Law Enforcement Digest

MARCH 2012

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UNITED STATES SUPREME COURT

WHERE OFFICERS DID NOT PURPOSELY STAGE WHAT INADVERTENTLY TURNED OUT TO BE "SHOWUP" IDENTIFICATION OF SUSPECT, CONSTITUTIONAL DUE PROCESS PROTECTIONS AGAINST SUGGESTIVE ID PROCEDURES WERE NOT TRIGGERED

Perry v. New Hampshire, ___ U.S. ___, 2012 WL 75048 (Jan. 11, 2012)

Facts and Proceedings below: (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> Around 3 a.m. on August 15, 2008, the Nashua, New Hampshire Police Department received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Blandon to describe the man, Blandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Barion Perry's arrest followed this identification.

> Before trial, Perry moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. The New Hampshire trial court denied the motion. To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry: The trial court must first decide whether the police used an unnecessarily suggestive identification procedure; if they did, the court must next consider whether that procedure so tainted the resulting identification as to render it unreliable and thus inadmissible. Perry's challenge, the court found, failed at step one, for Blandon's identification did not result from an unnecessarily suggestive procedure employed by the police. A jury subsequently convicted Perry of theft by unauthorized taking.
>
> On appeal, Perry argued that the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. Suggestive circumstances alone, Perry contended, suffice to require court evaluation of the reliability of an eyewitness identification before allowing it to be presented to the jury. The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction.

[Emphasis added]

ISSUE AND RULING: Does the U.S. Constitution's 14th Amendment Due Process Clause require a preliminary judicial inquiry into the reliability, i.e., suggestiveness, of an eyewitness identification when the identification was not purposely arranged by law enforcement? (ANSWER BY SUPREME COURT: No, rules an 8-1 majority, Justice Sotomayor dissenting)

Result: Affirmance of New Hampshire Supreme Court's affirmance of conviction of Perry.

ANALYSIS: (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> The Constitution protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," . . . does the Due Process Clause preclude its admission.
>
> Contending that the Due Process Clause is implicated here, Perry relies on a series of [U.S. Supreme Court] decisions involving police-arranged identification procedures. . . . These cases detail the approach appropriately used to determine whether due process requires suppression of an eyewitness identification tainted by police arrangement. First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Even when the police use such a procedure, however, suppression of the resulting identification is not the inevitable consequence. Instead, due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." "[R]eliability [of the eyewitness identification] is the linchpin" of that evaluation. Where the "indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed. Otherwise, the identification, assuming no other barrier to its admission, should be submitted to the jury.

> Perry argues that it was mere happenstance that all of the cases . . . involved improper police action. The rationale underlying this Court's decisions, Perry asserts, calls for a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. This Court disagrees.
>
> If "reliability is the linchpin" of admissibility under the Due Process Clause, Perry contends, it should not matter whether law enforcement was responsible for creating the suggestive circumstances that marred the identification. This argument removes [the] statement [in the leading precedent] from its mooring, attributing to it a meaning that a fair reading of the opinion does not bear. The due process check for reliability, [that precedent] made plain, comes into play only after the defendant establishes improper police conduct.
>
> Perry's contention also ignores a key premise of [the precedent he cites]: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place. This deterrence rationale is inapposite in cases, like Perry's, where there is no improper police conduct. . . .
>
> Perry's position would also open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. There is no reason why an identification made by an eyewitness with poor vision or one who harbors a grudge against the defendant, for example, should be regarded as inherently more reliable than Blandon's identification here. Even if this Court could, as Perry contends, distinguish "suggestive circumstances" from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations, for most eyewitness identifications involve some element of suggestion.
>
> In urging a broadly applicable rule, Perry maintains that eyewitness identifications are uniquely unreliable. The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. The Court's unwillingness to adopt such a rule rests, in large part, on its recognition that the jury, not the judge, traditionally determines the reliability of evidence. It also takes account of other safeguards built into the adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment rights to counsel and to confront and cross-examine the eyewitness, eyewitness-specific instructions warning juries to take care in appraising identification evidence, and state and federal rules of evidence permitting trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. Many of these safeguards were availed of by Perry's defense. Given the safeguards generally applicable in criminal trials, the introduction of Blandon's eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair.

[Citations omitted]

LED EDITORIAL NOTE: For more information on the law relating to identifications, see the following article on the Law Enforcement Digest page of the Criminal Justice Training Commission website: "Lineups, showups, and photographic spreads: legal and practical

aspects regarding identification procedures and testimony," by John R. Wasberg, Retired Senior Counsel, Office of the Washington State Attorney General.

CONCEDED BRADY VIOLATION HELD TO BE "MATERIAL" AND TO REQUIRE REVERSAL IN LOUISIANA MURDER CASE WHERE MURDER DEFENDANT WAS NOT PROVIDED WITH DETECTIVE'S NOTES IMPEACHING THE LONE EYEWITNESS

Smith v. Cain, ___ U.S. ___, 2012 WL 43512 (Jan. 10, 2012)

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

> The State of Louisiana charged petitioner Juan Smith with killing five people during an armed robbery. At Smith's trial a single witness, Larry Boatner, linked Smith to the crime. Boatner testified that he was socializing at a friend's house when Smith and two other gunmen entered the home, demanded money and drugs, and shortly thereafter began shooting, resulting in the death of five of Boatner's friends. In court Boatner identified Smith as the first gunman to come through the door. He claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith in the crime.
>
> The jury convicted Smith of five counts of first-degree murder [and his direct appeal failed].
>
> Smith then sought post-conviction relief in the state courts. As part of his effort, Smith obtained files from the police investigation of his case, including those of the lead investigator, Detective John Ronquillo. Ronquillo's notes contain statements by Boatner that conflict with his testimony identifying Smith as a perpetrator. The notes from the night of the murder state that Boatner "could not . . . supply a description of the perpetrators other then [sic] they were black males." [Detective] Ronquillo also made a handwritten account of a conversation he had with Boatner five days after the crime, in which Boatner said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." And [Detective] Ronquillo's typewritten report of that conversation states that Boatner told Ronquillo he "could not identify any of the perpetrators of the murder."
>
> Smith requested that his conviction be vacated, arguing, inter alia, that the prosecution's failure to disclose Ronquillo's notes violated this Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). The state trial court rejected Smith's Brady claim, and the Louisiana Court of Appeal and Louisiana Supreme Court denied review.

ISSUE AND RULING: The State concedes that the prosecutor violated Brady by not providing the defense with the detective's notes that are favorable to the defense. Are the notes "material" under the Brady standard that requires reversal of a conviction if there is a reasonable probability that had the withheld evidence been disclosed, the result of the proceeding would have been different? (ANSWER BY SUPREME COURT: Yes, rules an 8-1 majority, Justice Thomas dissenting)

Result: Reversal of convictions and remand to Louisiana courts (presumably for retrial).

ANALYSIS: (Excerpted from Supreme Court opinion)

> Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or

punishment. The State does not dispute that Boatner's statements in Ronquillo's notes were favorable to Smith and that those statements were not disclosed to him. The sole question before us is thus whether Boatner's statements were material to the determination of Smith's guilt. We have explained that "evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Coney v. Bell, 556 U.S. 449-470 (2009). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. See United States v. Agurs, 427 U.S. 97-113 and n. 21 (1976). That is not the case here. Boatner's testimony was the only evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict his testimony: Boatner told the jury that he had "[n]o doubt" that Smith was the gunman he stood "face to face" with on the night of the crime, but Ronquillo's notes show Boatner saying that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." Boatner's undisclosed statements were plainly material.

The State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed. The State also contends that Boatner's statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason that the jury could have disbelieved Boatner's undisclosed statements, but gives us no confidence that it would have done so.

. . . .

The judgment of the Orleans Parish Criminal District Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

LED EDITORIAL COMMENTS: We could not determine from the Supreme Court majority and dissenting opinions in the Smith v. Cain case whether the police had failed to provide the exculpatory notes to the prosecutor or instead the prosecutor had been given the investigator's notes and had failed to provide them to the defendant. It does not matter. If such exculpatory information known to the State is not provided to defense counsel, not only is it possible that, as here, a criminal conviction will later be set aside (see U.S. v. Jernigan, 492 F.3d 1050 (9th Cir. 2007) Oct. 07 LED:05; U.S. v. Price, 566 F.3d 900 (9th Cir. 2009) Aug. '09 LED:13)), but also, there is the possibility of civil liability under either (1) a common law action under State law for malicious prosecution (see Bender v. City of Seattle, 99 Wn.2d 582 (1983); Peterson v. Littlejohn, 56 Wn. App. 1 (Div. I, 1989)); or (2) a federal Civil Rights Act lawsuit (see Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) Feb. 09 LED:05).

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SUPREME COURT EXPLORES FOURTH AMENDMENT ISSUES ABOUT ATTACHING AND USING GPS DEVICES ON VEHICLES; WASHINGTON SUPREME COURT RESOLVED THESE QUESTIONS IN 2003 JACKSON DECISION ADOPTING A WARRANT REQUIREMENT UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION – In United States v. Jones, ___ U.S. ___, 2012 WL 171117 (Jan. 23, 2012), three separate opinions are authored addressing Fourth Amendment questions relating to law enforcement use of GPS tracking devices on vehicles. The only definitive Fourth Amendment ruling that comes out of the three opinions is that stated in the lead opinion by Justice Scalia. That lead opinion concludes that it constitutes a "search" to attach a GPS device to a vehicle that is owned or lawfully possessed by a suspect. The Scalia opinion is joined by four other justices. That opinion declines to address whether this "search" can be "reasonable" under some circumstances without a search warrant, because that theory was not timely argued by the government and was therefore waived by the government.

The other two opinions in Jones are concurring opinions are authored by Justice Sotomayor (she writes a lone concurrence, and she also signs on to Justice Scalia's lead opinion) and by Justice Alito (his concurrence is joined by three other justices). The latter two opinions address a number of Fourth Amendment GPS questions in addition to the narrow question addressed by Justice Scalia. These additional Fourth Amendment questions related to use of GPS devices to track vehicles in various circumstances must await future cases to be resolved.

Result: Affirmance of D.C. Circuit Court ruling that suppressed evidence and reversed the U.S. District Court drug-trafficking conspiracy conviction of Antoine Jones.

LED EDITORIAL COMMENT: Most media commentators have suggested that, in light of the views stated in the Sotomayor and Alito concurring opinions in Jones, a majority of the current U.S. Supreme Court justices see a general search warrant requirement in the Fourth Amendment for most law enforcement investigative uses of GPS tracking devices. That remains to be seen in future U.S. Supreme Court decisions. In any event, for law enforcement actions that are reviewed under the Washington constitution, the Fourth Amendment ruling and discussion in Jones is irrelevant. That is because the Washington Supreme Court ruled broadly (in our assessment) in State v. Jackson, 150 Wn.2d 251 (2003) Nov 03 LED:03, that under article I, section 7, a search warrant based on probable cause is required: (1) to install a GPS tracking device on a suspect's vehicle, and (2) to track suspects who are in vehicles.

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

POLYGRAPHER'S MATERNAL QUESTIONING STYLE, HER REFERENCES TO "THE COPS," AND HER OTHER TACTICS TO PUT SUSPECT AT EASE AND CONVINCE HIM TO TELL THE TRUTH DID NOT RENDER HIS CONFESSION INVOLUNTARY – In Ortiz v. Uribe, ___ F.3d ___, 2011 WL 5607625 (9th Cir. Nov. 18, 2011), a 3-judge Ninth Circuit panel rejects a defendant's argument that his Mirandized confession to a polygrapher during the pre-polygraph discussion was involuntary. The Court holds that in light of the totality of the circumstances, the confession was made freely, voluntarily and without improper compulsion or inducement.

The Ortiz Court rules that the following tactics by the polygrapher were permissible: (1) her empathic and maternal style and distancing of her role from that of the arresting officers in prepping the Mirandized 18-year-old carjacking-homicide suspect for a polygraph examination; (2) her statements that the only way a polygraph examination would help the defendant was if he was telling the truth; (3) her reassuring statements to the 18-year-old defendant that if he

was telling the truth and if he was in fact innocent, she could help him get cleared through the polygraph exam results; and (4) her statements that reminded the defendant that he was obliged to his family to tell the truth, and that his children were counting on him to do the right thing.

The Ortiz Court describes the facts of the case as follows:

> On April 3, 1997, Robert Chen died from three gunshot wounds inflicted during a carjacking in Barstow, CA. Two months later, the police received information implicating Ortiz and three other co-defendants. On June 5, 1997, Ortiz voluntarily accompanied Sergeant Steven Higgins and Detective Frank Bell to the Barstow Sheriff's Station for questioning. During a recorded interview, Ortiz was informed of, and waived, his Miranda rights. He also agreed to take a polygraph examination to support his statements that he was not involved in the shooting.
>
> Sergeant Higgins and Detective Bell transported Ortiz to the sheriff's headquarters in San Bernardino for a polygraph examination. Detective Kathy Cardwell conducted an interview to instruct him about the procedures she would follow in conducting the polygraph examination. The interview was recorded. Detective Cardwell told Ortiz that if he did not feel comfortable with a particular question during the polygraph examination, she would reword it until he was comfortable.
>
> Ortiz told her throughout the explanation of the function of a polygraph examination that he was nervous. He stated that he was concerned that his nervousness would affect the results of the examination. Detective Cardwell assured him that she would help him get through the examination. She told Ortiz that "the cops" could not tell her what to ask him. She never informed Ortiz that she was a sworn deputy sheriff.
>
> In her instructions, Detective Cardwell urged Ortiz to tell his version of the facts rather than allow his co-defendants' statements to be the only accounts of what had occurred. During her explanation, she referred to him as "young puppy" and "poor guy." She compared Ortiz to her own sons, told him that she loved him, and offered him a hug. She also urged him to tell the truth, reminding him of his obligation to his loved ones. She encouraged him "to do the right thing by [his] mom, . . . [his] daughters and [his] lady." She further told him that the polygraph would "be a piece of cake" and that she would "get [him] through all of this." Detective Cardwell told Ortiz that the polygraph would prove "that you didn't [kill the victim] if you didn't." (emphasis added). At one point she also said, "[l]et's get on with it and get you cleared." When he continued to express concern that the polygraph machine would be inaccurate because he was nervous, she told him "[t]hat's why you and I will work out the questions, not them [the detectives]. They can't have any say so in here, this is my world . . . ." (emphasis added).
>
> Ortiz never submitted to a polygraph examination. During the instructions on how a polygraph examination is conducted, he admitted to shooting the victim twice. Following his admission to Detective Cardwell, Ortiz confessed to Detectives Bell and Higgins that he killed the victim.
>
> At the time of his confession, Ortiz was 18 years old and had earned a General Educational Development Certificate (GED). He lived with his girlfriend and their two young daughters. He had at least one prior arrest.

Result: Affirmance of California U.S. District Court's denial of the habeas corpus petition of David Fernando Ortiz.

LED EDITORIAL COMMENT: Beware! While the question of whether a Mirandized confession was obtained by improper coercion or inducement is reviewed under a standard that is highly deferential to law enforcement, and therefore is very difficult for defendants to meet, the standard is highly fact-based. The fact-based nature of the standard means that a pro-law enforcement result in one case may not translate into a pro-law enforcement result in a case with just a few factual differences. Also, jurors assessing a confession in determining guilt beyond a reasonable doubt will be asked by defense counsel to consider the techniques employed by law enforcement questioners. So officers should proceed with some caution in taking a lesson from the Ortiz decision.

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WASHINGTON STATE COURT OF APPEALS

COURT IMPORTS SEARCH-INCIDENT-TO-ARREST SCOPE LIMITS INTO CONSENT SEARCH CASE, AND HOLDS THAT GENERAL CONSENT TO SEARCH CAR AND ITS TRUNK DID NOT INCLUDE CONSENT TO SEARCH LOCKED CONTAINER IN THE TRUNK

State v. Monaghan, ___Wn. App. ___, 266 P.3d 222 (Div. I, Jan. 3, 2012)

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

> In July 2009, [Deputy A] stopped a vehicle for running a stop sign in Whatcom County. Monaghan was at the wheel. There were two passengers in the vehicle, Danielle Fink-Crider and another.
>
> [Deputy A] thought that he recognized Fink-Crider and believed there was an outstanding bench warrant for her arrest. He asked [Deputy B], who arrived at the scene to assist, to check while he filled out a citation for Monaghan's traffic infraction. [Deputy B] confirmed by computer that there was an outstanding warrant for Fink-Crider's arrest.
>
> [Deputy A] then asked Monaghan for the identity of his female passenger. Monaghan said she was his girlfriend and her name was "Amber Smith." Knowing this to be untrue, the deputy arrested Monaghan for making a false statement to a law enforcement officer and handcuffed him.
>
> [Deputy A] read Monaghan his Miranda rights, and Monaghan waived them. [Deputy A] then asked Monaghan for his consent to search the vehicle for weapons. The deputy advised him that his consent was purely voluntary and that he could withdraw or limit his consent at any time. Monaghan consented to the search of the passenger compartment of the vehicle.
>
> Monaghan later consented to [Deputy B's] request to search the trunk of the vehicle. During this search, [Deputy B] found a zippered container in the trunk with a locked safe inside. The deputy opened the safe with a key he located on a key ring in the passenger compartment of the car. Inside the safe, the deputy found methamphetamine and drug paraphernalia.
>
> The State charged Monaghan with unlawful possession of a controlled substance. Monaghan moved to suppress the evidence obtained in the search of the trunk of his vehicle. He argued, among other things, that the search of the safe exceeded the scope of consent that he gave the deputies. The trial court denied his motion and entered its findings of fact and conclusions of law.

> Based on a stipulated record, the court found Monaghan guilty as charged. The court entered its findings, conclusions, and a judgment and sentence consistent with that decision.

[Footnotes omitted]

ISSUES AND RULINGS: (1) To prove a consensual search, the State must show that (A) the consent was voluntary, (B) the person granting consent had authority to consent, and (C) the search did not exceed the scope of the consent. As for the third requirement, Monaghan consented, first to a search the car for weapons, and second to a search of the car's trunk without any express restriction as to the object of the search. Did Monaghan's consent authorize the law enforcement officer, under the limits of article I, section 7 of the Washington constitution, to use a key he found in the passenger compartment to open and search a locked container that the officer found in the trunk? (ANSWER BY COURT OF APPEALS: No, because Washington constitutional case law on search incident to arrest that bars searches of locked containers during a search incident to arrest extends to consent searches and requires special consent to search a locked container)

(2) Does the evidence establish that Monaghan impliedly consented to a search of the locked container in the trunk, where the evidence shows that Monaghan was standing nearby while the officer retrieved a key from the passenger area of Monaghan's car and unlocked the container? (ANSWER BY COURT OF APPEALS: No, because the evidence and the trial court findings do not establish that Monaghan watched the office opening the locked container)

Result: Reversal of Whatcom County Superior Court conviction of Nicholas Lee Monahgan for unlawful possession of a controlled substance.

Status: The Court of Appeals' decision will become final; no review will be sought.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> (1) Express consent issue
>
> When a party claims both state and federal constitutional violations, our courts should first review the state constitutional claim.
>
> Article I, section 7, generally provides greater protection from state action than does the Fourth Amendment. . . .
>
> . . . .
>
> Where the State relies on consent to conduct a warrantless search, we must address three questions. First, was the consent freely and voluntarily given? Second, was the consent granted by a person with authority to consent? Third, was the search conducted within the scope of the consent given?
>
> . . . .
>
> Here, it is undisputed that Monaghan's consent to search the passenger compartment and the trunk of his vehicle was freely and voluntarily given. It is also undisputed that he neither withdrew his consent to the searches, nor limited them in any way, despite knowing that he could. And there is no dispute that he had the authority to grant consent to the searches. Thus, the sole question before us is whether the search of the locked safe exceeded the scope of the consent that Monaghan gave [Deputy B] to search the trunk of his car.
>
> The unchallenged findings of fact, which are verities on appeal, state:

. . . .

> 7. [Deputy B] located a soft pack in the trunk of the vehicle and discovered a desk sized dictionary/safe inside. He obtained the keys from the driver's area of the Acura and found a key on the ring that fit the lock of the dictionary/safe. He opened the dictionary/safe and found three methamphetamine pipes, a baggy with white crystalline substance inside and other drug paraphernalia.
>
> 8. Defendant stood at the driver's door of [Deputy A's] vehicle talking to Ms. Fink-Crider as [Deputy B] searched the trunk and its contents. Parked directly behind the [Acura], the headlights of [Deputy A's] vehicle illuminated the scene. Defendant was within fifteen feet of the trunk of his car and the search. He did not at any time withdraw his consent to the search or limit it in any way.
>
> . . . .

As the trial court in this case correctly stated at the suppression hearing, the parties agreed that there was no request by either deputy to search the inside of the locked container. This is significant in Washington. In [State v. Stroud, 106 Wn.2d 144 (1986) overruled on other grounds by State v. Valdez, 167 Wn.2d 761 (2009)], the supreme court gave "locking articles within a container" of a vehicle "additional privacy expectations" under article 1, section 7. **[LED EDITORIAL NOTE/COMMENT: The Stroud and Valdez decisions address search incident to arrest, not consent search, authority.]** This is in marked contrast to the federal standard under the Fourth Amendment, which permits a warrantless search of both locked and unlocked containers. **[LED EDITORIAL NOTE/COMMENT: Here, the Court of Appeals continues its surprising excursion into search incident to arrest authority with a footnote citing general Fourth Amendment authority relating to search incident to arrest.]**

Furthermore, this additional privacy expectation of the Washington Constitution has withstood the test of time. For example, in State v. Vrieling, 144 Wn.2d 49 (2001), **[LED EDITORIAL NOTE/COMMENT: Vrieling likewise addresses search incident to arrest, not consent search, authority]** the supreme court stated that "officers may not unlock and search a locked container or locked glove compartment without obtaining a warrant." We note that the recent overruling of Stroud on other grounds did nothing to diminish the additional privacy expectation in locked containers within vehicles that our courts have consistently recognized.

We conclude that Monaghan had an additional privacy expectation in the locked container discovered in the search of the trunk in this case. This search and seizure was without a warrant and without Monaghan's consent. Thus, it was without the authority of law that the Washington Constitution requires.

. . . .

(2) Implied consent issue

The State argues, in the alternative, that Monaghan impliedly consented to the search of the locked safe. . . . .

The facts here are different [from those in the case cited by the State]. . . .

> The State's argument appears to rest on the assumption that Monaghan saw [Deputy B] open the locked safe . . . . But the trial court made no such finding. Finding of Fact merely describes where Monaghan stood during the search of the trunk and its contents. There is nothing in this or any other finding that supports the State's contention that Monaghan saw [Deputy B] open the locked safe. Finally, Monaghan's testimony during the hearing indicated that his attention could just as easily have been directed to talking with Fink-Crider, who was in the police vehicle to the rear of Monaghan's vehicle during the search. In short, the State fails in its burden to show even implied consent to the search of the locked safe in the trunk.
>
> The search and seizure of the contents of the safe lacked the authority of law required by the Washington Constitution. The contents must be suppressed.

[Subheadings added; some citations omitted]

LED EDITORIAL COMMENT: We do not agree with the Court of Appeals' rationale that Washington constitutional case law limiting searches of vehicles incident to arrest should be imported into consent search analysis under the Washington constitution. The approach does not seem logical, and we have never seen a suggestion of support for that mixing-and-matching approach in any case that we have reviewed from any jurisdiction. Arguably, under an extreme view of the approach of the Monaghan decision, because neither searching the trunk (see State v. Stroud, 106 Wn.2d 144 (1986)) nor looking under the hood (see State v. Mitzlaff, 80 Wn. App. 184 (Div. II, 1995) March 96 LED:11) is permitted in a search incident to arrest, a general consent to search a car without either – (1) express permission to search those specific areas or (2) a general consent to "search all areas, containers or compartments of the car, whether locked or unlocked" – would not permit a search of those areas.

We think that the sole question here should have been whether the consent to search the trunk could reasonably be interpreted under the exchange of language and the context of the physical circumstances as consent to search a locked container in the trunk. That locked container could be opened without any damage to it by use of a key retrievable from the passenger area of the vehicle (admittedly, searching without destroying property is an implied limit on a consent search, but there was no destruction here). We think the answer to that question is "yes," the scope of consent under the totality of the circumstances included permission to retrieve a key from the passenger area and unlock the container. Traditionally, the scope of a consent to search is determined by all the surrounding circumstances, taking into account any express or implied limitations on the search in terms of time, duration, area or intensity. Here, nothing that the officer or defendant Monaghan said, and nothing about the attendant circumstances indicated a limit on the officer's search to only unlocked containers in the trunk.

However, the Monaghan decision is now precedent for Washington courts. Therefore, while it is possible that future appellate court decisions in Washington will disagree with the Court of Appeals' thinking in Monaghan, Washington law enforcement agencies should review their consent search forms with their legal advisors and/or local prosecutors, and should consider whether the forms should be revised to ensure that the consent extends to all areas, containers, and compartments of the vehicle, house, etc. that is to be searched. Alternatively, if forms are not revised to include locked containers, consideration should be given to seeking separate consent when a locked container is discovered during the course of a consent search.

Of course, where probable cause to search exists (probable cause to search was not present in the Monaghan case), securing an item or area and seeking a search warrant is the safest approach under the law.

OFFICER HELD TO HAVE UNLAWFULLY SEARCHED VISITOR'S PURSE DURING EXECUTION OF SEARCH WARRANT – PURSE WAS WITH WHAT WERE CLEARLY HER OTHER PERSONAL EFFECTS, AND SHE IMMEDIATELY CLAIMED THE PURSE

State v. Lohr, 164 Wn. App. 414 (Div. II, Oct. 18, 2011)

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

> On December 30, 2009, a [law enforcement] special weapons and tactics team executed a premises search warrant at a local residence. The purpose of the search warrant was to locate evidence of the crimes of delivery of marijuana and possession of marijuana with intent to deliver. [Officer A] remained outside for security purposes, while other officers went inside to conduct the search. Later, [Officer A] entered the residence and saw Lohr, who did not live at the residence, among the several individuals present; she was sitting on a couch approximately seven feet from [Officer A]. **[LED EDITORIAL NOTE: In a footnote elsewhere in the opinion, the Court of Appeals states that the parties do not dispute that Lohr was not named in the warrant, and therefore could not be automatically searched under the warrant.]**
>
> [Officer B], who had been inside during the search, informed [Officer A] that Lohr was free to leave. Lohr asked [Officer A] for her boots and pants, which were seven to eight feet away behind [Officer A], and [Officer A] gave them to her. While retrieving those items, [Officer A] noticed a "medium size" purse sitting with her boots and pants and asked Lohr whether the purse also belonged to her. Lohr responded that the purse was hers and that she wanted to take it with her. Prior to handing the purse to Lohr, [Officer A] searched the purse and found Lohr's identification card and several syringes, one of which contained a substance later determined to be methamphetamine.
>
> The State charged Lohr with one count of unlawful possession of a controlled substance, to wit: methamphetamine. She unsuccessfully moved to suppress the evidence that [Officer A] seized during his search of her purse.
>
> At the suppression hearing, [Officer A] testified that the purse was "wide open" as he handed it to Lohr, and that he looked inside it to check for any means of identifying the purse's owner and to ensure that the purse did not contain weapons. [Officer A] observed several items in the purse, including an identification card and "multiple hypodermic needles." After removing the identification card from the purse and reading it, [Officer A] determined that it bore Lohr's name and photograph.
>
> [Officer A] then continued to search the purse for weapons and observed a syringe with a substance later determined to be methamphetamine. [Officer A] did not testify at the suppression hearing that he recognized the syringes as being commonly associated with illegal drug use, but Lohr does not raise this issue on appeal.
>
> Lohr testified that, when the officers arrived at the residence, she was sleeping on the couch and her boots, purse, and jeans were "right next to [her] where [she] could reach [her] hand over and grab them when [she] was laying [sic] down sleeping."

After a stipulated facts bench trial, the trial court found Lohr guilty as charged.

ISSUE AND RULING: Lohr was not named in the search warrant. Lohr's purse was located with her nearby boots and pants, which were recognizable as her personal effects. Lohr immediately claimed the purse when an officer asked whether it was hers. When the officer looked into the open purse, he saw an identification card with Lohr's name on it. Was the officer's subsequent search of the purse that turned up unlawful drugs lawful? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Lewis County Superior Court conviction of Susan Kay Lohr for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Lohr contends that the trial court erred in denying her motion to suppress the evidence seized from her purse because [Officer A] unlawfully searched her purse in violation of the Fourth Amendment of the federal constitution and article I, section 7 of our state constitution. The State contends that [Officer A] lawfully searched the purse because it was not readily recognizable as Lohr's personal property and, thus, was a part of the premises subject to the search warrant. We agree with Lohr, reverse her conviction, and remand for suppression of the evidence taken from the purse.
>
> I. Standard of Review
>
> When reviewing a trial court's denial of a suppression motion, we review its findings of fact for whether substantial evidence supports them and whether its findings support its conclusions of law. . . .
>
> II. Findings of Fact Unsupported by Substantial Evidence
>
> Lohr assigns error to the following findings of fact:
>
> > 1.16 The purse was not immediately recognizable as belonging to [Lohr].
> > 1.17 The purse was open. . . . [Officer A] looked inside to see if there was any identification to show who the purse belonged to. . . . [Officer A] also wanted to ensure that the purse did not contain a weapon.
> > 1.18 Inside the purse . . . [Officer A] saw an identification card that had [Lohr's] picture and information. Also inside the purse were several syringes that . . . [Officer A] recognized as being commonly used for ingesting drugs.
>
> Lohr's arguments do not address findings of fact 1.17 and 1.18. We do not consider assignments of error not supported by argument or reference to the record. RAP 10.3(a)(6). But Lohr's arguments generally and extensively address finding of fact 1.16, i.e., whether her purse was readily recognizable as belonging to her. We find her arguments persuasive that her purse was readily recognizable as hers and not subject to the search warrant.
>
> Our decision in State v. Worth, 37 Wn. App. 889 (1984) is instructive about whether Lohr's purse was readily recognizable as belonging to her. In Worth, law enforcement officers obtained an arrest warrant for an individual and a warrant to search his premises and person. The warrant authorized the seizure of items related to a series of pharmacy robberies, "including clothing, cosmetics,

weapons, and narcotics." Worth was not identified as the subject of the search warrant. Worth was sitting in a chair when law enforcement officers executed the warrant; a purse rested against her chair. An officer searched the purse for weapons and discovered a tin canister containing white tablets.

Another officer led Worth into a different room for questioning and took along the purse. After Worth refused to consent to the officer's searching the purse, the officer emptied the purse of its contents, searched the purse's inner compartments, and discovered a "bindle of cocaine."

On appeal, Worth argued that the second search of her purse was unlawful. We observed, "[I]t was apparent to officers conducting the search that Worth's purse was not just another household item which police could search by virtue of their warrant to search the premises of Folkerts'[s] house. Because Worth's purse rested against the chair on which she was seated, it was clear that she owned the purse."

The State cites State v. Hill, 123 Wn.2d 641 (1994) **Nov 94 LED:04** to support its argument that Lohr's purse was not readily recognizable as belonging to her. . . .

Unlike in Hill, where our Supreme Court relied on Hill's failure to challenge the trial court's specific finding of fact that his sweatpants were not obviously associated with him [and therefore rejected his challenge to a search of the sweatpants], here, Lohr assigned error to the trial court's finding that her purse was not immediately recognizable as hers. Thus, Hill is distinguishable.

Here, as in Worth, it was clear before [Officer A] searched the purse that it was Lohr's purse with her jeans and boots. Despite the fact that Lohr's purse was not located next to her but was seven to eight feet away, it was next to her clothing and was clearly associated with her. As we observed in Worth:

> We do not believe that the purpose of the Fourth Amendment is furthered by making its application hinge on whether an individual happens to be holding or wearing such a personal item as a purse when a search is under way. A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable personal effects, such as Worth's purse, which an individual has under his control and seeks to preserve as private. In the case at bench the officers did readily recognize the purse belonged to . . . Worth and asked her consent to search it. The court found, however, that consent was not given, and the State does not challenge that finding.

Similarly here, the State does not challenge the trial court's findings that "[Lohr] requested her boots and her pants," "[Officer A] retrieved [Lohr's] boots and pants," and the purse was "sitting with [her boots and pants]." Moreover, the record contains no indication that [Officer A] questioned Lohr's ownership of the boots and pants before returning them to her. Lohr's purse was located with her boots and pants, which were recognizable as her personal effects, and it follows that her purse was also readily recognizable as her personal effect. Furthermore, Lohr claimed the purse when [Officer] asked whether it was hers; and, after Lohr claimed the purse, [Officer A] saw an identification card with Lohr's name on it when he looked inside the purse. Thus, substantial evidence

does not support the trial court's finding of fact 1.16 that "[t]he purse was not immediately recognizable as belonging to [Lohr]."

III. Conclusions of Law Erroneous and Unsupported by Findings

Lohr also assigns error to the following trial court's conclusions of law:

> 2.2 Pursuant to . . . Hill, . . . the purse is considered to be another household item because it was not associated with a particular person. . . . [Officer A] therefore [wa]s permitted to look inside the purse in order to determine ownership and to determine if there were any weapons present prior to giving the purse to [Lohr].
> 2.3 . . . [Officer A] was not searching the purse for the purpose of gathering evidence.
> 2.4 . . . [Officer A] was conducting a lawful search when he discovered the syringes in [Lohr's] purse.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend IV. Article I, section 7 of the Washington State Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." **[LED EDITORIAL NOTE: Here, in a footnote, the Court of Appeals states that defendant did not present an argument that the Washington constitution provides greater protection than the federal constitution on the issue raised in this case.]**

Under a premises search warrant, law enforcement officials may search the premises owner's personal effects, provided those effects are plausible repositories for the objects named in the warrant. Hill. A premises warrant "merely gives law enforcement officials permission to detain occupants while they conduct the search." Worth. But, a premises warrant does not authorize an officer to conduct a personal search of individuals found at the premises or a search of the personal effects that individuals are wearing or holding. Hill; see also Worth. Furthermore, "Fourth Amendment protections extend to 'readily recognizable personal effects . . . which an individual has under his control and seeks to preserve as private.'" Hill, 123 Wn.2d at 647 (alteration in original) (quoting Worth, 37 Wn. App. at 893).

As we discuss above, Lohr's purse was readily recognizable as her personal effect. The relevant question in premises searches is whether an item belongs to an individual not named in the warrant and, thus, whether the item is "not just another household item" subject to the warrant. Accordingly, if an item is readily recognizable as belonging to an individual not named in the warrant, the item is not within the warrant's scope.

Whether the defendant controlled the item and whether the defendant tried to maintain the item's privacy are factors that aid in determining if an item was readily recognizable as belonging to someone not named in a premises warrant; but these are not independently dispositive factors. Were we to hold otherwise — i.e., that an item was readily recognizable as belonging to someone not named in the warrant, but nonetheless the search was lawful because the unnamed person did not control the item or failed to take further steps to maintain the item's privacy (including asking the officer to stop the search)—we would turn on its head the concept of requiring consent to a search otherwise

unauthorized by law. Accordingly, we hold that because Lohr's purse was readily recognizable as her personal effect, [Officer A] unlawfully searched her purse.

Furthermore, although the trial court found that [Officer A] searched Lohr's purse for weapons as well as for identification, the State provides no argument or citation to authority that a concern for officer safety justified the purse search here. [Court's footnote: *Had [Officer A] felt the purse without searching it and discovered that it contained an object that might be a weapon, he may have had a basis for further investigation, but those facts are not before us.*] Because the purse was immediately recognizable as Lohr's and, thus, its search was unauthorized by the premises search warrant, and because the State fails to establish another exception to the warrant requirement, it fails to meet its burden to justify the warrantless search of Lohr's purse. Thus, the trial court's conclusions of law . . . that [Officer A] was conducting a legal search for weapons are erroneous and the seized evidence must be suppressed.

We reverse and remand for suppression of the evidence discovered during the search of Lohr's purse and for further proceedings.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURT REJECTS SUFFICIENCY OF EVIDENCE AND CONSTITUTIONAL CHALLENGES TO OBSTRUCTING STATUTE WHERE DISTURBANCE-CALL OCCUPANT REFUSED ORDER TO COME TO DOOR AND EXIT WITH HIS HANDS UP – In State v. Steen, 164 Wn. App. 789 (Div. II, Nov. 9, 2011, Amended Dec. 20, 2011) the Court of Appeals holds that there is sufficient evidence to convict the defendant of obstruction and rejects his constitutional challenge under the facts of this case.

The Court summarizes the facts as follows:

> Police officers knocked on a trailer door at the scene of a reported disturbance and ordered any occupants to exit with their hands up. Ronald Steen, the sole occupant, did not open the door. The officers lawfully entered the trailer through an open window under the community caretaking exception to the warrant requirement. The officers discovered and detained Steen, who refused to provide his name and date of birth. A jury convicted Steen of obstructing a law enforcement officer, RCW 9A.76.020(1), based on these facts.

RCW 9A.76.020(1) provides: "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties."

The Court notes the following definitions:

> "Hinder" means "to make slow or difficult the course or progress of." Webster's Third New Int'l Dictionary 1070 (2002). "Delay" means "to stop, detain, or hinder for a time . . . to cause to be slower or to occur more slowly than normal." Webster's at 595. "Obstruct" means "to be or come in the way of: hinder from passing, action, or operation." Webster's at 1559. A person acts willfully when he acts knowingly with respect to the material elements of the offense. RCW 9A.08.010(4).

The Court's analysis in key parts is as follows:

1. Willfulness

Steen first asserts that his failure to open the door was not obstruction because he did not know that the officers were discharging their official duties. . . .

Steen's assertions misapprehend the nature of a sufficiency challenge in which we view all evidence and reasonable inferences in the light most favorable to the State. Viewed in this light, the facts show that the deputies, who arrived in patrol cars and wore police uniforms, repeatedly knocked "very loudly" on the trailer's door, "yell[ed]" out "Sheriff's department," and asked any occupants to exit the trailer. The trailer was small—between 7 to 8 feet wide and 12 to 30 feet long—and had "open windows," making it easier to hear the officers' commands. A woman had recently exited the trailer and was visibly upset. A jury could have reasonably inferred from these facts that Steen (1) had heard the officers' identification and commands but had decided not to comply and (2) knew that the officers wanted to look inside the trailer to investigate a recent disturbance involving the woman. Accordingly, this argument fails.

2. Failure to Obey a Lawful Police Command Can Constitute Obstruction when Officers are Performing Community Caretaking Functions

Steen argues that the "act of remaining silent" is insufficient to establish the crime of obstruction. We agree that Steen's refusal to provide his name or date of birth, when considered in isolation, is insufficient to support an obstruction conviction. Under Washington law, "[a] person cannot be punished for refusing to speak." State v. Williams, 171 Wn.2d 474, 484 (2011) **July 11 LED:19** (citing State v. Contreras, 92 Wn. App. 307, 316 (1998) ("[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer.")); accord State v. Hoffman, 35 Wn. App. 13, 15–17 (1983) (obstruction arrest not lawful where defendant refused to provide identification to police officer).

But our analysis does not end there. We must resolve how Steen's failure to obey the officers' lawful orders to open the trailer's door and to exit with his hands up—orders that the officers issued while performing their community caretaking functions—impacts the sufficiency analysis.

Under RCW 9A.76.020(1)'s plain language, a person may commit obstruction by willfully disobeying a lawful police order in a manner that hinders, delays, or obstructs the officer in the performance of his or her duties. Thus, as we explained in the previous section, because any rational fact finder could have reasonably inferred that Steen ignored the officers' commands, there was sufficient evidence to conclude that his conduct was willful. Additionally, there was sufficient evidence that this willful conduct hindered, delayed, or obstructed the officers in the performance of their community caretaking functions. [One of the officers] testified that [they] arrived on the scene in an "unknown situation[]" and that their investigation required them to look for the other individuals who were reportedly involved in the disturbance and for anyone who was injured. [The officer] was aware that the distraught woman on the property had exited the trailer. As part of their investigation, the officers knocked on the trailer for several minutes, to no avail, before entering through the window. From this testimony, the jury could have reasonably inferred that Steen's decision not to open the trailer's door impeded the officers' ability to locate the unaccounted-for participants in the disturbance, to render any necessary aid to victims, and to investigate the nature and causes of the reported disturbance. Accordingly, the jury could have found that Steen's conduct here—ignoring the officers' lawful orders to exit the trailer with his hands up while the officers were performing their

community caretaking functions—was willful conduct that amounted to obstruction.

Our interpretation is consistent with Contreras, in which we held that an individual's failure to follow police officers' lawful orders authorized the individual's warrantless arrest for obstruction. There, we concluded that the arrest of a vehicle prowl suspect for obstruction was lawful where the suspect did more than "merely refuse to talk" but, rather, "disobeyed the officer's orders to put his hands up in view of [the officer], to exit the car, to keep his hands on top of the car, and to provide his name." Contreras, 92 Wn. App. at 316–17.

We are mindful of our Supreme Court's recent opinion in Williams, in which the court held that "some conduct in addition to making false statements" is required to support an obstruction conviction. That requirement is met here. Steen's refusal to open the trailer door and exit the trailer with his hands up amounts to "conduct" that is punishable under the obstruction statute. Significantly, the Williams court distinguished Contreras as a case involving more than a false statement to police officers: "In Contreras . . . the defendant not only gave a false name but refused to comply with orders to keep his hands in view and exit the vehicle." Similarly here, Steen refused to comply with the officers' orders to answer the trailer's door and to exit with his hands up. Today, we follow Contreras and conclude that the plain language of RCW 9A.76.020(1) signals the legislature's intent to criminalize an individual's willful failure to obey a lawful police order where the failure to obey willfully hinders, delays, or obstructs the officer in the discharge of his or her community caretaking functions. We further conclude, based on the foregoing analysis, that sufficient evidence supported Steen's obstruction conviction.

3. Refusal to Open Door and Answer Questions as Exercise of First and Fifth Amendment Rights

Steen next argues, as part of his sufficiency claim, that he had a constitutional right to remain silent under the First and Fifth Amendments. Thus, in his view, the State could not use his refusal to open the trailer door or to provide his name or date of birth as substantive evidence of his guilt.

In sections II and III below, we thoroughly consider and reject Steen's contention that he had a constitutional right to refuse to provide his name and date of birth or to refuse to open the trailer door and reveal his presence to officers. As Section II explains, the main First Amendment case that Steen cites for support, Wooley v. Maynard, 430 U.S. 705 (1977), is a factually distinguishable case involving governmental action that forced citizens to display government-approved ideological messages on their private property. Furthermore, as section III explains, because Steen's name, date of birth, and presence were not "incriminating" communications, at least as the United States Supreme Court has interpreted that term, he was not privileged under the Fifth Amendment from revealing that information. See Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 190–91 (2004).

[Footnotes and some citations omitted]

Result: Affirmance of Pierce County Superior Court conviction of Ronald Steen for obstructing a law enforcement officer.

(2) SPLIT PANEL HOLDS THAT WHERE AN ADULT INVITED A MINOR TO SEND HIM A NUDE PHOTOGRAPH OF HERSELF, AND SHE REFUSED, HER REFUSAL PRECLUDED HIS PROSECUTION FOR COMMITTING THE CRIME OF SEXUALLY EXPLOITING A MINOR – In State v. Stribling, 164 Wn. App. 867 (Div. II, Nov. 9, 2011), a 2-1 majority agrees with the arguments of defendant that where he sent an e-mail invitation to a minor asking her to e-mail back a nude photograph of herself for his sexual gratification, and she refused, he did not commit the offense of sexually exploiting a minor. Her refusal precluded application of the statute, the majority opinion holds.

A person is guilty of sexually exploiting a minor if the person "[a]ids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance." RCW 9.68A.040(1)(b). Stribling argued that this statute requires something more than a person unsuccessfully asking a minor to send a nude photograph. The State countered that asking a minor to send a nude photograph of herself falls squarely under the statute's plain language of "invit[ing]" a minor to engage in sexually explicit conduct.

The majority opinion of the Court of Appeals concludes that Stribling's argument is correct, both: (1) because the minor did not accept the invitation – concluding in this regard that the statute's spirit requires that there be a particular "result" of the otherwise offending conduct (this part of the majority's analysis is based in large part on language in the Washington Supreme Court decision in a very different factual context in State v. Chester, 133 Wn.2d 15 (1997). **Oct 97 LED:06**); and (2) because the statute's phrase "knowing that such conduct will be photographed" contemplates that the sexually explicit conduct actually be "photographed," and in this case no photograph was ever taken.

Judge Johanson authors the majority opinion and is joined by Judge Van Deren. Judge Penoyar authors the dissenting opinion.

Result: Reversal of Cowlitz County Superior Court conviction of Benjamin Clinton Stribling for sexually exploiting a minor; remanded for sentencing of Stribling based on the trial court convictions for one count of guilt of attempted possession of depictions of a minor engaged in sexually explicit conduct (based on the facts outlined above), and six counts of communicating with a minor for immoral purposes.

LED EDITORIAL NOTE: Defendant Stribling apparently did not challenge, and the Court of Appeals does not question his conviction for attempted sexual exploitation of a minor based on his request to the minor girl for a nude photograph of herself.

(3) PUBLIC RECORDS ACT CASE: COURT OF APPEALS REJECTS THE ARGUMENT THAT THERE IS NO STATUTE OF LIMITATIONS UNDER THE PRA – In Johnson v. Department of Corrections, 164 Wn. App. 769 (Div. II, Nov. 8, 2011) the Court of Appeals rejects a Department of Corrections (DOC) inmate's argument that there is no statute of limitations period under the PRA. The Court avoids determining whether the one year limitations period of RCW 42.56.550(6) applies, or the two year "catch all" limitations period of RCW 4.16.130 applies because the plaintiff did file his lawsuit within the two year limitations period and, accordingly, there is no way he would have met the one year limitations period.

Result: Affirmance of Thurston County Superior Court order dismissing the lawsuit.

LED EDITORIAL COMMENT: The argument that there is no statute of limitations under the PRA comes from a reading of RCW 42.56.550(6) which provides that "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." The argument is that the limitations period only applies where the agency has 1) claimed and exemption or 2)

produced a record on a partial or installment basis. Accordingly, in situations where the agency simply produces the entire record (without installments) or where there is no record (and thus no exemption is claimed) the limitations period of RCW 42.56.550(6) does not apply. In Tobin v. Worden, 156 Wn. App. 507 (Div. I, 2010), the Court of Appeals held that under such a circumstance the one year statute of limitations period does not apply. The Johnson Court rejects the argument that there is no statute of limitations under the PRA.

(4) CITY ORDINANCE PROHIBITING POSSESSION OF FIREARMS IN PUBLIC PARKS OR PARK FACILITIES IS PREEMPTED BY STATE LAW – In Chan v. City of Seattle, 164 Wn. App. 549 (Div. I, Oct. 31, 2011) the Court of Appeals holds that a City of Seattle firearms ordinance which prohibits the possession of firearms in certain parks and park facilities is preempted by state firearms law.

The City of Seattle Parks and Recreation Department firearms rule provides in relevant part:

> **4.0 GENERAL POLICY: CARRYING CONCEALED FIREARMS AND DISPLAYING FIREARMS ARE NOT PERMITTED AT PARKS DEPARTMENT FACILITIES AT WHICH CHILDREN AND YOUTH ARE LIKELY TO BE PRESENT**
>
> The Department, in its proprietary capacity as owner or manager of Department facilities, does not permit the carrying of concealed firearms or the display of firearms, except by law enforcement officers and on-duty security officers, at Parks Department facilities at which: 1) children and youth are likely to be present and, 2) appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility.

The rule also designates those facilities where children and youth are likely to be present.

RCW 9.41.290 provides:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

RCW 9.41.300 authorizes cities, towns, counties and municipalities to enact certain laws prohibiting the possession of firearms in specific circumstances, but not the circumstances addressed by the City ordinance at issue in this case.

The Court of Appeals holds that "under the plain language of RCW 9.41.290 and RCW 9.41.300, the City's attempt to regulate the possession of firearms at designated park areas and park facilities open to the public by adopting the Firearms Rule is preempted by state law."

Result: Affirmance of King County Superior Court order granting injunction against the City of Seattle's enforcement of that portion of firearms ordinance prohibiting possession in public parks or park facilities.

(5) DEFENDANT WAIVED CONFRONTATION CLAUSE CHALLENGE TO INTRODUCTION OF LABORATORY REPORT IN LIEU OF SCIENTIST'S TESTIMONY WHERE HE DID NOT DEMAND THE SCIENTIST'S PRESENCE AT TRIAL AS REQUIRED BY CrR 6.13(b), AND DID NOT OBJECT TO INTRODUCTION OF THE LABORATORY REPORT – In State v. Schroeder, 164 Wn. App. 164 (Div. III, Sept. 29, 2011) the Court of Appeals rejects the defendant's arguments under Melendez–Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009) **Sept 09 LED:03**, and Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** that his confrontation rights were violated when a laboratory report was admitted without accompanying testimony from the scientist who had tested the substance.

In Melendez-Diaz the United States Supreme Court held that the certificate of the scientist who analyzed the controlled substance was the "equivalent of testimony by affidavit, a practice prohibited by Crawford and the Sixth Amendment's confrontation clause." However, in response to concerns about the burden of requiring scientists to testify at every trial, the Melendez-Diaz Court explained that the "'The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.'" Schroeder, 164 Wn. App. at 167 (quoting Melendez-Diaz, 557 U.S. ___, 129 S. Ct. at 2534 n. 3).

Washington has adopted such a procedure rule/"notice and demand" rule in CrR 6.13(b) which requires that defendants demand the presence of an expert at trial at least 7 days prior to trial.

Thus, the Schroeder Court holds "First, unlike Mr. Melendez–Diaz, Mr. Schroeder did not object to the admission of the crime laboratory certificate at his trial. He thus waived his right to confrontation on that piece of evidence. Second, Mr. Schroeder never demanded that the laboratory technician testify in his case."

Result: Affirmance of Spokane County Superior Court conviction of Michael D. Schroeder of second degree unlawful possession of a firearm and possession of a controlled substance.

LED EDITORAL COMMENT: The Schroeder Court does not cite or discuss the more recent United States Supreme Court case of Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (June 23, 2011) Sept 11 LED:02 (Confrontation Clause does not permit introduction of forensic laboratory report containing a testimonial certification regarding the defendant's blood alcohol level through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification). We repeat our Comments on the Bullcoming case here:

> **In our comments to the Melendez-Diaz case, Sept 09 LED:03, we noted that the Melendez-Diaz majority opinion stated that "notice-and-demand" procedures (see, for example, Washington's Criminal Rule 6.13) under which a defendant is given reasonable notice of an expert's certified report and the right to demand that the expert appear at trial, will generally satisfy Confrontation Clause requirements. Justice Ginsberg's opinion in Bullcoming again points to "notice-and-demand" procedures as satisfying Confrontation Clause requirements while reducing the burden on forensic laboratories. Justice Ginsberg's opinion states: "Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories. Statutes governing these procedures typically 'render . . . otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution**

call the author/ analyst of [the] report.'" However, the section of Justice Ginsberg's opinion that includes this language (Part IV) did not achieve a majority of votes and thus, does not constitute a majority opinion of the Court. It is unclear whether those justices who did not sign Part IV do not believe that "notice and demand" procedures would suffice, or whether they simply feel that the discussion is not necessary to the opinion.

That said, prosecutors generally agree that "notice and demand" procedures are acceptable. The problem arises, however, when defendants routinely include a "demand" in each and every case. Such a practice effectively renders "notice and demand" procedures ineffective for reducing the burden on laboratories.

In Schroeder the Court of Appeals also agrees that notice and demand procedures are acceptable.

(6) EVIDENCE OF KNOWLEDGE OF WRONGFULNESS HELD SUFFICIENT TO SUPPORT JURY'S REJECTION OF PARANOID SCHIZOPHRENIC MURDERER'S INSANITY DEFENSE – In State v. Chanthabouly, 164 Wn. App. 104 (Div. II, Sept. 27, 2011), the Court of Appeals rejects the interpretation of Washington's insanity statute on behalf of a paranoid schizophrenic murder defendant. The defense argument was that, while there is evidence in the record that defendant's mental illness did not prevent him from knowing at the time of the killing that his actions were legally wrong, there is no evidence in the record that he knew at the time of the fatal shooting of a fellow high school student that his conduct was morally wrong. From that, he argued that the trial court should have applied his knowledge-of-moral-wrongfulness test to grant his motion for a judgment, as a matter of law, of acquittal on grounds of insanity. **[LED EDITORIAL NOTE: The brief of defendant in the Court of Appeals cited case law from some other states interpreting those states' insanity statutes. The Chanthabouly opinion does not address those out-of-state cases or statutes.]**

The Chanthabouly Court explains that under the affirmative defense of Washington's insanity statute, RCW 9A.12.010, the test of insanity is met if the defendant establishes by a preponderance of evidence that – because of his mental disease or defect – he was unable tell right from wrong as to his otherwise criminal conduct (note that an alternative way for a defendant to establish insanity is to prove that he did not understand the nature and quality of his actions, but that was not an issue in this case). But, based on State v. Crenshaw, 98 Wn.2d 789 (1983), the Chanthabouly Court rejects defendant's argument for distinguishing between "knowledge of moral wrong" and "knowledge of legal wrong" under Washington's insanity defense. The Court of Appeals concludes that under Crenshaw, a defendant's knowledge at the time of the charged action that his conduct was unlawful, as a general rule, equals knowledge of wrongfulness under RCW 9A.12.010.

The Chanthabouly Court explains that the following evidence supports the jury's verdict that defendant did not establish insanity under the knowledge-of-right-from-wrong prong of the test of RCW 9A.12.010: (1) his flight after the killing; (2) his other attempts, including during police interrogation, to conceal his involvement in the killing; (3) his total failure (contrary to his later statements to psychiatric experts) to suggest during the police interrogations that he had believed that he was acting in self defense at the time of the killing; (4) his statements to law enforcement officers and others demonstrating that he understood that other people, including his mother, would view his act as legally and morally wrong; (5) his statements to police and others reflecting that he knew the killing was against the law; and (6) his apparent rationality and responsiveness during police interrogation.

Result: Affirmance of Pierce County Superior Court second degree murder conviction of Douglas S. Chanthabouly.

LED EDITORIAL NOTE AND COMMENT: As noted, the Washington Supreme Court's 1983 Crenshaw decision is relied upon by the Chanthabouly Court. The 1983 Crenshaw decision recognized that there is one circumstance in which a defendant can prove lack of ability to understand right from wrong even though he was aware of the illegality of his conduct. That circumstance is when the defendant proves that his mental disease or defect caused him to believe that he was acting under a command from God to commit the act. See also the discussion of the "deific command" insanity defense in State v. Applin, 116 Wn. App. 818 (Div. I, 2003) Oct 03 LED:18. The defendant in Chanthabouly did not claim to have been acting under a command from God when he committed the killing, so that issue is not addressed in the Chanthabouly decision.

We think that in all cases (deific command or not) where it is anticipated that an insanity defense may be raised, law enforcement investigators should attempt – as apparently was done in this case – to explore a suspect's knowledge of both legal and moral wrongfulness of his actions. Among other reasons for taking this tack is that it is conceivable that the Washington Supreme Court will decide in the future that RCW 9A.12.010 means something different than what the Court said in Crenshaw.

(7) INDEPENDENT SOURCE EXCEPTION TO EXCLUSIONARY RULE ALLOWS TESTIMONY AND EVIDENCE OF UNUSUAL AMMUNITION PURCHASED BY DEFENDANT; THIRD PARTY PERPETRATOR ARGUMENT PERMISSIBLE ONLY WHERE SUFFICIENT EVIDENCE IS PRESENTED TENDING TO IDENTIFY SOME OTHER PERSON AS THE PERPETRATOR– In State v. Hilton, 164 Wn. App. 81 (Div. III, Sept. 27, 2011) the Court of Appeals rejects the defendant's exclusionary rule and third party perpetrator arguments.

Independent Source Exception to Exclusionary Rule

[**LED Editorial Note: This appeal arises from the second trial in this case. The Court of Appeals reversed the first conviction in an unpublished decision holding that the search warrant for the defendant's duplex, which resulted in the seizure of matching A-Merc shells (the unusual ammunition used by the killer), was invalid due to the search warrant's lack of specificity. See State v. Hilton, 2006 WL 183009 (Div. III, Jan. 26, 2006), review denied, 158 Wn.2d 1027 (2007).**]

The Court holds that the independent source exception to the exclusionary rule applies to allow testimony and records of a gun shop owner:

> The exclusionary rule generally requires that evidence obtained from an illegal search and seizure be suppressed. State v. Gaines, 154 Wn.2d 711, 716–717 (2005) **Oct 05 LED:04**. Evidence derived from an illegal search may also be suppressed as fruit of the poisonous tree. Typically, the testimony of a witness whose identity is discovered through a constitutional violation is not suppressed; the free will of the witness attenuates any taint that led to the discovery of the witness. Washington courts have likewise recognized that the testimony of a witness discovered through a constitutional violation is not subject to suppression. E.g., State v. Russell, 125 Wn.2d 24, 57 n. 9 (1994), cert. denied, 514 U.S. 1129 (1995) **Feb 95 LED:08**; State v. O'Bremski, 70 Wn.2d 425, 429–430(1967); State v. Dods, 87 Wn. App. 312, 316–319 (1997) **March 98 LED:17** . . . .
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> Evidence tainted by unlawful police action also is not subject to exclusion if it is obtained pursuant to a valid warrant or other lawful means independent of the

unlawful action. Gaines, 154 Wn.2d at 718; State v. Miles, 159 Wn. App. 282, 291–298, review denied, 171 Wn.2d 1022 (2011). This doctrine is well recognized under both the state and federal constitutions. Gaines, 154 Wn.2d at 717, 722 (independent source exception complies with article I, section 7 of the Washington Constitution). The rationale for the rule is that the police should not be in a worse position than they otherwise would have been in because of the error.

The basic question in applying the independent source rule is determining whether the police activity "'was in fact a genuinely independent source of the information and tangible evidence at issue' here." Miles, 159 Wn. App. at 294. In State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24** one of the reasons given by the court for rejecting the inevitable discovery doctrine is that whether the police would have discovered the evidence apart from the constitutional violation "is necessarily speculative." Seizing upon this observation, Mr. Hilton argues that the determination that [the detective] found the sales records at Schoonie's Rod Shop independent of the records found in his apartment was also speculative.

It was not. Well prior to the search warrant for Mr. Hilton's apartment, the police had recognized the unusual ammunition and decided to trace it. [The detective] had already contacted the manufacturer, although he had not begun contacting local suppliers, before the search warrant issued. Even after contacting Schoonie's, the detective continued to contact all of the other local ammunition sellers. While at Schoonie's, he did not limit himself to Mr. Hilton's A–Merc records, but obtained the records for all purchasers of that ammunition. In short, the record reflects that the detective was not focused solely on Mr. Hilton, but was identifying other local A–Merc customers as well. Far from simply exploiting information obtained at Mr. Hilton's apartment, the detective was thoroughly pursuing a lead first developed at the murder scene.

[Footnotes and some citations omitted]

Third Party Perpetrator Evidence

The Court also holds that the defendant waived his third party perpetrator argument by failing to make the argument at trial. However, even if it had not been waived it would be rejected because "Even when dealing with a circumstantial evidence case, the defendant can respond in kind 'by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.'" State v. Clark, 78 Wn. App. 471, 479 (1995) (emphasis in original).

Result: Affirmance of Benton County Superior Court convictions of Kevin Lee Hilton for two counts of aggravated first degree murder.

(8) PUBLIC RECORDS ACT CASE: DAILY PENALTY IS NOT PER INDIVIDUAL RECORD NOR PER "GROUPED" RECORDS – In Bricker v. L & I, 164 Wn. App. 16 (Div. II, Sept. 20, 2011) the Court of Appeals holds that the per diem penalty award in a public records case does not need to be imposed per individual record. The Court also holds that records do not have to be grouped, with per diem penalties per group. Rather the trial court has relatively broad discretion to impose a single per diem penalty regardless of the number of records at issue in the request.

Result: Affirmance of Thurston County Superior Court penalty award against the Department of Labor and Industries.

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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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