Wn.2d 711 (2005) – October 05:04

Execution of search warrant

Under the particular facts of the case, search warrant for deadly weapons and evidence of gang membership justified officers in keeping occupants of target residence in handcuffs for duration of search; also, the officers' asking an occupant questions about immigration status did not render detention unlawful under the Fourth Amendment. Muehler v. Mena, 125 S.Ct. 1465 (2005) – May 05:02

San Jose officers are denied qualified immunity in section 1983 federal civil rights case because: 1) they seized much more evidence during warrant searches than was "reasonable"; and 2) they shot some dogs due to lack of prior reasonable law enforcement plan for entry into perimeter of one of residential properties targeted by one of search warrants. San Jose Charter of the Hells Angles Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005) – August 05:08

Starting search but delaying handing of search warrant to Spanish-only-speaking resident while waiting for interpreter to arrive held ok on totality of circumstances. U.S. v. Martinez-Garcia, 397 F.3d 1205 (9th Cir. 2005) – October 05:02

Good faith exception to exclusionary rule

Superior court order that extended the period of "community placement" for a sex offender was invalid – therefore, a warrantless "good faith" CCO search based on that erroneous community placement was unlawful; also, the "good faith" of police officers following up the CCO search with searches under warrants was irrelevant and not justification. State v. Wallin, 125 Wn. App. 648 (Div. I, 2005) – June 05:17

Incident to arrest exception (motor vehicle)

Vehicle search held not "incident to arrest" because arrestee was not close enough to his vehicle when arrest was made. State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) - January 05:08

Hatchback area of car is searchable under Fourth Amendment "search incident" rule for vehicles. U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005) - March 05:07

"Search incident to arrest" rule is still a "bright line" rule under the Fourth Amendment (the rule is the same under article one section seven of the Washington state constitution.) U.S. v. Osife, 398 F.3d 1143 (9th Cir. 2005) – June 05:04

When officer has discretion whether to make custodial arrest (such as for DWLS), officer may wait until after motor vehicle "search incident" to exercise that discretion. State v. Pulfrey, 154 Wn.2d 517 (2005) – August 05:09

Independent source exception to exclusionary rule

"Independent source" rule applied: evidence seized under a search warrant is held admissible despite an unlawful police entry into a motel room - - after police had probable cause to search, but before they applied for a search warrant. State v. Spring, 128 Wn. App. 398 (Div. I, 2005) – June 05:16

"Independent source" exception to exclusionary rule applies under article I, section 7 of Washington constitution. State v. Gaines, 154 Wn.2d 711 (2005) – October 05:04

"Knock and Announce" rule

Announcements without actual knocks held reasonable under totality of circumstances for officers executing warrant at meth-cooking house. U.S. v. Combs, 394 F.3d 739 (9th Cir. 2005) – September 05:08

Officer-affiant-credibility challenges

Defendant did not make sufficient showing to trigger a Franks hearing to check officer's informant-based representations in search warrant affidavit. State v. O'Neal, 126 Wn. App. 395 (Div. II, 2005) – June 05:09

Search warrant holdings – 1) citizen informant status established for probable cause purposes despite informant's criminal history; 2) affiant's omission of some material facts about informant in presenting warrant request to commissioner not basis for suppression because affiant omission was not intentional or reckless; and 3) Washington constitution does not impose a different standard than does Fourth Amendment for assessing "material omissions" cases. State v. Chenoweth, 127 Wn. App. 444 (Div. I, 2005) – October 05:13

Open view, open smell

In failure-to-use-fish-guard case, State wins on issues of: 1) "open view," 2) Miranda-custody, and 3) seizing-of-property-without-prior-hearing. State v. Creegan, 123 Wn. App. 718 (Div. III, 2004) - January 05:13

Fourth Amendment does not restrict law enforcement use of dog sniff of car at traffic stop if duration of stop not extended by sniffing; different rule might apply under Washington state constitution's article 1, section 7. Illinois v. Caballes, 125 S.Ct. 834 (2005) - March 05:03

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. – April 05:02

Game agent's approach to home via back driveway was lawful, and he had "open view" of elk carcass in poaching suspect's open garage; unlawfulness of agent's subsequent warrantless entry to seize carcass is irrelevant; and Miranda warnings were not required for non-custodial questioning. State v. Posenjak, 127 Wn. App. 41 (Div. III, 2005) – August 05:14

Particularity requirement

Evidence held sufficient to support convictions for harassment and for communication with a minor for immoral purposes; search warrant withstands challenges based on tests for probable cause, particularity and staleness. State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) **–** May 05:15. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

Officer's inadvertent attaching of wrong list of items to be seized results in overbroad search warrant, but evidence held admissible because the items actually seized were on the list of items that had been approved for seizure by the magistrate who issued the search warrant. U.S. v. Sears, 411 F.3d 1124 (9th Cir. 2005) – September 05:13

Plain view

Container that was marked "Bushmaster" and that officers noted was very similar to containers they used as "gun cases" did not meet "single purpose container" standards under Fourth Amendment "plain view" analysis. U.S. v. Gust, 405 F.3d 797 (9th Cir. 2005) – September 05:15

Privacy protection

Randomly checking guest registers of motels held lawful under article 1, section 7 of the Washington Constitution. State v. Jorden, 126 Wn. App. 70 (Div. II, 2005) - April 05:07. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

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, 125 Wn. App. 881 (Div. III, 2005) – April 05:15

Area near defendant's garage was a protected private area under article 1, section 7 of the Washington constitution. State v. Boethin, 126 Wn. App. 695 (Div. II, 2005) – June 05:05

Midnight, camouflaged entry onto and search of backyard portion of marijuana grower's isolated, two-acre parcel of rural property, where the front drive had "no trespassing" and "private property" signs, held to violate grower's privacy rights under the state and federal constitutions, even though the portion of the property entered was not marked with such signs (backyard area searched was conclusorily labeled by Court of Appeals as "curtilage"). State v. Littlefair, __ Wn. App. __, 119 P.3d 359 (Div. II, 2005) – November 05:13

PUD workers held to be acting in concert with and hence as agents of police; therefore, check at residence for diversion of power held to be unlawful government search. State v. Orick, __ Wn. App. __, 120 P.3d 87 (Div. II, 2005) – December 05:15

Probable cause (see also "Staleness of PC")

Affidavit for search warrant held to meet both prongs of the Aguilar-Spinelli test for informant-based probable cause; also, the information provided by the identified informant was not stale. State v. Merkt, 124 Wn. App. 607 (Div. III, 2004) - February 05:15

Citizen informants, even though named in search warrant affidavit, held not shown to have credibility for purposes of informant-based probable cause standard under Aguilar-Spinelli. State v. McCord, 125 Wn. App. 888 (Div. III, 2005) – May 05:11

Evidence held sufficient to support convictions for harassment and for communication with a minor for immoral purposes; search warrant withstands challenges based on tests for probable cause, particularity and staleness. State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) **–** May 05:15. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

Probable cause for warrant to seize and search computer and storage media established by affidavit stating adult male took nude pictures of 16-year-old girl who posed, with assistance of others, as birthday present to defendant. State v. Griffith, 115 Wn. App. 357 (Div. III, 2005) – September 05:20

Search warrant holdings – 1) citizen informant status established for probable cause purposes despite informant's criminal history; 2) affiant's omission of some material facts about informant in presenting warrant request to issuing magistrate not basis for suppression because affiant omission was not intentional or reckless; and 3) Washington constitution, article 1, section 7, does not impose a different standard than Fourth Amendment for assessing "material omissions" cases. State v. Chenoweth, 127 Wn. App. 444 (Div. I, 2005) – October 05:13

Protective sweeps

"Protective sweep" during search warrant execution held unjustified because no reasonable officer-safety concerns established; also, affidavit for warrant held not to meet either prong of Aguilar-Spinelli test for informant-based probable cause. State v. Boyer, 124 Wn. App. 593 (Div. III, 2004) February 05:10

Staleness of probable cause

Affidavit for search warrant held to meet both prongs of the Aguilar-Spinelli test for informant-based probable cause; also, the information provided by the identified informant was not stale. State v. Merkt, 124 Wn. App. 607 (Div. III, 2004) - February 05:15

Evidence held sufficient to support convictions for harassment and for communication with a minor for immoral purposes; search warrant withstands challenges based on tests for probable cause, particularity and staleness. State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) **–** May 05:15

SECURITIES LAW (Chapter 21.20 RCW)

Financial note was a "security" within the meaning of chapter 21.20 RCW and therefore securities fraud conviction is upheld. State v. Pedersen, 122 Wn. App. 759 (Div. I, 2004) - March 05:19

SENTENCING (See topical entry on "Armed With a Deadly Weapon" above)

SEXUAL EXPLOITATION OF CHILDREN (Chapter 9.68A RCW) (See also topical entry on "Communicating with a minor for immoral purposes" above)

Defendant may be convicted of attempted possession of child pornography based upon the defendant's possession of materials that appear to be child pornography but may in

fact not depict actual minors. State v. Luther, 125 Wn. App. 176 (Div. I, 2005) - March 05:21. Status: The Washington Supreme Court is reviewing this Court of Appeals' decision.

SIXTH AMENDMENT CONFRONTATION CLAUSE

29-month-old child's statement to doctor held admissible under "medical diagnosis" hearsay exception and not "testimonial" under Crawford's Sixth Amendment "confrontation clause" interpretation. State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (Div. II, 2005) – June 05:11

SIXTH AMENDMENT RIGHT TO COUNSEL

Sixth Amendment's initiation-of-contact restriction is not triggered by a tribal court arraignment. U.S. v. Charley, 396 F.3d 1074 (9th Cir. 2005) – August 05:06

SPEEDY ARRAIGNMENT, SPEEDY TRIAL

No violation of Striker/Greenwood speedy trial/speedy arraignment rule where defendant was out of state and not incarcerated there during relevant pre-arraignment period. State v. Hessler, 123 Wn. App. 200 (Div. III, 2004) – May 05:13

THEFT (Chapter 9A.56 RCW)

Card dealer who committed gambling crimes to get big tips from players was lawfully convicted of first degree theft. State v. Heffner, 126 Wn. App. 803 (Div. III, 2005) – December 05:20

TRAFFIC (Title 46 RCW)

Washington's seat belt law upheld against vagueness attack under the specific facts of the Eckblad case. State v. Eckblad, 152 Wn.2d 515 (2004) - January 05:07

"Recklessly" findings by trial court support its conclusion of law that defendant committed "reckless endangerment" in relation to auto accident. State v. Graham, 153 Wn.2d 400 (2005) March 05:11

"Reckless manner" under vehicular homicide and vehicular assault statutes means "driving" in a rash or heedless manner, indifferent to the consequences. - State v. Roggenkamp, 153 Wn. 2d 614 (2005) April 05:07

Vehicular homicide jury instructions upheld – state not required to causally connect defendant's intoxication and victim's death. State v. Morgan, 123 Wn. App. 810 (Div. I, 2004) – June 05:20

Drivers' license suspensions based on conviction of certain criminal offenses are held constitutional. City of Redmond v. Bagby, 155 Wn.2d 59 (2005), and City of Bremerton v. Hawkins, 155 Wn.2d 107 (2005) – October 05:07

UNIFORM CONTROLLED SUBSTANCE ACT (RCW 69.50) AND OTHER DRUG LAWS

Drug crime of "unlawful possession" does not contain "knowledge" element and is not unconstitutionally vague. State v. Bradshaw, 152 Wn.2d 528 (2004) - January 05:08

Evidence supports methamphetamine-manufacturing conviction. State v. Keena, 121 Wn. App. 143 (Div. II, 2004) – June 05:14

"Constructive possession" – fingerprints on mason jar plus proximity to item are not enough to support conviction based on the state's theory of "construction possession" of illegal drugs in the jar. State v. Cote, 123 Wn. App. 546 (Div. III, 2004) – June 05:20

Federal "Controlled Substances Act" does not violate federal constitution's commerce clause in its application to California's medical-use-of-marijuana law. Gonzales v. Raich, 125 S.Ct. 2195 (2005) – August 05:04

Defense under Washington's Medical Marijuana Act held not met by facts of case; also, the Washington Act is held to supersede and absolutely preclude a common law defense of "medical necessity." State v. Butler, 126 Wn. App. 741 (Div. II, 2005) – August 05:24

Under Washington Medical Use of Marijuana Act, where defendant in marijuana possession case was not presently caring for glaucoma sufferer and was designated only to obtain marijuana for him, defendant did not qualify as a "primary caregiver". State v. Mullins, 128 Wn. App. 633 (Div. II, 2005) – October 05:17

Affirmative defenses under Washington's Medical Use of Marijuana Act interpreted: marijuana grower presented sufficient evidence for jury to consider whether she was "qualifying patient" but not enough for jury to consider whether she was "primary caregiver". State v, Ginn, 128 Wn. App. 872 (Div. II, 2005) – October 05:20

Only physicians licensed in Washington may prescribe medical use of marijuana under Washington Medical Use of Marijuana Act. State v. Tracy, 115 Wn. App. 381 (Div. II, 2005) – October 05:21

Proceeds of illegal drug trafficking may not be forfeited without tracing the proceeds to particular drug transaction. Tri-City Metro Drug Task Force v. Contreras, ___ Wn. App. ___, 119 P.3d 862 (Div. III, 2005) – December 05:19

VAGUENESS DOCTRINE FOR INVALIDATING STATUTES

Washington's seat belt law upheld against vagueness attack under the specific facts of the Eckblad case. State v. Eckblad, 152 Wn.2d 515 (2004) - January 05:07

Drug crime of "unlawful possession" does not contain "knowledge" element and is not unconstitutionally vague. State v. Bradshaw, 152 Wn.2d 528 (2004) - January 05:08

VIENNA CONVENTION ON CONSULAR RELATIONS

Note: Vienna Convention on consular relations remains in effect. – May 05:22

"Vienna Convention on Consular Rights" – Civil liability held in one federal circuit court decision to be possible for police violation of this treaty. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) – November 05:02

VOYEURISM (RCW 9A.44.115)

Father's voyeurism conviction upheld against his constitutional and sufficiency-of-the-evidence challenges. State v. Stevenson, 114 Wn. App. 699 (Div. II, 2005) – October 05:23

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WASHINGTON STATE COURT OF APPEALS

PUD WORKERS HELD TO BE ACTING IN CONCERT WITH AND HENCE AS AGENTS OF POLICE; THEREFORE, CHECK AT RESIDENCE FOR DIVERSION OF POWER HELD TO BE UNLAWFUL GOVERNMENT SEARCH

State v. Orick, __ Wn. App. __, 120 P.3d 87(Div. II, 2005)

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

> In August 2002, an informant told [Sergeant A] that "Mike" from north Clark County was Martin Huddleston's marijuana supplier. Around the same time, another informant gave similar information to [Detective B]. [Detective B] showed one informant a photo of Orick, and the informant said that was "Mike."
>
> Checking various records, [Detective B] determined that Michael and Lori Orick owned a home on 9-1/2 acres in north Clark County. The home was located at 28500 N.E. Cedar Brook Drive, Yacolt, Washington.
>
> [Detective B] drove out and tried to view the home. [*Court's footnote: Detective B also arranged for a State Patrol airplane to fly over, but due to the heavy forest canopy, the people observing could not see landmarks or buildings.*] He found that Cedar Brook Drive was a gravel road. At its entrance were two yellow gateposts, and on each gatepost was a sign that said, "Warning, No Trespassing." Because of these signs, [Detective B] "did not venture any further." He could not see the house, and "[t]here was no way to do any type of visual property description."
>
> In October 2002, [Detective B] asked the Public Utility District (PUD) for its power records on Orick's home. The PUD complied, but its records did not show that an abnormal amount of power was being consumed.
>
> [Detective B] knew that PUD records will not reflect actual consumption if power is diverted before it reaches the meter. Thus, in early December he asked a PUD supervisor "to check for a possible diversion." The supervisor agreed and assigned two PUD employees . . . .
>
> The next day, [the two PUD employees] Harwell and O'Rourke drove to the Oricks' Yacolt property. After passing the "no trespassing" signs and traveling up Cedar Brook Drive, they approached the house and were "immediately confronted" by Lori Orick. She asked what they were doing, and they said they were checking a newly installed meter system with which they had been having trouble. When they finished speaking with her, they checked the meter, which showed a normal amount of electrical usage, and then the transformer, which indicated that "a huge amount of electrical power [was] being diverted."
>
> A week or so later, Christensen submitted a search warrant affidavit in which he used [the two PUD employees'] observations to link the informants' information to the Oricks' Yacolt property. The warrant issued, and the ensuing search revealed a marijuana grow operation.

On December 13, 2002, the State charged Orick with manufacturing marijuana. Before trial, Orick moved to suppress the evidence. The trial court granted the motion and dismissed the case.

ISSUES AND RULINGS: 1) Were the two PUD employees acting in concert with the law enforcement officers and therefore subject to federal and Washington constitutional search restrictions? (ANSWER: Yes); 2) Did the warrantless entry onto the Oricks' property and check of the meter and transformer violate the constitutional rights of the Oricks under the federal and Washington constitutions? (ANSWER: Yes); 3) Did the trial court correctly suppress the evidence gathered under the search warrant? (ANSWER: Yes, because without the information about the power diversion, the affidavit for the search warrant did not establish probable cause as to the marijuana grow)

Result: Affirmance of order of Clark County Superior Court suppressing evidence and dismissing charges against Michael Earl Orick for manufacturing marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) PUD employees acting in concert with law enforcement officers

The first question is whether the Fourth Amendment and Article I, § 7 apply to [the PUD employees'] warrantless entry onto the property. Although the Fourth Amendment and Article I, § 7 generally do not apply to a PUD employee, they do when the employee acts at the express request of, and thus jointly and in concert with, a police officer. It is undisputed here that Harwell and O'Rourke were acting at the express request of, and thus jointly and in concert with, [Detective B]. Hence, the Fourth Amendment and Article I, § 7 govern [their] warrantless entry onto the property.

2) Unlawful search under federal and Washington constitutions

The next question is whether Harwell and O'Rourke's warrantless entry onto the property violated the Fourth Amendment and Article I, § 7. The test is the same as if they had been police officers: Did they have probable cause and an applicable exception to the warrant requirement? They did not have probable cause because neither they, [Detective B], nor [Sergeant A] knew whether the marijuana grow was on this property or somewhere else. They did not have an applicable exception to the warrant requirement, as the circumstances were plainly not exigent. Their entry was unlawful, and the trial court was obligated to suppress it. [*Court's footnote:* See e.g., State v. Johnson, 75 Wn. App. 692 (1994) **Jan 95 LED:19**].

3) Suppression required

The last question is whether the trial court erred by suppressing the remainder of the evidence that was seized when the warrant was served. The trial court held:

> Without the information of power diversion occurring on the Defendant's property, the affidavit for search warrant did not provide a sufficient nexus between the criminal activity alleged in the search warrant and the Defendant's home. As a result, any

> and all evidence obtained as a result of the execution of the search warrant on the Orick property would be inadmissible.
>
> We agree and conclude that the trial court was obligated to suppress all evidence seized under the warrant, and that it properly dismissed the case. We need not reach any other issues.

[Some citations and footnotes omitted]

ON RECONSIDERATION, COURT AGAIN HOLDS THAT OFFICER'S QUESTIONING OF SUSPECT DURING A DV INVESTIGATIVE STOP—WHERE OFFICER TOLD SUSPECT HE WOULD BE DETAINED UNTIL OFFICER COULD "CLEAR IT UP" -- WAS CUSTODIAL

State v. France, ___ Wn. App. ___, 120 P.3d 654 (Div. II, 2005)

Background regarding Washington Supreme Court remand order: (Excerpted from Court of Appeals opinion)

> A jury convicted Duff Richard France of violating a no-contact order and fourth degree assault. In his initial appeal, France claimed that the trial court erred by admitting statements he made before receiving Miranda warnings. We agreed that France's statements were the product of a custodial interrogation and should have been excluded. We found the error harmless as to his fourth degree assault conviction, but we reversed his conviction for violating a no-contact order and remanded for a new trial. [See State v. France, 121 Wn. App. 394 (Div. II, 2004) **July 04 LED:10]**
>
> The State petitioned the Supreme Court for discretionary review and permission to supplement the record with Exhibit 1, a certified copy of the no-contact order signed by France. Our Supreme Court granted both motions and remanded the case back to us with direction that we reconsider in light of State v. Hilliard, 89 Wn.2d 430 (1977), and State v. Heritage, 152 Wn.2d 210 (2004) **Sept 04 LED:12**.

Procedural background: (Excerpted from Court of Appeals opinion)

> Here, the dispatcher advised [a Pierce County Deputy Sheriff] that France was a "suspect" in a specified domestic violence incident. The dispatcher gave France's name, and [the Pierce County Deputy Sheriff] recognized France as someone he had just seen walking along the side of the road. [The Pierce County Deputy Sheriff] stopped France and told him that there was an alleged domestic dispute and that they "needed to clear it up" before France would be free to leave. *Court's footnote: [The Pierce County Deputy Sheriff] testified as follows: Q What did you say specifically? A I told him that there was an alleged domestic dispute between him and Ms. [Ellen] Robinette and we needed to clear it up before I let him proceed or go on or go free or what.*
>
> France then admitted being at Robinette's trailer (a violation of the order), where he argued with Robinette and then left. [The Pierce County Deputy Sheriff] then asked France whether he was allowed at the Robinette trailer (a question designed to elicit evidence of France's knowledge of the no-contact order) and

> France said that "he knew about the restraining order, [that] it was still in existence, and that [France] had been living there for the last year." More importantly, however, no reasonable person in that same situation would have believed that he or she would have been allowed to leave because [the Pierce County Deputy Sheriff] had stated that he would not let France leave until the matter had been cleared up. In addition, [the Pierce County Deputy Sheriff] did not ask general or open-ended questions regarding France's presence on the roadside. Instead he asked questions designed to obtain an admission from France that he knew about the no-contact order, an element of the crime charged that is most clearly established by a defendant's admission. When [the Pierce County Deputy Sheriff] announced that he was formally arresting France and read him Miranda warnings, France invoked his rights.

ISSUE AND RULING: Where the officer told France in an open-ended way that France would be held until the officer was able to "clear it up," was France in custody that was the functional equivalent of "arrest" such that Miranda warnings were required before any questioning? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Duff Richard France for violating a no-contact order and for fourth degree assault (in analysis not addressed in this **LED** entry) the Court of Appeals holds that the trial court's admission into evidence of the un-Mirandized statement was harmless error because the other evidence of France's guilty was sufficient to support the convictions.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> In Hilliard, officers told an otherwise unknown assault suspect that they would discretely check his explanation that he had not assaulted anyone but was in the area to visit a married woman. Police told him that if his story checked out, he would be allowed to leave. When Hilliard refused to supply further information identifying the married woman, police arrested him on suspicion of the assault and advised him of his Miranda warnings. At trial, Hilliard unsuccessfully sought to suppress his pre-Miranda statements to the police and the Supreme Court affirmed.
>
> Here, police knew France, knew there was a court order prohibiting France from having contact with Robinette, and knew that Robinette had reported being assaulted by him a short while before. Unlike Hilliard, where the identity of the assailant of the 17-year-old victim was unknown to police, police knew France and the history of domestic violence with Robinette. More importantly, police told France that he would not be allowed to go until the matter was cleared up. The duration of the detention was unlimited. Unlike Hilliard, police did not limit the detention to verify specific information France voluntarily provided. Thus, Hilliard does not control our decision here.
>
> In Heritage, our Supreme Court reiterated the test for determining whether police contact was a custodial interrogation stating "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." Analogizing to routine traffic stops, the Heritage court stated that because both traffic stops and routine Terry stops are brief and they occur in public, they are "substantially less 'police dominated' than the police interrogations contemplated by Miranda." But the duration of the

> police stop of France here was uncertain. France was not told that he would be free to leave as soon as police verified certain information or completed a traffic citation form. France's freedom was curtailed indefinitely "until [the Pierce County Sheriff Deputy decided] the matter was cleared up." After being expressly told that he would not be allowed to leave, France was then asked if he had been to the assault victim's home and then whether he knew there was a no-contact order in effect and that for him to be at Robinette's home was a violation of that order.
>
> Having considered the two cases brought to our attention by our Supreme Court, we again hold that the questioning of France without Miranda warnings was improper. It occurred after police told him that he could not leave until the matter was cleared up, its duration was open-ended and because police had probable cause to arrest France, neither France nor any reasonable person in his position would have felt that he was free to leave until he satisfactorily explained the assault and his unlawful presence at Robinette's home. France's was the type of situation where police had probable cause to make an arrest but delayed doing so to avoid a Miranda warning. See State v. Creach, 77 Wn.2d 194 (1969), distinguished by Hilliard, 89 Wn.2d 430 (1977).

[Some citations omitted]

LED EDITORIAL COMMENT: The last excerpted sentence above from the France Court's analysis on the Miranda "custody" question is misleading and relies on a Washington Supreme Court decision that is no longer the law under Miranda. Because the State won in this case, and no petition for review was filed by the defendant seeking Washington Supreme Court review, the France decision is final. It is a close question, however - - when one looks at the totality of the circumstances in France - - whether the Court of Appeals ruled consistent with Miranda precedents that Miranda custody existed under the facts of the case. No doubt, prosecutors will be facing arguments in the future based on the misleading language in the France opinion. We would hope that prosecutors doing so will consider the analysis that follows in this editorial commentary.

Custody for Miranda purposes is an objective test that does not turn on purely subjective impressions of the police or of the suspect. Probable cause that is known to the police (also sometimes referred to as "police focus") is irrelevant to the Miranda custody question to the extent that the probable cause information is not communicated to the suspect in a way that would cause a reasonable person, on the totality of the circumstances, to believe that he or she is in custody that is the equivalent of arrest. State v. Lorenz, 152 Wn.2d 22 (2004) Sept 04 LED:10; Stansbury v. California, 511 U.S. 318 (1994) July 94 LED:02. Many Supreme Court and Court of Appeals precedents in Washington, as well as several decisions of the U.S. Supreme Court, plus a multitude of decisions from other jurisdictions so hold. The discussion of the probable cause factor in the 1977 Creach case that is cited by the France Court no longer reflects the state of the law, as was explained in no uncertain terms in Lorenz. The Lorenz decision expressly overruled State v. Dictado, 102 Wn.2d 277 (1984) in this respect, and, in doing so, Lorenz also impliedly overruled Creach.

As we indicated in the preceding paragraph of our commentary here, when the probable cause information possessed by police is communicated to the suspect, that communication becomes just one factor - - to be considered along with all other

circumstances in a given case - - in deciding whether the person was in custody that was the equivalent of arrest (as opposed to a non-custodial setting or a mere investigatory detention under Terry v. Ohio). See the discussion in the Stansbury decision of the U.S. Supreme Court cited above. Unfortunately for officers, on the question of how the communication of probable cause is to be factored into the Miranda custody question, there is no instructive case law in Washington and little guidance from the U.S. Supreme Court other than the limited discussion on this point in Stansbury.

Determining whether a person is in Miranda custody is not an easy question to resolve. It turns on such factors as: the duration of the questioning (again, a mere Terry investigatory stop is ordinarily not deemed to be Miranda custody); the words used by the police (including communication of probable cause, communication regarding the length of time that the interrogation might be expected to last, and any express communication that the suspect need not answer questions or is free to leave at any time); the intensity and manner of questioning; the use of restraints or a show of force prior to or at the time of the questioning; and perhaps (under the Washington Supreme Court decision in State v. Heritage, 152 Wn.2d 210 (2004) Sept 04 LED:12) the youth of the suspect. In France, the focal point for the Court of Appeals was the officer's words - - that the officer needed to "clear it up." Perhaps if the officer had said something slightly different, not suggesting such an indefinite duration to the questioning, then maybe the officer's words, coupled with the officer's communication of elements of his probable cause, would not have been deemed to constitute custody that was the equivalent of arrest.

Because the test of custody is so multi-factored and difficult to pin down, many prosecutors and police legal advisors will tell officers that the better course of action, whenever in doubt as to Miranda applicability, is to Mirandize. We suppose that this case illustrates that point.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) PROCEEDS OF ILLEGAL DRUG TRAFFICKING MAY NOT BE FORFEITED WITHOUT TRACING THE PROCEEDS TO PARTICULAR DRUG TRANSACTION –In Tri-City Metro Drug Task Force v. Contreras, ___ Wn. App. ___, 119 P.3d 862 (Div. III, 2005), the Court of Appeals rules that the provision of RCW 69.50.505(a)(7) authorizing forfeiture of proceeds of illegal drug transactions requires evidence of tracing. In the Contreras forfeiture case, Ms Contreras, the owner of a large amount of cash and new personal property, was found in possession of a large quantity of illegal drugs. Evidence was presented that evidence of her legitimate income was inadequate to explain the large amount of cash and personal property. The Court of Appeals explains as follows that this evidence was insufficient to support proceeds forfeiture because it did not trace the proceeds to any particular drug transaction:

> Former RCW 69.50.505(a)(7) provides that "personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges" which constitute illegal drug activity are subject to forfeiture. This provision requires some evidence of tracing.

> When "[t]he record does not reflect that any effort was made to trace the proceeds" to any illegal drug transaction, and the findings do not address that issue, there is no basis for the forfeiture of the personal property as proceeds. Such is the case here. Since the property was not traceable to any illegal drug transaction, it was not subject to forfeiture under the statute. The hearing examiner misapplied the statute.

[Citations omitted]

Result: Reversal of Franklin County Superior Court order affirming a hearing examiner's forfeiture order.

(2) CARD DEALER WHO COMMITTED GAMBLING CRIMES TO GET BIG TIPS FROM PLAYERS WAS LAWFULLY CONVICTED OF FIRST DEGREE THEFT – In State v. Heffner, 126 Wn. App. 803 (Div. III, 2005), the Court of Appeals rejects a professional card dealer's argument that gambling is a "special" crime and therefore he should have been tried only under the gross misdemeanor of cheating at gambling (RCW 9.46.196) instead of the Class B felony of first degree theft (RCW 9A.56.030).

In order to generate big tops from players, defendant manipulated card hands to let players win. The Heffner Court summarizes some of the evidence as follows:

> Mr. Heffner was arrested on July 17 and made a post-Miranda confession. He admitted manipulating cards to create winning hands for the customers in order to make them happy and generate tips because he needed money as his wife was expecting their second child. He admitted dealing manipulated hands to two $5,000 bonus hand winners, receiving a $500 tip from one and a $100 tip from the other. One casino patron overheard Mr. Heffner complain that a woman tipped him only $100 after he let her win. A casino co-worker said that while visiting Mr. Heffner in his home, Mr. Heffner demonstrated how he manipulated the deuces when dealing.

Defendant's "special" statute argument and the Court's reason for rejecting the argument are set forth by the Court as follows:

> Mr. Heffner contends cheating is a special statute that should have been charged instead of first degree theft. When a special statute is concurrent with a general statute, the accused must be charged solely under the special statute. In order for statutes to be concurrent, each violation of the special statute must result in a violation of the general statute. In order to determine whether two statutes are concurrent, we examine the elements of each statute to determine whether a person can violate the special statute without necessarily violating the general statute.
>
> First degree theft as charged in this case requires proof that the accused, by color or aid of deception, obtained control over another's property valued at more than $1,500, with the intent to deprive the person of the property. RCW 9A.56.020(1)(b). The crime of cheating, as the statute existed when the offense was alleged to have been committed, makes the following activities while gambling a gross misdemeanor:

> (1) Employ or attempt to employ any device, scheme, or artifice to defraud any other participant or any operator;
> (2) Engage in any act, practice, or course of operation as would operate as a fraud or deceit upon any other participant or any operator;
> (3) Engage in any act, practice, or course of operation while participating in a gambling activity with the intent of cheating any other participant or the operator to gain an advantage in the game over the other participant or operator; or
> (4) Cause, aid, abet, or conspire with another person to cause any other person to violate subsections (1) through (3) of this section.
>
> Former RCW 9.46.196 (LAWS OF 1991, ch. 261, § 8).
>
> When committing a cheating offense, one would not necessarily violate the first degree theft statute because first degree theft requires that a minimum of $1,500 be involved. Because the two statutes here are not concurrent, they are not considered specific or general of each other.

Result: Affirmance of Grant County Superior Court conviction of Jason D. Heffner for first degree theft.

(3) AS A "CONTINUING OFFENSE," VIOLATION OF A DV NO-CONTACT ORDER HELD TO BE PREDICATE OFFENSE JUSTIFYING BURGLARY CHARGE – In State v. Spencer, 128 Wn. App. 132 (Div. I, 2005), the Court of Appeals rules that a knowing violation of a domestic violence no-contact order is a continuing offense, and therefore a person who violates such an order by knowingly entering an area within 1000 feet of a protected residence continues to violate that order when he enters or remains in the residence. Accordingly, the residential burglary statute, which prohibits entering a residence with intent to commit a crime, applies per se to a person who knowingly enters or remains in a residence in violation of such an order.

Result: Affirmance of King County Superior Court conviction of Steven Jeffrey Spencer for residential burglary – domestic violence.

(4) JUVENILE STUDENT'S 16-INCH DAGGER WITH 10-INCH BLADE HELD TO BE "DANGEROUS WEAPON" UNDER RCW 9.41.280, STATUTE PROHIBITING "DANGEROUS WEAPON" ON K-12 SCHOOL PREMISES – In State v. J. R., 127 Wn. App. 293 (Div. I, 2005), the Court of Appeals holds that a 16-inch dagger with a 10-inch blade is a dangerous weapon under RCW 9.41.280 even where the dagger is not being carried furtively with intent to conceal it.

J. R., a 15-year-old juvenile, was found by a high school vice principal to have the dagger in his backpack. He was charged and convicted in juvenile court of having a dangerous weapon on school premises in violation of RCW 9.41.280.

RCW 9.41.280 provides in relevant part as follows:

> (1) It is unlawful for a person to carry onto, or to possess on, public or private elementary or secondary school premises…:
>
> (a) Any firearms;
> (b) Any other dangerous weapon as defined in RCW 9.41.250;

> (c) Any device commonly known as "nun-chu-ka sticks" …: (d) Any device, commonly known as "throwing stars" …: or
> (e) Any air gun…

[Emphasis added]

RCW 9.41.250 provides as follows:

> (1) Manufactures, sells or disposes of or possesses any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles, or spring blade knife, or any knife the blade of which is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement;
> (2) Furtively carries with intent to conceal any dagger, dirk, pistol, or other dangerous weapon;
> or
> (3) Uses any contrivance or device for suppressing the noise of any firearm,
> is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

The J. R. Court concludes that all types of weapons referenced in RCW 9.41.250 are included as "dangerous weapons" for purposes of RCW 9.41.280.

J. R.'s primary argument was that a dagger is not a "dangerous weapon" within the meaning of RCW 9.41.280(1)(b) and RCW 9.41.250(2) unless a person carries the weapon "furtively…with intent to conceal" it. The J. R. Court's answer to this argument is as follows:

> J. R. also argues that under RCW 9.41.250(2) a "dagger…or other dangerous weapon" only qualifies as a dangerous weapon for purposes of criminal prosecution where it is "furtively carrie[d] with intent to conceal." [*Court's footnote: RCW 9.41.250(2).]* we agree that if J. R. had been charged under RCW 9.41.250(2), the State would have had to prove J. R. carried the dagger "[f]urtively…with intent to conceal." Here, J. R. was charged with possession of a dangerous weapon on school facilities under RCW 9.41.280, not RCW 9.41.250(2). Furtively carrying a dangerous weapon with intent to conceal is not an element of RCW 9.41.280.

Result: Affirmance of Whatcom County Juvenile Court conviction of J. R. for violating RCW 9.41.280.

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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.ca9.uscourts.gov/] and clicking on "Opinions." Federal statutes can be accessed at [http://www.law.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 2005, is at [http://slc.leg.wa.gov/]. Information about bills filed since 1997 in the 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].

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