Law Enforcement Digest

FEBRUARY 2012

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

677th Basic Law Enforcement Academy – August 30, 2011 through January 10, 2012

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Best Academic:	Alexa C. Moss, Pierce County SO
Best Firearms:	Justin L. Kangas, Pacific County SO
Patrol Partner Award:	Jason L. Youngman, Pierce County SO
Tac Officer:	Corporal Brian Dixon, WSP

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FEBRUARY 2012 LED TABLE OF CONTENTS

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NINTH CIRCUIT U.S. COURT OF APPEALS

CIVIL RIGHTS ACT LAWSUIT: OFFICER WHO HAD HISTORY OF CONFUSING HER GLOCK AND TASER, AND WHO MISTAKENLY SHOT AND KILLED DETAINEE SHE INTENDED ONLY TO TASE HELD UNDER ESTATE'S ALLEGATIONS TO HAVE USED EXCESSIVE FORCE AND NOT BE ENTITLED TO QUALIFIED IMMUNITY

Torres v. City of Madera, 648 F.3d 1119 (9th Cir. August 22, 2011)

Facts: (Excerpted from Ninth Circuit opinion)

> In the course of responding to a complaint of loud music on October 27, 2002, Madera City Police officers arrested Everardo and Erica Mejia ("Mejia"), handcuffed them, and placed them in the back seat of a patrol car. After approximately thirty to forty-five minutes (during which time Everardo had fallen asleep), Mejia was removed from the car and replaced by another arrestee. Everardo awoke at this time and began yelling and kicking the rear car door from inside, though the parties dispute whether he was yelling, "Get me out of the car," or simply that his handcuffs were too tight.
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> Officer Noriega, one of several police officers on site that evening, was standing a few feet directly behind the patrol car when she first heard Everardo yelling. She recalls telling her fellow officers that whoever was closest should tase Everardo because he could injure himself if he kicked through the glass window. As it turned out, Officer Noriega herself was closest, so she approached the car. Upon reaching the rear driver's side door, she opened it with her left hand. She then reached down with her right hand to her right side, unsnapped her holster, removed the Glock, aimed the weapon's laser at Everardo's center mass, put her left hand under the gun, and pulled the trigger, all without looking at the weapon in her hand. She had turned off the safety to her Taser earlier that evening, enabling her to use it more quickly. The parties agree that Officer Noriega had intended to reach for her Taser, which she kept in a thigh holster immediately below her holstered Glock on her dominant right side, and that she had intended to use her Taser in dart-tase rather than touch-tase mode. Everardo died later that evening from the gunshot wound.
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> This was not the first time Officer Noriega had mistakenly drawn the wrong weapon, though never before with such dire consequences. The Madera City Police Department first issued Officer Noriega a Taser, and certified her to use it, sometime in the winter of 2001, less than one year before Everardo's shooting. Her certification training consisted of a single three-hour class, during which she fired the weapon only once. She was given a right-side holster for her Taser and instructed to wear it just below her Glock. There was no discussion during this training session of a recent incident in which a Sacramento officer had mistaken his handgun for his Taser.
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> Nonetheless, Officer Noriega soon came to experience firsthand the risk of confusing the two weapons, both all-black and of similar size and weight. The first incident occurred about a month and a half after she was first issued the Taser when she was at a jail putting her weapons back in their holsters. She mistakenly put her Glock into the Taser holster, realizing her error when the weapon did not "sit right" in the wrong holster. Concerned about the mistake, she notified her sergeant, Sergeant Lawson, who instructed her to practice putting each weapon in its proper holster and to practice drawing them.

> Just one week later, Officer Noriega again confused her weapons, this time during a field call. Seeking to touch-tase a kicking and fighting suspect who refused to get into the back seat of a patrol car, Officer Noriega instead pulled out her Glock. Only when she tried unsuccessfully to remove the cartridge, which would have been present on her Taser but was not a feature on her Glock, did she realize she was holding the wrong weapon "and it was pointing at[her] partner's head, the [Glock's] laser was pointing at his head." Frightened by this second incident of weapon confusion and by how narrowly she had averted a potentially fatal mistake, she again informed Sergeant Lawson, explaining that she "had pulled out my gun thinking it was my Taser." Again, Sergeant Lawson instructed her "to keep practicing like he's been doing and that he's having everybody do."
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> For the next nine months, leading up to the day of Everardo's tragic shooting, Officer Noriega followed her sergeant's instructions, practicing drawing her two weapons daily, both before work and during downtime throughout each shift. Officer Noriega described her daily self-training as follows: "I would have both my gun and my taser in their holsters. And I would draw my taser, and then I would draw my gun. And in my mind thinking taser, taser, taser, gun, gun, taser. Just practicing that way so I would draw, draw, draw." In the five or so times she used her Taser in the field, never again did she confuse her two weapons, until the night of Everardo's shooting. On all previous occasions, however, she had only touch-tased the subjects, which required her first to remove the Taser's safety cartridge. Never before had she dart-tased anyone, as she had intended to do to Everardo.

Proceedings below: The U.S. District Court dismissed the lawsuit brought by the estate of Everardo on dual grounds: (1) that the officer's actions as alleged by plaintiff were reasonable as a matter of law; and (2) in any event, that a reasonable officer would not have known at the time of the incident (2002) that such a mistaken use of deadly force violated the Fourth Amendment.

ISSUES AND RULINGS: (1) Under the totality of the allegations viewed in the best light for plaintiffs, including those regarding Everado's non-threatening behavior and Officer Noriega's training and her past experiences confusing her taser and her Glock, is there a question of fact under which a jury could find the officer's actions to be unreasonable in violation of the Fourth Amendment? (ANSWER: Yes); (2) Should Officer Noriega be denied qualified immunity on the rationale that the case law as of 2002 would have put a reasonable officer on notice that an unreasonable mistake in the use of deadly force against an unarmed non-dangerous person violates the Fourth Amendment? (ANSWER: Yes)

Result: Reversal of dismissal order of U.S. District Court (Eastern District, California); remand of case for trial.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> Violation of Constitutional Right
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> An objectively unreasonable use of force is constitutionally excessive and violates the Fourth Amendment's prohibition against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 394–96 (1989). Determining the reasonableness of an officer's actions is a highly fact-intensive task for which there are no per se rules. We recognize that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular

situation," and that these judgments are sometimes informed by errors in perception of the actual surrounding facts.

Not all errors in perception or judgment, however, are reasonable. While we do not judge the reasonableness of an officer's actions "with the 20/20 vision of hindsight," nor does the Constitution forgive an officer's every mistake. See Maryland v. Garrison, 480 U.S. 79, 87 n. 11 (1987). Rather, we adopt "the perspective of a reasonable officer on the scene . . . in light of the facts and circumstances confronting [her]." Graham, 490 U.S. at 396. Where an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact. Jensen v. City of Oxnard, 145 F.3d 1078, 1086 (9TH Cir.1998) (mistaken shooting of fellow police officer was unreasonable if it occurred in conditions in which the officer should have been able to recognize the figure before him); see also Wilkins v. City of Oakland, 350 F.3d 949, 955 (9th Cir. 2003)(same); cf. Garrison, 480 U.S. at 86 (validity of warrantless search that resulted from a mistake of premises turned on whether the officers "had known, or should have known" about the condition precipitating the error).

Standing in the shoes of the "reasonable officer," we then ask whether the severity of force applied was balanced by the need for such force considering the totality of the circumstances, including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396; Blanford v. Sacramento County, 406 F.3d 1110, 1115 (9th Cir. 2005).

The question that confronts us now is whether Officer Noriega's conduct in mistakenly applying deadly force to Everardo was objectively unreasonable under the totality of the circumstances. In Jensen, we held that:

> [i]f, as is alleged in the complaint, [the officer defendant] shot Officer Jensen three times in the back from a distance of three feet in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer, such a use of force would be unreasonable.

145 F.3d at 1086 (emphasis added). Similarly here, if Officer Noriega knew or should have known that the weapon she held was a Glock rather than a Taser, and thus had been aware that she was about to discharge deadly force on an unarmed, non-fleeing arrestee who did not pose a significant threat of death or serious physical injury to others, then her application of that force was unreasonable. See Tennessee v. Garner, 471 U.S. 1, 3 (1985). That she intended to apply lesser force is of no consequence to our inquiry, for objective reasonableness must be determined "without regard to [the officer's] underlying intent or motivation." Graham, 490 U.S. at 397. Just as "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force[,] nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Id.

To guide the determination of whether Officer Noriega should have known she was holding the wrong weapon, we identified five factors for consideration in Torres I:

> (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that [s]he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

524 F.3d at 1057.

. . .

Here, there is no dispute that Everardo had committed no serious offense, though acting out, posed no immediate threat to Officer Noriega's safety or that of anyone else, and, far from "attempting to evade arrest by flight," was sitting handcuffed in the back seat of a patrol car. The amount of force ultimately applied was a lethal shot from a semiautomatic handgun. Thus, if a jury were to find Officer Noriega's mistaken belief that she was holding her Taser rather than her Glock unreasonable, her use of force in this situation was excessive and violated Everardo's Fourth Amendment rights. Because there remain material factual issues in dispute on which a jury could make such a finding, the Torres Family has properly alleged the violation of a constitutional right, and summary judgment based on failure to do so was improper.

Qualified Immunity

. . .

The facts of this case do not fall in the "'hazy border between excessive and acceptable force'" as a legal matter. See Brosseau v. Haugen, 543 U.S. 194, 201 (2004) **Feb 05 LED:06** (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001). This is not a case where a fleeing suspect's actions may or may not have established probable cause to believe he posed a danger to others. . . .

Rather, this is a case where the suspect was already arrested, handcuffed, and in the back seat of a patrol car. There is no suggestion that Everardo was armed, that he was fleeing, or that he posed a threat to any officers or anyone else. While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not "seize an unarmed, nondangerous suspect by shooting him dead" in the absence of "probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to the officer or to others." Garner, 471 U.S. at 11; accord Brosseau, 543 U.S. at 197–99 (reaffirming the rule of Garner and explaining that it provides sufficient "fair warning" of a constitutional violation in "obvious" cases); Adams v. Speers, 473 F.3d 989, 994 (9th Cir. 2007) (denying qualified immunity where suspect's nondangerousness and officer's failure to warn before shooting placed the case squarely "within the obvious"). Officer Noriega applied deadly force to an unarmed, nondangerous suspect, and there could be no reasonable mistake that this use of force was proscribed by law.

The district court nonetheless determined Officer Noriega was entitled to qualified immunity because the law in 2002 did not clearly establish that an unreasonable mistaken use of force violated the Fourth Amendment. But in

2001, we decided a case holding it clearly established that an allegedly unreasonable mistake of identity resulting in the use of deadly force against a fellow police officer violated that officer's Fourth Amendment right. See Jensen, 145 F.3d at 1086–87; cf. Garrison, 480 U.S. at 85–86 (lawfulness of search of wrong apartment turns on reasonableness of officers' factual mistake); Hill v. California, 401 U.S. 797, 803–04 (1971) (same for arrest of wrong individual). We later reaffirmed this principle in another case of mistaken identity, holding it clearly established as of January 11, 2001. In both cases, we focused our qualified immunity inquiry not on what the officer intended to do, but instead on the level of force actually used.

Jensen and Wilkins are materially indistinguishable from this case for purposes of qualified immunity. Although those two cases involved mistakes of identity, whereas here we deal with a mistake of weapon, we have never required a prior case "on all fours prohibiting that particular manifestation of unconstitutional conduct" to find a right "clearly established." To the contrary, we have repeatedly stressed that officials can still have "fair warning" that their conduct violates established law "even in novel factual circumstances," and even when "a novel method is used to inflict injury," Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994). See, e.g., Deorle v. Rutherford, 272 F.3d 1272, 1285–86 (9th Cir. 2001) **June 01 LED:05** (officer violated a clearly established right when, without warning, he shot a lead-filled beanbag round in the face of a mentally or emotionally disturbed, unarmed man who had committed no serious offense, and who posed no risk of flight or danger to the officers or others); Oliver v. Fiorino, 586 F.3d 898, 907–08 (11th Cir. 2009) (same for officer who repeatedly tased a compliant, unarmed man not suspected of any crime, even in absence of case law factually on point).

In Jensen and Wilkins, we held that, had the defendant officers realized that the targets they were about to shoot were fellow police officers rather than armed civilians, they "could not have reasonably believed the use of deadly force was lawful." Jensen, 145 F.3d at 1087; see Wilkins, 350 F.3d at 955. Likewise here, had Officer Noriega realized that she was pointing a Glock at Everardo's chest, she "could not have been reasonably mistaken as to the legality of [her] actions." Jensen and Wilkins adequately put Officer Noriega on notice that an unreasonable mistake in the use of deadly force against an unarmed, nondangerous suspect violates the Fourth Amendment.

[Footnotes and some citations omitted]

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BRIEF NOTES FROM THE NINTH CIRCUIT U.S. COURT OF APPEALS

(1) NEVADA DEPARTMENT OF CORRECTIONS' PROHIBITION ON INDIVIDUAL POSSESSION OF TYPEWRITERS DECLARED CONSTITUTIONAL – In Nevada Department of Corrections v. Greene, 648 F.3d 1014 (9th Cir. August 15, 2011) the Ninth Circuit Court of Appeals rejects constitutional challenges to a Nevada prison regulation prohibiting inmates from individually possessing typewriters.

In December 2006 a Nevada Department of Corrections (NDOC) inmate murdered another inmate using a roller pin from an inmate-owned typewriter. In March 2007, an NDOC inmate attempted to stab a correctional officer, again, using a piece of an inmate-owned typewriter. In response to these attacks, the NDOC banned inmate possession of typewriters, and notified all inmates that it would be adding typewriters to the list of items prohibited from possession.

The Greene Court rejects an inmate's retaliation claim, explaining that:

> A viable claim for retaliation requires, in part, that an inmate demonstrate that the prison officials' adverse action does not reasonably advance a legitimate correctional goal. Institutional security is a legitimate correctional goal. Morrison v. Hall, 261 F.3d 896, 907 (9th Cir. 2001). . . . The undisputed evidence shows that the ban was enacted after the murder of an inmate with a weapon fashioned from the roller pin of a typewriter. No rational finder of fact could determine that the ban on typewriters does not reasonably advance the legitimate correctional goal of institutional safety.

The Court also rejects the inmates' claims that the ban unconstitutionally denies them access to the courts because in order to establish a right of access claim an inmate must establish actual injury and neither inmate plaintiff in this case can do so.

Result: Affirmance of U.S. District Court (Nevada) summary judgment in favor of Nevada Department of Corrections declaring that its prohibition on inmates' personal possession of typewriters is constitutional.

(2) GIRLFRIEND HAD AUTHORITY TO CONSENT TO SEARCH FOR CHILD PORN ON COMPUTER THAT IMPRISONED BOYFRIEND OWNED, BUT THAT HE HAD ALLOWED HER TO USE WITHOUT RESTRICTION AND WITHOUT PASSWORD PROTECTION – In United States v. Stanley, 653 F.3d 946 (9th Cir. Aug. 2, 2011), the Court rules 2-1 that, under the factual circumstances described below in this LED entry, there was valid third party consent to search a computer for child pornography.

From 2001 through 2004, defendant Stanley and his live-in-girlfriend shared a computer that his father gave him in 2001. They both treated the computer as "co-owned" during the period, though both had their own directories and folders. Stanley had his files "password-protected" during that time.

When the two ended their relationship in 2004, Stanley moved out and took the computer with him. He removed the password protection from his files. The ex-girlfriend's files were still on the computer. Shortly after that, Stanley was charged, convicted and imprisoned for child molestation. Shortly after he was imprisoned, with Stanley's agreement, his parents asked the ex-girlfriend to go to Stanley's residence and retrieve the computer. Stanley expected to get the computer back from her when he finished his prison term. Neither Stanley nor his parents placed any restrictions on the girlfriend's use of, or access to, anything in the computer.

A year and a half later, while Stanley was still in prison, the computer crashed. The ex-girlfriend contacted a friend to do repairs. During his work, the repairman found files that he thought were child pornography. Because the repairman was on federal probation, he decided he needed to turn the computer over to his probation officer. Stanley's ex-girlfriend gave him consent to give the computer to the probation officer. The probation officer subsequently turned the computer over to a federal agent. The repairman-parolee told the federal agent what he knew of the computer's history and its contents.

The federal agent then contacted the ex-girlfriend to determine whether she had the authority to consent to a search. She explained the history of usage of the computer, and she gave the agent permission to search the computer for child pornography, which the agent found on the computer.

The majority opinion of the Ninth Circuit 3-judge panel concludes that these facts establish that the ex-girlfriend could consent to a search of the computer, because Stanley had given her

unrestricted possession, use and control of a computer that did not have password protection on any of its files.

The dissenting judge argues, among other things, that the facts that – (1) the ex-girlfriend was using the Stanley-owned computer only until Stanley was released from prison, (2) Stanley had previously password-protected and separated his files from hers when they were sharing the computer, and (3) Stanley theoretically had no opportunity to reinstate password protection before going to prison – reflected Stanley's intent that other persons, including his ex-girlfriend, not access those files or allow others to access them. The dissenting opinion contains some interesting discussion of the nature of computers in relation to consent to their search by persons sharing the computers. The majority opinion, in addition to disagreeing with the dissent's legal analysis, accuses the dissenting judge of making raw factual assessments (contrary to trial court's factual determinations) that appellate courts are not allowed to make.

Result: Affirmance of U.S. District Court (Central District of California) conviction of Kevin Lloyd Stanley for possession of child pornography in violation of federal law.

LED EDITORIAL COMMENT: The Ninth Circuit majority opinion explains that the federal agent obtained a search warrant before searching the computer, but he inadvertently missed the deadline for executing a search under the warrant. The consent justified the search, so the warrant mess-up was irrelevant, the majority holds. But law enforcement officers should take heed that the split decision reflects that the facts of this case presented a relatively close question on third party consent authority, and that whenever there appears to be probable cause to support a search warrant application, seeking a search warrant is always legally safer than relying solely on third party consent authority (getting both consent and a warrant is the best approach).

Note also that the majority opinion in Stanley rules in the alternative (under analysis not discussed in this LED entry) that, even if she lacked actual authority to consent to a search, the ex-girlfriend's consent supported the search under the "apparent authority" doctrine of the Fourth Amendment. That doctrine does not apply under the Washington constitution, article I, section 7, so that safety valve is not available for Washington prosecutions where the State is relying on third party consent to search. See State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CONVICTION UNDER RCW 9.41.040 FOR UNLAWFUL POSSESSION OF FIREARM REVERSED BECAUSE (1) TRIAL COURT IN ORIGINAL CASE DID NOT ADVISE OF FIREARMS-RIGHTS-LOSS CONSEQUENCE OF CONVICTION, AND (2) DEFENDANT WAS NOT SHOWN TO OTHERWISE HAVE LEARNED OF SUCH CONSEQUENCES – In State v. Breitung, ___Wn.2d ___, 2011 WL 6824965 (Dec. 29, 2011), the Washington Supreme Court rules unanimously that, even though there was no evidence that the defendant was misled by the municipal court in 1997 as to the loss of his right to possess firearms following his 1997 domestic violence assault conviction, the facts – (1) that he was not informed by the court at that time of his loss of firearms rights as required by RCW 9.41.047(1), and (2) that he did not otherwise learn of such loss of rights – precluded his subsequent prosecution for second degree unlawful possession of a firearm under RCW 9.41.040.

Past Washington appellate court decisions have held, in light of the facts of those cases and in recognition of the rule of law that knowledge of wrongfulness if not an element of unlawful possession of a firearm under RCW 9.41.040, a defendant charged under that statute must show that he or she was affirmatively misled in some way by the predicate-conviction court (i.e., the trial court in the original case). An example of such misleading conduct was found by the

Washington Supreme Court in State v. Minor, 162 Wn.2d 796 (2007) **April 08 LED:16** based on the predicate-conviction court's failure to check a box on a form that was given to the defendant, and that, if the box had been checked, would have informed the defendant of his loss of firearm rights due to his original conviction.

There was no such evidence of misleading conduct by the predicate-conviction court in Breitung, but the Supreme Court concludes that the notice requirement of RCW 9.41.047(1) can be given effect only by precluding prosecution under RCW 9.41.040 whenever the defendant can show in his affirmative defense that: (1) the predicate-conviction court did not give the required notice, and (2) the defendant did not subsequently gain knowledge of the firearms possession prohibition.

Result: Affirmance of Court of Appeals reversal of Pierce County Superior Court conviction of Robert Charles Breitung on one count of second degree unlawful possession of a firearm (the Court of Appeals decision was reported in the **October 2010 LED** at page 25); also, reversal of Court of Appeals reversal of Pierce County Superior Court conviction of Breitung on two counts of second degree assault (on grounds not addressed in this LED entry).

LED EDITORIAL NOTE: If the State had proven that defendant Breitung had been clearly informed of the firearms-possession-ban by a law enforcement officer (or other government agent or officer) at some time between his 1997 conviction and law enforcement's discovery that he was in possession of a firearm, then his affirmative defense against the charge under RCW 9.41.040 should have failed. See, e.g., State v. Locati, 111 Wn. App 222 (Div. III, 2002) Aug 02 LED:20.

(2) COUNTY NOISE ORDINANCE, PROHIBITING HONKING OF A VEHICLE HORN EXCEPT FOR A PUBLIC SAFETY PURPOSE OR ORIGINATING FROM AN OFFICIALLY SANCTIONED PARADE OR OTHER PUBLIC EVENT, WAS IMPERMISSIBLY OVERBROAD, IN VIOLATION OF FREE SPEECH PROTECTIONS OF FEDERAL AND STATE CONSTITUTIONS – In State v. Immelt, ___ Wn.2d ___, 2011 WL 5084574 (Oct. 27, 2011), a 6-3 majority of the Washington State Supreme Court invalidates a county noise ordinance that prohibited honking of a vehicle horn except for public safety purposes or during an officially sanctioned parade or other event. The majority justices are Stephens, Sanders, Alexander, Chambers, Owens, and Fairhurst (note that Justice Sanders is sitting in a temporary capacity on cases on which he heard oral argument before Justice Wiggins was sworn into office on the Supreme Court on January 7, 2011).

The ordinance bans "sound that is a public disturbance noise" and defines "public disturbance noise" to include, among other things, "[t]he sounding of vehicle horns for purposes other than public safety." A violation of the ordinance is an infraction unless two violations of the ordinance are committed within a 24–hour period, in which case the second violation is criminalized as a misdemeanor.

The defendant repeatedly honked a car horn in front of her neighbor's home for approximately 5 to 10 minutes at 6:00 a.m.. She awakened several neighbors. The police were called and while they were investigating, the defendant drove past and made three long car horn blasts. The defendant was stopped and arrested.

The Supreme Court declines to follow other jurisdictions, e.g., New York, that have questioned or rejected the expressive value of horn honking, instead concluding that while "it does not involve spoken words, horn honking may be clearly a form of expressive conduct." The Court holds that the ordinance is impermissibly overbroad in violation of the state and federal constitutional prohibitions on restricting free speech.

Dissent: Chief Justice Madsen (joined by Justice Charles Johnson) and Justice Jim Johnson each file separate dissents.

Result: Reversal of Court of Appeals' decision that affirmed a Snohomish County Superior Court order that upheld the District Court conviction of Helen D. Immelt for violation of noise ordinance.

(3) EVIDENCE HELD SUFFICIENT TO SHOW THAT DEFENDANT INFLICTED SUBSTANTIAL BODILY HARM AND HENCE SECOND DEGREE ASSAULT UNDER RCW 9A.36.021(1)(a) AND RCW 9A.04.110(4)(b), BUT SUPREME COURT DISAPPROVES OF THE COURT OF APPEALS' DEFINITION OF "SUBSTANTIAL BODILY HARM" – In State v. McKague, 172 Wn.2d 802 (Oct. 6, 2011), the State Supreme Court affirms the Court of Appeals' holding that substantial evidence supported a second degree assault conviction, but it disapproves of the definition of "substantial bodily harm" applied by the Court of Appeals. (The Court of Appeals decision is reported at State v. McKague, 159 Wn. App. 489 (Div. II, January 19, 2011) **Sept 11 LED:15**.) The Supreme Court explains as follows:

> The Court of Appeals affirmed the convictions in a split decision. Judge Armstrong dissented on the issue of the sufficiency of the evidence of "substantial bodily harm." He specifically disagreed with the lead opinion's citation to a dictionary definition of the term "substantial" as including "something having substance or actual existence." State v. McKague, 159 Wn. App. 489, 520–21 (2011) (Armstrong, J., dissenting in part and concurring in part). Judge Armstrong opined that under this definition, any cognizable injury would necessarily be "substantial." He would have held that the term "substantial" requires the harm to be considerable and that the State's evidence was insufficient to meet that standard.
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> We agree with Judge Armstrong that the majority applied an erroneous definition of "substantial," but we nonetheless affirm McKague's conviction because the evidence was sufficient to show that Chang's injuries were "substantial" under a proper definition.
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> In a challenge to the sufficiency of the evidence the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Second degree assault, as charged here, is committed when the defendant intentionally assaults another and thereby recklessly causes "substantial bodily harm." RCW 9A.36.021(1)(a). "Substantial bodily harm" means a bodily injury involving a temporary but substantial disfigurement, a temporary but substantial loss or impairment of the function of any body part or organ, or a fracture of any body part. RCW 9A.04.110(4)(b). "Substantial" is not defined in the statute.
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> As noted, in its lead opinion the Court of Appeals applied the dictionary definition of "'substantial'" as "'something having substance or actual existence,' 'something having good substance or actual value,' 'something of moment,' and 'an important or material matter, thing, or part.'" McKague, 159 Wn. App. at 503 n. 7 (quoting Webster's Third New International Dictionary 2280 (2002)). But the portion of the definition stating that "substantial" means "something having good substance or actual existence" would make practically any demonstrable impairment or disfigurement a "substantial" injury regardless of how minor. Thus, the definition would apparently render the term "substantial" meaningless, a result a court must avoid. We hold instead that the term "substantial," as used in RCW 9A.36 .021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. While we do not limit the meaning of "substantial" to any particular dictionary definition, we approve

> of the definition cited by the dissent below: "considerable in amount, value, or worth." Webster's, supra, at 2280.
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> Applying the "considerable in amount, value, or worth" definition, we hold that the evidence here was sufficient to meet that standard. As discussed, McKague punched Chang in the head several times and pushed him to the ground, causing his head to strike the pavement. Chang's resulting facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement. See State v. Hovig, 149 Wn. App. 1, 5, review denied, 166 Wn.2d 1020 (2009) **May 09 LED:21** (red and violet teeth marks lasting up to two weeks constituted substantial bodily injury); State v. Ashcraft, 71 Wn. App. 444, 455 (1993) (bruises from being hit by shoe were temporary but substantial disfigurement). And Chang's concussion, which caused him such dizziness that he was unable to stand for a time, was sufficient to allow the jury to find that he had suffered a temporary but substantial impairment of a body part or an organ's function. We therefore affirm the Court of Appeals holding that the State's evidence was sufficient on the "substantial bodily harm" element of second degree assault.

[Footnotes and some citations omitted]

Result: Affirmance of Court of Appeals decision affirming Thurston County Superior Court conviction of Jay Early McKague for second degree assault and third degree theft, and affirmance of his sentence to life without parole as a persistent offender (this was his "third strike").

(4) PUBLIC RECORDS ACT CASE: DISCOVERY IN PRA CASES IS THE SAME AS IN OTHER CIVIL CASES; COURT ADOPTS FREEDOM OF INFORMATION ACT STANDARDS OF REASONABLENESS REGARDING ADEQUACY OF SEARCH; PARTY MAY BE ENTITLED TO COSTS AND FEES BASED ON WRONGFUL FAILURE TO DISCOSE EVEN IF REQUESTOR ALREADY POSSESSES RECORDS PRIOR TO LAWSUIT – OVERRULING DAINES V. SPOKANE COUNTY – In Neighborhood Alliance v. Spokane, 172 Wn.2d 702 (Sept. 29, 2011), the Washington State Supreme Court holds that "discovery in a PRA case is the same as in any other civil action."

The Supreme Court also adopts the Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search, explaining:

> Under this approach, the focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.
>
> Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested. Indeed, "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." This is not to say, of course, that an agency must search every possible place a record may

> conceivably be stored, but only those places where it is reasonably likely to be found.
>
> As the concurrence discusses, many FOIA cases are resolved on motions for summary judgment concerned with the adequacy of the search. In such situations, the agency bears the burden, beyond material doubt, of showing its search was adequate. To do so, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched. An agency may wish to include such information in its initial response to the requester, since doing so may avoid litigation.

The Supreme Court holds that because plaintiff is already entitled to a remedy "the failure to perform an adequate search is at least an aggravating factor, to be considered in setting the daily-penalty amount." It puts "off for another day the question whether the PRA supports a freestanding daily penalty when an agency conducts an inadequate search but no responsive documents are subsequently produced." But the Court goes on to state that "A prevailing party in such an instance is at least entitled to costs and reasonable attorney fees."

Finally, the Supreme Court holds that "a party may be entitled to recover costs and fees if the agency wrongfully fails to disclose documents in response to a request" even if the requestor possesses the documents at the time the lawsuit is filed. The Court explains:

> As discussed above, a party prevailing against an agency in a PRA action may be awarded costs and attorney fees, and may be awarded daily penalties at the discretion of the trial court. But contrary to the Court of Appeals' holding, no causation requirement exists to be a prevailing party in a PRA action. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103 (2005). In Spokane Research, we explained,
>
> > Rather, the "prevailing" relates to the legal question of whether the records should have been disclosed on request. Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit.
>
> We have additionally held that once a trial court finds an agency violated the PRA, daily penalties are mandatory, but the amount is subject to the trial court's discretion. Yousoufian v. Office of King County Exec., 152 Wn.2d 421, 433 (2004). A violation therefore results in a remedy, with no discussion of what causes the final disclosure, such as when suit was filed.
>
> The Court of Appeals reached the opposite result by relying on its previous decision in Daines v. Spokane County, 111 Wn. App. 342 (2002). The Daines court held that a party could not be "prevailing" and entitled to a remedy under the PRA when it had the record in its possession and knew of that fact at the time of filing, because the action was not necessary to compel disclosure. . . . However, we expressly rejected this approach in Spokane Research, reasoning that the harm occurs when the record is wrongfully withheld, which usually occurs at the time of response or disclosure. Contrary to the Daines court's holding, the remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves

> only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether. To the extent that Daines held otherwise, it is overruled.
>
> As will generally be true in many cases, a party does not know with certainty that a document in its possession is the public record it seeks until the agency responds. As we have previously recognized, the PRA requires a response to a request and disclosure of all responsive public records held by the agency. The fact that the requesting party possesses the documents does not relieve an agency of its statutory duties, nor diminish the statutory remedies allowed if the agency fails to fulfill those duties. . . .

[Footnotes and some citations omitted]

Concurrence: Chief Justice Madsen files a concurrence, joined by Justice Fairhurst.

Result: Reverses in part and affirms in part the decision of the Court of Appeals that affirmed in part and reversed in part the judgment of the Lincoln County Superior Court, which granted summary judgment in favor of Spokane County. The Supreme Court affirms the part of the Court of Appeals decision adopting FOIA standards relating to search for records and reverses those parts regarding discovery and holding that plaintiffs could not be prevailing party where they already possessed the records.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) CORPORATION QUALIFIES AS A "PERSON" FOR PURPOSES OF IDENTITY THEFT STATUTES – In State v. Evans, ___ Wn. App. ___, 265 P.3d 179 (Div. II, Nov. 1, 2011) the Court of Appeals holds that a corporation is a person for purposes of the identity theft statute.

The defendant forged a check belonging to his employer, Allube Incorporated. He was convicted of identity theft in the second degree.

The identity theft statute, RCW 9.35.020(1), provides that: "(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." The definitional statute for identity theft, RCW 9.35.005(4), provides that "person" has the same definition as RCW 9A.04.110(17) which provides that "person," includes "any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." (Emphasis added.)

The Court of Appeals holds that a corporation qualifies as a person for purposes of the identity theft statutes.

Result: Affirmance of Grays Harbor County Superior Court conviction of Derrick Robert Evans of second degree identity theft.

(2) SEATTLE PUBLIC SAFETY CIVIL SERVICE COMMISSION'S REDUCTION OF DISCIPLINE OF UNTRUTHFUL OFFICER FROM TERMINATION TO THIRTY DAYS SUSPENSION IS REVERSED BECAUSE RECORD DOES NOT SUPPORT COMMISSION'S RATIONALE THAT POLICE DEPARTMENT WAS INCONSISTENT IN DISCIPLINE; COMMISSION ORDERED TO RECONSIDER ITS DECISION – In Werner v. Seattle, 163 Wn. App. 899 (Div. I, Sept. 19, 2011) the Court of Appeals summarizes its decision as follows: "The Seattle Police Department fired Officer Eric Werner for lying in an internal investigation. The Seattle Public Safety Civil Service Commission reduced the discipline to a 30 day suspension. The commission found that the police department was not applying its rules evenhandedly.

Because this finding is not supported by substantial evidence, the commission is ordered to reconsider its decision."

Result: Affirmance of King County Superior Court order reversing Seattle public safety civil service commission decision reducing discipline from termination to 30-day suspension and remanding to commission for reconsideration.

(3) WHERE EVIDENCE IN HOMICIDE INVESTIGATION WAS DESTROYED AFTER CASE WENT COLD FOR THIRTY YEARS, COURT HOLDS THERE IS NO DUE PROCESS VIOLATION BECAUSE EVIDENCE WAS NOT MATERIAL EXCULPATORY AND THERE WAS NO BAD FAITH ON THE PART OF POLICE IN DESTROYING THE EVIDENCE – In State v. Groth, 163 Wn. App. 548 (Div. I, Sept. 12, 2011) the Court of Appeals rejects defendant's due process challenge based on the destruction of much of the evidence originally collected in the investigation of the murder he was ultimately charged with.

The defendant was a suspect in a 1975 homicide. The case went cold and much of the evidence was subsequently destroyed. The investigation was re-opened in 2006 and the defendant was charged with murder. He argued that the destruction of evidence violated due process. In key part, the Court's analysis rejecting this argument is as follows:

> Under Arizona v. Youngblood, 488 U.S. 51 (1988) and State v. Wittenbarger, 124 Wn.2d 467 (1994) **Nov 94 LED:03**, whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement. If the State fails to preserve "material exculpatory evidence," criminal charges must be dismissed. But under Youngblood and Wittenbarger, this is a very narrow category:
>
> In order to be considered "material exculpatory evidence", the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.
>
> On the other hand, the State's failure to preserve evidence that is merely "potentially useful" does not violate due process unless the defendant can show bad faith on the part of police. "Potentially useful" evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."
>
> The physical evidence collected in this case was considerable. In addition to the murder weapon, investigators collected plaster casts of footwear impressions from the [victim's] backyard; blood samples found at the scene; samples of the victim's clothing, blood, hair and fingernail scrapings from the autopsy; [the victim's boyfriend's] boots and clothing from the night of the murder; laboratory analyses, if any, of the physical evidence; and the crime laboratory analyst's notes, reports, and conclusions concerning forensic testing.
>
> Groth contends this was material, exculpatory evidence and the charges against him therefore should have been dismissed. He relies on the premise that since he was not arrested in 1975, the evidence "probably exonerated him." The record does not support this speculation. Although Groth was never arrested, neither was he ruled out as a suspect. Further, none of the evidence has apparent exculpatory value without testing or analysis, and it is not clear that any testing or analysis was completed before the evidence was destroyed. The court properly ruled the evidence was only "potentially material." Under Youngblood and Wittenbarger. there was no due process violation unless Groth can show the evidence was destroyed in bad faith.

> "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Thus, a defendant must show the destruction "was improperly motivated." Groth makes no such showing.

[Citations and footnotes omitted]

Result: Affirmance of King County Superior Court conviction of James Eric Groth for second degree murder.

(4) PUBLIC RECORDS ACT CASE: THERE IS NO REQUIREMENT THAT RECORDS BE PRODUCED ELECTRONICALLY; HOWEVER, ANY RESPONSE NOTIFYING THE REQUESTOR THAT REDATIONS WILL BE MADE, EVEN TO SAY THAT THE RECORDS CANNOT BE PRODUCED IN THE FORMAT REQUESTED, TRIGGERS THE PRA REDACTION LOG REQUIREMENT – In Mitchell v. Department of Corrections, ___ Wn. App. ___, 260 P.3d 249 (Div. II, Sept. 7, 2011; amended Dec. 6, 2011) the Court of Appeals holds that any response notifying the requestor that redactions will be made to records, even to say that the records cannot be produced in the format requested, triggers the redaction log requirement; however, the Court holds that records do not have to be produced electronically.

Facts and Procedural history: (Excerpted from the Court of Appeals opinion)

> On May 14, 2007, Mitchell, a prisoner in [Department of Corrections] DOC, submitted a written request to the DOC asking for all data pertaining to him from two electronic databases. On June 18, the DOC responded by letter that Mitchell would not be permitted to personally inspect the requested records, but that he could appoint a personal representative to do so. On July 1, Mitchell responded with a request that the DOC disclose the records electronically by e-mail.
>
> On July 16, the DOC responded by letter that the requested records would "have redactions that are mandatory exempt from disclosure, therefore would not meet the criteria to be sent electronically." [***Court's Footnote**: The DOC records that Mitchell requested, which the DOC claimed include information that must be redacted, were stored in a computer database. To disclose these records electronically the DOC would first have to print the electronically stored records, then redact the printed version, and finally scan the redacted hard copies of the records back into electronic format.*] The DOC informed Mitchell that he could either pay for copies that would be sent to him, or he could have a third party inspect the records on his behalf. When Mitchell did not respond within 30 days, the DOC administratively closed his request, subject to being reopened at any time upon notification from Mitchell.
>
> On November 13, 2008, Mitchell filed a motion for an order to show cause in Thurston County Superior Court, arguing that the DOC violated the [Public Records Act] PRA by denying access to records without providing an exemption statement, and arguing that the DOC was required to disclose the records electronically. The DOC responded that it had not denied Mitchell's request but, rather, had properly offered him the option to arrange for third-party inspection or to pay for copies. The trial court found that the DOC had not refused to disclose any information and that it was not required to disclose records electronically, denying Mitchell's motion for an order to show cause.

[Some footnotes omitted]

Exemption Statement Analysis

The Court of Appeals concludes that any response notifying the requestor that redactions will be made to records, even to say that the records cannot be produced in the format requested, triggers the exemption log requirement:

> An agency "produces" a document by making it available for inspection or copying. Sanders v. State, 169 Wn.2d 827, 836 (2010). The DOC produced the requested records in its July 16 response, writing that Mitchell could either pay for copies of the documents or arrange for a third party to inspect the documents on his behalf. But the DOC also refused Mitchell access to part of the records in this response, stating that redactions of exempted information would be necessary; the DOC did not, however, recite the statutory provisions under which it claimed such exemption.
>
> The DOC first asserts that it did not deny Mitchell access to the records and thus the requirement of an exemption statement was not triggered. This argument is contrary to the plain language of RCW 42.56.210(3). Under this subsection, an exemption statement must be included in any response "refusing, in whole or in part, inspection of any public record." RCW 42.56.210(3). Under the plain meaning of the word, the July 16 letter was a "response." The DOC offers no argument to the contrary. Because the July 16 letter was a response, and because it refused access to part of the requested records, it triggered the exemption statement requirement under RCW 42.56.210(3).
>
> The DOC further asserts that an exemption statement is not required until the records are physically produced, and thus that its July 16 response did not trigger the requirement of an exemption statement. This argument is also contrary to the plain language of RCW 42.56.210(3). It is impossible to read this subsection as applying only to the physical production of documents. Under the unambiguous wording of RCW 42.56.210(3), responses refusing access in whole or in part "shall" include an exemption statement. This language plainly requires agencies to include an exemption statement with any response that refuses access to public records. It does not mandate that exemption statements be included only with physically produced documents. We hold, therefore, that the plain language of RCW 42.56.210(3) required DOC to provide an exemption statement with its July 16 response notifying Mitchell that some of the information he had requested was exempt and needed to be redacted.

Electronic Production Analysis

The Court of Appeals holds that nothing in the PRA obligates an agency to produce records electronically. The Court notes that the Attorney General Model Rules suggest that agencies should provide records in electronic format when requested in that format, WAC 44-14-05001, but that agencies need not do so if it is not technically feasible. WAC 44-14-05001. Analogizing the case to Mechling v. City of Monroe, 152 Wn. App. 830, 849 (2009) (no statutory duty to produce records in electronic format but duty to provide fullest assistance; court may require electronic disclosure if it is reasonable and feasible to do so), the Court concludes:

> The requested records are stored in a computer database and ostensibly include information that must be redacted. Requiring DOC to disclose these records electronically would force the agency to print the records, redact them, and then scan them back into electronic format. Following Mechling, we hold that such duplication of effort is outside of the agency's obligation of "fullest assistance" under the PRA. We affirm the trial court's ruling that DOC is not required to disclose the requested records electronically.

Result: Affirmance in part, reversal in part of Thurston County Superior Court entry of judgment in favor of DOC.

LED EDITORIAL COMMENT: RCW 42.56.210(3) requires that "Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." In Mitchell the Court of Appeals concludes that a response merely informing the requestor that the records cannot be provided in the manner requested, because redactions must be made, but that they can be provided in another format triggers this exemption statement requirement (even though there is no actual production or denial of records). Agency public records officers should consult with their legal advisors to determine whether they need to alter their procedures and begin producing redaction logs in such circumstances.

(5) REQUIRED "SEXUAL INTERCOURSE" ELEMENT OF FIRST DEGREE CHILD RAPE NOT MET WHERE DEFENDANT PENETRATES BUTTOCKS BUT NOT ANUS – In State v. A.M. 163 Wn. App. 414 (Div. I, Sept. 6, 2011) the Court of Appeals holds that defendant's penetration of buttocks only does not satisfy the penetration requirement of the sexual intercourse element of child rape.

The Court explains that rape of the child in the first degree requires sexual intercourse, RCW 9A.44.073(a), and sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight." RCW 9A.44.010(1)(a). The Court then considers whether penetration of the buttocks is sexual intercourse:

> The issue is whether the "ordinary meaning" of the term "sexual intercourse" encompasses penetration of the buttocks. To determine the ordinary meaning of a term, we may consult a dictionary. The State cites a variety of dictionary definitions tending to show that the term has evolved over the years so that it is no longer limited to heterosexual intercourse and that it includes anal intercourse even without penetration. None of the definitions examined, however, say that sexual intercourse occurs upon insertion of the penis in between the buttocks.
>
> The State contends the buttocks are part of the anus, analogizing to cases in which we have held that the labia minora are part of the vagina. The State argues that because the buttocks protect the anus from penetration, they are like the labia, which protect the vagina from penetration. This may be true to some extent, but it stretches credulity to maintain that the buttocks and anus are components of the same organ or that one is part of the other. A buttock is "either of the two rounded prominences separated by a median cleft that form the lower part of the back in man and consist largely of the gluteus muscles." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 305 (2002). In contrast, the anus is "the posterior opening of the alimentary canal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (2002). The two parts, albeit related, are distinct. And the legislature has not indicated that penetration of the buttocks alone is sufficient to be sexual intercourse.
>
> We hold that penetration of the buttocks, but not the anus, does not meet the ordinary meaning of "sexual intercourse." Accordingly, we reverse the conviction for rape of a child in the first degree.

[Citation and footnotes omitted]

Result: Reversal of Cowlitz County Superior Court adjudication of guilty of A.M. for first degree child rape.

(6) OFFICER LAWFULLY OBSERVED EVIDENCE IN SIDE PANEL OF CAR DOOR UNDER "OPEN VIEW" DOCTRINE, HOWEVER, SEIZURE OF THAT EVIDENCE WITHOUT A WARRANT WAS UNLAWFUL – In State v. Jones, 163 Wn. App. 354 (Div. II, August 30, 2011), in a split opinion the Court of Appeals holds 2-1 that although an officer lawfully observed evidence in the side panel of the defendant's car door, the officer could not seize the evidence without a warrant.

A police officer stopped and cited the defendant for failing to wear a seat belt. When the defendant stopped his vehicle, he opened the driver's side door. The Jones' majority opinion describes as follows what happened next:

> When [the officer] first approached Jones's vehicle, he noticed a compartment in the driver's side door containing white pills and two unlabeled pill bottles. The pills had spilled out of one of the bottles, and [the officer] noted an imprint of the number 512 on one of the white pills. [The officer] recognized the pill as oxycodone.
>
> [The officer] asked Jones who owned the pills, and Jones responded that they belonged to his wife. [The officer] asked Jones if the pill bottle was labeled, and Jones responded that it was not. [The officer] asked Jones what the pills were, and Jones told [the officer] that the pills were Percocet. [*Court's Footnote: Percocet contains oxycodone and acetaminophen. Physician's Desk Reference 1125 (62nd ed. 2008).*] [The officer] advised Jones he was under arrest, placed him in handcuffs, and read him his Miranda warnings. . . .
>
> [The officer] then searched Jones [and found cocaine]. . . .
>
> After placing Jones in the back of his patrol car, [the officer] searched Jones's vehicle. [The officer] found two pill bottles, which contained pills, in the driver's side door console. The large pill bottle contained what appeared to be oxycodone and methadone pills. The smaller bottle contained what appeared to be methadone pills. Forensics later confirmed that the substances found in Jones's vehicle and on his person were cocaine, oxycodone, and methadone.

The defendant argued that the search of his vehicle incident to arrest was unlawful. The State argued that there was no search or unlawful seizure of evidence because the pills were in "open view." "The open view doctrine applies when an officer observes a piece of evidence from a nonconstitutionally protected area." State v. Gibson, 152 Wn. App. 945, 954 (2009) **Jan 10 LED:11**. **[LED EDITORIAL NOTE: The "plain view" doctrine applies where officers observe evidence from a constitutionally protected area where they have a right to be. It is well established in case law the officers may seize evidence that is in plain view.]**

However, the Court rejects the open view argument:

> The open view doctrine "does not[, however,] provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant." State v. Posenjak, 127 Wn. App. 41, 52–53 (2005) **Aug 05 LED:14**. In order to seize items in open view, the officer must have probable cause to believe the items were evidence of a crime and be faced with "'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence'" such that it is impracticable to obtain a warrant. Gibson, 152 Wn. App. at 956.
>
> When [the officer] approached Jones's vehicle, he noticed a compartment in the driver's side door containing white pills and two pill bottles. [The officer] noted an imprint of the number 512 on one of the white pills and recognized the pill to be

> oxycodone. Under the open view doctrine, [the officer's] observation of the pills and pill bottles, from the nonconstitutionally protected area outside of Jones's vehicle, was not a search implicating article I, section 7; however, the open view doctrine did not permit his warrantless entry into Jones's vehicle to seize the items.
>
> In Gibson, two officers stopped the defendant's car after he failed to signal a turn. One of the officers learned that the defendant had an outstanding arrest warrant, arrested the defendant, handcuffed him, and placed him in the back of his patrol car. The arresting officer then walked around the defendant's locked vehicle and noticed a bottle of "Drano," a bottle of "Drain Out," and a bag of ammonia sulfate. He recognized these items as chemicals commonly used to manufacture methamphetamine, reached through the window of the defendant's vehicle, unlocked the door, and entered to secure the items. The officer knew that moving these items could pose health risks to the officers, and he entered the defendant's vehicle to verify that the items were secure. Inside the vehicle, the officer found ammonium sulfate, drain cleaner, dry ice, toluene, coffee filters, a funnel, coffee filters with pseudoephedrine, a bag of pseudoephedrine, and a coffee grinder containing pseudoephedrine. After determining that the items were secure, he left the items in the vehicle, and another officer obtained a warrant to search and seize the evidence of methamphetamine manufacturing. On appeal, the defendant challenged the initial warrantless search of his vehicle.

The situation here parallels that in Gibson where, ". . . to justify the warrantless seizure, the deputies must have had probable cause to believe that the contents of Gibson's vehicle were evidence of a crime and must have been faced with 'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence' that made it impracticable to obtain a warrant." Gibson, 152 Wn. App. at 956. As in Gibson, "the determinative question is whether there were sufficient exigent circumstances to justify the seizure without a warrant." Here, unlike in Gibson, no such circumstances existed. At the time of the search, Jones had been arrested, handcuffed, searched, and secured in the patrol car. Another officer was at the scene, and Jones's vehicle was parked in a parking lot. There was nothing to prevent the officers from safely securing the scene and obtaining a warrant. thus the evidence seized from the car must be suppressed. [*Court's Footnote: See State v. Swetz, 160 Wn. App. 122, 134 (2011) (noting that the observation of an item in open view from a lawful vantage point is not a search, but the officer's right to seize the items, if they are in a constitutionally protected area, must be justified by a warrant or an exception to the warrant requirement), petition for review filed, No. 85717–2 (Wash. Mar. 11, 2011). But see State v. Louthan, 158 Wn. App. 732, 746 (2010) (noting that there was no illegal search or seizure when police searched Louthan's vehicle without a warrant and seized a bong in open view) petition for review filed, No. 85608–7 (Wash. Feb. 8, 2011); State v. Barnes, 158 Wn. App. 602, 613–14 (2010) (holding that the trial court erred in ordering suppression of relevant evidence of the crime of arrest that the defendant had in open view)*]. **[LED EDITORIAL NOTE: Louthan and Barnes were digested in the January 2011 LED, and Swetz was digested in the April 2011 LED.]**

Dissent: Judge Quinn-Brintnall dissents arguing that the defendant failed to preserve the argument for appeal.

Result: Reversal of Pierce County Superior Court conviction of Anthony Dewayne Jones for unlawful possession of oxycodone and unlawful possession of methadone; affirmance of conviction for unlawful possession of cocaine with intent to deliver within 1,000 feet of a school bus stop route [not discussed in this LED entry because this portion of the opinion was not published].

(7) PUBLIC RECORDS ACT CASE: AGENCY'S FAILURE TO RESPOND TO PUBLIC RECORDS REQUEST WITHIN 5 DAYS VIOLATES THE PRA; INADVERTENT LOSS OF E-MAIL PRIOR TO REQUEST DOES NOT VIOLATE PRA – In West v. Department of Natural Resources, 163 Wn. App. 235 (Div. II, August 23, 2011), in a split opinion, the Court of Appeals holds 2-1 that the Department of Natural Resources (DNR) violated the public records act (PRA) by failing to respond to the request within 5 business days (it responded within eleven days). The Court remands the case for consideration of an attorney fee and penalty award under RCW 42.56.550(4).

The Court also rejects the plaintiff's argument that the DNR unlawfully destroyed e-mails: "Despite this argument, there is simply no evidence in the record of any unlawful destruction of emails. Instead, the record shows that the DNR inadvertently lost [the] email almost one year before West made his request. Thus, the email did not exist at the time of West's request."

Dissent: Judge Hunt dissents from the majority's apparent conclusion that the plaintiff is presumptively entitled to penalties and fees based on DNR's violation of the five day requirement. Judge Hunt argues that RCW 42.56.550(4) only entitles a requestor to penalties where the requestor was denied the right to inspect or copy a public record, and costs and attorneys fees where the requestor prevails in an action seeking the right to inspect or copy a public record, or the right to receive a response to a public records request within a reasonable amount of time.

Result: Affirmance in part and reversal in part of Thurston County Superior Court order dismissing Arthur West's public records act lawsuit.

Status: Mr. West has filed a petition for review.

LED EDITORIAL COMMENT: We think that Judge Hunt is correct in her interpretation of RCW 42.56.550(4).

(8) COMMERCIAL DRIVER'S LICENSE (CDL) LANGUAGE IN IMPLIED CONSENT WARNINGS, GIVEN TO DRIVERS WHO HOLD A CDL AND ARE STOPPED WHILE DRIVING THEIR PERSONAL VEHICLES, IS NOT MISLEADING OR INNACURATE AND DID NOT RESULT IN ACTUAL PREJUDICE TO CDL DRIVER – In Lynch v. Department of Licensing, 163 Wn. App. 697 (Div. II, August 14, 2011; publication ordered Sept. 27, 2011) the Court of Appeals holds that implied consent warnings given to individuals who hold commercial driver's licenses (CDL) and are stopped DUI while driving their personal vehicles, were not inaccurate or misleading and did not prejudice the driver.

RCW 46.25.090 governs disqualification of commercial driver's licenses (CDL). Subsection (1) relates to driving while under the influence and provides in part:

> (1) A person is disqualified from driving a commercial motor vehicle for a period of not less than one year if a report has been received by the department pursuant to RCW 46.20.308 or 46.25.120, or if the person has been convicted of a first violation, within this or any other jurisdiction, of:
>
> (a) Driving a motor vehicle under the influence of alcohol or any drug;
>
> (b) Driving a commercial motor vehicle while the alcohol concentration in the person's system is 0.04 or more, or driving a noncommercial motor vehicle while the alcohol concentration in the person's system is 0.08 or more, or is 0.02 or more if the person is under age twenty-one, as determined by any testing methods approved by law in this state or any other state or jurisdiction;
>
> . . .
>
> (e) Refusing to submit to a test or tests to determine the driver's alcohol concentration or the presence of any drug while driving a motor vehicle;

. . .

The implied consent warnings provide the following with regard to CDLs:

> **For those not driving a commercial motor vehicle at the time of arrest:** If your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

Result: Affirmance of Department of Licensing order suspending Leesa Marie Lynch's driver's license and disqualifying her CDL (reversing Pierce County Superior Court order which had reversed the DOL order).

(9) COURT UPHOLDS WARRANTLESS SEARCH OF PROBATIONER'S ROOM, INCLUDING MEMORY CARD, UNDER RELAXED RULE FOR PROBATIONER SEARCHES – In State v. Parris, 163 Wn. App. 110 (Div. II, August 9, 2011), the Court of Appeals upholds a CCO's search of a probationer's residence, including a memory card, based on reasonable cause to believe he had violated the terms of his probation. The Court's analysis is as follows:

> Although in some circumstances article 1, section 7 provides broader protections than its federal counterpart, Washington law recognizes that probationers and parolees have a diminished right of privacy which, permits a warrantless search, based on probable cause. Parolees and probationers have diminished privacy rights because they are persons whom a court has sentenced to confinement but who are simply serving their time outside the prison walls; therefore, the State may supervise and scrutinize a probationer or parolee closely. Nevertheless, this diminished expectation of privacy is constitutionally permissible only to the extent "necessitated by the legitimate demands of the operation of the parole process."
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> Convicted sex offenders in Washington also have a reduced expectation of privacy because of the "public's interest in public safety" and in the effective operation of government. Parris falls under both the sex offender and probationer exceptions to the otherwise constitutionally guaranteed privacy rights to be free from unreasonable searches and seizures.
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> RCW 9.94A.631 authorizes a warrant exception for a CCO to search a probationer's residence and "other personal property" when the CCO has reasonable cause to believe probationer has violated release. A warrantless search of parolee or probationer is reasonable if an officer has well-founded suspicion that a violation has occurred. Analogous to the requirements of a Terry stop, reasonable suspicion requires specific and articulable facts and rational inferences. "Articulable suspicion" is defined as a substantial possibility that criminal conduct has occurred or is about to occur.
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> . . .
>
> . . . Parris's community custody conditions included prohibitions on contact with minors, possession of sexually explicit materials, and possession or use of alcohol, illegal drugs, or drug paraphernalia. [The CCO's] search of Parris's room and possessions was based on her knowledge that Parris had already violated several of his conditions, including drug use, contact with a minor, and curfew violation. And, based on Parris's mother's report, [the CCO] had reason to suspect Parris had violated additional community custody conditions: Parris's mother had told [the CCO] that she (his mother) was concerned about Parris's drug use, that he might have obtained a firearm, and that she feared he was "out of control." Thus, in addition to searching for evidence of drug use, pornography, and contact with a minor female, [the CCO] was concerned about whether Parris might be storing an illegal firearm in his room and she believed she might find

evidence of such in a photograph, video, or DVD. Under these facts, [the CCO] Nelson had a well-founded and reasonable suspicion that the memory cards might contain evidence of additional violations, such as possession of a firearm; therefore, the requirements of community custody necessitated the search both for Parris's safety and for the safety of others.

Parris also argues that a memory card is equivalent to a closed container for which the owner possesses a reasonable expectation of privacy such that, although he had diminished privacy expectations as a probationer, the search of storage devices requires a "heightened search requirement," which [the CCO] could not meet without a warrant specifically authorizing a search of the memory cards' contents. Washington case law does not support this argument; instead, Parris cites federal case law addressing warrantless searches of individuals who are not on probationer/parolee status. . . .

. . . At the outset we note that Washington case law does not provide a clear answer as to whether the law affords portable electronic storage drives the same reasonable expectations of privacy as closed containers. [*Court's Footnote: We note the following cases from other jurisdictions, which we do not find instructive here because none of the computer data owners in these cases were on probation, parole, or community custody like Parris was here. None of these cases involve the corresponding diminished expectation of privacy to which persons on community custody in the State of Washington submit as a condition of being allowed to serve sentencing terms outside prison confinement. Thus, we note, but do not follow, the trend in other states and federal circuit courts to analogize and to treat electronic storage media as closed containers for search and seizure purposes. See U.S. v. Barth, 26 F.Supp.2d 929 (W.D. Tex. 1998)(finding that the owner of a computer manifested a reasonable expectation of privacy in the contents of data files by storing them on a computer hard drive); U.S. v. Chan, 830 F. Supp. 531 (N.D. Cal. 1993)(analogizing data in a pager to contents of a closed container); but see State v. Smith, 124 Ohio St.3d 163 (2009), cert. denied, 131 S. Ct. (2010) (arguing that cell phones were not closed containers because they did not store physical objects)*].

Accordingly, we begin with the Ninth Circuit's [U.S. v. Conway, 122 F.3d 841 (9th Cir. 1997)] analysis of Washington law under analogous facts, where a CCO searched a probationer's residence, including searching inside a shoebox located in the residence:

> Because [the CCO] had reasonable grounds to suspect that Conway had violated the terms of his release, the search was valid under Washington law. It does not matter whether the community corrections officers believed they would find evidence of Conway's address or contraband when they opened the shoeboxes. Washington law does not require that the search be necessary to confirm the suspicion of impermissible activity, or that it cease once the suspicion has been confirmed.

The State persuasively argues that once a CCO establishes reasonable cause, her search lawfully encompasses the offender's residence and personal property, including electronic storage media. Even adopting Parris's attempted analogy to a locked box, the Conway rationale would also apply to the content of Parris's memory cards seized as part of the personal possessions in his room: In our view, opening a shoebox to look inside at its contents is not qualitatively different from looking at data stored as "contents" on a memory card. Furthermore,

> neither the shoebox in Conway nor the memory cards here were "locked," [*Court's Footnote: We find nothing in the record indicating that the memory cards prompted Nelson to enter a password or required Nelson to circumvent some other data privacy protection.*] contrary to Parris's attempted analogy to a locked container.
>
> Although Parris may have had a subjective expectation of privacy in his personal effects, such an expectation was not objectively reasonable under the circumstances here. Given his status as both a sex offender and a probationer, whose effects and personal belongings are continuously subject to searches and seizures by law enforcement officials under RCW 9.94A.631(1), Parris's expectation of privacy in his personal effects fails the reasonableness prong of the Gocken test. State v. Gocken, 71 Wn. App. 267, 279 (1993), review denied, 123 Wn. 2d 1024 (1994) **March 94 LED:11**. RCW 9.94A.631(1) operates as a legislative determination that probationers do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings (including closed containers) for which society is willing to require a warrant. The statute itself diminishes the probationer's expectation of privacy. We hold, therefore, that Parris had no reasonable expectation of privacy in his portable memory cards and, thus, no separate warrant was required to search the memory cards' contents.

[Some citations and footnotes omitted]

Result: Affirmance of Kitsap County Superior Court conviction of Derek Lee Parris for possession of depictions of a minor engaged in sexually explicit conduct with crime being committed against a family or household member.

(10) EVIDENCE INSUFFICIENT TO SUPPORT KIDNAPPING IN THE FIRST DEGREE CONVICTION WHERE CHILD VICTIM VOLUNTARILY ENTERED DEFENDANTS' CAR AND APARTMENT, AND WHERE DEFENDANT TOOK THE VICTIM HOME WHEN REQUESTED – In State v. Dillon, 163 Wn. App. 101 (Div. II, August 9, 2011), the Court of Appeals holds that evidence is insufficient to support a kidnapping in the first degree conviction where the 13 year old male victim voluntarily met the defendant, got into his vehicle, went to his apartment where they had a sexual encounter, and the defendant brought the victim back home when asked to do so.

The Court of Appeals explains:

> A conviction for first degree kidnapping requires the State to prove beyond a reasonable doubt that Dillon intentionally abducted [the victim] with the intent to facilitate the commission of a felony. RCW 9A.40.020(1)(b). Under the statute, "abduct" means to "restrain a person by either secreting or holding him in a place where he is not likely to be found, or (b) using or threatening the use of deadly force." RCW 9A.40.010(2). And "restrain" means to "restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(1). Restraint is "without consent" if it is "accomplished by . . . any means including acquiescence of the victim," if he is a child less than 16 years old. RCW 9A.40.010(1).
>
> A child is abducted when restrained in areas or under circumstances where it is unlikely those persons directly affected by the victim's disappearance will find the child. But the definition of "restraint" involves both the restriction of the victim's movements and the lack of consent. Moreover, by the plain terms of the statutory definition, the restriction of movement must substantially interfere with the victim's liberty. "Substantial" means "a 'real' or 'material' interference with the

> liberty of another as contrasted with a petty annoyance, a slight inconvenience, or imaginary conflict." Thus, even if a child victim acquiesces to being taken or held by a defendant, there must be some evidence that the defendant in fact limited the victim's liberty.
>
> It is undisputed that the State proved the "without consent" element of the restraint by virtue of [the victim's] age. The issue is whether the evidence is sufficient to show that Dillon intentionally and substantially interfered with [the victim's] liberty. . . .
>
> . . .
>
> Here, there is no evidence to infer that [the victim's] liberty was compromised, or that Dillon intended to restrict [the victim's] movements. In contrast to [State v. Billups, 62 Wn. App. 122 (1991) **Feb 92 LED:15**] and [State v. Ong, 88 Wn. App. 572 (1997) **Feb 98 LED:15**] Dillon did not lure [the victim] into the car, or take him anyplace other than the intended destination. Even assuming that [the victim] was somewhat restrained when he got into Dillon's car, it is pure speculation that Dillon would have refused to let [the victim] get out of the car or return him to the rendezvous point anytime he wanted. The only other place where Dillon could have restricted [the victim's] liberty was at Dillon's apartment, but when [the victim] asked Dillon to take him home, Dillon complied. Because the State presented no evidence that Dillon intended to restrain [the victim], or that he actually interfered with [the victim's] liberty, it failed to prove first degree kidnapping. Accordingly, we remand to dismiss with prejudice. . . .

[Footnotes and some citations omitted]

Result: Reversal of Clark County Superior Court conviction of Steven M. Dillon for first degree kidnapping with sexual motivation.

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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.supremecourt.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 (CJTC) 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 edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor 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 CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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