Law Enforcement Digest

DECEMBER 2010

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

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UNITED STATES SUPREME COURT GRANTS REVIEW IN GREENE V. CAMRETA

On October 12, 2010, the U.S. Supreme Court granted review of the Ninth Circuit decision in Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) (decision filed December 10, 2009) **Feb 10 LED:05**. Greene involves a Civil Rights Act lawsuit in which the Ninth Circuit held that an unlawful Fourth Amendment "seizure" occurred when a caseworker and a law enforcement officer interviewed a possible child sex abuse victim at an elementary school without parental consent, court order, or exigent circumstances. A U.S. Supreme Court decision is expected in the case in 2011.

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2010 LED SUBJECT MATTER INDEX

2010 LED SUBJECT MATTER INDEX – LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2010 through and including this December 2010 LED. Since 1988, we have published an annual index each December. Also, since establishing the LED as a monthly publication in 1979, we have published several multi-year subject matter indexes: a 10-year index of LEDs from January 1979 through December 1988; a 5-year subject matter index from January 1989 through December 1993; a 5-year index from January 1994 through December 1998; a 5-year index from January 1999 through December 2003; and a 5-year index from January 2004 through December 2008. The 1989-1993, 1994-1998, 1999-2003, and 2004-2008 indexes, as well as monthly issues of the LED starting with January of 1992, are available on the "Law Enforcement Digest" internet page of the Criminal Justice Training Commission (CJTC) – go to CJTC Home Page at: https://fortress.wa.gov/cjtc/www/ and click on "Law Enforcement Digest."

ACCOMPLICE LIABILITY (RCW 9A.08.020)

Accomplice who was not present in a school zone at the time of cohort's delivery of controlled substances cannot receive school zone sentence enhancement for the offense. State v. Pineda-Pineda, 154 Wn. App. 653 (Div. I, 2010) – April 10:20

ARREST, STOP AND FRISK

Vehicle stop held not pretextual; open view of methamphetamine manufacturing materials provides exigent circumstances supporting vehicle entry to secure the materials. State v. Gibson, 152 Wn. App. 945 (Div. II, 2009) – January 10:11

Description of MV owner in MV registration records check, plus observation, provides reasonable suspicion to stop MV for arrest warrants; but case must be remanded for fact hearing on search incident and maybe other issues. State v. Bliss, 153 Wn. App. 197 (Div. II, 2009) – January 10:22

Field (or "social") contact held to have developed into an unlawful seizure without reasonable suspicion at the point during the field contact when the officer requested consent to frisk. State v. Harrington, 167 Wn.2d 656 (2009) – February 10:17

RCW 46.63.030: Where the infraction of second degree negligent driving did not occur in law enforcement officer's presence, officer could not lawfully issue a citation for that infraction. State v. Magee, 167 Wn.2d 639 (2009) – February 10:23

Bench warrant for failure to appear at probation violation hearing need not be supported by probable cause. State v. Erickson, 168 Wn.2d 41 (2010) – March 10:12

Officer's street contact and request for voluntary giving of information and production of identification held not a "seizure" – pretextual or otherwise. State v. Bailey, 154 Wn. App. 295 (Div. III, 2010) – March 10:13

E-911 call, plus officer's observation of evidence of the likely aftermath of a fight, add up to probable cause to arrest for domestic violence assault. State v. Trujillo, 153 Wn. App. 454 (Div. III, 2009) – March 10:19

Totality of circumstances, including officer's request to look in contacted person's wallet for identification, was not a Terry seizure. State v. Smith, 154 Wn. App. 695 (Div. II, 2010) – April 10:17

Washington State University police officer had authority for off-campus arrest under Mutual Aid Agreement. State v. Hardgrove, 154 Wn. App. 182 (Div. III, 2010) – April 10:22

Division One Court of Appeals panel interprets post-Valdez Washington vehicle search incident rule to permit a search for marijuana based on odor from passenger area; also, stop for no headlights under RCW 46.37.020 held justified by reasonable suspicion and held not pretextual. State v. Wright, 155 Wn. App. 537 (Div. I, 2010) – June 10:12. The Washington Supreme Court has granted discretionary review in Wright. – November 10:03

In-person report by unknown, unidentified UPS driver held to be reliable in support of reasonable suspicion for a Terry stop. U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir. 2010) (decision filed Jan. 19, 2010) – July 10:11

Asking passenger in parked car for id was not a "seizure"; also, car search challenge fails because theory was not raised at time of trial. State v. Johnson, 156 Wn. App. 82 (Div. II, 2010) – July 10:21

Officer's contact with person in private marina and request for ID was not a seizure; officer's state of mind was irrelevant to seizure issue. State v. Hopkins, 156 Wn. App. 468 (Div. II, 2010) – August 10:19

Furtive gestures by passenger plus other suspicious behavior add up to justification for frisk of passenger during late-night traffic stop. U.S. v. Burkett, 612 F.3d 1103 (9th Cir. 2010) (decision filed July 20, 2010) – September 10:07

Where officer shouted to passenger to stop as he ran from car that officer was stopping for traffic violation, officer may have unlawfully seized passenger under Young and Mendez; but use of gun by defendant to resist seizure was not justified under Valentine. State v. Mann, 157 Wn. App. 428 (Div. III, 2010) – October 10:22

Two-minute visit at 3:20 a.m. to suspected "drug house" was not "reasonable suspicion" for Terry stop of visitor to house where sole apparent basis for police labeling of premises as "drug house" was neighbors' reports of recent pattern of heavy "short stay traffic" to house. State v. Doughty, ___ Wn.2d ___, 239 P.3d 573 (2010) – November 10:04

Seizure and arrest of person upheld because (1) initial stop was supported by reasonable suspicion of car prowling, (2) arrest was supported by probable cause of same, and arrest was for gross misdemeanor crime against property, thus meeting misdemeanor presence exception of RCW 10.31.100(1). But search of car held to violate search incident rule of article I, section 7 of Washington constitution even though the search would have been lawful under the Fourth Amendment search incident rule of Arizona v. Gant. State v. Chesley, ___ Wn. App. ___, 239 P.3d 1160 (Div. II, 2010) – November 10:14

ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)

Swollen eye and face pain throughout at least a morning held to be enough to support assault three conviction. State v. Fry, 153 Wn. App. 235 (Div. III, 2009) – April 10:23

BAIL JUMPING (RCW 9A.76.170)

Bail jumping conviction stands even though, because of defendant's absconding behavior, no court proceeding occurred on the hearing date on which he failed to appear. State v. Aguilar, 153 Wn. App. 265 (Div. III, 2009) – April 10:20

CIVIL LIABILITY

Civil Rights Act lawsuit: Officer held qualifiedly immune in taking of possibly endangered child into protective custody without court order or parental notice; however, action against agency must go to trial on failure-to-train theory, in part based on failure of officer to notify local non-custodial (but local and actively involved) parent. Burke v. County of Alameda, 586 F.3d 725 (9th Cir. 2009) (decision filed November 10, 2009) – January 10:02

Civil Rights Act lawsuit for alleged "excessive force": Taser held to be an "intermediate" "significant" level of non-lethal force requiring strong government interest to justify its use; court

holds taser use not lawful if no "immediate threat"; Court also indicates that mental health problems of civilian may militate against use of taser. Bryan v. McPherson, 590 F.3d 767 (9th Cir. 2009) (decision filed December 28, 2009) – February 10:02. NOTE: See the entry below in this section regarding the Ninth Circuit's revised decision on qualified immunity in Bryan.

Civil Rights Act lawsuit: Unlawful Fourth Amendment "seizure" occurred when caseworker and law enforcement officer interviewed possible child sex abuse victim at elementary school without parental consent, court order, or exigent circumstances. Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) (decision filed December 10, 2009) – February 10:05 NOTE: The U.S. Supreme Court has granted review in this case; see note above on page 1 of this LED.

Taser use held reasonable on the totality of the circumstances. Mattos v. Agarano, 590 F.3d 1082 (9th Cir. 2010) (decision filed January 12, 2010) – March 10:05. NOTE: The Ninth Circuit has granted the plaintiff's motion for rehearing before a larger panel of judges. – November 10:04

Judge's order to deputy sheriff to escort prisoner from courtroom to jail did not give the deputy "judicial immunity" from a civil suit for negligence when the prisoner escaped en route to jail and caused injury to a courthouse security guard. Lallas v. Skagit County, 167 Wn.2d 861 (2009) – March 10:13

Prisoner's section 1983 federal Civil Rights Act lawsuit under cruel and unusual punishment provision of the Eighth Amendment alleging excessive force by corrections officer focuses on the purpose of the use of force, not on the extent of injury. Wilkins v. Gaddy, 130 S.Ct. 1175 (2010) (decision filed February 22, 2010) – April 10:07

No "excessive force" and hence no Civil Rights Act liability because officers acted reasonably and therefore are entitled to qualified immunity in relation to their use of a taser in "touch/drive-stun" mode on a misdemeanant arrestee who was resisting arrest. Brooks v. Seattle, 599 F.3d 1018 (9th Cir. 2010) (decision filed March 26, 2010) – June 10:10. NOTE: The Ninth Circuit has granted the plaintiff's motion for rehearing before a larger panel of judges. – November 10:04

Seizure of residence for over 26 hours before making application for search warrant held to violate Fourth Amendment. U.S. v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) (decision filed March 9, 2010) – July 10:15

Clause in search warrant held not overbroad in authorizing seizure of indicia of identity of persons in control of premises. Ewing v. City of Stockton, 588 F.3d 1218 (9th Cir. 1218) (decision filed December 9, 2009) – August 10:08

Use of deadly force against driver of imperiling, careening van was not unlawful under either the Fourth or Fourteenth Amendment. Wilkinson v. Torres, 610 F.3d 546 (9th Cir. 2010) (decision filed July 6, 2010) – September 10:02

Civil Rights Act liability based on Fifth Amendment violation: California officers used unlawful coercion when they told 14-year-old during custodial interrogation that, if he confessed, he would get treatment, but if he did not confess, he would get jail. Crowe v. County of San Diego, 608 F.3d 406 (9th Cir. 2010) (decision filed June 18, 2010) – September 10:05

Three-judge panel revises opinion in Civil Rights Act case involving taser use; opinion still holds that officer used excessive force but now concludes that officer is entitled to qualified immunity. Bryan v. McPherson, 608 F.3d 614 (9th Cir. 2010) (decision filed June 18, 2010) – September 10:07

Search warrant held overbroad, and line officers held not immune from civil liability even though superiors and deputy prosecutor approved warrant before judge signed it – 8-3 majority holds officers were not reasonable in believing that warrant was supported by probable cause to search for gang indicia and firearms evidence generally. Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir. 2010) (decision filed August 24, 2010) – October 10:03

Fitness for duty re-examination of officer by same psychologist and officer's dismissal for refusal of the re-exam held lawful. Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010) (decision filed June 18, 2010) – October 10:06

Civil Rights Act civil liability: Fire department administrators and contract attorney violated firefighter's Fourth Amendment rights when, during an internal affairs investigation, they ordered him to retrieve some objects from his home on pain of being disciplined for insubordination. Delia v. City of Rialto, ___ F.3d ___, 2010 WL 3504502 (9th Cir. 2010) (decision filed September 9, 2010) – November 10:03

CIVIL SERVICE AND EMPLOYMENT LAW

High standard set for overturning arbitrator's ruling in disciplinary matter. Kitsap County Deputy Sheriff's Guild v. LaFrance, 167 Wn.2d 428 (2009) – January 10:05

CJTC INTERNET LED PAGE

WAPA staff attorney Pam Loginsky's 2010 summary on confessions, search, seizure and arrest is accessible on CJTC LED page. – August 10:02

Law enforcement articles on (1) Miranda initiation of contact and (2) identification procedures have been updated on the Criminal Justice Training Commission's internet LED page. – November 10:03

CORPUS DELICTI RULE

RCW 10.58.035 held constitutional but also held not to have relaxed the corroboration requirement for sufficiency of evidence under corpus delicti rule; court appears to have issued a mostly advisory opinion. State v. Dow, 168 Wn.2d 243 (2010) – May 10:21

CRIMINAL MISTREATMENT (Chapter 9A.42 RCW)

Under facts of case where an elderly father had previously pressed assault charges against his adult caretaking son, the jury should have been instructed that care cannot be forced on a person. State v. Koch, 157 Wn. App. 20 (Div. II, 2010) – November 10:21

CRUEL AND UNUSUAL PUNISHMENT (EIGHTH AMENDMENT)

Eighth Amendment of U.S. constitution held to bar sentencing juveniles to life without parole for non-homicide crimes. Graham v. Florida, 130 S.Ct. 2011 (2010) – July 10:08

DISCOVERY UNDER CRIMINAL PROCEDURE COURT RULES

State prosecutor in drug case held required to disclose to defendant that federal agency was conducting video surveillance of defendant's home during time of alleged state crimes. State v. Krenik, 156 Wn. App. 314 (Div. I, 2010) – August 10:24

Under Criminal Discovery Rule 4.7 and State v. Boyd, attorneys for defendant have the right to take and freely review mirror images of his computer's hard drive. State v. Grenning, 169 Wn.2d 47 (2010) – September 10:15

DOMESTIC VIOLENCE PROTECTION ACT (Chapter 26.50 RCW)

Former RCW 26.50.110 made criminal all no-contact order violations, as does the current version of the statute. State v. Bunker, 169 Wn.2d 571 (2010) – October 10:15

DURESS DEFENSE (RCW 9A.16.060)

Duress defense under RCW 9A.16.060: threat may be implied. State v. Harvill, 169 Wn.2d 254 (2010) – October 10:07

Where victim of shooting knew who shot him and his companion but claimed to police that he did not know, the shooting victim committed "rendering criminal assistance;" also, duress defense was not applicable to the defendant's mere generalized fear of retaliation with no actual threat, express or implied, from another. State v. Budik, 156 Wn. App. 123 (Div. III, 2001) – October 10:17

ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)

Electronic intercept-and-record court order under Privacy Act (RCW 9.73.090 and RCW 9.73.130) was supported by a showing that other normal investigative procedures would be "unlikely to succeed." State v. Constance, 154 Wn. App. 861 (Div. I, 2010) – September 10:19

EVIDENCE LAW

No improper "vouching" found in officer's testimony regarding demeanor: 1) of alleged victim of domestic violence and sex crimes, and 2) generally of other victims of such crimes. State v. Aguirre, 168 Wn. App. 350 (2010) – April 10:13

Sentencing enhancement for illegal drug delivery near school bus route stop: Measuring wheel evidence must be authenticated if it is to be used to prove distance from bus stop of drug-delivery location. State v. Bashaw, 169 Wn.2d 133 (2010) – August 10:15

Under Sixth Amendment right to confrontation and under RCW 9A.44.020(2)'s "rape shield" provisions, orgy-consent argument by defendant should have been allowed. State v. Jones, 168 Wn.2d 713 (2010) – October 10:10

Child witnesses, just like adult witnesses, are presumed to be competent, and the burden is on the party challenging the witness to rebut that presumption. State v. Webb, ___ Wn.2d ___, 239 P.3d 568 (2010) – November 10:12

Expert witness was lawfully allowed to give his opinion that concluded the evidence was consistent with a dogfighting operation. State v. Nelson, 152 Wn. App. 755 (Div. III, 2009) – November 10:22

EXCESSIVE FORCE (See "Civil Liability")

EXCLUSIONARY RULE (See subtopic under "Searches")

FICTITIOUS IDENTIFICATION POSSESSION (See "Forgery, Fraud and similar and related crimes")

FIREARMS LAWS (Chapter 9.41 RCW AND OTHER WEAPONS LAWS)

Trial court order restoring right to possess firearms vacated by Court of Appeals because ten years had not passed since entry of Class B felony conviction. State v. Mihali, 152 Wn. App. 879 (Div. II, 2009) – January 10:14

Second Amendment of federal constitution applies to states, but the content of defendant's challenge to RCW 9.41.040's limits on possession of firearms by children is held inadequate to allow court to address constitutionality of statute. State v. Sieye, 168 Wn.2d 276 (2010) – April 10:15

1996 reclassification of vehicular homicide from Class B to Class A felony was not retroactive and therefore did not change convict's status for purposes of restoration of firearms rights. Rivard v. State, 168 Wn.2d 775 (2010) – July 10:20

Through the Fourteenth Amendment, the Second Amendment of the U.S. Constitution applies to limit state and local firearms laws. McDonald v. City of Chicago, 130 S.Ct. 3020 (2010) (decision filed June 28, 2010) – August 10:08

Conviction under RCW 9.41.040 for unlawfully possessing firearm reversed solely because predicate conviction court (i.e., the trial court in the original case) did not advise the defendant of the firearms-rights-loss consequences of the conviction. State v. Breitung, 155 Wn. App. 606 (Div. II, 2010) – October 10:25

Rusty firearm was proved to be "operational" at time of possession for purposes of prosecution under RCW 9.41.040 for unlawfully possessing a firearm. State v. Raleigh, 157 Wn. App. 728 (Div. II, 2010) – November 10:25

FISH AND WILDLIFE CRIMES (Title 77 RCW)

RCW 77.15.570: Non-Indian husband fishing alone on "usual and accustomed" fishing place of Indian tribe was "assisting" his Indian wife, who was at home, in exercising her fishing rights. State v. Guidry, 153 Wn. App. 774 (Div. II, 2009) – April 10:22

FORFEITURE (See also Uniform Controlled Substances Act topic)

Claimants in RCW 69.50.505 drug forfeiture cases may recover attorney fees even if they are only fractionally successful in their challenges. Guillen v. Contreras, ___ Wn.2d ___, 238 P.3d 1168 (2010) – November 10:12

FORGERY, FRAUD AND SIMILAR OR RELATED CRIMES

Evidence held sufficient to support conviction for unlawfully possessing fictitious identification. State v. Tinajero, 154 Wn. App. 745 (Div. III, 2009) – August 10:22

FREEDOM OF SPEECH

Library filter for adults using internet held not violative of Washington constitution's article I, section 5. Bradburn v. N.C. Reg. Lib. Dt., 168 Wn.2d 789 (2010) – July 10:20

GAMBLING (Chapter 9.46 RCW)

"Honor-based" internet betting service is engaged in "bookmaking" and "professional gambling" even though service requires all users to agree that all bets are non-binding, and even though service does not take a position on the bets. Internet Community & Entertainment Corp. v. State of Washington, 169 Wn.2d 687 (2010) – October 10:16

HARASSMENT (RCW 9A.46.020)

Arrestee's statement from back seat of patrol car that he "would kick [officer's] ass if [he] wasn't in handcuffs," plus other facts, held to support his harassment conviction; vehicle-search-incident challenge held waived because defendant did not raised theory in trial court. State v. Cross, 156 Wn. App. 568 (Div. II, 2010) – September 10:16

HEALTH INFORMATION PRIVACY

Washington State Hospital Association issues 2010 edition of Guide to Disclosure of Protected Health Information. – October 10:03

IMPLIED CONSENT BREATH AND BLOOD TESTS FOR ALCOHOL (RCW 46.20.308)

DUI defendant loses argument that implied consent warnings must advise of certain things not specified in statutory warning. State v. Elkins, 152 Wn. App. 871 (Div. I, 2009) – April 10:22

INDIANS (NATIVE AMERICANS) AND LAW ENFORCEMENT

RCW 77.15.570: Non-Indian husband fishing alone on "usual and accustomed" fishing place of Indian tribe was "assisting" his Indian wife, who was at home, in exercising her fishing rights. State v. Guidry, 153 Wn. App. 774 (Div. II, 2009) – April 10:22

Note: 2009 opinion in Eriksen addressing pursuit by tribal officers off the reservation is withdrawn; reconsideration is pending – September 10:15

State has jurisdiction under RCW 37.12.010 to prosecute Indian tribe member who committed traffic crimes on highway on Indian reservation. State v. Abrahamson, 157 Wn. App. 672 (Div. I, 2010) – October 10:25

Tribal officers have inherent sovereign authority to pursue non-Indian traffic law violators from reservation, and they may make stops off the reservation to hold non-Indian DUI suspects for city, county or State officers. State v. Eriksen, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 4008887 (2010) – December 10:16

INTERROGATIONS AND CONFESSIONS (See also "Sixth Amendment Right to Counsel")

Booking exception to Miranda warnings requirement held not applicable in case where booking was for possession of illegal drugs, and jail employee's question asked about recent drug usage. State v. Denney, 152 Wn. App. 665 (Div. II, 2009) – March 10:21

Fifth Amendment initiation-of-contact rule clarified: (1) bright-line, 14-day-break-in-custody rule created to set boundary for police-initiated, subsequent attempt at custodial interrogation after attorney-right asserted by custodial suspect; (2) the new 14-day standard includes convicted and sentenced prisoners immediately returned to general prison or jail population after asserting right to attorney during custodial interrogation. Maryland v. Shatzer, 130 S.Ct. 1213 (2010) (decision filed February 24, 2010) – April 10:03

Tampa PD's Miranda warning held to adequately convey right of suspect to have attorney present during questioning. Florida v. Powell, 130 S.Ct. 1195 (2010) (decision filed February 23, 2010) – April 10:06

Arguable ambiguity in Vancouver PD's juvenile Miranda warning does not negate juvenile's waiver of his Miranda rights. State v. Campos-Cerna, 154 Wn. App. 702 (Div. II, 2010) – April 10:19

Where custodial defendant understood lawful Miranda warnings, his silence at the outset of questioning and throughout much of nearly-three-hour interrogation session did not make inadmissible his confession that came near the end of the session; his waiver was implied in his confession and at no point had he invoked his Miranda rights. Berghuis v. Thompkins, 130 S.Ct. 2250 (2010) – July 10:02

Civil Rights Act liability based on Fifth Amendment violation: California officers used unlawful coercion when they told 14-year-old during custodial interrogation that, if he confessed, he would get treatment, but if he did not confess, he would get jail. Crowe v. County of San Diego, 608 F.3d 406 (9th Cir. 2010) (decision filed June 18, 2010) – September 10:05

Mirandized suspect's refusals to demonstrate how his purportedly "accidental" shooting of his estranged wife occurred were inadmissible "selective" assertions of his right to silence. Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010) (decision filed August 23, 2010) – October 10:04

Law enforcement articles on (1) Miranda initiation of contact and (2) identification procedures have been updated on the Criminal Justice Training Commission's internet LED page. – November 10:03

Deliberate 2-step interrogation method without curative warning at Step 2 held to violate the Miranda rule of Missouri v. Seibert. State v. Hickman, ___ Wn. App. ___, 238 P.3d 1240 (Div. II, 2010) – November 10:14

Officer's initiation of contact with continuous-custody suspect who had asserted right to silence two hours earlier upheld under Michigan v. Mosley/Miranda initiation-of-contact rule. State v. Brown, State v. Duke, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3959631 (Div. III, 2010) – December 10:18

INTIMIDATION OF A PUBLIC SERVANT (RCW 9A.76.180)

Evidence of intent-to-influence-official-action element of RCW 9A.76.180 held insufficient to support charge. State v. Montano, ___ Wn.2d ___, 239 P.3d 360 (2010) – November 10:09

LEGISLATIVE UPDATE FOR 2010

Part One Of The 2010 Washington Legislative Update – May 10:02

Part Two Of The 2010 Washington Legislative Update – June 10:02

2010 Washington Legislative Update Subject Matter Index – June 10:08

LIMITATIONS PERIODS (RCW 9A.04.080)

RCW 9A.04.080(2), statute of limitations: The phrase, "during any time when the person charged is not usually and publically resident within this state," does not toll the statute of limitations for persons while they are in jail in Washington. State v. Walker, 153 Wn. App. 701 (Div. III, 2010) – April 10:19

Trip out of state for training did not toll statute of limitations. State v. Willingham, 169 Wn.2d 192 (2010) – September 10:14

LINEUPS, PHOTO IDENTIFICATIONS AND SHOWUPS

Law enforcement articles on (1) Miranda initiation of contact and (2) identification procedures have been updated on the Criminal Justice Training Commission's internet LED page. – November 10:03

MUTUAL AID PEACE OFFICER POWERS ACT (Chapter 10.93 RCW)

Washington State University police officer had authority for off-campus arrest under Mutual Aid Agreement. State v. Hardgrove, 154 Wn. App. 182 (Div. III, 2010) – April 10:22

OBSTRUCTING (RCW 9A.76.020 AND RELATED OR SIMILAR OFFENSES)

Words alone can constitute obstructing under RCW 9A.76.020(1). State v. Williams, 152 Wn. App. 937 (Div. II, 2009) – January 10:17

PUBLIC RECORDS ACT (Chapter 42.56 RCW)

Public Records Act: Court establishes a 16-part test to guide trial courts in calculating daily penalties. Yousoufian v. Sims, 168 Wn.2d 444 (2010) – May 10:23

RAPE AND OTHER SEX OFFENSES (Primarily Chapter 9A.44 RCW)

Evidence in child molestation case held sufficient to prove the "purpose of gratifying sexual desire" and "intimate parts" elements of RCW 9A.44.010(2)'s definition of "sexual contact." State v. Harstad, 153 Wn. App. 10 (Div. I, 2009) – October 10:23

RENDERING CRIMINAL ASSISTANCE (RCW 9A.76.050-090)

Where victim of shooting knew who shot him and his companion but claimed to police that he did not know, the shooting victim committed "rendering criminal assistance;" also, duress defense was not applicable to the defendant's mere generalized fear of retaliation with no actual threat, express or implied, from another. State v. Budik, 156 Wn. App. 123 (Div. III, 2001) – October 10:17

RES JUDICATA AND COLLATERAL ESTOPPEL

Acquittal in criminal prosecution under beyond-a-reasonable-doubt standard did not preclude probation revocation that was based on same conduct but was determined under a lower proof standard. City of Aberdeen v. Regan, ___ Wn.2d ___, 239 P.3d 1102 (2010) – November 10:13

SEARCHES (See also "Arrest, Stop and Frisk")

Attorney-client privileged papers

Dismissal of charges held to be required based on detective's seizure and scrutiny of attorney-client-protected papers taken during execution of a search warrant in a child sex abuse investigation. State v. Perrow, 156 Wn. App. 322 (Div. III, 2010) – July 10:24

Community caretaking, emergency and exigent circumstances exceptions to warrant requirement

Vehicle stop held not pretextual; open view of methamphetamine manufacturing materials provides exigent circumstances supporting vehicle entry to secure the materials. State v. Gibson, 152 Wn. App. 945 (Div. II, 2009) – January 10:11

Officers held justified in forcing entry of residence under the Fourth Amendment's purely objective test for the emergency aid exception to the warrant requirement; beware, however: The tests for the emergency aid and community caretaking exceptions to the warrant requirement under the Washington constitution include a subjective and/or no-pretext component. Michigan v. Fisher, 130 S. Ct. 546 (2009) – March 10:02

Community caretaking function justified officer's warrantless entry of residence to see if non-responsive, apparently unconscious, person observed in open view on couch was in need of medical help. State v. Hos, 154 Wn. App. 238 (Div. II, 2010) – March 10:16

Consent exception to search warrant requirement

Civil Rights Act civil liability: Fire department administrators and contract attorney violated firefighter's Fourth Amendment rights when, during an internal affairs investigation, they ordered him to retrieve some objects from his home on pain of being disciplined for insubordination. Delia v. City of Rialto, ___ F.3d ___, 2010 WL 3504502 (9th Cir. 2010) (decision filed September 9, 2010) – November 10:03

Exclusionary rule

Supreme Court holds that to justify a warrantless search of a residence in following up a probation violation, a probation officer must have probable cause that the violator resides there; court also rejects the State's argument that the Washington constitution contains an inevitable

discovery exception to its exclusionary rule. State v. Winterstein, 167 Wn.2d 620 (2009) – February 10:24

Defendant permitted to raise Gant argument on appeal despite having failed to move for suppression at the time of trial; state's "good faith" exception-to-exclusion argument rejected by Division Two of the Washington Court of Appeals. State v. Harris, 154 Wn. App. 87 (Div. II, 2010) – March 10:25

State's "good faith" exception-to-exclusion argument is accepted by Division One of the Washington Court of Appeals in 2-1 decision; Division One disagrees with Division Two and with the Ninth Circuit of the United States Court of Appeals. State v. Riley, 154 Wn. App. 433 (Div. I, 2010) – March 10:25 (note that Riley was also reported on in the June 2010 LED at 24)

Vehicle search incident to arrest held unlawful – court is not clear as to whether it equates U.S. and Washington Supreme Court holdings in Gant, Patton and Valdez; "good faith" exception to exclusionary rule rejected in analysis under Washington constitution, article I, section 7. State v. Afana, 169 Wn.2d 169 (2010) – August 10:09

Washington Supreme Court confirms that exclusionary rule of Washington constitution's article I, section 7 does not contain a case-law-based good faith exception. State v. Adams, 169 Wn.2d 487 (2010) – October 10:15

Exigent circumstances

Odor of marijuana from car gave officer at traffic stop probable cause that would have supported search warrant and warrantless arrest of lone occupant, but mobility of car plus late night hour and rural location did not add up to exigency for warrantless search. State v. Tibbles, 169 Wn.2d 364 (2010) – September 10:09

Incident to arrest (motor vehicle) exception to warrant requirement

Under Arizona v. Gant, custodial arrest of driver for use of drug paraphernalia justifies search of vehicle for illegal drugs. State v. Snapp, 153 Wn. App. 485 (Div. II, 2009) – January 10:06

NOTE: The Washington Supreme Court has granted discretionary review in Snapp. – November 10:03

Description of MV owner in MV registration records check, plus observation, provides reasonable suspicion to stop MV for arrest warrants; but case must be remanded for fact hearing on search incident and maybe other issues. State v. Bliss, 153 Wn. App. 197 (Div. II, 2009) – January 10:22

"Independent grounds" ruling in Valdez goes beyond Arizona v. Gant; Washington law enforcement officers are generally precluded by the Washington constitution from searching vehicles "incident to arrest" once the occupant-arrestee has been secured; and while Valdez involves a vehicle search, the reasoning in the court's lead opinion might be extended to restrict searches of persons incident to arrest. State v. Valdez, 167 Wn.2d 761 (2009) – February 10:11

Search of car violated Gant, but evidence held admissible under Fourth Amendment's "inevitable discovery" exception to exclusionary rule (an exception to exclusion that apparently does not apply under Washington constitution). U.S. v. Ruckes, 586 F.3d 713 (9th Cir. 2009) (decision filed November 9, 2009) – March 10:09

Defendant permitted to raise Gant argument on appeal despite having failed to move for suppression at the time of trial; state's "good faith" exception-to-exclusion argument rejected by Division Two of the Washington Court of Appeals. State v. Harris, 154 Wn. App. 87 (Div. II, 2010) – March 10:25

Division One Court of Appeals panel interprets post-Valdez Washington vehicle search incident rule to permit a search for marijuana based on odor from passenger area; also, stop for no headlights under RCW 46.37.020 held justified by reasonable suspicion and held not pretextual. State v. Wright, 155 Wn. App. 537 (Div. I, 2010) – June 10:12. NOTE: The Washington Supreme Court has granted discretionary review in Wright. – November 10:03

Vehicle search incident to arrest held unlawful – court is not clear as to whether it equates U.S. and Washington Supreme Court holdings in Gant, Patton and Valdez; "good faith" exception to exclusionary rule rejected in analysis under Washington constitution, article I, section 7. State v. Afana, 169 Wn.2d 169 (2010) – August 10:09

Seizure and arrest of person upheld because (1) initial stop was supported by reasonable suspicion of car prowling, (2) arrest was supported by probable cause of same, and arrest was for gross misdemeanor crime against property, thus meeting misdemeanor presence exception of RCW 10.31.100(1). But search of car held to violate search incident rule of article I, section 7 of Washington constitution even though the search would have been lawful under the Fourth Amendment search incident rule of Arizona v. Gant. State v. Chesley, ___ Wn. App. ___, 239 P.3d 1168 (Div. II, 2010) – November 10:14

Incident to arrest (non-motor vehicle) exception to warrant requirement

Search of person incident to arrest held lawful under objective standard for "custodial arrest"; court rejects defendant's argument that jail would not have taken him on DWLS arrest. State v. Gering, 146 Wn. App. 935 (Div. III, 2008) – January 10:09

Search of person incident to arrest held lawful and not limited under the rationale of recent case law limiting searches of vehicles. State v. Johnson, 155 Wn. App. 270 (Div. III, 2010) – June 10:18

Recently increased restrictions on vehicle searches again held not applicable to searches of persons incident to arrest. State v. Whitney, 156 Wn. App. 405 (Div. III, 2010) – August 10:16

Medical Use of Marijuana Act

User's "authorization form" re "Medical Use of Marijuana Act" does not stop search under a warrant (this time, at least). State v. Fry, 168 Wn.2d 1 (2009) – March 10:11

Open view (See also subtopic "Privacy expectations, scope of constitutional protections")

Vehicle stop held not pretextual; open view of methamphetamine manufacturing materials provides exigent circumstances supporting vehicle entry to secure the materials. State v. Gibson, 152 Wn. App. 945 (Div. II, 2009) – January 10:11

Community caretaking function justified officer's warrantless entry of residence to see if non-responsive, apparently unconscious, person observed in open view on couch was in need of medical help. State v. Hos, 154 Wn. App. 238 (Div. II, 2010) –March 10:16

Overbreadth and particularity

Clause in search warrant held not overbroad in authorizing seizure of indicia of identity of persons in control of premises. Ewing v. City of Stockton, 588 F.3d 1218 (9th Cir. 1218) (decision filed December 9, 2009) – August 10:08

Privacy expectations, scope of constitutional protections (see also "Open view")

Tracking dog's sniff through open window of car located in driveway was not a "search" subject to state constitutional restriction. State v. Hartzell & Tieskotter, 153 Wn. App. 137 (Div. I, 2009) – January 10:19 (Note: On July 19, 2010, the Court of Appeals issued a revised opinion correcting its analysis on a sentencing issue (not addressed in the LED) with no change in the search analysis; the revised opinion was not addressed in the LED).

User's "authorization form" re "Medical Use of Marijuana Act" does not stop search under a warrant (this time, at least). State v. Fry, 168 Wn.2d 1 (2009) – March 10:11

Child pornography case: no Fourth Amendment privacy protection for computer file-sharing system accessible to others on peer-to-peer network. U.S. v. Borowy, 595 F.3d 1045 (9th Cir. 2010) (decision filed February 17, 2010) – April 10:11

Police employer's warrantless review of officer's pager transcript held reasonable as a non-investigatory, work-related search; Supreme Court avoids technology-privacy-search questions. City of Ontario, Calif. v. Quon, 130 S.Ct. 2619 (2010) (Decision filed June 17, 2010) – August 10:02

Probable cause to search

Government prevails on probable cause issues in case involving: (1) corroborated anonymous tip; (2) one controlled buy by compensated CI with good track record but with disclosed past

arrests for crimes of dishonesty; (3) an unsuccessful attempt at a second controlled buy; and (4) a six-day delay in execution of search warrant. U.S. v. Jennen, 596 F.3d 594 (9th Cir. 2010) (decision filed February 24, 2010) – April 10:08

Probable cause to believe motel room was probationer's current residence was established by (1) credible and specific informant's tip that same morning specifying the room in which he was living, (2) corroboration from motel manager, and (3) CCO's corroborating voice recognition when probationer responded "Who is it?" to knock at door. U.S. v. Franklin, 603 F.3d 652 (9th Cir. 2010) (decision filed April 29, 2010) – July 10:08

Search warrant held overbroad, and line officers held not immune from civil liability even though superiors and deputy prosecutor approved warrant before judge signed it – 8-3 majority holds officers were not reasonable in believing that warrant was supported by probable cause to search for gang indicia and firearms evidence generally. Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir. 2010) (decision filed August 24, 2010) – October 10:03

Probationer, parolee searches

Supreme Court holds that to justify a warrantless search of a residence in following up a probation violation, a probation officer must have probable cause that the violator resides there; court also rejects the State's argument that the Washington constitution contains an inevitable discovery exception to its exclusionary rule. State v. Winterstein, 167 Wn.2d 620 (2009) – February 10:24

School search exception to search warrant requirement

High school administrators' search of student's vehicle in school parking lot upheld as reasonable under school search exception to search warrant requirement. State v. Brown, State v. Duke, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3959631 (Div. III, 2010) – December 10:18

Scope of search under search warrant

Dismissal of charges held to be required based on detective's seizure and scrutiny of attorney-client-protected papers taken during execution of a search warrant in a child sex abuse investigation. State v. Perrow, 156 Wn. App. 322 (Div. III, 2010) – July 10:24

Securing premises while seeking search warrant

Seizure of residence for over 26 hours before making application for search warrant held to violate Fourth Amendment. U.S. v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) (decision filed March 9, 2010) – July 10:15

Staleness of probable cause

Government prevails on probable cause issues in case involving: (1) corroborated anonymous tip; (2) one controlled buy by compensated CI with good track record but with disclosed past arrests for crimes of dishonesty; (3) an unsuccessful attempt at a second controlled buy; and (4) a six-day delay in execution of search warrant. U.S. v. Jennen, 596 F.3d 594 (9th Cir. 2010) (decision filed February 24, 2010) – April 10:08

Waiver of argument by failure to timely raise

Defendant who pleaded guilty is not allowed to make Gant argument because his guilty plea inherently waived his right to do so. State v. Brandenburg, 153 Wn. App. 944 (Div. II, 2009) – March 10:25

Asking passenger in parked car for ID was not a "seizure"; also, car search challenge fails because theory was not raised at time of trial. State v. Johnson, 156 Wn. App. 82 (Div. II, 2010) – July 10:21

Arrestee's statement from back seat of patrol car that he "would kick [officer's] ass if [he] wasn't in handcuffs," plus other facts, held to support his harassment conviction; vehicle-search-incident challenge held waived because defendant did not raised theory in trial court. State v. Cross, 156 Wn. App. 568 (Div. II, 2010) – September 10:16

SEX OFFENDER REGISTRATION

2006 federal sex offender registration law regulating interstate sex offender movement does not apply to moves made before effective date. Carr v. U.S., 130 S.Ct. 2229 (2010) – July 10:07

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Excited utterance on e-911 tape admissible under state and federal constitutional provisions on right to confrontation; but state constitutional protection held to be greater than federal. State v. Pugh, 167 Wn.2d 825 (2009) – April 10:15

Under Sixth Amendment right to confrontation and under RCW 9A.44.020(2)'s "rape shield" provisions, orgy-consent argument by defendant should have been allowed. State v. Jones, 168 Wn.2d 713 (2010) – October 10:10

STALKING (RCW 9A.46.110)

Stalking statute's phrase "intentionally and repeatedly harassing or following another person" receives pro-state interpretation. State v. Kintz, 169 Wn.2d 537 (2010) – October 10:13

TAMPERING WITH A WITNESS (RCW 9A.72.120)

TRAFFIC (Title 46 RCW) (See also "Implied consent")

RCW 46.63.030: Where the infraction of second degree negligent driving did not occur in law enforcement officer's presence, officer could not lawfully issue a citation for that infraction. State v. Magee, 167 Wn.2d 639 (2009) – February 10:23

Where felony DUI charge is based on prior DUIs, the prior DUI charges must have been reduced to convictions at the time of the new driving event. State v. Castle, 156 Wn. App. 539 (Div. I, 2010) – October 10:24

UNIFORM CONTROLLED SUBSTANCES ACT (CHAPTER 69.50 RCW AND OTHER DRUG LAWS)

Trading drugs for firearms constitutes possessing the firearms "in furtherance of" the drug trafficking offense. U.S. v. Mahan, 586 F.3d 1185 (9th Cir. 2009) (decision filed November 16, 2009) – January 10:04

User's "authorization form" re "Medical Use of Marijuana Act" does not stop search under a warrant (this time, at least). State v. Fry, 168 Wn.2d 1 (2009) – March 10:11

Accomplice who was not present in a school zone at the time of cohort's delivery of controlled substances cannot receive school zone sentence enhancement for the offense. State v. Pineda-Pineda, 154 Wn. App. 653 (Div. I, 2010) – April 10:20

RCW 9.94A.533(5) drugs-in-jail sentencing enhancement does not apply to arrestee with methamphetamine that was discovered in search when he was booked into jail; he did not volitionally bring drugs to jail. State v. Eaton, 168 Wn.2d 476 (2010) – May 10:24

Evidence supports marijuana grower's conviction for possessing marijuana with intent to deliver. State v. O'Connor, 155 Wn. App. 282 (Div. III, 2010) – June 10:23

Sentencing enhancement for illegal drug delivery near school bus route stop: Measuring wheel evidence must be authenticated if it is to be used to prove distance from bus stop of drug-delivery location. State v. Bashaw, 169 Wn.2d 133 – August 10:15

Considering the totality of all of the evidence seized in a search incident to arrest – (1) a baggie proven to contain methamphetamine; (2) several other baggies containing a similar-appearing residue; (3) the presence of a total of over a dozen baggies; (4) a digital scale; and (4) a straw – the evidence is sufficient to support defendant's conviction for possession of methamphetamine with intent to deliver. State v. Slighte, 157 Wn. App. 618 (Div. II, 2010) – October 10:20

Claimants in RCW 69.50.505 drug forfeiture cases may recover attorney fees even if they are only fractionally successful in their challenges. Guillen v. Contreras, ___ Wn.2d ___, 238 P.3d 1168 (2010) – November 10:12

VIENNA CONVENTION AND CONSULAR NOTIFICATION

U.S. State Department has updated its "Consular Notification and Access Manual." – October 10:03

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

TRIBAL OFFICERS HAVE INHERENT SOVEREIGN AUTHORITY TO PURSUE NON-INDIAN TRAFFIC LAW VIOLATORS FROM RESERVATION, AND THEY MAY MAKE STOPS OFF THE RESERVATION TO HOLD DUI SUSPECTS FOR CITY, COUNTY OR STATE OFFICERS – In State v. Eriksen, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 4008887 (2010), the Washington Supreme Court rules 6-3 that a tribal law enforcement officer has 1) inherent sovereign authority to continue fresh pursuit of a non-Indian driver who the officer has not yet identified as such and reasonably believes has broken traffic laws on the tribe's reservation, and 2) authority under the 1855 Treaty of Point Elliott to stop the driver off the reservation and hold that driver, after determining that the driver is not a tribal member, for a city, county or state law enforcement officer to come to the scene and investigate a suspected DUI offense.

The Eriksen ruling extends the holding in State v. Schmuck, 121 Wn.2d 373 (1993) **Nov 93 LED:07**, which held that: 1) a tribal peace officer has inherent authority to stop a speeding driver on the reservation to determine whether the driver is a tribal member subject to the jurisdiction of the tribal traffic courts; and 2) after determining that the traffic law violator is a non-Indian, but also determining that the violator is a probable DUI, the tribal peace officer has authority under the 1855 Treaty of Point Elliott to detain the suspect on the reservation for a reasonable period of time while waiting for state or local law enforcement officers to come to the scene and investigate.

Justice Richard Sanders was the author of the majority opinion. Justice Mary Fairhurst authored the dissenting opinion, joined by Chief Justice Barbara Madsen and Justice Gerry Alexander. The dissent points out that "common law" (i.e., case-law based, not statute-based) fresh pursuit authority is limited to pursuit of suspected felons extraterritorially within the state. The dissent then argues that the majority has improperly extended Schmuck, arguing in vain that Schmuck's holding that tribal officers may detain a non-Indian violator on the reservation is based on treaty language that does not support holding non-Indian violators outside the reservation.

Result: Affirmance of Whatcom County Superior Court DUI conviction of Loretta L. Eriksen.

LED EDITORIAL NOTES/COMMENTS:

1) New opinion revises withdrawn 2009 opinion's discussion about tribal officers as "general authority Washington peace officers": Earlier this year, the Washington Supreme Court granted a motion to reconsider and withdrew its unanimous 2009 opinion in this case. The new majority opinion is the result of that reconsideration. Most of the analysis from the 2009 opinion (briefly addressed in the November 2009 LED) is retained in the new opinion. The biggest difference is that the new opinion deletes the discussion in the now-withdrawn 2009 opinion that had suggested that a tribal officer could qualify as a "general authority Washington peace officer" even without fulfillment of the steps in RCW 10.92.020 for tribal agencies to achieve such authority for their officers. The new majority opinion reflects the Supreme Court's tacit understanding that the Court was wrong on this point in the withdrawn 2009 opinion.

The 2008 legislation adopting chapter 10.92 RCW requires that, to obtain "general authority Washington peace officer" status for a tribal officer, a tribal agency must take a series of steps, including having the officer meet certification requirements in RCW 43.101.157, and executing an interlocal agreement with a Washington law enforcement agency pursuant to chapter 39.34. See the brief legislative-update notes in the June 2008 LED at pages 10-11. Unlike the 2009, now-withdrawn opinion, the new Supreme Court majority opinion in Eriksen acknowledges the requirements of RCW 10.92.020. The opinion settles for the assertion that, while the requirements of RCW 10.92.020 provide an alternative means for tribal officers to obtain extraterritorial enforcement power, those provisions do not mean that fresh pursuit authority does not exist for tribal officers who do not have "general authority Washington peace officer" status through that means (or do not have such authority through cross-commissioning by a general authority Washington law enforcement agency):

> **RCW 10.92.020 provides a mechanism through which tribal police may become "general authority Washington peace officers." Attaining this characterization would permit those tribal police officers to engage in statutory fresh pursuit under**

> RCW 10.93.070(6). However, failure to achieve recognition as a general authority Washington peace officer does not bar tribal police officers from fresh pursuit on the grounds [inherent sovereign authority] articulated above. Similarly RCW 10.93.120(1) permits "[a]ny peace officer who has authority under Washington law to make an arrest" to "proceed in fresh pursuit" in order to effectuate that arrest. [RCW 10.93.120(1)] does not, however, explicitly bar tribal officers from fresh pursuit to complete a stop initiated on the reservation.

2) Stop-and-detain limit on inherent sovereign fresh pursuit authority of tribal officers: The Supreme Court opinion in Eriksen is careful to point out as follows that the inherent sovereign law enforcement authority asserted for the tribal officer is limited to stopping and detaining the non-Indian traffic violator:

> As in Schmuck, the Lummi Nation does not assert authority to arrest and prosecute Eriksen for DUI but merely claims the power to *stop and detain* her until she could be turned over to Whatcom County officials. [State v. Schmuck, 121 Wn.2d 373 (1993) Nov 93 LED:07.]

3) Holding probably applies to all tribal officers: While the majority's ruling in Eriksen focused on a particular treaty – the 1855 Treaty of Point Elliott – it is our best guess based on our general understanding of other treaties and on the discussion in Schmuck and Eriksen that the holding will apply to officers of other tribal agencies in Washington as well. As always, we caution that our informally expressed views do not constitute legal advice, and that readers should consult their own legal advisors and prosecutors for advice on these and other matters addressed in the LED.

4) Reverse fresh-pursuit situation discussed: The Eriksen Court discusses with approval the decision in State v. Waters, 93 Wn. App. 969 (Div. III, 1999) May 99 LED:11, a Court of Appeals decision that upheld the arrest by City of Omak police of a Colville tribal member who the Omak officers chased onto tribal trust land. At the time that Waters was decided, our LED editorial comments raised some questions about the reasoning in the Waters decision. We have not tried

to update any research underlying those May 1999 LED Editorial comments, so those 1999 comments should be viewed in that light.

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WASHINGTON STATE COURT OF APPEALS

HIGH SCHOOL ADMINISTRATORS' SEARCH OF STUDENT'S VEHICLE IN SCHOOL PARKING LOT UPHELD AS REASONABLE UNDER SCHOOL SEARCH EXCEPTION TO WARRANT REQUIREMENT; OFFICER'S INITIATION OF CONTACT WITH CONTINUOUS- CUSTODY SUSPECT WHO HAD ASSERTED RIGHT TO SILENCE TWO HOURS EARLIER UPHELD UNDER MICHIGAN V. MOSLEY/MIRANDA INITATION-OF-CONTACT RULE

State v. Brown, State v. Duke, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3959631 (Div. III, 2010)

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

> Teddi Isherwood's teenage son, Taylor Duke, did not come home one night. Ms. Isherwood reported him as a runaway and went to his high school the following morning to look for him. She told Assistant Principal Abe Ramirez that her son had been with his friend, Joshua Brown, the night before and that Mr. Brown's Ford Bronco was in the school's parking lot.
>
> Mr. Ramirez did not find Mr. Duke or Mr. Brown in their classes. He then contacted the high school's resource officer, [Police Officer A], for help. The two of them checked Mr. Brown's Bronco and found both boys asleep inside. Mr. Ramirez knocked on a window to wake Mr. Brown. Both boys woke up and got out of the Bronco. [Officer A] saw a knife on the floor behind the front passenger seat as Mr. Duke climbed out of the Bronco. The principal told the boys that they were truant and that Ms. Isherwood was looking for Mr. Duke. Mr. Brown was escorted to the office. Meanwhile, Mr. Ramirez talked to Ms. Isherwood and Mr. Duke and sent Mr. Duke to class. [Officer A] then told Mr. Ramirez that he had seen a knife in Mr. Brown's

Bronco. Weapons are not allowed on school grounds, and Mr. Ramirez was concerned.

Mr. Ramirez asked Mr. Brown if he could retrieve the knife. Mr. Brown said he could. Mr. Ramirez and the dean of students, Kay Sidwell, searched Mr. Brown's Bronco; [Officer A] watched. Dean Sidwell found the knife [Officer A] had seen. And Mr. Ramirez found a shotgun and a .22 pistol with bullets in a case in the Bronco's cargo area. They handed the weapons to [Officer A].

The firearms had been reported stolen. [Officer A] arrested Mr. Brown for possessing firearms and read him his Miranda rights. Mr. Brown said he understood his rights and did not want to talk about the firearms. Another officer transported Mr. Brown to the police department.

Two hours after the arrest, [Officer B] again read Mr. Brown his Miranda rights. [Officer B] was investigating a vehicle prowl. Mr. Brown again said he understood his rights. And he agreed to talk to [Officer B] about the vehicle prowl. He admitted that he and Mr. Duke had stolen firearms from a truck.

[Officer A] arrested Mr. Duke following Mr. Brown's confession and transported him to the police department. [Officer B] read Mr. Duke his Miranda rights. Mr. Duke waived those rights and admitted that he helped Mr. Brown steal the firearms.

The State charged Mr. Brown with two counts of theft of a firearm and one count each of juvenile in possession of a firearm, possession of a firearm or other dangerous weapon on school facilities, second degree vehicle prowling, and minor in possession of or consuming alcohol. He moved to suppress the physical evidence and his confession. He argued that the search of his car was unlawful and his confession was coerced and obtained in violation of his Miranda rights. The juvenile court denied his motions and, after a hearing, concluded Mr. Brown was guilty of all charges except for minor in possession of or consuming alcohol.

> The State also charged Mr. Duke with two counts of theft of a firearm and one count each of juvenile in possession of a firearm, possession of a firearm or other dangerous weapon on school facilities, and second degree vehicle prowling. He moved to suppress the firearms and his confession. And he argued that his confession was the fruit of an unlawful search of Mr. Brown's car. The juvenile court denied his motions and concluded he was guilty of all charges.

ISSUES AND RULINGS: 1) Under the totality of the circumstances, does the "school search exception" to the constitutional search warrant requirement support the weapons search by the high school administrators of Mr. Brown's vehicle that was located in the school parking lot at late morning on a school day? (ANSWER: Yes);

2) Officer A Mirandized Mr. Brown after arresting him. Mr. Brown stated that he did not want to talk about the weapons found in his vehicle. Officer A did not ask Mr. Brown any questions after that. Two hours passed while Mr. Brown remained in continuous custody without any attempt by any officers to question him. Officer B then re-Mirandized Mr. Brown and asked him if he would talk about some recent vehicle prowl incidents. Mr. Brown acknowledged that he understood the warnings, and he agreed to talk. Under these circumstance, does the Miranda-based rule of the U.S. Supreme Court decision in Michigan v. Mosley apply such that it was lawful for Officer B to initiate contact with Mr. Brown regarding the vehicle prowls, re-Mirandize him and question him about the vehicle prowls? (ANSWER: Yes)

Result: Affirmance of Grant County Superior Court juvenile court adjudications that: (1) that Joshua Michael Brown was guilty of two counts of theft of a firearm, one count each of juvenile in possession of a firearm, possession of a firearm or other dangerous weapon on school facilities, and second degree vehicle prowling; and (2) Taylor Clayton Duke was guilty of two counts of theft of a firearm and one count each of second degree vehicle prowling, juvenile in possession of a firearm, and possession of a firearm or other dangerous weapon on school facilities.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) School search exception to search warrant requirement

Mr. Brown and Mr. Duke contend the search here was not justified under the school search exception to the general requirement for a warrant because there were no exigent circumstances. They also contend that the search went beyond its original justification-the knife-even if the search was justified.

. . . .

Here is what the [trial] court concluded:

> The presence of weapons in a school environment is a serious problem in schools throughout the country and has specifically impacted the Moses Lake School District . . . That a Moses Lake school administrator would be concerned about the presence of weapons on the campus of a school in the Moses Lake School District is to be expected. There was an exigency in that lunch was fast approaching and students would be returning to the parking lot. A student could have removed the knife (or any other weapon) from the vehicle. The probative value and reliability of the information used to justify the search, i.e., [Officer A's] visual observation of a weapon in Respondent Brown's vehicle, was high. Given these considerations and given the circumstances, the "school search" exception to the warrant requirement applies in this case, and the school administrators' search of Respondent Brown's vehicle was reasonable.
> . . .

School officials may search a student's belongings without a warrant under the "school search" exception if the search is justified at its inception and its scope is

related to the reasons justifying it. State v. Slattery, 56 Wn. App. 820, 823-24 (1990).

A search by school officials is justified at its inception if school officials have reasonable grounds for suspecting that they will find evidence that a student has violated the law or school rules. New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985); Slattery. The existence of an emergency is one of a number of factors that a court considers to determine whether school officials had reasonable grounds to search; others include:

> "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search."

State v. Brooks, 43 Wn. App. 560, 567-68 (1986) (quoting State v. McKinnon, 88 Wn.2d 75, 81 (1977).

Mr. Brown and Mr. Duke first argue that there was no emergency sufficient to justify the school officials' warrantless search. The argument mischaracterizes the rationale underlying the court's conclusion that the school search exception applied: school officials have an interest in maintaining order and discipline in the school. An emergency under the school search exception is not the same as the exigent circumstances exception to the general requirement for a warrant. See Slattery (listing exceptions separately). An exigency under the school search exception is any threat to the order and discipline of a school. McKinnon. An exigent circumstance under the [general] exigent circumstances exception, however, is a true emergency. State v. Hinshaw, 149 Wn. App. 747, 754 (Div. III, 2009) **July 09 LED:20**. It requires swift action to prevent danger to life, a suspect's imminent escape, or destruction of evidence. Hinshaw.

The juvenile court here was not asked to and did not pass on whether the [general] exigent circumstances exception permitted the warrantless search of Mr. Brown's Bronco. The court was asked to consider the factors necessary to decide whether school officials had reasonable grounds to search these students, i.e., the school search exception. Brooks. And it did so.

This school district has had serious problems with weapons on campus in the past. The boys were truant and had been in Mr. Brown's vehicle. The vehicle contained a knife. The lunch period was about to begin. And Mr. Brown agreed that school officials could enter his vehicle. Mr. Brown does not challenge these findings. He agrees that "the circumstance that justified entering Mr. Brown's car was the pocketknife earlier seen by Officer Lopez on the floorboard in the back seat area." The findings support the court's conclusion that the search was justified at its inception as a school search. T.L.O. We also conclude that the exigency here – the threat a weapon posed to discipline and order – was sufficient to support a school search. McKinnon.

Mr. Brown and Mr. Duke argue, alternatively, that the scope of the search, even if justified, was not reasonable. The search was prompted by the presence of a knife, so they argue that the search should have ended once the knife was recovered.

The scope of a search is reasonable "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O. The school officials here searched only Mr. Brown's vehicle. The search was prompted by a knife on the vehicle's floorboard. Moses Lake High School has a zero-tolerance policy for weapons, and Mr. Brown brought a weapon onto school grounds. School officials have a substantial interest in ensuring that school grounds are safe. See Slattery. And, here, the decision to search Mr. Brown's vehicle for weapons was not only linked to the initial intrusion but also was not overly intrusive in light of the seriousness of

Mr. Brown's infraction, bringing a weapon to a school that has no tolerance for weapons. The juvenile court, then, properly concluded that the "school search" exception applied. And it properly admitted the physical evidence seized.

. . . .

Mr. Brown and Mr. Duke also contend that their confessions should be suppressed as the fruit of a poisonous tree because the search was illegal. We have already concluded that the search was proper. This derivative contention, then, also fails.

2) Post-assertion police initiation of contact and voluntariness of waiver under Miranda

Mr. Brown contends that his confession should have been excluded because it followed his earlier assertion of his right to remain silent.

Whether a defendant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning, (2) whether the police continued interrogating the defendant before obtaining a waiver, (3) whether the police coerced the defendant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary. State v. Wheeler, 108 Wn.2d 230, 238 (1987).

Mr. Brown argues that the police did not scrupulously honor his right to cut off questioning and that his subsequent waiver, therefore, was not voluntary. The court concluded otherwise:

> [Officer B] gave Respondent Brown . . . a fresh set of Miranda warnings, and . . . [Officer A] "scrupulously honored" Respondent Brown's invocation of his right to remain silent. There is no evidence that [Officer A] attempted to question Respondent Brown prior to the time [Officer B] issued the fresh set of Miranda warnings.

> Respondent Brown freely, voluntarily, and intelligently waived his right to remain silent and thereafter provided a statement to [Officer B].

Once a defendant invokes his right to remain silent, the police must "scrupulously honor" the defendant's right to cut off questioning by immediately ceasing the interrogation, by resuming the interrogation only after significant time has passed, and by providing a fresh set of Miranda warnings before resuming the interrogation. Michigan v. Mosley, 423 U.S. 96, 104-06 (1975). Officers further "scrupulously honor" a defendant's right to cut off questioning by limiting the scope of a subsequent interrogation to a crime that was not a subject of the earlier interrogation. We have held that limiting the scope of an interrogation to a different crime is required. State v. Reuben, 62 Wn. App. 620, 626 (Div. III, 1991) **Jan 92 LED:16**. But whether subsequent interrogations must be limited to a different crime is subject to some debate. State v. Robbins, 15 Wn. App. 108 (Div. I, 1976). It is a debate that we need not resolve here.

[Officer A] arrested Mr. Brown for firearms possession, gave Mr. Brown Miranda warnings, and then asked if he wanted to talk about the firearms. Mr. Brown said no. [Officer A] did not question Mr. Brown once Mr. Brown asserted his right to remain silent . . . .

In fact, no one questioned Mr. Brown again until two hours had passed and he had been advised of his Miranda rights again . . . . Two hours is a sufficient period of time. And the court concluded as much . . . .

Next, [Officer B] asked Mr. Brown about a vehicle prowl he was investigating, not about firearms possession. The juvenile court properly concluded that the police officers here scrupulously honored Mr. Brown's right to cut off questioning.

. . . .

Mr. Brown argues that he did not voluntarily waive his right to remain silent. A waiver of the right to remain silent must be voluntary to be valid. To be voluntary, a defendant's waiver must be the product of rational intellect and free will. In determining voluntariness, we evaluate the totality of the circumstances, including Mr. Brown's physical and mental condition, his experience, and the conduct of the police.

We have concluded that the police officers honored Mr. Brown's exercise of his right to remain silent and to cut off questioning. And Mr. Brown has experience with the criminal justice system and appeared to understand and of course exercised his right to remain silent. . . .

Here, the juvenile court's findings support its conclusion that Mr. Brown voluntarily waived his right to remain silent. Mr. Brown's confession, then, was properly admitted.

We affirm the adjudications in both cases.

[Some citations omitted; subheadings revised for LED]

LED EDITORIAL NOTE: As noted in the November 2010 LED at page 3, the article *Initiation Of Contact Rules Under The Fifth Amendment* on the CJTC LED internet page was recently updated. The Brown/Duke opinion digested above is not yet incorporated in the updated article. The analysis in Brown/Duke, per our Comment # 4 below, is guarded but is not inconsistent with our discussion of the Michigan v. Mosley subtopic at pages 3 through 4 of the article.

LED EDITORIAL COMMENTS: 1) School search exigency factor is far easier to meet than is the general "exigent circumstances" exception to the search warrant requirement.

The Brown/Duke opinion above correctly explains that the "exigency factor" under the "school search exception" to the search warrant requirement is much easier to prove than is the general

"exigent circumstances" exception to the search warrant requirement. For analysis on the general exigent circumstances exception to the search warrant requirement, see State v. Hinshaw, 149 Wn. App. 747, 754 (Div. III, 2009) July 09 LED:20, cited in the Brown/Duke opinion; see also State v. Tibbles, 169 Wn.2d 364 (2010) Sept 09 LED:09.

2) The school search exception to the warrant requirement requires that both (1) the decision to search and (2) the lead on execution of the search generally be by school personnel, not police.

Law enforcement officers may share information with school authorities without making the school authorities their "agents" for constitutional search purposes. But if law enforcement officers direct or recommend a particular course of action by the school authorities, or if officers take over the execution of the search, that may make the school authorities agents of the police. In that circumstance, the search will be tested under the more restrictive standards for searches that apply to law enforcement.

3) To date, no Washington appellate court decision has held that article I, section 7 of the Washington constitution is more restrictive on searches by school officials than is the Fourth Amendment of the U.S. constitution.

The Brown/Duke opinion does not say whether the school search issue is being addressed under the Fourth Amendment or under article I, section 7 of the Washington constitution. It does not matter. In State v. B.A.S., 103 Wn. App. 549, 553 n.4 (Div. I, 2000) Feb 01 LED:13, Division One of the Court of Appeals declared: "The Washington Constitution does not provide students with greater protections from searches by school officials than the Fourth Amendment." The Brown/Duke opinion is the first published Washington appellate court decision to address the school search doctrine since B.A.S. (NOTE: We do not consider to be a true "school search" case the Washington Supreme Court decision in York v. Wahkiakum School District, 163 Wn.2d 297 (2008) (interpreting article I, section 7 of the Washington constitution as barring warrantless, random, suspicionless drug testing of high school athletes)).

4) Under some circumstances, such as here, per Michigan v. Mosley, law enforcement officers may initiate contact with continuous custody suspect who has asserted right to silence (as opposed to assertion of right to attorney).

The previously referenced initiation-of-contact article on the CJTC internet LED page says the following at pages 3-4 regarding law enforcement officer initiation of contact with a suspect who has remained in continuous custody after invoking the right to silence (as opposed to invoking the right to an attorney) when Mirandized:

> **Some questions remain today regarding the duration of the restriction on re-contact of continuous-custody suspects who have asserted the right to silence. As we point out below in subsection III.C of this article, some aspects of the restrictions on initiating contact with a continuous-custody suspect are more restrictive where the suspect has asserted the right to counsel, as opposed to when the suspect has asserted only the right to remain silent. Thus, as discussed below in subsection III.C, an assertion of the right to counsel during custodial interrogation places a long-term bar on police initiation of contact with the continuous-custody suspect: (i) on all previously committed crimes (related or unrelated); and (ii) by all officers (whether or not officers making subsequent contacts know or should know of the assertion of counsel rights). On the other hand, Mosley holds, as noted above, that, so long as rights are otherwise carefully respected, a second set of officers may go back after a reasonable passage of time to re-contact the continuous-custody suspect where the contact is on an unrelated crime. There is not a great deal of related case law on re-contacting the continuous-custody suspect who has asserted the right to silence, but what there is supports a flexible reading of [Mosley] to allow re-contact in some additional situations beyond its facts.**
>
> **Thus, in U.S. v. Hsu, 852 F.2d 407 (9th Cir. 1988), the Federal Court held the following scenario to be lawful: in-custody drug suspect tells DEA agent #1 following Miranda warnings that he does not want to talk; thirty minutes later, DEA agent #2, not knowing of the continuous-custody suspect's earlier assertion of the right to**

silence to the other agent, contacts the suspect, Mirandizes him, and gets a confession. And in People v. Warner, 250 Cal. Rptr. 462, 203 Cal. App. 3d 1122 (1988), the initiation of contact found acceptable by the court was a similar re-contact on the same crime by an unknowing second officer, except that the time between contacts was several hours. If the Hsu or Warner defendants had initially asserted the right to counsel to the first officer, the re-contacts would have been unlawful, despite the subsequent officers' ignorance of the assertion. Thus, these cases hold that Mosley does not impose the same absolute, encompassing bar when the right initially asserted is that of silence, rather than the assertion of the right to counsel. Hsu and Warner appear to be correct readings of Mosley in allowing generally for initiations of contact with silence-right-asserting, continuous-custody suspects by unknowing subsequent officers, whether on the same crime or unrelated crimes.

We also believe that it is not necessary that a re-contact of the -silence-right-asserting, continuous-custody suspect be by unknowing second officers. There is very little case law on the following point, but what there is supports the view that at least one re-contact of the continuous-custody suspect by the same officer on the same crime will be lawful if: (a) there is a significant time lapse between contacts (e.g., several hours), (b) both sets of warnings are given in a non-coercive manner, and (c) the defendant freely waives his or her rights on the second occasion. U.S. v. House, 939 F.2d 659 (8th Cir. 1991) (House holds re-contact on same crime permitted under where there was a nine-hour time lag and other factors met); Charles v. Smith, 894 F.2d 718 (5th Cir. 1990); Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (in Smith and Jacobs, re-contact on same crime fails analysis, but apparently only because officers waited only a few minutes).

The Brown/Duke opinion addresses two Washington appellate court decisions that have addressed the Michigan v. Mosley issue. Those decisions presently are not included in the above-referenced article on initiation of contact (they will be incorporated into the article in the near future). The two decisions are consistent with the discussion in the article. In the first case,

State v. Robbins, 15 Wn. App. 108 (Div. I, 1976), Division One of the Court of Appeals held to be admissible the re-contact statement of the defendant. On Friday, the Mirandized custodial suspect said she did not want to make a statement. On the following Monday, the same officer re-contacted the suspect on the same crime after she had remained in jail throughout the weekend, she responded after new Miranda warnings and waiver that she wanted to talk. Those circumstances met Mosley and the statement was admissible, the Court of Appeals held in Robbins.

The second Washington Court of Appeals decision on Michigan v. Mosley cited in Brown/Duke is State v. Reuben, 62 Wn. App. 620, 626 (Div. III, 1991) Jan 92 LED:16. In Reuben, Division Three held to be inadmissible the re-contact statement of the defendant. After a fatal traffic accident, a WSP trooper Mirandized the suspect in the ER at the hospital, and the suspect said "Go f*** yourself" (which the Court of Appeals deemed an invocation of the right to silence). A short time later, a WSP detective arrived at the ER and questioned the suspect without re-Mirandizing him. Not surprisingly in light of the very short time lapse between contacts and the fact that the second officer was questioning the suspect about the same crime and had not re-Mirandized him, these circumstances did not meet the requirements of Michigan v. Mosley, the Court of Appeals held in Reuben.

One other Washington Court of Appeals decision on Michigan v. Mosley is State v. Boggs, 16 Wn. App. 682 (Div. II, 1977). Boggs is not cited in Brown/Duke. In Boggs, in weekend efforts at interrogation of a jailed suspect, officers ignored the suspect's invocation, on at least two occasions, of both his right to silence and his right to attorney. On a subsequent police contact on Monday, a deputy sheriff engaged the suspect in a conversation while escorting him back to his cell after he had made a phone call. The deputy did not re-Mirandize the suspect. The suspect finally talked. Of course, Division One of the Court of Appeals held the statement to be inadmissible because the officers had violated both the suspect's (1) right to silence (in light of the totality of the circumstances, including the absence of new warnings) and (2) right to an attorney.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent

proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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