Law Enforcement Digest

September 2006

594th Basic Law Enforcement Academy – March 22, 2006 through July 27, 2006

President:	George Drazich – King County Sheriff's Office
Best Overall:	Michael D. Coffey II – Federal Way Police Department
Best Academic:	Brian J. Petersen – Kitsap County Sheriff's Office
Best Firearms:	David W. May – Tacoma Police Department
Tac Officer:	Officer Herman Koppisch – Tacoma Police Department

****

SEPTEMBER 2006 LED TABLE OF CONTENTS

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT 2

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) 2

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) 3

WASHINGTON STATE SUPREME COURT 7

RCW 10.31.100 EXCEPTION TO COMMON LAW "MISDEMEANOR PRESENCE" LIMIT ON WARRANTLESS CUSTODIAL ARREST IS HELD CONSTITUTIONAL
State v. Walker, ___ Wn.2d ___, 138 P.3d 113 (2006) 7

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT 9

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, __ Wn.2d __, __ P.3d __ (2006) 9

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, __ Wn.2d __, __ P.3d __ (2006) 10

WASHINGTON STATE COURT OF APPEALS 11

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR 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) 11

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) 13

EVIDENCE SUFFICIENT TO CONVICT FOR HIV ASSAULT AND WITNESS TAMPERING
State v. Whitfield, 132 Wn. App. 787 (Div. II, 2006) 15

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, ___ Wn. App. ___, 137 P.3d 872 (Div. II, 2006) 19

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) 21

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS 23

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) 23

****

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) VIENNA CONVENTION ON CONSULAR RELATIONS HELD NOT TO REQUIRE SUPPRESSION OF STATEMENTS TAKEN BY OFFICERS UNDER CIRCUMSTANCES WHERE THE TREATY HAS BEEN VIOLATED – In Sanchez-Llamas v. Oregon, Bustillo v. Johnson, 126 S.Ct. 2669 (2006), a majority of the U.S. Supreme Court holds that the international treaty known as the Vienna Convention on Consular Relations ("Vienna Convention") does not require suppression of statements taken by law enforcement officers under circumstances where the officers government has failed to comply with the requirement under the treaty that an a lien arrestee be advised of his consular notification rights. The Supreme Court does not resolve, however, whether the Vienna Convention creates individual rights that may be enforceable in some other way.

This case involved two unrelated cases consolidated for U.S. Supreme Court review. In one of the cases, Mr. Sanchez-Llamas, a Mexican national, was convicted in the Circuit Court of Jackson County, Oregon, of attempted murder and other felony offenses, after the trial court denied his motion to suppress his incriminating statements to the police. He sought suppression based on the fact that the police had violated his right to be told following his arrest of his right to consular notification and communication under the Vienna Convention. He had received no warning as to his Vienna Convention right prior to being interrogated. The Oregon Court of Appeals, 84 P.3d 1133 (Or. App. 2004), and the Supreme Court of Oregon, 108 P.3d 573 (Or. 2005), affirmed the trial court.

In the second of the two consolidated cases, Mr. Bustillo, a Honduran national, was convicted of attempted murder and other offenses in a Virginia state court after police officers failed to inform him of his right to consular notification under the Vienna Convention. Mr. Bustillo did not raise his Vienna Convention challenge until he filed a post-conviction habeas corpus petition. The Virginia appellate courts rejected his belated Vienna Convention-based challenge to his conviction.

In an opinion authored by U.S. Supreme Court Chief Justice Roberts and joined by four other justices, the U.S. Supreme Court majority assumes, without deciding in these two cases (and hence reserving that issue to be resolved in a future case), that the Vienna Convention provides individually enforceable rights, and then holds that: 1) the Supreme Court lacks supervisory authority to impose upon state courts a remedy of suppression of evidence for state police

officers' violations of the Vienna Convention; 2) there is no suppression remedy implicit in the Vienna Convention; and 3) and the post-conviction Vienna Convention argument by Mr. Bustillo was subject to the same state procedural-default/waiver rules as any other federal-law claim. As to the suppression-remedy issue, the majority opinion suggests (and the dissenting opinions in the case agree) that, in some cases, hypothetical defendants (but not these particular defendants) may be able to partially support a claim of involuntariness of a confession with the fact that their Vienna Convention rights were violated.

Justice Breyer writes a dissenting opinion, joined by Justices Stevens and Souter, arguing in vain that: 1) the Court should have expressly held that the Vienna Convention does create individually enforceable rights; 2) there is a suppression remedy implicit in the Vienna Convention, though not as automatically applicable as for a Miranda violation; and 3) in some circumstances, state procedural default/waiver rules would not apply to a violation of the Vienna Convention. Justice Ginsburg agrees as to what we have numbered here as the first and third points in Justice Breyer's dissenting opinion, but she disagrees on the suppression-remedy question, and therefore she concurs in the result reached by the majority.

Results: Affirmance of the Oregon and Virginia state court convictions of Mr. Sanchez-Lamas and of Mr. Bustillo.

LED EDITORIAL NOTES REGARDING OTHER SELECT READING ON THE VIENNA CONVENTION: The May 99 LED included a relatively comprehensive outline at 18-21 discussing rights of foreign nationals under the Vienna Convention. We explained that special warnings must be given relatively contemporaneously following custodial arrest (but not where there is only a Terry seizure or routine traffic stop) of a foreign national. We explained, among other things, that foreign nationals of most countries (such as those from Mexico and Canada) are entitled to be informed following their arrest of their rights to contact their consul, and where foreign nationals of certain other countries (for example, China, Russia and the Philippines) are arrested, law enforcement officers must themselves notify those countries' foreign counsuls after explaining this to the arrested foreign national.

The U.S. Department of State's Vienna Convention WEBPAGE link can be found on the CJTC LED WEBPAGE. The Department of State materials are very practical, thorough and easy to understand and use. Also on the CJTC LED WEBPAGE is a link to an outline by Pam Loginsky of the Washington Association of Prosecuting Attorneys, containing a detailed discussion of the Vienna Convention treaty plus links to U.S. Department of State information (Ms. Loginsky's outline is titled "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors" (May 2006) and the Vienna Convention treaty discussion begins at page 19 of her outline).

LED entries as to federal court decisions addressing whether the treaty creates an enforceable individual right in civil liability cases are: Jogi v. Voges, 425 F.3d 367 (7th Cir. (2005) Nov 05 LED:02 (where a federal circuit court held that civil liability under the federal civil rights act can result from a law enforcement agency's failure to adhere to this treaty); and Standt v. City of New York, 153 F.Supp.2d 417 (S.D.N.Y. 2001) Dec. 01 LED:20 (same holding). The civil liability question remains open in light of the U.S. Supreme Court majority opinion's avoidance in Sanchez-Llamas of the question of whether the Vienna Convention creates any individually enforceable rights.

Other LED entries regarding the Vienna Convention have included: Medellin v. Dretke, 125 S.Ct. 2088 (2005) Aug 05 LED:05 (where the U.S. Supreme Court decided, as it did in Sanchez-Llamas, to put off deciding whether the treaty creates individually enforceable

rights); U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) May 00 LED:12 (where the Ninth Circuit of the U.S. Court of Appeals ruled that a violation, while it may be enforceable in some other way, does not trigger suppression of evidence in criminal cases); State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000) Aug 00 LED:13 (no suppression of evidence for violation); State v. Jamison, State v. Acosta, 105 Wn. App. 572 (Div. I, 2001) Aug 01 LED: 18 (no suppression of evidence for violation).

(2) 911 REPORT BY VICTIM OF ONGOING DV CRIME HELD TO MEET CRAWFORD TEST FOR "NONTESTIMONIAL" – AND HENCE ADMISSIBLE – HEARSAY UNDER SIXTH AMENDMENT CONFRONTATION CLAUSE – In Davis v. Washington and Hammon v. Indiana, 126 S.Ct. 2266 (2006), the U.S. Supreme Court rules in two unrelated cases, consolidated for U.S. Supreme Court review, that: 1) in one case, a domestic violence victim's excited utterances reporting an ongoing DV crime, in response to a 911 operator's questioning, were "nontestimonial" under the rule of Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**, and therefore were not subject to exclusion under the Sixth Amendment Confrontation Clause (Davis v. Washington); and 2) in a separate case, a domestic battery victim's written statements, in an affidavit given to a police officer immediately following a DV battery, were testimonial, and therefore, were subject to exclusion under Crawford's interpretation of the Confrontation Clause (Hammon v. Indiana).

The 2004 U.S. Supreme Court decision in Crawford

In Crawford v. Washington, 124 S.Ct. 1354 (2004) **May 04 LED:20**, in a ruling under the Sixth Amendment confrontation clause, the U.S. Supreme Court reversed a Washington conviction. The far-reaching ruling has prevented prosecutors throughout the nation from introducing hearsay statements at criminal trials in most circumstances where: 1) the out-of-court statement (the hearsay) was "testimonial" in nature; 2) the defendant did not have an opportunity prior to trial to formally cross-examine the declarant; and (3) the declarant was not available at trial and hence could not be cross-examined at trial. The Davis-Hammon decision addresses the question of what is "testimonial" in certain contexts of out-of-court statements to the police and their agents.

At Mr. Crawford's trial for felony assault and attempted murder of a male acquaintance, the trial court allowed the State to put into evidence a tape-recorded hearsay statement that Mr. Crawford's wife had given to the police describing the stabbing incident. Because Mr. Crawford asserted the marital status privilege at trial, his wife was not available at trial for cross-examination. On review of Mr. Crawford's conviction of first degree assault with a deadly weapon, the Washington Supreme Court upheld admission of the wife's out-of-court statement on grounds that the statement was reliable because the statement "interlocked with" (i.e., was essentially the same as) Mr. Crawford's confession to the police. See State v. Crawford, 147 Wn.2d 424 (2002) **Feb 03 LED:09.** The Washington Supreme Court cited as authority for its 2002 decision the U.S. Supreme Court precedent of Ohio v. Roberts, 448 U.S. 56 (1980).

In a 2004 opinion authored by Justice Scalia, the U.S. Supreme Court reversed the Washington Supreme Court's 2002 decision in Crawford (by unanimous vote) and overruled the U.S. Supreme Court's 1980 decision in Ohio v. Roberts by a 7-2 vote. As noted above, under the new rule announced in Crawford, if a declarant's out-of-court statement was "testimonial" in nature and was not subjected at the time of its making to cross-examination, it is not admissible if the declarant was not available at trial for cross-examination. After Crawford, the courts no longer engage in case-by-case efforts to try to determine "reliability" of such statements on the totality of the circumstances, as they had been doing under the 1980 decision in Ohio v. Roberts.

The Crawford Court did not try to provide an all-encompassing definition of the crucial concept of “testimonial” hearsay for purposes of application of its new rule. However, the 2004 Scalia opinion quoted from several alternative, suggested definitions of “testimonial” found both in case law and in briefing in the Crawford case. The Court noted one broad definition offered in an amicus curiae (friend-of-the-court) brief submitted by a group of criminal defense attorneys. That amicus brief suggested that “[an out-of-court statement is testimonial if] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” The Scalia opinion did say with certainty that "[w]hatever else the term [i.e., “testimonial”] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [statements given in] police interrogations.”

An area of concern to the courts nationally after Crawford was decided was “excited utterances” made to civilians or to police officers or their agents. It was hoped by many prosecutors that many such statements would be considered "nontestimonial” and therefore admissible under the Confrontation Clause. Most excited utterances were thought to be "nontestimonial" because the statements would not have been made in the expectation that the statements were likely to be used at trial. The Davis-Hammon decision addressed some of the questions concerning “excited utterances” made to police officers and to police agents (such as 911 operators). The Davis-Hammon decicion makes such statements admissible only under fairly restrictive standards.

Davis case facts and procedural background

Defendant Davis was convicted in Washington’s King County Superior Court of felony violation of a domestic no-contact order. The Washington Court of Appeals and Washington Supreme Court (154 Wn.2d 291 (2005)) affirmed. The Washington Supreme Court held that a portion of the victim's 911 conversation in which she reported that the defendant had just left her home after assaulting her and otherwise violating a DV no-contact order was not testimonial for purposes of the Confrontation Clause. The victim had not testified at the defendant’s trial.

Hammon case facts and procedural background

Defendant Hammon was convicted, following a bench trial, in an Indiana trial court of domestic battery, based in part on the victim's written statements in an affidavit given to police officer. The victim did not testify at the trial. Defendant appealed. Ultimately, the Supreme Court of Indiana affirmed the conviction.

U.S. Supreme Court analysis in Davis case

The majority opinion for the U.S. Supreme Court in Davis-Hammon is, as in Crawford, authored by Justice Scalia. The opinion explains that statements taken by police officers or their agents (such as 911 operators) in the course of questioning by police or their agents are "nontestimonial," and not subject to the Confrontation Clause, when the statements are made under circumstances objectively indicating that the primary purpose of the questioning is to enable police to assist to meet an ongoing emergency. (NOTE: Justice Scalia uses variations of the word “interrogate” to refer to all such questioning. In our LED summary, we use variations of the word “questioning” because we believe such usage is less likely to confuse or mislead as to the broad scope of the Court’s ruling.)

On the other hand, Justice Scalia’s opinion explains, statements taken by police officers or their agents in the course of questioning are "testimonial," and subject to the Confrontation Clause, when the circumstances objectively indicate that there is no ongoing emergency, and that the

primary purpose of the questions is to establish or prove past events potentially relevant to later criminal prosecution.

Applying these standards, the Court rules in the Davis case that statements made by the domestic abuse victim in response to the 911 operator's questions while defendant was allegedly inside the victim's home in violation of a DV no-contact order, in which the victim identified her assailant, were "nontestimonial." Therefore, the victim's statements to the 911 operator were not subject to the Confrontation Clause. The Scalia opinion explains that the victim was speaking about events as they were actually happening, rather than describing past events, and the primary purpose of the 911 operator's questioning was to enable police assistance to meet the ongoing emergency caused by the physical threat to the victim.

The opinion goes on to explain, however, that a conversation with police that begins as questioning to determine the need for emergency assistance, and is therefore not subject to the Confrontation Clause, may evolve into "testimonial statements that are subject to the Confrontation Clause once that purpose has been achieved. In the Davis case, the Scalia opinion notes, some later portions of the 911 conversation may have been testimonial. However, the Washington Supreme Court held that admission of any testimonial portions of the hearsay was harmless error, and Justice Scalia asserts that this part of the ruling of the Washington Supreme Court was not before the U.S. Supreme Court for review.

U.S. Supreme Court analysis in Hammon case

In the Hammon case, on the other hand, the U.S. Supreme Court rules that the domestic battery victim's written statements in the affidavit given to a police officer who responded to the domestic disturbance call were "testimonial" and therefore were subject to Confrontation Clause exclusion. That is because there was no emergency in progress when the statements were given. The alleged battery had happened before the police arrived, so that the primary purpose of the officer's questioning was to investigate a possible past crime.

In closing, in response to an alternative argument of the Indiana prosecutor, Justice Scalia's opinion leaves it to the Indiana courts to consider whether the defendant tampered with or intimidated the victim or otherwise did something in addition to committing the battery that could be deemed to be obtaining the absence of the complaining witness such that he would have forfeited his right to confrontation.

Justice Thomas' concurrence in Davis and dissent in Hammon

U.S. Supreme Court justice Thomas argues in vain in an opinion not joined by any other Justice that the Court should follow a less stringent test for what is "non-testimonial," and he accordingly asserts that the Court should not have reversed the Indiana conviction in the Hammon case.

Results: Affirmance of Washington Supreme Court affirmance of King County Superior Court conviction of Adrian Martell Davis for felony violation of a DV no-contact order; reversal of Indiana state court conviction of Hershel Hammon for domestic battery, and remand of that case to the Indiana courts for possible further proceedings.

LED EDITORIAL COMMENT:

In our May 2004 LED entry regarding Crawford v. Washington, we said that there was a great deal of uncertainty about the reach of the decision, and that the full ramifications of the decision would not be known for many years. That has not changed, though it is clear that the decision has broad exclusionary effect. The decision has, for instance, restricted the use of child hearsay statements, but how much is not yet known. As to

child hearsay, courts have generally held that initial disclosures children make to parents, teachers, doctors, and so forth are "nontestimonial" and, thus admissible in court when the child is unavailable to testify if the State can demonstrate full compliance with RCW 9A.44.120, and can satisfy the "reliability" requirements contained in our state's appellate cases. It is possible, however, that a court could also deem even these child disclosures to non-police "testimonial" if it appears that the statements were obtained for use against a defendant at trial, rather than simply to determine whether the child has been harmed, and by whom. Statements that the child victim makes to police officers, or government forensic interviewers, are certainly "testimonial," however, and will be admissible only if the child takes the stand and is subject to cross examination.

As we noted in the May 2004 LED, it was believed by most commentators that "dying declarations," even if "testimonial," might escape a confrontation clause challenge. That was based on language in the 2004 Scalia opinion in Crawford. There have been no post-Crawford Washington decisions on this question as yet.

And "Smith affidavits" in Washington (see State v. Smith, 97 Wn.2d 856 (1982)), most recently addressed in the LED in the January 2004 LED entry regarding State v. Nieto, 119 Wn. App. 157 (Div. I, 2003)), also are believed not to be impacted by Crawford v. Washington because current Washington case law allows admission of "Smith affidavits" (or sworn declarations) into evidence only if the affiant (declarant) takes the witness stand at trial. See State v. Thach, 126 Wn. App. 297 (Div. II, 2005) (not previously reported in the LED), a case decided after Crawford was announced, holding that Crawford does not apply in this context because the Smith affiant/declarant must take the stand at trial.

****

WASHINGTON STATE SUPREME COURT

RCW 10.31.100 EXCEPTION TO COMMON LAW "MISDEMEANOR PRESENCE" LIMIT ON WARRANTLESS CUSTODIAL ARREST IS HELD CONSTITUTIONAL

State v. Walker, ___ Wn.2d ___, 138 P.3d 113 (2006)

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

> On July 11, 2003, Colfax police officers and Whitman County deputies were called to investigate a burglary. During their investigation, the officers approached a parked car in which petitioner Ashley Walker and another individual, Richard Kennedy, were sitting. According to the police report of [one of the deputies], the following transpired:
>
> > I asked Kennedy and Walker if they had been drinking. Kennedy said he had been drinking. Walker said she did not drink. While talking to Kennedy I noticed the pupils of his eyes were extremely dialated [sic]. I asked If [sic] they had smoked any marijuana. Kennedy said he could not use drugs because he took random urinary analysis. Walker said she smoked marijuana before she left her house in Spokane. I asked if she had any marijuana with her. Walker said she did not have any marijuana. Walker said she had a marijuana pipe in her bag. I asked Walker if she would get the pipe for me. Walker opened her purse and pulled out a blue glass pipe and handed it to me. Walker immediatly [sic]

> closed her purse after she gave me the pipe. I looked at the pipe and noticed black residue in the bowl of the pipe.
>
> I told Officer [A] Walker gave me a pipe she had in her purse. Officer [A] told Walker to stand up and told her she was under arrest for possession of drug paraphernalia. *Court's footnote: It is not illegal in Washington to possess drug paraphernalia. It is illegal to use drug paraphernalia under RCW 69.50.412(1).]* He placed her in handcuffs and advised her of her CR's. Officer [A] placed her in the seat of his patrol car. Officer [A] searched Walker's purse incident to lawful arrest. Upon searching her purse he located 2 glass pipes. He also found numerous small plastic baggies containing a white powdery substance.

The white powdery substance found in Walker's purse was methamphetamine. Walker was charged with one count of possession of methamphetamine with intent to deliver. Walker brought a motion in superior court to suppress the methamphetamine evidence, arguing the underlying arrest was unlawful. After oral argument, the court granted Walker's motion and dismissed the charges. The court reasoned that the crime for which Walker was charged, RCW 69.50.412(1), was not specific to cannabis; therefore, the cannabis exception of RCW 10.31.100(1) did not apply. In an unpublished opinion, the Court of Appeals reversed, holding that RCW 10.31.100(1) applied and sufficient probable cause supported the arrest. In a concurring opinion, Judge Stephen M. Brown noted it was immaterial the officer told Walker she was under arrest for possession of paraphernalia when in fact she was arrested for use of drug paraphernalia.

ISSUE AND RULING: Under article 1, section 7 of the Washington constitution, does RCW 10.31.100(1) create valid exceptions to the common law "in the presence" requirement for warrantless custodial arrests for misdemeanors? ANSWER: Yes, rules a 6-3 majority).

Result: Affirmance of Court of Appeals unpublished decision reversing Whitman County Superior Court's order dismissing a charge against Ashley Marie Walker for possessing methamphetamine with intent to deliver; remand for further proceedings.

ANALYSIS: The lead opinion by Justice Charles Johnson begins by first setting out the key statutory language in RCW 10.31.100(1) and then briefly describing the defendant's constitutional theories:

RCW 10.31.100(1) reads:

> [a]ny police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

Walker argues this statute is unconstitutional under article 1, section 7. Walker first contends article 1, section 7 of the constitution incorporates the common law rule that an officer may not make a warrantless arrest for a misdemeanor unless

the misdemeanor was committed in the presence of the officer. **[LED EDITORIAL NOTE: "Common law" here means court-made law developed in published opinion over the years on a case-by-case basis and generally not tied to statutory or constitutional interpretations.]** Walker notes that while an exception existed at common law for misdemeanors amounting to a "breach of the peace," there was no exception at common law for cannabis. Thus, Walker concludes, RCW 10.31.100(1) is permissible only insofar as it codifies the common law rule; however, any other exception relating to offenses not committed in the presence of an officer is unconstitutional. Walker asserts the legislature is attempting to legislate away the warrant requirement embodied in our state constitution, one exception at a time.

The lead opinion by Justice Charles Johnson next explains in extensive discussion that, among other things, case law and a long history of relevant legislation in Washington supports the conclusion that the Legislature did not exceed the constitutional limits on its authority in creating RCW 10.31.100(1)'s exceptions to the "misdemeanor presence" requirement for custodial arrest. The lead opinion by Justice Charles Johnson also holds that RCW 10.31.100(1) is consistent with the federal constitution's Fourth Amendment. Finally, although the lead opinion specifically addresses only the constitutionality of subsection (1) of RCW 10.31.100, the reasoning clearly applies to all of the current subsections in RCW 10.31.100 establishing exceptions to the "misdemeanor presence" requirement for custodial arrest.

Justice Tom Chambers writes a concurring opinion joined by Justices Richard Sanders and Jim Johnson. The concurring opinion argues in vain that the Court should have upheld the arrest on a much narrower ground, and that the Court should not have issued its blanket constitutional approval of RCW 10.31.100(1).

Justice Chambers' concurrence thus argues that when Ms. Walker showed the officer the marijuana pipe with residue in the bowl, the officer had probable cause to believe Ms. Walker was committing the crime of marijuana possession in his presence. The officer did not state at the time of the arrest that the arrest was for marijuana possession. Instead, the officer stated the arrest was for mere possession of drug paraphernalia, something that alone is not a crime under Washington statutes (although it may be a crime under city or county ordinance). Justice Chambers explains, however, that an incorrect statement by an officer as the reason for an arrest does not make the arrest unlawful if there is in fact a valid alternative basis for the arrest.

But Justice Chambers goes on to argue (again, in vain) that the Court should rule under the Washington constitution that RCW 10.31.100(1) is unconstitutional to the extent that it authorizes warrantless custodial arrests for cannabis-related misdemeanors and gross misdemeanors not committed in an officer's presence.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) 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 – In Lewis v. Department of Licensing, __ Wn.2d __, __ P.3d __ (2006), a case consolidating four separate cases, the Washington Supreme Court addresses the patrol-car-audio-and-video-recording provisions of the Privacy Act, chapter 9.73 RCW, the chapter that generally governs electronic recording and surveillance in Washington State.

RCW 9.73.090 provides in relevant part as follows:

> (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:
>
> (a) . . . ;
>
> (b) . . . :
>
> (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.
>
> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.
>
> A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

In a unanimous opinion, the Washington Supreme Court reverses the more broadly pro-State ruling of Division One of the Court of Appeals in these consolidated cases (see **April 05 LED:09; Aug 05 LED:23**), and takes a middle-ground position in holding: 1) that conversations on the street between officers and traffic stop detainees are not “private” for purposes of chapter 9.73; 2) that under RCW 9.73.090(1)(c), however, officers using patrol car recording device may not lawfully tape record such street conversation with traffic stop detainees without complying with RCW 9.73.090(1)(c)’s requirement that the officers first inform the detainees that the conversations during the stop are being recorded; and 3) that both the video and audio recording must be suppressed where officers fail to give the required warning, but that, because the conversations are not “private,” failure-to-warn violations of the statute do not require suppression of officer testimony regarding the conversations and the stops.

Result: Reversal of Court of Appeals decision (see **April 05 LED:09; Aug 05 LED:23**) in all but the Higgins case; and: 1) remand of license suspension case of Steven Lewis (where the officer failed to give the warning) to DOL for license suspension hearing without consideration of traffic stop audio and video recording; 2) 3) remand of DUI cases of Edward Kelly and Andrew DeWaele (where the officers failed to give the warning) to Auburn Municipal Court for a hearing without consideration of traffic stop audio and video recording; and 4) remand of DUI case of Kenneth D. Higgins (where the officer warned that a “recording” was being made and this

warning was deemed by the Supreme Court to be sufficient) to the King County District Court for a hearing with consideration of the recording of the traffic stop.

(2) 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) – In State v. Fowler, __ Wn.2d __, __ P.3d __ (2006), the Washington Supreme Court unanimously holds that a single-party consent recording of telephone conversations between a rape/incest suspect and his victim are admissible under chapter 9.73 RCW despite the fact that the conversations were private and there was no prior court authorization for the recording. The Court rules that, while the recording activity would have been unlawful if the victim had made the recordings while located in Washington, the law of Washington does not govern the recording activity that took place in Oregon at an Oregon law enforcement officer's sole instigation.

The Washington Supreme Court summarizes the facts, procedural background, and its ruling in the case as follows:

> Petitioner Alexander L. Fowler was convicted by a jury of two counts of incest in the first degree, two counts of incest in the second degree, and one count of rape in the second degree, all stemming from sexual misconduct with his stepdaughter. Fowler asserts that the trial court erred by admitting into evidence recordings of two telephone conversations he had with the victim. The conversations were recorded in Oregon with the consent of and by the victim acting at the request of the Oregon police when they investigated Fowler's possible sexual misconduct. Fowler was in Washington when he spoke on the phone to the victim, and he did not consent to the recordings; the victim was in Oregon at her family home.
>
> Under Oregon law it is permissible for one party to consent to a recording of a telephone conversation. In Washington, unless an exception applies, it is generally unlawful to tape record a telephone conversation with only one party's consent under the privacy act, chapter 9.73 RCW. Generally, all parties must consent to a recording in Washington. Based on Washington's privacy act, Petitioner claims that the recordings of the conversations in Oregon were unlawful under RCW 9.73.030 and were therefore inadmissible in court under RCW 9.73.050. We hold that the recording of conversations in Oregon did not violate RCW 9.73.030 and were thus not barred from admission. Accordingly, we affirm petitioner's conviction.

Thus, the Supreme Court holds that the recordings made by the victim in this case are admissible because: 1) the victim was in Oregon at the time that she made the recordings (even though the suspect was in Washington at the time); 2) the recordings were done exclusively at the request of an Oregon law enforcement officer; and 3) no Washington officer or other Washington governmental agent was involved in the recording activity or its instigation. The case likely would have had a different outcome if a Washington officer had instigated the taping, even if that taping had occurred, as here, in Oregon. And, if the taping had been done by the victim or anyone else while located in the State of Washington, the recordings (only with one party's consent, not court-authorized, and not subject to any RCW 9.73 exception) would have been excluded as evidence, whether or not law enforcement instigated the taping.

Result: Affirmance of Court of Appeals decision (see **Aug 05 LED:17**) and affirmance of Thurston County Superior Court convictions of Alexander Leonard Fowler for incest in the first degree (two counts), incest in the second degree (two counts), and rape in the second degree, all related to his sexual misconduct with his stepdaughter.

****

WASHINGTON STATE COURT OF APPEALS

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR 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)

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

> In June 2003, John George and his son Tommy bought a 1974 Chevrolet Cheyenne Super pickup truck from Jerome Potter. At the time, the truck was inoperable due to a problem with the rear wheel differential, and had been parked in Potter's yard for more than two years. Potter disclosed the mechanical problem, and also disclosed that the truck had 185,000 miles on it. Potter also said he had replaced the original 350 engine with a more powerful 400 engine. The Georges paid Potter $1,800 for the truck.
>
> After performing some repairs and rendering the truck operable, the Georges advertised the truck for sale in the Seattle Times as follows: "1974 Cheyenne Super 1/2 T, 1 ownr, 350 v8, AT, tow pkg. All stock and original gar'd. 70 K mi very nice $5,500."
>
> A Seattle Police Department detective read the ad and suspected it was fraudulent. After locating and identifying the truck, the detective confirmed with Potter the truck's actual specifications. Two other detectives then posed as buyers. The Georges told them that John George was the original owner, and that the truck had always been garaged and had 70,000 miles on it. After examining the truck and starting the engine, one of the detectives arranged to purchase it for the asking price. Tommy delivered the truck, and the undercover detective offered him a valid cashier's check for $5,500. Both Georges were then arrested.
>
> The State charged the Georges with attempted first degree theft by deception. They were tried together. The State presented the evidence described above, but presented no evidence of the market value of the truck at the time of the attempted sale. At the close of the State's evidence, the Georges moved for dismissal, contending that absent proof of the value of the truck, there was no evidence of any loss and certainly no evidence to support theft in the first degree. The court denied the motion. The jury returned verdicts of guilty.

ISSUES AND RULINGS 1) Did the State prove an attempted "deprivation" for purposes of the theft statute where the State did not prove that the truck was worth less than the detective in the "sting" agreed to pay? (ANSWER: Yes); 2) Did the State prove an attempted theft of over $1500 (first degree theft) where the State did not prove the market value of the truck? (ANSWER: Yes)

Result: Affirmance of King County Superior Court convictions of John S. George and Tommy B. George for theft in the first degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Theft by deception means "[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(b).

1) Actual Loss. The Georges point out that proof of a deprivation to the victim is required to support a theft conviction, and contend that because the State failed to prove the truck was worth less than the detective agreed to pay, there was no evidence their deception would have resulted in any loss. Thus they first contend the evidence established no crime at all.

The Georges rely on State v. Lee, 128 Wn.2d 151 (1995). Lee contracted to purchase an uninhabitable house. He was required by the contract to provide insurance. While the sale was pending, Lee repaired the house to render it insurable and then rented it to a family left homeless by a fire, charging the Red Cross $700 in rent. He was convicted of second degree theft by deception, on grounds that he obtained or exerted control over property belonging to the Red Cross or to the homeless family. The Washington Supreme Court held that neither victim suffered any deprivation because "*each received what they bargained for":* the Red Cross found housing for a family, and the family was indeed housed.

Here, the putative buyer of the truck did not get what he bargained for. The Georges repeatedly claimed the truck had been driven only 70,000 miles by its only owner and had always been garaged. None of this was true. The Georges object that according to the State's evidence, whether the truck had only one owner or was always garaged is not germane to its market value, and point out that they added value by making repairs to the truck. They do not, however, suggest that a difference in 100,000 miles on the truck is irrelevant to its value. To induce the sale, the Georges falsely described the truck in the significant matter of mileage, if nothing else. The evidence was sufficient to establish the deprivation necessary to prove an unlawful taking.

2) Theft in the First Degree. The degree of theft depends upon the value of the property deceptively obtained. To establish attempted theft in the first degree, the State must prove the attempted theft of "[p]roperty or services which exceed(s) one thousand five hundred dollars in value." RCW 9A.56.030 (1)(a). Value is "the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18).

The Georges contend the State failed to prove theft in the first degree because there was no evidence of the truck's market value. [T]he Georges point out that market value is an objective standard. They contend the agreed price for the truck was not evidence of market value because it was subjective. They further argue the value of the truck is not ascertainable, because organizations such as Kelly Blue Book and the National Automobile Dealers Association do not have data for cars made before the early 1980s. Where value is not ascertainable, the charge is theft in the third degree. RCW 9A.56.010(18)(e).

These arguments concern methods of determining the value of property other than money, and would be relevant if the Georges were charged with theft of the truck. The theft by deception statute, however, criminalizes the act of "[c]reat[ing] or confirm[ing] another's false impression which the actor knows to be false," [RCW 9A.56.010(5)(a)] resulting in the actor "*obtain[ing] control* over the property

of another ... with intent to deprive him or her of such property." [RCW 9A.56.020(b)] Further, theft by color or aid of deception means that "the deception operated to bring about *the obtaining of property or services; it is not necessary that deception be the sole means of obtaining the property or services.*" [RCW 9A.56.010(4)] In drawing the line between criminal conduct and sharp business practices, the legislature clearly contemplated that something in addition to pure deception will be involved. Indeed, in many acts of theft by deception, something falsely described is given in exchange to induce the transaction.

We are mindful that in Lee the court stated, "it appears that the loss to the victim, rather than the benefit to the offender, is key in determining the existence *and the value* of a deprivation." The Georges do not contend this language controls here, but we would reject such an argument. Lee involved theft by unauthorized control or deception. The issue was whether the evidence established the underpinning deprivation. The court was not analyzing the degree of theft or the value of the property obtained thereby.

We do not believe the legislature intended an inquiry into the thief's net gain or the victim's net loss once the fact of a deprivation is established. The evidence establishing existence and value of a deprivation will be the same in takings theft cases (and often, in unauthorized control cases as well), but in deception cases, the statute requires a different analysis. RCW 9A.56.020(b) looks only to the value of the property obtained, not the net result of the exchange. Here, the property the Georges attempted to obtain was a valid cashier's check for $5,500. Where the property stolen is money, there is no need to determine value.

The evidence was sufficient to establish the value element of attempted theft in the first degree.

[Some footnotes and citations omitted; numbering added to subheadings]

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)

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

Mr. Van Tuyl petitioned for marriage dissolution in October 2002. On January 23, 2003, the trial court entered a TRO under RCW 26.09.060; .110; .120; and .194, ordering the parties to restrain "from molesting or disturbing the peace of the other" and "from going onto the grounds of or entering the home or working place or school of the other party." Conforming to Washington's pattern domestic relations forms, the order stated in two places:

> VIOLATION OF A RESTRAINING ORDER IN PARAGRAPH 3.1 WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST. RCW 26.09.060.

Ms. Van Tuyl was unrepresented by counsel when the TRO was entered. Mr. Van Tuyl's attorney testified he mailed a proposed order and notice of the presentment hearing to Ms. Van Tuyl and then mailed her a copy of the signed

> TRO at her last known address. The documents were not returned as undeliverable.
>
> On May 22, 2003, Mr. Van Tuyl contacted the authorities to report Ms. Van Tuyl's proscribed presence on his garage driveway. Ms. Van Tuyl was charged with violating a court order under RCW 26.50.110(1). On May 24, 2003, Mr. Van Tuyl contacted the authorities to report Ms. Van Tuyl repeatedly called his place of work to harass him. She was again charged with violating a court order under RCW 26.50.110(1).
>
> Pretrial, Ms. Van Tuyl unsuccessfully requested the trial judge recuse herself. Although allowed by the trial court, counsel did not request reconsideration.
>
> During trial, Ms. Van Tuyl called her dissolution attorney, Laurie Daviess-White, who testified Ms. Van Tuyl was unrepresented when the TRO was entered. Further, Ms. Daviess-White testified she told Ms. Van Tuyl about the restraining order at a show cause hearing in March 2003. Ms. Van Tuyl admitted knowing about the TRO on May 22, 2003 and May 24, 2003.
>
> The court instructed, without objection, that to convict Ms. Van Tuyl the jury must find on May 22, 2003 and May 24, 2003 she "knew of the existence of the restraining order." Ms. Van Tuyl was convicted. Over Ms. Van Tuyl's actual notice argument, the superior court affirmed. We granted discretionary review to examine the interplay between chapter 26.09 RCW and chapter 26.50 RCW.

ISSUE AND RULING: Was the evidence of the repeated phone calls by Ms. Van Tuyl to Mr. Van Tuyl's place of work sufficient to support her conviction under RCW 26.50.110(1) for violating the restraining order issued in the marriage dissolution proceedings? (ANSWER: Yes)

Result: Affirmance of Chelan County Superior Court conviction of Cindy Lou Van Tuyl on two counts of violating a restraining order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Ms. Van Tuyl . . . contends insufficient evidence supports her conviction for the May 24, 2003 incident because telephone calls do not violate the restraining order.
>
> . . .
>
> The elements of violating a restraining order are: (1) an order granted under chapter 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020; (2) knowledge of the order by the person to be restrained; and (3) a violation of the restraint provisions. RCW 26.50.110(1).
>
> The TRO ordered the parties to restrain "from molesting or disturbing the peace of the other" and "from going onto the grounds of or entering the home or working place or school of the other party." Ms. Van Tuyl alleges her phone calls did not disturb Mr. Van Tuyl's peace.
>
> Viewing the evidence in the light most favorable to the State, harassing telephone calls to Mr. Van Tuyl's workplace disturbed his peace, violating the TRO. Accordingly, sufficient evidence exists to support the jury's finding of guilt for violation of a court order based on the May 24, 2003 occurrence.

[Case citations and some other text omitted]

LED EDITORIAL NOTE: Under analysis not addressed in this LED entry, the Court of Appeals also holds that Ms. Van Tuyl received adequate notice of the marital dissolution temporary restraining order (TRO) as required to support the intent element of the misdemeanor violation of court order offense. The supporting evidence in this regard was that the husband's attorney testified: 1) that he mailed copies of the proposed order and the notice of presentment hearing to the wife; 2) that the attorney then mailed a copy of the signed TRO order to her last known address; and 3) that he did not receive any returned, undeliverable mail.

EVIDENCE SUFFICIENT TO CONVICT FOR HIV ASSAULT AND WITNESS TAMPERING

State v. Whitfield, 132 Wn. App. 878 (Div. II, 2006)

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

> Whitfield learned that he had HIV (human immunodeficiency virus) in April 1992, while incarcerated in Oklahoma. On April 20, 1995, he wrote: "My family is aware of my current medical status and have been since April of 1992."
>
> In a memorandum dated April 25, 1995, a psychologist at the Howard McLeod Correctional Center stated: "[Whitfield] was diagnosed HIV positive while incarcerated at Dick Conner Correctional Center. Reportedly, he contracted the virus through non-consensual sex while incarcerated." Whitfield's case manager also wrote: "Whitfield is well aware of the consequence of his disease and this seems to frighten him. If he becomes a threat to the public it will not be because of ignorance." After being released from prison in 1995, Whitfield moved to Washington in 1999 and later had multiple sexual encounters with 17 women. He fathered three children with three different women.
>
> During more than a thousand sexual liaisons involving oral, vaginal, and sometimes anal sex, Whitfield rarely wore a condom, even when asked to. And he never informed any of his partners that he had been diagnosed HIV-positive. When asked about his sexually transmitted disease status, he would deny having any disease or would state that he had tested negative. At least five of the 17 women became HIV-positive or ill with Acquired Immune Deficiency Syndrome (AIDS) after having sex with Whitfield.
>
> From time to time during this period, Whitfield made comments about HIV. On one occasion, he asked his sex partner's friend, a home care nurse, whether she cared for people sick with HIV or AIDS. When she replied that she did not, Whitfield stated that if he had HIV, he would infect as many people as he could. And while talking with another sex partner and her friend, Whitfield stated that if he had HIV, he would give it to as many people as possible.
>
> Dr. Diana Yu, the Thurston County Public Health Officer, first became aware of Whitfield in 2002, when a person diagnosed with AIDS named him as a sex partner. Dr. Yu's office tried unsuccessfully to locate Whitfield at that time.
>
> In March 2003, another woman diagnosed with AIDS named Whitfield as her only sex partner. Diana Johnson, a supervisor of the HIV unit, then located and interviewed Whitfield in May. Johnson met with Whitfield in an Olympia parking lot and tested him for HIV.

Upon receiving the results, Johnson tried to reach Whitfield either at his home and by calling his cellular telephone, but she was initially unable to contact him. On August 1, Johnson contacted Whitfield by telephone and met with him at the Health Department. When she told him that the test results indicated that he was HIV-positive, Whitfield broke into tears. Using a standard HIV post-test counseling form, Johnson then explained to Whitfield about what he needed to do to avoid infecting others, which included notifying all his sexual partners of his HIV status and using condoms to reduce the risk of infection. At the end of the counseling, Whitfield signed the form.

In December 2003, Dr. Yu learned that a third individual diagnosed with AIDS named Whitfield as a sex partner. Dr. Yu contacted a Thurston County deputy prosecutor. On March 11, 2004, Dr. Yu signed a Health Officer Order brought under RCW 70.24.024 (cease and desist order).

The next day, Johnson served Whitfield with the cease and desist order. The cease and desist order required Whitfield to submit names and information about all of his sexual partners to the Health Department. It also ordered Whitfield not to engage in any activity that may involve exchange of vaginal fluid or semen and to inform all of his sexual partners that they may have been exposed to HIV. Dr. Yu then drafted a declaration under RCW 70.24.034 and sent it to the deputy prosecutor to aid the prosecutor in detaining Whitfield.

On March 24, 2004, Detective Paul Lower went to Whitfield's residence to execute a search warrant. The detective encountered Whitfield as he loaded household goods into a U-Haul truck. Detective Lower then arrested Whitfield for first degree assault. The next day, the detective saw Whitfield at the jail. Whitfield admitted to Detective Lower that he had had multiple sexual contacts with eight women after his counseling with Johnson in August 2003. According to Detective Lower, Whitfield also admitted that he had discarded the post-HIV counseling documents.

On March 25, the Thurston County Superior Court issued a no-contact order prohibiting Whitfield from contacting B.S., one of his former sexual partners. Whitfield signed the order, indicating that he received a copy of it. Whitfield, however, called B.S. from the jail on March 29 and 31, and April 8. During the calls, Whitfield tried to persuade B.S. to testify that he had told her about his HIV status.

On October 28, 2004, the State, in its sixth amended information, charged Whitfield with 17 counts of first degree assault with sexual motivation, in violation of RCW 9A.36.011(1)(b) and RCW 9.94A.835; 3 counts of witness tampering, in violation of RCW 9A.72.120(1)(a); and 3 counts of violating a no-contact order, in violation of RCW 26.50.110(1). Fourteen of the 17 first degree assault charges, the three witness tampering charges, and the three no-contact order violation charges included a domestic violence element of RCW 10.99.020.

After Whitfield waived his right to a jury trial, a bench trial ensued. At trial, Dr. Yu testified that medical science currently cannot cure HIV or AIDS and that HIV eventually leads to AIDS. She also stated that the statistical risk of a female getting infected by an unprotected vaginal intercourse with an HIV-positive male is four percent but that science cannot predict who will become infected and who will not.

> Dr. Mark Whitehill, a clinical psychologist and a certified sex offender treatment provider, testified on Whitfield's behalf. He said, "I've found no evidence, psychologically, that [Whitfield's] assaultive conduct was intentional. Hence, it seems to me a diminished capacity defense is appropriate." Dr. Whitehill also testified that Whitfield admitted knowing that he was HIV-positive since 1992.
>
> The court found Whitfield guilty as charged on all counts except one count of witness tampering. [Whitfield was sentenced to 2137 months of confinement.]

ISSUES AND RULINGS: 1) Is there sufficient evidence of Whitfield's intent to inflict great bodily harm to support his first degree assault convictions? (ANSWER: Yes); 2) Is there sufficient evidence of Whitfield's ability to transmit HIV to support his first degree assault convictions? (ANSWER: Yes); 3) Is there sufficient evidence of intent to induce a witness to testify falsely to support Whitfield's convictions for witness tampering? (ANSWER: Yes)

Result: Affirmance of Thurston County Superior Court convictions of Anthony Eugene Whitfield on 17 counts of first degree assault with sexual motivation, 2 counts of witness tampering, and 3 counts of no-contact order violations; also affirmance of sentence of 2137 months confinement.

RELEVANT LANGUAGE IN FIRST DEGREE ASSAULT STATUTE:

Under RCW 9A.36.011(1), "[a] person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm ... (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance."

ANALYSIS: (Excerpted from Court of Appeals opinion – subheadings provided by **LED** Editors)

1) Proof of intent to commit assault

> Whitfield argues that the State presented insufficient evidence of his intent to inflict great bodily harm. He asserts that the State failed to show that he knew of his HIV status before Johnson notified him on August 1, 2003, or even that he knew how to transmit the disease.
>
> We can infer criminal intent as a logical probability from the facts and circumstances. Reviewed in the light most favorable to the State, the evidence at trial proved that Whitfield knew about his HIV status before coming to Washington. That evidence included: (1) Whitfield's April 20, 1995 handwritten letter noting that his family was aware of his medical status since April 1992; (2) Whitfield's Oklahoma case manager's April 25, 1995 memorandum in which he wrote that Whitfield knew the consequences of his disease; (3) the case manager's testimony that the language "medical status" in Whitfield's letter referred to his HIV status; and (4) Dr. Whitehill's testimony that Whitfield had known about his HIV status since 1992.
>
> Whitfield asserts that he did not know that he could transmit HIV through vaginal and oral intercourse because he contracted HIV through nonconsensual anal sex. As noted, the record belies Whitfield's assertion. In April 1995, the case manager wrote, "Whitfield is well aware of the consequence of his disease and this seems to frighten him. If he becomes a threat to the public it will not be because of ignorance."

Moreover, Whitfield deliberately lied to all of the victims, telling them that he did not have any sexually transmitted diseases while insisting that they engage in unprotected sex with him. Whitfield's deception and unprotected sexual activities continued even after the Health Department counseling in August 2003, and after the March 2004 cease and desist order.

Finally, Whitfield sent an email message to one victim stating that he hoped she would get AIDS and, on multiple occasions, told others that if he knew he had HIV he would try to infect as many people as possible. Evidence that Whitfield knew he could transmit HIV through vaginal and oral intercourse meets the standard for sufficiency. The State presented evidence of his intent to inflict great bodily harm.

2) Proof of ability to transmit HIV

Whitfield next argues that the State failed to present sufficient evidence to convict him of 12 of the first degree assault charges pertaining to victims who tested HIV-negative. He asserts that he was not always capable of transmitting HIV. In making this argument, he relies on Dr. Yu's testimony that a person infected with HIV is not always contagious or capable of transmitting the disease.

Whitfield's argument, however, confuses the elements of the charged crime. Under RCW 9A.36.011(1)(b), "[a] person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm ... *exposes,* or transmits to ... another ... the human immunodeficiency virus as defined in chapter 70.24 RCW." Accordingly, as the trial court correctly pointed out, the State had to prove only that Whitfield intentionally exposed the victims to HIV.

According to Dr. Yu, "every incidence of sexual activity would be a period of exposure," although not every exposure would necessarily transmit HIV. Dr. Yu also testified that exposure occurs with any sexual activity that involves vaginal, oral, or anal exchange of bodily fluids as occurs during unprotected sex.

Whitfield knew that he was HIV-positive when he engaged in unprotected sexual activities while deliberately concealing his HIV status. Thus, viewed in the light most favorable to the State, sufficient evidence shows that Whitfield intentionally exposed the 12 HIV-negative victims to the disease.

3) Proof of witness tampering

Whitfield also argues that the State failed to present sufficient evidence that he tampered with a witness. He asserts that the evidence does not show his intent to induce a witness to testify falsely because "the conversations were taken out of context and not taken seriously by B.S."

Here, the court found Whitfield guilty of two counts of witness tampering based on his telephone conversations with B.S. on March 31 and April 8. RCW 9A.72.120(1) provides: "A person is guilty of tampering with a witness if he or she *attempts* to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding ... to: (a) Testify falsely or, without right or privilege to do so, to withhold any testimony." (Emphasis added.) "A person tampers with a witness if he *attempts* to alter the witness's testimony." "A person is guilty of an attempt to commit a crime if, with intent to commit a

specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A .28.020(1).

Whitfield completed a substantial step when he urged B.S. to testify that they had consensual sex after she knew about his HIV status. During the March 31 conversation, Whitfield asked B.S. to testify that she knew about his HIV diagnosis and further told her, "that's probably like the only ticket that I got right now." Whitfield also assured B.S. that her testimony would not cause her any problem because she had not previously testified under oath on this matter. During his April 8 conversation, Whitfield also gave B.S. an example of what she should state in court, "look Judge, hey check it out, Judge I knew we did it. It was consensual. Let my man come home."

In light of his conversations with B.S., Whitfield completed the crime of witness tampering when he attempted to induce B.S. to give false testimony. It remains irrelevant whether he succeeded in his attempt. Thus, the State submitted sufficient evidence to convict Whitfield of witness tampering.

[Some citations omitted]

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, ___ Wn. App. ___, 137 P.3d 872 (Div. II, 2006)

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

In December 2004, Ocean Shores police officer Christian Iverson was dispatched to Richard Frost's home to investigate the theft of Frost's .38 caliber Smith and Wesson handgun. Frost said that he suspected that Minor had stolen the gun because Frost's daughters had heard rumors at school that Minor had stolen the gun and then sold it.

Subsequently, Katie Robinson, who came into contact with Iverson because she had been arrested on another matter, told Iverson that she had seen Minor with a handgun. She said she saw Minor with a .38 caliber, fully loaded, black gun in the spring or fall of 2004 while the two were at a friend's home. At Minor's trial, Robinson testified that Minor told her to lie about seeing the gun and “not to get him in trouble.”

Joe Palm also saw Minor possessing a gun. Palm reported to detective Russ Fitts that in September or October 2004, Minor showed him a .38 caliber revolver and tried to sell it to him. Palm said he refused to buy the gun because he was on parole and was, therefore, ineligible to possess a firearm. Palm did not testify at Minor's trial.

[The State charged, among other things, that Minor] having previously been convicted of a serious offense, residential burglary, possessed a firearm in the spring or summer of 2004 in Robinson's presence.

Minor testified that he did not show Robinson a gun and that he never told her to lie. He also testified that no one had ever told him that as a convicted felon he was not allowed to possess a gun. Furthermore, on his judgment and sentence for his predicate conviction, the box that stated that he was not allowed to

possess a firearm was not checked. And Minor did not sign the judgment and sentence nor did he review it with his attorney.

At a bench trial in juvenile court, the court found Minor guilty[.]

ISSUE AND RULING: Did the felon-with-a-firearm defendant have a valid defense based on the failure of the original trial court that convicted and sentenced him for the predicate felony to tell him that, as a freshly-minted felon, he was no longer allowed under Washington law to possess firearms? (ANSWER: No, defendant's ignorance of the law is no excuse because neither the original trial court nor any other government official affirmatively misled the defendant)

Result: Affirmance of Grays Harbor County Superior Court conviction of Jacob L. T. Minor under RCW 9.41.040(1)(a) for first degree possessing a firearm after having been previously convicted for a serious offense, residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Minor argues that at the time of disposition for his residential burglary conviction the trial court failed to advise him that he was prohibited from thereafter possessing a firearm and that without such an instruction we must vacate the unlawful firearm possession conviction. The State acknowledges that the record is devoid of evidence that Minor received written notification of his loss of firearm rights and that without a record of the oral proceedings, we must assume that he also did not receive oral notification. But the State argues that lack of notice here does not warrant reversal. We agree with the State.

Former RCW 9.41.040(1)(a)(2003) states that a person, whether adult or juvenile, is guilty of first degree unlawful possession of a firearm if the person "owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted in this State or elsewhere of any serious offense as defined in this chapter." RCW 9.41.010(12)(a) lists any crime of violence as a serious offense and RCW 9.41.010(11)(a) lists burglary as a crime of violence.

Knowledge of the illegality of firearm possession is not an element of the crime. State v. Leavitt, 107 Wn. App. 361 [(Div. II, 2001) **Nov 01 LED:17**]. The State need only prove that the defendant knew that he possessed a firearm. Leavitt. But RCW 9.41.047(1), which governs the restoration of the right to possess a firearm, states that when a person is convicted of a serious offense that makes him ineligible to possess a firearm, the court must "notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record."

Although ignorance of the law is generally not a defense, we must balance that long-standing principle with the "inherent unfairness of [a] sentencing judge [ ] inadvertently misleading a defendant about his legal obligations such that the defendant relied on this misinformation to his detriment." Leavitt. Due process requires dismissal of an unlawful firearm possession charge when a court misleads a defendant into believing that his conduct was not prohibited and the defendant shows prejudice. "The sentencing court need not make express affirmative assurances on the status of the convicted defendant's rights. Actions,

inactions, or a combination of the two may be enough to implicate due process rights." State v. Moore, 121 Wn. App. 889 [(Div. III, 2004) **Oct 04 LED:18**].

Several cases have dealt with whether subsequent convictions for possession of a firearm must be reversed because the trial court failed to inform the defendant about the long-term restriction on possessing a firearm following a felony conviction.

In Moore, Division Three of this court held that the trial court's failure to inform Moore that he could no longer possess a firearm constituted governmental mismanagement under CrR 8 .3(b). The court found that Moore had been prejudiced because the predicate juvenile dispositional judge had affirmatively told him that "he could put the ordeal behind him if he stayed out of trouble." Moore.

Similarly, in Leavitt, we held that the trial court misled Leavitt when it suspended his sentence so long as he abstained from certain conduct for one year, including not possessing firearms for one year. The trial court did not inform Leavitt that the prohibition against possession of firearms could extend longer than the one year. Thus, we reversed Leavitt's unlawful possession of a firearm conviction, holding that Leavitt demonstrated actual prejudice when the predicate sentencing court misled him and failed to advise him of the statutory firearm-possession prohibition.

But in State v. Blum, we refused to reverse a conviction for unlawful possession of a firearm where a predicate Colorado court failed to inform Blum that he was prohibited from possessing a gun. 121 Wn. App. 1 [(Div. II, 2004) **Oct 04 LED:17**]. We held that lack of knowledge of the law was no defense and that the State did not have a duty to inform Blum because his conviction was from another state. We refused to apply Leavitt because the trial court did nothing to mislead Blum.

Here, the court failed to comply with RCW 9.41.047 when it did not check the box on the judgment and sentence indicating that Minor was prohibited from possessing a firearm. But Minor fails to demonstrate any reliance on the trial court's oversight. At oral argument, Minor conceded that the record did not indicate that he looked at or relied on the judgment and sentence to determine whether he could possess a firearm. And unlike in Moore and Leavitt, the trial court here did nothing to affirmatively indicate to Minor that he could possess a firearm.

We agree with Minor that this reading of RCW 9.41.047 imposes no sanction for the court's failure to comply with the statute's express oral and written notice requirements. But we can find no consequence the legislature spelled out for violating this statute. It is not a judicial function but, rather, a legislative task to prescribe a remedy for failing to inform a convicted felon of the loss of the right to possess firearms.

Thus, without a legislatively prescribed sanction, we hold that Minor's ignorance of the law is not a defense. And because Minor cannot show prejudice based on affirmative conduct by the trial court, we affirm his conviction.

[Some citations omitted]

LED EDITORIAL COMMENT: The question of whether a felon's due process rights were violated by a court or other government official affirmatively misleading him as to his right to possess firearms is, of course, one for the courts to sort out. Note, however, that the question of whether there is probable cause to arrest is not affected by the possibility that this defense might be raised at trial.

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)

Facts: (Excerpted from Court of Appeals opinion)

> On July 24, 2004, a Longview police officer responded to a vehicle prowl report at Mark Morris High School. Behind the school, the officer found R.L.D. and another minor huddled together against a brick wall.
>
> The officer determined that several individuals, including R.L.D., planned to go to Azteca restaurant to steal some money. As R.L.D. and the others walked toward the restaurant, they passed through the school parking lot where they discovered an unlocked Nissan automobile. R.L.D. and a friend entered the car, removed wires from below the steering column, and began to "hot wire" the car when a bystander interrupted them. They fled without starting the car. The officer took them into custody.

Proceedings below: The State charged then-17-year-old R.L.D. with second degree theft and conspiracy to commit second degree burglary. He pleaded guilty but subsequently appealed arguing that the facts did not support his guilty plea as to second degree theft.

ISSUE AND RULING: Is there sufficient evidence to support R.L.D.'s guilty plea to second degree theft? (ANSWER: No, and theft-related charges must be dismissed under a rule of law, not addressed in depth in this **LED** entry and its excerpts, specially applicable to guilty plea reversals)

Result: Dismissal of theft-related charge and remand to Cowlitz County Superior Court for resentencing of R.L.D. as a juvenile on his unchallenged conviction for conspiracy to commit burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> R.L.D. first contends that an insufficient factual basis supports his guilty plea to second degree theft, rendering it invalid. He argues that where the facts support only an attempted second degree theft charge, the remedy is to vacate the adjudication.
>
> Due process requires that a guilty plea be voluntary, knowing, and intelligent. A guilty plea cannot be knowing and intelligent when the defendant has been misinformed about the nature of the charge. A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements. Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.
>
> A person commits second degree theft by taking a motor vehicle valued less than $1,500. RCW 9A.56.040(1)(d). RCW 9A.56.020(1)(a) defines "theft" as

wrongfully obtaining or exerting unauthorized control over the property or services of another with the intent to deprive him or her of such property or services.

Here, R.L.D. and a friend entered an unlocked car, removed wires from below the steering column, and tried to hot wire when interrupted by a bystander. All versions of the event before the court when taking the plea indicate that R.L.D. and his friend fled before they could actually start the car.

Under these facts, R.L.D. did not have keys to the car, had not started the engine, and had not driven it. Although he attempted to hot wire the car, his efforts proved unsuccessful. The plea agreement facts (and other facts before the court) insufficiently demonstrate the requisite dominion and control to support a theft conviction.

Because R.L.D.'s plea to second degree theft does not meet constitutional muster, his adjudication of that crime must be vacated. Nevertheless, his actions fit the lesser crime of attempted second degree theft because attempting to "hot wire" the car constitutes a substantial step toward stealing it. Relying on In re Pers. Restraint of Keene, 95 Wn.2d (1980), R.L.D. argues that the remedy is to vacate and dismiss. We agree.

In Keene, our Supreme Court held that where insufficient evidence supported a guilty plea of forgery, but sufficient evidence supported third degree theft, the remedy was to vacate and dismiss.

****

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

EMPLOYEE MAY SUE EMPLOYER FOR FIRING HIM FOR COOPERATING WITH POLICE INVESTIGATION OF HIS WORKPLACE – In Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630 (Div. III, 2006), the Court of Appeals holds that an employee may sue his employer on grounds that his employer fired him for reasonably cooperating in a police investigation of his workplace.

The Gaspar Court describes the facts and procedural background in the case as follows:

> Mr. Gaspar was the general manager at Peshastin Hi-Up Growers (PHU), a Washington cooperative. On November 12, 2003, a detective from the Chelan County sheriff's department contacted Mr. Gaspar regarding PHU employee Jean Dennis. Ms. Dennis had unlawfully bought postage stamps for discounted prices from a defective machine at the Leavenworth Post Office. When confronted by Mr. Gaspar two days later, she admitted purchasing the stamps at the malfunctioning machine. Eventually she paid back the post office by altering a pretyped check. Mr. Gaspar notified the PHU board of directors in December 2003 and discussed termination of Ms. Dennis with individual board members later that month. He also consulted an attorney for advice on how to proceed.
>
> Between November 12, 2003 and January 12, 2004, Mr. Gaspar met with the detective and a prosecutor six times regarding the illegally-obtained stamps and the altered check. In late December 2003, the board voted to place Ms. Dennis on administrative leave. Then, on January 14, 2004, without prior notice, the board voted to terminate Mr. Gaspar's employment.

> In October 2004, Mr. Gaspar filed a complaint against PHU alleging wrongful termination in violation of public policy. He alleged he was terminated for reporting illegal acts to the board. By amended complaint, he later additionally alleged he was terminated for his contacts with law enforcement. PHU moved to dismiss pursuant to CR 12(b)(6) (failure to state a claim upon which relief can be granted) or CR 12(c) (judgment on the pleadings). On April 8, 2005, the trial court issued an order of dismissal. Mr. Gaspar promptly moved for reconsideration. In its letter memorandum decision denying the motion for reconsideration, the trial court reiterated that Mr. Gaspar had failed to establish a clearly mandated public policy for helping law enforcement. As a result [the trial court ruled], he failed to support a claim of wrongful termination in violation of such a public policy. Mr. Gaspar timely appealed.

As noted, the Court of Appeals agrees with Mr. Gaspar that he must be allowed to pursue his lawsuit. The Washington law, including RCW 7.69.010 (which states aspirationally that witnesses and victims of crime have a civic and moral duty to cooperate fully with law enforcement), establishes a public policy that supports a worker suing his employer for unreasonable dismissal for his reasonable cooperation with a police investigation of the workplace. Therefore, the Gaspar Court's order reverses the Superior Court's order that had dismissed the case.

Result: Reversal of Chelan County Superior Court order dismissing the case; remand for trial.

****

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].

****

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]