Law Enforcement Digest

January 2005

HONOR ROLL

574th Session, Basic Law Enforcement Academy, Spokane Police Academy
July 26th through December 1st, 2004

Highest Scholarship:	Michael C. Schneider – Washington State Gambling Commission
Highest Mock Scenes:	David J. Bratton – Spokane County Sheriff's Office
Outstanding Officer:	Michael C. Schneider – Washington State Gambling Commission
Pistol Marksmanship:	Travis C. Frizzel – Chewelah Police Department
Overall Firearms:	Travis C. Frizzel – Chewelah Police Department

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575th Basic Law Enforcement Academy – August 5, 2004 through December 14, 2004

President:	Peter Fletcher – Cle Elum Police Department
Best Overall:	Jesus Sanchez – Redmond Police Department
Best Academic:	Stephen Smith, Jr. – Seattle Police Department
Best Firearms:	Erik Olson – WA St. Dept of Fish & Wildlife
Tac Officer:	Officer Kirk Wiper – Kelso Police Department

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WASHINGTON STATE SUPREME COURT

VEHICLE OPERATOR'S ADVANCE CONSENT TO SEARCH VEHICLE WAS VOLUNTARY; BUT POLICE SEIZURE OF PASSENGER AT GUNPOINT WAS NOT JUSTIFIED, AND PASSENGER'S SUBSEQUENT ABANDONMENT OF ILLEGAL DRUGS WAS INVOLUNTARY

State v. Reichenbach, ___ Wn.2d ___, 101 P.3d 80 (2004)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

> In early February 2001, [a law enforcement officer], received a call from Richard Seaman. Seaman indicated to [the officer] that his landlord, Reichenbach, was forcing him to drive to Vancouver so that Reichenbach could purchase narcotics. Seaman asked [the officer] for advice and [the officer] instructed Seaman to contact him when Seaman was planning another trip to Vancouver with Reichenbach. Thereafter, Seaman contacted [the officer] several times, informing [the officer] that he was driving Reichenbach to Vancouver and suggesting that [the officer] stop and search Seaman's car during these trips. [The officer] took no action.
>
> On March 1, 2001, Seaman again called [the officer], informing him that he would be driving Reichenbach to Vancouver to purchase methamphetamine. Based on his contact with Seaman, [the officer] obtained a search warrant for Seaman's car and Reichenbach's person.

Seaman called [the officer] from Vancouver twice, indicating that Reichenbach had been unable to purchase methamphetamine and that he was not sure whether Reichenbach would be able to do so. [The officer] did not inform the judge who issued the warrant of Seaman's calls.

That afternoon, [the officer] staged an accident on Highway 14 to block Seaman's car. [The officer] did not inform Seaman of his plan. According to Seaman, Reichenbach was trying to tear a baggie of methamphetamine in half as Seaman's car arrived at the accident scene. Police officers approached the vehicle and ordered Reichenbach to raise his hands at gunpoint. Reichenbach dropped his left hand twice around his hip area before complying with the order. One of the police officers removed Reichenbach from the car and searched it. Officers discovered the baggie of methamphetamine on the floor near the left side of the passenger seat where Reichenbach had been sitting.

Reichenbach was charged by information with possession of methamphetamine [and he was convicted] .

ISSUES AND RULINGS: 1) Was Seaman's consent to search voluntary? (ANSWER: Yes); 2) Was the car search within the scope of the consent? (ANSWER: Yes); 3) Did the officers unlawfully seize Seaman's passenger (the defendant)? (ANSWER: Yes); 4) Did defendant abandon the illegal drugs as the result of the unlawful seizure by the police? (ANSWER: Yes)

Result: Reversal of Skamania County Superior Court conviction of Steven I. Reichenbach for possession of methamphetamine.

ANALYSIS: (Excerpted from opinion for the unanimous Supreme Court)

1) Voluntariness of consent

Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances, including (1) whether Miranda warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent. While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however. In addition, the court may weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose.

Here, Seaman repeatedly suggested to [the officer] that he stop and search his car during his trips with Reichenbach to Vancouver. [The officer] instructed Seaman to advise him when a trip to Vancouver was planned, so that [the officer] could stop and search Seaman's car. On March 1, 2001, Seaman did contact [the officer], giving [the officer] another opportunity to stop Seaman's car. Although [the officer] did not inform Seaman of his plan to stop his car, the record shows that Seaman was at no point under pressure to consent to the search of his car. Under these circumstances, Seaman consented to [the officer]'s search. He knew that he was free to refuse consent by opting not to call [the officer]. While Seaman's educational background is unclear, his decision to report his dealings with Reichenbach demonstrates intelligence. Moreover, Seaman was cooperating with the police. When Seaman called [the officer] on March 1, 2001, [the officer] did not attempt to coerce or deceive Seaman. Finally, Seaman testified during the reference hearing that he had consented to the search of his vehicle. Based on the totality of circumstances, we conclude that Seaman voluntarily consented to the search of his car.

2) Scope of search

The next question is whether the search of Seaman's vehicle exceeded the scope of Seaman's consent. A consensual search may go no further than the limits for which the consent was given. Any express or implied limitations or qualifications may reduce the scope of consent in duration, area, or intensity. State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) **May 95 LED:15**. Relying on Cotten, Reichenbach argues that Seaman limited the scope of his consent when he told [the officer] that he was not sure whether Reichenbach could find methamphetamine on March 1, 2001. In Cotten, FBI agents requested the defendant's mother's consent to search her residence for evidence connected to a bombing, telling her that they were only looking for materials that could be used to make bombs. While searching the residence, the agents found and seized a shotgun connected to a murder rather than the bombing. The defendant moved to suppress the shotgun. The Court of Appeals concluded that the scope of consent was limited to the items connected to the bombing and held that the mother's consent to search did not encompass the shotgun.

In contrast to the circumstances in Cotten, Seaman's statement regarding the presence of drugs does not suggest that Seaman intended to limit the scope of his consent to search. At most, Seaman's statement was intended to keep the police informed about whether a search would prove fruitful. We agree with the Court of Appeals that Seaman consented to the police search of his entire vehicle, and therefore the search did not exceed the scope of the consent.

3) Unlawful seizure of passenger

Reichenbach argues though, that even if Seaman consented, the seizure of the baggie of methamphetamine was unlawful based upon the unlawful seizure of his person. Specifically, he contends that he involuntarily abandoned the drugs in response to the unlawful seizure of his person, rendering the police seizure of the drugs unlawful. The State contends that Reichenbach has failed to meet his burden of establishing involuntary abandonment.

In State v. Parker, 139 Wn.2d 486 (1999) **[Dec 99 LED:13]**, upon which Reichenbach relies, this court recognized that the Washington State Constitution, article I, section 7, provides greater protection for automobile passengers than is guaranteed by the Fourth Amendment. The court also reiterated that constitutional protections are possessed individually under article I, section 7 of the state constitution. Thus, in the context of an automobile search, Parker held that the rights of a passenger are independent from those of a driver. The defendants in those consolidated cases were charged with possession of controlled substances. In each case, the police officers seized controlled substances while searching the passengers' purse or jacket as a part of a search incident to arrest of a driver. The defendants moved to suppress evidence of the drugs. This court held that the arrest of the driver, without more, does not provide the authority to search a nonarrested passenger. Additionally, the court held that the search of a nonarrested passenger is not justified where officers lack articulable suspicion that he or she is armed or dangerous and there is no evidence to independently connect the passenger to illegal activity. The State argues that Parker is inapposite because here, unlike in Parker, the drugs were not found incident to a search of a passenger or a search of items belonging to a

passenger. Rather, the State argues, the methamphetamine was seized in the course of a consensual search of Seaman's vehicle.

Although it is true that Seaman consented to the vehicle search, the question here is whether police would have discovered the drugs pursuant to that consent if Reichenbach had not abandoned the baggie. As the State correctly observes, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under article I, section 7. However, property is deemed to be involuntarily abandoned and thus cannot be seized absent a warrant or an exception to the warrant requirement if the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment. As this court observed, this rule is consistent with the principle that evidence obtained as a result of an unlawful seizure is inadmissible. Thus, even though Seaman consented to the search, if the items were involuntarily abandoned by a nonarrested passenger, the police may not lawfully seize those items.

Reichenbach claims that he was unlawfully seized when the police officers stopped Seaman's car and ordered him to raise his hands at gunpoint. When analyzing whether a seizure has occurred, the essential inquiry is whether, under the circumstances, a reasonable person would believe he or she is not free to leave. An objective test is used to determine whether a person is in a custodial arrest. In other words, the test is whether a reasonable detainee under these circumstances would consider himself or herself under a custodial arrest. A reasonable detainee, if ordered to raise his or her hands at gunpoint, would consider himself or herself under a custodial arrest. There is no doubt that Reichenbach was seized. The next question, then, is whether the seizure was lawful. Since Reichenbach's seizure was not based on probable cause or on a warrant, as the trial court pointed out, we turn to the question of whether Seaman's consent justified Reichenbach's seizure.

Relying on Parker, we conclude that Seaman's consent to search did not encompass consent to seize Reichenbach. As in Parker, the officers needed an independent basis to justify Reichenbach's seizure. Here, as in Parker, no probable cause existed for the custodial arrest. We conclude that the seizure of Reichenbach was unlawful.

4) Involuntary abandonment of methamphetamine

We next turn to the question of the causal nexus between the unlawful police seizure and the abandonment. Abandonment occurs if the circumstances show that the defendant has voluntarily relinquished his reasonable expectation of privacy in discarding the property. As Seaman testified, Reichenbach possessed the baggie immediately before the police officers stopped Seaman's car. The police officers found the baggie near the left side of the passenger seat on the floor. The only logical explanation is that Reichenbach dropped the baggie near the left side of his seat when he dropped his left hand at the time the police ordered him to raise his hands at gunpoint. Indeed, that was the State's theory at trial. We conclude that the baggie was abandoned in response to the unlawful seizure of Reichenbach's person. Accordingly, the baggie of methamphetamine was involuntarily abandoned and the police officers seized the baggie in violation of article I, section 7 of the state constitution.

LED EDITORIAL COMMENTS: 1) What about the search warrant? The Supreme Court did not address the search warrant that was issued in this case and discusses only the specific search & seizure issues indicated above.

2) What about programs where citizens consent on a continuing basis to have their vehicles stopped if operated at certain times of the day or night? In some jurisdictions, citizens participate in programs in which they consent to have their vehicles marked for police stops if police observe the vehicles being operated at certain times of the day or night. We do not see the Reichenbach decision as posing a problem for those stops. Reichenbach should be limited to its peculiar facts.

As for any person who has agreed to participate in such a program, the stop will be deemed to be consenting if that person is in the vehicle when it is stopped.

As for non-program-participants who may be in the vehicle, until officers get clarification from the vehicle's occupants, the stop is likewise arguably justifiable based on "community caretaking" and/or reasonable suspicion (justifying the stop based on concerns about possible unlawful possession of the vehicle). It might also be argued as to the non-program-participant persons in the vehicle that, if they knew about the program participant's consent, they impliedly consented to the stop as well. Yet another possible argument as to passengers in the vehicle other is that a mere stop of a vehicle does not alone constitute a general seizure of passengers in the vehicle. The Reichenbach case is distinguishable in this latter regard because the defendant there was clearly individually seized when he was ordered at gunpoint to raise his hands.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) 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 - In Yousoufian v. Office of Ron Sims, ___ Wn.2d ___, 98 P.3d 463 (2004), the Washington State Supreme Court holds that when a trial court has determined that a violation of the public disclosure act (PDA) has occurred "penalties need not be assessed per record, and that trial courts must assess a per day penalty for each day a record is wrongfully withheld."

The PDA provides in part that:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.

RCW 42.17.340(4) (emphasis added).

In May 1997 Mr. Yousoufian made a public disclosure request to King County for records for certain studies relating to the financing of Seahawks Stadium. The County produced one document and corresponded with Mr. Yousoufian over several months regarding additional documents. "Although the county produced many documents during this time, Yousoufian was not satisfied with the county's response because he felt that it was incomplete and untimely." Mr. Yousoufian hired an attorney who made a subsequent public disclosure request. The last

correspondence between the parties occurred in June 1998. In March 2000 Mr. Yousoufian filed a public disclosure lawsuit.

The trial court concluded that the county had eventually produced all of the requested documents, but that its delay amounted to a violation of the PDA. Mr. Yousoufian requested separate penalties for each day that each of the 228 records were withheld. The trial court refused to award damages for each record, instead grouping the records into 10 groups. The trial court also subtracted 527 days from the amount of days used to calculate penalties, reasoning that the 647 days Mr. Yousoufian waited to file his lawsuit was unreasonable (the court determined that 120 days was a reasonable period of time in which to commence the lawsuit). The trial court awarded the minimum penalty of $5 per day for each of the 10 groups.

The Court of Appeals affirmed both the trial court's refusal to award penalties per record and its subtraction of 537 days from the penalty period. However, the Court of Appeals reversed the trial court's imposition of the minimum $5 penalty "in light of the county's gross negligence."

The Supreme Court holds that the PDA "does not require the assessment of per day penalties for each requested record." The Supreme Court also holds that because the "PDA does not include a limitation on the penalty period beyond the statute of limitation, we are of the view that the PDA does not allow a reduction of the penalty period when the trial court finds the plaintiff could have filed suit earlier than it did." Finally, the Supreme Court agrees with the Court of Appeals that assessing the minimum penalty was unreasonable considering the county's "gross negligence."

Only five justices are in agreement with all elements of the majority opinion.

Result: Affirmance of Court of Appeals decision declining to impose per record penalties, reversal of Court of Appeals decision reducing the number of days used to calculate penalties, and remand to the King County Superior Court to recalculate penalties above the statutory minimum for each day that the records were wrongfully withheld.

(2) WASHINGTON'S SEAT BELT LAW UPHELD AGAINST VAGUENESS ATTACK UNDER THE SPECIFIC FACTS OF THE ECKBLAD CASE – In State v. Eckblad, ___ Wn.2d ___, 98 P.3d 1184 (2004), the Washington Supreme Court rules, 7-2, that the Washington seatbelt statute, RCW 46.61.688, is not unconstitutionally vague under the facts of the case before the Court.

The majority opinion summarizes the holding and the limits on the holding as follows:

> [W]e conclude that the statute is not vague facially or as applied to the facts of this case. The ordinary citizen reading this statute is put on notice that there is a general obligation to wear a seat belt. RCW 46.61.688(3). The statute puts the reader on notice that whether an exception applies to a particular vehicle requires a more searching inquiry. Overwhelmingly, courts considering similar challenges to similar statutes have upheld them against vagueness challenges. Eckblad has not shown that RCW 41.61.688 is vague facially or as applied in his case.
>
> We caution that we do not hold that the statute is immune from a future due process challenge. It may be unconstitutionally vague as applied to a different case. We do not reach the merits of a vagueness claim where a driver or passenger reasonably believes that a vehicle or its occupants are exempted by state or federal regulation from the seat belt requirements. Eckblad does not contend he believed the 1982 Chevrolet pickup truck in which he was riding was exempted from the mandatory seat belt law, and therefore such a case is not before us.

Result: Reversal of Skagit County Superior Court order suppressing a handgun and marijuana seized during a traffic stop; remand to Superior Court for possible trial of Trevor W. Eckblad for unlawful possession of marijuana and unlawful possession of a handgun.

DISSENTING OPINION: Justice Sanders authors a dissent, joined by Justice Alexander, arguing that the seat belt statute is unconstitutionally vague.

(3) DRUG CRIME OF "UNLAWFUL POSSESSION" DOES NOT CONTAIN "KNOWLEDGE" ELEMENT AND IS NOT UNCONSTITUTIONALLY VAGUE – in State v. Bradshaw, ___ Wn.2d ___, 98 P.3d 1190 (2004), the Washington Supreme Court rulers, 8-1, that RCW 69.50.401's prohibition on unlawful possession of controlled substances does not contain a "knowledge" or other "mental state" element. The majority opinion notes that Washington's appellate courts have recognized an affirmative defense of "unwitting possession" of controlled substances, but that there is nothing in the statutory scheme to justify imposing a mental state element in a mere possession case. The majority opinion also holds that the "mere possession" statute is sufficiently clear to meet the defendant's void-for-vagueness challenge.

Result: Affirmance of Whatcom County Supreme Court convictions of Donald E. Bradshaw and Christian Latovlovici for unlawful possession of controlled substances.

DISSENTING OPINION: Justice Sanders writes a lone dissent, arguing in vain that the statute should be read so that it is consistent with the "unlawful possession" laws of most other states, i.e., arguing that the Court should have read into the statute a "knowledge" mental state element.

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WASHINGTON STATE COURT OF APPEALS

VEHICLE SEARCH HELD NOT "INCIDENT TO ARREST" BECAUSE ARRESTEE WAS NOT CLOSE ENOUGH TO HIS VEHICLE WHEN ARREST WAS MADE

State v. Rathbun, ___ Wn. App. ___, 101 P.3d 119 (Div. II, 2004)

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

> [O]n February 12, 2003, [officer A] confirmed that Robert K. Rathbun had outstanding warrants for his arrest. [Officer A] was given the address where Rathbun was currently residing and a description of his pick-up truck. That afternoon, [officer A] drove by the residence and observed Rathbun working on the engine of his truck. The truck was parked in the driveway and was facing the front entrance of a barn. [Officer A] left and returned shortly thereafter with Deputy Lewis to serve the warrant.
>
> As [officer A] approached the driveway, he observed Rathbun standing in the swing of the open driver's side door of his truck. As [officer A] continued up the driveway, Rathbun moved to the front of the truck and then to the swing of the open passenger side door. Upon seeing the officers, Rathbun began running toward the barn. He ran through the length of the barn, approximately 40 to 60 feet away from the truck, and jumped over a fence. The officers gave chase and arrested him on the other side of the fence. Approximately 25 to 30 seconds elapsed from the time that [officer A] began driving up the driveway to the time that Rathbun was apprehended.

Immediately following Rathbun's arrest, the officers searched his truck incident to his arrest. During the search, the officers found methamphetamine and various drug paraphernalia. Based on this evidence, the State charged Rathbun with violating the Uniform Controlled Substances Act--possession of methamphetamine.

Prior to trial, Rathbun moved under CrR 3.6 to suppress the physical evidence that the officers found in his truck. The court granted the motion, holding that the search was an invalid warrantless search incident to arrest because Rathbun was not in close proximity to the truck. Consequently, the State's case was dismissed. The State has timely appealed.

ISSUE AND RULING: At the time of his arrest, was the arrestee in close enough proximity to his vehicle to justify a vehicle search as "incident to arrest?" (ANSWER: No)

Result: Affirmance of Grays Harbor County Superior Court order suppressing the evidence in State's methamphetamine possession case against Robert K. Rathbun.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State contends that the trial court erred in granting Rathbun's CrR 3.6 motion to suppress. Specifically, the State argues that the officers had a right to search Rathbun's truck under State v. Stroud, 106 Wn.2d 144 (1986), and that Rathbun could not defeat that right by fleeing from the vehicle immediately before his arrest. Rathbun responds that the search of his vehicle exceeded the scope of a valid automobile search incident to arrest because he was not in close proximity to the vehicle at the time of his arrest. A review of the pertinent case law shows that Rathbun is correct.

In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court held that incident to a lawful arrest, the police may search the area within the arrestee's "immediate control" or the area into which the arrestee might reach to grab a weapon or destroy evidence. In New York v. Belton, 453 U.S. 454 (1981), the Court expanded its holding in Chimel and articulated the "bright-line rule" that when an arrestee is occupying an automobile at the time of arrest, the police may search the vehicle's entire passenger compartment incident to the arrest. However, since the Court's ruling in Belton, federal and state courts have been in disaccord regarding the scope of an automobile search incident to arrest when the suspect was not occupying the vehicle at the time of arrest.

The United States Supreme Court recently addressed this issue in Thornton v. United States, 124 S.Ct. 2127 (2004). In Thornton, the defendant parked his car and exited the vehicle before the police could pull him over and arrest him. The officer arrested the defendant near the vehicle and searched his car incident to the arrest. The court upheld the search, holding that "Belton allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants' " of the vehicle. The court reasoned, "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." The Court limited the scope of such a search, stating, "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search."

Washington State courts have likewise addressed the scope of an automobile search incident to arrest. In Stroud, our supreme court adopted Belton's "bright-

line rule," holding that "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." But the court's ruling does not permit officers to search locked containers found within the vehicle.

In State v. Porter, 102 Wn. App. 327 (2000) **Nov 2000 LED:05**, we considered whether an officer may search a vehicle incident to an arrest where the former occupant of the vehicle is arrested some distance from the vehicle. We held that police may search the vehicle if it is within the area of the suspect's "immediate control" at the time of his or her arrest… In Porter, we found the search of the defendant's van incident to his son's arrest impermissible because the son had walked 300 feet away from the vehicle before he was arrested and thus, did not have immediate control over the vehicle. Furthermore, the van had no connection to the arrest.

The facts of the instant case present unique circumstances because, unlike other Belton cases, there is no evidence in the record here that Rathbun was an "occupant," or even a "recent occupant," of the vehicle prior to his arrest. Rather, [officer A] and [officer B] observed him working on the truck's engine and standing near its open doors. Nevertheless, Belton's underlying premise is to prevent danger to police and the destruction of evidence; a suspect who is standing near the open doors of a vehicle presents a similar threat to officer safety and preservation of evidence as an actual occupant or recent occupant of the vehicle. Thornton, 124 S. Ct. 2131. Thus, in this case, Belton applies regardless of whether Rathbun was an occupant or recent occupant of the truck.

The State argues that the search of Rathbun's truck was permissible because he was in control of the vehicle immediately prior to his arrest. But we have held that in determining whether police may search a vehicle incident to arrest when a suspect is arrested outside of the vehicle, the proper inquiry is whether the vehicle was within the arrestee's immediate control "*at the time the police initiate an arrest* "-- not whether the arrestee had control over the vehicle at some point prior to his or her arrest. Here, although [the arresting officers] initially observed Rathbun standing beside the open doors of his truck, by the time they initiated arrest, he had run through the length of the barn, approximately 40 to 60 feet away from the truck, and had jumped over a fence. Thus, we cannot reasonably conclude that, at the time Rathbun was arrested, the truck was within his area of "immediate control" or within close physical proximity to him. And at a distance of at least 40 feet, on the other side of a fence, Rathbun did not have the opportunity to destroy evidence or obtain a weapon from within the truck . . . The State's argument that a defendant may not "defeat the right" of police officers to search an automobile incident to arrest by "fleeing from the vehicle" immediately prior to his or her arrest also fails. [The Rathbun Court here discusses court decisions from other jurisdictions; we have omitted that discussion from this **LED** entry. **LED** Ed.]

However, the actual issue in these cases was not whether a defendant may prevent a lawful vehicle search incident to arrest by fleeing from the vehicle prior to arrest. Rather, the courts were addressing the same issue answered by Thornton: whether Belton applies to a suspect who has been arrested after exiting a vehicle. And regardless of whether a suspect has fled from his or her vehicle prior to arrest, Thornton requires some quantum of physical and temporal proximity between the suspect and the vehicle before police may validly search it

> incident to arrest. Indeed, none of the cases that the State cites suggest that Belton applies even if close physical proximity between a defendant and the vehicle or close temporal proximity between the time a defendant exits the vehicle and the vehicle is searched are lacking.
>
> As noted previously, the policy underlying a vehicle search incident to arrest pursuant to Chimel and Belton is to prevent the destruction of evidence and protect police from danger. Contrary to the State's position, the ability to search a vehicle incident to the arrest of a vehicle's occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle. If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a warrant. Thus, the trial court properly concluded that, because Rathbun was not in close proximity to his truck when he was arrested, the officers were not justified in conducting a warrantless search of the vehicle.

[Some citations omitted]

LED EDITORIAL COMMENT: Factually, it appears that in Rathbun the officers did not initiate communication with Mr. Rathbun until he had run a good distance away from his vehicle. A different analysis might apply in a case where officers are able to communicate with the arrestee before he is able to flee from his vehicle.

This is a confused area of law. For a vehicle search to be deemed "incident to arrest," there must be a link in time and space between the vehicle and the arrest. Case law from Washington and from other jurisdictions is not consistent as to whether the time-and-space linkage analysis is to be made at the point: 1) when the officer initiates the "seizure" process, or 2) when the officer initiates the "custodial arrest" process. The Rathbun Court seems to assume that the linkage test is made only at the point when the "custodial arrest" process starts, although in this case the "seizure" and the "arrest" appear to have been initiated at about the same time, and at that point the arrestee was a considerable distance from his vehicle. While it appears to us that appellate courts in Washington and in other jurisdictions have not been consistent in this regard, the most prudent course for officers to follow when a person about to be arrested on PC or under a warrant starts to run from his vehicle is to announce as quickly as possible that he must halt and is "under arrest."

"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, ___ Wn. App. ___, 98 P.3d 822 (Div. II, 2004)

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

> Lewis County emergency dispatch received a 911 call under unusual circumstances in December 1997. The caller stated, "1018 "E" Street, heart attack," and hung up the phone. Clerk's Papers (CP) at 343. Unfortunately, the 911 operator could not exchange any information with the caller.
>
> The operator attempted to call the number, but received a busy signal. Another dispatcher located and called the phone number of 1018 "E" Street, but an answering machine picked up the call. The enhanced 911 system electronically indicated that the call originated from a pay phone near a local grocery store.

Moments before the "E" Street call, the dispatcher had received a prank call from the same location.

Given the call's circumstances, the 911 dispatcher did not notify or request emergency medical aid. Rather, the operator treated the call as a 911 hang up, which required that the police investigate the nature of the call and report back to the dispatcher. The operator stated to Centralia police: "911 hang up. All they said was heart attack, 1018 "E" Street and hung up. The call came from Ideal Food Center, 727 N. Tower, busy on the call back." The operator also informed police that another dispatcher had tried the number associated with 1018 "E" Street, but reached an answering machine.

A police officer quickly arrived at the local grocery store that the enhanced 911 system indicated was the location of the "E" Street call. The responding officer located a young man, known to police through prior contacts. Another officer had observed the young man hurrying away from the grocery store near the time of the hang up call. The officer asked the young man about the "E" Street 911 call, and the minor stated that he made it. The officer gave the young man a warning and cleared the call as a suspicious circumstance with the 911 dispatcher. Although he had cleared the "E" Street call, the officer drove by 1018 "E" Street, but did not contact the homeowners.

About six hours later, police were informed that Cummins' husband had died in his home at 1018 "E" Street. The police officer who had cleared the "E" Street 911 call recontacted the young man who had admitted that he made the call at the grocery store. The minor now retracted that statement and told the officer that he lied because he assumed the officer would not believe him if he denied making the 911 call.

The police department investigated the enhanced 911 phone system and found that the system was both functioning properly and accurately identified that the "E" street call originated from the local grocery store. When Cummins called into the system to report finding her husband, the system had also properly identified that call as coming from 1018 "E" Street.

Cummins filed a damages claim with Centralia on behalf of her husband, she later was appointed her husband's personal representative, and in December 2000, she filed a wrongful death complaint. Centralia and Lewis County moved for summary judgment, which the trial court granted. Cummins appeals the court's summary judgment dismissal of her lawsuit against Centralia and Lewis County.

ISSUE AND RULING: Where the dispatcher was never able to communicate with the hang-up 911 caller, could the “special relationship” exception to the “public duty doctrine” nonetheless apply such that the government could be sued for failing to protect the heart attack victim? (ANSWER: No)

Result: Affirmance of Lewis County Superior Court’s grant of summary judgment to Lewis County and the City of Centralia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

"The first hurdle in any negligence action is establishing a duty." The public duty doctrine requires that the plaintiff seeking recovery from a public entity or government employee demonstrate a breach of duty owed to the individual plaintiff, not "the breach of a general obligation owed to the public in general, i.e.,

a duty owed to all is a duty owed to none." Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07**.

There are four exceptions to the doctrine; however, only the special relationship exception applies here. This exception applies where:

> (1) there is *direct contact or privity* between the public official and the injured plaintiff which sets the latter apart from the general public, *and* (2) there are *express assurances* given by a public official, *which* (3) *gives rise to justifiable reliance* on the part of the plaintiff.

Here, Cummins does not produce material facts establishing a special relationship exception under the public duty doctrine. There is no evidence in the record that any Centralia police officer had contact with Cummins' husband, or someone calling on his behalf, during the 911 call. Thus, Centralia police could not provide express assurances that Cummins' husband relied on. Similarly, the record fails to demonstrate a special relationship between Cummins' husband and the Lewis County dispatcher. The dispatcher received a 911 call that stated, "1018 "E" Street, heart attack," and hung up before she could respond. Consequently, the dispatcher made *no* contact or statement, express or implied, that Cummins' husband relied on.

These facts are distinct from cases finding a special relationship in the context of a 911 call. *See, e.g.,* [Bratton v. Welp, 145 Wn.2d 575 (2002) **April 02 LED:12]** (caller made numerous calls to 911 and operator promised assistance); Beal, 134 Wn.2d 774 (911 dispatcher told caller that " 'we're going to send somebody there" ' and " '[w]e'll get the police over there for you okay?' "); Chambers-Castanes v. King County, 100 Wnh.2d 275 (1983) (plaintiff called 911 numerous times and operator promised police would arrive).

. . . .

In summary, because Cummins failed to show material facts establishing a special relationship exception under the public duty doctrine, Centralia and Lewis County are immune from civil liability and the trial court did not err in granting their motion for summary judgment.

[Some citations omitted]

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, ___ Wn. App. ___, 99 P.3d 897 (Div. III, 2004)

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

> On February 23, 2002, Washington Department of Fish and Wildlife Officers Matthew Nixon and James Brown were driving on a public road when they observed a suction dredge in the Similkameen River in Okanogan County, Washington. They also noticed a camp on the south bank of the river.
>
> The officers discovered the dredging operation was not in compliance with fish and wildlife regulations in that the screen intake and nozzle were larger than allowed. They contacted their office to make sure a permit was not in place. When they learned no permit existed, they seized the portions of the dredging operation in violation of the regulations.

The officers then contacted Mr. Creegan at his residence to continue their investigation. He admitted not using a smaller screen as required. The officers told him they were seizing his equipment and would be referring the case to the prosecutor's office.

The State charged Mr. Creegan in district court with unlawful failure to use a fish guard under RCW 77.15.310(1)(a). He filed a motion to dismiss, claiming that the officers violated his due process rights by seizing his property without notice as required by RCW 77.15.310(2) and RCW 77.55.040. He also claimed the search of his operation was unlawful and the officers failed to give him Miranda warnings. The district court agreed the officers did not give Mr. Creegan notice of the seizure as required by the statute and accordingly dismissed the charge.

The State appealed to the superior court, which reversed. It concluded the officers were authorized to seize the property under RCW 77.15.070. The court also held that the officers did not need a warrant to conduct their search because the dredging operation was in an open and public area where Mr. Creegan did not have any expectation of privacy requiring a warrant. The court further determined Miranda warnings were not required because Mr. Creegan was not in custody. We granted his motion for discretionary review.

ISSUES AND RULINGS: 1) Did the WDFW officers conduct an unlawful search when the officers went into the river to inspect the dredging operation? (ANSWER: No, the operation was in “open view” in a public location); 2) Was defendant in “custody” for Miranda purposes when questioned by the WDFW officers at his home? (ANSWER: No, he was not subjected to the functional equivalent of arrest); 3) Did the WDFW officers violate defendant’s due process rights under the state and federal constitutions or his notice protections under statute when the officers seized his personal property without prior notice and without a prior hearing? (ANSWER: No)

Result: Affirmance of Okanogan County Superior Court order that reversed a District Court dismissal order; case remanded for trial of James J. Creegan on charge of unlawful failure to use a fish guard as required under RCW 77.15.310 (1)(a).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) “Open view”

Mr. Creegan claims the fish and wildlife officers conducted an unlawful search because they did not have a warrant. Generally, a warrantless search is unreasonable under both the state and federal constitutions. But the constitution only protects a person's home and private affairs from warrantless searches. Anything that is " 'voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs.' " The officers arrived at the dredge site by public road, accessible to anyone who traveled there. One of the officers had to wade into the river to see the dredge, but anyone could have done what he did. In these circumstances, the dredge was not part of Mr. Creegan's private affairs and thus was not subject to constitutional protections.

Moreover, no search occurs " 'when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used.' " The officers were lawfully at the Similkameen River. They observed the camp and noticed the violations. There was no search.

2) Miranda custody

Mr. Creegan next contends his right against self-incrimination was violated because the officers' questioning of him was not preceded by Miranda warnings. These warnings were designed to protect a defendant's right not to make incriminating statements during a custodial police interrogation. Accordingly, the defendant must have been subject to a custodial interrogation by a state agent for Miranda to apply.

The custody requirement is satisfied "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " The relevant inquiry is whether " 'the suspect reasonably supposed his freedom of action was curtailed.'"

Mr. Creegan was at home when the officers approached him. They asked him whether the dredging equipment was his. They also talked about the requirements for a dredging operation. Mr. Creegan told them he was in compliance with the requirements. He also admitted the equipment was his. The officers then told Mr. Creegan they were seizing the equipment.

Mr. Creegan could have ended the conversation at any time. There is nothing in the record to suggest he reasonably believed his freedom of action was curtailed. Because he was not in custody, Miranda warnings were not required.

3) Due process and seizure of personal property without prior notice

Mr. Creegan asserts the officers violated his due process rights by seizing his property without notice. Due process generally affords an individual notice and the opportunity to be heard before the government can deprive an individual of a property interest. But due process does not guarantee a particular form of procedure; it is flexible and calls for procedural protections appropriate for a given situation.

The officers here seized Mr. Creegan's property. They did so without notice and without a hearing. When only property rights are involved, however, postponing the judicial inquiry is not a denial of due process so long as the opportunity for a judicial inquiry is adequate. The officers seized the property under RCW 77.15.070(1), which permits the seizure of items used in violation of Title 77 RCW. RCW 77.15.070(1) details the procedure to recover the seized property. RCW 77.15.070(2)-(6) also indicate that the property seized may be subject to forfeiture and set forth a procedure to be followed in order for forfeiture to occur. That procedure includes a hearing.

RCW 77.15.070 and its mechanism for seizing and forfeiting property is similar to RCW 69.50.505, which permits the seizure and forfeiture of property used in connection with drug crimes. Courts have held that RCW 69.50.505 does not violate due process. Likewise, RCW 77.15.070 does not violate due process.

Mr. Creegan characterizes the issue as a due process claim. In essence, however, he argues a statutory notice requirement. He claims that RCW 77.15.070 conflicts with RCW 77.15.310(2) and RCW 77 .55.040, governing the penalties for failing to use a fish guard. He contends RCW 77.15.310(2) and RCW 77.55.040 require that the property owner be given notice before fish and wildlife officers can seize property.

> Title 77 RCW governs fish and wildlife. The purpose of the title is to preserve, protect, perpetuate, and manage the fish and wildlife in the state. RCW 77.04.012. In keeping with this purpose, RCW 77.15.070 gives fish and wildlife officers the authority to seize without warrants items that are being used in violation of the title. This statute gave the officers the authority to seize the nozzle and the screen intake on the pump from Mr. Creegan's dredge because neither had a fish guard as required by RCW 77.15.310(1). The officers left the dredge itself in place. Their conduct was proper under RCW 77.15.070.
>
> But Mr. Creegan nevertheless asserts RCW 77.55.040 requires that he be given 30 days' notice before his dredging equipment can be seized. Claiming RCW 77.55.040 is the more specific statute, he argues it controls over the general RCW 77.15.070.
>
> RCW 77.55.040 gives the director the authority to take "possession of the diversion device and close the device until it is properly equipped" 30 days after the owner receives notice to equip the device. It relates to the transfer of possession and closure of the "diversion device." The diversion device was the dredge itself. This statute permits the department's director to "take possession" and close the dredge. The statute does not mention seizing or removing parts of the dredge.
>
> Here, the officers took pieces of equipment that violated Title 77 RCW. The dredge was not seized. Nothing prevented Mr. Creegan from using the dredge. He still had his permit to operate it. He could have fitted the dredge with equipment in compliance with Title 77 RCW and continued operation. RCW 77.55.040 does not apply to this situation. RCW 77.15.070 is therefore the only applicable statute and it permits the seizure of the property.
>
> Interpreting the statute in the manner Mr. Creegan suggests would create an absurd result, which the rules of statutory construction prohibit. If we were to adopt Mr. Creegan's position, fish and wildlife officers would be required to observe an equipment violation for 30 days without having any ability to stop it. During this time, the harm to fish would continue unabated. This would jeopardize the goal of Title 77 RCW to protect, preserve, perpetuate, and manage fish and wildlife.

[Citations to cases omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **POLICE REPORT REQUESTED BY CHILD-VICTIM'S FATHER IS NOT EXEMPT UNDER PUBLIC DISCLOSURE ACT, BUT IS SUBJECT TO REDACTION OF HIGHLY OFFENSIVE INFORMATION** - In Koenig v. City of Des Moines, ___ Wn. App. ___, 95 P.3d 777 (Div. I, 2004), Division I of the Court of Appeals holds that "highly offensive information" must be redacted before records are disclosed under the public disclosure act (PDA).

The Koenig Court describes the facts as follows:

> David Koenig is the father of "Jane," a child victim of sexual assault. In October 1996, Koenig requested all records from the City of Des Moines and its police department (collectively, the city) related to Jane's case under RCW 42.17.250 through .348 (the public records act, or the Act). The city denied Koenig's request, broadly identifying RCW 42.17.310 as the statutory authority for nondisclosure. Between 1997 and 1999, Koenig made several more written

> requests for the records, identifying Jane by name in each request. The city continued to refuse these requests, citing provisions in the Act that exempt from disclosure certain investigative records and identifying information.
>
> On December 15, 1999, Koenig sued the city to compel disclosure of the records. The city obtained an injunction prohibiting disclosure of the records while Koenig's case was pending. Following trial and an *in camera* review of the records, the trial court issued a memorandum opinion and order to disclose redacted records to Koenig. The redacted content included Jane's name, address, and her relationship with the assailant. But the details about the sexual assaults against Jane, including where on her body she was touched and the manner in which she was touched, were not redacted from the records. In addition to awarding access to the records, the trial court also awarded attorney fees and costs to Koenig, although it denied Koenig's request for statutory penalties against the city.

On appeal the city asserted that the records were exempt under RCW 42.17.31901 (exempting information revealing the identity of child victims of sexual assault), RCW 42.17.310(1)(e) (exempting information revealing the identity of crime victims, witnesses, or complainants if disclosure would endanger any person's life, physical safety, or property, or if the victim, witness or complainant requests nondisclosure); and RCW 42.17.310(1)(d) (exempting police investigative records, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy).

1. RCW 42.17.31901

RCW 42.17.31901 exempts from public disclosure:

> Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

The Court explains as follows its limiting interpretation of this exemption:

> The city argues that RCW 42.17.31901 prohibits disclosure of the requested records because Koenig identified Jane by name in his requests. The city reasons that if redacted records are disclosed in response to a request that names a specific child, the act of disclosure itself would identify the child as certainly as if the records contained the child's identifying information. Thus, the city argues, courts should construe RCW 42.17.31901 to exempt from disclosure all records related to a specifically-named child, and not just the identifying information listed in the statute.
>
> Although the logic of the city's argument is persuasive, we cannot construe RCW 42.17.31901 in the manner the city advocates. Neither the plain language of the statute, nor any reasonable interpretation of its terms requires the exemption of entire records simply because a request names a specific child. Rather, the statute exempts specifically defined information from disclosure, and nothing more. Although the city relies on the declaration of intent for RCW 42.17.31901 (which may be found in the notes following RCW 7.69A.020) for the proposition that the legislature intended to limit public disclosure of records of child victims of sexual assault, that declaration indicates that the legislature was concerned only with the release of *identifying* information, not *all* information contained in such records.

> To be sure, the city does identify a troublesome hypothetical in which a requestor could speculate about the identity of a specific child victim of sexual assault, name the child in a request for records, and then receive confirmation of the child's identity, ironically, in the form of redacted records, which may contain highly offensive and embarrassing information. But even if we were presented with such a scenario, we could not rewrite the statute or construe it in a manner contrary to its unambiguous text. Likewise, we cannot do so here.
>
> Mindful of the legislature's charge to construe the Act's exemptions narrowly, we hold that RCW 42.17.31901 does not exempt from disclosure entire records pertaining to a specifically-named child victim of sexual assault. The trial court's redaction of identifying information from the records and its order to release the redacted records did not violate the requirements of RCW 42.17.31901.

2. RCW 42.17.310(1)(e)

RCW 42.17.310(1)(e) exempts from public disclosure:

> Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, . . . if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or nondisclosure, such desire shall govern.

The Court explains as follows its restrictive view of this exemption:

> The city also argues that the records are exempt from disclosure under RCW 42.17.310(1)(e) because they contain information revealing the identity of a crime victim, and because Jane indicated a desire for nondisclosure. But this argument also fails.
>
> Like RCW 42.17.31901, RCW 42.17.310(1)(e) only exempts identifying information from disclosure; it does not exempt entire records. In this case, as in other cases involving records pertaining to child victims of sexual assault, RCW 42.17.31901 completely engulfs the relevant provisions of RCW 42.17.310(1)(e) because redaction of identifying information under RCW 42.17.31901 is mandatory, i.e., it does not depend on a finding of endangerment or an indicated desire for nondisclosure. Thus, even if we assume that RCW 42.17.310(1)(e) applies here, the redaction of identifying information under RCW 42.17.31901 also satisfies the requirements of RCW 42.17.310(1)(e).

[Citations and footnote omitted.]

3. RCW 42.17.310(1)(d)

RCW 42.17.310(1)(d) exempts from public disclosure:

> Specific intelligence information and specific investigative records compiled by . . . law enforcement . . . agencies . . . , the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

The Court explains as follows its analysis of this exemption:

> The city's final argument asserts that the records are exempt from disclosure under RCW 42.17.310(1)(d). Initially, we recognize that the city no longer relies on an argument it made below--that nondisclosure was essential to effective law enforcement. The city now relies only on the "right to privacy" basis for exemption in RCW 42.17.310(1)(d), and consequently that is the only basis we

address here. We also recognize that, unlike RCW 42.17.31901 and RCW 42.17.310(1)(e), RCW 42.17.310(1)(d) does contemplate the exemption of entire records as opposed to merely the identifying information. But again, this exemption is inapplicable to the extent that the information implicating personal privacy or vital governmental interests can be deleted from the records sought.

Thus, to clarify, the question presented is whether RCW 42.17.310(1)(d) requires redaction of information, in addition to identifying information, from investigative records pertaining to child victims of sexual assault, the disclosure of which would violate personal privacy. To address this important question adequately, we must consider how the concept of personal privacy has developed within the context of the public records act.

When originally codified, the Act did not define the term "privacy" or similar terms used throughout its text. Thus, the courts undertook as necessary the task of developing and defining the concept of privacy. The first case in which the Supreme Court did so was Hearst Corporation v. Hoppe. In Hearst, the Seattle Post-Intelligencer sought certain records maintained by the King County Assessor. At issue was whether disclosure of the records would violate the taxpayers' right to privacy recognized in RCW 42.17.310(1)(c). The court presumed that, because the Act did not define the "right to privacy," the legislature intended the term to mean what it meant at common law. In the Hearst court's view, the most analogous privacy right at common law was found in the law of torts. The court reasoned that the standard and analysis of privacy in the Restatement (Second) of Torts was "uniquely analogous to the values and interests which subsection [.310(1)(c)] appear[ed] designed to protect." Consequently, the Hearst court adopted the Restatement's rule that a person's right of privacy is invaded if the matter publicized "(a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public." The court did not reach the "legitimate concern" prong of the analysis in Hearst, however, because it found that the information at issue was not of the kind was would be highly offensive to a reasonable person.

Not until 1986 did the Supreme Court substantially refine its analysis in Hearst. In In re Rosier, the court declared that "the information sought need not be highly offensive in order to establish a privacy interest. Rather, . . . an individual has a privacy interest whenever information which reveals unique facts about those named is linked to an identifiable individual." The court went on to incorporate Hearst's "highly offensive" test into the second part of a "balancing test under which an agency must determine whether an individual's privacy interest outweighs the public's interest in broad disclosure."

But within a year after In re Rosier, the legislature amended chapter 42.17 RCW to declare that the "right to privacy" (and similar terms used in the chapter) "is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, *and* (2) is not of legitimate concern to the public." [Emphasis added.] The legislature made clear its intent "to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court Decision in 'In re Rosier'" and to define "privacy" as the Court did in Hearst. Furthermore, it appears that the legislature intended that the amendment would diminish or possibly eliminate the discretion an agency could exercise when determining whether to disclose records under the Act:

> The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records.

Indeed, the Supreme Court recognized that subsection .255 prohibited courts from engaging in the kind of "freewheeling policy judgment" involved in balancing an "individual's privacy interest against the interest of the public in disclosure."

Yet determining whether information was of legitimate concern to the public proved to be no more straightforward than determining whether information implicated the right of privacy. Thus, in Dawson v. Daly, the Supreme Court fashioned another balancing test designed to assist courts, and presumably agencies, in determining whether information is of legitimate public concern.

In Dawson, a county prosecutor sought an injunction to prevent the disclosure of documents contained in a deputy prosecutor's personnel file, including performance evaluations. The trial court denied the injunction, but on direct review, the Supreme Court reversed that decision. The court recognized that RCW 42.17.255 does not allow a balancing of the employee's privacy interest against the public interest, but it went on to hold that RCW 42.17.010(11) contemplates some balancing of the public's interest in disclosure against the public's interest in the "efficient administration of government."

The Dawson court held that the term 'legitimate public concern' used in the earlier cases and in RCW 42.17.255 meant 'reasonable public concern.' Consequently, requiring disclosure where the public's interest in efficient government could be harmed more than it would be served was unreasonable, and therefore the public had no legitimate concern in the details of a prosecuting attorney's job performance evaluations that did not discuss specific incidents of misconduct. Thus, in Dawson the balance tipped in favor of exempting performance evaluations from disclosure because otherwise (1) "employee morale would be seriously undermined," and (2) supervisors would be "reluctant to give candid evaluations."

Following the Dawson Court's lead, in Brown v. Seattle Public Schools we held that the contents of performance evaluations of employees of public education was not of legitimate public concern, absent discussions of specific instances of misconduct or public job performance. Similarly, in Tiberino v. Spokane County Division Three held that, although the public had a legitimate concern in the *fact* that a government employee had misused public resources by abusing personal e-mail privileges, the public had no legitimate interest in the *content* of those e-mails.

We now apply the foregoing principles to the question presented here. At the outset of our analysis, we emphasize that the first prong of the test set forth in RCW 42.17.255 is not at issue here. Koenig does not challenge the trial court's conclusion that the disclosure of details in the records would be highly offensive to a reasonable person. We therefore need only determine whether certain information in the records, such as sexually explicit descriptive information, is of legitimate concern to the public. To answer that question, we must employ the Dawson balancing test of public benefit versus public harm.

> With regard to the public's interest in disclosure of the information contained in these records, we recognize that they contain a wealth of detail about the circumstances surrounding the assault, including where, when, and how the assaults occurred, and the methods the perpetrator used to commit the crime. The records also contain details about how promptly the attack was reported to law enforcement, and what resources and methods law enforcement officials used. Disclosure of this information advances the public's interest because it educates members of the public as to how they might prevent other children from falling prey to sexual assaults, and because it allows the public to gauge the overall effectiveness or ineffectiveness of law enforcement's performance.
>
> Regarding the detriment to the "efficient administration of government," however, we recognize that investigative records of sexual assaults on children will contain sexually explicit descriptions about where and in what manner the child was touched. We agree with the city and several *amici* that disclosure of such sexually explicit descriptive information would have a detrimental effect on the ability of law enforcement to investigate sexual assaults against children. If a member of the public could inspect and copy sexually explicit descriptive information contained in investigative records, we cannot expect but that children would withhold at least the most embarrassing descriptive details or perhaps would decide not to report a crime at all to avoid potential embarrassment.
>
> We expect that this result would be even more likely given that, as we held above, the Act does not exempt records from disclosure where the request identifies a specifically-named child. Disclosing the mere fact that a specifically-named child was a victim of sexual assault may not deter the reporting of such assaults, but enabling a requestor to deduce the identity of a child victim *and* know the sexually explicit descriptive information in those records likely would have a substantially detrimental effect on the reporting, investigation, and prosecution of these assaults.
>
> Balanced against this detrimental effect, we can foresee only a slight benefit that could result from the disclosure of sexually explicit descriptive information. Such information might relate details about the perpetrator's methods, and give the public an additional basis to gauge the accuracy and thoroughness of law enforcement investigations. But disclosure of this information would do little to "assure continuing public confidence [in] governmental processes, and to assure that the public interest will be fully protected." Weighing the slight benefit to the public's interest versus the substantial harm to the efficient administration of law enforcement, we conclude that the balance tips against disclosure of the sexually explicit descriptive information contained in these records.
>
> Thus, we conclude that the city carried its burden of showing that the sexually explicit descriptive information contained in the records Koenig requested was not of legitimate concern to the public. This information, in addition to Jane's identifying information, should also have been redacted from the records before they were disclosed to Koenig.

[Citations and footnotes omitted]

4. Penalties and Fees

Koenig argued that the trial court abused its discretion by failing to award him daily penalties under RCW 42.17.340(4) against the city for wrongfully refusing to disclose the requested documents. The Court of Appeals agrees, pointing out that "[a]fter the parties submitted their briefs in this appeal, we held in King County v. Sheehan that if a trial court finds that an agency

wrongfully withheld a requested record, it must impose a penalty of at least five dollars per day that the agency wrongfully withheld the records. Thus, the trial court here erred by declining to award penalties. We remand this issue to the trial court . . . [Footnotes omitted.]

Result: Affirmance of King County Superior Court order requiring disclosure of redacted documents; reversal of denial of daily statutory penalties and remand for determination of the amount of penalties.

(2) 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 – In Sperr v. City of Spokane & County of Spokane, 123 Wn. App. 132 (Div, III, 2004), the Court of Appeals rules that citizens making requests for records under Washington's Public Disclosure Act (PDA) are not entitled to indiscriminately sift through agency files in search of records that the agency has demonstrated do not exist, and an agency has no duty under the Public Disclosure Act to create records that do not exist.

Sperr made a public disclosure request to the Spokane Police Department (SPD) for documents related to his criminal history. The SPD responded by stating that it had no records pertaining to criminal activity by Sperr. Sperr filed suit in federal court requesting the federal court to order the County [the County maintained the records] to allow him to inspect his criminal history files. In 2002, the federal court granted summary judgment in favor of the City and County, and the case was dismissed. In 2003, Sperr filed a complaint in Spokane County Superior Court, accusing the City and County of denying him access to his police file when the police denied his request to allow him to personally access his own criminal files and do a computer search for documents already shown not to exist. The Superior Court also granted summary judgment in favor of the City and County, dismissing the case. The Court of Appeals affirms in the decision noted here.

The Court of Appeals explains as follows that there was no violation of the PDA:

> The purpose of the Act is to provide "full access to information concerning the conduct of government on every level . . . as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). "The public records portion of the act, RCW 42.17.250-.348, requires all state and local agencies to disclose any public record upon request, unless it falls within certain specific enumerated exemptions." King County v. Sheehan, 114 Wn. App. 325, 335, 57 P.3d 307 (2002); RCW 42.17.260(1). The requested record must be made available "for public inspection and copying." RCW 42.17.260(1). A police department is an "agency" subject to the provisions of the Act. RCW 42.17.020(1).
>
> Public records subject to inspection under the Act include (1) any writings (2) that contain information related to the "conduct of government or the performance of any governmental or proprietary function" and (3) that are "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.17.020(36). Police computer files on citizens are public records subject to inspection except to the extent that they are exempted under the Act. Hudgens v. City of Renton, 49 Wn. App. 842, 845-46, 746 P.2d 320 (1987); RCW 42.17.020(36).
>
> The problem with Mr. Sperr's argument is that he has no right to inspect or copy records that do not exist. An agency has no duty to create or produce a record that is non-existent. Smith [v. Okanogan County, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)]. Just as the Act does not provide "a right to citizens to

indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or ascribed to the agency," Limstrom [v. Ladenburg, 136 Wn.2d 595, 604-05 n. 3, 963 P.2d 869 (1998)], the Act does not authorize indiscriminate sifting through an agency's files by citizens searching for records that have been demonstrated not to exist. Mr. Busby, the manager of the city's police records unit, sent Mr. Sperr every file that included his name and the results of all computer searches of various databases that might contain other police records. Neither interstate nor intrastate criminal information databases contained references to Mr. Sperr.

Strictly speaking, the city did not deny Mr. Sperr an opportunity to inspect or copy a public record, RCW 42.17.340(1), because the public record he sought did not exist. Consequently, this court has no agency action to review under the Act. Because there is no remaining issue of material fact and the city was entitled to judgment as a matter of law, the trial court did not err in granting summary judgment dismissal of Mr. Sperr's suit. Smith, 100 Wn. App. at 11.

Result: Affirmance of decision of the Spokane County Superior Court dismissing the PDA action brought by Carl J. Sperr.

****

NOTE: GENERAL RULE 31 FOR WASHINGTON COURTS PROTECTS PRIVACY BY LIMITING INFORMATION PROVIDED IN COURT FILINGS

On October 26, 2004, a new Washington court rule – General Rule 31 – took effect. GR 31 applies to documents that are filed in the Washington courts (superior, juvenile, and justice courts). For law enforcement personnel, the most significant part of GR 31 is its subsection (e), which provides as follows:

(e) Personal Identifiers Omitted or Redacted from Court Records

(1) Except as otherwise provided in GR 22 [which relates to "family law" court records], parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

(A) Social Security Numbers. If the Social Security Number of an individual must be included in a document, only the last four digits of that number shall be used.

(B) Names of Minor Children. If the involvement of a minor child must be mentioned, only that child's initials shall be used, unless otherwise necessary.

(C) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

(D) Driver's License Numbers.

(2) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Court or the Clerk will not review each pleading for compliance with this rule. If a pleading is filed without redaction, the opposing party or identified person may move the Court to order redaction. The court may award the prevailing party reasonable expenses, including attorney fees and court costs, incurred in making or opposing the motion.

Law enforcement agencies should confer with their own legal advisers and local prosecutors' offices regarding application of GR 31.

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NEXT MONTH

The February 2005 LED will include an entry regarding the December 9, 2004 decision of the Washington Supreme Court in State v. Christensen, ___ Wn.2d ___, ___ P.3d ___, 2004 WL 2813577. The Christensen decision interprets chapter 9.73 RCW, Washington's Privacy Act, which governs the electronic interception and recording of private communications and conversations. In Christensen, the Supreme Court is unanimous in ruling for the defendant and reversing a pro-State decision of the Court of Appeals reported at 119 Wn. App. 74 (Div. I, 2003) **Jan 04 LED:20**. In the opening paragraph of its opinion, the Court summarizes its Christensen decision as follows:

> A mother, using the speakerphone function of the family's cordless telephone system, surreptitiously listened to a conversation between her daughter and her daughter's boyfriend in which a crime was discussed. The mother was permitted to testify against the boyfriend at his trial about what she overheard. We conclude that under the Washington privacy act, the conversation in question was a private one and the base unit of the cordless telephone was a device designed to transmit. We reverse.

The February 2005 LED will also include an entry regarding the December 13, 2004 decision of Division One of the Washington Court of Appeals in State v. Nowinski, __ Wn. App. __, __ P.3d __, 2004 WL 2849611 (Div. I, 2004), in which the appellate court reverses the second degree murder conviction of defendant for second degree murder with a deadly weapon. The Nowinski Court holds that a police interrogation in which a deputy prosecutor participated should have been suppressed under Evidence Rule 410 because defendant Nowinski had an objectively reasonable belief that he was engaged in plea negotiations when he described to the police and deputy prosecutor his participation in the murder.

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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].