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HONOR ROLL

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1993 WASHINGTON LEGISLATIVE ENACTMENTS - PART IV

LED EDITOR'S INTRODUCTORY NOTE: This is the fourth and final part of our update of 1993 state legislative enactments of interest to Washington law enforcement officers and their agencies. Part IV begins with a digesting of the enactments of interest not covered in prior LED's; then we have a few follow-up comments on enactments previously digested; finally, we present a cumulative index.

EMPLOYING PERSONS WITH HISTORIES OF SEXUAL EXPLOITATION OF CHILDREN

CHAPTER 71 (SHB 1017)

Effective Date: July 25, 1993

Amends RCW 9.96A.020 to provide that people with felony convictions for crimes for one of several specific sex offenses involving children (regardless of the period of time which has passed since conviction) are not to receive school teaching certificates or be employed in public school jobs that involve regular contact with children.

BAIL BOND AGENT LICENSING REQUIREMENTS

CHAPTER 260 (SHB 1870)

Effective Date: Various

Adds a new chapter in chapter 18 RCW establishing a statewide scheme for regulation of bail bond agents. The law is administered by DOL, and local laws regulating bail bond agents are preempted. Civil and criminal enforcement mechanisms are provided.

While the licensing provisions and civil enforcement mechanisms took effect on July 1, 1993, the criminal provisions in section 18 take effect in 1994 as follows:

(3) After June 30, 1994, any person who performs the functions and duties of a bail bond agent in this state without being licensed in accordance with the provisions of this chapter, or any person presenting or attempting to use as his or her own the license of another, or any person who gives false or forged evidence of any kind to the director in obtaining a license, or any person who falsely impersonates any other license, or any person who attempts to use an expired or revoked licensee, or any person who violates any of the provisions of this chapter is guilty of a gross misdemeanor.

(4) After January 1, 1994, a person is guilty of a gross misdemeanor if he or she owns or operates a bail bond agency in this state without first obtaining a bail bond agency license.

(5) After June 30, 1994, the owner or qualified agent of a bail bond agency is guilty of a gross misdemeanor if he or she employs any person to perform the duties of a bail bond agent without the employee having in his or her possession a permanent

bail bond agent license issued by the department.

PROPORTIONATE CIVIL PENALTIES FOR LITTERING VIOLATIONS

CHAPTER 292 (ESHB 1086)

Effective Date: July 25, 1993

Amends RCW 70.93.060 and 70.95.240 by adding the following parallel amendments to each section:

(2) (a) It is a class 3 civil infraction as defined in RCW 7.80.120 for a person to litter in an amount less than or equal to one cubic foot.

(b) It is a class 1 civil infraction as defined in RCW 7.80.120 for a person to litter in an amount greater than one cubic foot. Unless suspended or modified by a court, the person shall also pay a litter cleanup fee of twenty-five dollars per cubic foot of litter. The court may, in addition to or in lieu of part or all of the cleanup fee, order the person to pick up and remove litter from the property, with prior permission of the legal owner or, in the case of public property, of the agency managing the property.

EMANCIPATION OF MINORS

CHAPTER 294 (ESHB 1157)

Effective Date: January 1, 1994

Under a new chapter in Title 13 RCW, codifies the procedure (not described here) by which resident minors who are sixteen years of age or older may petition in superior court for a declaration of emancipation. While a person declared to be emancipated under the amendatory legislation will be an adult for most civil law purposes, section 6 (2) provides:

An emancipated minor shall not be considered an adult for : (a) The purposes of the adult criminal laws of the state unless the decline of jurisdiction procedures contained in RCW 13.40.100 are used; (b) the criminal laws of the state when the emancipated minor is a victim and the age of the victim is an element of the offense; or (c) those specific constitutional and statutory age requirements regarding voting, use of alcoholic beverages, and other health and safety regulations relevant to the minor because of the minor's age.

VEHICLE LENGTH LIMITS

CHAPTER 301 (EHB 1271)

Effective Date: July 25, 1993

Amends RCW 46.44.030 to exempt from the forty-foot length limit on vehicles an "auto stage, private carrier bus or school bus with an overall length not to exceed forty-six feet."

RESPONSIBILITY FOR ABANDONED VEHICLES

CHAPTER 314 (SHB 1507)

Effective Date: July 25, 1993

Adds a new section to Chapter 46.55 providing as follows:

(1) The abandonment of any vehicle creates a prima facie presumption that the last registered owner of record is responsible for the abandonment and is liable for costs incurred in removing, storing, and disposing of the abandoned vehicle, less amount realized at auction.

(2) If an unauthorized vehicle is found abandoned under subsection (1) of this section, the last registered owner of record is guilty of a traffic infraction under chapter 46.63 RCW, unless the vehicle is redeemed after impound as provided in RCW 46.55.120. In addition to the monetary penalty payable under that chapter, the person found to have committed the infraction is also liable for restitution in the amount of the deficiency remaining after disposal of the vehicle under 46.55.140.

SECURITY REQUIRED FOR AUTOMATED TELLER MACHINES

CHAPTER 324 (ESHB 1849)

Effective Date: Various

Establishes a new chapter in Title 19 RCW requiring that operators of automated teller machines or night deposit facilities evaluate the safety of those machines and facilities. For machines and facilities installed on or after July 1, 1994, the operators of the machines and facilities must meet certain lighting and safety requirements as of installation date. For machines and facilities existing as of July 1, 1994, the operators of the machines and facilities must meet lighting and safety requirements by July 1, 1996.

This Act also requires that issuers of "access devices" (e.g., credit cards) furnish notices of basic safety precautions. For customers obtaining such devices for the first time on or after July 11, 1994, notice must be given with the device. For existing customers who already have devices, notice must be given by December 31, 1994. Preempts and supersedes local laws addressing this subject area.

WORK ETHIC BOOT CAMP AUTHORIZED

CHAPTER 338 (ESHB 1922)

Effective Date: July 1, 1993

Establishes a work ethic boot camp as an alternative incarceration program in the Department of Corrections (DOC). An offender may be eligible for the work ethic boot camp if the offender: (a) is sentenced to a term of total confinement of not less than twenty-two months or more than thirty-six months; (b) is between the ages of eighteen and twenty-eight years; and (c) has no current

or prior convictions for any sex offenses or violent offenses. The act gives substantial discretion to DOC in developing this new program.

TINTED WINDOWS IN MOTOR VEHICLES

CHAPTER 384 (HB 1713)

Effective Date: July 25, 1993

Amends RCW 46.37.430 (5)(a) to clarify that tinting of motor vehicle windows other than the windshield shall result "in a minimum of twenty-four percent light transmission on AS-2 glazing...". Also deletes the following language from the same subsection:

Manufacturers of film sunscreening material shall provide a label to affix to the vehicle indicating the percentage light transmittance and light reflectance of the film and it shall be affixed by the installer to the area immediately below the federal vehicle identification number sticker on the driver's side striker post. All vehicles equipped with film sunscreening material are required, on and after January 1, 1991, to meet the labeling requirements in this section. The label shall meet standards adopted by the state patrol.

and adds the following language to that subsection:

A person or business tinting windows for profit who tints windows within restricted areas of the glazing system shall supply a sticker to be affixed to the driver's door post, in the area adjacent to the manufacturer's identification tag. Installation of this sticker certifies that the glazing application meets this chapter's standards of light transmission, reflectance, and placement requirements. Stickers must be no smaller than three-quarters of an inch by one and one-half inches. The stickers must be of sufficient quality to endure exposure to harsh climate conditions. The business name and state tax identification number of the installer must be clearly visible on the sticker.

RECOUPING JAIL COSTS FROM INMATES

CHAPTER 355 (ESSB 5451)

Effective Date: July 25, 1993

Amends chapter 10.64 RCW by adopting a new section providing:

Once a defendant has been convicted of a misdemeanor or gross misdemeanor, unless the defendant has been found by the court, pursuant to RCW 10.101.020, to be indigent, the court may require the defendant to pay for the cost of incarceration at a rate of up to fifty dollars per day of incarceration. Payment of other court ordered financial obligations, including all legal financial obligations and cost of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail shall be remitted to the county or city for criminal justice purposes.

DEPORTING ALIEN OFFENDERS

CHAPTER 419 (SHB 1727)

Effective Date: July 25, 1993

Adds a new section to chapter 9.94A RCW allowing the Department of Corrections to conditionally release alien prisoners under certain circumstances (prosecutor approval required) so that they can be deported by INS, rather than imprisoned by DOC.

PARENTAL FINANCIAL RESPONSIBILITY FOR CARE OF JUVENILE OFFENDERS

CHAPTER 446 (SHB 2070)

Effective Date: July 25, 1993

Based on ability to pay, parents in most circumstances are financially responsible for reimbursing DSHS if their children are committed to DSHS as juvenile offenders.

DWI VEHICLE FORFEITURE

CHAPTER 487 (ESSB 5815)

Effective Date: July 25, 1993

In the past two LED's, we noted that the DWI forfeiture portion of this enactment appeared to have some loopholes and logistical problems. We also noted that Pat Sainsbury, Chief Deputy Prosecuting Attorney for King County, had done a thorough review of the enactment, and that Pat could be contacted by those wishing information on the new law. See Sept. '93 LED at 13.

We have now learned that a general consensus has developed among DOL (the agency with the biggest logistical problems, and at the greatest legal risk, in trying to implement this presently flawed enactment), law enforcement representatives, and prosecutors that DWI forfeiture should not be pursued until the 1994 Washington Legislature has had an opportunity to correct a number of defects in the bill. While a few law enforcement agencies and courts have begun actions under the law (and the King County Prosecutor's Office and King County Police are developing a special pilot program in one district court to try to make the present law work without DOL involvement), we agree with the consensus view that most agencies will want to wait for the 1994 amendments, and for that reason we will not devote further time or LED space to the enactment other than to note in summary form the basic scheme the Legislature had in mind with the 1993 legislation. In brief step-by-step chronology, the DWI vehicle statute is supposed to work as follows:

Step 1 [See Sections 3, 4, and 5 of Act] --

At the initial court appearance of a DWI or physical control charge where there is a prior conviction of one of those two offenses in the past five years, the court informs the defendant that it is unlawful to transfer the motor vehicle (the one that was driven in the

current offense) until acquittal or dismissal of the charges; possession and use of the vehicle remains with the defendant during the pendency of the charges; the court sends notice of the pending charges to DOL, and DOL places a "hold" on the certificate of title. **[The "DOL hold" provisions present some logistical problems which present the most significant need for a legislative fix, most legal analysts agree.]**

Step 2 [See Section 3 of Act] --

Upon acquittal, dismissal, or other non-conviction disposition of the charges, DOL is notified that it may lift the "hold" on transfer of the vehicle; on the other hand, upon conviction, the court may issue legal process for seizure of the vehicle by any law enforcement officer.

Step 3 [See Section 2 of Act] --

A request for a hearing following seizure of the vehicle pursuant to the post-conviction legal process triggers a forfeiture hearings process which basically mirrors the review process under the controlled substances act (See RCW 69.50.505).

The 1994 amendments to chapter 487 may either (a) attempt to make workable the above-described, step-by-step, scheme; or (b) institute a different scheme where the most troublesome logistical aspect of the bill -- the "DOL hold" on title -- will not be necessary.

FOLLOW-UP NOTES ON ENACTMENTS DIGESTED IN EARLIER LED'S

Chapter 477 [SEX OFFENSES BY HEALTH CARE PROVIDERS] -- August LED at 16 -- A health care provider will not be guilty of a sex offense for sexual intercourse/contact with a patient if the provider proves the patient consented to the intercourse/contact knowing that it was not for treatment purposes . . .

Chapter 484 [PROHIBITING CREDIT CARD FACTORING] -- August LED at 17 -- the concept of "credit card factoring" was capsulized in materials from the Association of Washington Cities as follows (we finally grasped the concept upon reading this explanation):

A business that wishes to accept credit cards from its customers must first enter into a merchant agreement with a financial institution. Credit card factoring occurs when a business that has a merchant agreement (the factor), processes the credit card transactions of a second business that has been unable or unwilling to obtain its own merchant agreement. In return, the second business pays a fee to the factor, which often is based on a percentage of the credit sales proceeds. It has been reported that "disreputable" operators use factoring in connection with schemes to defraud or deceive consumers.

CHAPTER 513 [MINORS UNDER-THE-INFLUENCE IN PUBLIC] --August LED at 21 -- the new prohibition on minors being in public while exhibiting the effects of having consumed liquor is an alternative offense; the provisions establishing this new offense should not in any way affect the prosecutor's ability to prove the preexisting offense of "possessing, consuming or otherwise

acquiring"; hence, because the elements of the preexisting offense were not modified by chapter 513, proof of possession of intoxicants through e.g., circumstantial evidence, admissions by the suspect, and constructive possession (See e.g., State v. Walton, 67 Wn. App. 127 (1992) Jan. '93 LED:09) is not affected by chapter 513.

CUMULATIVE INDEX OF 1993 LEGISLATION

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WASHINGTON STATE COURT OF APPEALS

NO PRIVACY PROTECTION FOR SUSPECT WHERE PHONE COMPANY GAVE POLICE BILLING INFORMATION IDENTIFYING THE MAN AND GIVING HIS ADDRESS -- THE PHONE NUMBER WAS LISTED, BUT WITHOUT ADDRESS, AND UNDER ANOTHER'S NAME

State v. Faydo, 68 Wn. App. 621 (Div. III, 1993)

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

On October 24, 1990, Mr. Faydo brought a rare tripowered Cadillac manifold to RAM Engine and asked what it was. The RAM Engine employee who helped Mr. Faydo recognized the manifold as matching the description of one stolen from a Spokane County residence. The employee told Mr. Faydo he would get back to him, and Mr. Faydo gave him his first name and his phone number. The employee then contacted Detective Gerry Fojtik of the Spokane County Sheriff's Department and gave him Mr. Faydo's number and first name.

Detective Fojtik contacted U S West security and learned that the phone number was a published number belonging to Dana Kendall, but, at her request, her address of East 3604 Cleveland, Spokane, was not listed in the telephone directory. U S West Communications' billing information showed Edward Faydo of the same address as an additional name on the billing for that number. The record

does not indicate why Mr. Faydo's name was not included in the phone book. Detective Fojtik verified Mr. Faydo's address through the Department of Licensing and TIEPIN, the criminal justice network.

Based on the foregoing, the court issued a warrant to search the Cleveland address for the stolen manifold. The manifold was not found on the premises. However, officers discovered a marijuana grow operation in the basement. The Faydos were charged with possession of marijuana with intent to manufacture. They unsuccessfully moved to suppress the marijuana found during the search of their residence, and were found guilty on stipulated facts.

ISSUE AND RULING:

Did the State violate Const. art. 1, § 7 when Detective Fojtik obtained the address and Mr. Faydo's name from U S West's billing information? (ANSWER: No) Result: affirmance of Spokane County Superior Court convictions of Dana Faydo (a.k.a. Dana Kendall) and Edward Faydo for possession of marijuana with intent to manufacture. Status: decision final; petition for review denied by State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Two Washington cases address the constitutionality of law enforcement officers' obtaining customer information from telephone companies without legal process. State v. Gunwall, 106 Wn.2d 54 (1986)[**Aug. '86 LED:04**]; State v. Butterworth, 48 Wn. App. 152 (1987)[**Aug. '87 LED:19**].

In Gunwall, a warrant was issued for the search of defendant's home for controlled substances, based, in part, upon telephone toll records and information obtained by use of a pen register, a device that records numbers dialed from a certain telephone. The court recognized that such information is *not* protected by the Fourth Amendment. Nevertheless, the court held it was appropriate to "resort to separate and independent state grounds of decision . . .", i.e., article 1, section 7 of the Washington State Constitution. Generally, the court noted the significant differences in text between the Fourth Amendment and article 1, section 7, which protects a person's "private affairs". Specifically, the court relied upon "[t]he long history and tradition of strict legislative protection of telephonic and other electronic communications in this state . . .".

Having concluded state constitutional analysis was appropriate, the court held that police use of the toll records and the pen register information without authority of a warrant unreasonably intruded on the defendant's private affairs. In so holding, the court relied upon the rationale in State v. Hunt, 91 N.J. 338 (1982):

It is unrealistic to say that the cloak of privacy has been shed because the telephone company and some of its employees are aware of this information. Telephone calls cannot be made except through the telephone company's property and without payment to it for the service. This disclosure has been necessitated because of the nature of the instrumentality, *but more significantly the disclosure has been made for a*

limited business purpose and not for release to other persons for other reasons.

[Court's emphasis]

In Butterworth, the police received information from a confidential informant that the defendant had a grow operation at his residence. The police called Pacific Northwest Bell in an attempt to locate the defendant's address; the company indicated the defendant's listing was unpublished. It released his address after police made a written request to the company's security department. The police used this information to obtain a warrant for the search of defendant's home, during which they discovered and seized several pounds of marijuana plants.

The court held the State violated article 1, section 7 of the Washington Constitution and "intruded into the defendant's private affairs . . ." when the police obtained his unpublished listing from the telephone company. Butterworth relied upon People v. Chapman, 36 Cal. 3d 98 (1984), which cited the following facts:

(1) disclosure of one's name and address to the telephone company is not entirely volitional, (2) such disclosure is plainly for the limited purpose of billing, and (3) by affirmatively requesting an unpublished listing, the defendant took specific steps to ensure greater privacy than that afforded other telephone customers.

As the State points out, Gunwall and Butterworth are distinguishable on their facts. Gunwall concerned the release of telephone use information; Butterworth concerned the release of an unpublished listing. Here, the name Dana Kendall and the phone number were listed, but not the address. U S West told Detective Fojtik that the subscriber had given Mr. Faydo's name, as well as her own, for the billing for that number. The question is whether these distinctions are significant.

The disclosure of Mr. Faydo's name is different in kind from disclosure of the telephone use information which was the subject of the Gunwall decision. His identity is not "private" in the same sense as is a record of the phone numbers dialed on a subscriber's phone. The average person reasonably believes the phone numbers he calls are protected from warrantless government intrusions. In contrast, in this day and age in which private businesses routinely sell customer lists to other businesses, it is unreasonable to believe a customer's name and the names of others he lists at his residence for billing purposes will be kept private.

The disclosure of Mr. Faydo's name also is different from the disclosure of the unpublished listing in Butterworth, which the telephone subscriber had requested the company not release. Neither Mr. nor Mrs. Faydo asked U S West to keep their identities confidential. We know of no law, either statutory or decisional, which prohibits private companies from giving out the names of their customers. RCW 42.17.314, cited by the Faydos, applies only to public utility districts or municipally owned electrical utilities. [COURT'S FOOTNOTE: RCW 42.17.314 provides: "A law enforcement authority may not request inspection or copying of records of any person, which belong to a public utility district or a municipally owned electrical utility, unless the authority provides the public utility district or

municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this rule is inadmissible in any criminal proceeding."]

We therefore hold the State did not violate article 1, section 7 of the Washington Constitution when the sheriff's office obtained Mr. Faydo's name from U S West without legal process.

[Some footnotes omitted]

OFFICER'S DECEPTION AS TO PURPOSE OF ENTRY REQUEST DESTROYS CONSENT

State v. McCrorey, 70 Wn. App. 103 (Div. I, 1993)

Facts:

Justin McCrorey was a 17-year-old who got drunk and assaulted his former girlfriend by striking her and throwing her on the ground in his front yard. When police responded to a call to the neighborhood regarding the incident, they were told that McCrorey had been drinking heavily, that he may have taken his neighbor's car and driven it in a nearby ditch, and that McCrorey was now probably at home alone.

Responding officers knocked on McCrorey's front door. They invited him outside, but he refused. When the lead officer asked if he could come inside to talk, McCrorey refused, stating that if they wanted to come inside they would have to get a search warrant.

When the officer said that they just wanted to come in to get McCrorey's side of the story, McCrorey said that they could come in only if he would not be arrested. The lead officer did not agree to McCrorey's condition, saying only "let me come in and we'll talk about it."

McCrorey opened the door to allow the officers inside. Once inside, the officers saw a can of beer on a nearby table and noticed a strong odor of intoxicants on McCrorey. The officers told him he was under arrest, but McCrorey did not cooperate. He passively resisted arrest. Once arrested, however, McCrorey gave a Mirandized statement and confessed to having driven the wrecked vehicle and assaulted his former girlfriend.

Proceedings: (Excerpted from Court of Appeals opinion)

McCrorey was charged with first degree theft, two counts of fourth degree assault, first degree malicious mischief, taking a motor vehicle without permission, resisting arrest, possessing intoxicating liquor, and driving while intoxicated. The trial court found McCrorey guilty of fourth degree assault, attempted fourth degree assault, taking a motor vehicle without permission, resisting arrest, and possessing intoxicating liquor.

ISSUE AND RULING: Did the officers obtain a valid consent to enter and arrest McCrorey? (ANSWER: No, because McCrorey limited the scope of the consent). Result: Snohomish County Superior Court convictions for taking a motor vehicle without permission, MIP, and

resisting arrest reversed. Status: prosecutor's petition for review pending in State Supreme Court. **[LED EDITOR'S NOTE: Apparently, McCrorey did not appeal his convictions for assault and attempted assault; those convictions presumably stand.]**

ANALYSIS: (Excerpted from Court of Appeals opinion)

McCrorey argues his consent was vitiated because [the officer] did not disclose his intent to arrest McCrorey before obtaining his consent to enter the residence. McCrorey alleges such police deception will invalidate McCrorey's consent.

This court has previously approved the use of ruse entries in conjunction with undercover police activity. "The use of deception by a police officer does not necessarily affect the voluntariness of a consent to search." . . .

The case at hand is distinguishable, however. It does not present the issue of undercover police activity, but rather the failure to disclose the actual police purpose. The proper focus is not on the asserted purpose for which the officer enters, but on whether the agent's actions are consistent with that purpose, thus falling within the scope of the consent. **[Citing State v. Nedergard, 51 Wn. App. 304 (1988) Aug. '88 LED:07].**

We find the Ninth Circuit's approach in United States v. Bosse, 898 F.2d 113 (9th Cir. 1990) persuasive. A government agent who gains entry by misrepresenting the scope or purpose of the investigation raises special policy considerations. It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. . . . We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given. . . .

. . . [The officer] testified that McCrorey expressly stated [the officer] could enter if [the officer] would not arrest him. McCrorey's consent to [the officer's] entry was limited in scope and conditional upon [the officer] abiding by its terms. Even if [the officer] did not expressly promise not to arrest McCrorey, McCrorey could easily have inferred a promise from [the officer's] next statement: "Well, let me just come in and we'll talk about it." On the facts of this case, the circumstances indicate that the consent to enter was limited in scope. [The officer] subsequently exceeded that scope, rendering the consent invalid because of the intended or inadvertent misrepresentation. [The officer's] entry into the McCrorey home violated the Fourth Amendment.

Consequently, the trial court erred in denying the motion to suppress McCrorey's confession, and the exclusionary rule suppressing evidence obtained in violation of the constitutional prohibition against unreasonable searches and seizures is applicable.

Moreover, McCrorey claims that his conviction for resisting arrest should be reversed. An illegal arrest is the equivalent of an assault. A person being illegally

arrested may use reasonable and proportional force to resist the arrest. The evidence indicates that although McCrorey was uncooperative in allowing the officers to handcuff him, he did not use force that was unreasonably aggressive or disproportionate. **[LED Editor's Emphasis: This is not the proper standard. See comment 2 below.]** Consequently, the conviction for resisting arrest should be reversed.

[Some citations, footnotes omitted]

LED EDITOR'S COMMENTS:

1. "Consent" obtained through ruse as to purpose as compared to ruse as to identity.

The consent issue is an extremely close one, but based on the specific facts of this case, as described by the Court of Appeals, we believe the Court may be upheld in its decision that the officers exceeded the scope of a qualified consent to entry and hence that the Payton rule was violated. If a suspect says that he will let law enforcement officers enter his home only if they do not arrest him, and they say they want to come in and "talk about it," then a subsequent arrest inside may be deemed unlawful under Payton, even if the officers did not expressly agree to the suspect's limits on entry.

The reason why the entry may be deemed unlawful is not the subjective intent of the requesting officers to arrest the suspect contrary to his wishes. Consent and scope of consent are measured by an objective (reasonable person) standard, not a subjective (individualized) standard. Instead, the reason why the entry may be held unlawful is, we believe, that a reasonable person would believe that the officers would, following such a clear condition to entry, be required either: to tell him that arrest was going to occur or to abide by the condition.

Under our view, we read the decision very narrowly. The Court should have no problem with officers, who actually intend to make an arrest, beginning the conversation requesting consent-to-enter with the question: "May we come in and talk?" So long as the suspect cooperates in this circumstance and does not reply that he will cooperate only if not arrested, we see no problem in the minor deception as to purpose.

Unfortunately for law enforcement officers looking for clear guidance on deception-consent issues, there is little case law on deception in gaining consent-to-entry to make an arrest, as opposed to deception in getting consent-to-entry to conduct a search. And even in the context of consent-to-search cases, where there are a few Washington cases and a number of cases from other jurisdictions, the case law does not establish a bright line rule. The cases seem to leave it up to the appellate courts to decide the "fairness" of the ruse on a case-by-case basis. See LaFave, Search and Seizure, sections 8.2(m) ("consent" to search gained by law enforcement through deception as to purpose) and 8.2(n) ("consent" to search gained by law enforcement through deception as to identity). It appears that consent gained through deception as to identity almost always passes muster, perhaps because such deception is so essential to undercover operations. On the other hand, the cases on consent gained through deception as to purpose seem to involve closer judicial scrutiny of the fairness of the officers' deception.

2. Right to resist unlawful arrest.

The Court of Appeals in the last paragraph of analysis above omitted some critical text from the controlling Hornaday case regarding what force is permitted a citizen in resisting an unlawful arrest. The State Supreme Court in State v. Hornaday, 105 Wn.2d 120, 131 (1986) April '86 LED:15, June '86 LED:16, declared that any use of force by a citizen to prevent an unlawful arrest which threatens only a loss of freedom is not reasonable. Hence, under Hornaday, only purely passive resistance is allowed in response to an unlawful arrest where the officers themselves use reasonable force. Prosecutors beware: the McCrorey language does not adequately state the rule!

OFFICER'S REQUEST TO TALK TO PERSON WALKING AWAY, PLUS HIS "DEMAND" FOR ID, DECLARED TO BE A TERRY STOP REQUIRING REASONABLE SUSPICION OF CRIME

State v. Gleason, 70 Wn. App. 13 (Div. III, 1993)

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

At the suppression hearing, Officer [A] testified that on April 25, 1991, he was on patrol with Officer [B], a rookie officer who was in training. They drove by a Yakima apartment complex commonly referred to as "the cabins". He said the cabins were occupied by low income Hispanics and were plagued by a high incidence of illegal narcotics transactions. According to the officer, when Caucasians were on the premises, they usually were there to buy narcotics.

Officer [A] said he observed a white male, casually dressed in clean clothes, clean shaven, and with clean-cut hair, walk out of the apartment complex. He told Officer [B] that the man would be a good individual for him to stop and identify and if he did not live or work in the complex, he should warn him of the drug loitering law. The man was later identified as Mr. Gleason.

The officers made a U-turn in their patrol car, parked it, and got out. Mr. Gleason continued to walk on with his back to the officers. According to Officer [B], he walked toward Mr. Gleason, and called out, "[C]an I talk to you a minute?" The officer then asked him why he was there and demanded identification. Mr. Gleason produced a driver's license from his wallet. When he did this, Officer [A] said he saw a neatly folded piece of green paper in the palm of his hand and immediately recognized it as a bindle containing cocaine. Officer [A] grabbed Mr. Gleason by his shirt, grabbed his hand, and pulled the bindle out.

At the suppression hearing, Mr. Gleason disputed the officers' testimony. He said the officer grabbed him by the shoulder, spun him around, and asked for identification. He testified he had his fist closed at his side and the officer kept asking what was in his fist. He finally opened his hand, believing the officers would get it anyway.

The trial court resolved conflicts in the testimony in favor of the officers and determined there was no seizure when the officers first contacted Mr. Gleason. The court concluded the seizure occurred when the officer saw the bindle and asked what it was, and at that point, they had a well-founded suspicion that Mr.

Gleason was involved in criminal activity. The motion to suppress was denied.

After a stipulated trial, the court found Mr. Gleason guilty of one count of possession of cocaine and one count of possession of marijuana. He was sentenced to 152 hours of community service.

ISSUE AND RULING: Was the approach and inquiry of the officers an unlawful "seizure" under the Fourth Amendment? (ANSWER: Yes) Result: Yakima County Superior Court conviction for possession of cocaine reversed; case remanded for dismissal. Status: decision final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Not all encounters between police officers and citizens are "seizures" of the person. For example, a police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting information necessary to perform that function has not "seized" the citizen. A "seizure" occurs when the circumstances surrounding the encounter demonstrate that a reasonable person would not feel free to disregard the officer and go about his business. . . .

Officer [A] testified he first observed Mr. Gleason when he was leaving the apartment complex, walking west-bound from the parking lot toward Tenth Street. The patrol car was traveling south on Tenth. The officers made a U-turn and by the time they were proceeding north on Tenth, Mr. Gleason had proceeded out onto Tenth and was walking south. Officer [B] pulled the car onto a side street, parked and got out. He walked toward Mr. Gleason who was by then walking southbound away from him and with his back to him. The officer called out "[C]an I talk to you a minute?" He then began walking toward Mr. Gleason as Officer [A] got out of the patrol car. Mr. Gleason turned around. He stopped when Officer [B] was within arm's length in front of him. At that point, the officer asked him why he was there and demanded identification.

A person may be "seized" by a show of authority as well as by physical force. Here, the testimony of the officers alone establishes that a seizure took place before Officer [A] saw the bindle of cocaine. A reasonable person in Mr. Gleason's position would have believed he was not free to disregard the officers and go about his business.

A seizure is justified if the officer can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. Racial incongruity, defined as a person of any race being allegedly "out of place" in a particular geographic area, is never a sufficient basis for forming a suspicion of criminal activity.

Here, eliminating any consideration of racial incongruity, there were no facts to support a legally justified and well-founded suspicion of criminal activity at the time the arresting officers stopped and questioned Mr. Gleason. Racial incongruity aside, the trial court only found that Mr. Gleason, dressed in clean casual clothes, was seen leaving an apartment complex where narcotics had been sold in the

past. [T]his was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects, and the officers admitted there was no basis to arrest him for loitering. The officers' suspicion of criminal activity was based solely on Mr. Gleason's presence at an apartment complex where the tenants were primarily Hispanic.

Since Mr. Gleason was unlawfully seized before he was searched, the trial court erred in failing to grant his motion to suppress.

[Some citations, officer names omitted]

LED EDITOR'S COMMENT:

The Court of Appeals' analysis on the issue of the question of the point in time at which the officers had first made a Fourth Amendment "seizure" of Gleason leaves much to be desired in terms of the clarity of its rationale. We believe that the overwhelming majority of courts would rule that a mere request by officers to talk to a pedestrian walking away from them, taken alone, would not be a Terry seizure, and hence would require no suspicion to support the contact. See Professor LaFave's Treatise on Search Seizure, Volume 3, section 9.2(h) (discussing police "action" short of a stop). The test for "seizure," as distinguished from a mere "contact" under the Fourth Amendment, is difficult to define because the cases from the U.S. Supreme Court are somewhat conflicted. However, we believe that, at the very least, no seizure occurs where there is a mere question or contact from an officer that would not be deemed by a reasonable, innocent person to be an offensive intrusion if asked by a fellow citizen. See LaFave's discussion of this concept in his treatise at § 9.2(h) beginning at page 412. Here, a mere request to talk, if posed by a fellow citizen, would not be deemed by a reasonable person to be offensive. Thus, there clearly was no seizure of Gleason when he was asked to stop and talk.

On the other hand, the Court of Appeals felt it had a greater intrusion here. Without giving any details, the Court of Appeals conclusorily refers in two places to a "demand" for identification by the officers. A credible source tells us that the trial court found that the officers merely "requested" ID, so it is difficult to understand how the Court of Appeals could reach this conclusion. We do not have access to the suppression hearing transcripts, but if the officers in fact "demanded" ID, instead of merely requesting that it be voluntarily produced, then, although the question would still be a very close one, we can see some courts holding that at that point Gleason had been "seized" for Fourth Amendment purposes. And because the cocaine bindle was observed after the alleged "demand" for ID, and there was at that point no "reasonable suspicion" of criminal activity, then the bindle probably would be correctly suppressed as evidence. The moral of the story? (1) Always ask for voluntary cooperation in the "mere contact" situation, and (2) hope that the trial court's findings will be given proper deference in the Court of Appeals.

NO "CAT OUT OF THE BAG" RULE UNDER MIRANDA?

State v. Allenby, 68 Wn. App. 657 (Div. I, 1992)

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

On September 20, 1987, Washington State Patrol trooper Patrick Ditter was traveling on Interstate 82 when he saw a pedestrian with his thumb out. Trooper Ditter stopped the pedestrian, informed him that he was on a limited access freeway, and stated that hitchhiking was against the law. To determine whether the pedestrian was a runaway, Trooper Ditter asked the pedestrian for his name and date of birth, learned that the pedestrian's name was Erick Allenby, and ran a wants and warrants check.

When no information came back, Trooper Ditter decided to transport Allenby to a nearby town so Allenby could place a phone call to his brother, who lived in Kennewick. With Allenby's permission, Officer Ditter patted Allenby down to check for weapons and placed him in the backseat of the patrol car. However, before they started driving, Trooper Ditter received a radio communication from Yakima advising him that Allenby was an escapee from a juvenile detention facility and that there was a King County warrant out against him. Trooper Ditter testified that when Allenby heard the radio communication he stated, "Yep, that's me." At that point Trooper Ditter removed Allenby from the car, handcuffed him, completed a thorough search of his person, and placed him back in the vehicle. Although Trooper Ditter had placed Allenby under custodial arrest, at that time he did not advise Allenby of his Miranda rights. Trooper Ditter then transported Allenby to the Sunnyside Police Department.

During their trip to Sunnyside, Trooper Ditter asked Allenby about his trip from Seattle to Yakima, and Allenby made a brief incriminating statement. Immediately, Trooper Ditter stopped the conversation and read the Miranda warnings to Allenby. Trooper Ditter testified that Allenby was alert and coherent, that Allenby stated that he understood his Miranda rights, and that Allenby did not request an attorney. Trooper Ditter then questioned Allenby again about his trip, and Allenby told Trooper Ditter that he had stolen a red and black Chevrolet K-5 Blazer from Biddle Chevrolet in King County. Trooper Ditter also testified that Allenby stated the Blazer was possibly between Issaquah and the Snoqualmie summit on I-90 and that the keys to the car were in a pair of blue jeans which he was carrying with him. Trooper Ditter retrieved the keys.

Based on the information received by Trooper Ditter, Erick Allenby was charged by information on November 20, 1987, with one count of taking a motor vehicle without permission.

During the trial which followed, the Superior Court conducted a CrR 3.5 hearing to determine whether the statement Allenby made prior to Miranda warnings and the statements Allenby made after the warnings should be suppressed. Although the Superior Court found that the brief inculpatory statement made prior to the giving of the Miranda warnings was inadmissible, the Superior Court admitted the statements which Allenby made after the Miranda warnings were given. The Superior Court found Allenby guilty as charged, and on March 12, 1991, Allenby was given a sentence within the standard range.

[Footnote omitted]

ISSUE AND RULING: (1) Was Allenby's confession after receiving Miranda warnings inadmissible under the Federal Constitution's Fifth Amendment because he had already "let the cat out of the bag" in his prior unwarned statement? (ANSWER: No); (2) Does the Washington State Constitution establish a different standard for admissibility of incriminating statements than does the Federal Constitution? (ANSWER: No) Result: King County Superior Court adjudication of guilt for taking a motor vehicle without permission affirmed. Status: decision final; Allenby's petition for review denied by State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) FEDERAL CONSTITUTION

Prior courts have addressed whether a defendant's unwarned remark compromised the voluntariness of the defendant's later warned confession. When a prior statement has been coerced, "the time that passes between confessions, the change in place of interrogation, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Oregon v. Elstad, 470 U.S. 298 (1984). However, when a prior unwarned statement is clearly voluntary, a break in the stream of events is not required before a second warned confession can be rendered admissible. A thorough administration of Miranda warnings "conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" . . .

. . . Allenby contends that the voluntariness and admissibility of his warned confession were compromised because he had "let the cat out of the bag" in his prior unwarned statement.

However, Allenby's contention ignores federal precedent. The "cat out of the bag" doctrine first announced in United States v. Bayer, 331 U.S. 532 (1947) and adopted by Erho and [State v. Lavaris, 99 Wn.2d 851 (1983) Aug. '83 LED:10] has been modified by Elstad, which holds that when a prior unwarned statement is clearly voluntary, the proper administration of Miranda warnings renders the second warned confession an "'act of free will.'"

As in Elstad, the evidence presented on the record before this court supports a finding that Allenby's unwarned statement was voluntary. Allenby objected at trial to any testimony concerning the conversation between Trooper Ditter and himself prior to Allenby's unwarned admission, and the precise nature of their discussion was not revealed. However, the record indicates that Trooper Ditter had no knowledge of Allenby's taking of a motor vehicle prior to his brief unwarned remark and that Allenby unexpectedly stated "we stole it" in reference to a vehicle during their conversation. In addition, the record indicates that Trooper Ditter made no threats or promises to induce Allenby's subsequent statement and that Allenby knew his rights and understood them before giving his warned confession. Thus, because Allenby's prior unwarned statement was an unexpected, voluntary confession to a crime of which Trooper Ditter was unaware, Trooper Ditter's careful reading of the Miranda warnings rendered Allenby's second confession an act of free will, evidence of which could be admitted at trial.

(2) STATE CONSTITUTION

[In] State v. Earls, 116 Wn.2d 364 (1991)[May '91 **LED**:02] use of the Gunwall analysis was found to be unnecessary for article 1, section 9 because state precedent holds that "the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment. **LED EDITOR'S NOTE: In other words, the Court is saying that restrictions on custodial interrogation under the Washington constitution were held in Earls to be identical to those under the Federal constitution.]**

[Some citations omitted]

LED EDITOR'S COMMENT: We agree with the Court of Appeals' pro-law enforcement reading of Federal and State constitutional law under the narrow facts of this case, but we still stick with the comment we made in the August '83 **LED** after the State Supreme Court decided State v. Lavaris. There we suggested that, once an officer realizes that a Miranda violation has occurred during the investigative process, police should: (i) immediately give an additional warning that the unwarned or inadequately-warned statement cannot be used against the suspect and (ii) then start fresh with Miranda warnings and waiver before taking a statement.

Allenby seems to make such an extra warning unnecessary, but we think it would be safer to do so, because Allenby is only a Court of Appeals decision, not a State Supreme Court decision.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **COURT DISAPPROVES OFFICER'S REQUEST FOR CONSENT TO SEARCH AFTER TRAFFIC STOP COMPLETED** -- In State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) the Court of Appeals strikes down a consent search on grounds that the consenting party did so while being unlawfully detained. After completing the writing of a speeding ticket and without any basis for suspicion of criminal activity, the law enforcement officer asked the two men in the vehicle if they had any contraband or open containers in the vehicle.

They said "no," and the officer handed the passenger (whose father owned the vehicle) a card which read, in part, that the requestee had "the right to refuse permission to make a search and require that the officer obtain a search warrant." Thinking that the card implied that the officer could obtain a warrant anyway (or so he claimed in his suppression testimony) the vehicle owner's son consented to a search. The driver, defendant Cantrell, was not asked for consent. The officer's subsequent search ultimately yielded marijuana and methamphetamine.

The Court of Appeals rules that the consent was invalid because it was the product of an unlawful detention of the occupants of the vehicle. Relying heavily on a prior Court of Appeals decision, State v. Tijerina, 61 Wn. App. 626 (Div. III, 1991) Oct. '91 **LED**:12, the Court of Appeals declares that once the officer had completed writing the traffic ticket, he had no authority to detain the vehicle absent additional suspicious circumstances (there were none). Even though the further detention was only for the length of time it took to ask for consent, that short delay was too long, the Court of Appeals rules, and the subsequent consent was tainted by that "unlawful" detention.

Result: Pacific County Superior Court conviction for possession of controlled substances reversed. Status: State's petition for review pending in the State Supreme Court.

LED EDITOR'S NOTE: The Court of Appeals also declares that the consent by the vehicle owner's son, the passenger, was not valid as to the driver. The Court declares on this issue:

Nevertheless, the consent given by Schweitzer was not binding on Cantrell in this case. The record shows that Schweitzer's father owned the car in which they were traveling, and that Cantrell was its driver. Each, therefore, had a basis for asserting control over the vehicle and roughly equal ability to consent to a search of it. In such a situation, where two or more persons have "common authority" over the place searched, "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared." State v. Leach, 113 Wn.2d 735, 739 (1989) [See Feb. '90 LED:03] . . . On the other hand, when both persons possessing approximately equal control are present, the police must obtain the consent of both before searching without a warrant. As stated in Leach, "one's ability to control the premises is not subordinated to a joint occupant *when one remains on the premises and is able to object to access by others.*"

In this case, both Cantrell and Schweitzer were present at all times, but [the officer] asked only Schweitzer to consent to a search. His failure to obtain Cantrell's consent as well invalidates the search under the rule adopted in Leach.

LED EDITOR'S COMMENT ON UNLAWFUL DETENTION ISSUE: The prosecutor has petitioned for review in this case and has a very good argument that there was no "detention" here in this de minimis delay following issuance of the ticket. Arguably, the very brief delay constituted only a mere "contact" not requiring reasonable suspicion of criminal activity. (See the cases cited in Professor LaFave's Treatise on Search and Seizure, 1993 pocket part to Volume 3 at page 98.) Nonetheless, based on this case and on Tijerina (See October '91 LED at 12), we suggest the following approach to suspicion-less consent requests in traffic stops -- either: (1) officers should ask for consent before completing issuance of the ticket, or (2) if they wish to request consent after completing issuance of the ticket, they should, after handing the ticket to the violator and before making the consent request, preface the request by expressly telling the requestee that he or she is free to leave and need not answer any questions or respond to the consent request.

LED CORRECTION NOTICE

In the September '93 LED at 11, we reported that Chapter 401 (EHB 1107) amended RCW 46.37.190 ". . . to allow **emergency lights** on DOT, city and county maintenance vehicles; . . ." THIS IS WRONG. The amendment allows "**optical strobe light devices**" on these categories of vehicles, not "emergency lights."

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 the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.

