



Law Enforcement

JUNE 2009

Digest

641st Basic Law Enforcement Academy – December 16, 2008 through May 5, 2009

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PART TWO OF THE 2009 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part Two of a three-part compilation of 2009 State of Washington legislative enactments of interest to law enforcement. Part Three next month will include an index of the legislation digested in all three parts.

Note that unless a different effective date is specified in the legislation, bills adopted during the 2009 regular session take effect on July 26, 2009 (90 days after the end of the regular session). For a few enactments, different sections have different effective dates for separate sections. We have shown a singular effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, tax, budget, and workers' compensation benefits.

Thank you to the Washington Association of Prosecuting Attorneys for assistance in ensuring that we did not miss any legislation of interest to law enforcement.

Text of each of the 2009 Washington acts is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the 4-digit bill number for access to the enactment.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED regarding either legislation or court decisions do not constitute legal advice, express only the views of the editors, and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

EXPANDING LIMITATIONS PERIOD FOR PROSECUTING: THEFT 1, 2 (WHERE ACCOMPLISHED BY DECEPTION); MONEY LAUNDERING; AND IDENTITY THEFT

Chapter 53 (SSB 5380)

Effective date: July 26, 2009

Amends RCW 9A.08.080. The Legislature's Final Bill Report summarizes the Act's expansion of the criminal statute of limitations for certain specified crimes as follows:

A felony violation of the laws pertaining to the crimes of money laundering and identity theft may not be prosecuted more than six years after their commission or their discovery, whichever occurs later. The same statute of limitation applies to the crimes of theft in the first or second degree when accomplished by color or aid of deception.

LED EDITORIAL NOTE: Under Washington appellate court interpretation of constitutional *ex post facto* protection, an enactment expanding the limitations period for prosecuting certain classes of crimes applies to crimes of such classes for which the prior limitations period had not yet expired as of the effective date of the amendment, but not those crimes for which the prior limitations period had expired as of that effective date. See State v. Hodgson, 44 Wn. App. 592 (1986).

REVISING LAW REGARDING CONCEALED PISTOL LICENSE RENEWALS BY ACTIVE MEMBERS OF THE ARMED FORCES

Chapter 59 (SB 5739)

Effective date: July 26, 2009

Amends RCW 9.41.070 by adding a new subsection (14) to the provisions on concealed pistol licenses reading as follows:

Any person who, as a member of the armed forces, including the national guard, is unable to renew his or her license under subsections (6) and (9) of this section because of the person's assignment, reassignment, or deployment for out-of-state military service may renew his or her license within ninety days after the person returns to this state from out-of-state military service, if the person provides the following to the issuing authority no later than ninety days after the person's date of discharge or assignment, reassignment, or deployment back to this state: (a) A copy of the person's original order designating the specific period of assignment, reassignment, or deployment for out-of-state military service, and (b) if appropriate, a copy of the person's discharge or amended or subsequent

assignment, reassignment, or deployment order back to this state. A license so renewed under this subsection (14) shall take effect on the expiration date of the prior license. A licensee renewing after the expiration date of the license under this subsection (14) shall pay only the renewal fee specified in subsection (6) and shall not be required to pay a late renewal penalty in addition to the renewal fee.

PROTECTING YOUNG VICTIMS BY EXPANDING LIMITATIONS PERIODS IN SOME CIRCUMSTANCES FOR PROSECUTING RAPE 1 AND 2; RAPE OF CHILD 1, 2, AND 3; CHILD MOLESTING; AND INCEST

Chapter 61 (SB 5832)

Effective date: July 26, 2009

Amends RCW 9A.08.080. The Legislature's Final Bill Report summarizes the Act's expansion, in order to expand protection of youthful victims, of the criminal statute of limitations for certain sex crimes as follows:

Rape in the first degree and second degree when the victim is under 14 years of age at the time of the rape and the rape is reported to a law enforcement agency within one year of its commission may be prosecuted up to the victim's twenty-eighth birthday. Rape of a child in the first, second, and third degree, child molestation in the first, second, and third degree, and incest may be prosecuted up to the victim's twenty-eighth birthday.

LED EDITORIAL NOTE: See our editorial note regarding Chapter 53 above, page 2.

MODIFYING THE LIFTING OF RESTRICTIONS ON AN INTERMEDIATE DRIVER'S LICENSE

Chapter 125 (SB 5469)

Effective date: July 26, 2009

Amends RCW 46.20.075(7)'s provisions that lift restrictions on an Intermediate Driver's License after 12 months of holding the IDL. The Final Bill Report describes the effect of this amendment of subsection (7) as follows: "Being in an accident is no longer grounds for denying lifting the restrictions if there is another party to the accident and the other party was cited in connection with the accident." The wording of the amended subsection (7) is somewhat complex, reading as follows:

An intermediate licensee may drive at any hour without restrictions on the number of passengers in the vehicle if, for the twelve-month period following the issuance of the intermediate license, he or she: (a) Has not been involved in an accident involving only one motor vehicle; (b) Has not been involved in accident where he or she was cited in connection with the accident or was found to have caused the accident; (c) Has not been involved in an accident where no one was cited or was found to have caused the accident; and (d) Has not been convicted of or found to have committed a traffic offense described in chapter 46.61 or violated restrictions placed on an intermediate licensee under this section.

DIRECTING CJTC TO ADOPT AN ADMINISTRATIVE RULE SETTING THE STANDARDS FOR PSYCHOLOGICAL EXAMS FOR PEACE OFFICER JOB APPLICANTS

Chapter 139 (HB 1324)

Effective date: July 26, 2009

Amends the provisions of RCW 43.101.095(2)(a) relating to the requirement for psychological examinations of Washington peace officers hired after July 24, 2005. The amendment requires the Criminal Justice Training Commissions to adopt an administrative rule setting the standards for such examinations.

ENHANCING PUNISHMENT FOR ASSAULTING EMPLOYEE OF LAW ENFORCEMENT AGENCY WITH WHAT APPEARS TO BE A FIREARM

Chapter 141 (SB 5413)

Effective date: July 26, 2009

Adds a new section to chapter 9.94A RCW and amends RCW 9.94A.533. Enhances by 12 months the punishment of a person convicted of assault in the third degree under RCW 9A.36.031 for assaulting a law enforcement officer who was performing official duties at the time of the assault where the defendant is specially charged and found guilty of committing the assault "with what appears to be a firearm."

MODIFYING "MALICIOUS HARASSMENT" DEFINITION OF "SEXUAL ORIENTATION"

Chapter 180 (SB 5952)

Effective date: July 26, 2009

Amends the definition of "sexual orientation" in RCW 9A.36.080(6) to incorporate by reference the definition of that term in RCW 49.60.040. "Sexual orientation" is defined in RCW 49.60.040(15) as follows:

"Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth[.]

ADDRESSING CONDITIONS OF RELEASE FOR OFFENDERS PREVIOUSLY CONVICTED OF ASSAULT OF A CHILD IN THE FIRST DEGREE

Chapter 214 (EHB 2279)

Effective date: August 1, 2009

The Legislature's Final Bill Report (reformatted for the LED) for this enactment, in salient part, describes it as follows:

This act is known as the Eryk Woodruff Public Safety Act of 2009.

Community Custody. As a condition of community custody, the court must prohibit an offender sentenced for assault of a child in the first degree from serving in any paid or volunteer capacity where he or she has control or supervision of children under the age of 13.

Sentencing Guidelines Commission. The Commission must study the crime of Assault of a Child in the first degree [and considering a number of enumerated factors, omitted from this LED entry, set forth in the enactment] and submit its findings and recommendations to the appropriate committees of the Legislature by December 31, 2009.

ADDRESSING FIREARMS LICENSES FOR PERSONS WHO ARE NOT U.S. CITIZENS

Chapter 216 (2SHB 1052)

Effective date: July 26, 2009

Repeals RCW 9.41.170, the current alien firearms license statute, amends several sections in chapter 9.41 RCW, and adds new sections to chapter 9.41 RCW. This enactment establishes new requirements governing possession of firearms by non-citizens. The provisions are detailed and complex. To save space and time and to provide the best direction, we will not attempt our own summary of this enactment, and we will not provide the legislative staff summary. The Department of Licensing firearms website addresses this enactment's new

requirements, as well as the requirements of the law that is being repealed. So we refer LED readers to that website: <http://www.dol.wa.gov/business/firearms/fawhatsnew.html>

ADDRESSING FALSE AND DEFAMATORY STATEMENTS ABOUT CANDIDATES FOR PUBLIC OFFICE

Chapter 222 (SHB 1286)

Effective date: July 26, 2009

This enactment responds to a Washington Supreme Court decision. The amendments to chapter 42.17 RCW clarify that political advertising or electioneering communications that contain a false statement of material fact about a candidate for office must also be made with actual malice and be libelous or defamatory in nature to be a violation of the campaign laws in chapter 42.17 RCW. The enactment also prohibits a candidate from making a defamatory or libelous statement about his or her opponent in the candidate's statement submitted to the Secretary of State for inclusion in the voters' pamphlet.

EXPANDING TREATMENT SERVICES FOR SEXUALLY AGGRESSIVE YOUTH

Chapter 250 (SHB 1419)

Effective date: July 26, 2009

Among other things, amends RCW 74.13.075 to clarify that children between ages 8 and 12 are eligible for DSHS-provided treatment in the program for sexually aggressive youth whether or not the children are in State custody.

ADDRESSING TRUANCY, INCLUDING THE LOCATION OF ARRESTS FOR TRUANCY

Chapter 266 (SSB 5881)

Effective date: July 26, 2009

Revises some procedural provisions regarding truancy law and also amends RCW 28A.225.090(2) to provide: (A) that detention as a sanction for truancy is limited to no more than seven days; and (B) that a warrant of arrest relating to truancy must not be served on a child inside a school in a place where other students are present.

ALLOWING UNSCHEDULED PUBLIC TRANSIT STOPS

Chapter 274 (SB 5180)

Effective date: July 26, 2009

Amends RCW 46.61.560 to authorize public transportation service providers to allow drivers of transit vehicles to stop upon a roadway in an unincorporated area momentarily to receive or discharge passengers at an unmarked stop zone. The driver must (1) stop the vehicle in a safe and practicable position; (2) activate four-way flashing lights; and (3) stop at a portion of the highway with an unobstructed view for other drivers.

MODIFYING PROVISIONS RELATING TO 2-WHEELED AND 3-WHEELED VEHICLES

Chapter 275 (SB 5482)

Effective date: July 26, 2009

Amends various provisions in Title 46 RCW relating to 2-wheeled and 3-wheeled vehicles. Also adopts a new section in chapter 47.36 RCW. The Final Bill Report describes the effect of this enactment as follows:

The state definition of motorcycle is amended to conform with the federal definition for motorcycle, and includes certain vehicles that have a saddle or steering wheel. An operator of an enclosed three-wheel vehicle with a steering wheel and bucket seat that meets the definition of motorcycle must: (1) register the vehicle as a motorcycle; (2) wear a seat belt and helmet – unless the manufacturer has certified compliance with federal standards for roof crush resistance; and (3) not transport children under the age of five.

The wheel size and pedal specifications are eliminated from the definition of moped in conformity with the federal definition of moped. The definition of a motorized foot scooter is revised to specify a top speed of 20 miles per hour. A user of a motorized foot scooter must wear a bicycle helmet, and may not operate the scooter on sidewalks or fully-controlled limited access highways.

Jurisdictions with vehicle-activated control signals are required to create a procedure for recording issues with signals and establish a procedure to prioritize and repair the signals with detection issues. Vehicle detection areas must be clearly marked on the pavement if the existing detector is anywhere but in the center of the lane and immediately before the stop line or crosswalk.

A person holding a valid driver's license may operate a motorcycle as defined in RCW 46.04.330(2) (i.e. with a partially or completely enclosed seat, and equipped with safety belts and a steering wheel) without a motorcycle endorsement.

RESTRICTING INTERNET TOBACCO MERCHANDISING

Chapter 278 (SSB 5340)

Effective date: July 26, 2009

Adds a new section to chapter 70.155 RCW, amends RCW 70.155.010, and repeals RCW 70.155.105. The Final Bill Report (which we have reformatted) describes the effect of this enactment as follows:

The cigarette delivery sale statute is repealed.

A person may not ship tobacco products, other than cigars weighing more than three pounds for 1,000 units, purchased by mail or through the internet to anyone in Washington other than a licensed wholesaler or retailer. A person may not, with knowledge, provide substantial assistance to someone violating this tobacco shipping restriction.

The "Internet" is defined to mean computer, telephonic, or other electronic networks. The Attorney General may seek an injunction to restrain a threatened or actual violation of the tobacco shipping restriction. In addition to any civil or criminal remedy provided by law, a violation of the tobacco shipping restriction is: (1) punishable as an unranked class C felony for a knowing violation, except that the maximum fine is \$5,000; (2) subject to a civil penalty of up to \$5,000 for each violating shipment, to be imposed by the Attorney General in an action in superior court; and subject to a Consumer Protection Act action, if the action is brought by the Attorney General.

A court may order a violator to disgorge profits or other gains to be paid to the State Treasurer for deposit in the State General Fund. The state is entitled to recover costs of investigation, expert witness fees, costs of the action, and reasonable attorneys' fees in any action brought under the tobacco shipping restrictions.

ADDRESSING UNLAWFUL PUBLIC TRANSIT CONDUCT

Chapter 279 (ESSB 5513)

Effective date: July 26, 2009

Amends RCW 9.91.025 to expand the misdemeanor of unlawful transit conduct to include: smoking outside designated areas; discarding hazardous substances or automotive fluids; urinating or defecating outside of plumbing fixtures; consuming or open containers of alcohol without a permit; skating; or any conduct inconsistent with the transit mission after being lawfully ordered to cease the conduct by law enforcement or transit authorities.

CRIMINALIZING CERTAIN DOG BREEDING ACTS AND OMISSIONS

Chapter 286 (ESSB 5651)

Effective date: January 1, 2010

Adds a new section to chapter 16.52 RCW. The Final Bill Report (reformatted for the LED) describes the effect of this new section as follows:

A person may not own, possess, control, or have charge or custody of more than 50 dogs with intact sexual organs over six months old at any time. Any person who has more than ten dogs with intact sexual organs over six months old and who keeps the dogs in an enclosure for the majority of the day, must at a minimum: provide space that allows each dog to turn around freely, stand, sit, and lie down without touching any other dog in the enclosure. Each enclosure must be at least three times the length and width of the longest dog in the enclosure; provide each dog more than four months old with a minimum of one exercise period each day for at least one hour. Exercise must include either leash walking or giving the dog access to an enclosure at least four times the size of the minimum allowable enclosure. The use of cat mills or similar devices are prohibited unless prescribed by a veterinarian; provide easy and convenient access to clean food and water; and provide veterinary care without delay when necessary. Animals requiring euthanasia must be euthanized only by a veterinarian.

Housing facilities and primary enclosures must: be kept sanitary with sufficient ventilation to minimize odors and prevent moisture condensation; contain a means of fire suppression, such as a fire extinguisher; have sufficient lighting to observe the dogs at any time; enable the dogs to remain dry, clean, and protected from weather conditions that are uncomfortable or hazardous; have floors that protect the dogs' feet and legs from injury; be placed no higher than 42 inches above the floor and not stacked; and be cleaned daily of feces, hair, dirt, debris, and food waste.

Requirements are established regarding when and under what conditions breeding females, females in heat, females and their litters, and puppies less than 12 weeks old may be in the same enclosure at the same time with other dogs. All dogs in the same enclosure at the same time must be compatible, as determined by observation. Animals with a vicious or aggressive disposition must never be placed in an enclosure with another animal, except for breeding purposes. Only dogs between the ages of 12 months and 8 years may be used for breeding.

A person who has more than 50 unaltered dogs that are more than six months old or who is subject to the requirements of this bill and violates the requirements is guilty of a gross misdemeanor.

The requirements do not apply to: publicly operated animal control facilities or animal shelters; private, charitable nonprofit humane society or animal adoption

organizations; veterinary facilities; retail pet stores; research institutions; boarding facilities; and grooming facilities.

Commercial dog breeders licensed by the U.S. Department of Agriculture before the effective date of the act are exempt from the prohibition against having more than 50 unaltered dogs more than six months old.

BARRING THOSE CONVICTED OF ANIMAL CRUELTY FROM OWNING SIMILAR ANIMALS

Chapter 287 (SSB 5402)

Effective date: July 26, 2009

Amends RCW 16.52.011, 16.52.085, and 16.52.200. The Final Bill Report describes the effect of these amendments as follows:

"Similar animals" mean animals classified in the same genus.

When a court orders the forfeiture of an animal, the owner will be prohibited from owning or caring for similar animals two years for the first conviction of second degree animal cruelty; permanently for the first conviction of first degree animal cruelty; and permanently for the second, or any subsequent, conviction of animal cruelty. A person may petition the sentencing court for a restoration of the right to own or possess a similar animal five years after the date of the second conviction if that person has no more than two convictions for second degree animal cruelty. The court must consider various factors prior to restoring this right.

ADDRESSING CERTIFICATES OF DISCHARGE IN RELATION TO NO-CONTACT ORDERS

Chapter 288 (ESHB 1002)

Effective date: July 26, 2009

Addresses how a certificate of discharge of an offender is to be issued concurrent with the existence of a continuing no-contact order.

Note that the bill passed by the Legislature had an immediate effective date, but the Governor vetoed that section of the bill, thus defaulting to the date of July 26, 2009.

REVISING LAWS GOVERNING FIREARMS POSSESSION BY PERSONS WHO HAVE BEEN INVOLUNTARILY COMMITTED

Chapter 293 (HB 1498)

Effective date: July 26, 2009

Amends RCW 9.41.040, 9.41.047, 71.05.230, 71.05.240, 71.05.300, 71.34.730, and 71.34.740. The final House Bill Report (reformatted for the LED) describes the effect of this enactment as follows:

The crime of unlawful possession of a firearm in the second degree is amended to include persons who have previously been involuntarily committed for mental health treatment, either as an adult or juvenile, under the 14-day commitment procedures. When a person is involuntarily committed for mental health treatment, the court must forward a copy of the person's driver's license or other identification information to the NICS within three judicial days. When a person who was prohibited from possessing a firearm due to involuntary commitment has his or her right to possess a firearm restored, the court must forward notice of the restoration to the DOL, the DSHS, and the NICS within three judicial days. The standards and processes that apply to the restoration of firearm rights when a person was involuntarily committed are revised. A petition for restoration of

firearm rights may be filed in the superior court that ordered the commitment or in the county in which the petitioner resides.

The petitioner must show by a preponderance of the evidence that: (1) the petitioner is no longer required to participate in court-ordered treatment; (2) the petitioner has successfully managed the condition related to the commitment; (3) the petitioner does not present a danger to self or the public; and (4) the symptoms related to the commitment are not reasonably likely to recur.

The involuntary commitment statutes are amended to require notice regarding the loss of firearm rights when a person is involuntarily committed. In a 14-day commitment proceeding for an adult or a minor, the court must inform the person both orally and in writing that failure to make a good faith effort to seek voluntary treatment will result in the loss of his or her firearm rights if the person is subsequently involuntarily committed. Notice also must be provided in the petition and during the proceeding of the loss of firearm rights if the person is involuntarily committed.

PROHIBITING SEXUAL MISCONDUCT BY K-12 SCHOOL EMPLOYEES

Chapter 324 (EHB 1385)

Effective date: July 26, 2009

Amends RCW 9A.44.093's crime of "sexual misconduct with a minor in the first degree" to criminalize sexual intercourse between (1) a k-12 school employee and (2) an enrolled student of the same school who is 16 years old or older (i.e., over age 15) and not more than 21 years old (i.e., under 22 years of age) and not married to the school employee.

Mirrors the amendment to RCW 9A.44.093 (except as to nature of sexual act involved) by amending RCW 9A.44.096's crime of "sexual misconduct with a minor in the second degree" to criminalize sexual contact between (1) a k-12 school employee and (2) an enrolled student of the same school who is 16 years old or older and not more than 21 years old and not married to the school employee.

Each of the sections referenced above is amended to define "enrolled student" as meaning "any student enrolled at or attending a program hosted or sponsored by a common school as defined in RCW 28A.150.020, or a student enrolled at or attending a program hosted or sponsored by a private school under chapter 28A.195 RCW, or any person who receives home-based instruction under chapter 28A.200 RCW."

CHANGING THE REQUIREMENTS FOR RESTORATION OF VOTING RIGHTS OF PERSONS CONVICTED OF FELONIES

Chapter 325 (HB 1517)

Effective date: July 26, 2009

Amends various statutes to allow voting by persons previously convicted of felonies unless they are currently under the control (confinement or community custody) of the Department of Corrections. Voting rights may be revoked in some circumstances where the person willfully fails to pay legal financial obligations imposed as part of the sentence.

CLARIFYING LAW REGARDING, AND PRESCRIBING CIVIL PENALTIES FOR, GAMBLING BY PERSONS WHO ARE UNDER THE AGE OF 18

Chapter 357 (SSB 5040)

Effective date: July 26, 2009

Strikes some text in RCW 9.46.0305 relating to persons under age 18 and adds a new section to chapter 9.46 RCW. The Final Bill Report describes the effect of this new section as follows:

Persons under the age of 18 may play bingo, raffles, and amusement game activities as provided in Commission rule. Persons under the age of 18 may not participate in other gambling activities including punchboards, pull-tabs, card games, and fund-raising events. A minor who engages in prohibited gambling activities commits a class 2 civil infraction and is subject to a fine, community restitution, and court costs. The minor may not collect winnings or recover losses arising from unlawfully participating in gambling activities. Any money or item of value that is awarded to a minor must be forfeited to the Department of Social and Health Services Division of Alcohol and Substance Abuse and used for youth problem gambling awareness, prevention, and/or education.

Employers may conduct in-house controlled purchase programs for the purposes of employee training and employer self-compliance checks.

REQUIRING HEALTH CARE PROFESSIONALS TO REPORT PATIENT INFORMATION IN SOME CIRCUMSTANCES WHERE THE PATIENTS HAVE INCURRED VIOLENT INJURY

Chapter 359 (SSB 5056)

Effective date: July 26, 2009

Section 1 adds a new section to chapter 18.73 RCW regarding obligations of EMTs, first responders and other emergency medical personnel. The Final Bill Report summarizes the effect of this section as follows:

Emergency medical personnel treating a patient with a bullet wound, knife wound, or a blunt force injury must provide specific information to law enforcement personnel when this information is requested. This includes the patient's name, address, gender, age, condition, whether the patient was conscious, whether the patient appears to be under the influence of alcohol or drugs, the name of the emergency medical personnel providing care, and the name of the facility the patient is being transported to. Emergency medical personnel are immune from liability for disclosing this information to law enforcement.

This section also provides that the obligation to provide information is "secondary to patient care needs," but that "information must be provided as soon as reasonably possible taking into consideration a patient's emergency care needs."

Section 2 adds a new section to chapter 70.41 RCW regarding the obligations of hospitals. The Final Bill Report summarizes the effect of this section as follows:

Health care providers such as doctors, nurses, and hospitals must report gunshot or stab wounds to law enforcement as soon as reasonably possible if a patient is unconscious or unable to make such a report. Hospitals must establish a written policy which identifies who is responsible for making the report to law enforcement. Information to be included in the report is specified. Bullets or clothing removed from the patient must be reasonably maintained and provided to law enforcement. Health care providers are immune from liability for acting in compliance with this law and are not subject to the physician-patient privilege or the registered nurse privilege.

This section also provides that the obligations are "secondary to patient care needs and may be delayed or compromised without penalty to the hospital or person required to fulfill the requirements of this section."

REVISING RCW 69.50.505 FORFEITURE LAW'S SERVICE-OF-NOTICE PROVISION

Chapter 364 (SSB 5160)

Effective date: July 26, 2009

Amends RCW 69.50.505. The Final Bill Report describes the effect of the amendment as follows:

When property is seized under the authority of the Uniform Controlled Substances Act, a person who wishes to assert a claim of ownership or right to possession must notify the seizing law enforcement agency within 45 days of the service of notice from the seizing agency, in the case of personal property, or within 90 days, in the case of real property. Service by mail is deemed complete upon mailing the notice of claim within the 45-day period following service of the notice of seizure in the case of personal property and within the 90-day period following service of the notice of seizure in the case of real property. If no person notifies the seizing law enforcement agency of the person's claim of ownership or right to possession within those time periods, the item seized is deemed forfeited.

LAW ENFORCEMENT ACCESSING OF DRIVER'S LICENSE PHOTOS TO VERIFY ID

Chapter 366 (ESSB 5262)

Effective date: July 26, 2009

Amends RCW 46.20.118 to allow law enforcement officers access through DOL to driver's license photos to verify identity in circumstances when the officers are "authorized to request identification from an individual."

REVISING STANDARDS REGARDING WHICH OFFENDERS DOC IS TO SUPERVISE

Chapter 375 (ESSB 5288)

Effective date: July 26, 2009

Eliminates DOC supervision of some low risk offenders and make other revisions regarding DOC supervision of offenders.

ADDRESSING COMMITMENT OF SEXUALLY VIOLENT PREDATORS

Chapter 409 (SSB 5718)

Effective date: May 7, 2009

This bill was introduced at the request of the Attorney General's Office. The enactment amends numerous provisions in chapter 71.09 RCW relating to commitment of sexually violent predators. Among other things, the enactment clarifies where civil commitment proceedings are to be filed in cases where a sexually violent offense occurred outside of Washington state.

ADDRESSING JAIL MEDICATION MANAGEMENT

Chapter 411 (SSB 5252)

Effective date: July 26, 2009

The Final Bill Report (with subheadings added) describes the effect of this Act as follows:

Study

[The Washington Association of Sheriffs and Police Chiefs] is instructed to convene a jail medication management workgroup in order to develop a model policy regarding the management of medication in jails, subject to funding. The workgroup must include members of the pharmaceutical community and the Washington State Nurses Association. The model policy is to be developed by December 31, 2009. A list of parameters is provided for the model policy. This section is null and void if not funded.

Substantive changes in the law

The Board [of Pharmacy] is prohibited from regulating or establishing standards for a jail that does not operate a pharmacy or correctional pharmacy.

A jail is authorized to provide for the delivery and administration of medications and medication assistance for inmates by trained personnel under certain conditions, including provision for training, consultation with a licensed pharmacist, and adoption of a policy for controlling and storing medications. Inmates must not be allowed to dispense medications.

The Department of Health must annually review the medication practices of five jails which allow medications to be delivered to inmates by non-pharmacist jail personnel.

ADDRESSING PROPERTY CRIMES, INCLUDING CHANGING THE DOLLAR-AMOUNT DIVIDING LINES BETWEEN FELONY AND MISDEMEANOR CRIME, AND CHANGING CIVIL PENALTY DOLLAR AMOUNT MERCHANTS CAN RECOVER FROM SHOPLIFTERS

Chapter 431 (SB 6167)

Effective date: September 1, 2009

Amends RCW 4.24.230 (shoplifter civil penalty) and numerous provisions in Title 9A RCW, as well as amending other statutes. In salient part, the Final Bill Report describes the effect of these changes as follows:

Theft, possession of stolen property, and malicious mischief in the first degree occur if the crimes involve property valued at over \$5,000. Theft, possession of stolen property, and malicious mischief in the second degree occur if the crimes involve property that exceeds \$750 but does not exceed \$5,000. Theft, possession of stolen property, and malicious mischief in the third degree occur if the crimes involve property valued at up to \$750. Unlawful issuance of a bank check is a gross misdemeanor if it was for \$750 or less and a class C felony if it is for an amount greater than \$750. A person is guilty of organized retail theft in the second degree, a class C felony, if that person, with an accomplice, commits theft of property from a mercantile establishment and the value of the property is at least \$750 but less than \$5,000. It is organized retail theft in the first degree, a class B felony, if the property stolen has a value of at least \$5,000.

A mercantile establishment that has property alleged to have been stolen may request that the charge be aggregated with other thefts of property about which the mercantile establishment is aware. If the prosecuting jurisdiction declines the request to aggregate, it must promptly advise the mercantile establishment and provide the reasons for such decision. Merchants who create a database of individuals who have been apprehended, assessed a civil penalty, or convicted, are not subject to civil fines or penalties for sharing the database with other merchants, law enforcement officials, or legal professionals.

An organized retail crime task force is created to monitor the effects of raising the monetary threshold amounts used to define the various degrees of property crimes in Washington. . . .

. . .

In addition to actual damages, the maximum [civil] penalty [under an amended RCW 4.24.230] to the owner or seller of goods that are possessed by a person

[shoplifter] with the intention of converting the goods to that person's own use without payment of a purchase price is \$2,850 plus an additional penalty of not less than \$100 nor more than \$638.

PROTECTING ANIMALS IN DOMESTIC VIOLENCE SITUATIONS

Chapter 439 (HB 1148)

Effective date: July 26, 2009

Amends RCW 26.50.060(1)(k) to authorize a court in a DV situation to determine the right of custody or control of a pet and to “prohibit the respondent from interfering with the petitioner’s efforts to remove the pet.” The court “may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of the specified locations where the pet is regularly found.”

Also amends RCW 26.50.110(1)(a) to make it a gross misdemeanor to violate “[a] provision prohibiting interfering with the protected party’s efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent”

PROHIBITING ELECTRIC SHOCK DEVICES IN K-12 SCHOOLS

Chapter 453 (ESSB 5263)

Effective date: July 26, 2009

Amends RCW 9.41.280. Adds the following to subsection (1)’s list of items that are deemed unlawful for students in k-12 schools to carry onto or possess on school premises, school-provided transportation, or areas used exclusively by schools:

(f)(i) Any portable device manufactured to function as a weapon and which is commonly known as a stun gun, including a projectile stun gun which projects wired probes that are attached to the device that emit an electrical charge designed to administer to a person or an animal an electric shock, charge, or impulse; or

(ii) Any device, object, or instrument which is used or intended to be used as a weapon with the intent to injure a person by an electric shock, charge, or impulse.

Mental health professionals who conduct evaluations of those who (1) violate the prohibitions contained in this bill and (2) are at least 12 and not more than 21 years of age are not required to be “the county-designated mental health professional,” but rather are required to be “the designated mental health professional.”

A school security officer who is not a commissioned law enforcement officer may not possess a stun gun or other electric shock device on school property unless the person has successfully completed training in the use of the device that is equivalent to the training received by commissioned law enforcement officers.

UNITED STATES SUPREME COURT

“BRIGHT LINE” RULE OF FOURTH AMENDMENT FOR SEARCH INCIDENT TO ARREST RECENT MV OCCUPANT DISAPPEARS – IF OFFICERS HAVE SECURED THE ARRESTEE, THEN, UNLESS OFFICERS HAVE “REASON TO BELIEVE” EVIDENCE OF THE PARTICULAR OFFENSE FOR WHICH ARREST IS MADE IS IN THE VEHICLE’S PASSENGER COMPARTMENT, THEY MAY NOT SEARCH THAT AREA INCIDENT TO ARREST

Arizona v. Gant, __ S.Ct. __ , 2009 WL 1045962 (2009)

LED EDITORIAL INTRODUCTORY NOTE: Ever since the U.S. Supreme Court issued its decision almost 30 years ago in New York v. Belton, 453 U.S. 454 (1981), it has been generally understood – in light of clear language used in the majority opinion for the Belton Court – by lower courts, attorneys, and others (even law professors) who cared about the question that Belton’s Fourth Amendment rule was a “bright line” rule for search incident to arrest of an occupant of a vehicle. The accepted rule was that officers could search the passenger compartment of the vehicle regardless of whether the arrestee was already secured by officers. See, for example, State v. Stroud, 106 Wn.2d 144 (1986) (adopting a similar “bright line” rule under the Washington constitution, article 1, section 7, except that locked containers in the passenger compartment were declared not subject to search under the Washington “search incident” rule).

However, in the April 21, 2009 Gant decision of the U.S. Supreme Court (digested below), four justices assert that this so-called “bright line” was not in fact the rule announced or intended by the majority in Belton. A fifth justice in Gant (Scalia) indicates in a separate concurring opinion that the majority’s characterization of what Belton said and held is revisionist history and an incorrect reading of Belton. But Justice Scalia says that he is signing onto the Gant majority opinion anyway, because (1) he believes that the search-incident rule should be clear, and (2) he sees no logic to the broad search authority granted under Belton’s “bright line” rule.

The dissenting justices in Gant, like Justice Scalia, contend that Belton established a clear “bright line” rule. The four dissenters argue in vain that there is not sufficient reason to abandon the clear precedent of Belton allowing a vehicle search incident to arrest of an occupant after the occupant-arrestee has been secured.

For law enforcement officers, of course, the debate about whether Gant reflects revisionist history is academic and is irrelevant to doing their jobs. All that matters now is the contours of the new rule announced by the U.S. Supreme Court Gant majority. Those contours are relatively, but not totally, clear, in generally barring the automatic vehicle searches incident to custodial arrest that have been routinely carried out for over two decades. For state, local and tribal officers who are subject to the Washington constitution, and for those in several other states with similarly active state supreme courts, the implications of Gant are a little more troubling – in relation to the overall law enforcement mission of catching law violators – than for federal officers or for state, local and tribal officers in the vast majority of states. That is because Washington’s Supreme Court, like the supreme courts of a few other States, has held under the Washington constitution that in numerous respects the Washington constitution is more restrictive on law enforcement than the federal constitution’s Fourth Amendment. See our LED Editorial Comments below that follow our presentation of the key text of the Gant majority opinion.

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

I.

On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses-possession of a narcotic drug for sale and possession of drug paraphernalia (*i.e.*, the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that New York v. Belton, 453 U.S. 454 (1981) did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it."

The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began, but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. A jury found Gant guilty on both drug counts, and he was sentenced to a 3-year term of imprisonment.

After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in Belton, which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. The court distinguished Belton as a case concerning

the permissible scope of a vehicle search incident to arrest and concluded that it did not answer “the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure.” Relying on our earlier decision in Chimel v. California, 395 U.S. 752 (1969), the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. When “the justifications underlying Chimel no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer,” the court concluded, a “warrantless search of the arrestee’s car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.” Accordingly, the court held that the search of Gant’s car was unreasonable.

The dissenting justices would have upheld the search of Gant’s car based on their view that “the validity of a Belton search . . . clearly does not depend on the presence of the Chimel rationales in a particular case.” Although they disagreed with the majority’s view of Belton, the dissenting justices acknowledged that “[t]he bright-line rule embraced in Belton has long been criticized and probably merits reconsideration.” They thus “add[ed their] voice[s] to the others that have urged the Supreme Court to revisit Belton.”

The chorus that has called for us to revisit Belton includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles. We therefore granted the State’s petition for certiorari.

ISSUE AND RULING: After officers make a custodial arrest of a motor vehicle occupant and have searched the person of and secured the arrestee in a patrol car in handcuffs, may they automatically search the passenger compartment of the vehicle if they do not have a reasonable belief that the passenger compartment contains evidence of the crime for which the arrest has been made? (**ANSWER:** No, rules a 5-4 majority)

Result: Affirmance of Arizona Supreme Court decision holding that Rodney Joseph Gant’s car was unlawfully searched, and that therefore his convictions for drug crimes based on evidence seized in the car search must be reversed.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

II.

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.

In Chimel, we held that a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a

weapon or destructible evidence.” That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. (noting that searches incident to arrest are reasonable “ *in order to* remove any weapons [the arrestee] might seek to use” and “ *in order to prevent* [the] concealment or destruction” of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

In Belton, we considered Chimel's application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked “Supergold” - a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, the officer “ ‘split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other’ ” and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine.

The New York Court of Appeals found the search unconstitutional, concluding that after the occupants were arrested the vehicle and its contents were “safely within the exclusive custody and control of the police.” The State asked this Court to consider whether the exception recognized in Chimel permits an officer to search “a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle.” We granted certiorari because “courts ha[d] found no workable definition of ‘the area within the immediate control of the arrestee’ when that area arguably includes the interior of an automobile.”

In its brief, the State argued that the Court of Appeals erred in concluding that the jacket was under the officer's exclusive control. Focusing on the number of arrestees and their proximity to the vehicle, the State asserted that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents, making the search permissible under Chimel. The United States, as *amicus curiae* in support of the State, argued for a more permissive standard, but it maintained that any search incident to arrest must be “‘substantially contemporaneous’” with the arrest – a requirement it deemed “satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed.” There was no suggestion by the parties or *amici* that Chimel authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.

After considering these arguments, we held that when an officer lawfully arrests “the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile” and any containers therein. That holding was based in large part on our assumption “that articles

inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.' ”

The Arizona Supreme Court read our decision in Belton as merely delineating “the proper scope of a search of the interior of an automobile” incident to an arrest. That is, *when* the passenger compartment is within an arrestee’s reaching distance, Belton supplies the generalization that the entire compartment and any containers therein may be reached. On that view of Belton, the state court concluded that the search of Gant’s car was unreasonable because Gant clearly could not have accessed his car at the time of the search. It also found that no other exception to the warrant requirement applied in this case.

Gant now urges us to adopt the reading of Belton followed by the Arizona Supreme Court.

III.

Despite the textual and evidentiary support for the Arizona Supreme Court’s reading of Belton, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan’s dissent in Belton, in which he characterized the Court’s holding as resting on the “fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.” Under the majority’s approach, he argued, “the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car” before conducting the search.

Since we decided Belton, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee’s reach to justify a vehicle search incident to arrest, but Justice Brennan’s reading of the Court’s opinion has predominated. As Justice O’Connor observed, “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel.” Thornton v. U.S., 541 U.S. 615 (2004) **July 04 LED:02**. JUSTICE SCALIA has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in “this precise factual scenario . . . are legion.” Indeed, some courts have upheld searches under Belton “even when . . . the handcuffed arrestee has already left the scene.”

Under this broad reading of Belton, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search. To read Belton as authorizing a vehicle search incident to every recent occupant’s arrest would thus untether the rule from the justifications underlying the Chimel exception – a result clearly incompatible with our statement in Belton that it “in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.” Accordingly, we reject this reading of Belton and hold that the Chimel rationale authorizes police to search a vehicle incident to a recent

occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *[Court's footnote: Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. Cf. 3 W. LaFare, Search and Seizure § 7.1(c), p. 525 (4th ed.2004) (hereinafter LaFare) (noting that the availability of protective measures "ensur[es] the nonexistence of circumstances in which the arrestee's 'control' of the car is in doubt"). But in such a case a search incident to arrest is reasonable under the Fourth Amendment.]*

Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Thornton, 541 U.S., at 632 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including Belton and Thornton, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in Belton, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license-an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

IV.

The State does not seriously disagree with the Arizona Supreme Court's conclusion that Gant could not have accessed his vehicle at the time of the search, but it nevertheless asks us to uphold the search of his vehicle under the broad reading of Belton discussed above. The State argues that Belton searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that Belton searches authorize police

officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of Belton provides. Courts that have read Belton expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within Belton's purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a “bright line.” See 3 LaFave, § 7.1(c), at 514-524.

Contrary to the State's suggestion, a broad reading of Belton is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, Belton and Thornton permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, Michigan v. Long, 463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is “dangerous” and might access the vehicle to “gain immediate control of weapons.” *Id.*, at 1049 (citing Terry v. Ohio). If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross, 456 U.S. 798 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. **[LED EDITORIAL NOTE: Ross does not apply under the Washington constitution per State v. Ringer.]** Unlike the searches permitted by JUSTICE SCALIA's opinion concurring in the judgment in Thornton, which we conclude today are reasonable for purposes of the Fourth Amendment, Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. Maryland v. Buie, 494 U.S. 325 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of Belton would meaningfully further law

enforcement interests and justify a substantial intrusion on individuals' privacy. *[Court's footnote: At least eight States have reached the same conclusion. Vermont, New Jersey, New Mexico, Nevada, Pennsylvania, New York, Oregon, and Wyoming have declined to follow a broad reading of Belton under their state constitutions. . .]*

V.

Our dissenting colleagues argue that the doctrine of stare decisis requires adherence to a broad reading of Belton even though the justifications for searching a vehicle incident to arrest are in most cases absent. The doctrine of stare decisis is of course “essential to the respect accorded to the judgments of the Court and to the stability of the law,” but it does not compel us to follow a past decision when its rationale no longer withstands “careful analysis.”

We have never relied on stare decisis to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. The safety and evidentiary interests that supported the search in Belton simply are not present in this case. Indeed, it is hard to imagine two cases that are factually more distinct, as Belton involved one officer confronted by four unsecured arrestees suspected of committing a drug offense and this case involves several officers confronted with a securely detained arrestee apprehended for driving with a suspended license. This case is also distinguishable from Thornton, in which the petitioner was arrested for a drug offense. It is thus unsurprising that Members of this Court who concurred in the judgments in Belton and Thornton also concur in the decision in this case.

We do not agree with the contention in JUSTICE ALITO's dissent (hereinafter dissent) that consideration of police reliance interests requires a different result. Although it appears that the State's reading of Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, *[Court's footnote: Because a broad reading of Belton has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding.]* many of these searches were not justified by the reasons underlying the Chimel exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the Belton rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement “entitlement” to its persistence. The dissent's reference in this regard to the reliance interests cited in Dickerson v. United States, 530 U.S. 428 (2000) **Aug 00 LED:02**, is misplaced. In observing that “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture,” the Court was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right.

The dissent also ignores the checkered history of the search-incident-to-arrest exception. . . [Reviewing search-incident decisions prior to Chimel]

Finally, our opinion in Chimel overruled Rabinowitz and what remained of Harris and established the present boundaries of the search-incident-to-arrest exception. Notably, none of the dissenters in Chimel or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.

The experience of the 28 years since we decided Belton has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely “within ‘the area into which an arrestee might reach,’ ” and blind adherence to Belton's faulty assumption would authorize myriad unconstitutional searches. The doctrine of stare decisis does not require us to approve routine constitutional violations.

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

[Some citations and footnotes omitted]

LED EDITORIAL COMMENTS: Remember that the following LED Editorial Comments state the views of the editors alone and do not necessarily represent the opinions of the Attorney General or Criminal Justice Training Commission. Officers should seek advice from their own agency legal advisors and their local prosecutors. One consolation for all of us who are trying to interpret the Gant decision is that it is a Fourth Amendment decision applying to all law enforcement officers in all jurisdictions in the country. Therefore, court decisions around the country will help us to determine the answers to the Fourth Amendment questions addressed below. There have already been a few other-jurisdiction decisions citing Gant, but none of those decisions have addressed the questions that we have attempted to answer below. In the coming months, the LED editors will monitor, as best we can, the expected deluge of court decisions around the country interpreting Gant. We will provide further information as developments occur. We hope that a judicial consensus emerges, though we assume from past experience that it will take some time to get a clear picture.

Question 1: What is the new basic rule for a warrantless motor vehicle search incident to arrest for Washington officers in light of Gant and in light of Washington appellate court decisions interpreting article 1, section 7 of the Washington constitution?

Answer:

After officers have made a custodial arrest of a motor vehicle occupant – including searching the arrestee's person – and have secured the arrestee in handcuffs in a patrol car, and while

the vehicle is still at the scene of the arrest, they may automatically search – without a search warrant and without need for justification under any other exception to the search warrant requirement – the passenger compartment of the vehicle and any unlocked containers in that compartment **if and only if** (A) they proceed without unreasonable delay; and (B) they have a reasonable belief that the passenger compartment contains evidence of: (1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.

Question 2: Is the Gant decision retroactive?

Answer: Retroactivity in criminal cases is complicated, with questions addressing such things as (1) finality of past decisions no longer on direct appeal, and (2) waiver at superior court for cases still in the appellate pipeline. For cases not yet tried at superior court, defendants will generally be allowed to raise Gant even though the facts of the search incident to arrest occurred before April 21, 2009, the date of the U.S. Supreme Court decision in Gant.

As for Civil Rights Act lawsuits raising an alleged Fourth Amendment violation per Gant, there are also questions of finality and waiver relating to matters previously presented to a trial court, as well as statute-of-limitations issues for searches that occurred in the past. In addition, the Gant lead opinion expressly explains as to searches incident to arrest occurring prior to April 21, 2009 that officers will have qualified immunity because they could not have been expected to predict the ruling in Gant. The Gant Court did not address, and we will not speculate on, the possibility of agency liability for following an unconstitutional policy prior to April 21, 2009.

Question 3: Does the Gant “reasonable belief” exception apply to officers who are restricted by the Washington constitution?

Answer: Yes, Washington officers can avail themselves of the “reasonable belief” exception. The Washington Supreme Court held in State v. Stroud, 106 Wn.2d 144 (1986) that the Washington constitution is not more restrictive on vehicle searches incident to arrest than the Fourth Amendment, except that the Washington rule does not authorize officers to search locked compartments or locked containers within the passenger area of the vehicle. Now that the U.S. Supreme Court has limited the circumstances in which such a vehicle search incident to arrest can occur, Washington officers must follow the revised interpretation of the Fourth Amendment, but they are not required to try to anticipate further restriction by the Washington appellate courts in future decisions.

Question 4: Is the “reasonable belief” standard a lower proof standard than “probable cause”?

Answer: This is subject to debate. The U.S. Supreme Court is familiar with the concepts of “probable cause” and “reasonable suspicion,” so presumably the Court meant something else with its use of “reasonable belief.” A strong argument can be made that, in light of the existence of the Fourth Amendment’s “Carroll Doctrine,” the standard is less than probable cause. The Carroll Doctrine presumes exigent circumstances generally for all mobile vehicles located in public places (note that Washington and a few other states have independent grounds, state constitutional rulings rejecting the Carroll Doctrine and requiring something more than the mere mobility of the vehicle to establish exigent circumstances). The Carroll Doctrine therefore generally permits officers to search the entirety of a motor vehicle without a search warrant so long as officers have probable cause to search the vehicle. It would not make sense to have a Fourth Amendment probable cause standard for search incident to arrest when the Carroll Doctrine, authorizing a stem-to-stern car search based on probable cause to search would

completely subsume the exception anyway. Also, Justice Alito's dissent contains some discussion that suggests the "reasonable belief" standard is a lower standard than "probable cause." So we are guessing that the standard is something between "probable cause" and the "reasonable suspicion" stop-and-frisk standard of Terry v. Ohio.

But we do note, on the other hand, that the Ninth Circuit of the U.S. Court of Appeals has held that "reasonable belief" (that a resident of a home is present) means "probable cause" where the phrase was used by the U.S. Supreme Court in Payton v. New York, 445 U.S. 573 (1980) in announcing a rule for residential entry to arrest on an arrest warrant. See U.S. v. Gorman, 314 F.3d 1105 (9th Cir. 2002) March 03 LED:10. Probably the only legally safe approach, in light of this Ninth Circuit interpretation of "reasonable belief" under Payton, is to assume that "reasonable belief" means probable cause. This is a conservative "punt" on our part at this point prior to any case law development under Gant, and we urge consultation with legal advisors and prosecutors on this point. Often the line between probable cause and reasonable suspicion is a fine one. As always, the better that officers observe and report on the objective facts arousing their suspicions, the better chance that their actions will be upheld, whatever the standard.

Question 5: Does "the crime of arrest" include all crimes for which the officer has developed probable cause to arrest prior to beginning the search of the vehicle passenger compartment?

Answer: Yes, that appears to be the best guess among legal advisors and prosecutors who have looked at this aspect of Gant.

Question 6: May a passenger compartment search be conducted after securing the occupant-arrestee if unarrested vehicle occupants or unarrested passers-by are in the vicinity of the vehicle?

Answer: Justice Alito's dissent in Gant suggests that a search of the vehicle passenger area might be justified by the presence of unsecured persons (1) who had been occupants in the vehicle prior to the arrest, or (2) who were outside but gather near the scene of the arrest. This seems to us to be a stretch in most cases because of the inability of the officers in most cases to state an objective basis for believing that these unarrested persons would be likely to go into the vehicle to gain access to evidence, contraband or a weapon. Again, the better that officers observe and report on the objective facts that they believe supported their actions, the better chance that their actions will be upheld.

Question 7: Does Gant undermine the court interpretations of Chimel that allow a search of the "lunge area" based on the location of the arrestee at the point when the arrest process starts?

Answer: The Washington Supreme Court held in State v. Smith, 119 Wn.2d 675 (1992) Dec 92 LED:04 that the scope of a search incident to arrest is generally determined by the location of the arrestee at the time that the arrest process began. Justice Alito's dissent suggests that this approach might be contrary to the principles underlying Gant, but we think that the U.S. Supreme Court in Gant was focused exclusively on what the majority justices felt to be the overbreadth of search-incident authority where vehicles are involved, and that the Court will not use the same rationale to limit the scope of searches of the person incident to arrest.

Question 8: Does Gant undermine case law that authorizes officers to frisk/sweep the interior of a vehicle, prior to making an arrest, based on reasonable and articulable

suspicion that a weapon is present in the vehicle and may be used by the arrestee or someone else against the officer?

Answer: The Gant opinion explains that the vehicle frisk rule of Michigan v. Long, 463 U.S. 1032 (1983) is not affected by the decision in Gant.

Finally, Washington officers should keep in mind the following Washington appellate court rulings interpreting the Washington constitution, article 1, section 7, as imposing greater restrictions on law enforcement than are imposed on law enforcement officers under the federal constitution's Fourth Amendment.

1. Washington's rule for search incident to arrest requires that an officer have formally arrested that person before the officer begins the search. State v. O'Neill, 148 Wn.2d 564 (2003) April 03 LED:03; State v. Radka, 120 Wn. App. 423 (Div. III, 2004) March 04 LED:11. This generally means that the search of a vehicle by a Washington officer cannot lawfully begin until the arrestee has been searched and handcuffed and placed in the backseat of the patrol car.

2. When officers are searching the passenger compartment of a vehicle incident to arrest of an occupant, personal effects in a vehicle that are known to belong to a non-arrestee occupant of the vehicle are generally not subject to the search under the search incident rule unless the officer has an objective articulable reason for believing that a weapon, evidence or contraband is hidden within the particular personal effect. State v. Parker, 139 Wn.2d 486 (1999) Dec 99 LED:13.

3. As noted above in our answer to Question 4, in our view, the Fourth Amendment's Carroll Doctrine" does not apply under the Washington constitution. State v. Ringer, 100 Wn.2d 686 (1983). As noted above, the Carroll Doctrine presumes exigent circumstances for mobile vehicles located in public places, and the doctrine therefore generally permits officers to search the entirety of a motor vehicle without a search warrant so long as officers have probable cause to search the vehicle. The Ringer majority opinion recognized the availability of telephonic search warrants. Ringer therefore held that actual exigent circumstances (not just mobility of a vehicle) must be established in order for officers to use that rationale to search a vehicle. In State v. Patterson, 112 Wn.2d 731 (1989), the majority opinion of the Washington Supreme Court determined that officers responding to a burglary alarm were justified by exigent circumstances in searching a recently parked, unoccupied car that another responding officer had seen a few minutes earlier driving away from the burglary scene going the wrong way on a one-way street; the concurring opinion in Patterson criticized the majority opinion for not simply holding that the vehicle search was lawful based on probable cause under the Carroll Doctrine. Patterson appears to have settled, however, that Washington's constitution does not incorporate the Carroll Doctrine.

But it should also be noted that subsequent cases have recognized that if officers have probable cause to search a vehicle, they can impound the vehicle, including moving the vehicle to another location, while they seek a search warrant. See State v. Huff, 64 Wn. App. 641 (1992). One question left by Ringer's abolition of the Carroll Doctrine is whether a car is like a house in the sense that an officer's lawful "open view" observation of evidence or contraband inside a vehicle (occupied or not) does not alone justify the officer's warrantless, non-exigent, non-emergency, non-consenting entry of the vehicle to seize the item. In State v. Kennedy, 107 Wn.2d 1 (1986) the Washington Supreme Court majority opinion said that the answer is "yes" - - open view of evidence or contraband from outside the car does not itself justify entry into the vehicle, and one of the exceptions to the warrant requirement must apply to justify entry into the

vehicle. See also the discussion in State v. Lemus, 103 Wn. App. 94 (2000) Feb 01 LED:02. The best practice in this circumstance is to assume that entry of the vehicle is not permitted based solely on “open view” observation of evidence or contraband, just as it would not be lawful if a home were involved.

4. Under State v. Ferrier, 136 Wn.2d 103 (1998) Oct 98 LED:02, officers seeking to avoid getting a search warrant must give certain consent warnings to a resident when conducting a knock-and-talk operation. Officers in a knock-and-talk must tell the resident that he or she has a right to refuse, right to restrict scope, and the right to retract at any time. This rule has been applied to motel rooms as well. We believe that most prosecutors and law enforcement agency legal advisors would recommend Ferrier warnings and use of written forms for car searches. The Washington appellate courts have not squarely addressed in a published opinion the question whether and/or when Ferrier applies to car consent searches. We believe that the worst case scenario for testing this issue would be a case where an officer had a mere hunch (or maybe just a little more than that but not reasonable suspicion) and wanted to “fish” for evidence. The Washington courts might avoid the consent issue in such circumstances by holding that the consent request, if not preceded by an explanation that the person is free to go on his or her way, turns a mere contact into a seizure. See, for example, State v. Cantrell, 70 Wn. App. 140 (Div. II, 1993) Oct 93 LED:21 (request to search car without reasonable suspicion held a seizure); State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) March 93 LED:09 (request to search person without reasonable suspicion held a seizure). But the Washington courts might also rule the consent invalid without Ferrier warnings by reasoning that the “fishing” situation is analogous to the house search in Ferrier.

5. Impounding of vehicles for reasons other than – (1) seizure as evidence of a crime, (2) for forfeiture, or (3) as part of the process of pursuing a warrant to search the vehicle – generally is not lawful under the Washington constitution unless officers have considered reasonable alternatives to impoundment. Also, the authority to inventory the contents of a vehicle impounded for these other reasons (such as community caretaking) does not generally permit opening closed unattached containers or locked trunks without manifest necessity to do so. State v. Houser, 95 Wn.2d 143 (1980) April 81 LED:01; State v. White, 135 Wn.2d 761 (1998) Sept 98 LED:08; State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March 02 LED:02; All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb 03 LED:02; Potter v. WSP, 161 Wn.2d 335 (2007) Feb 08 LED:09.

6. The “automatic standing” rule that the U.S. Supreme Court abandoned as a Fourth Amendment rule still applies under the Washington constitution, though its contours are not clear. State v. Evans, 159 Wn.2d 402 March 07 LED:15.

7. Washington officers arresting a person outside of his or her residence do not have automatic authority to accompany the arrestee into his or her residence if the arrestee asks permission to go inside momentarily (to retrieve ID, get some clothes, turn off the stove, etc). State v. Chrisman, 100 Wn.2d 814 (1984). Under Chrisman, officers should obtain the arrestee’s consent in this situation or at least inform the arrestee that the officer will remain in control of the arrestee throughout. The Chrisman rule probably also applies to vehicles, so officers ideally should obtain express consent to accompany the arrestee if the arrestee wants to go back into a vehicle, or obtain express consent if the arrestee asks the officer to retrieve something from the vehicle.

8. Vehicles seized for forfeiture under RCW 69.50.505 or similar statutory authority may not be searched without a search warrant unless a recognized exception to the warrant requirement applies. State v. Hendrickson, 129 Wn.2d 61 (1996) July 96 LED:11.

9. The all-residents-present consent search rule of State v. Morse, 156 Wn.1 (2005) Feb 06 LED:02 is applicable only to fixed premises and does not apply to vehicle consent searches. State v. Cantrell, 124 Wn.2d 183 (1988) Jan 99 LED:03.

NEXT MONTH

The July 2009 LED (deadline June 15, 2009) will include Part Three of our three-part 2009 Washington Legislative Update, as well as entries regarding recent appellate court decisions, including an entry on State v. Hinshaw, 205 P.3d 178 (2009) a Division Three Court of Appeals decision; Hinshaw holds that, where the prosecutor presented no evidence relating to the time that would have been needed to obtain a search warrant, the fact that officers had probable cause to believe that a suspect had driven while intoxicated an hour earlier, combined with the general medical fact that alcohol is dissipated in the body over time, did not add up to exigent circumstances to justify reaching through a doorway to arrest the suspect.

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>].

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>]