Law Enforcement Digest

NOVEMBER 2011

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

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

(1) CIVIL RIGHTS ACT LAWSUIT: SPLIT 3-JUDGE PANEL HOLDS THAT AFFIDAVIT DID NOT ADD UP TO PROBABLE CAUSE TO SEARCH HOME COMPUTER FOR CHILD PORNOGRAPHY IN DESCRIBING (1) TEACHER'S MOLESTING AND OTHER MISBEHAVIOR WITH FEMALE STUDENTS, PLUS (2) DETECTIVE-AFFIANT'S TRAINING AND EXPERIENCE – In Dougherty v. City of Covina, ___F.3d ___, 2011 WL 3583404 (9th Cir. August 16, 2011), a 3-judge Ninth Circuit panel rules 2-1 that a detective's affidavit for a search warrant did not provide probable cause support for a warrant to search a grade school teacher's home computer for child pornography.

The detective's affidavit provided detailed accounts of recent reports from numerous students in a sixth grade teacher's class regarding his inappropriate touching of female students (including reports of his touching a number of girls' backs, apparently feeling for a bra strap), and his looking down females' shirts and up their skirts. The affidavit also described a reported child molesting incident from three years' previously, where the report did not lead to criminal charges due to inconsistencies in the victim's report, but that the detective had recently reinvestigated in some respects. Finally, the affidavit stated that in the detective's experience and training, persons involved in such behavior are likely to possess child pornography on a home computer.

The two majority judges follow the lead of opinions from the Second and Sixth Circuits of the U.S. Court of Appeals (while acknowledging that other courts disagree) in holding that in the absence of some evidence that the suspect is interested in child pornography, mere evidence of child molesting and inappropriate touching, peeping and leering, no matter how extensive, will not support a search warrant for a home computer for child pornography. Such an affidavit is not saved, they assert, by the inclusion in the affidavit of a detective's training-and-experience assertion that persons involved in such behavior are likely to possess child pornography on a home computer. They also note that the detective did not provide any information as to whether the suspect even had a home computer, or whether there had been any attempt to learn whether there was child pornography on the teacher's computer at work.

The majority opinion in Dougherty concludes, however, that the detective is entitled to qualified immunity because the law was not clearly established in the Ninth Circuit at the time the detective obtained the search warrant. The majority opinion also rejects, for failure to support his arguments with facts and law, the sixth grade teacher's claims of agency liability and supervisory liability.

Dissent: The dissenting judge in Dougherty disagrees with the probable cause analysis by the majority judges, contending that common sense supports the conclusion that it is probable that the sixth grade teacher would have child pornography on a home computer in these circumstances.

Result: Affirmance of dismissal order of U.S. District Court (Central District of California).

(2) CIVIL RIGHTS ACT LAWSUIT: OFFICER WHO FATALLY SHOT DRIVER, WHO RAMMED HER VEHICLE INTO POLICE VEHICLES AT END OF HIGH SPEED CHASE, IS ENTITLED TO QUALIFIED IMMUNITY FROM DUE PROCESS-BASED LIABILITY – In A.D. v. Markgraf, California Highway Patrol, 636 F.3d 555 (9th Cir. April 6, 2011), a 3-judge Ninth Circuit panel rules unanimously that a police officer who fatally shot a driver at the end of an extended high speed chase, that culminated in the driver ramming her vehicle into police vehicles three times, is entitled to qualified immunity against the family members' due process-based lawsuit on the rationale that a reasonable officer would have believed under the circumstances that a legitimate law enforcement objective existed for the shooting.

The Ninth Circuit explains:

> [O]nly official conduct that "shocks the conscience" is a cognizable due process violation. Whether this is shown, in turn, depends upon which test applies: deliberate indifference, or the more demanding showing that the officer acted with a purpose to harm that is unrelated to legitimate law enforcement objectives. The more demanding standard governs when actual deliberation is impractical. As the district court concluded, the purpose to harm standard controls given how quickly events occurred after Eklund's vehicle came to a stop at the chain link fence and she started to ram Markgraf's vehicle. In these circumstances, he lacked "the opportunity for actual deliberation." . . .

[Citations omitted]

Applying this standard, the Court concludes that it was not clearly established prior to 2006 that the officer's split second decision to shoot someone who had just led police on a dangerous high speed chase and who was using her car as a weapon would shock the conscience. Accordingly, the officer is entitled to qualified immunity from liability on the plaintiff's Fourteenth Amendment substantive due process claim.

Result: Officer held entitled to qualified immunity; vacation of U.S. District Court (Northern District of California) judgment that awarded: (1) damages of $30,000.00 each for two minor children, and (2) attorney fees of over $500,000.00.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

COURT REVERSES ITS PREVIOUS TWO OPINIONS IN THIS CASE AND HOLDS: WHERE A NON-TRIBAL MEMBER COMMITS A TRAFFIC INFRACTION ON THE RESERVATION, TRIBAL POLICE OFFICERS DO NOT HAVE AUTHORITY TO PURSUE THE VIOLATOR OUTSIDE OF THE RESERVATION AND STOP AND DETAIN WHILE WAITING FOR CITY, COUNTY OR STATE LAW ENFORCEMENT TO ARRIVE – In State v. Eriksen, ___ Wn.2d ___, 2011 WL 3849504 (September 1, 2011), a 5-4 majority of the Washington State Supreme Court reverses its previous two opinions in the same case (see State v. Eriksen, 166 Wn.2d 953 (2009) **Nov 09 LED:11**; State v. Eriksen, 170 Wn.2d 209 (2010) **Dec 10 LED:16**).

In Eriksen a tribal officer observed two infractions committed by a suspected DUI driver on a road within the reservation. The officer activated his overhead lights and the vehicle pulled over at a gas station off of the reservation. The tribal officer detained the driver while he waited for a sheriff's deputy to arrive. The driver was arrested, charged and convicted of DUI in state court.

As noted above, the conviction was twice affirmed by the Supreme Court under the rationale that tribal officers have the inherent authority to pursue violators off the reservation, stop them, and hold them for city, county or state officers. However, on the third consideration, the Court reverses itself and the conviction, holding that tribal officers do not have such authority. The majority opinion expressly declines to address a "fresh pursuit" issue raised in a friend-of-the-court brief because the issue was not raised by a party to the case. Neither of the two dissenting opinions address the "fresh pursuit" issue.

Dissent: Justice Owens authors a dissent, joined by Justices Charles Johnson and Chambers, arguing that the tribe has inherent authority to detain outside the reservation:

> This case concerns an Indian tribe's authority to detain a non-Indian who threatens the health and welfare of a tribe and its members until state law enforcement officers arrive. The general power of a tribe to do so is well established. The unique aspect of this case is that, in the process of pulling over the driver who threatened the tribe's health and welfare, the driver and tribal law enforcement officer crossed the reservation's border. Under my reading of applicable precedent, the tribe possesses authority to detain a non-Indian driver who violated the law while on the tribe's reservation and whose conduct continues to directly threaten the health or welfare of the tribe. . . .

[Citations omitted]

Justice Alexander authors a separate dissenting opinion arguing that the brief detention outside the reservation was a valid citizen's arrest because DUI is a breach of the peace. The majority opinion asserts that this issue cannot be addressed because the State was too late in raising the issue. The other dissenting opinion does not mention the citizen's arrest issue.

Result: Reversal of Whatcom County Superior Court DUI conviction of Loretta Lynn Eriksen.

LED EDITORIAL COMMENTS: The majority opinion relies heavily on the Court's opinion in State v. Barker, 143 Wn.2d 915 (2001) Oct 01 LED:11. The majority opinion declares that the Supreme Court held in Barker that an Oregon police officer who saw a driver commit several traffic infractions did not have statutory or common law authority to pursue the driver across the border into Washington to stop and detain the driver while awaiting Washington officers. For whatever value there may be in accurate reading of precedents, that declaration in the Eriksen majority opinion is not accurate. A careful reading of the full Barker opinion reveals that, notwithstanding some loose language near the end of the opinion, the Supreme Court was focused only on the exclusionary rule in Barker. The Supreme Court opinion in Barker carefully expressly assumed at the outset, solely because the State had not sought review of the Court of Appeals decision, that the Court of Appeals decision in Barker that made such a holding on law enforcement authority was correct.

The Eriksen majority opinion also acknowledges chapter 10.92 RCW, which allows tribes to obtain "general authority Washington peace officer" status for its officers by taking a series of steps including meeting certification requirements under RCW 43.101.57 and executing an interlocal agreement with a Washington law enforcement agency pursuant to chapter 39.34 RCW. The majority opinion concludes that creating a doctrine of fresh pursuit based on a tribe's inherent authority would undermine this legislation.

The majority acknowledges the policy issues created by its holding:

> **While the territorial limits on the Lummi Nation's sovereignty create serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border, the solution does not lie in judicial distortion of the doctrine of inherent sovereignty. Instead, these issues must be addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts, to ensure that all law enforcement officers have adequate authority to protect citizens' health and safety in border areas. We urge the Lummi Nation and Whatcom County to work together to solve the problems made evident by this case; but if they can or will not do so, we will not manipulate the law to achieve a desirable policy result.**

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WASHINGTON STATE COURT OF APPEALS

IN A SPLIT DECISION, THE COURT OF APPEALS HOLDS THAT WHERE AN OFFICER ERRONEOUSLY BELIEVED THAT A CITIZEN'S CONCLUSORY REPORT PROVIDED JUSTIFICATION TO STOP A VEHICLE FOR DUI, AND THE OFFICER'S PRIMARY REASON FOR HIS STOP WAS TO INVESTIGATE THE POSSIBLE DUI, THE STOP WAS UNLAWFULLY PRETEXTUAL EVEN THOUGH THE OFFICER OBSERVED A MINOR TRAFFIC VIOLATION AND BASED THE STOP IN PART ON THE LATTER VIOLATION

State v. Arreola, ___ Wn. App. ___, 2011 WL 4090202 (Div. III, September 15, 2011)

Facts and Proceedings below: (Excerpted from majority opinion)

> [The police officer] was the only witness to testify at the suppression hearing. He testified that while on routine patrol on the evening of the arrest he responded to a citizen report of a possible drunk driver on a state highway in the southwest section of Grant County. Upon arriving in the area of the reported sighting, he began following Mr. Chacon's car, which matched the description provided by the citizen report. He did not see any behavior suggesting that Mr. Chacon was under the influence of alcohol but could hear that the car was equipped with an after-market exhaust system, amplifying the noise of the engine in violation of RCW 46.37.390(3). He followed the Chevy southbound for roughly a half mile, at which point Mr. Chacon made a legal left turn. After following Mr. Chacon eastbound for a short distance, [the officer] activated his overhead lights. Mr. Chacon did not immediately pull over, but before long made a left turn into a yard and stopped. Upon approaching the car, [the officer] recognized Mr. Chacon from prior encounters, noticed that his eyes were bloodshot and watery, saw open containers of beer in the car, and smelled alcohol. He arrested Mr. Chacon on several outstanding warrants after issuing citations for the modified muffler, DUI, and driving with a suspended license.
>
> At the suppression hearing, [the officer's] explanation why he stopped Mr. Chacon's car was found by the court to be forthright but it was complicated, so the trial court questioned him at length. Overall, the officer testified that he thought he had probable cause to stop Mr. Chacon for suspicion of DUI; it was his interest in investigating for drunk driving that was his primary motive for the stop, although he had noticed the modified muffler and considered it a reason for stopping the car as well. He testified that he had pulled over at least 10 drivers in the past for muffler infractions but has not always stopped and cited the driver upon noticing a noncompliant muffler. He testified that modified mufflers—which he referred to at one point as "noisemaker[s]"—are "fairly common" in the Mattawa area.
>
> The trial court denied Mr. Chacon's motion to suppress, concluding that the stop "was not unconstitutionally pretextual under State v. Ladson[, 138 Wn.2d 343 (1999) **Sept 99 LED:05**] or State v. DeSantiago, 97 Wn. App. 446 (1999) [**Nov 99 LED:12**]."

[Footnotes omitted]

ISSUE AND RULING: Does the evidence establish as a matter of law that the officer made an unlawful pretext stop in violation of the Washington constitution, article I, section 7, where the officer testified that: (1) he erroneously thought that he had justification for a DUI stop based on a citizen's conclusory report of a possible drunk driver, and (2) while he had observed a vehicle

noise/muffler violation and made the stop in part because of that violation, the primary subjective reason for the stop was to investigate a possible DUI? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority; Judges Siddoway and Sweeney are in the majority, and Judge Brown dissents)

Result: Reversal of Grant County Superior Court felony DUI conviction of Gilberto Chacon Arreola.

ANALYSIS: (Excerpted from majority opinion)

> Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." "Authority of law" requires a valid warrant unless one of a few jealously guarded exceptions to the warrant requirement applies. The Washington Supreme Court has repeatedly affirmed that Washingtonians retain their privacy while in an automobile. But for Mr. Chacon's modified muffler, the State does not argue that [the officer] was justified in pulling him over to investigate for DUI under Terry v. Ohio, 392 U.S. 1, 21–22 (1968). The citizen's report triggering the officer's investigation was uncorroborated and any details it might have contained are not in the record. See State v. Hart, 66 Wn. App. 1, 6–7 (1992) **Nov 92 LED:13** (an uncorroborated tip must possess enough objective facts to justify detention of the suspect).
>
> For Fourth Amendment purposes, [the officer's] observation of the muffler infraction would have been justification enough for stopping Mr. Chacon in order to investigate suspected drunk driving; the United States Supreme Court has held that an officer wishing to investigate a crime can stop a driver for any traffic infraction he observes. Whren v. United States, 517 U.S. 806 (1996) **Aug 96 LED:09**. Of concern to our Supreme Court in Ladson, in light of our constitution's broader privacy guaranty, was the extensiveness of traffic regulation, such that "'virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.'" Ladson considered "whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent [the] 'authority of law' represented by a warrant," and concluded it should not. "[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason."
>
> To determine whether a given stop is pretextual, a court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. The State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. A court is required to "look beyond the formal justification for the stop to the actual one" when assessing whether a stop is pretextual.
>
> Evidence relevant to the officer's actual motive includes the nature of the patrol in which he or she is engaged, either by assignment, or because his or her suspicion has been specifically aroused. See [Ladson, 138 Wn.2d at 346] (officers working proactive gang control); DeSantiago, 97 Wn. App. at 452–53 (patrol officer engaged in narcotics investigation at the time he observed infraction); State v. Myers, 117 Wn. App. 93 (2003) **Aug 03 LED:18** (patrol officer

following driver suspected of having a suspended license when infraction observed), review denied, 150 Wn.2d 1027, 82 P.3d 242 (2004); State v. Montes–Malindas, 144 Wn. App. 254, 261 (2008) **July 08 LED:21** (patrol officer surveilling suspicious van when infraction observed); also relevant is whether or not the officer stops the offender immediately upon seeing the infraction, see State v. Minh Hoang, 101 Wn. App. 732, 741–42 (2000) **Nov 00 LED:08** (traffic infraction committed adjacent to officer's surveillance point, with officer immediately pulling over the driver), review denied, 142 Wn.2d 1027 (2001); whether or not the officer cites the offender for the traffic infraction, see [Hoang, 101 Wn. App. at 742] (whether the offender is cited is a factor to be considered, but is not dispositive); and the officer's testimony as to his or her motivation, although an officer's candid admission to pretextual conduct is more probative than a denial of pretextual conduct.

. . . .

. . . . As observed in earlier decisions of this court, whether [the officer] would have pulled over Mr. Chacon for the muffler violation had he not been concerned about drunk driving is irrelevant to our analysis; our concern is only with why the stop was made in this particular case. While we accept the trial court's finding that the muffler violation was "an actual reason" for the stop, it was clearly subordinate to the officer's desire to investigate the DUI report. The muffler violation therefore cannot be characterized as the actual reason for the stop under Ladson. Ladson observes that in the analogous context of suppressing evidence obtained in pretextual searches that rely on the emergency exception, Washington courts have held that the search "'must not be primarily motivated by intent to arrest and seize evidence.'" In every case presenting a pretextual stop issue a traffic infraction will be offered as the justification, and thereby an actual reason, for the stop. The reasoning of Ladson compels the result that a traffic stop is without authority of law where it cannot be constitutionally justified for its primary reason (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once lawfully sufficient but only a secondary reason.

The State nonetheless suggests that pretext is never an issue when an officer stops a citizen for a traffic infraction in order to investigate a driving-related crime. Its argument is predicated on the statement in State v. Nichols[,161 Wn.2d 1, 8 (2007) **Sept 07 LED:10**] that "[a] pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." Both Nichols and Ladson involved stops whose real purpose was alleged to be investigation for drugs, so it was accurate in those cases to contrast a "speculative criminal investigation unrelated to the driving" with pretextual enforcement of the traffic code. But the rationale of Ladson cannot be reconciled with the State's position that an officer lacking probable cause to stop a driver in order to investigate a driving-related crime may rely pretextually on a civil traffic infraction for an investigatory stop. This same misreading of Ladson was addressed in Myers, in which this court found pretextual a traffic stop for an illegal lane change where the officer's real motive was to investigate whether the driver had a suspended license, a driving offense. In rejecting the State's argument that the stop was justified by the mere fact that the officer was investigating a "driving" offense, this court pointed out that "Ladson's reference to the investigation of suspicions 'unrelated to the driving' plainly refers to a driving infraction, not the criminal

> investigation." But see [State v. Weber, 159 Wn. App. 779, 791 (2011) **April 11 LED:20**](attaching unspecified significance to the fact that the officer "was not conducting an investigation unrelated to traffic offenses").
>
> The traffic stop that yielded the evidence on which the State charged Mr. Chacon was without authority of law because the reason for the stop—to investigate for drunk driving—was not exempt from the warrant requirement. When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. We reverse the conviction and remand with directions that the trial court dismiss the charges with prejudice.

[Some citations and footnotes omitted]

Dissent: Judge Brown dissents arguing that deference should be given to the trial court's determination that the muffler violation was the actual reason for the stop.

> The officer cited [Arreola] for the muffler violation. Certainly, a stop can serve multiple, legal, complimentary purposes so long as an actual stop reason passes legal muster. We should not expect investigating officers to be blind to other potential concurring violations detected when investigating an actual stop reason. While [the officer] may have had suspicions regarding whether Mr. Chacon was involved with driving under the influence of alcohol, the trial court believed the officer's testimony regarding his muffler-violation stop practices. Although Mr. Chacon asserts a pretext stop, this court recognized in State v. Minh Hoang, 101 Wn. App. 732, 742 (2000) **Nov 00 LED:08**, that under State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05** suspicious patrol officers "may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop." . . .

LED EDITORIAL NOTE REGARDING STANDARD OF REVIEW IN COURT OF APPEALS: Our excerpts from the Court of Appeals majority opinion do not include all of the Court's discussion and review of the trial court's findings of fact and conclusions of law. An appellate court is required to uphold the trial court's ruling on a suppression motion if: (1) the trial court's findings of fact are supported by substantial evidence (even if the appellate court would have made different factual findings on the same evidence), and (2) the findings of fact support the trial court's conclusions of law. In this case, the Arreola majority opinion in effect concludes that the evidence establishes as a matter of law that the stop was subjectively pretextual and will not support a contrary factual finding.

LED EDITORIAL COMMENTS: The dissent makes a good point that in common sense and public policy officers should not be required to blind themselves to any other potential violations once they locate a vehicle based on a citizen's tip of DUI. Unfortunately this is exactly what the majority opinion appears to require of officers. Under the majority's analysis, if an officer locates a vehicle that a citizen has conclusorily reported as suspected DUI, the officer may only stop the vehicle if he or she observes driving consistent with DUI. But the dissent's criticism of the majority opinion may be more a criticism of the broad Ladson pretext rule (with alternative objective and subjective prongs) than a criticism of the majority's application of that rule. Our non-exhaustive research suggests that Washington is among only a handful of states whose Supreme Court has interpreted its state constitution as including a pretext rule of the breath of Ladson. But until and unless the Washington Supreme Court clarifies or narrows its ruling in Ladson, it may well be necessary that, before making a stop, Washington law enforcement personnel either: (1) determine the credibility and

objective bases for such reports of possible DUI, or (2) corroborate conclusory reports or reports from citizen reporters with observations of driving behavior that are consistent with DUI.

The majority opinion states that the officer was the only one to testify at the suppression hearing, that he testified that he responded to "a citizen report of a possible drunk driver," and that the trial court record does not contain any details that might have been contained in the citizen's report. We think that the Arreola majority would have upheld the stop as a reasonable-suspicion-based stop if the record had reflected that a known citizen had made a report providing objective facts of the reporter's first-hand observations that the vehicle was being driven DUI. See, for instance, our digesting – including our comments – of the Ninth Circuit decision in U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir. 2010) July 10 LED:11. Dispatchers and officers should always attempt to obtain as much detailed objective information from citizens as possible about who is making the report and what the reporter has observed.

As always, officers should consult with their assigned agency legal advisors and/or prosecutors to determine whether to alter procedures based on this opinion.

IN A SPLIT DECISION, THE COURT OF APPEALS HOLDS THAT AN OFFICER WHO ACTIVATED PATROL CAR'S EMERGENCY LIGHTS, PULLED IN BEHIND PARKED VAN, AND GOT OUT AND ASKED NEARBY DRIVER OF VAN WHAT HE WAS DOING IN NEIGHBORHOOD SEIZED THE DRIVER WITHOUT REQUIRED REASONABLE SUSPICION OR COMMUNITY CARETAKING BASIS

State v. Gantt, ___Wn. App. ___, 257 P.3d 682 (Div. III, August 16, 2011)

Facts and Proceedings below: (Excerpted from majority opinion)

> At approximately 9:50 p.m., on May 7, 2009, [Officer A] of the Selah Police Department was patrolling westbound on Goodlander Road. The officer saw a minivan stopped on the street a few yards north of Goodlander Road on Goodlander Drive. [Officer A] saw two people standing on the passenger side of the van.
>
> A few minutes later, [Officer A] returned eastbound on Goodlander Road. He saw the same van moved to an area in front of a driveway at the corner of Crestview Drive and Goodlander Road. [Officer A] saw a man walking toward a residence. [Officer A] decided to make a social contact. He activated his emergency lights and pulled up behind the van. The man returned to his van.
>
> A woman was sitting in the van. [Officer A] conacted the man. [Officer A] asked the man, later identified as Mr. Gantt, what he was doing there. Mr. Gantt appeared nervous and stated that he was looking for a friend. [Officer A] asked the name of the friend, and Mr. Gantt provided a name similar to "Elaine." The officer told Mr. Gantt that he had just seen the van stopped on the next block over and that he did not believe what Mr. Gantt was telling him.
>
> While talking to Mr. Gantt, [Officer A] noticed that there was an expired trip permit in the rear window of the van that had been altered from the original dates. Observing that Mr. Gantt was becoming increasingly nervous, [Officer A] requested backup. [Officer B] contacted [Officer A] while en route and told him that he was familiar with Mr. Gantt.

> Shortly after his arrival, [Officer B] walked over to the minivan and looked into the rear window of the cargo area. He observed mail, unused checkbooks, a video camera, an automobile stereo with a missing face plate, and a flashlight. [Officer B] noticed a woman's name and a Yakima address on an item of mail.
>
> When [Officer B] looked through the van's side windows, he saw two large-sized duffle bags, a small ice chest, and a pearl necklace. When he looked in the open front windows, [Officer B] saw a laptop computer between the two seats. He also noticed a small baggie, containing a green vegetable matter, lying on the passenger side.
>
> Mr. Gantt denied the officers' request to search the van. [Officer B] contacted the Yakima County Sheriff's Office to run a check on the name on the item of mail. The dispatch officer advised [Officer B] that a woman with the same name had reported a burglary earlier that evening. [Officer B] requested that a deputy respond to his location. When [a deputy sheriff] arrived, the officers gave Mr. Gantt Miranda warnings and obtained a telephonic search warrant.
>
> The State charged Mr. Gantt with one count of residential burglary, one count of possession of stolen property, and five counts of second degree identity theft.
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> A suppression hearing was held on stipulated facts contained in [Officer A's] report. The parties also stipulated that [Officer A] had activated his patrol car emergency lights.
>
> No findings of fact were entered. The court issued an oral ruling finding that [Officer A] initiated a social contact even though the circumstances were somewhat suspicious, that this contact was an exercise of the community caretaking function, that the activation of the patrol car lights at night did not change the contact into a detention or an illegal detention, that the expired trip permit allowed for further investigation, and from that point things moved forward in a fairly logical way. The court concluded that under these circumstances the officers acted appropriately, that Mr. Gantt was not seized until the officer noticed the traffic infraction, and that the evidence was sufficiently developed to warrant an arrest.
>
> At a stipulated facts trial, Mr. Gantt was found guilty on all counts.

ISSUES AND RULINGS: 1) Did Officer A seize Gantt at the point when Officer A, after turning on his emergency lights and pulling in behind Gantt's parked van, got out of his patrol car and asked the nearby Gantt to explain his activity in the neighborhood in the immediately preceding few minutes? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority; Judges Kulik and Siddoway are in the majority, and Judge Korsmo dissents)

2) It is indisputable that Officer A, while he had a good hunch, did not have reasonable suspicion that Gantt was engaged in criminal activity at the point when Officer A asked Gantt to explain his activity in the neighborhood. Was the seizure nonetheless justified under the rationale that Officer A was engaged in his "community caretaking" function when he asked the questions? (ANSWER BY COURT OF APPEALS: No, rules the majority)

Result: Reversal of Yakima County Superior Court convictions of Eric Christopher Gantt for one count each of residential burglary and second degree possession of stolen property, and for five counts of second degree identity theft.

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

ANALYSIS: (Excerpted from majority opinion)

> Seizure.
>
> . . . .
>
> [The Washington constitution] provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than focusing on unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656 (2009) **Feb 10 LED:17**.
>
> . . . .
>
> "A seizure under article I, section 7 occurs when, due to an officer's use of physical force or display of authority, an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request." This determination is made by looking objectively at the actions of the law enforcement officer.'" A seizure does not necessarily occur where an officer has a subjective suspicion of a criminal activity, but lacks suspicion to justify an investigative detention.
>
> Display of Authority.
>
> The first question here is whether [Officer A's] display of his emergency lights constituted a display of police authority.
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> In State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**, an officer was patrolling an area with a high incidence of drug activity when he observed Kevin Young standing on a street corner talking to a young woman. The officer saw nothing suspicious, but stopped his patrol car, got out, and asked Mr. Young how he was doing. The officer learned Mr. Young's name, then left the scene and radioed for Mr. Young's criminal history. Mr. Young had an extensive criminal history. While driving away, the officer saw Mr. Young walk out to the street, apparently watching where the officer was going. The officer turned around and drove back. When Mr. Young started walking away, the officer shined his patrol car's spotlight on him. Mr. Young walked behind a tree, crouched down, and tossed a small package near the tree. The officer asked Mr. Young to stop and retrieved the package, which appeared to contain crack cocaine. Mr. Young argued that he was seized when the deputy illuminated him with the spotlight.
>
> The court determined that "[t]he illumination by the spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in." Significantly, the court adopted a nonexclusive list of officer displays of authority that can amount to a seizure, including

> 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive conduct between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.'

In State v. DeArman, 54 Wn. App. 621 (1989), the court concluded that a motorist was seized when a police officer pulled up behind his or her car and activated full emergency lights. In DeArman, an officer observed a vehicle stopped at a stop sign for 45 to 60 seconds. The officer became concerned that the vehicle might be disabled because he could not tell whether the vehicle was moving. The officer pulled in behind Mr. DeArman's vehicle and activated his emergency lights. Mr. DeArman then drove through the intersection and pulled over 50 feet beyond the intersection. At this point, the officer became suspicious, contacted Mr. DeArman, and asked for his identification. The officer arrested Mr. DeArman on an outstanding warrant and discovered cocaine during a search of Mr. DeArman.

The court concluded that Mr. DeArman was seized when the officer pulled up behind him and activated his emergency lights. The court explained that the seizure was unreasonable because the officer did not have a reason to stop the vehicle once Mr. DeArman pulled through the stop sign and it became apparent that the vehicle was not disabled.

Similarly, in State v. Stroud, 30 Wn. App. 392 (1981), the court determined that a legally parked car was seized when police pulled in behind the vehicle and activated their emergency lights and headlight high beams. The court concluded that the use of emergency and headlight high beams "constituted a show of authority sufficient to convey to any reasonable person that a voluntary departure from the scene was not a realistic alternative."

Here, [Officer A] saw a minivan on the street with two people standing on the passenger side. A few minutes later, [Officer A] observed the same vehicle stopped in front of a driveway. The officer saw a man walking from the van to the residence. [Officer A] decided to make a social contact. The officer stopped behind the van, activated his emergency lights, got out of the patrol car, and asked the man what he was doing there. Mr. Gantt, appearing nervous, answered that he was looking for a friend. When asked, Mr. Gantt provided a name. At this point, [Officer A] told Mr. Gantt that he had just seen the van one block over and that he did not believe what Mr. Gantt was saying. The officer then noticed that the van had an expired permit that had been altered.

The activation of a patrol car's emergency lights constitutes a display of authority similar to that described in DeArman. We conclude that Mr. Gantt was seized when [Officer A] activated his emergency lights and asked Mr. Gantt what he was doing.

. . . .

Community Caretaking.

The State does not mention the term "community caretaking." Instead, the State contends: "While the circumstances may have been suspicious, the officer's social contact would have been independently justified in trying to determine whether [Mr.] Gantt was lost, or needed assistance." The State cites no authority to support this argument.

"The community caretaking function exception recognizes that a person may encounter police officers in situations involving . . . a routine check on health and safety." State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07**. Whether an encounter based on a community caretaking purpose is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in the performance of the community caretaking function. If the person has been seized, balancing the two interests does not necessarily favor an encounter by police. A court must cautiously apply the community caretaking exception because of the risk of abuse. "Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function."

"[R]endering aid or assistance through a health and safety check is a hallmark of the community caretaking function exception." It is in the public interest to allow police officers to approach citizens and permissively inquire as to whether they will answer questions. When considering the applicability of the community caretaking provision, the proper inquiry is "whether totality of the circumstances indicate 'a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter.'"

There is no objective evidence demonstrating that [Officer A] was performing a community caretaking function when he stopped Mr. Gantt. [Officer A] pulled behind Mr. Gantt's vehicle and activated his emergency lights even though the officer had not seen a traffic infraction or any criminal activity. [Officer A] asked Mr. Gantt what he was doing there. The officer did not ask whether Mr. Gantt was lost or needed assistance or whether he would answer questions. Instead, [Officer A] activated his emergency lights because he saw the van parked at two different locations and because he observed Mr. Gantt walking to a nearby residence.

Reasonableness.

Assuming Mr. Gantt was seized, the next question is whether the seizure of Mr. Gantt was reasonable. If a contact constitutes a seizure, that seizure is reasonable only if the officer had an objectively reasonable suspicion that the person was involved in criminal activity. [**See our LED EDITORIAL COMMENT #2 below regarding this sentence in the majority's analysis.**] At the time [Officer A] activated his emergency lights, he had no reason to suspect that Mr. Gantt was involved in criminal activity. The seizure was unreasonable.

Suppression.

Mr. Gantt asserts that all of the evidence seized

If a person is seized in violation of the Fourth Amendment or article I, section 7, the evidence subsequently obtained must be suppressed under the exclusionary rule. [Officer A] unlawfully seized Mr. Gantt by activating the patrol car's

> emergency lights. The evidence discovered as a result of this seizure must be suppressed including the "open view" evidence discovered by [Officer B]. [Officer B] was present only because [Officer A] had unlawfully seized Mr. Gantt.

[Some citations omitted]

Dissent: Judge Korsmo dissents, arguing that the majority opinion should not have given Gantt the benefit of the doubt on the facts. Judge Korsmo argues that the record was too vague for the majority opinion to conclude that Officer A activated his "emergency lights" as opposed to other lights such as "yellow wig-wag" lights. Judge Korsmo's dissent also argues that even if it was the emergency lights that Officer A turned on, this did not make the questioning of Gantt a seizure, as opposed to a mere social contact, where Gantt was not even in the van at the point when Officer A turned on the lights and made the contact with Gantt. The dissent does not discuss the question of whether the seizure might be justified as community caretaking.

LED EDITORIAL COMMENTS:

1. Changing the facts. It would probably have changed the result of the majority's seizure analysis if Officer A in the Gantt case had turned on lights other than his emergency lights. And it might also have changed the result of the majority's seizure analysis if the officer here had told Gantt that: (1) the lights had been turned on only for safety purposes, and (2) Gantt was free to either not talk to the officer or leave.

2. Seizure vs. social contact. If the majority opinion is correct in assuming that Officer A turned on his emergency lights (as opposed to other lights), then we think that, while the State has a distinguishing argument to the contrary, the majority opinion is consistent with the Court of Appeals precedents of DeArman and Stroud discussed in the majority opinion.

However, we think that the majority opinion contains error in a sentence of the opinion not excerpted above. Even if we concede that DeArman and Stroud support the ruling of unlawful seizure in Gantt, we are concerned that some lawyers, judges and others will be led astray by the error in the sentence. In the majority opinion's discussion of the concept of a police "social contact," which, unlike a "seizure," does not require justification, the majority opinion says: "A social contact between a police officer and a citizen 'does not suggest an investigative component.'" Judge Korsmo correctly explains in the following passage in his dissent that the majority opinion erred in this sentence by incorrectly taking out of context some language from State v. Harrington, 167 Wn.2d 656 (2009) Feb 10 LED:17:

> **The majority analysis distinguishes Harrington by citing it for the proposition that a social contact between an officer and a citizen "does not suggest an investigative component." The majority then finds that since [Officer A] asked Mr. Gantt what he was doing, an investigative element was present; therefore the conversation was not a social contact. However, this conclusion stems from a faulty reading of Harrington, and serves only to alleviate Mr. Gantt's burden upon appeal.**
>
> **The Harrington court noted that the plain meaning of the phrase "social contact" does not suggest an investigative component. It went on to note, however, that the actual application of a "social contact" in the field and before the court is different in that investigative questioning such as requesting identification is necessarily permitted. The Harrington court**

> **went on to further define the contours of a social stop in Washington by holding that even where separate actions may pass constitutional muster, those actions, when viewed cumulatively, may constitute a progressive intrusion into an individual's privacy to the point that a social contact becomes a seizure.**

To accurately reflect the analysis in Harrington and other Washington precedents regarding lawful social contacts, the Gantt majority opinion should not have incorrectly suggested that a social contact cannot have an investigative component. The Gantt majority opinion should have simply said on this point that the combined effect of turning on the emergency lights and engaging in investigative questioning added up to a seizure and went beyond a mere social contact.

3. Community caretaking. The Gantt majority opinion also contains some erroneous statements about the concept of the "community caretaking" rationale that clear precedent recognizes will justify temporarily seizing a person. Again, while we do not necessarily disagree that an unlawful seizure occurred in Gantt, we are concerned that some lawyers, judges and others will be led astray by the erroneous statements.

In a sentence not set forth in the excerpts above, the majority opinion states that the community caretaking rationale is not met if a reasonable person would not have felt free to leave or decline the officer's requests and to end the encounter. That is the definition of a "seizure." A seizure, however, can be justified if the community caretaking rationale is met. See State v. Acrey, 148 Wn.2d 738, 748-55 (2003) May 03 LED:04; State v. Kinzy, 141 Wn.2d 373, 385-93 (2000) Sept 00 LED:07. Also, in a portion of the majority opinion's analysis that is excerpted above, the majority opinion states: "If a contact constitutes a seizure, that seizure is reasonable only if the officer had an objectively reasonable suspicion that the person was involved in criminal activity." As with the unexcerpted erroneous statement regarding the community caretaking rationale, this passage fails to recognize that a seizure can be justified if the community caretaking rationale is met.

To accurately reflect the analysis in Washington precedents, the Gantt majority opinion should not have incorrectly suggested that community caretaking does not justify a seizure. The Gantt majority opinion should have simply said on this point that the facts of the Gantt case do not support the theory that the officer was engaged in community caretaking.

ASSISTANT PRINCIPAL'S INFORMANT-BASED SEARCH OF EVASIVE HIGH SCHOOL STUDENT'S BACKPACK UPHELD UNDER RELAXED CONSITUTIONAL STANDARD FOR SEARCHES BY K-12 SCHOOL STAFF

State v. E.K.P., 162 Wn. App. 675 (Div. II, July 19, 2011)

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

> On June 9, 2010, EKP was a student at Port Townsend High School. The school's assistant principal, Patrick Kane, heard from a "reliable source" that EKP smelled of alcohol and might be in possession of alcohol. He found EKP in a parking lot. When he asked her to accompany him to the office, she tried to hide her backpack behind a vehicle's tire, which he found suspicious. Once in the office, EKP confirmed that the backpack was hers but denied it contained "anything I need to know" about. Kane searched the backpack and found a plastic bottle containing alcohol. While she initially denied that the bottle was hers, she later admitted that it was.

> The State charged EKP with being a minor in possession of alcohol. She moved to suppress the plastic bottle, arguing that it was seized after an illegal search. At the suppression hearing, Kane testified as described above. On cross-examination, he admitted that the source of the initial information was a student. He also admitted that EKP did not smell of alcohol when he encountered her and did not exhibit any signs of intoxication. The juvenile court denied the motion to suppress, concluding that Kane had "reasonable grounds" to search EKP's backpack. After a stipulated facts trial, the court found EKP guilty as charged.

ISSUE AND RULING: Under the relaxed constitutional standard for searches by K-12 school staff, was the search of the backpack justified in light of the report from a "reliable source" plus E.K.P.'s evasive response to the high school's assistant principal? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Jefferson County Superior Court juvenile adjudication of guilt of E.K.P. for minor in possession of alcohol.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> EKP argues that the juvenile court erred in denying her motion to suppress because it used the wrong standard. She asserts that the court should have used the Aguilar-Spinelli test, which requires that an informant (1) be credible and reliable and (2) have a basis for his information. State v. Sieler, 95 Wn.2d 43 (1980). She notes that the State presented no information about the credibility or reliability of the student informant and presented no information about how she or he knew EKP might have alcohol in her possession. Thus, she concludes that the search of her backpack was illegal.
>
> But the search of the student in Sieler was conducted by a police officer. Searches of students conducted by school officials are measured against a different standard. A school teacher or administrator may legally search a student without warrant if she or he has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." New Jersey v. T.L.O, 469 U.S. 325 (1985); see also York v. Wahkiakum Sch. Dist., 163 Wn.2d 297 (2008); State v. B.A.S., 103 Wn. App. 549 (2000) **Feb 01 LED:13**. The juvenile court applied the correct test to EKP's motion to suppress. The student informant's report and EKP's effort to hide her backpack gave Kane reasonable grounds to suspect that a search of her backpack would turn up evidence of alcohol possession. We affirm the denial of the motion to suppress.

[Some citations omitted]

LED EDITORIAL NOTE: In State v. B.A.S., 103 Wn. App. 549 (2000) Feb 01 LED:13, the Court of Appeals noted that the Washington constitution's article I, section 7 has not been interpreted as imposing a different standard for K-12 school official searches than does the federal constitution's Fourth Amendment. Nothing has changed in Washington case law since the B.A.S. Court made that statement.

IN A SPLIT DECISION, THE COURT OF APPEALS HOLDS THAT OFFICER DID NOT HAVE REASONABLE SUSPICION FOR A TERRY STOP WHERE THE OFFICER SAW AN UNKNOWN MALE DRIVER IN A VEHICLE STOPPED IN A KNOWN PROSTITUTION AREA TALK TO A FEMALE PEDESTRIAN UNKNOWN TO THE OFFICER AND ALLOW HER TO GET INTO HIS VEHICLE

State v. Diluzio, 162 Wn. App. 585 (Div. III, July 12, 2011)

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

> At 10:40 p.m., on January 18, 2009, a Spokane police officer saw a vehicle stopped in the eastbound lanes of traffic on Sprague, approaching Sherman. The driver of the vehicle was talking to a female pedestrian through the passenger window. The police officer stopped in the lane of traffic behind the vehicle and watched as the woman got into the front passenger seat of the vehicle. There were no bus stops at the location, and the area was known for high levels of prostitution activity. Suspecting that solicitation of prostitution was occurring, the police officer stopped the vehicle.
>
> When the officer asked the driver for identification, the man gave a false name. He then provided the officer with the name Elmer Blake Diluzio, Jr., which is the man's real name. Mr. Diluzio also disclosed there was a warrant for his arrest. The officer arrested Mr. Diluzio for failure to cooperate by providing the false identification. The officer also arrested Mr. Diluzio for the outstanding warrant.
>
> During the search incident to arrest, a baggie with a white rock substance and a black tar-like substance was found in Mr. Diluzio's back pocket. The substances were field-tested and found to be methamphetamine and heroin. Mr. Diluzio was then additionally arrested for possession of a controlled substance.
>
> The trial court denied Mr. Diluzio's motion to suppress. He was convicted of two counts of possession of a controlled substance.

ISSUE AND RULING: Did the officer have reasonable suspicion for a Terry stop where the officer saw an unknown male driver in a vehicle stopped in a known prostitution area (1) talk to a female pedestrian unknown to the officer and (2) allow her to get into his vehicle? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority; Judges Kulik and Sweeney are in the majority, and Judge Korsmo dissents)

Result: Reversal of Spokane County Superior Court convictions of Elmer Blake Diluzio, Jr., of two counts of possession of a controlled substance.

ANALYSIS: (Excerpted from majority opinion)

> "The Fourth Amendment to the United States Constitution protects against unlawful search and seizure." State v. Doughty, 170 Wn.2d 57 (2010) (footnote omitted) **Nov 10 LED:04**. Article I, section 7 of the Washington Constitution protects against unlawful government intrusions into private affairs. A seizure occurs when, considering all of the surrounding circumstances, a reasonable person would not feel free to leave. This includes situations involving traffic stops.
>
> One exception to the prohibition on warrantless seizures is a law enforcement officer's investigatory stop of a vehicle if he or she has a reasonable suspicion to believe that criminal activity is indicated. . . .
>
> To be lawful, an investigatory stop, also referred to as a Terry stop, must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." The standard for articulable suspicion is "a substantial possibility that criminal conduct has occurred or is about to occur." "A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct." A person's presence in a high-

crime area at a "late hour" does not, by itself, give rise to a reasonable suspicion to detain that person."

An investigatory stop must be justified at its inception. A court must consider the totality of the circumstances surrounding the investigatory stop to evaluate reasonableness. In particular, the experience of the officer, the location of the stop, and the conduct of the defendant are factors used to determine if the officer's suspicions are reasonable.

Mr. Diluzio contends his convictions must be reversed because the officer lacked a reasonable suspicion to believe that Mr. Diluzio was committing a crime.

In [State v. Richardson, 64 Wn. App. 693 (1992) **Aug 92 LED:15**], police stopped Jerry Richardson in an area known for high drug activity as he was walking with a man suspected of being a drug runner. The officer asked Mr. Richardson and the other man if he could talk to them and then asked them to empty their pockets and put their hands on the trunk of the car. After Mr. Richardson consented to a search, the officer found cocaine in Mr. Richardson's pocket and arrested him for possession of a controlled substance.

The court found that the seizure was unreasonable, based on the fact that "[a] person's presence in a high crime area does not, by itself, give rise to a reasonable suspicion to detain him." In addition, at the time of the seizure, the officer knew only that he was in a high crime area and that Mr. Richardson was walking with an individual suspected of criminal activity. Significantly, the officer did not hear any conversations or see any suspicious activity between the two men to justify a seizure. These facts indicated that the officer did not have a reasonable suspicion to believe a crime had occurred or was about to occur.

In Doughty, the police stopped Walter Doughty's car after he briefly visited a suspected drug house at 3:20 a.m. The information that the house was used to distribute drugs was based on complaints from neighbors and information provided by an informant. The officer arrested Mr. Doughty after a records check revealed that Mr. Doughty's license was suspended. The subsequent search of Mr. Doughty's vehicle revealed a pipe containing methamphetamine residue. Methamphetamine was found in Mr. Doughty's shoe at booking. The trial court denied Mr. Doughty's motion to suppress, and he was convicted of one count of possession of methamphetamine.

In Doughty, the court concluded that the officer's actions were based on his own "incomplete observations." The court determined that Doughty is factually similar to Richardson because the officer did not hear any conversations or observe any suspicious activities other than Mr. Doughty leaving a house in the middle of the night. The court reasoned:

> [P]olice never saw any of [Mr.] Doughty's interactions at the house. . . . The two-minute length of time [Mr.] Doughty spent at the house — albeit a suspected drug house — and the time of day do not justify the police's intrusion into his private affairs.

The court also compared the facts in Doughty to the facts in State v. Gleason, 70 Wn. App. 13 (1993) **Oct 93 LED:15**. In Gleason, a stop was found to be unreasonable when it was based only on the defendant's exit from an apartment building known for drug sales and the absence of any other behaviors indicating drug-related activity, such as carrying a suspicious package.

. . . .

> The facts in Mr. Diluzio's case are similar to those in Doughty and provide even less justification for a stop. Here, as in Doughty, the investigatory stop was based on the officer's observation. The officer saw Mr. Diluzio having a conversation with a woman who got into the passenger side of his vehicle. There was no police informant and the police officer did not see any money change hands and did not overhear any conversations between the two individuals. Neither individual was known to have been involved in prostitution or solicitation activities. These incomplete observations do not provide the basis for a Terry stop.
>
> Even with the officer's 13 years of experience, the location of the stop, and the lack of open businesses or residences, the totality of the circumstances do not support a conclusion of a reasonable suspicion of criminal activity.
>
> Simply stated, the officer lacked sufficient specific and articulable facts to seize Mr. Diluzio. Because the Terry stop was unlawful, the motion to suppress should have been granted. We reverse Mr. Diluzio's convictions.

[Some citations omitted]

Dissent: Judge Korsmo argues in vain that the evidence, including the fact of the long experience of the law enforcement officer, add up to reasonable suspicion of solicitation of prostitution justifying the stop.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DETECTIVES' CONVERSATION WITH DEFENDANT REGARDING HIS SUSPECTED NEW CRIME COMMITTED WHILE IN JAIL HELD NOT TO VIOLATE WASHINGTON CONSTITUTION'S PROVISION PROTECTING RIGHT TO COUNSEL – In State v. Hahn, ___ Wn. App. ___ , 2011 WL 3444586 (Div. II, August 3, 2011), the Court of Appeals rejects a defendant's argument that detectives violated his right to counsel under article I, section 22 of the Washington constitution.

Aaron Hahn was in jail awaiting trial on multiple charges, including but not limited to several sex crimes against underage child, S.M. Hahn talked to several fellow inmates about hiring someone to kill S.M. One inmate reported this to law enforcement, and a sting was set up involving a fake hit man and court-ordered taping of conversations, first between Hahn and the inmate, and next between Hahn and the fake hit man.

After the sting resulted in a successful taping of Hahn's conversation with the inmate and then the solicitation of the fake hit man to commit murder, two detectives contacted Hahn at the jail to tell him that he would be charged with solicitation of murder. The detectives did not ask Hahn any questions in that contact. After the detectives left, Hahn contacted jail personnel, asking that the detectives be asked to return and talk to him. The detectives initially refused, sending a message that they would not talk to Hahn without his attorney. But Hahn insisted in a return message that the detectives talk to him without his attorney. The detectives then returned to Hahn, Mirandized him, got his permission to record the interrogation, and then interrogated him without his attorney. In the interrogation, he attempted without success to convince the detectives that they had misunderstood his words and intent in the recorded talks with the inmate and the fake hit man.

In a pre-trial hearing, the trial court denied Hahn's motion to suppress his recorded statements at the jail, including his Mirandized interrogation by the detectives. Hahn was convicted of solicitation of first degree murder, and he appealed. **[LED EDITORIAL NOTE: The Court of Appeals decision does not report the trial court's resolution of the many other charges against Hahn.]**

As noted above, one of Hahn's arguments on appeal was that the detectives violated his right to counsel under article I, section 22 of the Washington constitution, which is the counterpart to the U.S. constitution's Sixth Amendment right to counsel. **[LED EDITORIAL NOTE: Hahn made no argument under the U.S. constitution's Fifth Amendment and Miranda, apparently because, among other reasons, he had not asserted his right to an attorney during a custodial interrogation. For a discussion of the Fifth Amendment rules on law enforcement officers initiating contact with invoking, continuous-custody suspects – plus a short discussion of the absence of an initiation-of-contact rule under the Sixth Amendment – see the "Initiation of Contact" article on the Criminal Justice Training Commission's Internet LED page.]**

Hahn could not make a successful challenge under the U.S. constitution's Sixth Amendment. That is because the U.S. Supreme Court held in Texas v. Cobb, 532 U.S. 162 (2001) **June 01 LED:02** that the Sixth Amendment right to counsel does not apply to law enforcement contacts with a charged person on other matters unless the contact is on a criminal matter that has the exact same elements as the charged crime; the Cobb Court rejected the theory of some lower federal courts that the Sixth Amendment applies to contact on a "closely related" criminal matter.

Hahn instead asked the Court of Appeals to make a ruling that no Washington appellate court has made to date. Hahn argued that the Washington constitution, article I, section 22, provides greater protection of the right to counsel than the Sixth Amendment, and that article I, section 22 contains the "closely related" rule that the U.S. Supreme Court rejected in Cobb. This was the same argument that murder-rape defendant Gregory made to the Washington State Supreme Court in State v. Gregory, 158 Wn.2d 759 (2006) **Feb 07 LED:05**. The Gregory Court avoided answering the question about purported differences in the Washington and federal constitutions, holding that even assuming for the sake of argument that the "closely related" rule applies under the Washington constitution, the separate crimes on which detectives made contact in Gregory – (1) a rape of one victim, and (2) a rape and murder of another person – were not closely related.

For the same reason, the Hahn Court avoids answering the question about purported differences in the state and federal constitutions, holding as in Gregory that even assuming for the sake of argument that the "closely related" rule applies under the Washington constitution, the crimes in question in Hahn – (1) sex crimes and other crimes against child victim, S.M., and (2) a separate solicitation at a very different time and very different place to murder S.M. – were not closely related.

Result: Reversal of Clallam County Superior Court conviction of Aaron Michael Hahn for solicitation of first degree murder; the reversal is based on grounds not addressed in this LED entry, as the Court of Appeals rules that, because of ambiguity of the statements that Hahn made to the fellow inmate and to the fake hit man in the recordings, the jury should have been given the option of finding Hahn guilty of a lesser included charge of solicitation of fourth degree assault.

LED EDITORIAL NOTE: Under the presently uniform, right-to-counsel protections of the Sixth Amendment and article I, section 22 of the Washington constitution, if law enforcement personnel or their agents wish to contact a charged defendant on the charged crime, they must Mirandize the person. See the short discussion of Montejo v. Louisiana, ___ U.S. ___, 129 S. Ct. 2079 (2009) July 09 LED:15, and of the absence of an initiation-of-contact rule under the Sixth Amendment in the "Initiation of Contact" article on the Criminal Justice Training Commission's Internet LED page.

(2) COURT OF APPEALS UPHOLDS CONSTITUTIONALITY OF RCW 42.56.565 (INSPECTION OR COPYING OF PUBLIC RECORDS BY PERSONS SERVING CRIMINAL SENTENCES); AFFIRMS ORDER PERMANENTLY ENJOINING DISCLOSURE OF RECORDS – In King County Department of Adult and Juvenile Detention v. Parmelee, ___ Wn. App. ___, 254 P.3d 927 (Div. I, June 27, 2011), the Court of Appeals rejects constitutional challenges to RCW 42.56.565 based on vagueness, overbreadth and equal protection arguments, and holds that the Public Records Act (PRA) does not create a liberty interest ("the PRA 'merely creates a procedure, it does not create a liberty interest'") (citations omitted).

Result: Affirmance of King County Superior Court order permanently enjoining disclosure of certain records requested by inmate Allan Parmelee.

(3) COURT MAY APPROPRIATELY CONSIDER THE IDENTITY OF A PUBLIC RECORDS REQUESTOR WHEN DETERMINING WHETHER TO ISSUE INJUNCTIVE RELIEF UNDER THE PUBLIC RECORDS ACT; RCW 42.56.565 (INSPECTION OR COPYING OF PUBLIC RECORDS BY PERSONS SERVING CRIMINAL SENTENCES) APPLIES RETROACTIVELY – In Franklin County Sheriff's Office v. Parmelee, ___ Wn. App. ___, 253 P.3d 1131 (Div. III, June 21, 2011), the Court of Appeals holds that RCW 42.56.565 applies retroactively, and that in exercising its equitable powers the superior court may properly consider the identity of a Public Records Act (PRA) requestor when determining whether to issue injunctive relief under RCW 42.56.540, and must consider the identity of the requestor when determining whether to issue injunctive relief under RCW 42.56.565.

Result: Reversal of Franklin County Superior Court determination that it could not consider the identity of the records requestor; Court of Appeals does not disturb the Superior Court's temporary injunction prohibiting disclosure of records requested by inmate Allan Parmelee.

(4) FOR PURPOSES OF FIRST DEGREE ARSON STATUTE, RCW 9A.48.020, "VALUED AT" REFERS TO VALUE FOR INSURANCE PURPOSES, NOT MARKET VALUE; COURT FINDS SUFFICIENT EVIDENCE TO ESTABLISH MOBILE HOME WAS "VALUED AT" GREATER THAN $10,000 – In State v. Sweany, ___ Wn. App. ___, 2011 WL 2315170 (Div. III, June 14, 2011), the Court of Appeals holds that "valued at ten thousand dollars or more" refers to mobile home's value for insurance purposes, not market value, and regardless, there is sufficient evidence to find that the mobile home was valued at ten thousand dollars or more.

Leysa and Leah Sweany (mother and daughter) were charged with first degree arson for intentionally setting their mobile home on fire in order to collect insurance. RCW 9A.48.020(1) provides:

> (1) A person is guilty of arson in the first degree if he or she knowingly and maliciously:
> (a) Causes a fire or explosion which is manifestly dangerous to any human life, including firefighters; or
> (b) Causes a fire or explosion which damages a dwelling; or
> (c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or
> (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

[Emphasis added] The defendants were charged under subsections (b) and (d). The language underlined in subsection (d) above, "valued at ten thousand dollars or more" is at issue in this case.

The defendants contend on appeal that the State failed to prove an essential element of arson in the first degree – a greater than $10,000 value for the mobile home – beyond a reasonable doubt, arguing that "value" is the market value. The Court rejects defendants' argument, explaining:

> [T]he arson statute does not use the noun "value"; it speaks of property "valued at" $10,000 or more. The plain and ordinary meaning of "valued at" is of a value that is not inherent or objective but which is, or has been, assigned. In the context of insurance-motivated arson, where criminal liability attaches if fire is caused on "property valued at ten thousand dollars or more with intent to collect insurance," the logical assigned value is the insured value: the amount that the arsonist-insured presumably hopes to collect. Assuming a perfect underwriting process, the insured value provided by a policy will be the actual cash value (fair value) or a projected replacement value of the insured's interest in the property; a standard fire policy written in Washington insures on that basis and over-insurance is prohibited. Where a disparity exists between actual cash value or replacement value, on the one hand, and insured value, on the other, the purpose of the statutory scheme is better served by imposing criminal liability based on the amount of insurance proceeds that the arsonist hopes to collect than on the actual value of the property; in other words, by imposing criminal liability on the owner who sets fire to a $9,000 mobile home in hopes of collecting on a $45,000 claim rather than on the unlikely owner who sets fire to a $45,000 mobile home in hopes of collecting on a policy insuring the home for $9,000.
>
> Given that construction of RCW 9A.48.020(1)(d), Leysa and Leah have no basis for a sufficiency challenge. The evidence that the insured value of the mobile home at the time of the fire was at least $45,000 was clear and undisputed. Their argument on appeal proceeds exclusively from what they argue was the absence of evidence of a greater-than-$10,000 fair market value.
>
> In that connection, however, and as an alternative basis for affirming the trial court, review reveals that while the sufficiency of the evidence to establish a greater-than-$10,000 fair market value presents a much closer question, the evidence was nonetheless sufficient under that meaning of "value" as well.

[Citations and footnote omitted]

Result: Affirmance of Benton County Superior Court convictions of Leysa Lynn Sweany and Leah Lynn Sweany for first degree arson.

(5) EVIDENCE OF ROBBERY WITH A REALISTIC TOY GUN HELD SUFFICIENT FOR FIRST DEGREE ROBBERY STATUTE – In State v. Webb, ___ Wn. App. ___, 252 P.3d 424 (Div. III, June 7, 2011), the Court of Appeals holds that a toy gun appeared real is sufficient to satisfy the first degree robbery statute which provides that: "A person is guilty of first degree robbery if: (a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon; or (iii) Inflicts bodily injury." RCW 9A.56.200(1) (Emphasis added).

Result: Affirmance of Kittitas County Superior Court conviction of Daniel Robert Webb for reckless endangerment and first degree robbery.

(6) RECKLESS DRIVING IS NOT A LESSER INCLUDED OFFENSE OF ATTEMPT TO ELUDE – In State v. Hunley, ___ Wn. App. ___, 253 P.3d 448 (Div. II, May 17, 2011), the Court of Appeals holds that the offense of reckless driving is not a lesser included offense of attempting to elude a police vehicle.

A person commits the crime of reckless driving when he or she drives a vehicle in willful or wanton disregard for the safety of persons or property. RCW 46.61.500(1). A person commits the crime of attempting to elude a police vehicle when (1) a uniformed police officer signals the person to stop by hand, voice, emergency light, or siren; (2) the police officer is in a vehicle equipped with lights and sirens; (3) the defendant willfully fails or refuses to immediately bring the vehicle to a stop after being signaled to stop; and (4) the defendant drives his or her vehicle in a reckless manner. RCW 46.61.024(1).

The Court explains the difference between reckless driving and driving in a reckless manner as follows:

> It is well settled that "'in a reckless manner" means "driving in a rash or heedless manner, indifferent to the consequences." State v. Roggenkamp, 153 Wn.2d 614, 621–22 (2005) **April 05 LED:07**. This is a lower mental state than the "willful or wanton" mental state required for reckless driving. State v. Ridgley, 141 Wn. App. 771, 782 (2007). Because one can drive "in a reckless manner" without "willful or wanton disregard for the safety of persons or property," one can be guilty of attempting to elude a police vehicle without being guilty of reckless driving. Consequently, reckless driving is not a lesser included offense in attempting to elude a police vehicle and Hunley was not entitled to a lesser included offense instruction under the legal prong of the Workman test. *[Court's Footnote 4: Hunley cites State v. Argueta, 107 Wn. App. 532, 539 (2001) for the proposition that reckless driving is a lesser included offense in attempting to elude a police vehicle. But Argueta was decided under a prior version of RCW 46.61.024 which provided the mental element of "wanton or willful disregard," identical to reckless driving. Former RCW 46.61.024(1) (1983). The legislature amended the attempted eluding statute in 2003, replacing the "wanton or willful" mental state with "reckless manner" and abrogating Argueta's holding. RCW 46.61.024(1).]*

Result: Affirmance of Grays Harbor County Superior Court conviction of Monte W. Hunley for attempting to elude a police vehicle. Sentence vacated and case remanded for resentencing for reasons not discussed in this LED entry.

(7) FOR PURPOSES OF MALICIOUS MISCHIEF STATUTE "PROPERTY OF ANOTHER" INCLUDES PROPERTY IN WHICH THE DEFENDANT POSSESSES ANYTHING LESS THAN EXCLUSIVE OWNERSHIP – In State v. Newcomb, 160 Wn. App. 184 (Div. II, February 11, 2011), the Court of Appeals holds that a defendant can be charged with malicious mischief even though the property at issue was an easement over the defendant's mother's property.

Defendant Newcomb's neighbor possessed a non-exclusive easement across Newcomb's mother's property for purposes of ingress, egress, and utility (the easement was the only way for the neighbor to reach his home). Based on Newcomb's previous interference with the neighbor's use of the easement, a court entered a decree permanently enjoining Newcomb from interfering with the use or improvement of the easement. Newcomb subsequently destroyed a gravel road on the easement that his neighbor had built. The state charged Newcomb with first degree malicious mischief.

Because a person commits malicious mischief if or she knowingly and maliciously causes physical damage to the property of another, the issue in this case is whether the easement across Newcomb's mother's property was "property of another."

The Court explains that:

> "Property of another" is property in which the defendant possesses anything less than exclusive ownership. Consequently, a person can be convicted of malicious mischief for damaging any property in which another person has a possessory or proprietary interest. Whether the defendant or someone other than the intended victim also has an interest in the property makes no difference; "it is necessary only that the property belong at least in part to someone other than the accused."

Result: Reversal of Pacific County Superior Court's dismissal of first degree malicious mischief charges against Scott Ross Newcomb; case remanded for trial.

(8) SENTENCING COURT LACKS DISCRETION TO ALLOW DEFENDANT TO POSSESS A FIREARM "IN MILITARY FORMATION OR IN COMBAT" WHERE FIREARM RESTRICTION IS STATUTORILY MANDATED – In State v. Damiani, ___ Wn. App. ___, 251 P.3d 927 (Div. II, February 1, 2011), the Court of Appeals holds that a sentencing court does not have discretion to include that defendant may possess a firearm "in a military formation or in combat" where firearm restriction is statutorily mandated.

The defendant entered an Alford plea **[LED EDITORIAL NOTE: An Alford plea allows a defendant may take advantage of a plea agreement without admitting guilt]** to a charge of witness tampering, domestic violence. The trial court judge included a provision on the judgment and sentence stating "The court is not opposed to D possessing a firearm in a military formation or in combat."

The Court of Appeals concludes RCW 9.41.040 prohibits a convicted felon from possessing a firearm [as does federal law] and does not make exception for military use nor does it allow a superior court the discretion to make such exception.

Result: Reversal and remand for resentencing (in Thurston County Superior Court) of Carmen Angelo Damiani for witness tampering, domestic violence.

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NEXT MONTH

The December 2011 LED will include the 2011 Subject Matter Index as well as (space permitting) the Washington State Court of Appeals decision in Sargent v. Seattle Police Department, ___ Wn. App. ___, 2011 WL 4348129 (Div. I, September 19, 2011), a Public Records Act case.

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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