Law Enforcement Digest

December 2007

612th Basic Law Enforcement Academy – June 27, 2007 through November 1, 2007

President:	Kelly C. Hardin – King County Sheriff's Office
Best Overall:	Chad Myers – King County Sheriff's Office
Best Academic:	Chad Myers – King County Sherriff's Office
Best Firearms:	Chad Myers – King County Sherriff's Office
Tac Officer:	Officer Ron Tennyson, Tacoma Police Department

DECEMBER 2007 LED TABLE OF CONTENTS

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2007 LED SUBJECT MATTER INDEX

2007 LED SUBJECT MATTER INDEX -- LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2007 through and including this December 2007 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: https://fortress.wa.gov/cjtc and click on "Law Enforcement Digest".

"ARMED" CRIME SENTENCE ENHANCEMENT

Officers acted lawfully in attempt to contact arrest warrant subject by daylight approach to home on rural property despite "no trespassing" sign (area was "impliedly open" to public and officers were on "legitimate police business"); also, probable cause for search warrant for meth operation held sufficient and not stale; but meth manufacturing sentencing enhancements for "armed" and for manufacturing in presence of minor reversed. State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007) – August 07:15

ARREST, STOP AND FRISK AND SIMILAR LESSER INTRUSIONS

Facts of traffic violator's 1) gang affiliation and 2) prior prison sentence for firearm crime did not give officers reasonable suspicion of crime per Terry v. Ohio that would justify expanding questioning beyond initial purpose of traffic stop. U.S. v. Mendez, 467 F.3d 1162 (9th Cir. 2006) (filed Oct. 30, 2006) – January 07:06 (NOTE: This opinion was later withdrawn, and a revised opinion was issued – see below, this section.)

Scope of Terry frisk is restricted – cigarette pack held not to be likely container of weapon; officer is quite a bit off the mark in his testimony about the purpose of conducting a frisk. State v. Horton, 136 Wn. App. 29, (Div. III, 2006) – January 07:09

Protective sweep held justified under facts of case even though one of two armed robbery suspects had already been seized outside of illegal gambling rooms. U.S. v. Paopao, 469 F.3d 760 (9th Cir. 2006) (filed Nov. 22, 2006) – February 07:02

Bench warrant that was issued without a finding of probable cause held invalid, and therefore evidence seized in a search incident to arrest is suppressed. State v. Parks, 136 Wn. App. 232 (Div. I, 2006) – February 07:23

Officer's continuation of detention after his original suspicions were dispelled held

unlawful; "abandoned' property theory of state also rejected. State v. Veltri, 136 Wn. App. 818 (Div. III, 2007) – March 07:22

Ninth Circuit panel reverses itself – because the police questioning of a traffic violator about his gang affiliation and prior prison sentence for a firearm crime did not extend duration of traffic stop beyond the time required for a record check, no Fourth Amendment violation occurred. U.S. v. Mendez, 476 F.3d 1077 (9th Cir. 2007) (filed February 23, 2007) – April 07:02 (see above)

Look-alike brother of person wanted under felony arrest warrant loses challenge to frisk because 1) officer observed large pocket bulge, 2) officer then felt hard object, and 3) suspect then pulled away to try to avoid continuation of the frisk. State v. Bee Xiong, 137 Wn. App. 720 (Div. III, 2007) – May 07:19

Suspects' tandem purchase of multiple meth precursor items, plus a history of such purchases for one of the suspects, held to be reasonable suspicion for Terry stop. State v. Keller-Deen, 137 Wn. App. 396 (Div. III, 2007) – June 07:10

Where officer heard snorting sound and then saw defendant in toilet stall with two men, one of whom had what appeared to be cocaine in his hand, officer lacked probable cause to arrest defendant. State v. Chavez, 138 Wn. App. 29 (Div. III, 2007) – June 07:16

Where officer making traffic stop knew about a no-contact order protecting driver, but knew no identifying information other than the gender-ambiguous name of the prohibited person on that order, officer could not lawfully ask either the passenger or the driver for the passenger's ID or identifying information. State v. Allen, 138 Wn. App. 893 (Div. II, 2007) – July 07:21

When officer makes unlawful stop of a vehicle, both the driver and the passengers have been unlawfully seized. Brendlin v. California, 127 S.Ct. 2400 (2007) – August 07:02

Pretext stop argument is rejected by unanimous court. State v. Nichols, 161 Wn.2d 1 (2007) – September 07:10

Car frisk upheld where officer-safety concerns were based on a 7-year-old child's report that a car's driver had pointed a gun at the child; court also rules that search was conducted "incident to arrest" (but this alternative ruling is questionable under the definition of "arrest" indicated in State v. Radka and State v. O'Neill precedents). State v. Glenn, ___ Wn. App. ___, 166 P.3d 1235 (Div. I, 2007) – November 07:08

In an independent grounds ruling under article 1, section 7 of the Washington constitution, the Washington Supreme Court holds that police stop-and-frisk authority per Terry v. Ohio does not extend to investigation of any civil matters, including civil parking infractions. State v. Day, __Wn.2d __, 168 P.3d 1265 (2007) – December 07:18

ASSAULT (Chapter 9A.36 RCW)

Willfully spitting on a person at a VA medical center held to be an assault under federal criminal law. U.S. v. Llewellyn, 481 F.3d 695 (9th Cir. 2007) (filed March 7, 2007) – June 07:10 (Washington case law is to the same effect under chapter 9A.36 RCW)

Evidence of intent element held sufficient in assault case where defendant drove his car into two police vehicles. State v. Baker, 136 Wn. App. 878 (Div. III, 2007) – June 07:12

Consent defense is not allowed for assault occurring in prison. State v. Weber, 137 Wn. App. 852 (Div. III, 2007) – September 07:22

Premeditation evidence held sufficient to support attempted first degree murder conviction for shooting through window at wife, and the common law doctrine of "transferred intent" supports defendant's convictions for assaulting the children who were in the room with his wife when he shot at her. State v. Elmi, 138 Wn. App. 306 (Div. I, 2007) – October 07:24

Pit bull that attacked police officer was a "deadly weapon" for purposes of second degree assault statute. State v. Hoeldt, 139 Wn. App. 225 (Div. II, 2007) – October 07:24

BRIBERY (RCW 9A.72.090)

Drunk boater's offer to give his sinking boat to onlookers in exchange for a ride and for their silence as to his crime held not bribery (Court's analysis is questioned by the LED Editors). State v. Henjum, 136 Wn. App. 807 (Div. III, 2007) – August 07:23

BURGLARY (Chapter 9A.52 RCW)

Because a no-contact order did not bar the defendant from living at a particular address, his entry of the residence that he shared with the person protected by the order was not a per se unlawful entry of the house under the burglary statute. State v. Wilson, 136 Wn. App. 596 (Div. II, 2007) – April 07:17

CHILD PORNOGRAPHY (RCW 9.68A.070)

Resident at McNeil Island Special Commitment Center loses challenges: 1) to SCC staff's warrantless seizure of his computer, and 2) to his child pornography conviction under RCW 9.68A.070. State v. Williams, 135 Wn. App. 915 (Div. II, 2006) – January 07:21

CIVIL LIABILITY

Court upholds jury verdict, including punitive damages, for warrantless entry of residence and for excessive force. Frunz v. City of Tacoma, 468 F.3d 1141 (9th Cir. 2006) (filed Nov. 13, 2006) – January 07:02

Inmates' exhibitionist masturbating and other behavior results in sexually hostile environment for which California correctional institution is responsible. Deanna Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006) (filed Sept. 29, 2006) – January 07:05

Sheriff's office is subject to civil liability for negligent investigation of sexual abuse—lawsuit against agency by niece who was allegedly victimized by uncle is allowed to go forward. Lewis v. Whatcom County, 136 Wn. App 450 (Div I, 2006) – February 07:25

No qualified immunity from federal civil rights liability for California HP officer who violated several CHP rules in car chase and ultimately shot and killed the chased driver without sufficient justification. Adams v. Speers, 473 F.3d 989 (9th Cir. 2007) (filed January 10, 2007) -

March 07:02

Civil rights lawsuit – Seattle PD did not violate federal constitution's due process clause by enhancing danger in relation to the February 27, 2001 Seattle Pioneer Square Mardi Gras riot. Johnson v. City of Seattle, 474 F.3d 634 (9th Cir. 2007) (filed January 18, 2007) – March 07:06

Payton rule requiring warrant before officers make forcible arrest from residence in non-exigent circumstances is applied to 12-hour standoff that ended with the barricaded home occupant exiting his home. Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir. 2007) (filed January 16, 2007) – March 07:11

Public duty doctrine precludes lawsuit for "negligent infliction of emotional distress" based on officers' delayed discovery during MVA response of injured person in rear of SUV; also, "bystander" negligence rule does not apply. Timson v. Pierce County Fire District 15 and WSP, 136 Wn. App. 376 (Div. II, 2006) – April 07:22

Qualified immunity granted in civil rights lawsuit – officer held reasonable in ending extended, dangerous high speed chase by ramming eluder's car from behind. Scott v. Harris, 127 S.Ct. 1769 (2007) – June 07:08

Officer safety concerns during search warrant execution justified holding two unknown, unclothed adult residents standing at gunpoint for a few minutes. L.A. County v. Rettele, 127 S.Ct. 1989 (2007) – September 07:02

Strip search of mere trespass arrestee at station house exposes officers and department to civil rights liability based on alleged Fourth Amendment violations. Edgerly v. City and County of San Francisco, 495 F.3d 645 (9th Cir. 2007) (filed July 17, 2007) – October 07:02

Police liability for malicious prosecution may result from intentional or reckless materially false statements or omissions of material facts from police reports. Blankenhorn v. City of Orange (California), 485 F.3d 463 (9th Cir. 2007) (filed May 8, 2007) – October 07:03

"Vienna Convention on Consular Rights" – Civil Rights Act liability held not to be possible for police violation of this treaty. Cornejo v. County of San Diego, __ F.3d __, 2007 WL 2756964 (9th Cir. 2007) (filed Sept. 24, 2007) – November 07:02

"Professional rescue doctrine" does not bar law enforcement officer's lawsuit against his law enforcement employer for injuries sustained when a fellow officer from his agency struck him with a patrol car during a pursuit. – Beaupre v. Pierce County, __ Wn.2d __, 166 P.3d 712 (2007) – December 07:23

DISCOVERY OF EVIDENCE UNDER COURT RULES

Criminal discovery rule – defendants charged with possession of child pornography are entitled through their attorneys, to obtain copies of photos and videotapes plus mirror image of hard drive of computer. State v. Boyd, 160 Wn.2d 424 (2007) – October 07:10

DUE PROCESS (INCLUDING BRADY)

Brady disclosure rule violated and new trial required: FBI agent should have provided exculpatory investigative information to U.S. attorney who could have then provided the information to the bank robbery defendant – the investigative information was that a similarly described person (five-feet tall, Hispanic, woman, and acne complexion) had robbed vicinity banks while defendant was in jail awaiting trial. U.S. v. Jernigan, 492 F.3d 1050 (9th Cir. 2007) (filed July 3, 2007) – October 07:05

ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)

King County Jail phones provide clear recorded notice that all inmate calls are recorded, and therefore jail's recording of inmate calls is held both 1) not private and 2) consenting; recordings of the calls are therefore held admissible under chapter 9.73 RCW. State v. Modica, 136 Wn. App. 434 (Div. I, 2006) – February 07:13

Videotape of confession not admissible under RCW 9.73.090(1) because Miranda warnings, though given off-tape earlier, were not repeated on the tape; photo montage procedure also arguably flawed because, after the 2 victim-witnesses ID'd defendant, officers told them that they had picked same person, and an officer told one of them that the person picked was in custody – but murder conviction upheld anyway. State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) – May 07:08

Reserve undercover officer's extraterritorial taping of conversation in drug dealer's home held OK against challenges based on (1) Washington constitutional privacy protection, (2) chapter 9.73 RCW, and (3) chapter 10.93 RCW. State v. Barron, 139 Wn. App. 266 (Div. I, 2007) – September 07:18

EVIDENCE LAW

Taggers' prior acts of graffiti were signature crimes of malicious mischief (MO evidence) and therefore admissible in subsequent malicious mischief prosecutions for further graffiti. State v. Foxhoven and State v. Sanderson, 161 Wn.2d 168 (2007) – October 07:09

EXTRATERRITORIAL AUTHORITY

Reserve undercover officer's extraterritorial taping of conversation in drug dealer's home held OK against challenges based on (1) Washington constitutional privacy protection, (2) chapter 9.73 RCW, and (3) chapter 10.93 RCW. State v. Barron, 139 Wn. App. 266 (Div. I, 2007) – September 07:18

FIREARMS LAWS AND OTHER WEAPONS LAWS

Association contracting to use city convention center for gun show loses challenge to restrictions placed on show. Pacific Northwest Shooting Park v. City of Sequim, 158 Wn.2d 342 (2006) – January 07:07

Defendant's knowledge of characteristics of firearm that make it unlawful must be proven under RCW 9.41.190 (short-barreled rifles and shotguns), but knowledge of wrongfulness of conduct is not an element of the crime. State v. Williams, 158 Wn.2d 904 (2006) – February 07:11

FORFEITURE LAWS

Forfeiture of $118,134 in suspected drug cash found in crashed plane upheld against sufficiency-of-the-evidence challenge in light of packaging of cash, pilot's failure to declare this large amount of money before leaving on Canada-bound flight, presence of drug ledger, presence of small amount of marijuana, retrofitting of plane for cargo, and low altitude flying; also, claimant's due process challenge to forfeiture proceedings based on delay of hearing is rejected. Sam v. Okanogan Cty Sheriff's Office, 136 Wn. App. 220 (Div. III, 2006) – February 07:20

Parents of adult son lose vehicle drug-forfeiture case where they raised innocent owner defense as to two family cars. In re the Forfeiture of One 1970 Chevrolet Chevelle, ___ Wn. App. ___, 167 P.3d 599 (Div. I, 2007) – November 07:12

FREEDOM OF SPEECH (FIRST AMENDMENT)

Evidence held sufficient to support conviction for intimidating officer-witness – threat held to be "true threat" not protected as free speech under the First Amendment of the U.S. Constitution. State v. King, 135 Wn. App. 662 (Div. III, 2006) – January 07:12

IDENTIFICATION PROCEDURES – LINEUPS, PHOTO MONTAGES, SHOWUPS

Videotape of confession not admissible under RCW 9.73.090(1) because Miranda warnings, though given off-tape earlier, were not repeated on the tape; photo montage procedure also arguably flawed because, after the 2 victim-witnesses ID'd defendant, officers told them that they had picked same person, and an officer told one of them that the person picked was in custody – but murder conviction upheld anyway. State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) – May 07:08

INTERROGATIONS AND CONFESSIONS

In appeal from aggravated first degree murder conviction and death sentence, the sentence is reversed, but conviction is affirmed, and: 1) evidence held sufficient; 2) police initiation of contact with charged rape defendant to question him on unrelated murder case held OK under federal Sixth Amendment right-to-counsel protection; and 3) government's investigative use in the murder case of DNA evidence previously obtained in rape case held OK. State v. Gregory, 158 Wn.2d 759 (2006) – February 07:05

Objective standard for triggering Miranda warnings – a loss of freedom equal to that associated with a formal arrest – not met, and thus warnings were not required regardless of whether there existed probable cause to arrest. State v. Ustimenko, 137 Wn. App. 109 (Div. III, 2007) – May 07:12

Officer telling custodial interrogation suspect that the officer would not charge the suspect for writing graffiti in a stolen car did not make involuntary the suspect's confession to 1) taking vehicle without permission and 2) vehicle prowling. State v. L.U., 137 Wn. App. 410 (Div. I, 2007) – May 07:17

Evidence that defendant assaulted child and then ordered her into living room held sufficient to support unlawful imprisonment conviction; phone call by officer to suspect held not custodial questioning, and hence Miranda held not applicable. State v. Davis, 133 Wn. App. 415 (Div. III, 2007) – June 07:14

Fake-attorney ruse by police to get murder suspect to lick and send envelope did not violate constitutional privacy protections; nor did it violate RCW 9.73.020; nor was the ruse so outrageous as to require dismissal of case under CrR 8.3(b); also, defendant gave valid waiver of his Miranda rights prior to questioning despite his refusal to sign a waiver form. State v. Athan, 160 Wn.2d 354 (2007) – August 07:02

Arrestee's equivocal mid-interrogation mention of attorney did not require clarification by detectives of Miranda waiver – U.S. Supreme Court's Davis decision held to control. State v. Radcliffe, 139 Wn. App. 214 (Div. II, 2007) – August 07:10

Babykiller loses challenges to admission of both his pre-Miranda and his post-Miranda statements to police. State v. Adams, 138 Wn. App. 36 (Div. III, 2007) – August 07:12

Seventeen-year-old questioned about her infant son's death in interrogation room for over 90 minutes with father excluded from room was in "custody" for Miranda purposes. State v. Daniels, 160 Wn.2d 256 (2007) – September 07:14

INTIMIDATING A JUDGE (RCW 9A.72 RCW)

Evidence held insufficient to support conviction for intimidating a judge – defendant made no threat of future actions. State v. Brown, 137 Wn. App. 587 (Div. II, 2007) – June 07:20

INTIMIDATING A WITNESS (RCW 9A.72.110)

Evidence held sufficient to support conviction for intimidating officer-witness – threat held to be "true threat" not protected as free speech under the First Amendment of the U.S. Constitution. State v. King, 135 Wn. App. 662 (Div. III, 2006) – January 07:12

LANDLORD-TENANT LAW

When landlord invokes writ of restitution process to evict tenant from residence, landlord must arrange for storage of tenant's personal property unless tenant objects to storage. Parker v. Taylor, 136 Wn. App. 524 (Div. III, 2007) – March 07:23

LEGISLATIVE UPDATE (2007)

Part One: 2007 Washington Legislative Update. – March 07:02

Part Two: 2007 Washington Legislative Update. – June 07:02

Part Three: 2007 Washington Legislative Update. – July 07:01

MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.52 RCW)

In appeal from aggravated first degree murder conviction and death sentence, the sentence is reversed, but conviction is affirmed, and: 1) evidence held sufficient; 2) police initiation of contact with charged rape defendant to question him on unrelated murder case held OK under federal Sixth Amendment right-to-counsel protection; and 3) government's investigative use in the murder case of DNA evidence previously obtained in rape case held OK. State v. Gregory, 158 Wn.2d 759 (2006) – February 07:05

In defendant's appeal from aggravated first degree murder conviction, evidence held sufficient to support jury verdict as to premeditation element and robbery aggravator. State v. Allen, 159 Wn.2d 1 (2006) – April 07:04

Premeditation evidence held sufficient to support attempted first degree murder conviction for shooting through window at wife, and the common law doctrine of "transferred intent" supports defendant's convictions for assaulting the children who were in the room with his wife when he shot at her. State v. Elmi, 138 Wn. App. 306 (Div. I, 2007) – October 07:24

MUTUAL AID PEACE OFFICER POWERS ACT (Chapter 10.93 RCW)

Reserve undercover officer's extraterritorial taping of conversation in drug dealer's home held OK against challenges based on (1) Washington constitutional privacy protection, (2) chapter 9.73 RCW, and (3) chapter 10.93 RCW. State v. Barron, 139 Wn. App. 266 (Div. I, 2007) – September 07:18

POSSESSING STOLEN PROPERTY (Chapter 9A.56 RCW)

For a check with a forged endorsement, the face amount is the "value" of the stolen check for purposes of the possessing stolen property statute even though a replacement check has been issued. State v. Lampley, 136 Wn. App. 836 (Div. II, 2007) – April 07:16

PUBLIC RECORDS ACT

Public Disclosure Act (now "Public Records Act") does not require DOC, under the facts of the case at hand, to provide personnel record on employee to an inmate. Livingston v. Cedeno*,* 135 Wn. App. 976 (Div. II, 2006) – January 07:22

RIGHT TO TRAVEL

Trial court's banishment order held to be too broad and therefore to violate constitutional-right-to-travel protection. State v. Schimelpfenig, 128 Wn. App. 224 (Div. II, 2005) – January 07:22

SEARCHES (See also Arrest, Stop and Frisk)

Abandoned personal property

Court holds defendant's denial of ownership of locked briefcase that police seized – (a) without a warrant, consent, or exigent circumstances; and (b) in an area where defendant had a privacy interest – did not constitute voluntary abandonment of the briefcase (court also explains Washington's independent grounds "automatic standing" rule under article 1, section 7 of state constitution). State v. Evans, 159 Wn.2d 402 (2007) – March 07:15

Officer's continuation of detention after his original suspicions were dispelled held unlawful; "abandoned' property theory of the State is also rejected. State v. Veltri, 136 Wn. App. 818 (Div. III, 2007) – March 07:22

Community caretaking exception to warrant requirement

Social guest with special-guest benefits has standing to challenge officer's warrantless entry of meth house; also, "community caretaking" and "plain view" exceptions to constitutional search warrant requirement not met. State v. Link, 136 Wn. App. 685 (Div. II, 2007) – March 07:18

The presence outside a house of two stolen 1000 gallon tanks of ammonia, plus the presence inside of suspects and the likelihood of a gun inside, justify warrantless search of house on alternative rationales of protective sweep, exigent circumstances and community caretaking. State v. Smith, 137 Wn. App. 262 (Div. III, 2007) – April 07:13

Consent to search exception to search warrant requirement

Child porn defendant still loses, but Ninth Circuit panel revises its Fourth Amendment rationale – he had reasonable privacy expectation in contents of his office computer, but his employer owned and actively controlled use of the computer, so employer could and did consent to FBI-instigated search of contents of computer. U.S. v. Ziegler, 474 F.3d 1184 (9th Cir. 2007) (filed Jan. 30, 2007) – March 07:13

Social guest with special-guest benefits has standing to challenge officer's warrantless entry of meth house; also, "community caretaking" and "plain view" exceptions to constitutional search warrant requirement not met. State v. Link, 136 Wn. App. 685 (Div. II, 2007) – March 07:18

Present-cohabitants-mutual-consent rule held not applicable where tenant who was sole person who signed lease consented to search and where houseguest was challenging search of another guest's bedroom; also, mere pendency of eviction process did not destroy tenant's consent authority. State v. Haapala, 139 Wn. App. 424 (Div. II, 2007) October 07:11

Division Three addresses issues regarding: 1) reconstruction of telephonic search warrant affidavit; 2) citizen-informant veracity; 3) "any and all persons present" clause in search warrant; 4) plain view; and 5) consent to search given by unMirandized, in-custody, sleep-deprived suspect whose intelligence and education were not addressed in suppression hearing. State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007) – November 07:17

Entry to arrest

Payton rule requiring warrant before officers make forcible arrest from residence in non-exigent circumstances is applied to 12-hour standoff that ended with the barricaded home occupant exiting his home. Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir. 2007) (filed January 16, 2007) – March 07:11

Independent constitutional grounds ruling allows Washington officers to force entry to arrest on misdemeanor warrant, but such entries will be reviewed for generalized reasonableness and pretext; also, the person named on the warrant must actually be present at the time of entry. State v. Hatchie, __ Wn.2d __, 166 P.3d 398 (2007) – October 07:06

Executing search warrant (officer safety)

Officer safety concerns during search warrant execution justified holding two unknown, unclothed adult residents standing at gunpoint for a few minutes. L.A. County v. Rettele, 127 S.Ct. 1989 (2007) – September 07:02

Exigent circumstances (and emergency) exception to search warrant requirement

The presence outside a house of two stolen 1000 gallon tanks of ammonia, plus the presence inside of suspects and the likelihood of a gun inside, justify warrantless search of house on alternative rationales of protective sweep, exigent circumstances and community caretaking. State v. Smith, 137 Wn. App. 262 (Div. III, 2007) – April 07:13

"Strong chemical smell" from fifth wheel trailer – emergency exception to search warrant requirement held not to apply where there was no imminent threat of substantial harm to person or property. State v. Leffler, 140 Wn. App. 223 (Div. II, 2007) – October 07:16

Incident to arrest (search of motor vehicle)

Delayed follow-up K-9 sniff of van following suspect's arrest from van held to be impermissible second search under article 1, section 7 of Washington constitution; also, corpus delicti rule is applied based on the suppression of the evidence seized in the search. State v. Valdez, 137 Wn. App. 280 (Div. II, 2007) – April 07:08

Custodial arrest and search-incident of motor vehicle passenger not wearing seatbelt held justified based on his giving officer a false name and false date of birth. State v. Malone, 136 Wn. App. 545 (Div. III, 2007) – May 07:22

Where littering was misdemeanor under Olympia ordinance, arrest on probable cause justified search incident to arrest of vehicle that had been occupied by litterer 1) at time of offense and 2) just prior to arrest. State v. Kirwin, 137 Wn. App. 387 (Div. II, 2007) – October 07:14

Car frisk upheld where officer-safety concerns were based on a 7-year-old child's report that a car's driver had pointed a gun at the child; court also rules that search was conducted "incident to arrest" (but this alternative ruling is questionable under the definition of "arrest" indicated in State v. Radka and State v. O'Neill precedents). State v. Glenn, ___ Wn. App. ___, 166 P.3d 1235 (Div. I, 2007) – November 07:08

Incident to arrest (search of person)

In independent grounds ruling under article 1, section 7, a police search is held not to have occurred incident to arrest for violation of RCW 46.61.021(3) where the arresting officer's request for identification from passenger was not in relation to investigation of the seatbelt violation (that prosecutor later claimed as objective justification for the arrest under RCW 46.61.021(3)). State v. Moore, __ Wn.2d __, 169 P.3d 469 (2007) – December 07:16

Misstatement by affiant – challenge that makes this allegation

Washington constitutional standard for challenges to affiant misstatements or omissions is same as federal standard; also, probable cause affidavit held to establish credibility of

informant who was named and who gave statement against his penal interest. State v. Chenoweth, 160 Wn.2d 454 (2007) – September 07:04

Outrageous (alleged) police behavior (sting, undercover activity)

Fake-attorney ruse by police to get murder suspect to lick and send envelope did not violate constitutional privacy protections; nor did it violate RCW 9.73.020; nor was the ruse so outrageous as to require dismissal of case under CrR 8.3(b); also, defendant gave valid waiver of his Miranda rights prior to questioning despite his refusal to sign a waiver form. State v. Athan, 160 Wn.2d 354 (2007) – August 07:02

FBI agent's undercover investigation of NAMBLA found lawful. U.S. v. Mayer, ___ F.3d ___, 2007 WL 2694846 (9th Cir. 2007) (filed Sept. 17, 2007) – November 07:03

Particularity requirement for search warrants

Search warrant authorizing search for "certain evidence of a crime, to-wit: 'assault 2nd DV'" held to be too vague as to items sought and hence to fail particularity requirement of the Fourth Amendment. State v. Higgins, 136 Wn. App. 87 (Div. II, 2006) – February 07:16

Fourth Amendment particularity requirement not met by warrant to search for evidence of criminal activity relating to "child sex". State v. Reep, ___ Wn.2d ___, 167 P.3d 1156 (2007) – November 07:04

Division Three addresses issues regarding: 1) reconstruction of telephonic search warrant affidavit; 2) citizen-informant veracity; 3) "any and all persons present" clause in search warrant; 4) plain view; and 5) consent to search given by unMirandized, in-custody, sleep-deprived suspect whose intelligence and education were not addressed in suppression hearing. State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007) – November 07:17

Plain view doctrine

See entry immediately above regarding State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007) – November 07:17

Privacy

In appeal from aggravated first degree murder conviction and death sentence, the sentence is reversed, but conviction is affirmed, and: 1) evidence held sufficient; 2) police initiation of contact with charged rape defendant to question him on unrelated murder case held OK under federal Sixth Amendment right-to-counsel protection; and 3) government's investigative use in the murder case of DNA evidence previously obtained in rape case held OK. State v. Gregory, 158 Wn.2d 759 (2006) – February 07:05

Motel guest registries held private under the search warrant requirement of article 1, section 7 of Washington constitution. State v. Jorden, 160 Wn.2d 121 (2007) – July 07:18

Fake-attorney ruse by police to get murder suspect to lick and send envelope did not violate constitutional privacy protections; nor did it violate RCW 9.73.020; nor was the ruse so outrageous as to require dismissal of case under CrR 8.3(b); also, defendant

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Reserve undercover officer's extraterritorial taping of conversation in drug dealer's home held OK against challenges based on (1) Washington constitutional privacy protection, (2) chapter 9.73 RCW, and (3) chapter 10.93 RCW. State v. Barron, 139 Wn. App. 266 (Div. I, 2007) – September 07:18

FBI agent's undercover investigation of NAMBLA found lawful. U.S. v. Mayer, ___ F.3d ___, 2007 WL 2694846 (9th Cir. 2007) (filed Sept. 17, 2007) – November 07:03

Use by State Department of Financial Institutions of statutorily authorized administrative subpoena to obtain subject's bank records violates article 1, section 7, of Washington constitution; Washington Legislature generally lacks power to grant such subpoena power to executive branch agencies. State v. Miles, 160 Wn.2d 236 (2007) – November 07:07

Collecting DNA samples per RCW 43.43.754 from those convicted of felonies does not violate either the Federal constitution's Fourth Amendment or the Washington constitution's article 1, section 7. State v. Surge, 160 Wn.2d 65 (2007) – December 07:23

Probable cause

Affidavit describing suspect's receipt of 9 e-mails with many attachments all with child pornography content established probable cause to search suspect's computer for child pornography. U.S. v. Kelley, 482 F.3d 1047 (9th Cir. 2007) (filed April 9, 2007) – May 07:04

Officers acted lawfully in attempt to contact arrest warrant subject by daylight approach to home on rural property despite "no trespassing" sign (area was "impliedly open" to public and officers were on "legitimate police business"); also, probable cause for search warrant for meth operation held sufficient and not stale; but meth manufacturing sentencing enhancements for "armed" and for manufacturing in presence of minor reversed. State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007) – August 07:15

Washington constitutional standard for challenges to affiant misstatements or omissions is same as federal standard; also, probable cause affidavit held to establish credibility of informant who was named and who gave statement against his penal interest. State v. Chenoweth, 160 Wn.2d 454 (2007) – September 07:04

Judge who issued search warrant lawfully reviewed warrant in suppression hearing; also, information given against penal interest helps establish credibility of informant in probable cause affidavit. State v. Chamberlin, 161 Wn.2d 30 (2007) – September 07:07

Division Three addresses issues regarding: 1) reconstruction of telephonic search warrant affidavit; 2) citizen-informant veracity; 3) "any and all persons present" clause in

search warrant; 4) plain view; and 5) consent to search given by unMirandized, in-custody, sleep-deprived suspect whose intelligence and education were not addressed in suppression hearing. State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007) – November 07:17

Protective sweep

Protective sweep held justified under facts of case even though one of two armed robbery suspects had already been seized outside of illegal gambling rooms. U.S. v. Paopao, 469 F.3d 760 (9th Cir. 2006) (filed November 22, 2006) – February 07:02

The presence outside a house of two stolen 1000 gallon tanks of ammonia, plus the presence inside of suspects and the likelihood of a gun inside, justify warrantless search of house on alternative rationales of protective sweep, exigent circumstances and community caretaking. State v. Smith, 137 Wn. App. 262 (Div. III, 2007) – April 07:13

Standing and automatic standing

Court holds defendant's denial of ownership of locked briefcase that police seized – (a) without a warrant, consent, or exigent circumstances; and (b) in an area where defendant had a privacy interest – did not constitute voluntary abandonment of the briefcase (court also explains Washington's independent grounds "automatic standing" rule under article 1, section 7 of state constitution). State v. Evans, 159 Wn.2d 402 (2007) – March 07:15

Strip searches

Strip search of mere trespass arrestee at station house exposes officers and department to civil rights liability based on alleged Fourth Amendment violations. Edgerly v. City and County of San Francisco, 495 F.3d 645 (9th Cir. 2007) (filed July 17, 2007) – October 07:02

Subpoenas

Use by State Department of Financial Institutions of statutorily authorized administrative subpoena to obtain subject's bank records violates article 1, section 7, of Washington constitution; Washington Legislature generally lacks power to grant such subpoena power to government executive branch agencies. State v. Miles, 160 Wn.2d 236 (2007) – November 07:07

Suppression hearing

Judge who issued search warrant lawfully reviewed warrant in suppression hearing; also, information given against penal interest helps establish credibility of informant in probable cause affidavit. State v. Chamberlin, 161 Wn.2d 30 (2007) – September 07:07

Telephonic search warrant application reconstruction

Division Three addresses issues regarding: 1) reconstruction of telephonic search warrant affidavit; 2) citizen-informant veracity; 3) "any and all persons present" clause in search warrant; 4) plain view; and 5) consent to search given by unMirandized, in-custody, sleep-deprived suspect whose intelligence and education were not addressed

in suppression hearing. State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007) – November 07:17

Wildlife officer check for hunters (RCW 77.15.080)

WDFW officer's stop of pickup truck containing warmly dressed driver and passenger as truck was exiting one-lane dirt road on opening day of elk season held reasonable under RCW 77.15.080(1) as a justified WDFW officer stop to check possible hunters. Schlegel v. DOL, 137 Wn. App. 364 (Div. III, 2007) – May 07:14

SENTENCING

Sentence prohibiting predator-of-elderly thief from working as caretaker for elderly or disabled persons upheld. State v. Acrey, 135 Wn. App. 938 (Div. I, 2006) – January 07:20

Trial court's banishment order held to be too broad and therefore to violate constitutional-right-to-travel protection. State v. Schimelpfenig, 128 Wn. App. 224 (Div. II, 2005) – January 07:22

Officers acted lawfully in attempt to contact arrest warrant subject by daylight approach to home on rural property despite "no trespassing" sign (area was "impliedly open" to public and officers were on "legitimate police business"); also, probable cause for search warrant for meth operation held sufficient and not stale; but meth manufacturing sentencing enhancements for "armed" and for manufacturing in presence of minor reversed. State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007) – August 07:15

SEXUAL HARASSMENT

Male inmates' pervasive pattern of exhibitionist masturbating and other behavior results in sexually hostile environment for which California correctional institution is responsible to female correctional officers. Deanna Freitag v. Ayers**,** 468 F.3d 528 (9th Cir. 2006) (filed Sept. 29, 2006) – January 07:05

SIXTH AMENDMENT RIGHT TO CONFRONTATION

In child molestation prosecution, child witness held to have been available for Crawford confrontation clause purposes. State v. Price, 158 Wn.2d 630 (2006) – January 07:07

Objections based on hearsay evidence rule and constitutional right of confrontation rejected in case where drug buyer used an accomplice/agent to purchase illegal drugs from undercover officer, and officer later testified to what the drug-buying accomplice/agent said. State v. Chambers, 134 Wn. App. 853 (Div. II, 2006) – January 07:17

Doctrine of "forfeiture by wrongdoing" precludes defendant from raising his Sixth Amendment right to confrontation regarding hearsay from deceased victim that defendant murdered. State v. Mason, 106 Wn.2d 910 (2007) – October 07:10

SIXTH AMENDMENT RIGHT TO COUNSEL

In appeal from aggravated first degree murder conviction and death sentence, the sentence is reversed, but conviction is affirmed, and: 1) evidence held sufficient; 2) police initiation of contact with charged rape defendant to question him on unrelated murder case

held OK under federal Sixth Amendment right-to-counsel protection; and 3) government's investigative use in the murder case of DNA evidence previously obtained in rape case held OK. State v. Gregory, 158 Wn.2d 759 (2006) – February 07:05

Sixth Amendment right to counsel held violated by CCO's post-conviction, pre-sentencing interview. State v. Everybodytalksabout, __ Wn.2d __, 166 P.3d 693 (2007) – October 07:09

THEFT (Chapter 9A.56 RCW)

Evidence held sufficient to support jury verdict that value of stolen rings was over $1500. State v. Hermann, 138 Wn. App. 596 (Div. III, 2007) – August 07:21

TRAFFIC LAWS (Chapter 46 RCW)

Bicycling at night requires light and reflector even if riding on sidewalk; residue of methamphetamine supports possession conviction. State v. Rowell, 138 Wn. App. 780 (Div. III, 2007) – September 07:16

No driver's license suspension for felony use of car under RCW 46.20.285(4) where cocaine was on the person of DUI driver. State v. Wayne, 134 Wn. App. 873 (Div. III, 2007) – October 07:22

UNIFORM CONTROLLED SUBSTANCES ACT AND OTHER DRUG LAWS
Evidence sufficient to support conviction for manufacturing methamphetamine. State v. Forrester, 135 Wn. App. 195 (Div. II, 2006) – January 07:14

Under Washington's "Medical Use of Marijuana Act," California doctor's prior authorization does not qualify patient for "compassionate use" defense. State v. Tracy, 158 Wn.2d 683 (2006) – February 07:13

Forfeiture of $118,134 in suspected drug cash found in crashed plane upheld against sufficiency-of-the-evidence challenge in light of packaging of cash, pilot's failure to declare this large amount of money before leaving on Canada-bound flight, presence of drug ledger, presence of small amount of marijuana, retrofitting of plane for cargo, and low altitude flying; also, claimant's due process challenge to forfeiture proceedings based on delay of hearing is rejected. Sam v. Okanogan Cty Sheriff's Office, 136 Wn. App. 220 (Div. III, 2006) – February 07:20

Officers acted lawfully in attempt to contact arrest warrant subject by daylight approach to home on rural property despite "no trespassing" sign (area was "impliedly open" to public and officers were on "legitimate police business"); also, probable cause for search warrant for meth operation held sufficient and not stale; but meth manufacturing sentencing enhancements for "armed" and for manufacturing in presence of minor reversed. State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007) – August 07:15

Bicycling at night requires light and reflector even if riding on sidewalk; residue of methamphetamine supports possession conviction. State v. Rowell, 138 Wn. App. 780 (Div. III, 2007) – September 07:16

Where defendant obtained doctor's documentation one day after police seized his marijuana plants, but before he talked to police, he had valid defense under Medical Marijuana Act. State v. Hanson, 138 Wn. App. 322 (Div. III, 2007) – September 07:23

Thief in possession of 78 boxes of cold medicine and 64 lithium batteries can be prosecuted for possessing pseudoephedrine with intent to manufacture methamphetamine. State v. Missieur, __ Wn. App. __, 165 P.3d 381 (Div. I, 2007) – October 07:19

Parents of adult son lose vehicle drug-forfeiture case where they raised innocent owner defense as to two family cars. In re the Forfeiture of One 1970 Chevrolet Chevelle, ___ Wn. App. ___, 167 P.3d 599 (Div. I, 2007) – November 07:12

UNLAWFUL IMPRISONMENT

Evidence that defendant assaulted child and then ordered her into living room held sufficient to support unlawful imprisonment conviction; phone call by officer to suspect held not custodial questioning, and hence Miranda held not applicable. State v. Davis, 133 Wn. App. 415 (Div. III, 2007) – June 07:14

VIENNA CONVENTION ON CONSULAR RIGHTS (RE ALIENS)

"Vienna Convention on Consular Rights" – Civil Rights Act liability held to be possible for police violation of this treaty. Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007) (filed March 12, 2007) – May 07:02

"Vienna Convention on Consular Rights" – Civil Rights Act liability held not to be possible for police violation of this treaty. Cornejo v. County of San Diego, __ F.3d __, 2007 WL 2756964 (9th Cir. 2007) (filed Sept. 24, 2007) – November 07:02

VOYEURISM (RCW 9A.44.115)

Evidence of voyeurism held sufficient to support conviction – peeping over top of toilet stall held to have occurred "for more than a brief period of time, in other than a casual or cursory manner." State v. Fleming, 137 Wn. App. 645 (Div. III, 2007) – June 07:19

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WASHINGTON STATE SUPREME COURT

IN INDEPENDENT GROUNDS RULING UNDER ARTICLE 1, SECTION 7, SEARCH HELD NOT INCIDENT TO ARREST FOR VIOLATION OF RCW 46.61.021(3) WHERE AN OFFICER'S REQUEST FOR IDENTIFICATION FROM PASSENGER WAS NOT IN RELATION TO INVESTIGATION OF SEATBELT VIOLATION (THAT PROSECUTOR LATER CLAIMED TO BE THE JUSTIFICATION FOR ARREST UNDER RCW 46.61.021(3))

State v. Moore, __ Wn.2d __, 169 P.3d 469 (2007)

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

[O]n April 27, 2003, [a law enforcement officer] stopped a vehicle in which Moore was a passenger. [The officer] recognized Moore from a previous encounter but could not recall his name. When asked, Moore told [the officer] that his name was "Antoine Carver." [The officer] suspected that Antoine Carver was not Moore's true name. During the stop, [the officer] observed a pit bull sitting on Moore's lap in the backseat. [The officer] arrested Moore for having a dangerous dog outside of an enclosure in violation of Everett Municipal Code sections 6.08.010(B)(C) and .015. [The officer] also arrested Moore for "Refusal to Give Information/Cooperate with an officer." A second officer at the scene then searched Moore and found cocaine, methadone pills, and approximately $800 in cash. Later that same day, [the arresting officer] filed a supplemental report mentioning that [the officer] had noticed that none of the passengers were wearing seatbelts when [the officer] approached the vehicle.

The State charged Moore with possession of a controlled substance with intent to manufacture or deliver. Before trial, Moore moved to suppress the evidence discovered in the search on the grounds that his arrest was unlawful. The trial court held that [the arresting officer] did not have probable cause to arrest Moore for having a dangerous dog outside of an enclosure because the car constituted a suitable enclosure. The court also deemed that probable cause did not exist to arrest Moore for refusal to give information/cooperate with an officer because "[g]iving false identification is not a crime in and of itself unless the person is being stopped and charged with a traffic infraction." The court explained:

> In this case, [the arresting officer] hadn't identified any traffic infraction that [Moore] was being investigated on, and instead, apparently, was under the impression if you give false identification under any circumstance you're committing a misdemeanor. [The officer is] simply wrong on that case.
>
> ... Mr. Moore had no obligation to give his name in the first place, and so to arrest him for giving a wrong name is inappropriate.

Nonetheless, the trial court held the arrest was valid, ruling that a "hidden reason" supported Moore's arrest. Based on [the arresting officer's] observation that Moore was not wearing a seatbelt and belief that Moore provided false identification, the trial court reasoned that "[t]he officers didn't arrest Mr. Moore for a seat belt violation, but, in hindsight, it appears that they could have." The court thus concluded that [the arresting officer] "had lawful authority to ask the defendant his name for committing the traffic infraction of a seatbelt violation" and that "when the defendant provided a false name to them, officers then had probable cause to arrest" him for failing to identify himself pursuant to an investigation of a traffic infraction under former RCW 46.61.021(3). [Supreme Court's footnote: *Under this provision, "[a]ny person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself, give his or her current address, and sign an acknowledgement of receipt of the notice of infraction." Former RCW 46.61.021(3). Violation of RCW 46.61.021(3) is a misdemeanor. RCW 46.61.022.*]. The court upheld the search and denied Moore's motion to suppress.

> During a bench trial, the court found Moore guilty of possessing a controlled substance with intent to manufacture or deliver. Moore appealed and the Court of Appeals affirmed [by unpublished opinion].

ISSUE AND RULING: RCW 46.61.021(3) requires that a person identify himself if asked by an officer pursuant to an investigation of a traffic infraction. Can a search be deemed to have been made incident to an arrest for violation of RCW 46.61.021(3) where the officer's request for identification was not made in relation to investigation of the seatbelt violation later claimed by the prosecutor to have justified the arrest? (ANSWER: No, rules a 6-3 majority, with Bridge, Madsen and Fairhurst dissenting)

Result: Reversal of unpublished Court of Appeals opinion that had affirmed a Snohomish County Superior Court conviction of Alex Undrae Moore for possession of cocaine with intent to manufacture or deliver.

ANALYSIS: (Excerpted from Supreme Court majority opinion authored by Justice Owens)

> [T]he search incident to arrest exception to the warrant requirement is narrower" under article I, section 7 than under the Fourth Amendment. Under the Washington Constitution, a lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest. Probable cause exists when the arresting officer has "knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed" at the time of the arrest.
>
> In the instant case, officers searched Moore without a warrant, incident to his arrest for having a dangerous dog outside of an enclosure and for refusal to give information/cooperate with an officer. The State does not challenge the trial court's finding that probable cause does not support either of these bases for Moore's arrest. The State nonetheless argues that [the arresting officer] had additional probable cause to support an arrest of Moore for violating former RCW 46.61.021(3), which provides in pertinent part that "[a]ny person requested to identify himself or herself to a law enforcement officer *pursuant to an investigation* of a traffic infraction has a duty to identify himself or herself."
>
> The record does not support the State's argument that [the officer] conducted an "investigation" of the seatbelt violation. The crime of failing to correctly identify one's self under RCW 46.61.021(3) requires more than the mere observation of a traffic infraction and an unrelated request for identification. Rather, the officer must ask the individual for identification *pursuant to an investigation* of a traffic infraction. [The arresting officer here] did not cite any passengers for the seatbelt violation and only mentioned [the officer's] observation that the passengers were not wearing seatbelts in a supplemental report. [The officer] also clarified at a subsequent hearing that [the officer] did not ask Moore for his name pursuant to an investigation of the seatbelt infraction. Based on the objective fact that [the officer] was not investigating the seatbelt infraction, a reasonable officer would not have concluded that Moore violated former RCW 46.61.021(3) by failing to correctly identify himself pursuant to an investigation of a traffic infraction. Accordingly, we conclude that probable cause does not support Moore's arrest.

[Some citations omitted]

DISSENT: Justice Bridge writes a dissent joined by Justices Madsen and Fairhurst. The dissent argues in vain that the majority has injected an implicit *subjective* inquiry into analysis that the majority opinion admits is an *objective* inquiry.

LED EDITORIAL COMMENT: We are hopeful that in future cases the Moore majority's holding will be exclusively restricted to the unusual facts and to the particular statute that was at issue in this particular case. Generally, under the purely objective standards of the federal constitution's Fourth Amendment, regardless of the specific offense that officers identify in their mind at the time of arrest or booking, the known facts giving probable cause for a lawful arrest as to any crime will support the arrest. Devenpeck v. Alford, 125 S.Ct. 588 (2004) February 05 LED:02. The majority opinion in Moore does not mention the Devenpeck precedent, nor does the majority opinion suggest that the objective standard of Devenpeck would not ordinarily apply under the Washington constitution.

IN INDEPENDENT GROUNDS RULING UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION, COURT HOLDS THAT TERRY v. OHIO STOP-AND-FRISK AUTHORITY DOES NOT EXTEND TO LAW ENFORCEMENT INVESTIGATION OF CIVIL PARKING INFRACTIONS

State v. Day, __ Wn.2d __, 168 P.3d 1265 (2007)

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

> [A deputy sheriff] was driving on patrol one Sunday morning. The deputy saw a car backed into shrubbery along the Yakima River in an "improved access facility," where parked vehicles are supposed to display parking permits. RCW 77.32.380. [The deputy] testified he approached the car to check whether there was a permit. As [the deputy] approached, he saw Charlie Day sitting in the car with his head moving as if he was looking for something. As [the deputy] got closer, he started to suspect the car was associated with drug use because it was cluttered with cigarette lighters and rubber gloves, among other things. Of immediate interest to [the deputy], however, was an empty handgun case on the floor near Day's feet.
>
> [The deputy] asked Day if there was a gun in the car. Day said there was. Day was cooperative but [the deputy] (he later testified) nonetheless became concerned for his safety and asked Day to step out of the car. Day did. [The deputy] frisked Day, handcuffed him, and asked where the gun was. Day said it was behind the passenger seat where his wife was sitting. [The deputy] then asked Alice Day to exit the vehicle and frisked her as well, while telling both Days they were not under arrest. After another officer arrived, [the deputy] searched the car and found the handgun under the passenger seat.
>
> Dispatch reported the gun was stolen and there was an outstanding arrest warrant for Alice Day. [The deputy] arrested the couple, conducted a search incident to arrest, and discovered evidence of methamphetamine manufacturing in the vehicle. Based on that evidence, Day was charged and convicted of manufacturing methamphetamine.

> Day argues that the officer exceeded his authority under the Washington State Constitution by stopping and searching him merely on suspicion of a parking infraction and, therefore, that the fruits of that search must be suppressed and his conviction vacated for lack of lawful evidence. Whether the officer acted with authority of law turns on whether the [Terry v. Ohio] exception to the warrant requirement, which allows an officer to stop and frisk a person without a warrant or probable cause under certain limited circumstances, applies to these circumstances. The Court of Appeals found it did and affirmed Day's conviction. State v. Day, 130 Wn. App. 622 (Div. III, 2005) **March 06 LED:10**.

[Footnotes omitted]

ISSUE AND RULING: Under article 1, section 7 of the Washington constitution, does the stop-and-frisk authority of Terry v. Ohio that is applicable in criminal and traffic investigation stops apply to civil parking infraction investigations? (ANSWER: No, rules a 6-3 majority, with Bridge, Madsen and Fairhurst in dissent)

Result: Reversal of Court of Appeals decision that affirmed the Benton County Superior Court conviction of Charlie Bernett Day for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Supreme Court majority opinion authored by Justice Chambers)

> If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power.
>
> The State asks us to extend one of our carefully drawn exceptions to the warrant requirement to parking infractions generally. Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. This exception to the warrant requirement is often referred to as a " Terry stop." While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful Terry stop, "a reasonable safety concern exists to justify the protective frisk for weapons" so long as the search goes no further than necessary for protective purposes. State v. Duncan, 146 Wn.2d 166 (2002) **June 02 LED:19**. This brief, nonintrusive search is often referred to as a " Terry frisk." *E.g.,* State v. Glossbrener, 146 Wn.2d 670 (2002) **Sept 02 LED:07**. If the initial stop is not lawful or if the search exceeds its proper bounds or if the officer's professed belief that the suspect was dangerous was not objectively believable, then the fruits of the search may not be admitted in court. [Court's footnote: *The State does not argue that, outside of the relatively relaxed standards of a Terry search, [the deputy] had objectively reasonable fear for his safety that justified the search. Accordingly, we do not reach whether, given the acknowledged gun, the likely parking infraction, the rubber gloves, the cigarette lighters, and the furtive movement would support a search on that basis. We think it highly unlikely, however, that the lawful possession of a gun could be the basis for a lawful search without burdening rights under article 1, section 24 of our constitution.*]

A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "specific, objective facts" that the person detained is engaged in criminal activity or a traffic violation. The Terry investigative stop exception was first adopted under the Fourth Amendment to the United States Constitution, which forbids "unreasonable" searches and seizures, implicitly recognizing the State's police power to conduct "reasonable" ones. It was later (largely) accepted as an exception under article 1, section 7 of the Washington Constitution.

Article 1, section 7 does not use the words "reasonable" or "unreasonable." Instead, it requires "authority of law" before the State may pry into the private affairs of individuals. Washington's adoption of the Terry investigative stop exception is grounded upon the expectation of privacy. Our constitution protects legitimate expectations of privacy, "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Whether the Fourth Amendment or article 1, section 7 of the Washington Constitution is in issue, a detaining officer must have "a reasonable, articulable suspicion, based on specific objective facts, that the person seized has committed or is about to commit a *crime."* Under the Fourth Amendment, whether the officer had grounds for a Terry stop and search is tested against an objective standard. By contrast, under article 1, section 7, we consider the totality of the circumstances, including the officer's subjective belief. See State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05. Our constitution does not tolerate pretextual stops. Ladson.

Terry has also been extended to traffic infractions, "due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." However, we see no reason to extend it even further to parking infractions. The reasons underlying extending Terry to traffic violations simply lose force in the parking context.

Both parties refer us to various statutes, which they contend shed light on whether parking near the Yakima River in an "improved access facility" without a displayed permit is a civil or a traffic infraction in the eyes of the legislature. In concluding that the offense in question here was a traffic infraction, the Court of Appeals relied upon RCW 43.12.065(2)(b), which states, "violation of a rule relating to traffic including parking, standing, stopping, and pedestrian offenses is a traffic infraction." We do not find a legislative labeling definitive. The issue before us involves the scope of constitutional protections, not statutory interpretation.

This court jealously protects our constitutional rights. If and when probable cause exists to believe that a crime is being committed, the general rule is that government agents must seek a warrant, unless a carefully tailored exception applies. The investigative Terry stop is one of those exceptions. Recently, we declined to extend Terry to general civil infractions, Duncan [**June 02 LED:19**], and we refuse to extend it any further today. Like in Duncan, at the time of the seizure, the officer, at most, had "a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a" civil infraction. That is not sufficient to support a Terry stop. [Court's

> footnote: *We agree with [the concurring and dissenting opinions] that an officer may approach and speak with the occupants of a parked car even when the observed facts do not reach the Terry stop threshold. We stress that the issue before the court is whether we should expand the Terry exception to the warrant requirement to include parking infractions, not whether [the deputy] acted improperly by approaching the Days' car.*] Neither legislative labeling nor judicial creativity can change the fact that [the deputy] suspected a parking infraction, not a traffic infraction. The Day vehicle was parked, backed into the bushes with its engine off. [The deputy] suspected that the vehicle did not have the required permit to park along the Yakima River in an "improved access facility," where vehicles are required to display a parking permit. RCW 77.32.380. For constitutional purposes, we find that is a civil infraction, not a traffic infraction.

[Some footnotes and citations omitted]

DISSENT: Justice Bridge writes a dissenting opinion joined by Justices Fairhurst and Madsen. Justice Bridge argues in vain that the Terry rule should be the same for all investigations of infractions involving an occupied vehicle, whether the suspected violations are of traffic or of parking laws.

LED EDITORIAL COMMENT: The Washington Supreme Court majority in Duncan invoked article 1, section 7 of the Washington constitution in holding that law enforcement officers cannot make Terry stops to investigate civil infractions. The Day majority also invokes article 1, section 7 in holding that officers cannot make Terry stops to investigate civil parking infractions. Our research does not yield a clear answer on whether the federal constitution's Fourth Amendment does or does not similarly limit officers who are investigating non-traffic civil matters. The U.S. Supreme Court has not addressed this issue, and the few decisions we have found in other jurisdictions appear to be split on the issue. See the collection of a handful of cases in section 9.2(c) of Professor LaFave's Search and Seizure treatise. In any event, the good news of Day is that Washington now has two solid precedents declaring that Terry applies to civil traffic stops.

It should also be noted that the Day Court does not prohibit an officer from making a contact with an individual to engage in a consensual conversation regarding a possible civil infraction (non-criminal, non-traffic). Also, under the analysis by the majority in Duncan, if there is probable cause as to the civil, non-traffic infraction, the officer does have Terry stop-and-frisk authority. In most cases, the officer's suspicions based on his or her observations will, unlike the circumstances in Day, provide the officer with probable cause (not just the lesser reasonable suspicion standard of Terry).

The Day majority opinion also notes:

> **The State does not argue that, outside of the relatively relaxed standards of a Terry search, [the deputy] had objectively reasonable fear for his safety that justified the search. Accordingly, we do not reach whether, given the acknowledged gun, the likely parking infraction, the rubber gloves, the cigarette lighters, and the furtive movement would support a search on that basis. We think it highly unlikely, however, that the lawful possession of a gun could be the basis for a lawful search without burdening rights under article 1, section 24 of our constitution.**

The Washington Supreme Court appears in this quoted passage to be confused about justification of a frisk, but this may be a good thing in terms of distinguishing the Day decision in future cases. The majority opinion in Day appears to assume that frisk authority is almost automatic whenever a Terry stop is lawful, regardless of how minor the offense. Such is not the law under case law in Washington or elsewhere. Frisk authority is generally not automatic following a stop based on reasonable suspicion, except for stops for types of crimes where a person is likely to be armed, such as armed robbery or assault with a weapon. Beyond that, officers must support frisks in their reports with a description of articulable objective facts. Such justification is highly fact-based, depending on the totality of the circumstances, taking into account not only the seriousness of the crime and the officer's experience and training, but also a variety of other things. Such justification should recount such things as: suspicious bulge in suspect's clothing consistent with presence of a weapon; poor lighting; suspect's bulky clothing; suspect's criminal record; intelligence about danger specific to the particular suspect; suspect's sudden move toward a pocket or area; suspect's awkward movements as if trying to hide something; suspect's erratic and/or aggressive words or other behavior; officer's need to transport the suspect; officer's need to do something else that will make the officer vulnerable to attack from the suspect; suspect's failure initially to stop vehicle or otherwise heed the officer's request to stop; presence of an empty holster or knife sheath or knife or gun; officer's arrest of suspect's companion; lone officer outnumbered by potentially hostile persons; etc

The above quote from the Day majority opinion suggests to us that the Court is of the, view that there are circumstances when an officer may conduct a frisk even though a stop is not justified. Such was the holding in City of Seattle v. Hall, 60 Wn. App. 645 (Div. I, 1991), where an officer was approached by a citizen who initiated the contact and who, although he was not suspected of committing a violation of law, was reasonably believed by the officer to be armed and dangerous. The Hall holding on frisk authority in a non-stop circumstance has not been revisited in any subsequent published Washington opinion. Courts in other jurisdictions are split on the issue of whether an officer has frisk authority during a consensual contact initiated by the officer with a person where the officer does not have Terry stop authority. See the collection of cases in section 9.5(a) of Professor LaFave's Search and Seizure treatise. While we note here that the case law is split, we are not suggesting that officers should not do what they reasonably need to do to be safe.

Of course, as always we urge law enforcement officers and agency command staff to consult their own legal advisors and local prosecutors for guidance on this and other legal questions.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **"PROFESSIONAL RESCUE DOCTRINE" DOES NOT BAR LAW ENFORCEMENT OFFICER'S LAWSUIT AGAINST HIS LAW ENFORCEMENT EMPLOYER FOR INJURIES SUSTAINED WHEN A FELLOW OFFICER FROM HIS AGENCY STRUCK HIM WITH A PATROL CAR DURING A PURSUIT** - - In Beaupre v. Pierce County, __ Wn.2d __, 166 P.3d 712 (2007), the Supreme Court rules that a Pierce County deputy sheriff who was seriously

injured by a fellow Pierce County deputy sheriff may sue his employer for injuries allegedly negligently caused by the fellow deputy during a pursuit.

The rescue doctrine allows a *non-professional, voluntary* rescuer to seek recovery for injuries incurred "while reasonably undertaking the rescue of a person who has negligently placed himself in a position of imminent peril." However, with certain exceptions (for instance, injuries caused by third parties who are not the object of the rescue efforts), the *professional* rescue doctrine bars professional rescuers from recovering under the rescue doctrine because a professional rescuer assumes certain hazards "not assumed by a voluntary rescuer." Under the professional rescue doctrine, a professional rescuer may not recover for injuries stemming from hazards "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." However, if the hazard is "hidden, unknown, and extra hazardous" or otherwise not "reasonably anticipated or foreseen," the professional rescuer may seek recovery.

The Supreme Court rejects application of the bar of the professional rescue doctrine to the facts of the case before it, holding that "[t]he doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the [professional] rescuer to the scene."

Result: Affirmance of King County Superior Court decision denying summary judgment to Pierce County; case remanded for trial.

(2) COLLECTING DNA SAMPLES PER RCW 43.43.754 FROM THOSE CONVICTED OF FELONIES DOES NOT VIOLATE FEDERAL CONSTITUTION'S FOURTH AMENDMENT OR ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION - - In State v. Surge, 160 Wn.2d 65 (2007), the Washington Supreme Court rules that RCW 43.43.754, which authorizes the collection of biological samples for DNA testing from individuals convicted of all felonies and certain gross misdemeanors (stalking, harassment, communicating with a minor for immoral purposes) does not violate either Wash. Const. art. I, sec. 7, or the Fourth Amendment, at least as applied to felonies. Five separate opinions are issued. It appears that the statute is solid as applied to felonies, but that it might not be upheld if a challenge were brought against its application to one of the three gross misdemeanors that it covers.

Result: Affirmance of King County Superior Court felony convictions and sentencing provisions for the six defendants in this consolidated appeal.

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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://www.atg.wa].

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