

April, 1992

HONOR ROLL

384th Session, Basic Law Enforcement Academy,

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- Best Overall: Officer Andrew Hall, Seattle Police Department*
- Best Academic: Officer Andrew Hall, Seattle Police Department*
- Best Firearms: Officer David H. Bedinger, King County Police Department*
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Corrections Officer Academy - Class 166 - February 10 thru March 6, 1992

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- Highest in Mock Scenes: Officer Chris Fitzpatrick, Clallam Bay Corrections Center*
- Highest Defensive Tactics: Officer Mark McCormick, Chelan County Regional Jail*
Officer David Ogle, Stevens County Jail

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WASHINGTON STATE SUPREME COURT

"RACIAL INCONGRUITY" OF PERSON TO NEIGHBORHOOD NOT REASONABLE SUSPICION

State v. Barber, 118 Wn.2d 335 (1992)

By a 6-3 vote, the Washington State Supreme Court has ruled in State v. Barber, that the trial court's ruling in a suppression hearing did not adequately explain the trial court's basis for upholding the Terry stop of defendant, and therefore the case must be remanded so that the trial court may further consider the facts surrounding the Terry stop of defendant. The trial court must decide whether there was "reasonable suspicion" for a Bellevue police officer to stop Mr. Barber as a burglary suspect, or whether Mr. Barber was unlawfully stopped because his race did not fit the neighborhood in which he was observed.

There was ambiguous testimony in the suppression hearing from the officer who had initiated the stop. The testimony of the officer supported an argument that the officer had initially focused on three black males in a predominantly white neighborhood simply because their race did not fit the neighborhood. On the other hand, the officer's un rebutted testimony also supported the following characterization of the facts regarding the officer's observations from his patrol car (factual description excerpted from majority opinion in Barber):

(1) one of the three persons walking along the Bellevue street at approximately 8:00 p.m. was carrying a large blanket-covered bundle; (2) as the officer drove past them in his marked police patrol car, they noticed the officer and began glancing at him and at each other; (3) after the officer has passed the group, he continued observing them through his rearview mirror, and they continued to glance at him and at each other; (4) the officer then saw the one carrying the blanketed bundle heave the bundle into brush off the shoulder of the roadway; (5) the contents of the blanket appeared to the officer to be of substantial weight, since the bundle did not fall very far into the brush despite what appeared to have been a fair amount of exertion by the person throwing the bundle; (6) the acts of the person throwing the bundle constituted at least littering; (7) to this police officer (of some 10 years' experience), when a person is carrying a bundle within a blanket on a street at night, the items covered are usually the fruits of a recent burglary and (8) according to uncontroverted testimony at the suppression hearing, when seen by the officer, the defendant was walking out in the street in violation of law.

[Footnote omitted]

Noting that racial incongruity as such may not legally be utilized as reasonable suspicion to justify a Terry stop, the majority opinion for the State Supreme Court declares that the trial court did not make clear in its ruling denying the defendant's suppression motion that the trial court considered only permissible factors in its reasonable suspicion determination. Accordingly, the majority rules that the case must be remanded for a determination by the trial court on the following issue:

[E]liminating any consideration of racial incongruity whatsoever, were there facts to support a legally justified and well-founded suspicion of criminal activity at the time the arresting officer stopped the defendant and his companions?

The dissenting opinion by Justice Dolliver (joined by Justices Utter and Smith) takes a unique civil libertarian position never before asserted in the history of American jurisprudence, as far as we know. The dissenters "would hold that if racial incongruity, alone, initiates the sequence of events leading to an investigative stop . . ." then the evidence seized as a result of the stop must be excluded and the conviction overturned.

The dissent thus proposes a standard which would make unlawful any seizure which would occur after an officer with the wrong state of mind made an observation. The majority responds in part to the dissent's focus on subjective intent of officers as follows:

The dissent overlooks the fact that, in examining the legal validity of a Terry stop, the police officer's assumptions are irrelevant and not to be taken into account by the trial court in its redetermination. As our opinion makes clear, it is well established law, federal and state, that the facts surrounding an investigative stop must be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a [person] of reasonable caution in the belief" that the action taken was appropriate?

LED EDITOR'S COMMENTS:

(1) "Racial incongruity" rule does not mean that racial descriptors are irrelevant in identifying suspects on recently committed crimes.

Whatever the ramifications of this decision, it should not in any way affect legal analysis in the situation where a recent crime has been committed and the suspect description includes a racial identifier. Officers looking for suspects described by victims or witnesses may certainly consider, among other descriptors, racial descriptors, in determining whether a Terry stop of someone observed in the vicinity of the reported crime is lawful.

The majority and dissent in Barber are concerned with the situation where no crime has been reported, but the officer observes suspicious behavior. The concern of all members of the Supreme Court is that some officers may actually make seizures of persons solely on the basis of their lack of racial "fit" with a neighborhood. Such a seizure is, of course, unlawful. Presumably, officers will not declare, suggest, or concede in future suppression hearings that racial incongruity (lack of racial fit with the neighborhood) played any role in determining whether to make a stop.

We would hope that trial courts will not allow defense counsel to inquire into an officer's motivation for looking at people located in public areas. Why an officer looked at someone (as opposed to why an officer seized someone) is irrelevant. However, if defense counsel is allowed to inquire into this irrelevant area, officers should be careful to not state or imply that the reason they initiated observation of the suspects in the first place was racial incongruity. . . . How about something along the lines of: "I observed the individual (or group of people) because that's my job as a police officer" or maybe something a little less flippant?

(2) Objective standards for search and seizure law.

The majority's opinion correctly points out that the test for lawfulness of a stop and an arrest is an objective one not a subjective one (see the cases we cited in last month's LED

in our comments on Klump at page 15). The dissent's argument for a subjective test is disturbing, both because the suggested test is unsupported by case law and because three justices sign an opinion that reads more like a college newspaper op-ed piece than a legal opinion. Newcomer Justice Johnson did not participate in this case, but we have little doubt that he would have joined the dissent if he had participated. This is dangerously close to a majority for a pretty bizarre standard of law.

We can only hope that the dissenting opinion in this case is an anomalous one involving soap-box hyperbole intended only to communicate the critical importance of even-handed treatment of all people, not to communicate a legal theory actually held by the dissenters. We believe that to be the case, and therefore we assume that the dissenting opinion does not represent a systemic approach by the dissenters to try to substitute subjective search-and-seizure standards for objective ones.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "ESSENTIAL ELEMENTS" RULE HAS DIFFERENT STANDARD WHERE DEFENDANT FIRST CHALLENGES INFORMATION ON APPEAL -- In State v. Kjorsvik, 117 Wn.2d 93 (1991) the State Supreme Court rules 7-2 that where a defendant does not challenge until appeal a prosecutor's information as to the sufficiency of the document in charging the "essential elements" of the crime, the appellate courts should read the charging document more liberally in favor of State than they would if the challenge were raised in the first instance in the trial court. The purpose of this rule is to prevent defendant's "sandbagging" of the State at the trial court level, the majority declares. In this case, even though the prosecutor's information charging defendant with robbery omitted the essential element of "intent to steal," the inclusion of the word "unlawfully" in the information, along with other language describing the crime, saved the information. Result: King County Superior Court conviction for first degree robbery affirmed.

(2) STATE'S "MISSING WITNESS" ARGUMENT OK WHERE DEFENDANT OPENS THE DOOR BY TESTIFYING THAT ALLEGED DRUG "CRIB" SHEETS ARE ACTUALLY NOTES RE: LAWFUL PERSONAL BUSINESS -- In State v. Blair, 117 Wn.2d 479 (1991) the Supreme Court holds that it was permissible for the prosecutor to argue to the jury about "missing witnesses" that defendant had not produced at trial to support his testimony. Defendant had claimed at his VUCSA trial that the "crib" notes or sheets seized by police were not notes of drug transactions but were notes relating to personal loans, gambling debts, and other lawful personal business. The prosecutor had argued that defendant's story was incredible in that defendant did not identify the last names of the persons named on the sheets and produced only one witness to support defendant's testimony regarding what the prosecutor called "crib" sheets.

There are ordinarily some limits on the State's use of the argument that defendant's story is suspect because he failed to call certain witnesses to support his story. Under some circumstances such an argument may unfairly shift the burden of proof and may also constitute argument to the jury on facts not in evidence. However, under the facts of this case, defendant opened the door to this argument. The Supreme Court overrules a prior case in ruling that, under the facts of this case, the prosecutor's "missing witness" argument was permissible. Result: Whatcom County Superior Court conviction for delivery of a controlled substance affirmed.

(3) CHARGE OF ATTEMPTED FIRST DEGREE MURDER CANNOT BE BASED ON EXTREME

INDIFFERENCE KILLING - In State v. Dunbar, 117 Wn.2d 587 (1991) the State Supreme Court reviews a trial court dismissal of first degree murder charges of attempted first degree murder against two defendants. The two defendants had been charged with attempted first degree murder on two counts: in each case, COUNT 1 was based on attempted premeditated murder (see RCW 9A.32.030(1)(a)), while COUNT 2 was based on attempted murder by extreme indifference to human life creating a grave risk of death (see RCW 9A.32.030(1)(b)). The trial court had stricken COUNT 2 as to each defendant on grounds that the underlying crime did not have an intent element and therefore "attempt" could not be charged as to that crime. The Supreme Court agrees; because the "grave risk of death" variation on first degree murder does not have "intent" as an element, attempt may not be charged as to that crime. Result: cases remanded to Pierce County Superior Court for trials of John B. Dunbar and Orville H. Smullen based on attempted premeditated murders.

(4) COLPOSCOPE EVIDENCE NOT SUBJECT TO FRYE TEST BECAUSE IT IS IN GENERAL USE IN MEDICAL COMMUNITY -- In State v. Noltie, 116 Wn.2d 831 (1991) the State Supreme Court affirms a Court of Appeals ruling (see Sept. '90 LED:09) and holds that the use of a colposcope, an instrument which may be used in a gynecological examination to allow medical personnel to better observe and photograph body parts than is possible with the unaided eye, is not a novel scientific technique, and the admission of testimony regarding the results of such an examination does not depend upon the proponent of the evidence satisfying the standards for novel scientific evidence established by Frye v. United States, 293 F. 1013 (1923). Result: King County Superior Court convictions for indecent liberties and first degree statutory rape affirmed.

WASHINGTON STATE COURT OF APPEALS

JUVENILE'S MIRANDA WAIVER INVALID DUE TO OFFICER'S UNWITTING DECEPTION

State v. Allen, 63 Wn. App. 623 (Div. III, 1991)

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

On the evening of February 2, 1990, Police Sergeant Scott Hamilton saw Ms. Allen and another woman staggering in the roadway. When he approached them, he saw Ms. Allen was wearing only one shoe and sock, had blood on her, and appeared to be intoxicated. Sergeant Hamilton attempted to question them, and when the other woman started to respond, Ms. Allen struck her in the face. He arrested Ms. Allen for assault, advised her of her rights, and asked her if she had been drinking. She told him she had consumed a large quantity of wine. At this point there was some allegation of a sexual assault. He contacted Ms. Allen's mother who took her to the hospital. The Sergeant advised a deputy prosecutor he believed Ms. Allen was too intoxicated to give a competent statement at that time. He also made arrangements to have the mothers of the girls bring them to the police station the next day.

The next day, [a second officer], having been told Ms. Allen was the victim of a possible rape, took her tape-recorded statement. He advised her of her Miranda

rights, which she waived. She then told him she had consumed alcohol at home and at a friend's house. Ms. Allen was reluctant to talk about the rape, and at some point during the interview said she did not want to say at whose house she had been the previous evening. [The officer] assured her she was not a suspect in anything and was, in fact, considered a victim.

[COURT'S FOOTNOTE: The officer sent her statement to the office of the prosecuting attorney. The deputy prosecuting attorney declined to prosecute anyone for rape and further did not charge Ms. Allen with assault. Rather, he charged her in juvenile court with being a minor in consumption of intoxicants.]

ISSUE AND RULING: Should Allen's statement to the second officer have been suppressed because her Miranda waiver was obtained by deception? (ANSWER: Yes) Result: Benton County Superior Court (juvenile court) adjudication of guilty of minor in consumption reversed and charges dismissed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A "totality-of-the-circumstances" approach is used in determining whether a juvenile has voluntarily waived Miranda rights. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."

To prevail on her claim waiver was procured by deception, Ms. Allen must show she was led to believe the sole purpose of the questioning was to determine whether a third person could be charged with rape, and this belief was material to her decision to talk.

Police need not inform a suspect of the precise charges against him, especially when the nature of potential charges depends on circumstances unknown to the police. **"The suspect should be informed of the reason for the investigation or the incident which gave rise to the interrogation so that the suspect can make a knowing and intelligent decision whether to forgo the privilege against self-incrimination."** If the defendant is aware of other offenses upon which questioning is based, and the officers indicate at the outset they want to ask about matters other than the stated purpose of questioning, the waiver may be valid. [SEE LED EDITOR'S COMMENT BELOW]

Here, the purpose of the interview was to obtain information about the alleged rape, and Ms. Allen was affirmatively assured this was the case. She was aware she had been arrested the night before for an assault and may well have believed the Miranda warnings related to that offense as well as rape. Nothing in the record suggests [the officer] intimated to her any other charges were contemplated. Indeed, it appears the prosecutor decided to pursue the minor in consumption charge some time after this interview. Under all these circumstances, it cannot be said Ms. Allen's waiver was knowing and voluntary. Use of the statement taken by [the officer] was error.

Erroneous admission of a voluntary confession is harmless only "if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt." The trial court made no written finding as to Ms. Allen's statement to Sergeant

Hamilton [the first officer]. Thus, the only untainted evidence, his observations on the evening of her arrest, is insufficient to support a conviction.

[Some citations omitted; emphasis added by **LED** Editor]

LED EDITOR'S COMMENT: Responding to the **Allen** Court's discussion (in bold above) of the desirability or need for officers to articulate the purpose of questioning, we hope that this case will be limited to its unique facts. We would concede that if an officer gives the kind of **unqualified** assurance that was given here, i.e., to the effect that the person is not a criminal suspect but a victim, this deception (albeit an unwitting deception) will likely taint the interrogation as an improper inducement of admissions by the person being questioned.

On the other hand, we hope that defense attorneys will not be able to expand the Court of Appeal's discussion of the language in bold above regarding what the officer should say in explaining at the outset the purpose of interrogation. The United States Supreme Court squarely addressed this issue in **Colorado v. Spring**, 93 L. Ed.2d 954 (1987) April '87 **LED:02**.

In **Spring** the U.S. Supreme Court held that as long as officers do not **affirmatively misrepresent** the purpose of questioning, it is not necessary that they inform the suspect of the specific crime or crimes with which he or she may be charged prior to their seeking a **Miranda** waiver. The majority there expressly **declined** to hold that "mere silence by law enforcement officials as to the subject matter of interrogation is 'trickery' sufficient to invalidate a suspect's waiver of **Miranda** rights." 93 L.Ed.2d at 967.

All but one of the state and federal court cases cited in **Allen** (none were Washington decisions or U.S. Supreme Court decisions) were decided before **Spring**, and those cases are therefore not authoritative. The other case cited in **Allen** did not directly address the **Miranda** issue. We feel that the **Allen** Court's discussion regarding the need to spell out the purposes of interrogation, while suggesting a reasonable approach for interrogators to take in most cases, misstates the law. There is no requirement that the officer try to thoroughly explain in every case the "reason for the investigation or the incident" which triggers the questioning.

As the Supreme Court pointed out in **Spring**, the **Miranda** rule is a "bright line" rule, and its lines will be muddied by a corollary rule which requires that the courts analyze the "purpose" explanation that the officer has given to the suspect prior to seeking a waiver. All that is required under **Miranda** is that the officer not affirmatively misstate the purpose of questioning.

INVENTORY OF VEHICLE SEIZED UNDER DRUG FORFEITURE LAW UPHELD

State v. McFadden, 63 Wn. App. 435 (Div. I, 1991)

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

On April 1, 1988, McFadden entered an apartment that was under surveillance by police detectives. A police informant and the apartment's resident were waiting inside for a person from whom they planned to buy cocaine. The detectives had a

search warrant for the apartment.

After a few moments, the informant activated his police transmitter and the police detectives entered the apartment. They saw McFadden standing over the toilet dumping the contents of a plastic bag into the toilet. The bag was retrieved and found to contain 5.5 grams of cocaine.

The police detectives proceeded to search the van in which McFadden arrived at the scene. The detectives testified that they decided to seize the vehicle based on the fact that it was used to facilitate a drug transaction. They performed a cursory inventory search of the van, during which 83.9 grams of cocaine were found in an unlocked toolbox, along with other drug paraphernalia.

McFadden testified at trial that he was in possession of the cocaine in the apartment, which he intended to buy. However, he asserted that he was not dealing cocaine, had never dealt cocaine, and that the cocaine in the van had been put there without his knowledge. On rebuttal, the prosecution called a police detective to testify that on July 12, 1989, he had seen a police informant purchase cocaine from McFadden in a tavern.

ISSUE AND RULING: Was the inventory search of McFadden's van following its seizure pursuant to the drug forfeiture statute lawful? (**ANSWER:** Yes) **Result:** King County Superior Court convictions for possession of controlled substance with intent to deliver affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

McFadden asserts that under Washington law a warrant is required to search a parked automobile unless one of three exceptions apply: (1) lawful impoundment of the vehicle; (2) exigent circumstances exist; or (3) the search is incident to arrest. At the suppression hearing the State did not attempt to justify the search or seizure of the van on any of these bases. Moreover, McFadden is correct in asserting that the search and seizure of his van pursuant to RCW 69.50.505(b)(4) does not fall within any of these exceptions.

McFadden does not argue that the seizure of the van was unconstitutional and we express no opinion thereon. Rather, he addresses his state constitutional argument solely to the search following the seizure. While this is not an impound case, we think that the law as to an inventory search following a lawful impound provides guidance. Inventories following lawful impound are justified. The reasons which justify an inventory search following impoundment are even more compelling when the search follows a seizure pursuant to RCW 69.50.505. In a normal impound situation the expectation is that the owner will reclaim his vehicle. The contrary is the case in seizure of a vehicle used to facilitate drug transactions, where the expectation is that the vehicle will be forfeited. Although the vehicle is to be forfeited, there is no right to forfeit the contents, which must be returned to the owner thereof. Balancing the societal need for the search against the privacy interest provided by the constitution, we find that the search was valid.

Moreover, as stated in Lowery v. Nelson, [43 Wn. App. 747 (1986)], some federal courts have ruled that the "government's right to seize and forfeit a vehicle vests at

the time of the illegal conduct." Under this reasoning no warrant is required to seize and search what can be considered the government's own property.

We hold that a motor vehicle seized pursuant to RCW 69.50.505 on probable cause that it is used to facilitate a drug transaction is subject to a valid inventory search and evidence found in the course of such a search is admissible at trial.

[Footnotes, come citations omitted]

LED EDITOR'S NOTE: In preliminary discussion, the Court of Appeals rejects defendant's invitation to the Court to impose a more strict rule for drug forfeiture vehicle inventory searches under the State Constitution (article 1, section 7) than is imposed under the Federal Constitution (4th Amendment). In rejecting defendant's independent constitutional grounds argument, the Court of Appeals finds to be significant the fact that Washington State has adopted a "uniform narcotics control statute substantially identical to the federal legislation . . ." The Court declares this to be a "clear statement that the matter is not one of special local concern but one as to which national and uniform policies are desirable."

EVIDENCE NOT SUFFICIENT TO SUPPORT "PHYSICAL CONTROL" CONVICTION

State v. Maxey, 63 Wn. App. 488 (Div. II, 1991)

Facts: (Excerpted from Court of Appeals opinion)

Richard Maxey and two of his children were asleep in a van that his wife, Debra Maxey, was driving when the police pulled her over. The police officer asked her to get out of the van and take field sobriety tests. She testified that she put the ignition key in her pocket as she stepped out. Mr. Maxey awoke and came out of the van on the passenger's side to see what was happening. Officer Edgington, the arresting officer, testified that he instructed Mr. Maxey to get back into the van several times and that when he told Mrs. Maxey that he was going to take them all, including the children, to the Forks Jail, Mr. Maxey said to his wife, "Come on, Deb, let's go." Then Mr. Maxey sprinted to the driver's side of the van and got in on the driver's side. The officer believed that Mr. Maxey was about to start the van and drive away, so he ran to the driver's door and observed Mr. Maxey "reachin' forward like he was gonna turn on the ignition key"; whereupon the officer pulled Mr. Maxey from the van and arrested him for obstructing a public servant and being in actual physical control of a vehicle while intoxicated. The officer did not see the key in the ignition nor did he try to locate it. He also testified that after he placed Mr. Maxey in the patrol car, Mrs. Maxey entered the front of the van from the passenger's side, got between the front seats and passed the children out to him. Mrs. Maxey then secured the van and had the key in her possession at the time she went to the patrol car.

Proceedings:

The District Court accepted a guilty plea to obstructing and also found Maxey guilty of being in physical control of a motor vehicle while intoxicated. The Superior Court affirmed.

ISSUE AND RULING: Was there sufficient evidence of control of the vehicle to support Maxey's

conviction for physical control? (ANSWER: No) Result: Clallam County District Court conviction for physical control reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The seminal authority for the definition of "actual physical control" is State v. Smelter. In Smelter, a State Patrol officer found the defendant seated behind the wheel of a vehicle stopped partly on the shoulder of Interstate 5 with its engine off. The vehicle was out of gas. The defendant had alcohol in his blood exceeding .10 percent by weight. The defendant contended that because he was unable to move his vehicle as it was out of gas, he was not in actual physical control of it. After reviewing cases from other jurisdictions and observing that positioning in the driver's seat is common to all the cases where there was actual physical control of a motionless vehicle, the court held that

[t]he focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidence permits a legitimate inference that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control . . .

The evidence from which the court allowed the inference of control to be drawn [in Smelter] consisted of extrinsic evidence that the defendant, while intoxicated, drove his vehicle until it ran out of gas and the defendant's admission of these facts.

...

While these authorities provide us with some guidance, the issue here is quite different. The State contends that under Smelter, the inoperability of the vehicle is not a defense. We decline to read the Smelter decision so broadly. Here, there is no issue about how the van got to its final location; no one disputes that Mrs. Maxey was driving when the officer stopped it. The authorities cited above all involve the use of circumstantial evidence to draw an inference that the person in the driver's seat was the person who drove the car to its then present inoperable position. Rather here, the jury had to infer that Mr. Maxey had a key or some other means enabling him to exercise "influence, domination, or regulation" of the car, not just an intention to leave the scene.

The State contends that the jury could infer such a fact from evidence of Mr. Maxey's demeanor, his tone of voice, his quick movement toward the car, his intoxication, and from evidence of the officer's belief that Mr. Maxey was going to take the car, and of the possibility that Mrs. Maxey could have taken the keys out of the van after Mr. Maxey was arrested.

We disagree. The circumstantial evidence to support control of the vehicle argued by the State is not based upon a factual assertion, but upon the officer's unsubstantiated belief that a key was present. This is not enough. While Mr. Maxey's movements may suggest an intent to assert control of the van and leave

the scene, because he lacked the means of control, the charge fails.

[Some citations omitted]

LED EDITOR'S NOTE:

Maxey does not involve RCW 46.61.504 which provides a defense to a physical control charge where a driver, "prior to being pursued by a law enforcement officer, has moved the vehicle safely off the roadway." Recently, we were apprised of a situation where a municipal court apparently had read this statutory defense very broadly to exonerate a drinker who had come out of a bar, had gotten into his car and then had passed out behind the wheel with the keys in the ignition while waiting for a friend to come out of a bar. Note that Edmonds v. Ostby, 48 Wn. App. 867 (1987) Nov. '87 LED:12 upheld a lower court rejection of the defense under RCW 46.61.504 where Ostby's vehicle was located in an apartment complex parking lot at the time of the police contact, and, in the words of Court of Appeals:

Ostby had passed out behind the wheel of his vehicle due to his intoxication; the motor was running and the transmission was in drive.

The Court of Appeals declared in Ostby:

This situation posed a danger to the public. Ostby did not comply with the defense to the statute that he pull his vehicle safely off the roadway.

We think that where a person is found behind the wheel of a car at curbside with the keys in the ignition, and it can be proven that the person has been in a bar since moving the vehicle to that location, then RCW 46.61.504 would not apply. This conclusion is guided by our reading of Ostby, along with our understanding of the purpose of RCW 46.61.504.

FIRST DEGREE RENDERING CRIMINAL ASSISTANCE DOES NOT REQUIRE THAT ASSISTING PARTY HAVE KNOWLEDGE OF DEGREE OF PRINCIPAL'S UNDERLYING CRIME

State v. Anderson, 63 Wn. App. 257 (Div. I, 1991)

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

Rodney Anderson and Mark Wilson arrived at the Roundup Tavern in a car driven by Anderson. The time was after midnight. Instead of going into the tavern, Wilson went to the nearby Wild Willie's store and robbed the clerk by displaying what appeared to be a gun. Wilson then ran back to the car, got in, lay down, and told Anderson that he had just robbed Wild Willie's. Anderson drove away from the Roundup with Wilson in the car. Within a short time, the police stopped the car and arrested both men. A plastic toy pistol was found under the passenger seat. In an interview with the police, Anderson admitted that when he drove Wilson from the scene, he knew that Wilson had committed a robbery. He also said that he had no advance knowledge of what Wilson was going to do. Wilson testified to that effect at Anderson's trial.

Anderson was acquitted of first degree robbery but convicted of rendering criminal

assistance in the first degree.

ISSUE AND RULING: May a person be convicted of first degree rendering criminal assistance where the accused didn't know of the specific degree of the crime being committed at the time that he was rendering assistance? (**ANSWER:** Yes) **Result:** Clark County Superior Court conviction for first degree rendering criminal assistance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The charge of rendering criminal assistance was based on RCW 9A.76.050 and 9A.76.070. RCW 9A.76.050 provides in pertinent part:

[A] person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he:

...

(3) Provides such person with . . . transportation . . . or other means of avoiding discovery or apprehension . . .

RCW 9A.76.070(1) provides in pertinent part:

A person is guilty of rendering criminal assistance in the first degree if he renders criminal assistance to a person who has committed . . . any class A felony . . .

...

We hold that a person can be convicted of rendering criminal assistance in the first degree if he or she knows at the time of rendering the assistance that the one being assisted committed robbery. We further hold that a person can be convicted of rendering criminal assistance in the first degree notwithstanding a lack of knowledge concerning facts that would disclose the degree of the robbery.

By its plain terms, RCW 9A.76.050 provides that a person can be convicted of rendering criminal assistance only if he or she knows, at the time of rendering assistance, that the principal has committed a crime or juvenile offense, if being sought by law enforcement for the same, or has escaped from a detention facility. By its plain terms, RCW 9A.76.070 does not require that the person rendering assistance know the degree of crime committed by the principal. It appears then, that the person rendering assistance must have knowledge of the principal's crime, but not of facts disclosing the degree of that crime. [Court's Footnote: Because there is ample evidence that Anderson knew that Wilson had committed robbery, we need not decide whether knowledge would be sufficient to support conviction if it were mistaken or nonspecific. By mistaken knowledge, we mean a belief that the principal committed one crime when in fact he committed a different crime. By nonspecific knowledge, we mean knowledge that the principal committed a crime but no knowledge concerning what the crime was.]

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals also rejects Anderson's equal protection challenge to the rendering criminal assistance statute. Anderson had argued that the special treatment of "relatives" under the statute unconstitutionally discriminates against non-relatives such as himself.

EVIDENCE ESTABLISHES PC TO ARREST FOR VEHICULAR HOMICIDE

State v. Miller, 60 Wn. App. 767 (Div. III, 1991)

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

In the early hours of December 7, 1988, a 2-car accident occurred on Highway 395 just north of Spokane, which resulted in the death of Dorothy Garland. The actual facts of the accident are in dispute.

Muriel Konen was a passenger in the 1980 Dodge Omni driven by Ms. Garland, traveling southbound on the highway. Meanwhile, Michael Miller was traveling northbound in his 1968 Dodge van. Ms. Konen testified visibility was good, there was no problem observing the center line, the Omni was traveling 45 m.p.h., [The speed limit is 55 m.p.h.] and was completely in the southbound lane. She suddenly noticed what she thought was a motorcycle, approaching in her southbound lane. She realized just before impact the vehicle was a van with one headlight missing.

Mr. Miller testified there was thick fog in the area, and he was traveling about 50 m.p.h. when he suddenly noticed headlights more than halfway over the center line in his northbound lane. He claims he veered to the left, the Omni began turning back into its proper lane, he had his low beams on, and both headlights were working. After impact, both vehicles came to a rest in the southbound ditch.

Trooper Kermit Gagner was the first officer to arrive at the scene. He testified there were patches of fog in the area, but visibility was good. He noted traction sand covered some of the center line. He found a collision scrub mark, gouge marks, and debris. The scrub mark was near the center line in the southbound lane; the three gouge marks, which he determined were caused by the Omni, were in the middle of the southbound lane and formed an arc from right to left. The majority of the debris found in the southbound lane came from the Omni. He testified he originally believed the scrub mark near the center line was from the left front tire of the Omni. However, he changed his mind once he reconstructed the accident on paper and concluded the mark came from the right rear tire of the van.

Under either scenario, he was of the opinion the van was in the wrong lane, and the Omni did not cross the center line at any time.

Detective Powell Shoemaker testified he began working on the case hours later. He examined the van's headlights and determined both low beams worked, but the right high beam did not. He determined the right rear wheel of the van was in such condition it would lock up before the rest of the wheels when the brakes were applied. He believed the scrub mark was not caused by the left front tire of the Omni, but the right rear tire of the van. He therefore determined the van was "pretty much nearly all the way over the center line when it impacted with the

Dodge Omni . . .".

Mr. Miller's expert witness, an accident reconstructionist, testified the accident could not have occurred the way the police said it did. It was his opinion the damage on the Omni indicated the driver of the Omni turned to the right prior to impact; the scuff mark was made by the left rear tire of the van; both vehicles were in the northbound lane; and, therefore, the Omni was in the wrong lane. He also claimed there was no proof any of the headlights were out at the time of the accident. He further noted the State's theory the right high-beam headlight of the van was out, and the van was traveling in the wrong lane, would not coincide with Ms. Konen's testimony she believed the left high beam from the van was from a motorcycle traveling in its proper lane.

It was also revealed Mr. Miller had stopped at a bar prior to the accident and had consumed one 12-ounce beer and two 16-ounce beers. Patrolman Clark Indahl testified he interviewed Mr. Miller at the hospital and observed Mr. Miller's eyes were blood shot and watery, he had a thick coating on his tongue and a moderate odor of intoxicants. He admitted, however, he administered an alphabet field test on Mr. Miller, which Mr. Miller performed satisfactorily. Further, Mr. Miller's speech was good and he was cooperative. The officer also admitted bloodshot eyes could be caused by a number of reasons, including lack of sleep. Nevertheless, he gave his opinion Mr. Miller was under the influence of alcohol. A blood alcohol test revealed Mr. Miller had a level of .12 percent at 5:15 a.m. The State provided expert testimony that Mr. Miller's blood alcohol level would have been .16 percent at the time of the accident.

[The results of the blood alcohol test were admitted into evidence, and Miller was convicted of vehicular homicide in Spokane County Superior Court.]

ISSUE AND RULING: Did the arresting officer have probable cause to justify the arrest of Miller at the hospital? (**ANSWER:** Yes) **Result:** Spokane County Superior Court vehicular homicide conviction affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The arresting officer need only have facts and circumstances within his knowledge sufficient to cause a reasonable person to believe an offense has been committed. He need not, at the time of arrest, have at his command the evidence to prove each element of the crime beyond a reasonable doubt. In State v. Steinbrunn, 54 Wn. App. 506 (1989) the court held the odor of intoxicants on the defendant's person was enough to establish probable cause to arrest after a head-on collision and fatality. Here, the officer not only smelled intoxicants, he had Mr. Miller's admission he had been drinking. Additionally, he knew the accident occurred near the center of the road, from which he could infer one of the parties had crossed over into the oncoming lane of traffic. Thus, there were sufficient facts to cause a reasonable person to believe an offense had been committed by Mr. Miller. Because the arrest was lawful, drawing blood was also lawful. The court properly allowed the results of the test into evidence.

[Some citations omitted]

LED EDITOR'S COMMENT: The Steinbrunn decision at 54 Wn. App. 506 (1989) may become an important case on probable cause to arrest in the context of vehicular homicide investigations. The simple combination of (a) the smell of alcohol on a driver's breath, plus (b) a fatal traffic accident, arguably provides probable cause to arrest and test the driver's blood, according to a sentence in the Steinbrunn opinion at 54 Wn. App. 511, relied on here in Miller.

EVIDENCE DOES NOT SUPPORT BURGLARY CONVICTION - ACT OF KICKING IN DOOR, ALONE, IS NOT EVIDENCE OF INTENT TO COMMIT CRIME WITHIN PREMISES

State v. Woods, 63 Wn. App. 588 (Div. I, 1991)

Facts: (Excerpted from Court of Appeals opinion)

Diana Bullis testified that on January 26, 1990, her 15-year-old son, Jeff, was living with another family because of problems the two of them were having. She had told Jeff that he was permitted to enter her apartment only when she was home. All of his possessions remained in his bedroom in her home. Although she was normally gone from the home between 6 a.m. and 4 p.m., she stayed home on January 26 due to illness. She testified that she had locked the door and Jeff no longer had a key. At about 9 a.m., she heard a loud, crashing noise, and when she got up she saw a part of the door frame boards flying into the living room. She saw Wade and Jeff standing just inside the door. Wade was wearing boots with steel toes. She was angry and threatened to call the police. The boys looked surprised to see her and fled.

Wade testified in his own defense. He stated that on the morning of the incident, he and another friend were on their way to Southcenter when it began raining. They also realized they did not have bus fare. Jeff decided to stop at his mother's house to get a jacket. Jeff opened one of the locks with a key but the other lock remained locked. Wade testified that Jeff said all he had to do was give the door a push or a slight kick and that he had done this before. The boys then entered the apartment. It is unclear from the record who actually kicked in the door. When Jeff's mother yelled at them, they left without getting the jacket.

Proceedings:

Wade Woods was adjudicated guilty of second degree burglary in juvenile court proceedings.

ISSUE AND RULING: Was there sufficient evidence of an intent to commit a crime within the home to support the burglary conviction? (ANSWER: No) Result: burglary conviction reversed and matter remanded for entry of adjudication of guilt for first degree criminal trespass.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. Unlike many burglary cases, there is no evidence here of items actually stolen. The only direct evidence of the boys' intent came from Wade's testimony. He stated that they were going to take a bus and then realized they did

not have enough money. He also stated that it had begun raining and Jeff wanted a jacket. He stated that returning to the house was for the purpose of obtaining the jacket. Evidence in the record of an intent to commit a crime is tenuous at best. Jeff's belongings were still in the house. Even if he were actually going after money, there is no evidence that he had no money of his own in the house. Similarly, their fleeing when Jeff's mother yelled at them can as well be explained by fear of her anger at their forceful entry. In sum, inference of intent to commit a crime does not flow as a matter of logical probability from these circumstances.

Intent may not be inferred from evidence that is "patently equivocal". Under the circumstances of this case, Wade's conduct is equivocal. The State appears to rely on the fact of the amount of force used in the entry. In these circumstances, where the son's belongings remained in the house, the degree of force is not sufficient evidence of intent to commit a crime. We hold that the evidence does not justify a finding *beyond a reasonable doubt* that Wade had the requisite intent to commit a crime in the house.

Although there is not sufficient evidence to support the conviction for burglary, there is sufficient evidence of intent to support a conviction on the lesser included offense of first degree criminal trespass. We hereby reverse the conviction and remand for entry of an amended order of disposition on first degree criminal trespass.

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals rejected Woods' contention (in his challenge to the trespass charge) that the boys' entry was lawful. Woods argued that entry was lawful because: (1) his companion's mother had forbidden entry only when she was not at home and (2) she was in fact at home when the door was kicked in. The Court of Appeals concludes that "the manner of the boys' entry and their surprise at finding her there support the conclusion that they thought she was not home." Moreover, the Court of Appeals declares, Woods' companion "clearly did not have permission to kick down the door" even if the boys thought that they had permission to enter without a breaking, and therefore that there was sufficient evidence to support the conclusion that Woods' entry was unlawful.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) SEATTLE WEAPONS ORDINANCE CONSTITUTIONAL; KNIFE-CARRYING CITATION SUFFICIENTLY SPECIFIC -- In Seattle v. Riggins, 63 Wn. App. 313 (Div. I, 1991) the Washington State Court of Appeals upholds against a multifaceted constitutional challenge (including a state constitutional right-to-bear arms argument) a City of Seattle ordinance described as follows by the Court:

Seattle Municipal Code (SMC) 12A.14.080(B) makes it unlawful for a person to knowingly "[c]arry concealed or unconcealed on his/her person any dangerous knife, or carry concealed on his/her person any deadly weapon other than a pistol; . . . ". The term "dangerous knife" is defined as "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2") in length." SMC 12A.14.010(D). The term

"fixed-blade knife" is defined under SMC 12A.14.010(E):

"Fixed-blade knife" means any knife regardless of blade length, with a blade which is permanently open and does not fold, or retract or slide into the handle of the knife, and includes any dagger, sword, bayonet, bolo knife, hatchet, axe, straight-edged razor, or razor blade not in a package, dispenser or shaving appliance.

There are several exemptions to SMC 12A.14.080(B). The ordinance does not apply to licensed hunters and fishermen actively engaged in such pursuits, persons carrying knives unconcealed pursuant to a lawful occupation, and those carrying knives in a secure wrapper or toolbox. [LED Editor's emphasis]

Of significance to the Court of Appeals' constitutional analysis is the fact that the Seattle ordinance does provide the exemptions described by the Court of Appeals in the excerpt above (and emphasized by the LED Editor). The Court's opinion suggests that without an exemption along these lines, a weapons ordinance against carrying fixed-blade knives over 3 1/2" might not pass muster.

Another issue in this case involved defendant's challenge to the sufficiency of the language in the citation charging him with a violation of the ordinance. The citation read "12A.14.080(B)" in the code section of the citation form and in the description section read: "Unlawful use of weapons." Applying the relaxed sufficiency test for citations (as opposed to the stricter test for prosecutor-drawn complaints and informations), the Court of Appeals holds that the citation provided sufficient notice of the charge.

Result: Seattle Municipal Court conviction for violation of SMC 12A.14.080(B) affirmed.

(2) SPEEDY TRIAL RULE -- RELEASE OF DEFENDANT DURING INITIAL 60-DAY PERIOD EXTENDS SPEEDY TRIAL PERIOD TO 90 DAYS -- In State v. Kelley, 60 Wn. App. 921 (Div. I, 1991) the Court of Appeals rules that: (1) under CrR 3.3(c)(1) a trial court's release of a defendant anytime during the initial 60-day period before trial extends the speedy trial period to 90 days, but (2) that waiver by defendant of the 60-day limit does not waive the right to trial within 90 days. Result: King County Superior Court conviction of Felicardo Munoz Munos (UCSA) reversed because the speedy trial rule was violated; King County conviction of Charles Kelley (2nd degree burglary) affirmed.

(3) "LEAST INTRUSIVE MEANS" MAY NOT BE THE STANDARD UNDER TERRY -- In State v. Bennett, 62 Wn. App. 702 (Div. I, 1991) the Court of Appeals, in the course of upholding a Terry stop of several suspects, the Court of Appeals articulates the following rule for Terry stops:

In order to be of the proper scope, the stop must last (a) "no longer than is necessary to effectuate the purpose of the stop", and (b) "the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."

While the language in part (b) of this statement of the Terry test has some support in language used in the case of State v. Williams, 102 Wn.2d 733 (1984) we believe there is good authority that the "least intrusive means" standard articulated by the Court of Appeals in Bennett is not the current standard under Terry. Our belief that this "least intrusive means" standard is not the law is based on our reading of the cases and of our views on public policy which guides those cases.

As to the cases, the articulation of the "least intrusive means" standard in the 5-4 State Supreme Court decision in State v. Williams appears to be simply the Court's attempt to describe what had been stated in a plurality opinion of the U.S. Supreme Court in Florida v. Royer, 460 U.S. 491, 500 (1983). In his Search and Seizure treatise at section 9.2(f), Professor LaFave indicates that the "least intrusive means" rule may not be the law under the Fourth Amendment (at page 389 of Volume 3 of his treatise) and, in criticizing such a rule, he states his personal view that such a rule would have:

. . . a great potential for mischief. It is likely to result in unrealistic second-guessing of the police.

We agree with Professor LaFave that it is debatable whether the language in the Royer plurality opinion established a "least intrusive means" test for Terry stops under the Fourth Amendment, particularly in light of the Supreme Court's subsequent decisions in Michigan v. Long, 463 U.S. 1032 (1983) and U.S. v. Sharpe, 470 U.S. 675 (1985), in which cases Terry stops were upheld without expressly addressing the "least intrusive means" standard of the Royer plurality. Moreover, we do not believe that the language in State v. Williams, quoting the Royer plurality's proposed standard, was a holding of our Court based on our state constitution's article 1, section 7.

Finally, in regards to public policy, the problem with a "least intrusive means" standard is that "Monday morning quarterbacking" can often come up with a better way of proceeding. The test for lawfulness of a Terry stop should be one of generalized reasonableness, not one of whether the very best and very least intrusive means of intervention was used. We urge officers to use the least intrusive means which is safe and reasonable to use, but we urge prosecutors not to concede that "least intrusive means" is the proper standard for evaluating the permissible scope of intrusion in a Terry stop.

Result in Bennett: King County Superior Court conviction of juvenile for riding in a vehicle with knowledge that it was stolen affirmed.

(4) VEHICULAR HOMICIDE RESTITUTION ORDER UPHELD - DECEASED VICTIM'S CHILD SUPPORT PAYMENT OBLIGATION MUST BE PAID - In State v. Young, 63 Wn. App. 324 (Div. II, 1991) the Court of Appeals upholds a trial court's restitution order in a vehicular homicide case in which the defendant was ordered to pay the deceased victim's child support payments that had been reduced to judgment in dissolution proceedings before the victim's death. The Court of Appeals rejects arguments by defense counsel: (1) that the restitution order was unconstitutional as a forfeiture of estate, and (2) that the restitution order was not expressly authorized by statute. Result: Kitsap County Superior Court restitution order affirmed.

CORRECTION REGARDING LED EDITORIAL ADVICE ON URINE TESTING

In the February 1992 LED at 14, we addressed the problem faced by the law enforcement officer who arrests a person for vehicular assault or vehicular homicide if the arrestee resists the drawing of blood for testing of alcohol content. We suggested that in some cases breath or uring testing could and should be pursued as an alternative. Our suggestion regarding urine testing drew the following response from Kevin M. Korsmo, Deputy Prosecuting Attorney for Spokane County --

There are two problems with this suggestion. First, the statutory scheme of the implied consent and DWI/vehicular assault and homicide statutes speaks only of breath or blood testing (and also relates alcohol content to a ratio of breath alcohol), not urine testing. Secondly, test results are admissible only when performed via methodologies approved by the Toxicologist. RCW 46.61.506(3). The toxicologist has not yet approved any method for urine testing. I do understand, however, that Dr. Logan is in the first stages of preparing some protocols for urine testing. Urine testing may become a permissible tool in the not too distant future if the statutes are amended and a methodology is approved. I think that officers should be advised against offering a uring test at this time, however.

We defer to Mr. Korsmo. Accordingly, until further notice regarding the formal adoption of protocols for urine testing, it is our revised view that officers lack authority to pursue this testing alternative with the reluctant vehicular homicide/assault arrestee. Breath testing would appear to be the only alternative.

We thank Mr. Korsmo for his critical comments. We encourage comments and questions about entries in the LED, particularly when they are phrased along with "attaboys" such as the following closing line by Mr. Korsmo:

I very much enjoy reading the digest, particularly the comments on the case analysis. Keep up the good work!

COURT RULE CHANGES PROPOSED

The Washington Supreme Court has proposed a number of changes in the Evidence Rules, Superior Court Criminal Rules, and Justice Court Traffic Infraction Rules, among others. Included in the proposed rule changes, to be effective on September 1, 1992, are the following:

(1) Adoption of a new rule, CrR 3.2A, establishing a "procedure following arrest without warrant." Proposed CrR 3.2A would provide:

- (a) A person arrested without a warrant shall have a judicial determination of probable cause no later than 48 hours following the person's arrest.
- (b) The court shall determine probable cause on the sworn testimony of a peace officer or prosecuting attorney. The sworn testimony may be by written affidavit or electronically recorded, and in either case the testimony shall be preserved.

The rule is being proposed to meet the requirements of the U.S. Supreme Court decision in Riverside v. McLaughlin, 114 L.Ed.2d 49 (1991) Aug. '91 LED:16.

(2) Transformation of the "Justice Court Traffic Infraction Rules" (JTIR) from pure traffic infraction rules, to general infraction rules, to be known as "Infraction Rules For Courts Of Limited Jurisdiction" (IRLJ).

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses

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