



Law Enforcement

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Digest

HONOR ROLL

472th Session, Basic Law Enforcement Academy - December 4th, 1997 through March 5th, 1998

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Highest Defensive Tactics: Melissa M. Noren - King County Department of Adult Detention

Corrections Officer Academy - Class 265 - February 2nd through February 27th, 1998

Highest Overall: Jeff O'Donnell - McNeil Island Corrections Center
Highest Academic: Ralph L. Carpenter - Washington State Penitentiary
Highest Practical Test: Jacob A. Lawrence - Pierce County Sheriff's Office
Highest in Mock Scenes: Jeff O'Donnell - McNeil Island Corrections Center
Highest Defensive Tactics: Jeff O'Donnell - McNeil Island Corrections Center

APRIL LED TABLE OF CONTENTS

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT 3

"NO KNOCK" ENTRY PERMITTED UNDER "REASONABLE SUSPICION" STANDARD, AND POLICE EXECUTING WARRANT MAY "BREAK" TO ENTER WITHOUT ADDITIONAL JUSTIFICATION
U.S. v. Ramirez, 1998 WL 88055 (March 4, 1998)3

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT 4

DRUG DELIVERY CONVICTION SHOULD NOT HAVE BEEN ADMITTED TO IMPEACH DEFENDANT; VICTIMS' "EXCITED UTTERANCES" WERE PROPERLY ADMITTED, HOWEVER
State v. Hardy, 133 Wn.2d 701 (1997).....4

WASHINGTON STATE COURT OF APPEALS 5

JAIL POLICY RESTRICTING INTAKE OF CERTAIN OFFENSE CATEGORIES DOES NOT AFFECT CUSTODIAL ARREST AUTHORITY; CAR "SEARCH INCIDENT" THEREFORE LAWFUL
State v. Thomas, 89 Wn. App. ____ (Div. III, 1998) [950 P.2d 498]5

GUN SEIZURE DURING CONSENT SEARCH OK FOR OFFICER-SAFETY PURPOSES; ALSO, INITIAL MIRANDA VIOLATION DID NOT TAINT SUBSEQUENT MIRANDIZED STATEMENT
State v. King, 89 Wn. App. ____ (Div. II, 1998) [949 P.2d 856]7

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS 9

ODOR OF METH COMING FROM VEHICLE PROVIDES PC TO ARREST ALL OCCUPANTS
State v. Huff, 64 Wn. App. 641 (Div. II, 1992) 9

CORRECTIONAL OFFICER LACKED AUTHORITY UNDER DOC REGULATIONS TO HOLD VISITOR LONGER THAN NECESSARY TO REQUEST CONSENT TO SEARCH
State v. Dane, 89 Wn. App. ____ (Div. II, 1997) [948 P.2d 1326] 10

NO PRIVACY FOR ONE WHO LEAVES MESSAGE ON PHONE ANSWERING MACHINE
Farr v. Martin, 87 Wn. App. 177 (Div. I, 1997) 11

IN-CUSTODY DEFENDANT "INITIATES CONTACT" AFTER ASSERTION OF RIGHT TO COUNSEL
State v. Birnel, 89 Wn. App. ____ (Div. III, 1998) [949 P.2d 422] 11

JUVENILE ADJUDICATIONS WERE FIREARMS POSSESSION DISQUALIFIERS UNDER 1994 LAW
State v. Wright, 88 Wn. App. 683 (Div. I, 1997) 12

NO EVIDENCE LAW PRIVILEGE FOR STATEMENT MADE AT ACCIDENT SCENE TO PARAMEDIC
State v. Ross, 89 Wn. App. ____ (Div. I, 1997) [947 P.2d 1290] 13

CORROBORATION NOT NECESSARY TO PROVE MIRANDA WAIVER IN ONE-ON-ONE
State v. Haack, 88 Wn. App. 423 (Div. I, 1997) 14

JURY INSTRUCTION ON VOLUNTARY INTOXICATION NOT REQUIRED EVEN THOUGH SOME WITNESSES TESTIFY THAT DEFENDANT WAS "INTOXICATED" AT TIME OF OFFENSE
State v. Gabryschak, 83 Wn. App. 249 (Div. I, 1996) 16

TELEPHONE THREAT TO DISPATCH TO BURN DOWN STORE NOT PROTECTED SPEECH
State v. Edwards, 84 Wn. App. 5 (Div. II, 1996) 18

"SEATTLE SITTING ORDINANCE" UPHELD AGAINST CONSTITUTIONAL ATTACK
City of Seattle v. McConahy, City of Seattle v. Hoff, 86 Wn. App. 557 (Div. I, 1997) 18

"MEDICAL NECESSITY" DEFENSE ADDRESSED IN MARIJUANA GROW CASE
State v. Pittman, 88 Wn. App. 188 (Div. I, 1997) 19

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

"NO KNOCK" ENTRY PERMITTED UNDER "REASONABLE SUSPICION" STANDARD, AND POLICE EXECUTING WARRANT MAY "BREAK" TO ENTER WITHOUT ADDITIONAL JUSTIFICATION-- In U.S. v. Ramirez, 1998 WL 88055 (March 4, 1998), a unanimous U.S. Supreme Court reverses a restrictive "no knock" ruling of the Ninth Circuit of the U.S. Court of Appeals.

In Ramirez, federal agents had obtained a search warrant to search the home of Mr. Ramirez. The search was for a jail escapee, Alan Shelby. Shelby had a violent past, he had access to a large supply of weapons, and he had vowed that he would "not do federal time." Based on these facts, among others, indicating danger, the federal agents executing the warrant did not "knock and announce" prior to forcing entry. At the time of entry, one of the agents broke a garage window and poked the barrel of a gun through the opening. He did this in case someone went for a stash of weapons which were believed to be there. In the subsequent search, the agents did not find Mr. Shelby, but they ultimately found Mr. Ramirez, a convicted felon, in unlawful possession of a firearm.

The Ninth Circuit had upheld a District Court ruling in favor of Mr. Ramirez in the firearms case. The Ninth Circuit had held that the agents had "reasonable suspicion" of danger justifying their "no knock" entry. However, the Ninth Circuit had gone on to hold: (a) the agents had needed heightened suspicion of danger in order to justify any "breaking" incidental to the entry; and (b) the agents lacked this additional justification under the facts of this case. The U.S. Supreme Court opinion by Chief Justice Rehnquist finds no support in the Fourth Amendment for the Ninth Circuit's heightened "breaking" standard.

The "no knock" rule of the Fourth Amendment generally requires that the police knock and announce their presence and purpose, and wait for a brief, reasonable time (to allow voluntary compliance) prior to forced entry. Exceptions to this general rule allow for "no knock" entry where knocking and announcing would be futile or where law enforcement officers develop "reasonable suspicion" that knocking and announcing would result in, among other exigencies: (1) danger to officers or others, (2) destruction of evidence, or (3) the flight of suspects. Assessment in a suppression hearing of whether such "reasonable suspicion" existed is made on a review of the totality of the circumstances as they existed just before entry was made.

The Supreme Court holds in Ramirez that police had "reasonable suspicion" that Shelby might be dangerous to them or others. Because no "heightened" justification was required to support the incidental "breaking," and because the agents had "reasonable suspicion" of danger, the entry was lawful, the Supreme Court holds.

However, the Supreme Court does go on to point out that there are Fourth Amendment restrictions on the amount of force which may be used in entering premises and conducting searches. The Court appears to be saying in this latter part of the opinion that the legality of the entry-- AND HENCE THE ADMISSIBILITY OF EVIDENCE-- cannot be challenged based on an unreasonable breaking during entry. Similarly, the opinion implies that generally the admissibility of evidence obtained in a search or seizure is not affected by unreasonable destruction of property during the search or seizure. Nonetheless, a civil rights violation may be pursued for unreasonable actions, the Court points out as follows:

This is not to say that the Fourth Amendment speaks not at all to the manner of executing a search warrant. The general touchstone of reasonableness which

governs Fourth Amendment analysis...governs the method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression. [citation omitted by LED Ed.]

In analysis which does not appear to be necessary to the Court's ruling on the lawfulness of the entry and the admissibility of the evidence, the Ramirez Court goes on to address whether the officers used reasonable force in breaking the window under the facts of this case. The Court finds the breaking to be reasonable [and hence, apparently, not subject to a civil rights action] under the following analysis:

As for the manner in which the entry was accomplished, the police here broke a single window in [Ramirez] garage. They did so because they wished to discourage Shelby, or any other occupant of the house, from rushing to the weapons that the informant had told them [Ramirez] might have kept there. Their conduct was clearly reasonable and we conclude that there was no Fourth Amendment violation.

Result: Reversal of suppression rulings of Ninth Circuit Court of Appeals and U.S. District Court; case remanded to District Court for trial.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

DRUG DELIVERY CONVICTION SHOULD NOT HAVE BEEN ADMITTED TO IMPEACH DEFENDANT; VICTIMS' "EXCITED UTTERANCES" WERE PROPERLY ADMITTED, HOWEVER -- In State v. Hardy, 133 Wn.2d 701 (1997), the Washington Supreme Court rules, 6-3, that a defendant's prior conviction for delivery of controlled substances was not per se admissible to impeach him as a witness under Washington Evidence Rule 609(a)(1). The majority rules that this crime does not necessarily involve dishonesty, and therefore the trial court must engage in balancing analysis to determine admissibility of such a conviction to impeach a witness. In addition, when the impeachment question involves a defendant, the balancing analysis must pay close attention to the prejudicial effect of telling a jury about a defendant's prior conviction.

In another ruling in the Hardy case, the Court is unanimous that the trial court properly ruled that the responding officer lawfully was allowed to testify about the two alleged robbery victims' reports of the incident. The statements by the complainants to the officer, made just a few minutes after the alleged street robbery, qualified as "excited utterances," the Court explains (citations omitted):

Excited utterances are spontaneous statements made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based on self interest.

Three requirements must be met for hearsay to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was still under the stress of the startling event; and (3) the statement must relate to the startling event or condition. Here, the first and third elements are met as there was an alleged startling event, a physical robbery, and the statements related to the robbery itself. The remaining issue is whether the original declarants were still under the stress of the startling events when they made the statements. The inquiry is a factual one.

The police officer testified both declarants were visibly shaken and excited when they made the statements just minutes after the alleged robbery. The statements appear to have been

spontaneous. The trial court did not err when it concluded that the hearsay declarations were admissible as excited utterances.

Result: Reversal of Court of Appeals decision which had affirmed a King County Superior Court conviction for second degree robbery; case remanded for possible re-trial.

LED EDITOR'S NOTE: In a companion decision issued the same day as Hardy, the Supreme Court affirms a trial court ruling against admissibility, for impeachment purposes, of a defendant's prior conviction for possession of controlled substances. See State v. Calegar, 133 Wn.2d 718 (1997). The apparent combined effect of the Hardy and Calegar decisions is to make it particularly difficult to impeach testifying defendants with prior convictions for those classes of crimes (including most drug convictions) which the Washington State Supreme Court has determined do not inherently involve dishonesty or false statement. On the other hand, in 1991, the State Supreme Court ruled that a prior conviction for theft within the immediate past ten years will be per se admissible for impeachment purposes under ER 609. See State v. Ray, 116 Wn.2d 531 (1991) Sept '91 LED:15.

WASHINGTON STATE COURT OF APPEALS

JAIL POLICY RESTRICTING INTAKE OF CERTAIN OFFENSE CATEGORIES DOES NOT AFFECT CUSTODIAL ARREST AUTHORITY; CAR "SEARCH INCIDENT" PERMITTED

State v. Thomas, 89 Wn. App. ____ (Div. III, 1998) [950 P.2d 498]

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

In order to limit the jail population, Spokane police normally do not arrest drivers ticketed for reckless driving. They will arrest such a driver, however, if police records designate the driver as a gang affiliate. In Mr. Thomas's case, he was arrested for reckless driving due to a gang affiliation designation, but the information was erroneous.

On the evening of June 17, 1995, Cassk Thomas, Jr., was stopped by Spokane police officers for reckless driving committed in their presence. The officers were advised by police radio that Mr. Thomas was listed as a T4 affiliate, an allegation based upon police records that he was a gang member affiliate. Based on this information, the officers decided to take Mr. Thomas into custody. The officers placed Mr. Thomas in their patrol car and conducted a search of his vehicle which revealed a plastic bag containing cocaine.

After Mr. Thomas was charged with possession of a controlled substance, he moved to suppress the cocaine. Testimony at the suppression hearing established that Mr. Thomas had once been considered a gang affiliate, but that the police gang unit had decided in 1994 to remove his name from that status on their records. It was unclear why incorrect information was conveyed to the officers.

The court determined that the officers made a valid traffic stop for reckless driving, but that their usual practice was to cite and release reckless drivers

without conducting a vehicle search. The court found in this case the police decided to do a custodial arrest because of Mr. Thomas's gang affiliations. Since the custodial arrest decision was made on the basis of incorrect information, the court found it was an unlawful arrest and the subsequent car search was unjustified. The court suppressed the evidence, effectively terminating the State's case.

ISSUES AND RULINGS: 1) Does a jail policy restricting custodial arrest practice affect Fourth Amendment custodial arrest authority? (ANSWER: No) 2) Does the Washington Constitution, article 1, section 7, dictate a different answer to question No. 1? (ANSWER: No) Result: Reversal of Spokane County Superior Court suppression order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Relevance of restrictive jail policy

RCW 46.64.015 and RCW 10.31.100 control when a police officer may make a custodial arrest for traffic violations. RCW 46.64.015 governs the issuance of citations:

Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. . . . The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:

- (1) Where the arrested person refuses to sign a written promise to appear in court as required by the citation and notice provisions of this section;
- (2) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3), as now or hereafter amended;
- (3) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.

RCW 10.31.100 addresses when a police officer may make an arrest without a warrant.

Reding [State v. Reding, 119 Wn.2d 685 (1992) **Dec '92 LED:17**] specifically held that RCW 46.64.015 and RCW 10.31.100(3) authorize custodial arrest for reckless driving. The court here found Mr. Thomas committed reckless driving in front of the police officers and their stop was not a pretext. Thus, the officers had probable cause to make a custodial arrest of Mr. Thomas. The usual practice of Spokane police officers is to cite and release reckless drivers, but the officers decided to make a custodial arrest of Mr. Thomas because they believed

he was gang affiliated. The State contends the court should not have looked at the reason the officers made the custodial arrest because the officers had probable cause to make the custodial arrest without the erroneous information. We agree. Reding states: "The statutes, RCW 46.64.015 and RCW 10.31.100, do not require some additional factor to be present for police to have authority to perform a custodial arrest for reckless driving." Whether Mr. Thomas was gang affiliated or not, the officers had the authority to make a custodial arrest. Mr. Thomas cites cases and argues that the officers' reliance on erroneous information in arresting him rendered his arrest unreasonable. However, those cases differ from this case in that in those cases, the improper information provided the probable cause for the arrest. Here, the officers had the probable cause to make the custodial arrest before they received the erroneous information.

(2) State constitutional question

Mr. Thomas also claims that under a Gunwall analysis, the Washington Constitution offers him greater protection than the United States Constitution. In the similar case of State v. Nelson, 81 Wn. App. 249 (1996) [**Sept '96 LED:06**] involving custodial arrest for negligent driving, the court considered a Gunwall analysis and found that the two constitutions do not differ in any way that would affect this case.

[Some citations omitted]

GUN SEIZURE DURING CONSENT SEARCH OK FOR OFFICER-SAFETY PURPOSES; ALSO, INITIAL MIRANDA VIOLATION DID NOT TAINT SUBSEQUENT MIRANDIZED STATEMENT

State v. King, 89 Wn. App. ____ (Div. II, 1998) [949 P.2d 856]

FACTS: Officers investigating a homicide obtained consent to search an apartment for a large black handgun, possibly a .45 caliber or 9 millimeter. One of the officers was surprised when he came upon an adult male houseguest sitting on a bed near a .22 caliber gun. The houseguest was not a suspect. The officer handcuffed the houseguest, patted him down, and then seized the .22. The officer then asked the houseguest if the gun was his. The houseguest answered "yes". The officer asked the suspect to identify himself. The houseguest complied. A radio check disclosed that the gun was stolen, that the houseguest was on probation, and that he was therefore unlawfully in possession of the gun.

At that point, the officer gave the houseguest Miranda warnings for the first time. The officer arrested him for unlawful possession of the gun, and subsequently transported him to the police station. At the stationhouse, the suspect was again Mirandized. He waived his rights and gave a statement.

ISSUES AND RULINGS: 1) Did the officer have authority to seize the handgun and secure the houseguest for officer safety reasons? (ANSWER: Yes); 2) Was the check of the serial number on the gun an unlawful search? (ANSWER: No); 3) Assuming the initial questioning of the suspect was unlawful, was any Miranda violation at the apartment cured by the subsequent Miranda waiver at the stationhouse? (ANSWER: Yes) Result: Affirmance of Pierce County Superior Court conviction for theft of a firearm.

ANALYSIS:

1) Securing the gun and houseguest

The Court indicates that the seizure of both the gun and the houseguest associated with it posed very close questions. Ordinarily, police may not A) seize a person without reasonable suspicion of such person's criminal activity, or B) seize a weapon for safety purposes without a connection of such weapon to suspected criminal activity. The seizure-of-the-person aspect of the case is the more troubling issue for the Court. However, because of officer safety considerations, as well as the surprise element of the guest's presence on the premises, the Court holds that, on the peculiar facts of this case, the initial cuffing of the guest and the initial seizing of the gun were lawful. The Court of Appeals cannot find a case squarely on point on either the seizure of the person or on the seizure of the gun. But the Court finds sufficient support for its fact-based decision in the precedents of: 1) Michigan v. Summers, 452 L.Ed.2d 691(1981) **Sept '81 LED:01** (holding that police may detain an occupant of a premises during the time it takes to execute a search warrant at the premises); and 2) State v. Cotton, 75 Wn. App. 669 (Div. II, 1994) **May '95 LED:15** (holding that police lawfully searching an area may temporarily seize, until they complete the search, any deadly weapons they come upon during the search).

2) Running the gun's serial number

Caselaw precludes searching items for serial numbers when the serial numbers are not in plain view and the scope of a consent to search (or under search warrant or search on exigent circumstances) does not extend that far. See Arizona v. Hicks, 480 U.S. 321 1987) **May '87 LED:04** (turning stereo equipment to get serial number while making a warrantless check of a "shots fired" report at an apartment held unlawful). State v. Murray, 84 Wn.2d 527 (1974) (turning a TV to get its serial number while executing a warrant to search for unrelated stolen property held unlawful). However, where the serial number on an item is in plain view to the police without need to go beyond the permitted search scope, then such serial number may be lawfully recorded and checked against stolen property records. Such was the case with the .22 caliber handgun, the Court of Appeals holds. The police had lawfully seized the gun temporarily (the Court points out that police would not have been permitted to take the gun from the premises had it not turned up "stolen"), and the serial number was in plain view without further searching, the Court of Appeals holds.

3) Curing the taint of any original Miranda violation

The State did not challenge a trial court determination that the handcuffed houseguest should have been Mirandized in the apartment's bedroom before the officer asked him about ownership of the gun. Accordingly, the Court of Appeals assumes for the sake of argument that the first Mirandized statement was inadmissible. The assumed Miranda violation did not affect the defendant's later Mirandized statement at the stationhouse. As the Court of Appeals notes, a mere failure to give required Miranda warnings or to obtain a proper waiver in the taking of a first statement ordinarily can be cured by compliance with Miranda in the taking of a second statement. The Court of Appeals cites Oregon v. Elstad, 470 U.S. 298 (1985) **June '85 LED:10** in support of its decision on the cat-out-of-the-bag, cat-back-in-the-bag issue.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **ODOR OF METH COMING FROM VEHICLE PROVIDES PC TO ARREST ALL OCCUPANTS** – In State v. Huff, 64 Wn. App. 641 (Div. II, 1992), the Court of Appeals held that probable cause to arrest all occupants of a vehicle for possessing controlled substances exists when a trained police officer detects the odor of a controlled substance coming from the vehicle. **[LED EDITOR'S NOTE: The Huff decision was made over six years ago; ordinarily we report decisions within a year of the decision, and we try to report all reported appellate court decisions involving arrest, search and seizure issues. For some reason, we failed to report the Huff decision in 1992 when it was announced. We were recently asked about the Huff case by a police chief, and we have decided we should belatedly report this case.]**

The Huff case started with a law enforcement officer making a traffic stop. When the officer walked up to the car, he smelled what he concluded was methamphetamine odor coming from the car. When he testified at the suppression hearing, he said the smell was quite distinctive, “a cross between cat urine and a chemical smell,” that this was a smell he had been trained to recognize, and that he had come into contact with the smell over fifty times in the course of his duties. The officer ultimately arrested the driver on an outstanding warrant, and he arrested a passenger for obstructing (believing she had lied about her identity). **[LED EDITOR'S NOTE: Washington law as of 1998 would make the offense of the passenger “making a false or misleading statement to a public servant” per RCW 9A.76.175.]**

The arresting officer then had the car impounded while he obtained a search warrant. In the warrant search, the officers found amphetamine in a pink purse which had been in the back seat of the vehicle at the time of the arrest. The driver of the car was charged with possession of the drugs. He challenged the search of the car under a theory which, among other things, challenged the arrest of the passenger for “obstructing”. The Court of Appeals concluded that the Court need not determine whether the obstructing arrest was lawful, because the trained officer had probable cause to arrest all occupants of the car, noting as follows:

...[P]robable cause to arrest the occupants of a car for possession of a controlled substance exists when a trained officer detects that the odor of a controlled substance is emanating from a vehicle. State v. Hammond, 24 Wn. App. 596 (1979) (passenger) **[marijuana smoke – LED Ed.]**; State v. Compton, 13 Wn. App. 863 (1975) (driver) **[marijuana smoke – LED Ed.]**; 2 W. LaFave, *Search and Seizure* § at 3.6(b), at 36-38 (2d ed. 1987)...

In a footnote, the Court of Appeals further explained its probable cause rationale, based in large part on decisions in the Hammond and Compton cases in the 1970's involving the odor of burning marijuana coming from stopped cars:

A few courts have distinguished between whether the smell emanates from the suspect's person or from the car, holding that probable cause to arrest exists only when the defendant herself smells of narcotics. See 2 W. LaFave, *Search and Seizure* § 3.6(b) (2d ed. 1987) (collecting cases). However, this is not the rule in Washington. State v. Ramirez, 49 Wn. App. 814 (1987); State v. Hammond, 24 Wn. App. 596 (1979); State v. Compton, 13 Wn. App. 863 (1975).

Result: Affirmance of Skamania County Superior Court conviction for possession of a controlled substance; review denied by the State Supreme Court in late 1992.

LED EDITOR'S COMMENT: There is substantial caselaw supporting the view that the distinctive smell of marijuana smoke coming from an occupied car (or other identifiable area) provides probable cause to search the car (or other area) for more marijuana. In Washington State, however, because we don't have the Carroll doctrine, probable cause to search a car generally does not authorize the immediate warrantless search (absent exigency or consent). So a big question for Washington officers is whether detection of the odor gives PC to arrest one or more of the occupants of the car, and then to search the occupants and the passenger area "incident to arrest." While the issue is debatable, the prevailing view in Washington (per Huff) and other jurisdictions is that detection of the odor of burning or just-burned marijuana does support arrest of all occupants, as well as a "search incident" of the motor vehicle. That is what the Huff Court concluded. Officers should be prepared to un-arrest if no drugs are found in the "search incident," however. If drugs are found, and there are several occupants, officers should make an effort to determine which of the several occupants was in possession, actual or constructive, of the drugs.

(2) CORRECTIONAL OFFICER LACKED AUTHORITY UNDER DOC REGULATIONS TO HOLD VISITOR LONGER THAN NECESSARY TO REQUEST CONSENT TO SEARCH – In State v. Dane, 89 Wn. App. ____ (Div. II, 1997) [948 P.2d 1326], the Court of Appeals rules, 2-1, that correctional personnel exceeded their authority in their detention of a prison visitor.

Based in large part on an anonymous note, correctional investigators developed reasonable suspicion to believe that Elizabeth Eva Dane, on an upcoming conjugal visit to her husband, was going to try to smuggle illegal drugs into the Clallam Bay Corrections Center. DOC investigators confronted her when she arrived at the prison. One of the DOC investigators gave her Miranda warnings and questioned her at length regarding the suspected smuggling, but the DOC investigator did not ask for consent to search nor give Ms. Dane the opportunity to leave without a search. Only after extended questioning by DOC investigators and the involvement of local law enforcement officers did Ms. Dane finally confess. She then retrieved 11 balloons of drugs from her vagina.

Under DOC regulations, the investigators: 1) did not have arrest authority; 2) were required to defer to action by local law enforcement officers where they had advance notice of a smuggling event; and 3) were empowered only to request consent to search suspected contraband smugglers, and, if refused, were required to eject the visitors from the facility, not continue to hold them.

The Court of Appeals majority rules that the DOC investigators exceeded their authority in detaining and questioning Ms. Dane. Even though the investigators had reasonable suspicion that she was smuggling illegal drugs, their authority under DOC regulations permitted them only to detain her long enough to request consent to search, which, if refused, could have been followed by expulsion from the facility. While law enforcement officers would have had the authority to engage in the extended Terry investigative seizure effected in this case, the DOC investigators lacked such authority. Accordingly, the contraband and confession extracted from Ms. Dane had to be suppressed, the Dane majority rules.

The dissenting judge, Hunt, disagrees, arguing, among other things, that Ms. Dane did not have a reasonable expectation of privacy protecting her against the detention by correctional investigators.

Result: Reversal of Clallam County Superior Court conviction for possession of a controlled substance with intent to deliver (two counts).

(3) NO PRIVACY FOR ONE WHO LEAVES MESSAGE ON PHONE ANSWERING MACHINE – In Farr v. Martin, 87 Wn. App. 177 (Div. I, 1997), a dissolution/parenting plan civil case, the Court of Appeals rules that a person who leaves a message on a telephone answering machine waives any privacy right in the message. The Court of Appeals explains:

While it is unlawful to record private telephone communications without consent under RCW 9.73.030(1)(a), we agree with the lower court that Martin waived any statutory privacy right by leaving messages on an answering machine. A party consents to his or her communication being recorded when another party has announced, “in any reasonably effective manner,” that the conversation will be recorded. RCW 9.73.030(3). An answering machine’s only function is to record messages. Knowing that his messages were being recorded, Martin had no reasonable expectation of privacy.

Result: Affirmance in part, reversal in part, of King County Superior Court contempt orders based on rulings on other issues in this civil case.

(4) IN-CUSTODY DEFENDANT “INITIATES CONTACT” AFTER ASSERTION OF RIGHT TO COUNSEL – In State v. Birnel, 89 Wn. App. ____ (Div. III, 1998) [949 P.2d 422], the Court of Appeals rejects defendant’s Miranda-based objection to admission of his confession, but the Court goes on to reverse his second-degree murder conviction on unrelated grounds not addressed in this **LED** entry.

After Spokane Sheriff’s Deputies arrested Rick Birnel for murdering his wife, and brought him to a police station interview room, Birnel responded to Miranda warnings by stating that he wanted to speak to his attorney. At that point, the deputies did not attempt to question Birnel further. One deputy went to locate Birnel’s attorney, while another deputy remained and began explaining the booking procedure to Birnel.

Birnel interrupted the booking explanation by beginning to talk about the homicide. The deputy then responded by asking Birnel if he had changed his mind about first consulting counsel. Birnel said he wanted to tell his side of the story, and he began doing so. The deputy then took Birnel’s statement, which statement continued until Birnel’s attorney entered the interview room.

The Court of Appeals upholds this interrogation process. Once defendant had asserted his right to counsel in response to custodial Miranda warnings, any police-initiated attempt at questioning had to stop, which it did. However, when defendant initiated contact with the deputy as booking procedures were being explained, stating his desire to tell his side of the story, the deputy was permitted to question defendant, the Court of Appeals holds. Therefore, the defendant’s confession was admissible.

Result: Reversal of Spokane County Superior Court conviction for second degree murder on grounds (regarding self defense-jury instruction) not addressed in this **LED** entry.

LED EDITOR’S COMMENT: We have avoided a detailed breakdown of the Court of Appeals Miranda analysis. We believe that the Court probably reached the right result on the

Miranda issue, but that its discussion contains an erroneous statement about Miranda law (the opinion erroneously suggests that “interrogation” does not occur unless police questioning has a coercive element), and case citations (the opinion cites 6th Amendment decisions in a context in which 5th Amendment decisions should have been cited.) We would refer our LED readers to our article on “Initiation of Contact Rules Under the Fifth and Sixth Amendments,” April '93 LED:02; May '93 LED:19. In that 1993 article, we suggested, and we continue to suggest in our updates of the article, that if a continuous custody arrestee initiates contact with police after having asserted the right to counsel, police again go through full Miranda warnings and obtain an express waiver before proceeding with further questioning. While that approach may not be required in every case, and in fact was not required by the Birnel Court, it is the safest legal approach.

(5) JUVENILE ADJUDICATIONS WERE FIREARMS POSSESSION DISQUALIFIERS UNDER 1994 LAW – In State v. Wright, 88 Wn. App. 683 (Div. I, 1997), the Court of Appeals rejects defendant Wright’s argument that, under the 1994 version of RCW 9.41.040, he should not be barred from firearms possession based on a prior juvenile court adjudication for an offense (burglary second) which would have disqualified Wright from firearms possession if the offense had been committed by an adult.

LED EDITOR’S NOTE: In chapter 295, Laws of 1996 (effective June 6, 1996), the Washington Legislature made clear that juvenile adjudications for offenses which would bar adults from firearms possession based on adult court convictions do constitute bars to firearms possession. Accordingly, to the extent that it could have been argued in the past that the pre-1996 amendments removed the bar on juvenile felons, the bar has been clearly in place since at least June 6, 1996.

Result: Affirmance of King County Superior Court (juvenile division) adjudication of guilt for violation of RCW 9.41.040.

(6) NO EVIDENCE LAW PRIVILEGE FOR STATEMENT MADE AT ACCIDENT SCENE TO PARAMEDIC – In State v. Ross, 89 Wn. App. ____ (Div. I, 1997) [947 P.2d 1290], the Court of Appeals rejects a defendant’s argument that his statements to a paramedic should be excluded as privileged statements. A paramedic responding to a one-car accident told defendant Robert Rex Ross, one of the accident victims, that the paramedic needed to know where Ross had been sitting in the car at the time of the accident. Ross told the paramedic that he had been driving the car at the time of the accident. Later, prior to his trial for vehicular homicide, Ross signed a waiver releasing his Harborview Medical Center records. Under the following excerpted analysis, the Court of Appeals rules that the statement by Ross to the paramedic was not privileged, and, even if privileged, was admissible based on the waiver.

A) Privilege

The statutory physician-patient privilege states in part:

{A} physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient[.]

RCW 5.60.060(4). This privilege is a procedural safeguard, not a rule of substantive or constitutional law.

While statutorily limited to civil cases, the physician-patient privilege has been extended to criminal cases pursuant to RCW 10.58.010 which applies the civil rules of evidence to criminal prosecutions as far as practicable. Washington courts have extended the privilege to criminal cases to the extent practical in balancing the benefits of the privilege in encouraging full disclosure of proper medical treatment against the public interest in full disclosure of the facts. State v. Smith, 84 Wn. App. 813 (1997) [**June '97 LED:09**].

Ross argues that the privilege should be extended to paramedics because they are highly trained and act as physician extenders. Regardless of the merit of this argument, the Legislature, not the court, has the authority to extend the literal language of the privilege to include paramedics.

Indeed, the Legislature has enacted privileges for a variety of other professional occupations. See, e.g., RCW 5.62.020 (nurses), RCW 18.53.200 (optometrists), RCW 18.83.110 (psychologists), and RCW 5.60.060(6) (certain social workers, therapists, and other counselors). Thus, both the case law proscribing a strict interpretation and the legislatively enacted privileges for individual occupations support a literal reading and application of the physician-patient privilege. A literal reading excludes communications made to autonomously acting paramedics from the physician-patient privilege.

Ross asserts that his statement was nevertheless privileged because the paramedic was acting as an agent of a physician. However, the testimony of the paramedic reveals that a physician was not contacted until after Ross stated that he was the driver. Information obtained prior to a physician seeing the patient is not privileged. State v. Cahoon, 59 Wn. App. 606, (1990) [**March '91 LED:09**] (statement made to an emergency medical technician outside the presence of a physician is not privileged). Thus, Ross's statements to the paramedic are not privileged because paramedics in general are not expressly covered by the physician-patient privilege and the paramedic in this case was not acting as the agent of a physician at the time Ross admitted being the driver.

B) Waiver

Since we hold that the physician-patient privilege does not apply to independently acting paramedics, we do not need to reach the issue of waiver. However, it is undisputed that Ross signed a waiver to release his treatment related medical records from Harborview Medical Center. The physician-patient privilege states that the privilege is waived as to all physicians or conditions if a waiver is given for one physician or condition. RCW 5.60.060(4)(b). Thus, even if the privilege did apply, Ross would be deemed to have waived the privilege with the paramedic.

[Some text, citations omitted]

Result: Affirmance of King County Superior Court conviction for vehicular homicide.

(7) CORROBORATION NOT NECESSARY TO PROVE MIRANDA WAIVER IN ONE-ON-ONE INTERROGATION – In State v. Haack, 88 Wn. App. 423 (Div. I, 1997), the Court of Appeals rejects a defendant's argument that an alleged Miranda waiver that the State obtained in a one-on-one interrogation was required to be corroborated.

A detective had questioned Haack at the hospital shortly after Haack arrived there following a knife fight. The detective later testified in a suppression hearing that he had Mirandized Haack and had obtained a valid waiver. However, in his testimony, Haack claimed to not recall being advised of his rights. The trial court found a valid waiver, and Haack appealed. In holding for the State, the Court of Appeals analyzes the issue in part as follows:

Haack contends that the trial court's admission of his statements was error, arguing that the only evidence presented to indicate that he was given and knowingly waived his rights was Detective Corey's uncorroborated testimony, which he contends was insufficient to support the court's conclusion, in that Detective Corey could easily have corroborated the giving of the rights and the waiver by obtaining Haack's signature on the pre-printed acknowledgment of rights and waiver form that he had in his possession when he questioned Haack. In support of this contention, Haack cites State v. Davis, 73 Wn.2d 271 (1968) and State v. Erho, 77 Wn.2d 553 (1970), two cases in which the defendants disputed that they had been advised of their rights and in which the State failed to call other officers who were present during the interrogations at issue in order to corroborate the testifying officers' testimony that they advised the defendants of their rights. In both cases the court held that where the defendant disputes the giving of the Miranda warnings and the State fails, without explanation to call other officers who were present during the interrogation to corroborate that the warnings were given, the statement is inadmissible.

We do not read Davis and Erho as requiring independent corroboration of the testimony of a police officer in every instance in which the defendant disputes the giving of the warnings and intelligent waiver of the right to remain silent. Rather, those cases stand for the proposition that where such independent evidence exists, it must either be presented or the State must explain on the record why the evidence is not being presented. The underlying rationale is akin to the "missing witness rule", that is, where a witness is under the control of the party presenting evidence and is not called and no explanation is given for that failure, the trier of fact may entertain an inference that the testimony of the missing witness would have been adverse. In the context of a suppression hearing based on Miranda, that inference is sufficient to tip the scales in favor of the accused, where the State offers no explanation of its failure to call the witness. In such instances, the State cannot meet its burden as a matter of law, unless there is sufficient other evidence to overcome the inference.

But the cases do not hold that before police interrogate a suspect at least two officers must be present so that one can corroborate the other in the event of a suppression hearing. Neither do the cases require police to obtain a written acknowledgment and written waiver of rights.

Here, the detective failed to ask Haack to sign the pre-printed acknowledgment and waiver form, although he did obtain Haack's signature on a medical release

form. Whether Haack would have signed the form if asked is unknown. He may have done so, since he willingly signed the medical release form. Or he may not have done so, since he told the officer in no uncertain terms that he would answer those questions he wanted to answer and would not answer any questions that he did not want to answer. The officer's failure to ask Haack to sign the form goes to the weight to be given his testimony, but does not, as a matter of law, dictate that Haack's statements be suppressed. Were the rule otherwise, an accused could easily defeat admission of a statement merely by refusing to sign an acknowledgment and waiver of rights form, although being fully advised, and although willingly and intelligently waiving.

Haack also argues that the detective's testimony was "equivocal" in that the detective was not asked and did not testify whether Haack verbally waived his rights by an affirmative statement of waiver. Both Miranda and Davis emphasize that a waiver will not be presumed simply from silence after the warnings are given or even from the fact that a statement is eventually obtained. But here, the warnings were prefaced by an affirmative statement from Haack that he would answer those questions he wished to answer and not those questions he did not wish to answer. Immediately after Haack so stated, the detective read the Miranda rights and asked Haack whether he understood them. Haack responded that he did. When the officer asked Haack whether he would cooperate with respect to charges against the person who stabbed him, Haack responded that he would think about doing so. Haack answered a number of questions about how he got stabbed. When he wished to stop answering questions, he so stated, thereby demonstrating that he fully understood his rights by his election to exercise them. The officer immediately ceased questioning Haack at that point, demonstrating his own adherence to the principles of Miranda.

For a statement to be admissible under Miranda, the State must establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them. On the facts of this case, the trial court's determination that Haack, after being fully advised of his rights, knowingly and intelligently waived them is supportable on appeal, even though neither counsel at the suppression hearing asked Detective Corey whether Haack affirmatively stated that he would waive his rights. This is not a situation in which the advisement of rights was followed by silence. When asked whether he would cooperate, Haack responded that he would think about it. This statement was fully consistent with Haack's earlier statement that he would answer some questions but not others. Haack's own statements and conduct during the interrogation demonstrates a knowing and intelligent initial waiver followed by an election to exercise the right to remain silent, when he did not wish to answer any further questions. The trial court did not err by admitting Haack's statements into evidence at the trial.

[Some citations omitted]

Result: Affirmance of King County Superior Court convictions of burglary in the first degree and assault in the first degree.

(8) JURY INSTRUCTION ON VOLUNTARY INTOXICATION NOT REQUIRED EVEN THOUGH SOME WITNESSES TESTIFY THAT DEFENDANT WAS "INTOXICATED" AT TIME OF OFFENSE -- In

State v. Gabryschak, 83 Wn. App. 249 (Div. I, 1996), the Court of Appeals rejects defendant's argument that the jury should have been given an instruction on "voluntary intoxication" at his trial for felony harassment and third-degree malicious mischief.

Defendant Gabryschak was arrested for malicious mischief for kicking in a door. While being driven to the police station, he threatened to kill the transporting officer. Gabryschak was charged with third degree malicious mischief (for kicking in the door) and felony harassment (for threatening the transporting officer).

At trial, Gabryschak did not testify, nor did he call any witnesses. However, one of the involved police officers testified that, at the time of the arrest and transport, Gabryschak appeared to be "intoxicated" or "very intoxicated." The trial court declined to instruct the jury on "voluntary intoxication". Gabryschak was ultimately convicted on both counts.

In pertinent part, the Court of Appeals analysis of whether the trial court should have given the jury a voluntary intoxication instruction is as follows (note that while the Court expressly addresses only intoxication "by drinking," the same analysis would also apply to voluntary intoxication by other drugs):

When a voluntary intoxication instruction is sought, the defendant must show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be "substantial evidence of the effects of the alcohol on the defendant's mind or body"...

A defendant is not required to present expert testimony to establish that he or she was too intoxicated to form the necessary mental state. Indeed, a defendant may exercise his or her right to refrain from testifying at trial and to rest at the close of the State's case without presenting defense testimony, and still be entitled to a voluntary intoxication instruction, so long as the evidence presented by the State and elicited by the defense during cross examination of the State's witnesses contains substantial evidence of the defendant's drinking and of the effects of the alcohol on the defendant's mind or body. Although affirmative evidence presented by a defendant may ordinarily be more effective, nothing prohibits a defendant from attempting to persuade the trier of fact of his or her inability to form the requisite mental state because of intoxication, by means of cross-examining the State's witnesses.

Here, ample evidence that Gabryschak was intoxicated was elicited from the State's witnesses during cross examination. Nevertheless, we find no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged. At best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated.

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state. See, e.g., State v. Rice, 102 Wn.2d 120 (1984) (intoxication instruction necessary where there was evidence that the defendants drank beer all day, ingested between two and five Quaaludes, spilled beer and were unable to hit Ping-Pong balls, and one of the defendants was so drunk that he did not feel it when he was struck by a car); State v. Brooks, 97 Wn.2d 873 (1982) (instruction proper where there was evidence that the defendant drank beer, whiskey, and rum for two days, ate a spider and washed it down with whiskey, and had glassy eyes and slurred speech); State v. Jones, 95

Wn.2d 616 (1981) (instruction required where there was evidence that the 15-year-old defendant drank between nine and eleven beers before the incident, had glassy eyes and slurred speech, and had been put into the “drunk tank” after his arrest).

In contrast with these cases, the evidence in Gabryschak’s case shows that he responded consistently to the officers’ requests to see and speak to the occupants of the apartment - he consistently refused, indicating that he fully understood the nature of the requests; he tried to break and run while being escorted to the police car, indicating that he was well aware that he was under arrest; he leaned up against the back of Officer Anderson’s seat and spoke with conviction into her ear while threatening to kill her once released from jail, indicating that he was fully aware of his destination. No testimony reflects that Gabryschak’s speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he was unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states--with knowledge in the case of the felony harassment charge, and with malice in the case of the malicious mischief charge. We are, therefore, satisfied that the trial court did not err by rejecting the voluntary intoxication instruction.

[Some citations and footnotes omitted]

Result: Affirmance of Whatcom County Superior Court convictions for felony harassment and third degree malicious mischief.

(9) TELEPHONE THREAT TO DISPATCH TO BURN DOWN STORE NOT PROTECTED SPEECH -- In State v. Edwards, 84 Wn. App. 5 (Div. II, 1996), the Court of Appeals rejects defendant’s two challenges to his conviction for making a threat in violation of RCW 9.61.160. RCW 9.61.160 provides as follows:

It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

Defendant conceded on appeal that the evidence showed that he had called the local police department and had stated to the dispatcher that he was going to burn down a local department store if the employees of the store harassed his family. He had stated to the dispatcher that this was not a threat but a fact. However, defendant argued on appeal that his threat had been either too contingent in nature or not serious enough to qualify under the statute. The Court of Appeals finds no legal support for defendant’s proposed interpretation of the statute.

Defendant also argued that the statute was unconstitutional as applied to his statement to the E-911 dispatcher. Relying on the State Supreme Court decision in Seattle v. Huff, 111 Wn.2d 923 (1989) **Nov. ‘89 LED:06** (holding a portion of a Seattle telephone harassment ordinance to be overly broad in violation of free speech rights), defendant argued that free speech rights protected his statement to the dispatcher. However, the Court of Appeals distinguishes RCW 9.61.160 from the Seattle ordinance at issue in Huff. RCW 9.61.160 is drawn narrowly enough to meet constitutional free speech requirements, Division Two holds.

Result: Affirmance of Skamania County Superior Court conviction for telephone harassment in violation of RCW 9.61.160.

(10) “SEATTLE SITTING ORDINANCE” UPHeld AGAINST CONSTITUTIONAL ATTACK -- In City of Seattle v. McConahy, City of Seattle v. Hoff, 86 Wn. App. 557 (Div. I, 1997), the Court of Appeals upholds the constitutionality of the “Seattle sitting ordinance.” Under that ordinance, it is a civil infraction for any person to sit or lie on the sidewalk in downtown Seattle and other neighborhood commercial zones between

7 a.m. and 9 p.m. except in an emergency, or if he or she is in a wheelchair or on a bench or in a bus zone or patronizing a commercial establishment or attending a permitted event.

The facts in the two cases on review are described by the Court of Appeals as follows:

McConahy was cited while sitting on a street bulb with a group of friends, eating pizza, watching her friends play chess for change, and sometimes panhandling. Police officers approached the group and informed them that they were violating the ordinance. Her friends stood, but McConahy remained seated protesting the ordinance. McConahy wore an army jacket decorated with an American flag and a slogan that said, "Fuck your American dream." She also wore a button that said, "Sitting is not a crime." Hoff was cited while sitting reading a book and leaning against a building with leaflets advertising a protest against the ordinance in his lap. They had separate trials in municipal court. The Hoff court heard testimony and allowed extensive argument on his constitutional claims, and the McConahy court accepted much of this record. Both courts found that the defendants violated the ordinance and rejected their free expression and substantive due process claims.

The Court of Appeals rejects the defendants' varied constitutional challenges to the sitting ordinance. However, the Court of Appeals warns that its ruling in this case is limited:

While we decline to invalidate the ordinance in this case, we wish to make clear what we are not deciding. First, we express no opinion about whether the ordinance is or is not good social policy. We hold only that the ordinance is constitutionally-valid legislation. SMC 15.48.040 is quintessential legislative policy making, and we will not disturb the policy decisions made by legislative bodies unless they are unconstitutional or conflict with state law. We also hold that the City did not violate appellants' right to free expression because Hoff and McConahy were not involved in expressive activity when they were cited. But we do not decide whether, on different facts involving a protected activity or speech, SMC 15.48.040 would be a valid time, place, manner restriction. We also do not decide whether homeless residents could establish the requisite disparate impact to invoke the protection of the Privileges and Immunities Clause because these appellants have not done so.

Result: Affirmance of Seattle Municipal Court convictions for Sarah McConahy and John Hoff under sitting ordinance.

(11) "MEDICAL NECESSITY" DEFENSE ADDRESSED IN MARIJUANA GROW CASE – In State v. Pittman, 88 Wn. App. 188 (Div. I, 1997) the Court of Appeals rejects claims of a marijuana grower that the trial court committed error: 1) in instructing the jury on the medical necessity defense in her prosecution for growing marijuana, and 2) in excluding "expert" testimony from a lay witness on the medical need for marijuana.

1. Instruction issue: The Court of Appeals rejects the following instruction offered by defendant on the medical necessity defense:

It is a defense to a charge of possession with intent to manufacture or deliver marijuana that the defendant acted out of "medical necessity."

Medical necessity exists in this case if:

- (1) the defendant reasonably believed the manufacture or delivery of marijuana was necessary to minimize the effects of glaucoma;
- (2) the benefits derived from marijuana in the treatment of glaucoma are greater than the harm sought to be prevented by the controlled substances law; and

(3) no drug is as effective as marijuana in minimizing the effects of glaucoma.

The Court of Appeals agrees with the trial court that Pittman's proposed instruction was inadequate, and that the following instruction by the trial court was proper:

It is a defense to a charge of possession with intent to manufacture or deliver marijuana that the defendant acted out of "medical necessity." ...

The defendant has the burden of proving each of the following elements of the defense of medical necessity by a preponderance of the evidence:

(1) That the defendant reasonably believed that her manufacture or delivery of marijuana was medically necessary to minimize the effects of Donald Inman's glaucoma;

(2) That the defendant had no other reason, purpose or motivation, whatsoever, to manufacture or deliver the marijuana which was found in her possession on November 4, 1992; (the defendant's use of marijuana herself, even for purposes of stimulating her appetite as a means of combating cancer, is not sufficient, as a matter of law, to support a defense of medical necessity in this case);

(3) That the benefits derived from the use of marijuana in the treatment of Mr. Inman's glaucoma are greater than the harm sought to be prevented by the law prohibiting the manufacture or delivery of controlled substances; and

(4) That no legal alternative is available which is as effective as marijuana in minimizing the effects of Mr. Inman's glaucoma.

2. Expert Witness Exclusion: The expert witness on the medical necessity defense presented no scientific evidence to support his claim, based on what he characterized as common knowledge, that marijuana aids the appetite of cancer sufferers. For that reason, as well as the reason that defendant admitted (claimed) that she was growing the marijuana for a housemate with cancer, not for her own cancer, the Court of Appeals rules for the State under the following analysis upholding the trial court's exclusion of Ms. Pittman's expert:

Pittman contends that the trial court abused its discretion in excluding Mr. Randall's testimony that marijuana is beneficial in the treatment of cancer, arguing that Mr. Randall "certainly possessed enough practical experience to qualify him as an expert" on the issue. The State responds that the trial court properly excluded that portion of Mr. Randall's testimony because it was "completely unsupported by scientific evidence."

The admission or exclusion of expert testimony under Evidence Rule 702 is within the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of that discretion. Under ER 703, expert testimony must be based on sufficient foundational facts to support the expert's opinion. "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted."

In the present case, Pittman sought to introduce Mr. Randall's testimony that marijuana is useful in the treatment of cancer because it stimulates the appetite and helps cancer patients maintain weight and thus the ability to fight infection. Mr. Randall's testimony was based on the proposition that "if marijuana is capable of making an anorexic hungry it's capable of making a person with cancer hungry or a person with AIDS hungry." Although Mr. Randall did cite a study that concluded that marijuana stimulates the appetites of those suffering from anorexia nervosa, he cited no studies or other scientific evidence in support of his conclusion that marijuana must also stimulate the appetite of a cancer patient. The only basis for his conclusion was his opinion that: "I think almost everyone over the age of 15 in this society knows that marijuana makes you hungry."

On this record, we conclude that Mr. Randall's opinion that marijuana is beneficial in the treatment of cancer was based on nothing more than pure speculation. Although Pittman properly points out that Mr. Randall has a considerable amount of practical experience concerning the medical uses of marijuana, his practical experience does not obviate the need for a scientific basis for his opinion. In the absence of a scientific basis, Mr. Randall's opinion lacked an adequate foundation and was properly excluded by the trial court.

Moreover, any error in the trial court's evidentiary ruling was harmless in light of Pittman's testimony that none of the marijuana found in her house was for her own use; it was all for Inman. Pittman so testified before the offer of proof with respect to the use of marijuana for the treatment of cancer, effectively removing the medical necessity defense from issue at the trial, with respect to her own medical condition of cervical cancer.

[Some text, some citations omitted]

Result: Affirmance of Snohomish County Superior Court conviction of JoAnne Pittman for growing marijuana with intent to manufacture or deliver.

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Phone 206 464-6039; Fax 206 587-4290; Address 900 4th Avenue, Suite 2000, Seattle, WA 98164-1012; E Mail [johnw1@atg.wa.gov]. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do 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. LED's from January 1992 forward are available on the Commission's Internet Home Page at: <http://www.wa.gov/cjt>.