Law Enforcement Digest

December 2006

598th Basic Law Enforcement Academy – June 14, 2006 through October 19, 2006

President: Paul Dill – Bellevue Police Department
Best Overall: Wade Weingardner – Pullman Police Department
Best Academic: John Compton – Seattle Police Department
Best Firearms: Cory Clark – King County Sheriff's Office
Tac Officer: Deputy Seth Grant – King County Sheriff's Office

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2006 LED SUBJECT MATTER INDEX

2006 LED SUBJECT MATTER INDEX -- LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2006 through and including this December 2006 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 the Washington Criminal Justice Training Commission (CJTC) – go to CJTC Internet Home Page at: http://www.cjtc.state.wa.us and click on "Law Enforcement Digest".

ABATEMENT OF CONVICTION BY DEATH

Death of defendant with appeal pending does not automatically "abate" conviction. State v. Devin, ___ Wn.2d ___, 142 P.3d 599 (2006) – October 06:16

ANIMAL CRUELTY (Chapter 16.52 RCW)

Animal cruelty – evidence that young men shot dog several times with arrows held sufficient to support convictions, despite their claims that they were just "putting down" a stray dog. State v. Paulson, 131 Wn. App. 579 (Div. II, 2006) – April 06:08

ARREST, STOP AND FRISK

Officer's warrantless stop of car registered to person listed as "missing/endangered" was reasonable under "community caretaking function" exception to warrant requirement; also, examination of suspect's forearm did not exceed lawful scope of detention. State v. Moore, 129 Wn. App. 870 (Div. I, 2005) – January 06:07

Terry seizure of reckless driving suspect held justified by reasonable suspicion; also, Miranda warnings held not required in Terry stop questioning. State v. N.M.K., 129 Wn. App. 155 (Div. I, 2005) – January 06:14; review pending in the Washington Supreme Court.

Redmond v. Moore does not mean that pre-2005 arrests for DWLS third degree were unlawful arrests. State v. Carnahan, 130 Wn. App. 159 (Div. II, 2005); State v. Potter, 129 Wn. App. 494 (Div. III, 2005); State v. Olinger, 130 Wn. App. 22 (Div. III, 2005); State v. Holmes, 129 Wn. App. 24 (Div. I, 2005); and State v. Pacas, 130 Wn. App. 446 (Div. III, 2005) – January 06:22. The Washington Supreme Court subsequently agreed; see below this index.

Officer checking occupied car for possible non-traffic civil infraction was justified by officer-safety concerns in searching car for handgun after seeing open handgun case in car. State v. Day, 130 Wn. App. 622 (Div. III, 2005) – March 06:10

Separate purchases, close in time, by two unkempt men – one buying muriatic acid and the other buying denatured alcohol did not give reasonable suspicion for Terry stop. State v. Carlson, 130 Wn. App. 589 (Div. III, 2005) – March 06:13

Supreme Court upholds searches incident to arrests for DWLS in the third degree that were made before the Supreme Court decided Redmond v. Moore. State v. Potter, State v. Holmes, 156 Wn.2d 835 (2006) – May 06:14

Probable cause for arrest found; also, county ordinance prohibiting possession of drug paraphernalia with intent to use is upheld against preemption attack. State v. Fisher, 132 Wn. App. 26 (Div. I, 2006) – May 06:16

Expansion of traffic stop based on driver's dilated pupils held justified. State v. Santacruz, 132 Wn. App. 615 (Div. III, 2006) – May 06:18

"Pretext stop" issue must be addressed on remand in case where officer testified that, before the officer observed a driver commit a traffic violation, the officer noticed a "deer in the headlights" look on the face of the driver.
State v. Meckelson, 133 Wn. App. 431 (Div. III, 2006) – August 06:12

RCW 10.31.100 exception to common law "misdemeanor presence" limit on warrantless custodial arrest is held constitutional. State v. Walker, 157 Wn.2d 307 (2006) – September 06:07

Where postal inspectors had no objective basis for believing postal employee was armed, their frisk was unlawful. U.S. v. Flatter, 456 F.3d 1154 (9th Cir. 2006) (Decision issued August 9, 2006) – October 06:05

Frisking officer's action of seizing and searching item is held justified where he testified that, at the time of the frisk, he believed the item he had patted through the outside of the defendant's pocket could be or could contain a weapon. U.S. v. Hartz, 458 F.3d 1011 (9th Cir. 2006) (Decision issued August 17, 2006) – October 06:02

High crime area with history of vehicle prowls in the past, plus midnight hour and suspect's nervous manner do not add up to particularized "reasonable suspicion" that would justify a Terry stop. State v. Martinez, __ Wn. App. __ , 143 P.3d 855 (Div. III, 2006) – October 06:09

Custodial arrest upheld for driving with expired trip permit - - offense held to have been committed in officer's presence. State v. Holmes, __ Wn. App. __, 2006 WL 30008406 (Div. II, 2006) Dec 06:19

ASSAULT (Chapter 9A.36 RCW)

Evidence sufficient to convict for HIV assault and witness tampering. State v. Whitfield, 132 Wn. App. 787 (Div. II, 2006) – September 06:15

Father's defenses of corpus delicti, consent and religious freedom rejected in assault-of-child prosecution that arose from his attempt at do-it-himself, amateur circumcision of his 8-year-old son. State v. Baxter, 134 Wn. App. 587 (Div. II, 2006) – October 06:17

ATTEMPT (Chapter 9A.28 RCW)

Evidence held sufficient to support conviction for attempted first degree theft in case involving police sting of defendants who told major lies in "selling" a used truck to the officers. State v. George (and George), 132 Wn. App. 654 (Div. I, 2006) – September 06:11

Evidence held insufficient to convict for theft because attempt to "hot wire" car was never completed. State v. R.L.D., 132 Wn. App. 699 (Div. II, 2006) – September 06:21

BURGLARY (Chapter 9A.52 RCW)

Court addresses meaning of "enters unlawfully" and "remains unlawfully" in burglary statutes. State v. Allen, 127 Wn. App. 125 (Div. I, 2005) – February 06:23

Burglary conviction is held supported by testimony of real estate agent who had the only keys to unoccupied home, as showing defendant's lack of permission to be on property;

also, defendant's "abandoned property" defense is rejected where the unoccupied home was being prepared for sale at the time of the alleged crime. State v. J. P., 130 Wn. App. 887 (Div. III, 2005) – April 06:11

Home's detached garage without overhead door held to be "building" under burglary statute. State v. Johnson, 132 Wn. App. 400 (Div. II, 2006) – July 06:22

CIVIL LIABILITY

Failure-to-protect decision grounded in federal constitution's due process clause – adverse to law enforcement officer – is re-issued. Kennedy v. City of Ridgefield, 438 F.3d 1055 (2006) – April 06:02

Federal Civil Rights lawsuit – known facts giving probable cause for a lawful arrest as to crime of impersonating an officer held to support arrest for purposes of defending against section 1983 civil rights action under "Qualified Immunity" doctrine. Alford v. Haner, 448 F.3d 935 (9th Cir. 2006) – May 06:08

No civil liability – where, in responding to a call regarding a then-occurring home invasion, 911 dispatcher gave no assurances to occupant upon which occupant could have justifiably relied to his detriment, there was no actionable duty of the government. Harvey v. Snohomish County, 157 Wn.2d 33 (2006) – July 06:05

No civil liability – "public duty doctrine" precludes agency civil liability where dispatcher never was able to communicate with hang-up 911 caller, and thus no "special relationship" was created. Cummins v. Lewis County, 156 Wn.2d 844 (2006) – July 06:07

No civil liability – where parents of child killed by registered sex offender were not aware of deputy's prior assurance to another person in the community that he would send out fliers regarding the offender, county had no actionable duty to the child or parents. Osborn v. DOC and Mason County, 157 Wn.2d 18 (2006) – July 06:11

Unconstitutionality ruling issued as to California county jail's policy that led to strip searching of woman arrested on a misdemeanor charge of being under the influence of a controlled substance. Way v. Ventura County, 445 F.3d 1157 (9th Cir. 2006) – August 06:05

No qualified immunity for officers - - jury can decide civil rights suit alleging that officers used excessive force against non-suspect, non-resisting, 11-year-old during search warrant execution; ruling is based on youth's claims, among others, that officers: 1) pointed gun at youth for too long and 2) kept him in handcuffs for too long. Tekle v. U.S., 457 F.3d 1088 (9th Cir. 2006) (Decision issued August 11, 2006) – October 06:13

Jail held civilly liable for violating Washington strip search statute in automatically strip searching arrestee who was in custody pending release on bail. Plemmons v. Pierce County, 134 Wn. App. 449 (Div. II, 2006) – October 06:16

CIVILIAN JOB PROTECTION WHEN WORKERS ASSIST POLICE

Employee may sue employer for firing him for cooperating with police investigation of his workplace. Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630 (Div. III, 2006) – September 06:23

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

Evidence held sufficient to support convictions for communication with a minor for immoral purposes – 1) dad telling victim-daughter about defendant's message and 2) discovery by non-reading children of another message were each prohibited "communication" circumstances. State v. Hosier, 157 Wn.2d 1 (2006) – August 06:06

CORPUS DELICTI RULE

Despite fact that defendant admitted that he stole pseudoephedrine to pay off a debt to a "meth cook," corpus delicti is held not established for possessing ephedrine or pseudoephedrine with intent to manufacture methamphetamine; thus, confession of defendant is held inadmissible. State v. Whalen, 131 Wn. App. 58 (Div. II, 2005) – March 06:22

Corpus delicti of murder held established based on the totality of the evidence despite the fact that advanced decomposition of body of defendant's ex-girlfriend prevented medical examiner's determination of whether strangulation or drug overdose was the cause of death. State v. Rooks, 130 Wn. App. 787 (Div. I, 2005) – April 06:14

Father's defenses of corpus delicti, consent and religious freedom rejected in assault-of-child prosecution that arose from his attempt at do-it-himself, amateur circumcision of his 8-year-old son. State v. Baxter, 134 Wn. App. 587 (Div. II, 2006) – October 06:17

CRIMINAL RULE 3.1

Partially handcuffed murder suspect's waiver of Fifth and Sixth Amendment rights prior to custodial questioning by FBI agents valid - - and Criminal Rule 3.1 not violated - - because, although suspect asked agents about the process for appointing counsel, he made clear that he was willing to be questioned without a lawyer; also, jailhouse informant could testify because police did not make him their "agent" for Sixth Amendment purposes. State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) – August 06:18

DOMESTIC VIOLENCE

Evidence held sufficient to support conviction for violating restraining order by making phone calls. State v. Van Tuyl, 132 Wn. App. 750 (Div. III, 2006) – September 06:13

Inmate receiving visitor at jail violated no-contact order; also, circumstances surrounding an assault in a car support a separate unlawful imprisonment conviction. State v. Washington, __ Wn. App. __ , 143 P.3d 606 (Div. I, 2006) – October 06:11

DOUBLE JEOPARDY (Constitutional and statutory protections)

"Double jeopardy" statute, RCW 10.43.040, as amended in 1999, does not apply to bar criminal prosecution in the state court where military has sanctioned the defendant only with non-judicial punishment for the same offense. State v. Stivason, 134 Wn. App. 648 (Div. II, 2006) – October 06:21

ELECTRONIC SURVEILLANCE RECORDING (Chapter 9.73 RCW)

Patrol car recording of traffic stops must comply with warning requirement of RCW 9.73.090(1)(c) even though the street "conversations" are not "private;" but only the recordings, not the officers' recollections of the events, are to be excluded. Lewis v. Department of Licensing, 157 Wn.2d 446 (2006) – September 06:09

Victim's recording in Oregon of phone conversation with suspect did not violate chapter 9.73 RCW where Oregon officer alone instigated the recording, and all recording activity occurred exclusively in Oregon (though the suspect was in Washington). State v. Fowler, 157 Wn.2d 387 (2006) – September 06:10

EVIDENCE LAW

Arrestee's "volunteered statement" and his reply to the arresting officer's "neutral" response held admissible despite lack of Miranda warnings; however, arrestee's statements to hospital personnel held medically privileged despite presence of officers when those statements were made. State v. Godsey, 131 Wn. App. 278 (Div. III, 2006) – March 06:08

911 report by victim of ongoing DV crime held to meet Crawford test for "nontestimonial" – and hence admissible – hearsay under Sixth Amendment confrontation clause. Davis v. Washington and Hammon v. Indiana, 126 S.Ct. 2266 (2006) – September 06:03

Domestic violence victim's Smith statement held admissible against hearsay and confrontation clause challenges. State v. Thach, 126 Wn. App. 297 (Div. II, 2005) – October 06:22

FIREARMS (Chapter 9.41 RCW)

In felon-with-a-firearm case, it was no excuse for defendant that original court that sentenced for the predicate felony failed to inform the felon that he was not allowed to possess firearms. State v. Minor, 133 Wn. App. 636 (Div. II, 2006) – September 06:19

State's "constructive possession" theory regarding gun in upstairs bedroom is rejected on grounds that the juvenile defendant previously had moved out of the bedroom where the gun was found. State v. G.M.V., __ Wn. App. __, 2006 WL 2865170 (Div. III, 2006) – December 06:21

FIRST AMENDMENT (Freedom of Speech)

Bomb threat conviction reversed – man who was drunk when, during his detention by airport police, he threatened to "blow this place up," is entitled to a new trial with jury instructions reflecting "true threat" standard created to protect free speech. State v. Johnston, 156 Wn.2d 355 (2006) – March 06:04

Deputy prosecutor's line-of-duty questioning of deputy sheriff's veracity held not protected under First Amendment's freedom of speech clause. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006) – August 06:05

FIRST AMENDMENT (Freedom of Religion)

Father's defenses of corpus delicti, consent and religious freedom rejected in assault-of-child prosecution that arose from his attempt at do-it-himself, amateur circumcision of his 8-year-old son. State v. Baxter, 134 Wn. App. 587 (Div. II, 2006) – October 06:17

FISH AND WILDLIFE CRIMES, VIOLATIONS, ENFORCEMENT (Title 77 RCW)

Orchardist's conviction for unlawfully hunting big game in shooting of foraging elk upheld, necessity defense fails. State v. Vander Houwen, 128 Wn. App. 806 (Div. III, 2005) – February 06:24 Note: This case is under review in the Washington Supreme Court.

IDENTITY THEFT (Chapter 9.35 RCW)

Identity theft: case 1 – charge must be linked to specific real person; case 2 – actual use of victim's means of identification is not a required element of proof. State v. Berry, 129 Wn. App. 59 (Div. I, 2005) – February 06:13

Woman committed identity theft when she fooled officer at traffic stop by giving acquaintance's name, DOB, address and SSN, and she thus caused major subsequent problems for her unfortunate acquaintance. State v. Presba, 131 Wn. App. 47 (Div. I, 2005) – March 06:17

IMPLIED CONSENT (RCW 46.20.308)

Involuntary blood draw upheld in response to defendant's non-constitutional challenge under RCW 46.20.308, because, at the time of arrest, the officer had probable cause to believe that the suspect had committed vehicular assault or vehicular homicide. State v. Mee Hui Kim, 134 Wn. App. 27 (2006) – October 06:14

INTERROGATIONS AND CONFESSIONS (See also "Vienna Convention," "CrR 3.1," and "Sixth Amendment Right to Counsel" entries in this title)

Terry seizure of reckless driving suspect held justified by reasonable suspicion; also, Miranda warnings held not required in Terry stop questioning. State v. N.M.K., 129 Wn. App. 155 (Div. I, 2005) – January 06:14

Arrestee's "volunteered statement" and his reply to the arresting officer's "neutral" response held admissible despite lack of Miranda warnings; however, arrestee's statements to hospital personnel held medically privileged despite presence of officers when those statements were made. State v. Godsey, 131 Wn. App. 278 (Div. III, 2006) – March 06:08

Deliberate two-step interrogation – unMirandized custodial questioning followed by Mirandized questioning – held to violate Miranda. U.S. v. Williams, 435 F.3d 1138 (9th Cir. 2006) April 06:02

DUI arrestee changed his mind about contacting counsel and therefore CrRLJ 3.1 was not violated by law enforcement officer. State v. Kronich, 131 Wn. App. 537 (Div. III, 2006) April 06:03

Pre-sentence interview of convicted murderer by DOC employee held not subject to Fifth Amendment Miranda warnings requirement or subject to Sixth Amendment counsel protection. State v. Everybodytalksabout, 131 Wn. App. 227 (Div. I, 2006) – April 06:22

Partially handcuffed murder suspect's waiver of Fifth and Sixth Amendment rights prior

to custodial questioning by FBI agents valid - - and Criminal Rule 3.1 not violated - - because, although suspect asked agents about the process for appointing counsel, he made clear that he was willing to be questioned without a lawyer; also, jailhouse informant could testify because police did not make him their "agent" for Sixth Amendment purposes. State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) – August 06:18

Wording of military Miranda warnings held sufficient for waiving of rights for purposes of state court prosecution. State v. Hopkins, __ Wn. App. __ , 142 P.3d 1104 (Div. II, 2006) – October 06:23

INTIMIDATING A PUBLIC SERVANT

Intimidation of a public servant evidence held insufficient in case involving an officer breaking up an underage drinking party. State v. Burke, 132 Wn. App. 415 (Div. II, 2006) – May 06:20

LEGISLATION

Statute update: Initiative Measure 901, prohibiting smoking in public places and places of employment, takes effect December 8, 2005. – January 06:02

2006 Washington Legislative Update – Part One – May 06:01

2006 Washington Legislative Update – Part Two – May 06:02

LINEUPS, SHOWUPS AND PHOTO MONTAGES

Showup identification procedure held not unduly suggestive; also, evidence held sufficient to support conviction for second degree robbery. State v. Brown, 128 Wn. App. 1 (Div. III, 2005) – February 06:16

MINOR IN POSSESSION

Minor in possession conviction reversed on grounds that the minor's constructive possession of alcohol was not proven. State v. Roth, 131 Wn. App. 556 (Div. III, 2006) – April 06:05

"Minor in possession" evidence held insufficient to support conviction. State v. A.J.P-R., 132 Wn. App. 181 (Div. III, 2006) – August 06:16

NECESSITY DEFENSE

Under four-part test for common law "necessity" defense, facts of case are held not to justify the defense to an unlawful-possession-of-firearm charge. State v. Parker, 127 Wn. App. 352 (Div. III, 2005) – February 06:21

Orchardist's conviction for unlawfully hunting big game in shooting of foraging elk upheld, common law necessity defense fails. State v. Vander Houwen, 128 Wn. App. 806 (Div. III, 2005) – February 06:24 Note: The Washington Supreme Court is reviewing this case.

PHONE HARASSMENT (RCW 9.61.730)

Phone harassment - - there is now a split in Washington appellate courts - - division two disagrees with division one, and holds under RCW 9.61.230 that state must prove that

call was initiated with intent to harass, intimidate, torment or embarrass victim. State v. Lilyblad (aka Stephanie Rena Paris), 134 Wn. App. 462 (Div II, 2006) – October 06:20

POSSESSING DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT (RCW 9.68A.070)

Evidence taken from computer's hard drive, together with 10-year-old child's testimony, held sufficient to support conviction for accessing depictions of children engaged in sexually explicit conduct. State v. Mobley, 129 Wn. App. 378 (Div. III, 2005) – February 06:10

Defendant may be convicted of attempted possession of child pornography based upon the defendant's possession of materials that appear to be child pornography even if the materials in fact do not depict actual minors. State v. Luther, 157 Wn.2d 63 (2006) – August 06:11

PUBLIC RECORDS

Police child-sexual-assault records may not be withheld based on requestor's identification of victim. Koenig v. City of Des Moines, ___ Wn.2d ___, 142 P.3d 162 (2006) – October 06:15

ROBBERY(Chapter 9A.56 RCW)

Robbery conviction may not be based on force that a thief used to escape after the thief had abandoned the stolen property. State v. Johnson, 155 Wn.2d 609 (2005) – January 06:03

Showup identification procedure held not unduly suggestive; also, evidence held sufficient to support conviction for second degree robbery. State v. Brown, 128 Wn. App. 1 (Div. III, 2005) – February 06:16

SEARCH AND SEIZURE

Abandonment of personal property

Omission from affidavit of facts regarding named informant's criminal history and pending matter on which informant was seeking leniency did not invalidate warrant search; also, the suspect's denial of any ownership or connection to a briefcase justified seizing the briefcase and seeking a warrant to search it based on probable cause. State v. Evans, 129 Wn. App. 211 (Div. II, 2005) – January 06:18; review pending in the Washington Supreme Court.

Anticipatory search warrant

Under the Fourth Amendment, an anticipatory search warrant need not describe the triggering condition so long as the affidavit describes that condition and otherwise establishes probable cause. U.S. v. Grubbs, 126 S.Ct. 1494 (2006) – May 06:04

Apparent authority rule for consent searches

Where apartment leaseholder was present in bedroom, officers at entry door could not get valid consent to search from temporary guest; also, "apparent authority" rule does not apply to searches governed by article 1, section 7 of Washington constitution. State v. Morse, 159 Wn.2d 1 (2005) – February 06:02

Community caretaking exception to warrant requirement (See also "Emergency Act Exception")

Officer's warrantless stop of car registered to person listed as "missing/endangered" was reasonable under "community caretaking function" exception to warrant requirement; also, examination of suspect's forearm did not exceed lawful scope of detention. State v. Moore, 129 Wn. App. 870 (Div. I, 2005) – January 06:07

Consent search exception to warrant requirement

Officers' entry of suspect's rural property via driveway held not a "search"; also, suspect's consent to subsequent search is held valid, and evidence of methamphetamine manufacturing supports conviction. State v. Poling, 128 Wn. App. 659 (Div. II, 2005) – January 06:04

Where apartment leaseholder was present in bedroom, officers at entry door could not get valid consent to search from temporary guest; also, "apparent authority" rule does not apply to searches governed by article 1, section 7 of Washington constitution. State v. Morse, 159 Wn.2d 1 (2005) – February 06:02

Under the Fourth Amendment, if one cohabitant consents to a warrantless, non-exigent police search of a residence and another cohabitant is present and objects to the search, police do not have valid consent to search as against the objecting cohabitant; Washington's constitution is more restrictive and would require express consent from all present cohabitants, not just the absence of objection from one. Georgia v. Randolph, 126 S.Ct. 1515 (2006) – May 06:05

Where officers conducting a "consent" search of a car directed the disembarked, not-yet-seized, car occupants not to watch the search, the officers may have destroyed the continuing voluntariness, and hence the validity of, the consent. U.S. v. McWeeney, 454 F.3d 1030 (9th Cir. 2006) (Decision issued July 21, 2006) – October 06:03

Emergency aid exception to warrant requirement

Under the Fourth Amendment, the test of the Emergency Aid Exception to the search warrant requirement is purely objective; beware, however: the tests for the Emergency Aid and Community Caretaking Exceptions under the Washington Constitution may include a subjective and/or pretext element. Brigham City, Utah v. Stuart, 126 S. Ct. 1943 (2006) – July 06:02

Emergency aid and exigent circumstances exceptions to search warrant requirement held to justify warrantless residential entry to look for victim in domestic violence investigation. U.S. v. Black, __ F.3d __, 2006 WL 3026026 (9th Cir. 2006) Dec 06:13

Government loses on community caretaking/emergency exception in case where officers entered shed based on chemical smell indicating a meth lab may be inside. State v. Lawson, __ Wn. App. __, 144 P.3d 377 (Div. II, 2006) Dec 06:15

Entry of premises to arrest

Payton rule is applied under Washington constitution – misdemeanor arrest warrant justifies forcible warrantless entry to arrest; also, probable cause regarding arrestee's current place of residency (at time of police entry), not necessarily the address shown on the arrest warrant, determines what place may be entered. State v. Hatchie, 133 Wn. App. 100 (Div. II, 2006) – July 06:12

Exigent circumstances exception to warrant requirement

Exigent circumstances – DUI suspect would not take his hands out of his pockets and then fled into his home – under all of the circumstances the officer was justified in making a forcible warrantless residence entry to arrest the fleeing DUI suspect. State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) – July 06:17

Screen door is nonetheless a door for Fourth Amendment privacy purposes, but officers had exigent circumstances and therefore were justified in opening the screen door and going into residence without a warrant. U.S. v. Arellano-Ochoa, 461 F.3d 1142 (9th Cir. 2006) (Decision issued August 31, 2006) – October 06:06

Exclusionary rule application

Violation of the Fourth Amendment knock-and-announce requirement does not require suppression of evidence; but beware: Washington Supreme Court likely would require suppression based on RCW 10.31.040 or article 1, section 7 of the Washington constitution. Hudson v. Michigan, 126 S.Ct. 2159 (2006) – August 06:02

Knock-and-announce requirement at fixed private premises

Violation of the Fourth Amendment knock-and-announce requirement does not require suppression of evidence; but beware: Washington Supreme Court likely would require suppression based on RCW 10.31.040 or article 1, section 7 of the Washington constitution. Hudson v. Michigan, 126 S.Ct. 2159 (2006) – August 06:02

Impound-Inventory exception to warrant requirement

Objectively-based "manifest necessity" justified officers' impound-inventory look for possible meth lab in car's trunk; in follow-up warrant application, affidavit failed to show sufficient background of unnamed citizen informants; to meet Aguilar-Spinelli PC test but other information in affidavit re officer's observing of meth-related materials in car's passenger area gave probable cause for car trunk search. State v. Ferguson, 131 Wn. App. 694 (Div. III, 2006) – April 06:17

"Incident to arrest" exception to warrant requirement

Redmond v. Moore does not mean that pre-2005 arrests for DWLS third degree were unlawful arrests. State v. Carnahan, 130 Wn. App. 159 (Div. II, 2005); State v. Potter, 129 Wn. App. 494 (Div. III, 2005); State v. Olinger, 130 Wn. App. 22 (Div. III, 2005); State v. Holmes, 129 Wn. App. 24 (Div. I, 2005); and State v. Pacas, 130 Wn. App. 446 (Div. III, 2005) – January 06:22

Search ruled to be close enough in time to arrest to be deemed "incident to arrest" even though for safety reasons officers – before starting – waited 10 to 15 minutes for third officer to arrive. U.S. v. Weaver, 433 F.3d 1104 (9th Cir. 2006) - March 06:02

Supreme Court upholds searches incident to arrests for DWLS in the third degree that were made before the Supreme Court decided Redmond v. Moore. State v. Potter, State v. Holmes, 156 Wn.2d 835 (2006) – May 06:14

Privacy

Officers' entry of suspect's rural property via driveway held not a "search"; also, suspect's consent to subsequent search is held valid, and evidence of methamphetamine manufacturing supports conviction. State v. Poling, 128 Wn. App. 659 (Div. II, 2005) – January 06:04

No Fourth Amendment privacy for employee in his workplace computer where employer: 1) owned computer, 2) had policy and practice of routinely monitoring computer, and 3) had prohibition against private use. U.S. v. Ziegler, 456 F.3d 1138 (9th Cir. 2006) (Decision issued August 8, 2006) – October 06:02

Search warrant affidavit established that computer contained images of minors engaged in sexually explicit conduct, though court would prefer that affiant's attach copies of the images to the affidavit. U.S. v. Battershell, 457 F.3d 1048 (9th Cir. 2006) (Decision issued August 10, 2006) – October 06:08

Probable cause

Objectively-based "manifest necessity" justified officers' impound-inventory look for possible meth lab in car's trunk; in follow-up warrant application, affidavit failed to show sufficient background of unnamed citizen informants; to meet Aguilar-Spinelli PC test but other information in affidavit re officer's observing of meth-related materials in car's passenger area gave probable cause for car trunk search. State v. Ferguson, 131 Wn. App. 694 (Div. III, 2006) – April 06:17

Probable cause to search suspect's computer for child porn established by affidavit explaining, among other things, that the suspect subscribed to a child porn website for the website's final two months before the government shut the website down. U.S. v. Gourde, 440 F.3d 1065 (9th Cir. 2006) – May 06:12

Search warrant affidavit established that computer contained images of minors engaged in sexually explicit conduct, though court would prefer that affiant's attach copies of the images to the affidavit. U.S. v. Battershell, 457 F.3d 1048 (9th Cir. 2006) (Decision issued August 10, 2006) – October 06:08

Search of residence for illegal drugs under warrant upheld when defendant's Thein-nexus-probable-cause challenge to affidavit fails. State v. G.M.V., __ Wn. App. __, 2006 WL 2865170 (Div. III, 2006) Dec 06:21

Reckless or intentional omission or misstatement of facts in affidavits

Omission from affidavit of facts regarding named informant's criminal history and pending matter on which informant was seeking leniency did not invalidate warrant search; also, the suspect's denial of any ownership or connection to a briefcase justified seizing the briefcase and seeking a warrant to search it based on probable cause. State v. Evans, 129 Wn. App. 211 (Div. II, 2005) – January 06:18; review pending in the Washington Supreme Court.

Strip search

Unconstitutionality ruling issued as to California county jail's policy that led to strip searching of woman arrested on a misdemeanor charge of being under the influence of a controlled substance. Way v. Ventura County, 445 F.3d 1157 (9th Cir. 2006) – August 06:05

Jail held civilly liable for violating Washington strip search statute in automatically strip searching arrestee who was in custody pending release on bail. Plemmons v. Pierce County, 134 Wn. App. 449 (Div. II, 2006) – October 06:16

SEX OFFENDER REGISTRATION (RCW 9A.44.130)

Sex offender was not required to re-register when he moved out of house but owner allowed him to continue to sleep nights in his car in the driveway and to get mail and phone service there. State v. Stratton, 130 Wn. App. 760 (Div. II, 2005) – March 06:20

SIXTH AMENDMENT RIGHT TO CONFRONTATION

911 report by victim of ongoing DV crime held to meet Crawford test for "nontestimonial" – and hence admissible – hearsay under Sixth Amendment confrontation clause. Davis v. Washington and Hammon v. Indiana, 126 S.Ct. 2266 (2006) – September 06:03

Domestic violence victim's Smith statement held admissible against hearsay and confrontation clause challenges. State v. Thach, 126 Wn. App. 297 (Div. II, 2005) – October 06:22

SIXTH AMENDMENT RIGHT TO COUNSEL

Pre-sentence interview of convicted murderer by DOC employee held not subject to Fifth Amendment Miranda warnings requirement or subject to Sixth Amendment counsel protection. State v. Everybodytalksabout, 131 Wn. App. 227 (Div. I, 2006) – April 06:22

Partially handcuffed murder suspect's waiver of Fifth and Sixth Amendment rights prior to custodial questioning by FBI agents valid - - and Criminal Rule 3.1 not violated - - because, although suspect asked agents about the process for appointing counsel, he made clear that he was willing to be questioned without a lawyer; also, jailhouse informant could testify because police did not make him their "agent" for Sixth Amendment purposes. State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) – August 06:18

THEFT (Chapter 9A.56 RCW)

Evidence held sufficient to support conviction for attempted first degree theft in case involving police sting of defendants who told major lies in "selling" a used truck to the officers. State v. George (and George), 132 Wn. App. 654 (Div. I, 2006) – September 06:11

Evidence held insufficient to convict for theft because attempt to "hot wire" car was never completed. State v. R.L.D., 132 Wn. App. 699 (Div. II, 2006) – September 06:21

TRESPASS

Apartment complex driveway included under trespass notice even if driveway "impliedly open to the public" for some purposes. State v. Bellerouche, 129 Wn. App. 912 (Div. I, 2005) – January 06:16

TRAFFIC INFRACTIONS AND TRAFFIC CRIMES (Title 46 RCW)

In light of the arresting officer's concession in testimony that, at the time of the arrest, the vehicle was safely off the roadway, physical control conviction is held unsupportable. City of Spokane v. Beck, 130 Wn. App. 481 (Div. III, 2005) – March 06:15

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW) AND OTHER DRUG LAWS

Officers' entry of suspect's rural property via driveway held not a "search"; also, suspect's consent to subsequent search is held valid, and evidence of methamphetamine manufacturing supports conviction. State v. Poling, 128 Wn. App. 659 (Div. II, 2005) – January 06:04

Evidence held sufficient to support convictions for possessing pseudoephedrine with intent to manufacture methamphetamine. State v. Moles, Conn and Cambra, 130 Wn. App. 461 (Div. II, 2005) – February 06:18

Despite fact that defendant admitted that he stole pseudoephedrine to pay off a debt to a "meth cook," corpus delicti is held not established for possessing ephedrine or pseudoephedrine with intent to manufacture methamphetamine; thus, confession of defendant is held inadmissible under corpus delicti rule. State v. Whalen, 131 Wn. App. 58 (Div. II, 2005) – March 06:22

RCW 9A.42.100 prohibition against endangering dependent children during methamphetamine manufacture is not limited to parents, custodians or caregivers of such children. State v. Cooper, 156 Wn.2d 475 (2006) – April 06:03

Probable cause for arrest found; also, county ordinance prohibiting possession of drug paraphernalia with intent to use is upheld against preemption attack. State v. Fisher, 132 Wn. App. 26 (Div. I, 2006) – May 06:16

UNLAWFUL IMPRISONMENT (RCW 9A.40.040)

Inmate receiving visitor at jail violated no-contact order; also, circumstances surrounding an assault in a car support a separate unlawful imprisonment conviction. State v. Washington, __ Wn. App. __ , 143 P.3d 606 (Div. I, 2006) – October 06:11

VIENNA CONVENTION ON CONSULAR RELATIONS

Vienna Convention on consular relations held not to require suppression of statements taken by officers under circumstances where the treaty has been violated. Sanchez-Llamas v. Oregon, Bustillo v. Johnson, 126 S.Ct. 2669 (2006) – September 06:02

WITNESS TAMPERING (Chapter 9A.72 RCW)

Evidence sufficient to convict for HIV assault and witness tampering. State v. Whitfield, 132 Wn. App. 787 (Div. II, 2006) – September 06:15

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

EXIGENT CIRCUMSTANCES AND EMERGENCY AID EXCEPTIONS TO CONSTITUTIONAL SEARCH WARRANT REQUIREMENT HELD TO JUSTIFY WARRANTLESS RESIDENTIAL ENTRY TO LOOK FOR REPORTED VICTIM IN DOMESTIC VIOLENCE INVESTIGATION

U.S. v. Black, ___ F.3d ___, 2006 WL 3026026 (9th Cir. 2006)

Facts: (Excerpted from 9th Circuit majority opinion)

> The police justify their entry into Black's apartment, not as one looking for evidence of a crime but as a welfare search occasioned by a 911 domestic violence call. Police were dispatched to the apartment after Black's ex-girlfriend, Tyroshia Walker, called 911 and reported that Black had beaten her up that morning in the apartment and that he had a gun. Toward the end of her 911 call, Walker told the dispatcher that she intended to return to the apartment with her mother in order to retrieve her clothing and that the two women would wait outside the apartment, in a white Ford pickup truck, for police to arrive. Officer Rodriguez was dispatched to the scene to meet the women. When he arrived at the apartment a few minutes later there were no signs of Walker, her mother, or the truck. Rodriguez contacted Officer Kikkert, who was already on his way to the apartment, and directed him to stop by the grocery store from which Walker had made her phone call. Kikkert checked the store for signs of Walker but, finding none, he continued to the apartment.
>
> After Kikkert arrived at Black's apartment, the two officers knocked on the front door but received no response. They then contacted the apartment manager in an attempt to gain access to the building. In the meantime, Kikkert circled the building to inspect the backyard area. There, he discovered an individual who matched Black's physical description. The individual identified himself as Jasper Black and admitted that he knew the police were investigating a domestic violence call. He denied knowing the whereabouts of Walker and also denied that he lived in the apartment. When the defendant became agitated, one of the police officers patted him down for weapons and searched his pockets with the defendant's consent, which yielded the key to the apartment. Using the key, Rodriguez entered and made a quick sweep of the apartment to see if anyone was there. No one was present, but Rodriguez noticed a gun on the bed. Without touching the gun, he exited, arrested Black, and sought a warrant for the gun.

Proceedings below:

After the Nevada federal district court denied his suppression motion, Black was convicted as a felon in possession of a firearm.

ISSUE AND RULING: Did the DV investigation circumstances justify entry of the residence without a search warrant to determine if the reported DV victim was inside? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Nevada federal district court conviction of Jasper Black for being a felon in possession of a firearm.

ANALYSIS BY MAJORITY: (Excerpted from Court of Appeals opinion)

The police were justified in their entry because they feared that Walker could have been inside the apartment, badly injured and in need of medical attention, and that their warrantless search of the apartment was, therefore, justified by exigent circumstances. As the government argued both during the suppression hearing and on appeal, Walker could have returned to the apartment after her 911 call, but before police arrived at the scene. At that point, Black could have managed to pull her back into the apartment. Once inside the apartment, Black-in a repeat performance of his behavior earlier that morning-could have beaten Walker again and left her in the apartment severely injured. Even worse, he could have shot Walker using the gun that police knew was inside the apartment.

The dissent would hold that the circumstances of this case do not support an objectively reasonable belief that Walker could be inside the apartment. It emphasizes the short time span between Walker's phone call and Rodriguez's arrival on the scene. Because Walker was a two-minute drive from the apartment building when she called the police, and Officer Rodriguez arrived approximately three minutes after the call, the dissent argues that there was not sufficient time after Walker's arrival for the defendant to force her into the apartment. The dissent parses the time too finely.

First, if Black had seen Walker arrive outside the building, it would take little time for him to threaten Walker with a gun and force her inside. Second, the times cited by the dissent are all approximate times. Rodriguez was dispatched at *approximately* 8:40 and arrived at *approximately* 8:43. If each approximation is off by a single minute, then Walker could have arrived at the apartment three minutes before Rodriguez – ample time for Black to have taken her inside the building. We conclude that the circumstances do support an objectively reasonable belief that Walker could be in the apartment.

This is a case where the police would be harshly criticized had they not investigated and Walker was in fact in the apartment. Erring on the side of caution is exactly what we expect of conscientious police officers. This is a "welfare search" where rescue is the objective, rather than a search for crime. We should not second-guess the officers objectively reasonable decision in such a case.

Our circuit has recognized that "the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy." While we have stopped short of holding that "domestic abuse cases create a per se exigent need for warrantless entry," we continue to evaluate, on a case-by-case basis, whether the "total circumstances, presented to the law officer before a search . . . relieved the officer of the customary need for a prior warrant." Our own individualized assessment of the circumstances presented in this case leads us to the same conclusion that the district court reached: the officer's initial warrantless entry into the apartment was justified by exigent circumstance and, as a result, the subsequent seizure of Black's handgun-this time, accomplished with warrant in hand-was not unconstitutional under the Fourth Amendment.

[*Court's footnote: Analyzing police action under the "emergency aid" doctrine compels the same conclusion. Under this doctrine, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." See* Brigham City, Utah, v. Stuart, 126 S.Ct. 1943 (2006) July 06 LED:02. *If, in the course of doing so, an officer "discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would have been found." In* Brigham City*, the Supreme Court held that the emergency aid doctrine applies only if a court concludes that an officer's decision to enter without a warrant was objectively reasonable. See* Brigham City *(rejecting the argument that the officer's subjective motivation is in any way relevant). Because this "objective reasonableness" test is essentially the same as the one courts use to determine whether police action is justified under the "exigent circumstances" exception, we can affirm the district court's denial of Black's motion to suppress under the emergency aid doctrine as well.]*

[Some citations omitted]

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WASHINGTON STATE COURT OF APPEALS

GOVERNMENT LOSES ON THEORY OF COMMUNITY CARETAKING/EMERGENCY EXCEPTION TO SEARCH WARRANT IN CASE WHERE OFFICERS ENTERED A SHED TO INVESTIGATE A STRONG CHEMICAL ODOR COMING FROM THE SHED

State v. Lawson, ___ Wn. App. ___, 144 P.3d 377 (Div. II, 2006)

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

> Pierce County Sheriff's Deputies [A and B] responded to a call from an anonymous citizen reporting a strong chemical, ammonia-like smell coming from Lawson's residence. The caller said that the odor burned her eyes and throat.
>
> When the deputies arrived at the scene, they saw Lawson standing near a shed in his fenced yard. The deputies called Lawson to the fence and explained that they were there to investigate the odor. The deputies asked Lawson if the house was his and if they could search the shed. Lawson said yes and invited them in.
>
> Deputy [A] entered through the fence gate and immediately walked toward the shed. Neither Deputy [A] nor Deputy [B] advised Lawson of his Ferrier warnings. As Deputy [A] approached the shed, she smelled a strong chemical odor. She entered the shed and lifted the lid of one of two plastic totes. Inside the tote, Deputy [A] saw a grinder with white residue, a glass baking dish with residue, a spatula with residue, and a gallon milk jug containing a blue liquid. She immediately exited the shed and told Deputy [B] that she had discovered a methamphetamine lab.
>
> The deputies then arrested Lawson, and during a search incident to arrest, Deputy [B] discovered a small amount of methamphetamine in Lawson's pocket.

After Deputy [A] read Lawson his Miranda warnings, Lawson told her that he extracted ephedrine to sell and to trade for methamphetamine.

The State charged Lawson with one count of manufacturing methamphetamine and one count of possession of methamphetamine.

The trial court heard Lawson's motion to suppress evidence based on the deputies' alleged violation of the rule announced in [State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02, Nov 98 LED:20**]. After hearing testimony from Deputy [A], Deputy [B], and Victoria Lisoski, the trial court ruled that Lawson invited the deputies to look at his shed; that the deputies could smell something before they got into the shed; and that once in the shed, the deputies knew that Lawson had a methamphetamine lab. The trial court ruled that the chemical odor, the anonymous citizen's call, and the objects Deputy [A] found in the shed were sufficient to lead a reasonable person to believe that Lawson was engaged in a crime. Finding that there "was a clear and present danger to persons on [Lawson's] property and to the surrounding residents in the neighborhood," the trial court denied Lawson's motion to suppress. It also ruled that Deputies [A and B] were not required to give Ferrier warnings because the deputies were at Lawson's property to investigate a danger to persons on the property and to the surrounding community, and not to gather evidence of illegal drug activity.

After a bench trial on stipulated facts, the trial court found Lawson guilty of manufacturing methamphetamine and not guilty of possessing methamphetamine.

ISSUE AND RULING: Was the warrantless entry of the shed justified under the community caretaking or emergency exception to the constitutional search warrant requirement? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of Pierce County Superior Court conviction of Kevin Bert Lawson for manufacturing methamphetamine.

ANALYSIS: (Excepted from Court of Appeals opinion)

Police officers may enter a building without a warrant when facing exigent circumstances (emergency exception). The exception recognizes the " 'community caretaking function of police officers, and exists so officers can assist citizens and protect property.' " State v. Schlieker, 115 Wn. App. 264 (Div. II, 2003) **May 03 LED:12** (quoting State v. Menz, 75 Wn. App. 351 (Div. II, 1994) **Feb 95 LED:17**). The emergency exception justifies a warrantless search when (1) the officer subjectively believes that someone needs assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched. State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07** (quoting Menz, 75 Wn. App. at 354, 880 P.2d 48). When analyzing these factors, we view the officer's actions as the situation appeared to the officer at the time. State v. Lynd, 54 Wn. App. 18 (Div. I, 1989).

Lawson argues that the deputies' warrantless entry into his property did not fall within the community caretaking exception. He assigns error to the trial court's finding that the deputies' primary purpose in visiting Lawson's property was to

investigate a possible danger to someone on the property and to people in the surrounding community, and not to search for evidence of illegal drug activity.

The deputies testified that they went to Lawson's house because an anonymous caller had reported a strong ammonia odor and the caller suspected possible drug activity. [The deputies] wanted to "make sure that [Lawson's residence] was safe." But when she arrived at Lawson's house, [Deputy A] armed herself with a rifle and a handgun because "[people that manufacture methamphetamine] pose hazards to us . . . [They] don't like to go to jail and sometimes they like to go for handguns and like to take shots at us."

Deputy [A] testified that it was important for her to investigate the smell because "[i]t's a danger to public safety . . . [t]here are inhalation hazards . . . [and][s]ometimes meth labs explode." Deputy [B] testified that "if you have a lot of houses, one on top of the other and if somebody was producing meth or a byproduct of meth, you're putting a whole bunch of people's lives in danger." But he said that although there were children within a block of Lawson's house, there were no people on the street adjacent to Lawson's house.

When the State invokes the emergency exception, it must satisfy us that the claimed emergency is not merely a pretext for conducting an evidentiary search. Schlieker. In Schlieker, deputies responded to a domestic disturbance call reporting screaming, yelling, and a gunshot at a home. When the deputies arrived, the occupants explained that a cigarette lighter had exploded in the clothes dryer. The occupants then told the deputies that they suspected drug activity in a trailer the defendants had parked on the property. As the deputies approached the trailer to investigate, two individuals ran to a nearby car and drove away from the trailer. Concerned that the individuals stole the car and that someone in the trailer might be injured, the deputies entered the trailer.

The deputies found the defendants hiding in the trailer, handcuffed them both, and removed them from the trailer. Schlieker. The deputies then reentered the trailer and found evidence of methamphetamine manufacture. In denying the defendants' motion to suppress, the trial court concluded that the community caretaking exception justified the initial entry. On appeal, we found significant that (1) the deputies were not at the trailer out of concern for the defendants' safety, but to investigate trespassing and drug activity allegations; (2) the deputies had no information that someone inside the trailer had been injured; and (3) after finding the defendants unharmed, the deputies did not inquire about their well-being, but handcuffed and arrested them and searched for evidence of criminal activity. We held that the emergency exception did not justify the warrantless entry because "[t]he deputies' actions and that they did not inquire into the occupants' safety, but instead handcuffed and arrested them, convince us that this was not a circumstance wherein the deputies were attempting to help people who were injured or in danger."

We find Schlieker persuasive. Although, the deputies here did not handcuff Lawson before searching the shed, neither did they ask about his health or well-being. Also, similar to Schlieker, the deputies had no information that anyone on Lawson's property, particularly in the shed, was injured or in need of immediate help; and the 911 call did not report that anyone on Lawson's property was injured or in need of immediate help. Significantly, the trial court did not find that

the deputies subjectively believed that someone on the property or nearby needed help for health or safety reasons. *See* Schlieker. Rather, the trial court focused on the deputies' purpose of "investigating a potential danger to the community, and not . . . to gather evidence of illegal drug activity." But finding "a potential danger to the community" falls short of finding that the officers entertained a specific belief that someone in the shed needed immediate help, a necessary step in authorizing an emergency entry into the shed.

Generally, we have endorsed an emergency entry only where the officers reasonably believed that a specific person or persons needed immediate help for health or safety reasons. *See, e.g.,* Lynd, 54 Wn. App. at 22-23 (where police officer had knowledge of 911 hang-up call from defendant's home, the phone line remained busy after the 911 call, a domestic violence incident between spouses had just occurred, defendant was loading his things into his vehicle and preparing to leave, and defendant did not want the officer to enter the home to check on his wife, emergency exception justified warrantless entry into defendant's home to investigate the well-being of the wife); *see also* State v. Gocken, 71 Wn. App. 267 (Div. I, 1993) **March 94 LED:12** (the emergency exception justified a warrantless search where police officers entered the defendant and victim's condominium and kicked in the victim's bedroom door to perform a "routine check on [the victim's] welfare" after reports of decaying flesh odor and reports from family and friends that they had not seen the victim for several weeks). We are unwilling to extend the doctrine to authorize warrantless entries where the officers express only a generalized fear that methamphetamine labs and their ingredients are dangerous to people who might live in the neighborhood.

Because the State did not prove and the trial court did not find that the deputies subjectively believed someone on Lawson's property needed assistance for health or safety reasons, the court erred in denying Lawson's motion to suppress. And because the State argues only that officers were not required to advise Lawson of the Ferrier warnings because exigent circumstances justified their entry, we do not address consent.

[Some citations omitted]

DISSENT BY JUDGE HUNT

Judge Hunt writes a lengthy and spirited dissent. She argues that the community caretaking/emergency exception ruling by the majority in this case is wrong, and, among other things, is directly in conflict with the Division One Court of Appeals opinion under very similar facts in State v. Downey, 53 Wn. App. 543 (Div. I, 1989) **[LED EDITORIAL COMMENT: Strangely, the majority opinion in Lawson does not even mention the Downey decision.]**

LED EDITORIAL COMMENT:

When in doubt, of course, officers should apply for a search warrant. Also, while we have not seen the record in this case, the more detail and justification that officers can provide in their reports, the better the chance that the courts will accept officers' reliance on the warrantless-entry rationale of community caretaking or emergency circumstances.

CUSTODIAL ARREST UPHELD FOR DRIVING WITH EXPIRED TRIP PERMIT - - OFFENSE HELD TO HAVE BEEN COMMITTED IN OFFICER'S PRESENCE

State v. Holmes, ___ Wn. App. ___, P.3d ___, 2006 WL 3008406 (Div. II, 2006)

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

> Mossyrock Police Officer Stamper stopped Holmes because her truck had a defective tail light and expired license tabs. As Officer Stamper contacted Holmes, he saw a mismarked and expired three-day trip permit in the truck's rear window. Officer Stamper arrested Holmes for driving with an expired and mismarked trip permit in violation of RCW 46.16.160.
>
> Officer Stamper testified that, as he handcuffed Holmes, he "asked if she had anything on her that [he] needed to know about: any guns, weapons, knives, needles, anything that might stick [him] or injure [him], poke [him]." Holmes responded that she had marijuana in her purse in the truck. At that point, Officer Stamper had not yet read Holmes her Miranda rights because "he hadn't started questioning her on anything yet." Officer Stamper then read Holmes her Miranda rights, which she waived.
>
> After placing Holmes in his patrol car, Officer Stamper searched the truck. In Holmes's purse, he found marijuana and a smoking device. He also found a sunglasses case in Holmes's purse that contained a spoon, a hypodermic needle, and a plastic bindle containing methamphetamine.
>
> After Officer Stamper searched the truck, Holmes asked him to retrieve her medication from the truck. When Officer Stamper returned with two pill bottles, Holmes asked him to get an empty pill bottle from her truck that previously contained a prescription she had to refill. Officer Stamper did so and then took Holmes to jail. While booking Holmes, another officer found methamphetamine in the empty pill bottle.
>
> The State charged Holmes with possession of methamphetamine, unlawful use of drug paraphernalia, and bail jumping. The State dropped the bail jumping charge, recharged it under a separate cause number, and Holmes pleaded guilty.
>
> Holmes moved to suppress the statement that she had marijuana in her purse, arguing that she made the statement before the officer gave her Miranda warnings. After a CrR 3.5 hearing, the court denied Holmes's motion to suppress the statement, ruling that she did not make the statement in response to interrogation and that Officer Stamper did not expect her to tell him she had marijuana when he asked if she had anything that might injure him.
>
> At trial, Officer Stamper testified that when he asked Holmes why she did not tell him that the bottle had methamphetamine in it, "she never replied. She just looked at me."
>
> Holmes testified that the sunglasses case and its contents were not hers. She said that someone had worked on her vehicle, that he probably dropped the case

in her car, and that she then must have put it in her purse when she collected the purse's contents, which she had removed while retrieving her identification for Officer Stamper. She testified that she had never seen the sunglasses case before. She also testified that she did not know that the empty pill bottle contained methamphetamine.

ISSUE AND RULING: Did Holmes commit the gross misdemeanor of operating a vehicle with an expired and corrected trip permit in the presence of the officer such that the custodial arrest was lawful? (ANSWER: Yes)

Result: Affirmance of Lewis County Superior Court convictions of Faye Annette Holmes for possession of methamphetamine and possession of drug paraphernalia.

ANALYSIS: (Excepted from Court of Appeals opinion)

Holmes argues that the court should have suppressed her marijuana statement and the evidence police obtained from the truck after arresting her because the arrest was illegal. Specifically, Holmes claims that she did not drive with an expired trip permit in Officer Stamper's presence.

. . .

Holmes cites State v. Green, 150 Wn.2d 740 (2004) **March 04 LED:08**, for the proposition that driving with an expired trip permit is not a continuing offense and that the actual violation occurred on the date the trip permit expired. In Green, the defendant moved to suppress drug evidence obtained during a search incident to her arrest for failure to transfer title to a vehicle. The court held that a defendant committed the misdemeanor of failing to transfer title only when 45 days after delivery the purchaser had still not applied for a title transfer. Green (citing RCW 46 .12.101(6)). Thus, failure to transfer title was not a continuing offense and the crime was complete when 45 days had passed since the date of delivery of the vehicle. Accordingly, because the 45-day period had not elapsed before the arrest, and because the statute did not expressly provide that the offense was a continuing offense, the defendant did not commit a misdemeanor in the officers' presence and the trial court should have suppressed the drug evidence.

Green does not help Holmes. Officer Stamper arrested Holmes for driving with an expired and mismarked trip permit in violation of RCW 46.16.160. Under RCW 46.16.160(1), a vehicle owner with an expired out-of-state vehicle license registration may operate a vehicle in Washington under authority of a state-issued trip permit. RCW 46.16.160(2) provides:

> Every [trip] permit shall identify, as the department may require, the vehicle for which it is issued and shall be completed in its entirety and signed by the operator before *operation* of the vehicle on the public highways of this state. Correction of data on the permit such as dates, license number, or vehicle identification number invalidates the permit.

A violation of RCW 46.16.160 is a gross misdemeanor. RCW 46.16.160(7). The Green violation did not require operating a vehicle; the violation here did.

> Holmes committed the gross misdemeanor of *operating* a vehicle with an expired and corrected trip permit. *See* RCW 46.16.160(1), (2), (7). Because Holmes drove her vehicle while it had an expired and mismarked trip permit in Officer Stamper's presence, Officer Stamper lawfully arrested her. RCW 10.31.100.

[Some citations omitted]

SEARCH UNDER WARRANT UPHELD WHERE THEIN NEXUS/PROBABLE CAUSE CHALLENGE TO AFFIDAVIT FAILS; BUT STATE'S "CONSTRUCTIVE POSSESSION" THEORY REGARDING GUN IN BEDROOM IS REJECTED ON GROUNDS THAT JUVENILE DEFENDANT HAD MOVED OUT OF BEDROOM WHERE GUN WAS FOUND

State v. G.M.V., ___ Wn. App. ___, 2006 WL 2865170 (Div. III, 2006)

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

> Police executed a warrant to search a house in Moses Lake, Washington. The mother and stepfather of 15-year-old G.M.V. owned and occupied the house.
>
> The police had made a couple of controlled drug buys from G.M.V.'s boyfriend, Ivan Longoria. They watched Mr. Longoria leave G.M.V.'s house for a meeting with a confidential informant. They followed him to the buy location and then back to the house. Mr. Longoria came to a second buy from another direction, but again returned to the house. Mr. Longoria testified that he stayed at the house a lot but did not live there.
>
> Police then raided the home. They found G.M.V.'s stepfather, her two younger brothers, and G.M.V. in the home. G.M.V. came out of a basement bedroom. An officer read everyone their constitutional rights. He could not swear that he read G.M.V. her rights as a juvenile. And he could not affirmatively say that she waived her rights.
>
> The basement bedroom smelled of marijuana. Inside, police found a small amount of marijuana and a digital scale on top of a television, and 817 grams of marijuana under a pile of clothes near the bed. G.M.V. said she knew there were drugs in the house. She said they belonged to Mr. Longoria and that she knew he was a dealer.
>
> In an upstairs bedroom, police found an illegally sawed-off shotgun on a shelf with some stuffed animals in a closet. G.M.V. had recently occupied this upstairs bedroom.
>
> The State charged G.M.V. with possession of the marijuana in the basement bedroom. The State also charged her with constructive possession of the unlawfully altered gun found in the upstairs bedroom. G.M.V. claimed unwitting possession of the marijuana. She denied possession of the shotgun.
>
> At the adjudication hearing, G.M.V.'s mother testified that G.M.V. vacated the upstairs bedroom and moved to the basement some weeks before the raid. One of the officers testified that G.M.V. and her mother told him that the upstairs room had been G.M.V .'s "just recently" and that she had "barely moved." A second officer said the mother told him that G.M.V. "had stayed in that room in the past

but was currently living in the downstairs bedroom." G.M.V.'s mother testified that the upstairs room "was nobody's" at the time of the search.

Mr. Longoria testified that he shared the basement room with G.M.V. on the three or four nights a week he stayed at the house. He said he brought the marijuana and scales into the house the night before the raid, while G.M.V. was asleep. He lived in Othello and came to Moses Lake to sell drugs. He said he never sold drugs from the house because he did not want G.M.V. to know.

The juvenile court adjudicated G.M.V. guilty of constructive possession of the marijuana. The judge found that G.M.V. had dominion and control over the basement bedroom and that the possession of the marijuana was not unwitting.

The court also found that G.M.V. constructively possessed the sawed-off shotgun found in the upstairs bedroom. The court found that the upstairs room had been G.M.V.'s until a few days before the raid. She still had most of her things there and that suggested that her move downstairs was not complete. The judge theorized that G.M.V. would still have been going in and out of the room to change clothes and get her things. Therefore he concluded that she had dominion and control of the room. The court found that G.M.V. knew about the shotgun because it was in plain view.

ISSUES AND RULINGS: 1) In State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**, the Washington Supreme Court held that the mere fact that a person had dealt a large quantity of drugs in one drug deal – with no evidence connecting that drug deal to his residence – did not provide probable cause for a search of his residence, despite a number of experience-and-training allegations an officer made in a search warrant affidavit regarding the habits of drug dealers. In the G.M.V. case, the affidavit supporting the search warrant described two controlled buys – one in which the drug dealer left the target residence just before and returned immediately after he made the drug sale, and a second in which the drug-dealer came from another location to make the sale but returned to the residence, just after he made the drug sale. Was a sufficient connection shown between the residence and the drug-dealing in the G.M.V. case to establish probable cause to search the residence? ANSWER: Yes);

2) Testimony at trial tended to show that a 15-year-old girl had moved from an upstairs bedroom to a downstairs bedroom at the point in time when officers found a sawed-off shotgun in the upstairs bedroom. Was there sufficient evidence to support the 15-year-old's conviction under a "constructive possession" theory, for possession of the shotgun? ANSWER: No

Result: Affirmance of Grant County Superior Court (Juvenile Court) conviction of G.M.V for possession of marijuana, and reversal of G.M.V.'s conviction for possession of the sawed-off shotgun.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause in light of Thein

G.M.V. does not contend the warrant here was invalid on its face. She challenges instead the nexus between Mr. Longoria's criminal activities and her parents' house. She cites to State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**. The Thein court held that a warrant to search for drugs in a particular

place must be based on more than generalized notions of the supposed practices of drug dealers. Rather, the warrant must contain specific facts tying the place to be searched to the crime.

Thein is distinguishable. There, a warrant to search a drug dealer's home was based solely on evidence of drug activity elsewhere. But the affidavit supporting this warrant did not rely on generalized beliefs about the habits of drug dealers as in Thein. The warrant was to search the place Mr. Longoria left from and returned to before and after he sold drugs. This was a nexus that established probable cause that Mr. Longoria had drugs in the house. There was no ineffective assistance of counsel here since a challenge to the warrant would have failed.

2) Constructive possession of shotgun

To convict G.M.V. of possession of this shotgun, the State had to show that she constructively possessed it. Constructive possession means that the defendant exercised dominion and control. Dominion and control over the premises in which contraband is found is but one factor. The defendant must also have dominion and control over the contraband itself. "By establishing a defendant's dominion and control over the premises in which contraband is found, the State makes out a prima facie case sufficient to raise a rebuttable presumption of constructive possession of the contraband."

When a minor lives with her parents, however, we cannot presume dominion and control from her mere residence in the home. The fact that G.M.V. was a minor living with her parents means additional evidence of dominion and control was necessary.

The evidence of dominion over the upstairs bedroom here was limited. Officer Brian Taylor testified on direct that G.M.V. told him she "just recently" vacated the upstairs room. He said he understood from G.M.V. and her mother that she had "barely moved" downstairs. The State points to testimony by an officer who was shown a photograph of "the upstairs bedroom that [G.M.V.] identified as the room she was moving out of" Prosecutor: "Okay. So she specifically told you that was her bedroom?" Officer: "That's correct." The context of this exchange, however, was to identify the room, not to pinpoint the time of G.M.V.'s departure from it. Officer Kevin Dobson testified that the mother told him at the scene that G.M.V. "had stayed in that room in the past but was currently living in the downstairs bedroom."

Based on this, the court found that the upstairs bedroom was "last occupied" by G.M.V. It then found that the room was her bedroom. The latter finding is not supported by this record. And, accordingly, the conclusion that G.M.V. had constructive possession of the shotgun is likewise unsupported.

The State has shown, at best, that the upstairs bedroom was G.M.V.'s in the past, but was not hers on the day of this search. The evidence is that, on the day the shotgun was discovered, G.M.V.'s bedroom was in the basement. So, whether she moved out a day before or a month before, the facts do not establish G.M.V.'s dominion and control over the room in her parents' home in

which the gun was found at the time the gun was found. Everyone agreed she lived downstairs.

We therefore affirm the conviction for possession of marijuana but reverse the convictions for juvenile in possession of a firearm and possession of a short-barreled firearm.

[Some citations omitted]

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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 website 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/court-rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website 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/opinions.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." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. 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 2006, is at [http://www1.leg.wa.gov/legislature]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 proposed WAC amendments is at this address too. 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 [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://insideago].

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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 CJTC Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]