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HONOR ROLL

408th Session, Basic Law Enforcement Academy - September 1 through November 23, 1993

President: Officer Patrick S. McCurdy - King County Police Department
Best Overall: Officer Gary J. Roberts - Tacoma Police Department
Best Academic: Officer Gary J. Roberts - Tacoma Police Department
Best Firearms: Officer Paul A. McCain - King County Police Department

409th Session, Basic Law Enforcement Academy, Spokane - September 9 through December 2, 1993

Best Overall: Deputy Robert W. Reynolds - Stevens County Sheriff's Department
Best Academic: Officer Tracie A. Mayer - Spokane Police Department
Best Firearms: Deputy Charles L. Haley - Spokane County Sheriff's Department

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BRIEF NOTE FROM THE 9TH CIRCUIT OF THE U.S. COURT OF APPEALS

STATUS OF REAL PROPERTY FROM WHICH POLICE MAKE THEIR OBSERVATIONS OR SEIZURE, NOT STATUS OF PROPERTY CROSSED TO GET THERE, GOVERNS UNDER FOURTH AMENDMENT EXCLUSIONARY RULE -- In U.S. v. Traynor, 990 F.2d 1153 (1993) the 9th Circuit U.S. Court of Appeals rules that, for purposes of the Fourth Amendment rule exempting "open fields" from privacy protection, it does not matter that police (here, Spokane S.O. deputies) cross without a warrant over protected property (here, curtilage of the home) where their observations of illegal activity in an open field area occur after they have gone from the protected curtilage area to the unprotected open field area.

We agree with the Ninth Circuit's ruling that under the Fourth Amendment an illegal police trespass which doesn't yield incriminating evidence will not taint a later observation of illegal activity which occurs when they proceed to an unprotected area. This would appear to place in doubt the validity of the Court of Appeals' ruling in State v. Ferro, 64 Wn. App. 191 (Div. III, 1992) reported in the July '92 LED at 17. Admittedly, the facts in Ferro were not described in great detail by the Court of Appeals, and Washington's Supreme Court has interpreted the Washington Constitution's article 1, section 7 as providing privacy protection to open fields under some circumstances not covered by the Fourth Amendment of the Federal Constitution. Nonetheless,

because: (1) Traynor deals with an "exclusionary rule" issue, not the question of the scope of "open fields" protection; and (2) the facts in Ferro appeared to present a situation analogous to that addressed in Traynor, the Ferro Court's suppression decision appears to be erroneous under the logic of Traynor.

Result: suppression order of U.S. District Court (Eastern District of Washington) and federal conviction for manufacturing marijuana affirmed.

WASHINGTON STATE SUPREME COURT

UNENCLOSED PORCH NOT PRIVATE AREA UNDER PAYTON'S ENTRY-TO-ARREST RULE

State v. Solberg, 122 Wn.2d 688 (1993)

Facts:

Based on: (1) an informant's report about a possible marijuana grow in a house, (2) police officers' observations of the house, and (3) police officers' check pursuant to RCW 42.17.314 of power usage records as to the house, officers developed probable cause to search Solberg's house for a suspected marijuana grow operation.

Planning to get a search warrant but wishing to first contact and arrest Solberg, officers went to Solberg's house and knocked at the front door while standing on his unenclosed front porch. Solberg's house-mate answered the door and voluntarily stepped out onto the front porch to talk to the officers at their invitation to come out and talk to them. Upon hearing the officers talking to his house-mate, Solberg also stepped outside on the porch. At that point the officers arrested both men and gave them Miranda warnings.

Solberg waived his rights and talked to the officers, admitting that he had a marijuana grow operation with four lights. The house was then secured from the outside while a search warrant was sought. The affidavit supporting the warrant included Solberg's admissions on the porch. The subsequent search under the warrant yielded a substantial, four-light grow operation.

Proceedings:

After Solberg lost a suppression motion challenging his arrest on the front porch and the search under the warrant, he was found guilty in a non-jury trial. In an appeal to Division I of the Court of Appeals, Solberg won a reversal on the porch-arrest suppression issue but failed to obtain a reversal of his conviction, as the Court of Appeals held there was ample probable cause to support the search warrant after deleting the admissions that Solberg had made on the porch. See 66 Wn. App. 66 (1992) Nov. '92 LED:10.

ISSUE AND RULING: May law enforcement officers make a warrantless arrest of a suspect, based upon probable cause, when the suspect voluntarily exits his residence to speak to the officers on the unenclosed front porch of the residence? (ANSWER: Yes) Result: King County Superior Court conviction and exceptional sentence affirmed.

ANALYSIS: (Excerpted from State Supreme Court opinion)

A police officer may make a warrantless felony arrest in a public place so long as it is supported by probable cause. An arrest warrant is not required in such circumstances under either the federal or state constitutions. However, in the absence of exigent circumstances, police may not make a warrantless arrest after a nonconsensual entry into a suspect's home. Payton v. New York, 445 U.S. 573 (1980)[**June '80 LED:01**]. In United States v. Santana 427 U.S. 38 (1976), the [United States Supreme] Court had previously held that a suspect standing on the threshold of the home could be arrested by officers arriving at the home. Courts have had some difficulty in reconciling Santana with Payton and have split on the issue whether a suspect standing in the open doorway of a home can be arrested based on probable cause without a warrant.

In Washington, absent exigent circumstances, the police are prohibited from arresting a suspect while he or she is standing within the doorway of the residence. State v. Holeman, 103 Wn.2d 426 (1985)[**April '85 LED:11**]. . . .

The Holeman court reasoned that it was the location of the arrestee and not the location of the arresting officer that was determinative. In Holeman, the police officer had reached inside the suspect's home to grab the suspect and there was no consent to enter. The Court of Appeals in the present case relied on Holeman for its ultimate conclusion that Mr. Solberg was arrested "in his home". The Court of Appeals reasoned that since a suspect cannot be arrested on the threshold of his home when he or she answers the door to police, an arrest cannot be made on the porch if the suspect steps out of the house onto the porch to speak with officers. The Court of Appeals extension of the Holeman rule is largely unsupported by authority.

Although we recognize that the Holeman opinion has been criticized and may be a minority position, it is nonetheless settled law in Washington and draws a bright line at the threshold of the home. The Holeman conclusion is not without support in other jurisdictions. In any event, this case does not present the Holeman factual issue; the issue in this case is not whether an arrest is valid when a suspect answers the door to the residence and remains in the home while the police attempt to make a warrantless arrest. Here, the evidence shows that Mr. Solberg overheard Bowley talking to police out on the porch and joined them there of his own volition. The Court of Appeals' reliance on Holeman is misplaced as the precise issue here is whether there is a reasonable expectation of privacy on a porch thus bringing such an area within the scope of the Payton rule, or whether such an area is a public area for arrest purposes so as to fall under the rule . . . that warrantless arrests in public are legal. The Court of Appeals decision largely ignores the body of law which considers the issue of warrantless arrests made on a suspect's porch.

The conclusion that a warrantless arrest on a porch made after a resident has voluntarily exited the home is an illegal arrest, even if supported by probable cause, conflicts with other Washington decisions, with authority from other jurisdictions, and with scholarly comment. **[Here the Court discusses several Washington cases. LED Ed.] . . .**

Many courts in other states have considered the question whether police an arrest a suspect on the front porch of his or her home without violating the Payton rule. **[Here the Court discusses cases from other states. LED Ed.] . . .**

Scholarly comment is in accord with the authorities which hold that a porch is not a constitutionally protected area for purposes of arrest. Justice Utter has noted that while the arrest of a suspect who is standing in the doorway of his or her home is treated the same as an arrest in the home (because for Fourth Amendment purposes the location of the suspect, and not the officer, is material to the issue of whether an arrest occurs in the home), an arrest of a suspect who is located on a front porch is considered a "public arrest". Utter, Survey of Washington Search and Seizure Law: 1988 Update, 11 U. Puget Sound L. Rev. 411, 507-08 (1987-1988).

Professor LaFave discusses cases involving arrests made on the premises outside rather than inside the threshold of the home. He explains that

courts have upheld warrantless arrests made in such places as the common hallway of an apartment building, or the yard or porch of a house. . . . Though some of the cases on outside-the-threshold arrests have not even considered how it was that the defendant came to be there rather than inside, others have given specific attention to the police action which caused the arrested person first to leave the interior of the residence. It has been deemed unobjectionable that the defendant came outside at the request of police who did not reveal their intention to arrest, or, indeed, **even that the police engaged in some affirmative misrepresentation, such as that they merely wanted to discuss matters with him or that he was viewed by them only as a suspect or a witness. Such ruses have been considered permissible because . . . "in other contexts, courts have considered the police tactic of misinformation and have found no constitutional violation."** Here again, however, the warrantless arrest will be illegal if the defendant's presence outside was acquired by coercion or a false claim of authority (e.g., that otherwise they would be entitled to enter the premises).

(Footnotes omitted.) 2 W. LaFave, Search and Seizure § 6.1(e), at 593-94 (2d ed. 1987). **[Emphasis added by LED Editor -- see LED Editor's Comments below at 5-6.]**

Since there is no evidence of coercion by the officers and based on the foregoing authorities, we conclude that the arrest on the porch was valid based on probable cause and that a warrant was not constitutionally required under either the Payton or Holeman doctrines.

[Some citations, text and footnotes omitted]

LED EDITOR'S COMMENT:

1. **Why did the officers go to Solberg's house without a search warrant?** Using our 20-20 hindsight, we question the wisdom of going to a suspect house and knocking on the door without first getting a search warrant under these circumstances. If Solberg had refused to come out of his house, the officers would have had no choice but to stand outside until the search warrant arrived. Case law in Washington makes clear that police cannot deem a situation to be exigent merely because they speculate that the suspect might learn of their investigation, and that he might then destroy evidence or escape. Moreover, case law as discussed in Solberg (but not excerpted here) also establishes that officers may not create their own exigent circumstances, and therefore, if police go to a house with probable cause to search and arrest, but they have no warrant and no exigent circumstances; the occupant may freely deny entry to the officers. Even if officers then see the suspect destroying evidence while they wait for the warrant, they may not force entry. To repeat ourselves, the police are not allowed to create exigent circumstances with a knock on the door.

2. **Was our comment on the McCrorey case in error?** In the October '93 LED at 12, we suggested that the Court of Appeals may have been correct in that case where the Court ruled that an officer may have exceeded the scope of a consent to entry under the following circumstances -- (1) the officer asked a suspect for consent to enter; (2) the suspect said the officer could come in only if the officer did not arrest the suspect; (3) the officer said he couldn't promise that, but he wanted to come in and "talk about it;" (4) the suspect then let the officer inside and the officer arrested him.

Even though the McCrorey ruling has become final with the State Supreme Court's October 6 denial of the State's petition for review, we are having second thoughts about the view suggested in our McCrorey comment. Note the quoted language above at page 4 from Professor LaFave emphasized in bold print where he states that ruses (which are within reasonable limits) to obtain entry to make an arrest are generally considered permissible under Payton. That the State Supreme Court quotes this language from LaFave's treatise with approval is support for the view that such ruses are permissible. In McCrorey, the officer used a very minor ruse; the LaFave discussion strongly suggests that the Court of Appeals erred in McCrorey in ruling that the arrest violated the Payton rule on entry to arrest.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **STATUTE MANDATING REVOCATION OF JUVENILES' DRIVERS' LICENSES FOLLOWING ALCOHOL, DRUG OFFENSES SURVIVES EQUAL PROTECTION CHALLENGE**
-- In State v. Shawn P., 122 Wn.2d 553 (1993) the State Supreme Court rules that there is no constitutional equal protection violation in the provisions of RCW 46.20.265, 66.44.365, and 13.40.265 mandating revocation of drivers' licenses of juveniles younger than age 18 and older than age 13 following adjudications against persons in this age group for juvenile offenses for most alcohol and drug crimes.

The juveniles challenging this statutory scheme claimed that juveniles less than ages 18 and older than age 13 are unjustifiably discriminated against by the license revocation scheme. However, the Supreme Court responds that intoxicated juvenile drivers in this age group are a particular

danger to society, and hence there is a constitutionally sufficient rational basis for the discrimination of the statutory scheme.

Result: Kitsap County and Pierce County Superior Court orders rejecting juveniles' constitutional challenges to the statutory license revocation scheme affirmed.

(2) NO VIOLATION OF STATE LAW IN USING NATIONAL GUARD TO HELP EXECUTE SEARCH WARRANT FOR NARCOTICS -- In State v. Garibay, 122 Wn.2d 270 (1993) the Court rejects defendants' argument: (1) that the use of the Washington National Guard to assist a local law enforcement agency in the execution of a narcotics search warrant violated state and federal statutes or violated the Washington constitution, and (2) that evidence seized under the warrant should be excluded. Stating that the Court "does not reach" the question of whether any federal statute was violated, the Supreme Court holds that the remedy for any improper use of National Guardsmen under the federal statutes would not be exclusion of evidence. Furthermore, the Court finds no violation of any Washington State statute or constitutional provision.

LED EDITOR'S NOTE: The 1993 Washington Legislature amended chapter 38.08 RCW (see chapter 263 noted at September '93 LED:08) to make it clear that the National Guard may assist state and local law enforcement personnel in combatting illegal drug activities.

Result: affirmance of Okanogan County Superior Court convictions against Ventura Mirillo Valdobinos and Rafael Mendoza Garibay for delivery, conspiracy to deliver, and possession of cocaine; reversal of deadly weapon enhancement of their sentences because there was insufficient evidence that a rifle found under a bed in a bedroom in the search of defendants' mobile home was "easily accessible and readily available for use."

(3) "SPEEDY TRIAL" RULE MANDATES "DUE DILIGENCE" BY STATE TO OBTAIN PRESENCE FOR TRIAL OF DEFENDANT INCARCERATED BY FEDERAL GOVERNMENT OR OTHER STATE -- In State v. Anderson, 121 Wn.2d 852 (1993) the State Supreme Court rules 5-3 as to a Washington-charged criminal defendant that time spent by such a defendant in federal or out-of-state jails or prisons generally is not excluded from the computation of time for "speedy trial" under Criminal Rule (CrR) 3.3(g)(6).

Accordingly, to satisfy the speedy trial rule of CrR 3.3(g)(6), once the State learns of a charged defendant's foreign incarceration, the State must exercise due diligence and act in good faith to obtain the timely presence of the defendant for trial in Washington. And to fulfill its good faith/due diligence duty, the majority holds, the State must make use of the Interstate Act on Detainer -- IAD (RCW 9.100).

The majority briefly explains the workings of the IAD:

Washington State is a party to the Interstate Agreement on Detainer, codified at RCW 9.100. Under the IAD, which the State could have used in this case, when Washington has charges pending against prisoners held in a penal or correctional institution of another signatory jurisdiction, it may file a request with the detaining authority that the prisoner not be released prior to resolution of the Washington charges. After a detainer is filed, a prisoner may then demand, through the prison warden, that Washington bring the prisoner to trial. Trial must commence within 180 days following the prisoner's demand.

The IAD does not require Washington's prosecuting authorities to file a detainer against a prisoner with an outstanding charge in this state. Use of the IAD by defendants to exercise their speedy trial rights must therefore depend upon the optional use of the IAD by prosecuting authorities. In this case, Respondent could not initiate the process for his return for trial on the Snohomish County charge because the prosecuting attorney had not filed a detainer against him with federal authorities.

[Footnote omitted]

LED EDITOR'S NOTE: With the majority's "speedy trial" ruling here in Anderson, the State apparently will be forced to make the IAD available to all defendants incarcerated in federal and out-of-state penal institutions if State of Washington prosecutors wish to pursue State charges against such defendants. That is, the State of Washington prosecutor who learns of the foreign incarceration of a charged defendant must make a timely request of the foreign detaining authority that the prisoner not be released prior to resolution of the Washington charges, thus placing the ball in defendant's court to push for a speedy trial on the Washington charges.

Result: Snohomish County Superior Court second degree burglary conviction reversed, charges dismissed.

(4) CIVIL LIABILITY -- PRIOR CONVICTION, THOUGH LATER OVERTURNED ON APPEAL, CONCLUSIVELY ESTABLISHES PROBABLE CAUSE FOR PURPOSES OF LAW ENFORCEMENT AGENCY DEFENSE AGAINST ARRESTEE'S SUBSEQUENT CIVIL SUIT FOR MALICIOUS PROSECUTION -- In Hanson v. City of Snohomish, 121 Wn.2d 552 (1993) the Supreme Court holds that "a conviction, although later reversed, is conclusive evidence of probable cause, unless that conviction was obtained by fraud, perjury or other corrupt means, or, of course, unless the ground for reversal was absence of probable cause." Because the existence of probable cause is a complete defense to a civil suit against the government for malicious prosecution, the Supreme Court majority rules 6-2 (Justices Utter and Johnson dissenting) that the trial court properly dismissed Hanson's malicious prosecution lawsuit.

Result: affirmance of Snohomish County Superior Court ruling dismissing Hanson's claim of malicious prosecution, as well as, on grounds not discussed here, his claims of false arrest, false imprisonment, negligent investigation, and civil rights violations; Hanson still has a live claim for defamation against the City of Snohomish and others.

WASHINGTON STATE COURT OF APPEALS

PC TO ARREST FOR CRIMINAL TRESPASS ESTABLISHED FOR REPEAT TRESPASSER

State v. Thompson, 69 Wn. App. 436 (Div. I, 1993)

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

On March 10, 1991, Seattle Police Officer Melvin Britt was on patrol in the area of the Golden Sands Apartments in south Seattle. Britt had had several talks with the manager of the Golden Sands, Cheryl Belgarde, regarding problems in the area, and the manager had previously called the police to report drug activity around the apartments. **[COURT'S FOOTNOTE: Belgarde sought to curtail the trespassing and loitering by placing three or four no trespassing and no loitering signs on the building. These signs were approximately 3 to 4 feet long and 2 to 3 feet wide and were posted in the front and back of the building.]**

As Britt drove past the Golden Sands, he saw appellant Rashawn Thompson on the apartment grounds. Britt had had two prior contacts with Thompson, who did not live in the apartments or have permission from Belgarde to be on the premises. On March 3, 1991, Britt spotted Thompson and another individual on the apartment grounds, and the two ran from him when he approached. Britt eventually arrested (and released) Thompson and the other individual for "obstructing" and for trespass, and admonished Thompson for criminal trespass. **[COURT'S FOOTNOTE: Britt stated that the "obstructing" arrest was based on Thompson's refusal to stop. In admonishing Thompson, Britt filled out a card listing Thompson's name, his home address, his physical description, and the address he was admonished from. Thompson refused to sign the card.]** On March 5, 1991, Britt again found Thompson on the apartment grounds, and cited him for criminal trespass. Immediately prior to this contact, Thompson had again attempted to run from Britt. Britt told Thompson that if he was seen one more time at the Golden Sands, he would be going to jail.

As Britt proceeded past the Golden Sands on March 10, he saw Thompson duck behind a bush near the side of the building. Britt drove around the back in an effort to contact Thompson "so he didn't have the opportunity to run." Britt later apprehended Thompson approximately 500 to 600 feet from where he had initially spotted him.

Britt believed he had probable cause to arrest Thompson for criminal trespass based on the two prior incidents. Britt placed Thompson's hands on the hood of the police car, began a pat-down search, and told Thompson he was under arrest. Britt stated that

Whenever I arrest somebody, I always pat them down, make sure they have no weapons on them and no items of contraband which they would easily dispose of in my patrol car, which could later become an issue of whether it was his or not.

Britt found approximately 2.75 grams of cocaine on Thompson's person.

On May 3, 1992, Thompson was charged (in the juvenile department) with second degree criminal trespass, in violation of RCW 9A.52.080 (count 1), and possession of a controlled substance with intent to deliver, in violation of RCW 69.50.401(a)(count 2). Prior to trial, defense counsel did not move to suppress the cocaine seized from Thompson. Thompson was found guilty as charged on both

counts.

ISSUE AND RULING: Did the officer lack probable cause to arrest Thompson for criminal trespass, and was his attorney therefore constitutionally ineffective in not objecting to the arrest and search? (ANSWER: No, there was in fact PC to arrest, and counsel's performance was therefore adequate.) Result: King County Juvenile Court trespass conviction affirmed; intent to deliver portion of possession-with-intent conviction reversed for lack of proof of such intent, and case remanded to juvenile court for entry of judgment of guilty of simple possession.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Thompson . . . claims his trial counsel was deficient for failing to move to suppress the cocaine seized because there was a legitimate question as to the validity of Britt's search of him. He claims he was prejudiced by counsel's deficient performance because the evidence was illegally seized and would have been suppressed had a motion been made. The State contends that Thompson received effective assistance, even though no motion was made to suppress the cocaine seized, because a suppression motion would not have been meritorious.

. . .

A reasonable search of an arrestee's person is justified by the fact of his lawful arrest. A search incident to a lawful custodial arrest is based on the need to disarm and discover evidence, and "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."

The validity of Britt's search of Thompson thus turns on whether the arrest was lawful. An arrest for a misdemeanor without a warrant may only be made if the arresting officer has probable cause to believe the offense is being committed in his presence. Probable cause exists where "there is reasonable ground for suspicion, supported by circumstances within the knowledge of the arresting officer, which would warrant a cautious person's belief that the individual is guilty of a crime." State v. Blair, 65 Wn. App. 64, 69, 827 P.2d 356 (1992)[**Oct. '92 LED:13**]. . .

A person is guilty of criminal trespass in the second degree if "he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080(1). Thompson was arrested on March 10, 1991, after Britt observed him on the premises of the Golden Sands Apartments. Thompson did not live at the Golden Sands nor did he have permission from the apartment manager to be there. The premises were posted with "no trespassing" signs. Prior to March 10, 1991, Britt had twice admonished Thompson regarding his presence on the property. During these prior incidents, Thompson had run from Britt when he approached. Britt had warned Thompson that if he was seen on the property again, he would be arrested. When Britt spotted Thompson on the apartment grounds on March 10, Thompson ducked behind a bush near the side of the building. Britt later arrested and

searched Thompson approximately 500 to 600 feet from where he had initially spotted him. Based on these facts, we conclude that Officer Britt had probable cause to believe that Thompson had committed the crime of second degree criminal trespass on March 10, 1991.

This case shares certain similarities with State v. Blair, a case relied on by Thompson. In Blair, the court held that an officer's statement to Blair warning him not to return to Roxbury Village (a public housing complex) did not, in itself, create probable cause to arrest Blair for criminal trespass on a later date when he was observed entering the premises. The officer's warning to Blair had occurred during a prior arrest on an unrelated charge, and was apparently given because the officer had seen Blair on the Roxbury Village property in the past. After the warning was issued, the officer observed Blair walking with a friend into the Roxbury Village property. Despite Blair's protestations that he was not doing anything and was just going to get his hair braided, the officer placed Blair under arrest and search him.

The officer made no attempt to find out whether Blair was on the premises for a legitimate purpose. The court held that while the officer could have stopped Blair, asked him what he was doing on the premises, and investigated to see if his purposes were legitimate, he had no probable cause to arrest him based solely on the prior admonishment not to return.

The arrest in this case, however, was based on more than a single prior admonishment. Prior to his arrest on March 10, 1991, Thompson had been twice contacted by Officer Britt and admonished or warned regarding the premises, yet there is no evidence that he ever attempted to provide any legitimate explanation for his presence on the property. Indeed, Thompson had attempted to run away from Britt on both prior occasions, which is evidence that his presence on the property was unlawful. When Britt spotted Thompson a third time on the premises on March 10 -- and observed him duck behind a bush -- there was probable cause for him to believe that Thompson was unlawfully on the property. Unlike the facts in Blair, there is no indication that Thompson made any effort during his March 10 arrest to explain or justify his presence. Under these circumstances, Britt was not obligated to question Thompson regarding his right to be on the property prior to the arrest and search.

Based on the foregoing, a motion to suppress evidence seized from Thompson incident to his arrest would likely have been unsuccessful, and we therefore do not believe that Thompson was prejudiced by defense counsel's failure to bring such a motion. Although defense counsel could have challenged the validity of the arrest and seizure through a motion to suppress, she may have reasonably concluded, based on the facts, that such a motion was without merit. Defense counsel's performance was not deficient.

[Some citations omitted]

VEHICLE STOP TO CHECK FOR CEDAR PERMIT UNLAWFUL

State v. Thorp, 71 Wn. App. 175 (Div. II, 1993)

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

On November 9, 1989, a Grays Harbor deputy sheriff observed a flatbed truck loaded with cedar blocks traveling north on a county road. He stopped the truck in order to ascertain whether its driver, who turned out to be David Thorp, had a specialized forest products permit. Interrogation disclosed that Thorp had no such permit, but that he did have a valid driver's license. Checking the license through dispatch, the deputy discovered a misdemeanor warrant for Thorp's arrest. After placing Thorp under arrest, the deputy searched his person and found marijuana.

Thorp was charged in district court with possession of less than 40 grams of marijuana, in violation of RCW 69.50.401(e). He moved to suppress all evidence obtained as a result of the stop of his truck. The district court ruled the stop unconstitutional and granted his motion to suppress.

The State appealed to superior court. It did not contend that the deputy had probable cause or articulable suspicion. Rather, it argued that even if the deputy lacked probable cause and articulable suspicion, he was authorized to stop the truck for the purpose of checking whether the driver had a specialized forest products permit. The Superior Court ruled the stop was invalid.

[Footnote omitted]

ISSUE AND RULING: (1) Is the forest products industry a "pervasively regulated industry" such that the stop of Thorp was a lawful regulatory action? (ANSWER: No); (2) Was the stop of the vehicle justified under any other exception to the Fourth Amendment warrant requirement? (ANSWER: No) Result: affirmance of Grays Harbor County Superior Court order which, in turn, had affirmed the District Court's suppression of the marijuana evidence.

ANALYSIS:

(1) LAWFUL REGULATORY ACTION?

Addressing the State's primary argument that the stop was justified because the forest products industry is "pervasively regulated" the Court of Appeals declares:

According to the State, the stop is governed not by the Fourth Amendment principles that govern traffic stops, but by the Fourth Amendment principles that govern "pervasively regulated" industries. Relying on United States v. Biswell, 406 U.S. 311 (1972)(pawnshop licensed to sell firearms); Colonnade Catering Corp. v. United States, 387 U.S. 72 (1970)(catering business licensed to sell alcohol); and Washington Massage Found v. Nelson, 87 Wn.2d 948 (1976)(massage business), it says that "[t]he forest products industry is one which is the subject of extensive governmental regulations", and that "[a] warrant is not required to search premises where such extensively regulated activity is carried out."

The State's argument fails because the record does not show that the forest products industry is pervasively regulated with the meaning of Biswell and Colonnade. A pervasively regulated industry is one with "a long tradition of close

government supervision" and "such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." Persons voluntarily engaging in the industry implicitly consent to government intrusion and therefore have a diminished expectation of privacy . . . Nothing in the record here indicates in any way that the forest products industry has the sort of tradition or history that would make it a pervasively regulated industry.

Additionally, the State's argument fails because even if the forest products industry were pervasively regulated, the Fourth Amendment standards applicable to such industries would not allow the police to randomly stop a moving vehicle without probable cause or articulable suspicion. The effect of finding that an industry is pervasively regulated is to justify, on an implicit consent theory, governmental intrusion into a place of business, provided that the intrusion is reasonable in terms of time, place and scope. However, "The [United States] Supreme Court twice has rejected suggestions that this implicit consent theory justifies roving stops of motorists."

Finally, the State's argument fails because the stop in this case was made in the course of regulating the general public, as opposed to regulating one particular industry. The State says the stop was made on the authority of RCW 76.48.070(2) and Grays Harbor Ordinance 23. RCW 76.48.070(2), provides that it shall be unlawful for *any person* to transport cedar products without a permit; thus, it regulates the general public, and not just the forest products industry. Ordinance 23 similarly provides that any peace officer shall have the power to stop, inspect and search without a warrant *any person or vehicle* observed transporting 5 or more pounds of cedar products; thus, it also regulates the general public, and not just the forest products industry. The State seems to assume that every person who transports cedar products is a member of the forest products industry, but nothing in the record supports that proposition.

For all of the foregoing reasons, we conclude that the stop in this case is not governed by Fourth Amendment standards applicable to pervasively regulated industries. Instead, the stop is governed by the Fourth Amendment principles that ordinarily apply to traffic stops.

[Footnotes, some citations omitted]

(2) OTHER BASIS FOR STOP?

The Court goes on to explain that both the Fourth Amendment (U.S. Constitution) and Article 1, Section 7 (Wash. Constitution) prohibit a law enforcement officer who has neither probable cause nor an articulable suspicion of criminal or traffic violations from randomly stopping a moving vehicle for the purpose of asking the occupants whether they have required papers or permits.

OFFICER HAD PROBABLE CAUSE TO ARREST FOR VEHICULAR HOMICIDE/ASSAULT

State v. Rogers, 70 Wn. App. 626 (Div. II, 1993)

Facts and Proceedings:

One of the issues in Rogers' trial for vehicular homicide concerned the legality of a blood test done at a hospital after he had been transported by ambulance following a traffic accident. The circumstances leading up to the blood test are described by the Court of Appeals as follows:

Cowlitz County Deputy Sheriff Charles Rosenzweig arrived at the scene of the accident shortly after it occurred and found two men holding Rogers by the wrists in an apparent effort to prevent him from departing from the scene. As Rosenzweig took hold of Roger's wrist, he smelled alcohol on Rogers's breath. Rosenzweig asked Rogers for his name; whether he owned the larger truck; if he had been driving it; if he was hurt; and if he had been drinking. Rogers gave Rosenzweig his name and stated that he was not injured. He also told the deputy that he was the driver and the owner of the larger truck, and that he had been drinking. When Rogers was asked whether he had attempted to leave the scene, he stated, "I got to go get my wife, I have got to go call my wife." Rosenzweig arrested Rogers and placed him in handcuffs. Paramedics then arrived and transported Rogers to the emergency room of a Longview hospital.

ISSUE AND RULING: Did the deputy sheriff have probable cause to arrest Rogers for vehicular homicide or vehicular assault, thus justifying a warrantless, nonconsenting blood test at the hospital? (ANSWER: Yes) Result: Cowlitz County Superior Court conviction for vehicular homicide affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Rogers argues that Deputy Rosenzweig lacked probable cause to arrest him at the scene, and that that illegal arrest tainted the blood alcohol test and interrogation which occurred at the hospital. Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. The officer need not have evidence sufficient to prove every element of the crime beyond a reasonable doubt.

Here, Deputy Rosenzweig had probable cause to arrest Rogers at the scene. The extent of the injuries to Slatum's passenger and the damage to the two trucks evidenced a high-speed collision. Furthermore, Rogers told Rosenzweig that he was the owner and driver of the larger truck and he admitted, at the scene, that he had been drinking alcohol prior to the accident. In addition, Rosenzweig noticed a strong, "obvious" smell of alcohol on Rogers's breath and observed that Rogers was being restrained at the scene by two persons, who told Rosenzweig that Rogers had attempted to flee. When questioned about his alleged attempt to leave the scene, Rogers told Rosenzweig that he needed to leave in order to call his wife. Finally, when Rosenzweig took hold of Rogers's wrist to prevent him from fleeing, Rogers resisted the officer's grip.

We conclude from these facts that, at the very least, Rosenzweig had sufficient cause to believe that Rogers had committed the offenses of driving while under the influence of alcohol and vehicular assault. Because Rosenzweig had probable cause to arrest Rogers, the arrest was not illegal. Accordingly, the trial court did not err in admitting the results of the blood alcohol test and the testimony regarding

the interrogation which took place after the arrest.

LED EDITOR'S COMMENT:

The Court of Appeals' written decision does not explain which statute was implicated by the blood test given Rogers. The applicable statute is RCW 46.20.308(3) which allows a **forcible** (within reasonable-ness limits -- see Feb. '92 **LED** at 14) blood test following a lawful (PC) arrest for vehicular homicide or vehicular assault (mere DWI or physical control PC is not enough to justify a forcible blood test).

Other recent Washington decisions have been quite relaxed in interpreting probable cause as to vehicular assault or vehicular homicide. The most relaxed interpretation of the standard was in **State v. Steinbrunn**, 54 Wn. App. 506 (1989) where the Court of Appeals found PC to arrest for vehicular homicide in the following basic facts -- (1) knowledge by officer that one of the two cars in a head-on fatality accident had crossed the center line of a 2-lane highway under good driving conditions, and (2) a smell of intoxicants on the arrestee. We hope that the **Steinbrunn** precedent will not have to be relied on heavily in too many cases because we think the PC there (as it was described by the Court of Appeals) was a little thin. On the other hand, in **Rogers** there was more evidence of a drinking-caused, serious-injury-accident than in **Steinbrunn**; the PC in Rogers was substantial, we believe.

SWALLOWING DRUGS TO CONCEAL, RATHER THAN ASSIMILATE, IS POSSESSING THEM

State v. Rudd, 70 Wn. App. 871 (Div. II, 1993)

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

On February 7, 1991, police went to a motel room to arrest Rudd on an outstanding warrant. Rudd responded by running into the bathroom, shutting the door, and barricading himself in. When the officers demanded that he come out, he refused and threatened to kill himself. After some time, however, he relented and allowed the police into the bathroom.

When the police entered the bathroom, they saw baggies containing small amounts of white powder. They also noticed Rudd "was shaking, fainty, cold, clammy, weak and appeared sick." Rudd said he needed to go to the hospital, because he had swallowed seven baggies filled with cocaine. The police rushed him to the hospital, where the medical staff made the decision to pump his stomach. That was done, and a number of baggies were recovered. Although some were broken, others were intact and filled with cocaine.

ISSUE AND RULING: Was the evidence (coke baggies in the stomach) sufficient to support the possession conviction? (ANSWER: Yes, because the coke was swallowed for concealment, not assimilation) Result: Cowlitz County Superior Court conviction for cocaine possession affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Citing State v. Hornaday, 105 Wn.2d 120 (1986) [**June '86 LED:16**], Rudd argues

that evidence is insufficient to support a finding of possession when it shows only that a person had baggies of cocaine inside his or her stomach.

Cases involving an illegal substance inside the body can be divided into two categories. The first involves assimilation; the second involves concealment.

In an assimilation case, the defendant ingests or injects the substance directly into the body. The substance is assimilated into the bloodstream, and the defendant loses dominion and control over it. Necessarily, the defendant also ceases to possess it, for dominion and control are the key features of possession. Thus, evidence showing assimilation is generally insufficient to support a conviction for possession after ingestion. **[COURT'S FOOTNOTE: We have no occasion to consider whether evidence of assimilation can be used circumstantially to prove possession before ingestion.]**

In a concealment case, the defendant ingests or otherwise inserts into the body a balloon, baggie, or similar container filled with an illegal substance. Rather than being assimilated into the bloodstream, the substance remains concealed in the body until retrieved or expelled. The defendant does not lose dominion and control over it, nor does he cease to possess it. Thus, evidence showing concealment is generally sufficient to support a conviction for possession after ingestion.

Hornaday is an assimilation case. There, an officer approached a person who had the odor of alcohol on his breath and who otherwise appeared intoxicated. The officer identified the person as Hornaday and determined that his age was 20. The officer arrested him for illegal consumption or possession of alcohol and, subsequently, for resisting arrest. The district court held that the defendant "was in possession of liquor because it was in his body." Later, however, the Supreme Court disagreed. It stated:

Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance.

Neither party cites a Washington concealment case, nor do we know of any. However, we now hold that if a defendant ingests or otherwise conceals inside the body a balloon, baggie, or similar receptacle containing a controlled substance, and the contents of the receptacle are not assimilated into the body, but rather are recovered and admitted at trial, the evidence is sufficient to support a finding that the defendant possessed a controlled substance during the time the receptacle was in the body.

Here, several intact baggies containing cocaine were recovered from Rudd's stomach at the hospital. Later, they were admitted at trial. As a result, the evidence was sufficient to support his conviction.

[Some citations and footnotes omitted]

OFFICER NEEDED NO WARRANT TO LOOK INSIDE TRESPASSER'S TENT

State v. Cleator, 71 Wn. App. 217 (Div. I, 1993)

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

On January 24, 1992, Everett Police Officer Donald Denevers responded to a call reporting a residential burglary. At the scene, Officer Denevers was told that several envelopes, a Mason jar, and two Crayola children's banks, each containing money, had been taken that day. Denevers assumed that the burglar had come through the woods behind the house because the point of entry appeared to be a rear window, there was a gate in the back fence providing access to the woods, and the woods provided good cover. He entered the woods to investigate, and about 150 yards behind the house he discovered a 6-person tent with a fire smoldering in front of it. He saw no one and when he called out, no one answered.

The wooded area was not a camp-ground, and the officer believed that the tent was on city property.

After determining that no one was in the tent vicinity, Officer Denevers stepped up to the tent entrance and lifted the opaque flap, which was not tied or secured in any way. Officer Denevers testified that he looked into the tent for officer safety to ensure that no one was hiding inside with a weapon. Underneath the tent flap, the mosquito mesh was zipped closed, and Denevers looked through the mesh and saw a Mason jar with some coins in it just 2 feet inside the tent entrance. Beside the Mason jar were several coin rolls, similar to the ones that had been reported missing. After making sure there was no one hiding in the trees or bushes, Officer Denevers unzipped the tent opening, took the Mason jar and the coin rolls from the tent, and carried them back to the resident of the home. She identified them as hers, and the Mason jar and coin rolls were impounded.

The next day Denevers went back to the tent with Officer Ann Bakke to see who was living there. When they arrived, they found three individuals outside the tent -- Lance Cleator and Kahere Sidiq, who had spent the night in the tent, and Cleator's cousin, who had been visiting for a couple of hours. Officer Denevers told the juveniles that he was investigating a burglary and had found evidence in the tent, but Denevers did not indicate what that evidence was. Officer Denevers then advised the juveniles of their Miranda rights, and each, including Cleator, said that they understood. Cleator and Sidiq were arrested for possession of stolen property. In addition, Cleator was taken into protective custody because he was a runaway.

Officer Bakke drove Lance to the station. During the drive she asked Cleator how he had gotten the money, and Cleator admitted that he and Sidiq had gone into the house through the back slider. Cleator described how they got the Crayola coin banks, envelopes, money, and coins, and he stated that when they returned to the campsite, they emptied out the Crayola banks and burned them.

At the station, Cleator was again read his Miranda rights, and he gave a written

statement. Cleator was charged with residential burglary in violation of RCW 9A.52.025.

Before trial, Cleator moved to suppress the property recovered from the tent on the grounds that he had a reasonable expectation of privacy in the tent and that the search was warrantless. Cleator also moved to suppress his confession on the grounds that it was involuntary and the fruit of an illegal arrest. Cleator's motions were denied. Lance Cleator was found guilty of residential burglary and given a disposition within the standard range.

[Footnotes omitted]

ISSUE AND RULING: As an occupant of the tent, did the trespassing Cleator have an expectation of privacy which was violated by the officer's act of looking inside the tent? (ANSWER: No, rules a 2-1 majority) **Result:** Snohomish County Juvenile Court adjudication of guilt of residential burglary affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

We initially consider whether the police officer's warrantless seizure of stolen property violated Cleator's Fourth Amendment rights. "To determine whether a search necessitating a warrant has taken place under U.S. Const. amend. 4, the inquiry is whether the defendant possessed a 'reasonable expectation of privacy.'" An individual wrongfully camping on private property has no "reasonable expectation of privacy in the area surrounding his tent". State v. Pentecost, 64 Wn. App. 656 (1992) [Aug. '92 LED:16]. While no Washington cases directly address whether a squatter has a reasonable expectation of privacy *inside* his tent, the Pentecost court noted, in dicta, the trial court's conclusion that Mr. Pentecost had "a *limited expectation of privacy, if any, in only* his tent." (Some italics by the [Court].)

Most courts have rejected an individual's claim to a right of privacy in the temporary shelter he or she wrongfully occupies on public property. No reasonable expectation of privacy has been found in a squatter's home under a bridge . . . [cite omitted], in a squatter's home in a cave on federal land . . . [cite omitted], or in a squatter's home on state land . . . [cite omitted]. Thus, if an individual

places his effects upon premises where he has no legitimate expectation of privacy (for example, in an abandoned shack or as a trespasser upon another's property), then he has no legitimate reasonable expectation that they will remain undisturbed upon [those] premises.

4 W. LaFave, Search and Seizure § 11.3(c), at 305 (2d ed. 1987) . . . Further, where "an individual has no reasonable expectation of privacy in a particular area, the police 'may enter on a hunch, a fishing expedition for evidence, or for no good reason at all.'"

Lance Cleator and Kahere Sidiq wrongfully occupied public land by living in a tent

erected on public property. The public property was not a campsite, and it is undisputed that neither Cleator nor Sidiq had permission to erect a tent in that location. Under these circumstances, he could not reasonably expect that the tent would remain undisturbed. As a wrongful occupant of public land, Cleator had no reasonable expectation of privacy at the campsite because he had no right to remain on the property and could have been ejected at any time. Under the totality of the circumstances and taking into account that the tent was not his, that the tent was a temporary, unsecured shelter, and that it was wrongfully erected on public property which was not a campsite, Cleator's legitimate privacy expectations, to the extent they existed, were limited to his personal belongings. Officer Denevers only raised the tent flap and observed what was clearly visible and seized only that which he knew to be wrongfully obtained. Because he did not disturb Cleator's personal effects, his actions did not violate Cleator's limited expectation of privacy.

Finally, we determine whether the police officer's warrantless seizure of stolen property violated article 1, section 7 of the Washington State Constitution. "[U]nder the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the State unreasonably intruded into the defendant's 'private affairs.'" The analysis under article 1, section 7 "focuses on those privacy interests which citizens of this state *have held, and should be entitled to hold, safe from governmental trespass absent a warrant.*" ([Court's] emphasis.)

Although article 1, section 7 provides greater protection for privacy interests than the Fourth Amendment, Cleator's claim of unreasonable search and seizure also fails on independent state grounds. No case has been cited nor has our research disclosed any authority indicating that our citizens have ever held unlimited privacy rights to property they wrongfully occupied. We hold that Officer Denevers' look into the tent and limited entry to retrieve stolen property did not unreasonably intrude into Cleator's private affairs because Cleator's personal effects were not disturbed.

[Some citations and all footnotes omitted]

LED EDITOR'S COMMENT:

This case decision does not mean that the interior of a tent cannot be a constitutionally protected private area. Recently, the Ninth Circuit Court of Appeals ruled in U.S. v. Gooch, ___ F.2d ___ (9th Cir. 1993) that a person lawfully occupying a tent in a Washington State Parks and Recreation campsite was entitled to privacy, and that Federal officers searching for that person violated his right to privacy by making an unconsenting entry of his tent to arrest him. We will present the Ninth Circuit's analysis of the tent-privacy issue in next month's LED.

NOTE FROM SUPERIOR COURT

OFFICERS SUCCESSFUL IN MALICIOUS PROSECUTION COUNTERCLAIM ARISING OUT OF LAWSUIT OVER VEHICLE FORFEITURE UNDER UNIFORM CONTROLLED SUBSTANCES ACT

LED EDITOR'S NOTE: The following article was authored by Detective Chris Hurst of the Black Diamond Police Department. **LED** readers with questions may contact Detective Hurst or Chief Rick Luther at the Black Diamond Police Department, 25510 Lawson Street, Black Diamond, WA 98010.

On December 12, 1991 a Jeep pickup truck was seized from Brad Anderson in the City of Seatac, Washington by officers of the Black Diamond Police Department assisted by Renton Police Narcotics Unit and Seatac Police. Brad Anderson was the primary suspect in a four-ounce cocaine transaction.

During the transaction, Detective Chris Hurst of the Black Diamond Police Department obtained a telephonic search warrant for the location where the transaction was occurring. The warrant was served and the four ounces of cocaine was seized. Also seized was a marijuana grow which was in the residence. Anderson had used the pickup to facilitate the delivery of the cocaine. Anderson, after advisement of his Miranda warnings, stated that the truck was his. Anderson had not changed the title and the prior owner had no interest in the vehicle. Brad Anderson said that his father had bought the vehicle for him, and that he was paying his father back.

Notice of seizure and intended forfeiture was served. On January 8, 1992, upon learning of his son's arrest, Gerald Anderson, the father of Brad, transferred the vehicle into his name and made a claim for the truck. Gerald Anderson contacted Black Diamond Police and requested a hearing. Gerald Anderson was granted a hearing and showed up, but left the hearing stating that he really didn't want the truck and just wanted to help his son.

Gerald Anderson then requested a second hearing through his attorney, Peter Tucker. A second hearing was granted and notice was sent. On March 12, 1992, Detective Hurst filed criminal charges against Brad Anderson. That same day Gerald Anderson filed a personal lawsuit against Detective Hurst, April Hurst and Chief Luther seeking \$35,000.00 in damages from each of them. Anderson alleged that the seizure was without probable cause or any lawful authority, in violation of the Fourth Amendment of the United States Constitution, and in violation of Article 1, 7 of the Washington State Constitution. He claimed further that he was damaged, that his privacy was invaded, that the vehicle was converted personally by Detective Hurst, April Hurst and Chief Luther, and finally that the seizure was a taking or damaging of property under the color of law in violation of 42 USC 1983.

Detective Hurst, April Hurst and Chief Luther hired counsel and countersued for malicious prosecution and violation of CR 11 (Civil Rule 11 of the Washington Rules for Superior Court). In February of 1993, the deposition of Gerald Anderson was taken, at which time he stated that he had reviewed the complaint with his attorney prior to it being filed. During the deposition he had discussed each and every claim he made against the officers and April Hurst.

On June of 1993, all of the claims Anderson made were thrown out in a summary judgment in King County Superior Court, except one which was not yet adequately briefed. This final action was dropped just prior to the trial on the counterclaims. In October of 1993 the counterclaims for malicious prosecution and violation of CR 11 went to a jury trial.

During the trial Anderson attempted to blame everything on his original attorney, Peter Tucker (now withdrawn from the case). The burden of proof that Anderson had acted maliciously and knowingly was upon the counterclaimants. James K. Yearby testified for Hurst and Luther as an

expert witness. Yearby, who is the Director of Human Resources for King County, stated that their careers were permanently damaged by these accusations regardless of the outcome of the trial.

The jury found for Hurst and Luther and awarded Luther \$100,000.00 in damages and Hurst \$112,500.00 in damages. A later motion was granted and the officers were also awarded their attorney fees and costs, pushing the judgment up to \$221,945.56. The attorney for Chief Luther, Detective Hurst and April Hurst was Susan Rae Sampson of Sampson and Wilson in Renton. Gerald Anderson has filed an appeal of the verdict.

The seizure is currently pending, as Gerald Anderson has filed a new lawsuit in Aukeen District Court seeking the ownership of the truck. However, this time he has not sued the officers or April Hurst. The value of the truck was \$3,100.00 at the time it was seized.

Although Anderson was neither the registered nor the legal owner of the truck at the time it was seized, he could have had a hearing before the hearing examiner in January of 1992 at no cost to himself. At that time he could have made an innocent owner claim if his actual intent was just to get the truck back. Gerald Anderson is a successful businessman in the real estate, insurance and property management business in Kent, Washington.

Along the way, in the criminal proceedings, Gerald Anderson's son, Brad Anderson, and three of Brad's co-conspirators in the original four-ounce cocaine delivery, were each convicted in King County Superior Court of felony drug trafficking charges.

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 are 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.

