Law Enforcement Digest

FEBRUARY 2009

636th Basic Law Enforcement Academy – August 25, 2008 through January 7, 2009

President: Rodney Rauback – Bremerton Police Department
Best Overall: Daniel M. Smith – Redmond Police Department
Best Academic: Mark T. Gaffney – Tukwila Police Department
Best Firearms: Daniel M. Smith – Redmond Police Department
Tac Officer: Russ Hicks – Fife Police Department

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REVISED DUI ARREST REPORT DISTRIBUTED BY WASHINGTON STATE PATROL

January 1, 2009 is the effective date of chapter 282, Laws of 2008, reported in the June 2008 LED at page 15. The Washington State Patrol recently distributed to breath test instrument locations throughout Washington hard copies of revised DUI arrest reports under the new law. The revised reports also may be accessed at the following internet web site: [http://breathtest.wsp.wa.gov]. The most important changes are in the implied consent warnings for testing breath and blood. The changes in the warnings address revised ignition interlock driver's license procedures and revised commercial driver's license procedures.

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OUTLINE AND ARTICLES ON SELECT LEGAL TOPICS UPDATED ON CJTC LED PAGE

We have updated through December 31, 2008 the following three articles on the Criminal Justice Training Commission's internet Law Enforcement Digest web page: 1) Law Enforcement Legal Update Outline of Case Law on Arrest, Search & Seizure, and Selected Other Topics with Comments on Civil Liability; 2) "Initiation of Contact" Rules Under Fifth and Sixth Amendments; 3) Lineups, Showups and Photographic Spreads: Legal and Practical Aspects Regarding Identification Procedures & Testimony.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

CUSTODIAL SUSPECT'S AMBIGUOUS STATEMENTS REGARDING HIS ATTORNEY'S ADVICE DID NOT CONSTITUTE INVOCATION OF MIRANDA RIGHTS

Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2008) (decision filed December 5, 2008)

Facts:

Sparks, Nevada police officers were investigating Ricky Sechrest for grand larceny. At the same time, Reno, Nevada police officers were investigating him for an unrelated double-murder of pre-teen girls. The Sparks officers had Sechrest in custody. They obtained a Miranda

waiver, and they questioned him about the grand larceny. What happened next is described by the Ninth Circuit's Sechrest opinion as follows:

> When the Sparks officers finished questioning Sechrest, Sergeant Gonyo [of Sparks] left the room. He returned to inform Sechrest that Officer Bogison of the Reno Police Department was outside. Sergeant Gonyo asked Sechrest if he would like to talk to Officer Bogison, with whom Sechrest had spoken over the past few days. Sechrest replied, "Yes, I like Mr. Bogison, he is the only one on my side, and [he] understands me." Officer Bogison then approached Sechrest and said, "I understand you want to talk to me, is that right?" Sechrest replied, "Yes." Sechrest also stated that he had spoken with his attorney and had been advised to "keep his mouth shut." Officer Bogison responded, "Well, there is nothing we can do to alter that ... do you want to talk to me?" Sechrest replied, "I will tell you what, I will make a deal-no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Bogison then asked again, "Does this mean you want to talk to us?" Sechrest answered, "Yes."
>
> Sechrest entered an interrogation room with Officer Bogison and another Reno officer, Detective Eubanks. Before the interrogation began, Sechrest requested permission to call his grandmother and his attorney. Sechrest first called his grandmother. When that call ended, Officer Bogison asked Sechrest if he wished to call his attorney. Sechrest said, "No, I want to get this off my chest." Shortly thereafter, Sechrest confessed to the two murders.
>
> Before trial, Sechrest moved under Miranda to suppress the confession he made to the Reno police officers. Following an evidentiary hearing, the trial judge ruled that Sechrest's Miranda rights had not been violated and that Sechrest's confession could be admitted into evidence.
>
> Sechrest's seven-day jury trial began on September 12, 1983, in Nevada's Second Judicial District Court. During his voir dire of the jury, the prosecutor made two statements suggesting that Sechrest would not actually serve a full term of life imprisonment if he were sentenced to life in prison without the possibility of parole:

Proceedings below:

Sechrest was convicted for both murders. He was given the death penalty for each murder. He appealed in the Nevada courts, challenging, among other things, the trial court's failure to suppress his admissions during interrogation. He lost his Nevada appeals. He also lost his habeas corpus motion in U.S. District Court.

ISSUE AND RULING: Where Sechrest had already waived his Miranda rights and then 1) told interrogators that his attorney had told him to "keep his mouth shut," and 2) asked to call his attorney but then changed his mind about calling his attorney and agreed to talk, did these facts require officers to stop questioning Sechrest? (ANSWER: No)

Result: Reversal of U.S. District Court (Nevada) denial of habeas corpus relief on grounds not addressed in this LED entry; case remanded to District Court for further proceedings.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Sechrest first argues that the Reno officers violated his right to remain silent. A suspect in police custody must be informed of his right to remain silent before any interrogation begins. If the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to invoke his right to remain silent, the interrogation must cease. Any statement taken after the suspect's invocation of this right constitutes the product of compulsion and cannot be used as proof of guilt.

However, "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants [to invoke the privilege]." Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02**. Clarifying questions "minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement." "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning."

When the Sparks officers finished questioning Sechrest, Sergeant Gonyo asked Sechrest if he would like to talk to Reno Police Officer Bogison, and Sechrest answered that he would. When Officer Bogison first approached Sechrest, however, Sechrest told Officer Bogison that his lawyer had advised him to "keep his mouth shut." This statement was not a clear invocation of the right to remain silent. Although Sechrest was indicating what his lawyer had advised him to do, it was not clear that Sechrest was explaining his own intentions. An officer in Bogison's position would not necessarily have understood Sechrest's statement to be an invocation of his right to remain silent.

After Sechrest announced that his lawyer had advised him to "keep his mouth shut," Officer Bogison asked a second time if Sechrest wanted to talk to him. Because Sechrest's statement about his attorney's advice was sufficiently vague to merit clarification, this question was permissible.

Sechrest responded to Officer Bogison's question with an ambiguous, convoluted statement. Sechrest said, "I will tell you what, I will make a deal-no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." Once again, Sechrest's intentions were unclear. Officer Bogison asked again whether Sechrest wished to speak with him, and Sechrest said "yes." This last statement constituted a clear indication that Sechrest did not wish to invoke his right to remain silent.

In sum, each of Officer Bogison's questions merely sought to clarify whether Sechrest was invoking his right to remain silent, and Sechrest eventually made clear that he did not wish to invoke that right. We therefore conclude that Sechrest knowingly and voluntarily waived this right before he agreed to speak with the Reno police officers.

Sechrest also argues that the Reno officers violated his right to counsel under Miranda. "The right to counsel recognized in Miranda is sufficiently important to suspects in criminal investigations ... that it 'requir[es] the special protection of

the knowing and intelligent waiver standard.'" Davis. If a suspect waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him. "But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." A suspect who invokes his right to counsel cannot be questioned about any offense unless an attorney is actually present.

Applying these rules, we begin by determining whether Sechrest actually invoked his right to counsel. This is an objective inquiry. There must, at a minimum, be a statement from the suspect that can "reasonably be construed to be an expression of a desire for the assistance of an attorney." Where a suspect makes a reference to an attorney that is ambiguous or equivocal, the officers may continue with their questioning. The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."

When Officer Bogison first began questioning Sechrest, Sechrest said that he had spoken with his attorney and had been advised to "keep his mouth shut." This mention of an attorney and reference to advice from an attorney is not an unambiguous request for counsel. In Davis, the Supreme Court examined a case where the suspect said, "Maybe I should talk to a lawyer." The Court found that this reference to an attorney was not a clear invocation of a right to an attorney. We have also held that the statements, "I think I would like to talk to a lawyer," and, "maybe [I] ought to see an attorney" were not clear and unambiguous requests for counsel. Because Sechrest's reference to his attorney's advice was even less clear than these statements, it was insufficient to require that the officers stop their questioning.

Sechrest did make a later statement that was a request for counsel. After Sechrest agreed to speak to Officer Bogison and Detective Eubanks, Sechrest asked permission to telephone his grandmother and his attorney. Sechrest decided to call his grandmother first, however. After Sechrest's conversation with his grandmother, Officer Bogison asked Sechrest if he was going to call his attorney, but Sechrest said no. In context, Officer Bogison's question was simply an attempt to follow up on and implement Sechrest's earlier request, after a delay instigated by Sechrest. Under these specific circumstances, we find Officer Bogison's question permissible.

Accordingly, we conclude that Sechrest's right to counsel was not violated when the Reno officers questioned him at the Sparks police station.

[Some citations omitted]

LED EDITORIAL NOTE: The Davis rule discussed in Ignacio applies in Washington. See State v. Radcliffe, __ Wn.2d __ , 194 P.3d 250 (2008) Dec 08 LED:18.

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BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

CIVIL RIGHTS ACT: NO QUALIFIED IMMUNITY IN CASE WHERE PLAINTIFFS ALLEGE DETECTIVES VIOLATED BRADY DUE PROCESS REQUIREMENT THAT OFFICERS SHARE EXCULPATORY EVIDENCE WITH PROSECUTOR'S OFFICE RE PENDING CRIMINAL CASE – In Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) (decision filed December 8, 2008), a 3-judge panel of the Ninth Circuit, taking the two plaintiffs' allegations as true, rules that a case must go to trial on the question of whether two detectives of the San Francisco Police Department improperly withheld exculpatory evidence during the plaintiffs' prosecutions for murder and during post-trial proceedings. The plaintiffs had been convicted of murder but were, many years later, determined by the federal and California courts to be factually innocent.

In short, the relevant history of the criminal case was as follows. After charges were filed against Tennison and Goff, a purported eyewitness to some of the events surrounding the murder plausibly told police that it was not Tennison and Goff, but instead a man named Ricard, who had committed the murder. The eyewitness provided a number of details. The detectives wrote a report of the interview and placed the report in the file to which the prosecutor had access. But neither of the detectives alerted the prosecutor to the new information. The prosecutor, and therefore also the defense attorneys and defendant, did not become aware of the report or of the purported eyewitness until long after the trial.

Within a month after the jury found Tennison and Goff guilty of murder, while the defendants were pursuing a motion for a new criminal trial, Ricard was arrested on an unrelated grand larceny. On tape, Ricard confessed that he, not Tennison and Goff, committed the murder. His story matched many details of the story that the undisclosed, purported eyewitness had given before trial. The detectives in the murder case did not conduct that interrogation, but other officers soon made them aware of the taped confession. No one from the San Francisco Police Department made the homicide prosecutor aware of the tape until several months later.

The Ninth Circuit's Tennison decision explains that, if true, these allegations by the plaintiffs would establish constitutional due process violations by the detectives under Brady v. Maryland, 373 U.S. 83 (1963). The detectives should have immediately brought the exculpatory information to the attention of the prosecutor so that he could fulfill his duty under Brady to immediately disclose the information to the defense attorneys in the pending criminal proceedings. The constitutional due process violation would support a lawsuit under the federal civil rights statute, 42 U.S.C. section 1983.

Result: Affirmance of U.S. District Court (California) denial of summary judgment to the detectives.

LED EDITORIAL NOTE: We have made a good faith effort to accurately provide a brief summary of the Tennison decision. But that is not easy. The decision contains a great many factual and procedural details that did not seem to us to have been arranged methodically to make clear to the reader the various players, the chronology, and attribution of various allegations in the case. Readers who wish to review the full Ninth Circuit opinion can access it by going to the website of the Ninth Circuit. See our instructions for such internet access at page 25 of this LED.

LED EDITORIAL COMMENT: In Washington, another theory under which a charged party can sue police for not sharing exculpatory information with the prosecutor's office is the theory of "malicious prosecution." Two Washington decisions that have addressed this theory are Bender v. City of Seattle, 99 Wn.2d 1582 (1983) and Peterson v. Littlejohn, 56

Wn. App. 1 (Div. I, 1989). When in any doubt, officers should make the prosecutor aware of any new, potentially significant, exculpatory information that they obtain while charges are pending or while post-trial hearings are pending.

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WASHINGTON STATE SUPREME COURT

SUPREME COURT AVOIDS ISSUES RELATED TO BRINGING DRUG DOG TO TRAFFIC STOP; ALSO, COURT HOLDS TEST FOR PROBABLE CAUSE FOR SEARCH WARRANT FOR CAR NOT MET IN COMBINATION OF DRIVER'S NERVOUSNESS, LARGE AMOUNT OF CASH, CONFLICTING STORIES OF DRIVER AND PASSENGER ABOUT PURPOSE OF CASH AND TRIP, EMPTY BAGGIES, AND DRIVER'S PRIOR CONVICTION FOR HEROIN DELIVERY

State v. Neth, __ Wn.2d __, 196 P.3d 658 (2008)

LED INTRODUCTORY EDITORIAL NOTES:

1. Issue regarding bringing a drug dog to a traffic stop without consent or a search warrant and not in aid of otherwise lawful search is not addressed in the Neth opinion

The Washington Supreme Court originally accepted review in this case to address the question of whether, under the Washington or the federal constitution, consent, exigent circumstances, or a search warrant (or at least some level of criminal suspicion) is required in order to bring a drug-sniffing dog to sniff a car at a traffic stop. But the trial court ruled in this case that the dog was not shown in the search warrant affidavit to be reliable, and the prosecutor did not challenge that trial court ruling in the appellate court. Therefore, the Supreme Court declares in its unanimous Neth opinion, the legal question regarding bringing a drug-sniffing dog to a traffic stop should not be addressed in this case.

The Neth opinion does note that the bringing-a-drug-dog-to-a-traffic-stop question is presented in another case (State v. Valdez), currently pending before the Washington Supreme Court. In Valdez, the Supreme Court has heard oral argument and will be issuing a decision. The Court of Appeals resolved the Valdez case without addressing the dog sniff question. See State v. Valdez, 137 Wn. App. 280 (Div. II, 2007) April 07 LED:08. So we think that it is possible that the Washington Supreme Court ultimately will avoid that issue in Valdez as well.

2. Issue regarding establishing probable cause in a search warrant affidavit describing a drug dog's reliability is not addressed in the Neth opinion

The Neth opinion indicates that the prosecutor waived review of the question of what is required to establish probable cause when describing a drug dog's alert. So the Supreme Court does not address that legal question either. We address the question briefly in our LED EDITORIAL COMMENTS below following our excerpts from the opinion.

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

Joseph Neth and his girl friend, Marisa Vachon, were pulled over by a trooper of the Washington State Patrol for driving 68 miles per hour in a 60 miles per hour zone. Neth pulled his car to a stop in a parking area of a gas station in Goldendale, Washington. Neth was driving and Vachon was in the hatchback area with a dog. The trooper said Neth appeared nervous and stressed, was yelling at the dog, and became angry.

The trooper asked for identification, registration, and proof of insurance. Neth had none of these. He gave his name and date of birth, which turned up an outstanding arrest warrant for driving with a suspended license and failure to appear. The trooper called for backup, handcuffed Neth, and searched him, finding several unused clear plastic baggies, each about half the size of a sandwich bag, in his coat pocket. When asked about them, Neth did not answer. Neth was placed in the back of the patrol car while the trooper attempted to confirm the warrant.

The trooper told Neth he would be searching the car incident to arrest and asked if there was anything he should know about in the car. Neth said there was $2,500 or $3,500 in cash in the car that he was bringing to pay rent on a house in Goldendale that he was renting from his father. While waiting for confirmation on the warrant, the trooper interviewed Vachon, who said the pair was going to look for a house to rent. When told Neth had said he was going to pay rent on a house already rented, she replied she did not know if he had already rented a house. When asked, she said the pair had been dating for about a year.

Neth had given the trooper his father's name although nothing was done with that information. Neth also informed the trooper that he had recently purchased the car. Later, a registration check confirmed that the car had recently been sold and that the last legal owner was someone other than Neth.

After about 10 minutes, word reached the trooper that the issuing agency would not confirm the arrest warrant. The trooper released Neth but told him to wait because he would be cited for not having proof of insurance. He also cited Vachon for not wearing a seatbelt. It took approximately 30 minutes to write up the citations. The trooper testified the delay was because the pair's lack of identification required him to verify their license numbers and other information over the radio.

While the citations were being written, the K-9 officer and drug dog arrived and did a walk-around of Neth's car. The dog alerted three times. When Neth did not consent to a search, the trooper decided to impound the car and seek a search warrant. After receiving citations, both Neth and Vachon were released.

The next day, the trooper got the warrant. The search revealed $4,790 in various denominations of bills that the trooper testified appeared to be set up for making change, numerous baggies with crystals and residue all of which field tested positive for methamphetamine, a glass pipe, a digital scale, several hypodermic needles, and two spoons with burnt residue.

> Neth's motion to suppress was denied. The trial court found the dog sniff should have been excluded from the probable cause determination because the affidavit did not contain enough information to establish the dog's reliability. (The affidavit says only that the dog was "[t]rained to recognize the odor of illegal narcotics.") However, the trial court found there was probable cause to issue the warrant even without the dog sniff. A jury found Neth guilty of possession of methamphetamine with intent to deliver. He was sentenced to 90 months confinement.

ISSUE AND RULING: Was probable cause established in the officer's search warrant affidavit describing the large amount of cash, the driver's nervousness, the conflicting stories of the driver and passenger (as to whether they were looking for a place to rent or instead already had a rental to which to apply the cash), the empty baggies on the person of the driver, and the driver's prior conviction for heroin delivery? (ANSWER: No)

Result: Reversal of Klickitat County Superior Court conviction of Joseph Douglas Neth for possession of methamphetamine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Our question is whether the facts available to the magistrate, other than the drug dog's alert, justified a reasonable belief, rather than mere suspicion, that evidence of a crime was located in Neth's car. The facts listed in the trooper's affidavit of probable cause/search warrant which he believed were indicative of drug trafficking are as follows:
>
> 1 - The driver was overly nervous, yelling at times as I was talking to him.
>
> 2 - He was driving a car that he could not prove he owns or rents.
>
> 3 - He had no registration or insurance documents, or any transfer of ownership papers.
>
> 4 - He had no identification or a wallet on him or in his vehicle and was traveling from Vancouver to Goldendale. Female passenger had no identification as well.
>
> 5 - He made comments that he was renting a house in Goldendale but he did not know the exact location, or address of the residence, but still claimed to be working and residing in Ridgefield.
>
> 6 - He voluntarily stated he had money in the vehicle but did not know the exact amount $2500 to $3500 dollars. The money is in cash, was not located on his or passengers person, and the subject did not have a wallet.
>
> 7 - His girlfriend stated they were going to rent a house in Goldendale, she did not know that the house was already being rented, even though she had been dating him for a year.
>
> 8 - Subject possessed clear plastic bags that drug traffickers are known to use for carrying illegal drugs.

9 - The K-9 (Trained to recognize the odor of illegal narcotics) hit on the vehicle in 3 different locations and Sergeant Bartowski of the Goldendale P.D. stated they were strong hits. **[LED EDITORIAL NOTE: The Supreme Court explains elsewhere in its opinion that the Court is not considering this evidence, so we think that this factor should be ignored.]**

10 - Subject is a convicted felon for delivery charges including possession of Heroin.

These facts are unusual, and, taken together, they seem odd and perhaps suspicious. However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity. We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent versions of events. . . . Absent the dog's alert, the only facts that can be said to show a nexus connecting Neth's car to criminal activity are the plastic baggies, a relatively large sum of money in the car, and his criminal history.

The trooper stated that in his experience, clear plastic baggies are often used in delivery of illegal controlled substances. Other states have come to varying conclusions regarding the incriminating nature of clear plastic baggies. . . .

But absent some other evidence of illicit activity, the mere possession of a few empty, unused plastic baggies in a coat pocket does not constitute probable cause to search an automobile, even when combined with nervousness, inconsistent statements, and a large sum of money in the car. Baggies are capable of use for lawful as well as unlawful purposes. Innocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search. [Court's footnote: *Possession of a number of small baggies may well create reasonable suspicion justifying further investigation, but this fact alone does not rise to the level of probable cause. Additional information such as being in a high drug crime area, baggies with the appearance of having once contained illicit substances, or observations of transactions involving the baggies may well have been sufficient*.]

The trooper also relied on Neth's statement that he had a large amount of cash. It does seem unusual to have several thousand dollars in cash somewhere in the car rather than on one's person and to not have even a general idea how much cash there is. Like the pair's inconsistent explanations of their trip to Goldendale, it may have reasonably raised the trooper's suspicions, but with little more, it did not rise to the level of probable cause that a crime was being committed.

A history of the same or similar crimes may be helpful in determining probable cause, but without other evidence, it also falls short of probable cause to search. Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches. Some factual similarity between the past crime and the currently charged offense must be shown before the criminal history can significantly contribute to probable cause.

In sum, we conclude these facts did not create probable cause to search Neth's car and the evidence obtained pursuant to the warrant should have been

suppressed. Neth's conviction is reverse, and the case is remanded for further proceedings consistent with this opinion.

[Some citations omitted]

LED EDITORIAL COMMENTS:

1. The officer-affiant should have included more information in the affidavit regarding the reliability of the drug dog for probable cause purposes

The Supreme Court explains in a footnote in Neth not included in this LED entry that the prosecutor did not attack the trial court's determination in the suppression hearing that the affiant officer had not shown the drug dog to be reliable for probable cause purposes. The trial court ruled it was not enough for the officer to stated only that the dog was "trained to recognize the odor of illegal narcotics." The Neth opinion does not address what is required for such an affidavit to establish probable cause. We will briefly address that question in our comments below in the next succeeding paragraph.

The Supreme Court also explains in the same footnote in Neth that the ACLU filed an amicus brief arguing that reactions of drug dogs are too unreliable to ever support probable cause findings. We are confident that this attack by the ACLU on the use of drug-sniffing dogs will ultimately fail when the Washington appellate courts ultimately do address the issue.

No reported Washington appellate court decision has addressed this question regarding sufficiency of a search warrant drug dog affidavit. The result of our research, which was not exhaustive, of jurisdictions throughout the United States indicates that an affidavit will suffice if it explains along the following lines: (1) the handler and dog were trained and currently certified in searching for drugs, including the type of drugs that were detected and seized; and (2) the dog acted consistent with that training in alerting on the area from which the illegal drugs were seized. See, for example, U.S. v. Sundby, 186 F.3d 873 (8th Cir. 1999). A detailed account of the dog and handler's particular education or the dog's track record in training and/or in the field has not generally been required by courts in other jurisdictions. But in light of (1) the unfortunate history generally of restrictive independent grounds search and seizure rulings by Washington appellate courts in the past several decades, (2) the lack of any Washington appellate precedent on this particular point, and (3) the broadside attack on drug dogs by the ACLU and others, we believe it is advisable for Washington officers to include information in the affidavit regarding the relevant educational history of the dog and handler, as well as track record in the field and in training.

We have been provided two sample affidavits written by Washington drug dog handlers. We would happy to email copies of the relevant portions of the affidavits on request made to johnw1@atg.wa.gov. We would also be happy to receive copies of additional samples at that same address.

It should be noted that in cases where probable cause is based in part on a dog sniff, defendants will be allowed to explore the drug dog's track record in a suppression hearing. If there is something problematic with the dog's track record, then that should be disclosed in the affidavit. When in doubt, the officer should consult with the prosecutor's office in advance of submitting the affidavit.

2. <u>We do not understand why the baggies that were seized from the driver were considered on the PC question</u>.

The <u>Neth</u> Court states in its factual description that, <u>before</u> arresting Neth, the officer searched Neth and the officer found empty plastic baggies in Neff's coat pocket. It appears to us that the search of Neth's coat pocket and the seizing of baggies was unlawful because the search occurred <u>before</u> he was arrested. Accordingly, we think that the information about the presence of plastic baggies should not have been considered on the issue of whether the officer's affidavit established probable cause to search the car.

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<u>WASHINGTON STATE COURT OF APPEALS</u>

OFFICER HAD REASONABLE SUSPICION FOR A <u>TERRY</u> STOP IN LIGHT OF HIS CORROBORATION OF FRIGHTENED WOMAN'S REPORT THAT TWO MEN ASKED HER TO GET INTO THEIR CAR TO GO WITH THEM TO SMOKE CRACK COCAINE

<u>State v. Lee</u>, ___ Wn. App. ___, ___ P.3d ___, 2008 WL 5392289 (Div. I, 2008)

<u>Facts and Proceedings below</u>: (Excerpted from Court of Appeals opinion)

> On February 12, 2006, Seattle police officer Jacob Haines was patrolling a high-crime area when he saw a vehicle pull up to a woman who was walking on the sidewalk. Officer Haines saw the woman speak briefly with the occupants of the car and then walk away, looking frightened. Officer Haines then approached the woman and inquired into her well being. She told him that she did not know the men in the car and that she was scared. According to Officer Haines, the woman said her name was Kathy Stevens, gave her date of birth and the address of the homeless shelter at which she was staying, and, although he did not record it, also gave him her telephone number. Stevens told Officer Haines that the men asked her to get into the car and smoke crack cocaine with them, and they showed her a baggie with crack in it as well as a crack pipe, which she described. Officer Haines found Stevens to be completely cooperative and forthcoming.
>
> Officer Haines then directed another officer to stop the suspected vehicle to investigate. During the stop, the officers ordered the passenger, Anthony Lee, to exit the vehicle and when he did so, a glass pipe fell from his person. Officer Haines then arrested Lee for possession of drug paraphernalia and, in a search incident to that arrest, the officers found cocaine in his pocket.
>
> Lee was charged with possession of cocaine. The trial court denied Lee's pretrial motion to suppress the evidence against him and he was ultimately convicted as charged.

<u>ISSUE AND RULING</u>: Where the frightened woman gave her name and address and phone number, where she reported to the officer that two men had tried to talk her into their car to go smoke crack cocaine, and where the officer had observed her fright at the contact with the men, did the totality of the circumstances provide reasonable suspicion justifying a <u>Terry</u> stop of the suspects? (<u>ANSWER</u>: Yes)

Result: Affirmance of King County Superior Court conviction of Anthony Craig Lee for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Lee challenges the Terry stop that led to his arrest, arguing that the information provided by the citizen informant was not, by itself, sufficiently reliable to allow the officers to stop his vehicle. He contends that the trial court should have applied the Aguilar-Spinelli test, as derived from Aguilar v. Texas, 378 U.S. 108, (1964), and Spinelli v. United States, 393 U.S. 410 (1969), which requires a threshold examination of the informant's veracity and basis of knowledge. Moreover, Lee contends that the trial court erred because, rather than applying the Aguilar-Spinelli test, it erroneously applied the "totality of the circumstances" test, as described in State v. Randall, 73 Wn. App. 225 (Div. I, 1994) **Sept 94 LED:16**. Lee and amicus, the American Civil Liberties Union of Washington, argue that Randall should be overruled and that the Aguilar-Spinelli test should be applied to this case. For the reasons set forth below, we disagree.
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> "Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity." A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1 (1986). For over 25 years, when determining whether police have a reasonable suspicion sufficient to justify an investigatory detention, or Terry stop, under the Fourth Amendment of the United States Constitution and article I, section 7 of our state constitution, courts have applied the totality of the circumstances test, rather than the Aguilar-Spinelli test. . . . In fact, a reasonable suspicion can arise from information that is less reliable than that required to establish probable cause. Alabama v. White, 496 U.S. 325 (1990).
>
> Specifically, "[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." The totality of the circumstances test allows the court and police officers to consider several factors when deciding whether a Terry stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant. Kennedy. . . . Moreover, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119 (2000) **March 2000 LED:02**.
>
> As we stated in Randall,
>
> > Reasonable suspicion, like probable cause, is dependant upon both the content of information possessed by police and its degree of reliability. Both factors-quantity and quality-are considered in the "totality of the circumstances-the whole picture," that must be taken into account when evaluating whether there is reasonable suspicion.
>
> Moreover,
>
> > [N]o single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the

> reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer.

Lesnick, 84 Wn.2d 940, 944 (1975).

It is well established that, "[i]n allowing such detentions, Terry accepts the risk that officers may stop innocent people." Wardlow. However, despite this risk, "[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations." State v. Mercer, 45 Wn. App. 769.

Furthermore, it is clear that an officer's reasonable suspicion may be based on information supplied by an informant. But "[a]n informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.' " When deciding whether this "indicia of reliability" exists, the courts will generally consider several factors, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip.

A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. Indeed, "victim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible." Moreover, courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture.

. . .

Thus, the police are entitled to give greater credence to a report from a citizen crime victim than to a report from a criminal associate of the suspect. Indeed, there is no constitutional requirement that police distrust ordinary citizens who present themselves as crime victims and "[c]ourts are not required to sever the relationships that citizens and local police forces have forged to protect their communities from crime."

. . .

A careful reading of precedent also demonstrates that the Kennedy decision was the latest Washington Supreme Court decision on this issue and no subsequent opinion of this court or our Supreme Court places the Kennedy opinion's authority into doubt. Therefore amicus's reliance on State v. Hopkins, 128 Wn. App. 855 (Div. II, 2005) **Oct 05 LED:09**, State v. Jones, 85 Wn. App. 797 (Div. III, 1997) **Aug 97 LED:16**, and State v. Hart, 66 Wn. App. 1 (Div. I, 1992) **Nov 92 LED:13**, for the contrary proposition is misplaced. The court in Hart does not discuss Kennedy, and Kennedy is not even cited in Hopkins or Jones.

Amicus also incorrectly suggests that the Washington Supreme Court in State v. Jackson, 102 Wn.2d 432 (1984), rejected the totality of the circumstances test for Terry stops based on information from informants. The Jackson decision

> responded to the 1983 [U.S. Supreme Court] decision in [Illinois v. Gates, 462 U.S. 213 (1983)], wherein the United States Supreme Court replaced the Aguilar-Spinelli test with a totality of the circumstances test for search warrant probable cause determinations. In Jackson, the court refused to follow the lead of the United States Supreme Court and held that, under article I, section 7, a search warrant based on an informant's tip would have to continue to satisfy the reliability and basis of knowledge prongs of Aguilar-Spinelli.
>
> Nonetheless, the Jackson decision is inapposite to the issue presented here: the appropriate test under article I, section 7 for an investigatory stop based partly or wholly on an informant's tip. First, the issue in Jackson involved the showing required of an officer-affiant in order to obtain a warrant authorizing the search of a home, not the showing required to make a traffic stop in public. The Jackson decision is consistent with prior rulings that article I, section 7 of the Washington constitution affords more protection to peoples' homes than that provided by the Fourth Amendment. . . . Second, the Jackson court focused on the showing necessary to meet the probable cause standard of a search warrant, not the reasonable suspicion standard of an investigatory traffic stop, a much lower standard. . . . And finally, in Washington, prior to the Jackson case, the Aguilar-Spinelli test has long been the method of evaluating the veracity of search warrants based on informants' tips.
>
> In sum, the trial court in this case properly considered the totality of the circumstances known to the officers at the time of the investigatory detention. Those circumstances, as established by evidence that is not disputed on appeal, were as follows: Stevens reported that two individuals in a specific car pulled over and told her to get in the vehicle to smoke crack cocaine while showing her that they possessed both crack and a crack pipe. Furthermore, Officer Haines corroborated much of Stevens's report in that he saw the car pull up to her in a high-crime area, saw the occupants speak with her briefly and saw her then walk quickly away, appearing frightened. The undisputed facts support the trial court's conclusion that the Terry stop was justified by the informant's statements and the circumstances corroborated by the officer's own observations.

[Footnote, some citations omitted]

LED EDITORIAL COMMENT: We assume that the defense attorneys and ACLU (participating as amicus curiae – i.e., friend of the court) presumably will ask the Washington Supreme Court to review the "independent grounds" question that they raised in this case under article 1, section 7 of the Washington constitution. Simply put, that question is whether the Aguilar-Spinelli two-pronged test for informant-based suspicion (reviewing the informant's report for the source's 1) veracity and 2) basis of information) applies in the same way for "reasonable suspicion" analysis as for "probable cause" analysis. The Lee Court rejected their argument, and we would expect the Washington Supreme Court also to reject the argument.

2-1 MAJORITY HOLDS FERRIER WARNINGS WERE REQUIRED TO OBTAIN CONSENT TO SEARCH HOUSE FOR PERSON THAT OFFICER BELIEVED HAD BEEN INVOLVED IN A 3 A.M. ONE-CAR ROLLOVER ACCIDENT

State v. Freepons, ___ Wn. App. ___, ___ P.3d ___, 2008 WL 5195953 (Div. III, 2008)

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

> On August 27, 2005, a Honda registered to Adam Byrne was involved in a one-car accident in rural Benton County at about 3 a.m. The car appeared to have been rolled and a window was broken, but it was found locked with its alarm activated. Officers went to the Byrne residence and could not locate Adam or his brother Bryan. The car was towed away from the accident scene. This information was shared with Benton County Sheriff Deputies [A] and [B] before their 6 a.m. shift.
>
> Adam Byrne, 19 years old, was found lying by the side of the road at 6:30 a.m., approximately one mile from where his car was found. Deputies Fitzpatrick and Trevino responded. Adam was dirty and smelled of intoxicants but he was apparently not injured. He was taken into custody for suspicion of underage alcohol consumption and read his rights. Adam waived his rights and consented to a breath test, which resulted in a 0.065 alcohol reading.
>
> Adam told officers that he had been drinking at Mr. Hazzard's residence and got lost trying to walk home. He denied knowing anything about his car being wrecked and reported last seeing his car parked at Mr. Hazzard's house, unlocked, with the keys on the driver's seat. Adam told deputies that his brother, Bryan Byrne, had also attended Mr. Hazzard's party and he may have taken the car. Adam told the deputies that his brother did not have a cell phone. The deputies found a Honda key and remote entry key fob in Adam's pocket. The deputies suspected that Adam was not telling the truth about his involvement in the wreck.
>
> The deputies had Adam direct them to Mr. Hazzard's residence. They observed several dozen empty beer cans in the yard and through the window they could see three Benton County road signs. The deputies recognized the signs as stolen property and believed there had been underage drinking on the premises.
>
> Mr. Hazzard and Mr. Freepons, who (according to the court's findings) were both 18 years old at the time, came to the door. Because of the evidence of criminal activity and contraband, Deputy [A] gave Miranda warnings to Mr. Hazzard and Mr. Freepons. He told the men that there was a car accident and they were looking for Bryan Byrne. He asked them if Adam and Bryan had been to a party at the residence the previous day. They responded that the brothers were there the previous evening but were no longer there.
>
> The men agreed to allow deputies in the house to look for Bryan Byrne. Deputy [B] accompanied Mr. Freepons inside the residence while Deputy [A] remained outside with Mr. Hazzard. Mr. Hazzard provided Deputy [A] with Bryan Byrne's cell phone number when asked if Bryan had a cell phone.
>
> Meanwhile, Deputy [B] followed Mr. Freepons through the house. Mr. Freepons opened doors to allow the deputy to look inside. Mr. Freepons passed a door that he did not open, which prompted Deputy [B] to ask whose room it was. Mr. Freepons responded that it was "'no one[']s room.'" Deputy [B] opened the door without asking permission and immediately saw what he recognized as growing

marijuana. He continued his search for Bryan Byrne and arrested Mr. Freepons and Mr. Hazzard for the marijuana grow upon leaving the residence. After re-reading Miranda warnings, Mr. Freepons and Mr. Hazzard admitted to tending to the marijuana plants. Both men were informed of their Ferrier rights and signed written waivers for a second search of the residence, when evidence of the growing marijuana was collected.

Mr. Freepons and Mr. Hazzard were each charged with one count of manufacturing a controlled substance. They both moved to suppress the evidence, arguing that the search was unlawful because Ferrier warnings were required for the first search. The trial court disagreed, concluding that, given its finding that the purpose of the entry was to search for Bryan Byrne and not to investigate a crime, Ferrier warnings were not required.

Mr. Freepons and Mr. Hazzard were convicted on stipulated facts. Findings of fact and conclusions of law were entered for the suppression motion and trial.

ISSUE AND RULING: Where the officers suspected that Bryan Byrne was the driver of the car involved in a one-car rollover accident the night before, and the officers were investigating possible crimes in relation to the accident, including whether Byrne had been drinking alcohol, were the officers required to give Ferrier warnings (of the right to refuse consent, restrict scope and retract) when requesting consent from co-occupants of the house to search for Byrne? (ANSWER: Yes, rules a 2-1 majority – Schultheis and Sweeney in majority, Brown in dissent)

Result: Reversal of Benton County Superior Court convictions of Peter James Freepons and Brian James Hazzard for manufacturing marijuana.

Status: The Benton County Prosecutor's Office has petitioned for discretionary Washington Supreme Court review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A warrantless search is constitutional when valid consent is granted. Mr. Freepons and Mr. Hazzard essentially argue that their consent to enter the residence was not voluntary because they were not provided with warnings required by Ferrier [State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**].

The Washington Constitution, article I, section 7, recognizes a person's right to privacy with no express limitations. Under Ferrier*:*

> [W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.

Ferrier held that a knock and talk is inherently coercive. In a knock and talk, law enforcement officers knock on the door of a suspect's home, obtain permission to enter to discuss a complaint, and later ask for permission to search the premises. The Supreme Court has since clarified that the Ferrier requirement is limited to situations where police request entry for the purpose of obtaining consent to

conduct a warrantless search for contraband or evidence of a crime. State v. Khounvichai, 149 Wn.2d 557 (2003) **Aug 03 LED:06**.

Here, though the court found that the deputies were interested in finding Bryan Byrne, the State did not show and the court did not find that the desire to find Mr. Byrne was motivated by anything other than to look for evidence of a crime associated with the rollover accident.

That Mr. Freepons and Mr. Hazzard were given Miranda warnings prior to the deputies' entry into the house shows that the deputies anticipated that they would find what they were looking for-evidence of criminal activity within the home. The deputies did not deny that the purpose of finding Bryan Byrne related to the criminal investigation involving the rolled car regardless of who was driving, i.e., leaving the scene of an accident, hit-and-run, driving while intoxicated, minor in possession of alcohol, or vehicular assault.

The Washington Supreme Court has noted that "there is a fundamental difference between requesting *consent to search* a home and requesting *consent to enter* a home for other legitimate investigatory purposes." Khounvichai (emphasis added). Here, the deputies' intention to search the residence for evidence of a crime was clear.

[Some citations omitted]

DISSENTING OPINION BY JUDGE BROWN: (Excerpted from dissent)

Here the deputies were not seeking to conduct a "knock and talk" search of the appellants' residence for contraband or crime evidence against the appellants. The deputies merely inquired about Bryan Byrne in an unrelated matter. When appellants denied Mr. Byrne's presence, the deputies asked to check appellants' negative response by looking inside. Appellants consented. When inside, a deputy saw a marijuana grow, but did not find Mr. Byrne and left. After clearing up the Byrne matter, the deputies told appellants they wanted to go back into the residence to investigate the marijuana grow, and asked for and received consent conforming to State v. Ferrier.

The Ferrier court's focus was to prevent unwarranted police intrusions against crime suspects using a "knock and talk" ruse when police suspect the presence of contraband or crime evidence and have ample opportunity to secure a warrant. S*ee also* State v. Khounvichai, 149 Wn.2d 557 (2003 (stating, "[w]e . . . reiterate that [Ferrier] warnings are required only when police officers seek entry to conduct a consensual search for contraband or evidence of a crime"). In Ferrier*,* unlike here, the officers admitted they conducted the "knock and talk" to avoid the necessity of obtaining a search warrant. Here, the deputies were not seeking crime evidence against the appellants when they secured the appellants' consent to search. Moreover, considering the emergent and community caretaking nature of their inquiry, the deputies did not have "'ample opportunity to obtain a warrant,'" as in Ferrier. Thus, even Ferrier would seem to allow a consent entry under our facts.

Further, the majority reasons "[t]hat Mr. Freepons and Mr. Hazzard were given Miranda warnings prior to the deputies' entry into the house shows that the

> deputies anticipated that they would find what they were looking for-evidence of criminal activity within the home." However, one of the factors in determining whether consent to search is freely given is whether Miranda warnings were given prior to obtaining consent. *See* State v. Bustamante-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02** (setting forth the test for determining voluntariness of consent to search). Giving Miranda warnings does not factor into the analysis of whether Ferrier warnings are required prior to a consent search.
>
> Accordingly, I respectfully dissent.

[Some citations omitted]

LED EDITORIAL COMMENT: We think that the majority opinion erroneously fails to equate the facts in this case with those in Khounvichai, where the Washington Supreme Court held that Ferrier did not apply. In Khounvichai, the officers sought consent to come inside a residence to talk to a malicious mischief suspect. In Freepons, the officers' purpose was the same as the officers in Khounvichai – to talk to a suspect. The Freepons Court asserts that the officers were seeking criminal evidence inside the home. But we see nothing in the Freepons facts, as compared to the Khounvichai facts, to suggest any difference between the two cases. We hope that the Washington Supreme Court will accept the prosecutor's petition for discretionary review in this case.

Having said that, officers will want to err on the side of giving Ferrier warnings, particularly for entries of premises being used as residences. As always, officers should consult their local prosecutors and/or legal advisors on this and other legal issues.

EVIDENCE OF ATTEMPT-TO-INFLUENCE ELEMENT OF "INTIMIDATING A PUBLIC SERVANT" HELD SUFFICIENT TO PROSECUTE MAN THREATENING TO "KICK [ARRESTING OFFICER'S] ASS"

State v. Montano, __ Wn. App. __, 196 P.3d 732 (Div. III, 2008)

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

> While on patrol, [a law enforcement officer] saw respondent Jose Montano shove his brother, Salvador Montano. The officer stopped to investigate. Salvador Montano told the officer that Jose Montano had hit him. The officer observed blood on one of Salvador's ear lobes. [The officer] asked Jose Montano for identification. He had none with him. When asked for his name, Jose Montano became agitated, refused to provide his name, and began to walk away. The officer grabbed the back of Mr. Montano's coat, but he broke free. The officer grabbed the coat again; once again Mr. Montano broke free. The officer then grabbed Mr. Montano's wrist and told him he was under arrest. Mr. Montano in turn grabbed the officer's wrist and tried to pull him down.
>
> Another officer, who had arrived during the investigation, applied a TASER. Mr. Montano stopped struggling and was handcuffed. [The first officer] walked Mr. Montano to the patrol car. Mr. Montano became angry and pulled away. He told [the officer]: "I know when you get off work, and I will be waiting for you." He also told the officer: "I'll kick your ass." He also called the officer a "punk ass" and stated: "I know you are afraid, I can see it in your eyes."

> Once in the car, Mr. Montano made several more unsolicited comments, including the statement: "You need to retire. I see your gray hair." He repeated his belief that the officer was scared and that he could see fear in the officer's eyes.
>
> Charges of fourth degree assault (domestic violence) and intimidating a public servant were filed in the Grant County Superior Court. Mr. Montano moved to dismiss the intimidation charge . . . . The defense conceded that Mr. Montano had actually threatened [the officer], but argued that there was no attempt to influence official actions. The prosecutor argued that the threats began after the arrest, so it was reasonable to conclude they were being made for the purpose of obtaining release. The trial court granted the motion, reasoning that the threats alone did not prove a purpose to influence the officer to change his actions. It was equally possible [the trial court concluded] that the defendant was just expressing anger at the arrest.

ISSUE AND RULING: One element of the crime of intimidating a public servant is that a threat was made in order to influence official action of a public servant. Where the officer was transporting Montano for booking at the point when Montano threatened the officer, was there sufficient evidence for a jury to reasonably conclude that Montano's threats were being made for the purpose of obtaining release? (ANSWER: Yes, and therefore the case can go to trial)

Result: Reversal of Grant County Superior Court order dismissing charge against Jose Juan Montano of intimidating a public servant.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> It is a crime to threaten a public servant in order to influence that person's official actions. The statute provides in relevant part:
>
> > (1) A person is guilty of intimidating a public servant if, by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.
> > . . . .
> >
> > (3) "Threat" as used in this section means
> >
> > (a) to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> >
> > (b) threats as defined in RCW 9A.04.110(25).
>
> RCW 9A.76.180. The elements of this offense are (1) use of a threat (2) to influence a public servant's official behavior.
>
> This statute has twice been the subject of published opinions. State v. Stephenson, 89 Wn. App. 794 (1998) involved a First Amendment challenge to the statute. The decision in State v. Burke, 132 Wn. App. 415 (Div. II, 2006) **May 06 LED:20** involved a challenge to the sufficiency of the evidence to support a conviction. Not surprisingly, both parties relied upon Burke in their arguments to the trial court and, again, in this court.
>
> Burke involved the situation where [an officer] chased some underage drinking suspects into a house and out again into the backyard where a large drinking

party was underway. The suspects escaped in the crowd and the officer had to abandon the pursuit. When he turned to leave, the crowd surrounded him. Chris Burke charged the officer and "belly bumped" him. After a brief scuffle, Burke assumed a "fighting stance" and the two men came to blows. Burke eventually was arrested and subsequently was charged and convicted of third degree assault and intimidating a public servant. At trial, Burke testified that he was drunk and very disappointed that the party was ending because of the appearance of the police.

This court overturned the intimidating a public servant conviction. The court found that there was sufficient evidence that Burke had threatened the officer. Burke had used "profanities and threats" against the officer. He also had assumed the fighting stance. This evidence was sufficient to prove that Burke had threatened the officer.

The [Burke] court concluded, however, that there was no evidence that the threats were made for the specific purpose of influencing the officer's actions. Burke made no specific statement suggesting an attempt to influence the officer's actions, and the physical attack likewise did not suggest that Burke was communicating to the officer that he should undertake a particular course of action. The prosecutor argued that the jury could reasonably infer that Burke intended to influence the officer's actions because there was no other reason for him to act as he did. This court disagreed, noting that mere anger alone did not show intent to influence. The [Burke] court also rejected the argument that Burke must have intended to influence the officer to not end the party. The court noted that the officer was not undertaking any such action at the time he was threatened and there was simply no basis for drawing any inference of intent to influence. "The evidence must show a connection, however weak, between Burke's anger and intent to influence [the officer]." Finding that there was no evidence that anything more than anger motivated Burke's actions, this court reversed the conviction for failure to prove the intent to influence element.

Similarly here, Mr. Montano argues that his anger at being arrested did not show intent to influence Officer Smith's actions. However, we think there is a significant distinction between this case and Burke. Unlike the situation in Burke, here the officer was undertaking an official action at the time of the threats. He had arrested Mr. Montano and was taking him to jail when the threats began. The threats continued during transport. This is in stark contrast to Burke where the officer had abandoned his pursuit of the suspects and was simply trying to leave the scene.

We believe a rational trier-of-fact could infer that Mr. Montano's threats were designed to get the officer to change his course of action even if there was no explicit "I will attack you unless you release me" statement. The threats began when the officer took Mr. Montano into custody and continued throughout the transportation process until the officer turned him into the jail. Because of the temporal proximity of the threats and the arrest, it would be permissible for the trier-of-fact to draw the conclusion that the threats were an attempt to influence the action the officer was then undertaking.

It is, of course, also possible that the trier-of-fact will determine that Mr. Montano was simply angry and vented that anger during the arrest process without

attempting to influence the officer's official actions. Indeed, the repeated threats and statements without an express request for the officer to release him tend to suggest simple anger was all that was involved. That decision, however, is one left to the trier-of-fact. Viewed in a light most favorable to the prosecution, there is evidence, "however weak," from which a trier-of-fact could find Mr. Montano intended to influence [the officer's] official actions. [T]he trial court erred in deciding what inference was to be drawn from the evidence.

The order of dismissal is reversed and the case remanded for trial.

[Some citations omitted]

CITATION FOR "POSSESSION OF DRUG PARAPHERNALIA" FAILS "ESSENTIAL ELEMENTS" TEST; ALSO, PROXIMITY OF PIPE TO BACK SEAT PASSENGER HELD INSUFFICIENT ALONE TO SATISFY CONSTRUCTIVE POSSESSION STANDARD

State v. George, 146 Wn. App. 906 (Div. I, 2008)

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

One evening in March 2005, [a WSP trooper] stopped a two-door Ford Explorer in Bellingham for driving 43 miles per hour in a 25 mile-per-hour zone. When he walked up to the driver's side of the vehicle and the driver rolled the window down, [the trooper] immediately smelled the strong odor of burnt marijuana wafting from the vehicle. There were three men in the vehicle: the driver; the vehicle's registered owner in the front passenger seat; and George. George was in the back seat behind the driver. [The trooper] asked whether there was any marijuana in the vehicle. All three denied that there was.

[The trooper] placed the occupants under arrest "for the odor of marijuana in the vehicle." He had each of the men step out of the vehicle one at a time, patting them down as he did so. He placed the driver and the registered owner in the back of his patrol car. He handcuffed George and had him stand in front of the vehicle while he searched it.

[The trooper] found an eight-inch long, six-and-a-half-inch wide blue glass water pipe among empty beer cans and bottles on the floorboard behind the driver's seat, next to where George had been sitting. There was burned marijuana in the pipe. [The trooper] asked the occupants if "somebody wanted to own up" to the pipe. All three denied owning it. [The trooper] then took the pipe for entry into evidence, cited all three occupants for possession of marijuana and possession of drug paraphernalia, and booked them into jail. George's citation read that he was charged with:

"*RCW 69.50.412(i)*

Possession of drug paraphernalia

RCW 69.50.401

Possession of marijuana less than 40g.

George was tried in the Whatcom County District Court for both misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia."

George was convicted on both counts. The superior court affirmed.

[Italics added]

ISSUES AND RULINGS: 1) The "essential element" rule requires that a charging document, including a criminal citation issued by a law enforcement officer, state the elements of the charged crime. The citation in this case stated that the offense was "possession of drug paraphernalia, RCW 69.50.412(i)." There is no such crime under the RCWs as mere "possession of drug paraphernalia." Does the citation meet the "essential elements" test? (ANSWER: No, rules a unanimous Court)

2) Does the evidence, including George's proximity to the drug paraphernalia that had been recently used, meet the "constructive possession" test? (ANSWER: No, rules a 2-1 majority, because little more than proximity linked George to the drug paraphernalia)

Result: Reversal of Whatcom County Superior Court's affirmance of District Court conviction of Graeme A. George for possession of drug paraphernalia and possession of marijuana; case dismissed with prejudice.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Essential elements test

A person may not be convicted of a crime with which he or she was not charged. Auburn v. Brooke, 119 Wn.2d 623 (1992) **Dec 92 LED:19**. In order to meet this requirement, all of the essential elements of the charged offense, statutory or otherwise, must be included in a charging document in order to afford to the accused the constitutional requirement of notice. An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.

. . .

The State's reliance on State v. Grant, 104 Wn. App. 715 (2001), is . . . unavailing. In that case, we recognized that the shorthand phrase "DWI" sufficiently charged the crime of "driving while intoxicated," or, more properly, "driving under the influence of or affected by intoxicating liquor. . . RCW 46.61.502(1)(b)." This shorthand was sufficient because it contained the "necessary facts of the offense."

Here, the citation at issue alleged that George was guilty of "possession of drug paraphernalia." But no Washington statute criminalizes "possession of drug paraphernalia." *See, e.g.,* State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) **Nov 02 LED:05** ("bare possession of drug paraphernalia is not a crime"); State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) **Oct 98 LED:12** ("mere possession of drug paraphernalia is not a crime"); State v. Lowrimore, 67 Wn. App. 949 (Div. II, 1992) **March 93 LED;15** ("RCW 69.50.412 does not, ipso facto, make possession of drug paraphernalia a crime").

For possession of drug paraphernalia to be a crime, a defendant must either "use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture,

compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance," RCW 69.50.412(1), or "deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." RCW 69.50.412(2).

Even under the most liberal construction of the citation issued by [the trooper], none of the possible circumstances under which George's possession of the pipe could have been found to be criminal were alleged in the citation. This error alone requires reversal of George's conviction for possession of drug paraphernalia.

2) Constructive possession test

Possession of drug residue in a pipe can appropriately be charged as possession of a controlled substance because there is no minimum amount of drug which must be possessed in order to sustain a conviction. To prove possession of drug paraphernalia, the State had to prove not only that George possessed the pipe but also that he used it in a drug-related activity. RCW 69.50.412(1).

Possession may be either actual or constructive. The State argued in closing that George had both. But actual possession requires physical custody. State v. Callahan, 77 Wn.2d 27 (1969). Because George did not have physical custody of the pipe, the question is whether the State proved that he had constructive possession of the pipe and its contents.

Constructive possession is proved when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found." An automobile may be considered a "premises." Here, there was insufficient evidence to support a finding that George exercised dominion and control over the vehicle. He was a mere backseat passenger, not the driver or the owner.

The State argued George had constructive possession of the pipe and its contents. "It's at his feet, he's the only one in the back seat and it is sitting right there on the floorboard."

Exclusive control by the defendant is not required to establish possession; more than one defendant may be in possession of the same prohibited item. State v. Turner, 103 Wn. App. 515 (Div. II, 2000) **March 01 LED:11**. However, a defendant's mere proximity to drugs is insufficient to prove constructive possession. This is so even where there is evidence that the defendant handled the drugs, because "possession entails actual control, not a passing control which is only a momentary handling." Callahan. As established by Callahan, the rule is that "where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." State v. Spruell, 57 Wn. App. 383 (Div. I, 1990). See also State v. Cote, 123 Wn. App. 546 (Div. III, 2004) **June 05 LED:20**.

Constructive possession cases are fact-sensitive. For guidance, we look not only to the rule as established by Callahan, but also to the results reached in decisions on comparable facts. In Spruell, police entered a room and found appellant Hill and another individual near a table on which there was cocaine residue, a scale, vials and a razor blade. The defendant's conviction for possession of the cocaine was reversed for insufficient evidence:

> There is no evidence in this case involving Hill other than the testimony of his presence in the kitchen when the officers entered and the testimony of the conditions there . . . . There is no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest. There is no evidence of any activity by Hill in the house. So far as the record shows, he had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. That evidence being absent, Hill's conviction must be reversed and dismissed on double jeopardy grounds.

Spruell. In Cote, the evidence was held insufficient to prove constructive possession where the defendant was a passenger in a truck containing components of a methamphetamine lab, and his fingerprints were found on Mason jars containing chemicals in the back of the truck.

. . .

Sufficient evidence in addition to proximity was also found in State v. Ibarra-Raya, 145 Wn. App. 516 (Div. III, 2008) **Sept 08 LED:14** where the defendant, who was observed standing near a freshly-dropped bindle of cocaine, said “If you saw me drop it, then I'll admit it's mine.” This admission was sufficient to take the issue of constructive possession to the jury.

Here there was no evidence about George's past use or ownership of marijuana or paraphernalia. No drugs or paraphernalia were found on his person. There was no evidence such as dilated pupils, odor on his person, matches, or a lighter to suggest that George had been smoking marijuana with or without the pipe. There was no testimony tending to rule out the other occupants of the vehicle as having possession of the pipe. There was no testimony establishing when George got into the vehicle or how long he had been riding in it. There was no fingerprint evidence linking George to the pipe. And George made no statements or admissions probative of guilt.

The trooper could not remember whether he first spotted the pipe before or after the occupants stepped out of the car. For safety purposes, he did an initial scan

> inside the car with his flashlight to see what the occupants had in their hands and whether there were guns, but he did not recall seeing the pipe at this time. "I'll just say the first time I seen it was after they stepped out but at least while they were stepping out." The trooper acknowledged that he was not sure how long the pipe had been on the floorboard or how recently it was used. "Based on the strong odor of it, that it was fairly recent it could have been there days but it had been used before days had gone by . . . . As strong as it was to me, I would have been really surprised if it would have been more than three hours." Thus, the trooper's testimony does not support an inference that George had been using the pipe and then tried to hide it by putting it at his feet.
>
> The State contends it was sufficient that the pipe was found on the floorboard behind the driver's seat, and that while sitting behind the driver George could have easily reduced the pipe to his actual possession. This is not enough to distinguish the facts from Callahan and Spruell, where the drugs were likewise found close enough to the defendants that they could easily have been reduced to actual possession. The State cites no cases holding that proximity plus knowledge of a drug's presence establishes dominion and control over the drug. We have held that knowledge of the presence of marijuana is insufficient to prove dominion and control.
>
> While there is evidence that a crime was committed, the State did not succeed in clearly associating the crime with George. We hold the evidence insufficient to sustain a finding that George either used the pipe to smoke marijuana or that he constructively possessed the pipe and its contents.

[Some citations omitted; subheadings revised]

DISSENT:

Judge Dwyer authors a dissent on the constructive possession issue, providing a detailed, extensive list of reasons why he would have ruled the constructive possession evidence sufficient.

LED EDITORIAL COMMENT ON ESSENTIAL ELEMENTS ISSUE: We think that the citation in this case would have been sufficient if it had charged "use of drug paraphernalia" instead of "possession of drug paraphernalia." But we urge officers to consult their local prosecutors for advice on this issue.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, 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. 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 own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are 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 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "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 internet address for the Criminal Justice Training Commission's LED 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.gov].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. 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. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]