



Law Enforcement

October 1999

Digest

HONOR ROLL

494th Session, Basic Law Enforcement Academy – May 18th through August 11th, 1999

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Best Firearms: James Ebel – Spokane County Sheriff's Office
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495th Session, Basic Law Enforcement Academy – June 16th through September 9th, 1999

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **CITY PROBATION COUNSELORS AND COUNTY PRETRIAL RELEASE COUNSELORS HAVE SAME CIVIL LIABILITY DUTY TO PROTECT PUBLIC AS STATE PAROLE OFFICERS** – In Hertog v. Seattle, 138 Wn.2d 265 (1999), the State Supreme Court, by a 6-3 vote, extends its ruling in Taggart v. State, 118 Wn.2d 195 (1992), where the Court held that a state parole officer has a duty to protect others from reasonably foreseeable danger resulting from the dangerous propensities of parolees. The Hertog majority holds that the same civil liability exposure exists for city probation counselors and county pretrial release counselors.

Result: Affirmance of Court of Appeals and King County Superior Court decisions denying summary judgment to City of Seattle and King County; case remanded for trial.

(2) INSULTING WORDS ALONE CANNOT BE “PROVOCATION” JUSTIFYING SELF DEFENSE – In State v. Riley, 137 Wn.2d 904 (1999), the State Supreme Court rejects the argument by defendant that the jury should not have been given an “aggressor instruction” in his prosecution for first degree assault. The “provocation instruction” tells the jury that one who intentionally initiates an assault cannot claim self defense for using force during the course of the fight which follows that assault.

Along the way, the majority opinion for the Supreme Court states that mere insulting words, alone, cannot be “provocation” justifying a claim of self defense. The majority opinion thus concludes that defendant, who claimed that he shot his victim in response to an insult from the victim, had no basis for challenging the giving of the “aggressor instruction” at his trial.

Justice Talmadge writes a concurring opinion, joined by Justice Durham, arguing that the majority opinion unnecessarily and unwisely overrules several Washington precedents on the question of whether insulting words alone might justify a physical response under certain circumstances. He poses hypothetical situations involving white supremacist and Nazi taunting to illustrate his point.

Result: Affirmance of Pierce County Superior Court conviction of Johnny Lee Riley, Jr. for first degree assault while armed with a deadly weapon.

(3) MANDATE FOR SUSPENDING DRIVER’S LICENSE OF DRUG OFFENDERS AGED 13-21 INCLUDES THOSE 18-21 DESPITE STATUTORY REFERENCE TO “JUVENILES” – In Davis v. DOL, 137 Wn.2d 957 (1999), the State Supreme Court rules 5-4 that the usage in RCW 69.50.420(1) of the word “juvenile” in the phrase, “juvenile thirteen years of age or older and under the age of twenty-one,” includes persons aged 18-21, despite the fact that usage of the word, “juvenile,” in other statutory contexts refers to persons under age 18.

Accordingly, the majority upholds that driver’s license revocation under RCW 69.50.420(1) and 46.20.265(1) for a drug offense committed by Brett Davis.

Result: Affirmance of Court of Appeals decision dissolving injunction against DOL’s revocation of the driver’s license of Brett Davis.

(4) JUDGE’S DECISION TO NOT REVOKE PROBATION OF DRUNK DRIVER BREAKS CAUSAL LINK IN SUIT AGAINST PROBATION OFFICER ARISING OUT OF VEHICULAR HOMICIDE INCIDENT – In Bishop v. Miche and King County, 137 Wn.2d 518 (1999), a unanimous State Supreme Court holds that the rule of Taggart v. State, 118 Wn.2d 195 (1992) **March 92 LED:05**, that a state parole officer has a civil liability duty to protect others from reasonably foreseeable danger resulting from the dangerous propensities of parolees, applies equally to county probation officers. However, the Miche Court goes on to hold that, under the facts of the case before it, a judge’s decision to not revoke the probation of a violator broke the chain of causation of any negligence of the probation officer.

Steven Walter Miche was on a suspended sentence for DUI and therefore under supervision of a probation officer. Miche’s driver’s license was then in suspended status. In a probation revocation hearing on November 6th, 1992, Miche’s probation officer informed the judge, among other things: 1) that Miche had recently been arrested for driving while license suspended; 2) that Miche had a severe alcohol problem, was in need of treatment, had attended AA meetings only sporadically, and was scheduled to go into intensive alcohol treatment in three days; and 3) that Miche seemed to be trying to cooperate with the terms of probation.

Previously, the probation officer had informed the district court that Miche should not have gotten the break of a suspended sentence in the first place. Miche had used an alias Steven W. Williams at the earlier trial and sentencing, thus hiding his record. The probation court had not done anything in response to this information from the probation officer about Miche’s earlier deception.

The judge in the November 6, 1992 hearing decided not to revoke Miche’s probation. Two days later, November 8, 1992 (one day before Miche was scheduled to go into intensive alcohol treatment), Miche drove while intoxicated and caused a motor vehicle accident killing Alexander Bishop. Bishop’s family sued Miche, his King county probation officer, and the King County probation department.

The Supreme Court rejects King County’s arguments that: a) the Taggart decision (imposing a civil liability duty on parole officers) was wrong and should be overruled; and b) that county probation officers have different powers than state parole officers and therefore should not be subject to civil suit for negligent supervision. However, as noted above, the Bishop Court holds that the judge’s actions on November 6, 1992 broke the causal link to the probation officer. The Court explains:

... in light of the information before the district court judge at that hearing and his decision not to revoke probation, as a matter of law proximate causation is lacking. The judge knew that Miche had violated the court-imposed condition of his probation by driving while his license was suspended. He knew that Miche had an alcohol problem but attended meetings somewhat sporadically. He knew that Miche was scheduled to attend intensive alcohol treatment within 3 days, and thus knew that Miche was not then in such treatment and that Miche needed such treatment. Nevertheless, despite Miche's violation of his probation conditions, the obvious severity of his alcohol problem, and the fact that Miche knowingly drove after his license had been suspended, the judge did not revoke probation. The accident occurred only 2 days later, one day before Miche's scheduled treatment was to begin.

As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident. The judge's actions, of course, are shielded by judicial immunity. Accordingly, summary judgment in favor of the County was proper because as a matter of law proximate causation is lacking.

We agree with the Court of Appeals' holding that the County owed a duty to control Miche, but hold that as a matter of law proximate cause is lacking. Therefore, summary judgment in favor of the County was proper.

Result: Reversal of Court of Appeals unpublished opinion which, in turn, had reversed a King County Superior Court order granting summary judgment to the probation officer and King County; King County dismissed from lawsuit.

(5) EVIDENCE SUFFICIENT TO SUPPORT CONVICTION FOR ATTEMPTED BURGLARY – In State v. Bencivenga, 137 Wn.2d 703 (1999), a unanimous State Supreme Court rules that evidence supporting the following factual description by the Supreme Court is sufficient to support a conviction for attempted burglary:

At 3:30 on a cold and snowy January morning Sue Burke watched as two individuals in dark clothing attempted to pry open the back door of a Kentucky Fried Chicken restaurant (KFC) located across the street from her house in Bellingham. Burke dialed 911. Bellingham Police Officers Dennis James, Glen Wong, Jason Monson, and Monson's partner, police dog Major, responded. Wong investigated the crime scene. Major, accompanied by James and Monson, picked up a scent and followed it to a fence about five blocks from the KFC. From behind the fence Bencivenga responded, "Okay. I'm coming out."

At trial James testified the defendant waived his right to remain silent and then admitted he had tried to force the KFC door, claiming, however, he had not intended to steal anything, but rather simply sought to win a \$100 bet with a friend that he could open the door to the KFC by removing a pin. Officer Wong's investigation confirmed fresh pry marks by the lock mechanism and chipped paint on the door that Bencivenga had attempted to open. Wong then photographically documented this evidence of attempted forced entry.

The Court of Appeals had reversed Bencivenga's conviction following a bench trial for attempted burglary based on a misreading of State v. Jackson, 112 Wn.2d 867 (1989) **Nov 89 LED:07**. The Bencivenga Court explains that the Jackson case was focused on a jury instruction regarding inference of intent. Jackson did not undercut the general rules: a) that evidence may be either direct or circumstantial; and b) that fact-finders may draw reasonable inferences from evidence, even if other inferences are also reasonable.

Here, the Bencivenga Court finds sufficient evidence to support the elements of attempted burglary, i.e., that, with intent to commit a crime against a person or property inside the KFC building, defendant took a substantial step toward commission of an unlawful entry of the building.

Result: Reversal of Division One Court of Appeals decision (by unpublished opinion) and hence reinstatement of James Bencivenga's Whatcom County Superior Court conviction for attempted burglary in the second degree.

(6) FORSEEABILITY OF HARM NOT NECESSARY TO JUSTIFY RESTITUTION ORDER – In State v. Enstone, 137 Wn.2d 675 (1999), a unanimous State Supreme Court rules that a finding of foreseeability is not a necessary element of a restitution order.

Douglas Enstone pleaded guilty to committing assault in the second degree against a woman. He admitted shoving her out the door of his home, causing her to fall on concrete stairs and to suffer very serious head injuries. The State's evidence was that the assault had involved much more than a shove, but the evidence is irrelevant to the Supreme Court's decision. Enstone argued that he should not be made to pay for the victim's emergency, live-saving surgery. His theory was that she would not have been so seriously hurt if she had not been drunk, and that he could not reasonably be expected to have foreseen that such serious injury would occur from a shove.

The trial court rejected Enstone's argument, applying a straight causation standard to determine what damages can be included in a restitution order. The Court of Appeals affirmed. See State v. Enstone, 89 Wn. App. 882 (1998). Now the State Supreme Court has affirmed both lower courts. In holding that foreseeability of harm is not required for a restitution order, the Supreme Court overrules the following Court of Appeals decisions placing a foreseeability limit on restitution orders, including City of Walla Walla v. Ashby, 90 Wn. App. 560 (Div. III, 1998) **May 98 LED:17**.

Result: Affirmance of Court of Appeals decision which had affirmed a King County Superior Court order directing Douglas Enstone to pay restitution of \$30,967.75.

WASHINGTON STATE COURT OF APPEALS

EMERGENCY ENTRY ISSUE AVOIDED IN DV CASE; CONSENT SEARCH REQUEST HELD NOT SUBJECT TO FERRIER BECAUSE NOT "KNOCK AND TALK"; ALSO, 10TH DAY EXECUTION OF SEARCH WARRANT OK, AS PROBABLE CAUSE NOT THEN STALE

State v. Leupp, ___ Wn. App. ___ (Div. II, 1999) [980 P.2d 765]

Facts and Proceedings:

The Court of Appeals describes in part the facts in this case:

In the early hours of July 6, 1997, an intoxicated person made a "911 hang-up call" from Leupp's residence. Grays Harbor Deputy Sheriff Keith Peterson responded. At the front door, Peterson spoke with Leupp and two females, Roberta Schumacher and Michelle Frost; everyone in the residence was nervous and uncooperative.

Peterson subjectively believed that someone might have been injured, perhaps assaulted, and that the three occupants were trying to prevent him from discovering that other person. Leupp gave Peterson permission to enter the residence to see if anyone was injured or in need of assistance, and Peterson entered. **LED Editor's Note: In asking for consent to enter and search, the officer did not expressly advise Leupp of his right to refuse consent, his right to revoke consent, or his right to restrict the scope of the search.**

One of the women walked to a back room that Leupp later admitted was his. Peterson followed her. Upon entering the room, he immediately saw, in plain view atop a dresser, a white powder residue that resembled cocaine in color and texture. Peterson had the training and experience to enable him to recognize cocaine.

Peterson then noticed a triple beam scale on the floor, and he knew that such scales are commonly used to weigh illicit drugs. On the scale he could see more white powder residue. And next to the scale Peterson saw brown paper formed into an oval and wrapped with tape, in a manner consistent with that used to package larger amounts of illicit drugs, including cocaine, when such drugs have been shipped by a supplier. The oval shaped package was laying on a grocery bag, but Peterson could not see the bag's contents.

Leupp entered the room and stood between Peterson and the dresser, preventing Peterson from seeing anything else. Leupp then revoked his consent.

Peterson applied for a search warrant on the basis of his observations.

Officer Peterson's affidavit also stated some additional facts about the suspects, including that Leupp had several previous convictions for dealing drugs. In addition Officer Peterson described his extensive experience and training, and appropriately linked that fact to the search warrant request.

The warrant was issued on July 8, 1997, two days after the DV call. Ten days after that, on July 18, 1997, officers executed the warrant. They found large amounts of cocaine and drug paraphernalia. Leupp was charged with cocaine possession with intent to deliver.

Prior to trial, Leupp moved to suppress the evidence, arguing, among other things: 1) that the "emergency exception" to the warrant requirement did not justify entry of his residence on July 6, 1997; 2) that voluntary consent was not obtained for the July 6, 1997 entry and search; and 3) that the search was executed after the evidence supporting it had become stale. Leupp's motion was denied, and he was convicted.

ISSUE AND RULING: 1) Was the entry and search justified under the "emergency exception" to the search warrant requirement? (ANSWER: Probably so, but this question need not be answered, because the search could be justified based on consent); 2) Was the search justified under the "consent search exception" to the warrant requirement even though no "Ferrier" warnings were given? (ANSWER: Yes; no Ferrier warnings were needed, because this was not a "knock and talk" case); 3) Had the PC evidence become stale by the time the warrant was executed 10 days after its issuance? (ANSWER: No)

Result: Affirmance of Grays Harbor County Superior Court conviction of James M. Leupp for possessing cocaine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) "Emergency exception" to warrant requirement

Ordinarily, the police must have a warrant to enter and search a private building. An exception to this rule exists for emergencies. The emergency doctrine is related to another exception to the search warrant requirement, i.e., where exigent circumstances are present. Exigent circumstances are present where it may be impractical to obtain a search warrant, as in cases of hot pursuit.

In contrast to the exigent circumstances exception, the emergency doctrine does not involve officers investigating a crime but arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm. For example, in Lynd [State v. Lynd, 54 Wn. App. 18 (1989) **Nov 89 LED:07**], the police, responding to a "911 hang-up call," had a right to enter a home to seek out a woman who might have made the call and might have been injured by her husband, who was departing the scene with a cut face. Lynd explained that for a search to come within the emergency exception:

we must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was "actually motivated by a perceived need to render aid or assistance." To that end, the State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed.

There must also be a reasonable basis for associating the need for assistance with the place that is entered.

Like the officer in Lynd, Peterson was responding to a "911 hang-up call," late at night by someone intoxicated, and he had a right to investigate the circumstances behind that call, without obtaining consent, if he reasonably and subjectively believed that an emergency existed. But we need not resolve this issue if Peterson's entry was consensual, because that is potentially an equally valid basis for entry. We proceed to the consent issue, and find it dispositive.

2) “Consent search exception” to warrant requirement – Ferrier question

Leupp cites Ferrier [State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**], to argue that Peterson had a duty to tell him he could refuse consent. In Ferrier, the Supreme Court held, for the first time, that in the course of conducting a "knock and talk" procedure, the police violate article I, section 7 of the Washington Constitution if they do not inform a home dweller of her right to refuse consent to a warrantless search. The Supreme Court decided Ferrier on August 27, 1998, and hence it was unavailable to Leupp in proceedings below.

Leupp did not cite the Washington Constitution in moving to suppress. But even if he had, Peterson did not go to Leupp's residence to conduct a "knock and talk." That "inherently coercive" situation occurs when police officers come to someone's door without a warrant or other basis for entry, suspecting illegal activity but lacking probable cause to arrest or search, and ask if they can come inside to look around. Instead, Peterson came to Leupp's door responding to a 911 distress call. In this situation, Peterson had no duty to inform Leupp of a right to refuse consent.

Viewing the totality of the circumstances the evidence indicates that Leupp's consent was voluntary.

Peterson clearly did not exceed the scope of Leupp's consent. He asked permission to enter to "look around" for someone who might be injured, someone linked to the 911 call. No such person was visible in the living room. Peterson specifically mentioned checking the "back room." Apart from the officer's right to follow Frost in the interests of self-protection in case she was trying to retrieve a weapon, Peterson had a right to pursue the express purpose for obtaining consent, i.e., to check for someone who might be injured.

3) Staleness of PC/Delay in execution of search warrant

Finally, Leupp raises a common complaint, that the warrant had become stale by the time it was served on July 18, 1997 - 10 days after being issued. The warrant directed the officers to execute it within 10 days. Leupp's complaint is not that the officer recited stale facts, but that the warrant was not served expeditiously.

Because Leupp raises this issue for the first time on appeal, we need consider it only if it is an issue of manifest constitutional error. Leupp does not satisfy this standard. The issue implicates a court rule, not manifest constitutional error.

CrR 2.3(c) provides that a warrant "shall command the officer to search, within a specified period of time not to exceed 10 days" The Supreme Court considered this rule in State v. Thomas, 121 Wn.2d 504 (1993) [**Aug 93 LED:22**], where the warrant similarly directed the officers to search a residence "within 10 days of this date." The Supreme Court, while noting that "a delay in execution may render a warrant invalid if probable cause no longer exists at the time the warrant is executed," approved the rule's 10-day execution period. In light of Thomas, the warrant's command to search within 10 days of issuance did not violate CrR 2.3(c), and execution of the warrant on the tenth day was proper.

(Some citations omitted)

LED EDITOR'S COMMENT RE LEUPP COURT'S FERRIER CONSENT SEARCH ANALYSIS:
On September 9, 1999 the Washington Supreme Court issued a decision consistent with the Leupp Court's Ferrier analysis. See our "Next Month" digest entry below at page 21.

STATE WINS ON OPEN VIEW, AUTOMATIC STANDING, PHOTO MONTAGE ISSUES

State v. Bobic, 94 Wn. App. 702 (Div. I, 1999)

Facts and Proceedings:

Mihai Bobic and Igor Stepchuk were charged with various crimes arising from an alleged conspiracy to steal and strip vehicles, to repurchase the abandoned vehicle hulks from insurance company auctions, and then to reassemble and sell the vehicles. Bobic was convicted of conspiracy to commit first degree theft, conspiracy to commit first degree possession of stolen property, conspiracy to commit first degree trafficking in stolen property, and six of eight counts of first degree possession of stolen property. Stepchuk was also convicted on the three conspiracy counts and five of eight counts of possession of stolen property.

Bobic appeals the denial of his motion to suppress evidence seized in a storage unit rented to a third person. The detective observed the contents of the storage unit from an adjacent unit through a small hole in the wall. Bobic contends that the trial court improperly concluded that he did not have standing to challenge the search and that he did not have an expectation to privacy.

Bobic also appeals the court's denial of his motion to suppress identifications based on two photo montages. One montage consisted only of six photos: one photo of Bobic and five of his alleged co-conspirators. The other included his photo with those of two co-conspirators and three other individuals. Bobic contends that the montages were impermissibly suggestive.

ISSUES AND RULINGS: 1) Does Bobic have automatic standing to challenge the officer's observation of Bobic's storage locker? (ANSWER: Yes); 2) Was the officer's observation of the interior of Bobic's storage unit by standing in an adjoining unit and looking through a preexisting hole in the wall an "open view" non-search? (ANSWER: Yes); 3) Assuming that the photo montage used by police was impermissibly suggestive, should the identification testimony have been suppressed based on a substantial likelihood of irreparable misidentification, and therefore a violation of constitutional "due process" requirements? (ANSWER: No, the evidence does not support finding a constitutional "due process" violation)

Result: Affirmance of King County Superior Court convictions of Mihai Bobic and Igor Stepchuk (multiple counts) but reversal of sentencing on issue not addressed in this LED entry; remanded for re-sentencing. Status: The State Supreme Court accepted a petition for review on August 31, 1999; oral argument in the Supreme Court is likely to be set in the spring of 2000.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1)/(2) Automatic Standing/Open View

The automatic standing doctrine grants to persons charged with a possessory crime standing to challenge the constitutionality of a search or seizure. Bobic contends that the court erred in holding that he did not have standing to challenge a warrantless search of a storage locker leased to a third party on his behalf. While the automatic standing doctrine remains viable in Washington, the detective's actions in this case did not amount to a "search" within the scope of the Fourth Amendment or article I, section 7 of the Washington Constitution. As we may uphold the trial court's ruling on any basis supported by the record, we affirm, holding that no constitutional violation occurred.

The United States Supreme Court abandoned the automatic standing doctrine as a matter of federal constitutional law in United States v. Salvucci, based on an earlier ruling that a defendant's pretrial testimony cannot be used as substantive evidence at trial. The Washington Supreme Court declined to follow Salvucci in the plurality opinion of State v. Simpson, and further in State v. Carter [**127 Wn. 2d 836 (1995) Jan 96 LED:07**]. Thus, the automatic standing doctrine is still alive in Washington.

Bobic clearly has automatic standing to challenge a "search" of the storage locker in question. But where, as here, " " a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, ... [t]he object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution." ' ' " In other words, the officer's observations do not constitute a search because the object under observation is deemed to be in "open view."

The detective in this case observed the contents of the storage unit in question by standing in an adjacent unit and looking through a hole in a common wall. The owner of the storage facility provided access to the storage unit from which the detective made the observations. From the record and the briefs, it appears that the detective's method of observation was neither extraordinary nor invasive, as the contents of the storage unit could be viewed through the hole by the owner or manager of the facility, or by anyone renting or using the unit from which the observation was made. Under the open view doctrine, the fact that the officer was at the location where the observation takes place solely to look for evidence of a crime is immaterial. For these reasons, we conclude that the detective's observations, which provided the basis for the search warrant, violated no constitutional right, and the court properly denied Bobic's suppression motion.

(3) Photo ID and "DUE PROCESS"

Bobic argues that the two photo montages used for pretrial identification were impermissibly suggestive because one montage only included Bobic and five others who all were uncharged co-conspirators in a car theft ring, and the other included Bobic and two co-conspirators along with three other individuals. In order to prevail, Bobic must demonstrate not only that the procedure was impermissibly suggestive, but also, under the totality of circumstances, that the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." We hold that, **assuming arguendo the montages were impermissibly suggestive**, there was no substantial likelihood of irreparable misidentification.

Factors considered in determining whether an identification procedure creates a likelihood of irreparable misidentification **[and therefore violates constitutional due process protections – LED Ed.]** include: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." Our review of the record, and in light of the trial court's evaluation of these factors and the lack of argument that the in-court identifications were unreliable, we conclude that Bobic's due process rights were not violated.

[Some citations omitted; bolding added]

LED EDITOR'S NOTE RE PHOTO ID ISSUE: While the State's case was not harmed by the questionable ID procedures used in Bobic, as well as the Eacret case which follows in this LED, we think officers should avoid putting photos of more than one suspect in any given photo ID montage (or putting more than one suspect in any given lineup). While such usage might survive the minimal scrutiny of a "due process" challenge, it can hurt the State's case with the jury. Defense attorneys may be able to make insinuations in this circumstance which may create "reasonable doubt" in a juror. We recently wrote a training article on identification procedures. Contact us at [johnw1@atg.wa.gov] if you want us to e-mail you a copy of the article.

PHOTO MONTAGE INCLUDING PICTURES OF ALL THREE SUSPECTS AMONG THE EIGHT PERSONS DEPICTED HELD NOT IMPERMISSIBLY SUGGESTIVE

State v. Eacret, 94 Wn. App. 282 (Div. I, 1999)

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

After speaking with several witnesses and the defendants [to an assault], a police officer constructed an eight-photograph montage that included photos of Paul, Kevin, and Barry Eacret. Each photo was black and white and came from the state Department of Licensing records. The officer showed the montage to the victim, the victim's friend, and a third witness. The victim and his friend chose photos of Paul, Kevin and Barry as depicting the assailants. The third witness picked photos of Paul and Kevin.

Paul moved to suppress the montage because it included photos of all three Eacrets in the same array. He also argued that the photos did not depict similar-looking people, the photos of Paul and Kevin were clearer than the others, and Paul was older than the other individuals depicted.

The trial court agreed that the photos of Paul and Kevin were clearer and that the array did not consist of similar-looking men. The court also questioned whether including photos of each alleged assailant in the same montage was proper. But the court found that the montage did not unduly highlight the defendants' photos and was not impermissibly suggestive.

ISSUES AND RULINGS: Did the inclusion in one photo montage of all three suspected assailants make the procedure impermissibly suggestive in that this method unfairly reduced the chance that a witness would pick someone other than an alleged participant? (**ANSWER:** No) **Result:** Affirmance of King County Superior Court convictions of David Paul Eacret and Kevin Stewart Eacret for second degree assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Paul's only challenge to the court's admission of the identification evidence is the inclusion of photos depicting each of the three alleged assailants in the same montage. An out-of-court photographic identification meets due process requirements if it is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Minor differences in the photos are not suggestive enough to warrant further inquiry into the likelihood of misidentification. [*Court's Footnote: See, e.g., State v. Hendrix, 50 Wn. App. 510, (1988) (defendant's photo only one with tiny number in corner); State v. Weddel, 29 Wn. App. 461 (1981) (defendant's photo one-quarter of an inch larger and with unique background).*] When there is no evidence of suggestiveness in the photographic identification procedure, the inquiry ends; in such a case, any uncertainty or inconsistency in identification testimony goes only to its weight, not to its admissibility.

Here, Paul provides no authority to support his contention that inclusion of multiple defendants rendered the montage impermissibly suggestive. In fact, the contrary was found in similar cases. [*State v. Smith, 9 Wn. App. 279 (1973) (no impermissible suggestiveness where three of eleven photos larger and two of those three were of defendant); United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970) (fact seven of fourteen photos were of defendants did not render procedure impermissibly suggestive).*] After our own review of the montage, we find nothing that unduly attracts attention to Paul's photo. Inclusion of the photos of Kevin and Barry did not increase the 1:8 ratio of Paul's photo to the other photos any more than would two photos of people unrelated to the assault. Stated differently, while inclusion increased the chances that a witness would choose one of the three suspects rather than a non-suspect, it did not make it more likely that Paul's photo would be the one chosen. For these reasons, we reject Paul's argument and affirm his conviction.

[Some citations omitted]

LED EDITOR'S NOTE: See "LED Editor's Comment" re Bobic case above at page 10 of this LED.

5-TO-10-SECOND WAIT SUFFICIENT ON "KNOCK AND ANNOUNCE" ISSUE; ALSO, MIRANDA WAIVER IMPLIED, BUT DEADLY WEAPON SENTENCE ENHANCEMENT VOIDED

State v. Johnson, 94 Wn. App. 882 (Div. I, 1999)

ISSUES AND RULINGS: (Excerpted from Court of Appeals opinion)

On August 11, 1994, at 7:45 p.m., Detective Howard Gordon and several other police officers executed a search warrant on Johnson's Burien apartment which he shared with Ethel Washington. Detective Gordon testified that he knocked on the door and announced "King County police with a search warrant." He then waited a couple of seconds and repeated the announcement. He did not recall if he demanded that the occupants open the door. When he heard movement on the other side of the door, he "felt the individuals in the apartment were either destroying evidence or possibly arming themselves," so he instructed Detective Gaddy to force the door open. Once inside, Detective Gordon saw Johnson running from the living room toward the bathroom and Washington running toward the bedroom. He followed Washington into the bedroom and saw her throw an object, later identified as a plate, out the bedroom window. The plate

contained heroin residue. The officers also found balloons in the bedroom that appeared to contain heroin. Miriam Parangot of the Washington State Patrol crime lab confirmed that the substance found in the balloon, and in a plastic bag, was heroin. In addition, police discovered a safe inside the apartment which contained bundles of cash totaling \$8,034, along with several watches, rings, and bracelets.

Detective Glenn Edmondson also testified that there were two knocks and announcements of police presence, and that approximately 10 seconds passed between the first knock and the forcible entry. He was unsure whether any movement occurred in the apartment before they entered. When he entered the apartment, he saw Johnson standing between the bathroom and living room. He "pulled him from the hallway into the living room ... put him down on the floor ... and advised him of his constitutional rights." After Detective Edmondson read Johnson his Miranda rights and he "indicated he understood those rights," he moved Johnson to a table between the living room and the dining room. Soon after, an officer brought Washington into the living room, and Detective Gordon read them both their rights. After stating again that he understood his rights, Johnson told the police to leave Washington alone because she "didn't have anything to do with it."

Detective Edmondson then asked Johnson if there were any weapons in the residence, and Johnson replied that there was one in the "book case," by which he meant the coffee table in front of the couch. The coffee table had two doors that opened onto a space underneath where books or magazines could be stored. The gun was inside the enclosed area on top of a pile of magazines. At the time, Johnson was handcuffed and seated between the living room and the dining room, and the gun was five to six feet away from where he was sitting.

The State charged Johnson with two VUCSA violations, each count alleging that he was armed with a deadly weapon at the time of the crime. The jury found that Johnson was armed and convicted him of one count of possession of heroin with intent to deliver and one count of possession of cocaine.

ISSUES AND RULINGS: 1) Did the officers wait a reasonable period of time, following their knock and announcement, before forcing entry into house? (ANSWER: Yes, once the officers heard the scurrying noises, forcible entry was justified); 2) Was the gun accessible to Johnson, justifying the deadly weapon enhancement? (ANSWER: No); 3) Did Johnson impliedly waive his Miranda rights? (ANSWER: Yes); 4) Did the trial court err in admitting the \$8,034 in currency found in Johnson's safe? (ANSWER: No).

Result: Affirmance of King County Superior Court conviction of Matthew Danny Johnson for two VUCSA violations; reversal of "armed with a deadly weapon" sentence enhancement.

ANALYSIS:

1) Reasonable wait time

In part, the analysis of the Court of Appeals on the "knock and announce" issue is as follows:

Johnson first contends that the police conducted an illegal search of his home because they did not wait a reasonable time after knocking and announcing their presence before forcibly entering his apartment. Absent exigent circumstances, RCW 10.31.040 requires officers executing a search warrant to knock, announce their identity and purpose, demand admittance, and give the occupants a reasonable time to voluntarily admit them. Failure to comply with the "knock and announce" rule renders the entry illegal, and any evidence seized during the search inadmissible. A police officer who identifies himself and announces that he has a search warrant has implicitly demanded admission. Because it is undisputed that the officers identified themselves and stated they had a search warrant, the issue is whether the officers waited a sufficient time between the announcement and the forced entry.

The trial court found that Detective Gordon waited from five to ten seconds after announcing his presence and purpose before knocking again and repeating the announcement. The court also found that Detective Gordon heard quick movement or rapid scurrying inside the apartment which did not sound like people were moving toward the door, and that the officers had reason to believe that the occupants may have been

trying to discard evidence. While slightly conflicting testimony was offered on each of these points, substantial evidence supports the trial court's findings. We also defer to the trial court's resolution of factual issues because it sits "closest to the trial scene and [is] thus afforded the best opportunity to evaluate contradictory testimony."

Whether an officer waited a reasonable time before using force to enter a residence depends on the circumstances of the case. To determine whether police officers have complied with the "knock and announce" rule, the trial court must decide whether, before the nonconsensual entry, the officers' conduct effectuated the purposes of the rule. They are (1) to reduce the potential for violence to both occupants and police; (2) to prevent unnecessary destruction of property; and (3) to protect the occupants' right to privacy. But the right of privacy is severely limited when the police have satisfied the Fourth Amendment's probable cause and warrant requirements, as the officers did in this case, and destruction of property is permitted when necessary. Suspicious noises and the possibility that evidence is being destroyed are factors courts have looked at to determine whether there was sufficient time between announcement and entry to comply with the knock and announce rule.

[Citations omitted]

2) Deadly weapon enhancement of sentence

The Court of Appeals first explains the law generally applicable to deadly weapon sentence enhancement:

RCW 9.94A.125 authorizes sentence enhancement whenever a defendant or an accomplice is armed with a deadly weapon during the commission of an offense. People are entitled to have weapons at home, and the State cannot use the fact of possession against that person in a trial for an unrelated crime. But the right to bear arms is subject to reasonable regulation and does not apply to one who is in the process of committing a crime. A person is "armed" if "a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." But a person is not armed simply because a weapon is present during the commission of a crime; there must be some nexus between the defendant and the weapon. Whether a person is armed is a mixed question of law and fact which we review de novo.

[Footnotes and citations omitted]

After extended discussion of what the Johnson Court characterizes as conflicting Washington case law regarding deadly weapon sentence enhancement, the Johnson Court concludes:

In these cases, the deadly weapon enhancement should only be applied where it furthers its intended purpose of enhancing officer safety during Fourth Amendment searches and seizures. The Sabala court recognized that even if a defendant is not technically armed, a weapon intentionally positioned to provide easy access still poses a threat. The Taylor court later observed that regardless of whether it was intentionally accessible, a weapon's close proximity to the defendant can support the enhancement because it serves the same purpose. It follows that if the defendant is not near his weapon when an officer discovers a crime, the purposes of the deadly weapon sentence enhancement are not implicated.

In our view, ... absolute prohibition on weapon possession by one who commits a crime on the premises where a weapon is located was not what the Legislature intended when it enacted the deadly weapon sentence enhancement. Because Johnson was handcuffed and the gun was well outside his reach, the gun was not easily accessible and the required nexus between the crime and the weapon was absent. These facts do not support the deadly weapon sentence enhancement, and it is reversed.

[Some text, footnotes and citations omitted]

3) Implied Miranda Waiver

In support of its conclusion that Johnson impliedly waived his Miranda rights, the Johnson Court's analysis is as follows:

The issue, then, is whether Detective Edmondson's failure to read Johnson the waiver portion of the Miranda warning violated his constitutional rights and should have caused

the handgun evidence to be suppressed. As previously noted, Johnson acknowledged that he understood his rights, and then volunteered that Washington "didn't have anything to do with it." In State v. Gross, 23 Wn. App. 319 (1979) this court considered the same issue. When the police read the defendant his Miranda warnings, but did not ask him if he wished to waive his rights, the court held that the defendant's assertion that he understood his rights, followed by his volunteering information, reflected a knowing and intelligent waiver. We reach the same conclusion here.

[Footnotes, some citations omitted]

4) Admission of currency evidence to show "intent to deliver"

Affirming on the admissibility of the \$8,034 in currency, the Johnson Court explains:

Finally, Johnson contends that the trial court erred in admitting evidence of the large sum of money found in a safe in his apartment to support the inference that he intended to deliver drugs. A trial court's decision to admit evidence is reviewed for abuse of discretion. The court said it admitted this evidence because "large volumes of money tends [sic] to show an intent to deliver." The court was correct that the crime of possession with intent to deliver is usually proved with circumstantial evidence. And Washington courts consistently hold that possession of a large amount of cash is circumstantial evidence of intent to deliver. Thus, the trial court's decision was consistent with Washington law.

LED EDITOR'S COMMENT REGARDING MIRANDA IMPLIED WAIVER ISSUE: Even though the courts should find an implied waiver of Miranda rights under appropriate factual circumstances, officers are urged not to rely on this possibility. Officers should always try to get express acknowledgement from the Mirandized suspect that he or she understands the rights and is willing to talk.

FAILURE TO TWICE BLOW SUFFICIENT AIR INTO BAC DEVICE WAS A "REFUSAL"

Rockwell v. DOL, 94 Wn. App. 531 (Div. III, 1999)

Facts: (Excerpted from Court of Appeals opinion)

At approximately 11:57 p.m. on May 5, 1991, Mr. Rockwell was arrested by Moses Lake Police Officer Victor Serna for driving while under the influence of intoxicating liquor. At the time of the arrest, Officer Serna had reasonable grounds to believe Mr. Rockwell was driving under the influence. The officer's belief was based on Mr. Rockwell's erratic driving, poor performance and lack of coordination on the roadside test, a smell of intoxicants on his person, and his admission that he had been drinking.

Officer Serna took Mr. Rockwell into custody and advised him of his rights under RCW 46.20.308 and of the consequences of refusing to submit to a breath or blood test. The officer read Mr. Rockwell his implied consent and Miranda rights, and Mr. Rockwell acknowledged he understood those rights. Officer Serna asked Mr. Rockwell to submit to a breath test. Although Mr. Rockwell placed his mouth over the mouthpiece four or five times, and on at least one occasion gave the appearance of blowing, he did not expel enough air to register two test samples. During Mr. Rockwell's failed attempts at blowing air into the clear mouthpiece, no condensation showed in it. Condensation normally appears in the mouthpiece when a valid sample is given. **[Mr. Rockwell was able to produce one sample, as the Court of Appeals discusses below in its "Analysis." -- LED Ed.]**

Mr. Rockwell never mentioned to Officer Serna that he had any breathing problem or difficulty. At trial, Mr. Rockwell submitted medical evidence indicating that in August 1992 his physician advised him he suffered from several different physical conditions and ailments, including the early stages of emphysema. The physician did not recommend any course of treatment other than to stop smoking. In February 1995, Mr. Rockwell provided spirometry tests that demonstrated mild restriction of his lung capacity. However, Mr. Rockwell did not present any medical evidence that would tend to demonstrate that the diagnosis and test results following his arrest on May 5, 1991 would have any effect on his ability to provide a breath sample on the Blood Alcohol Content

(BAC) machine on that date. Also, there was insufficient medical evidence in the record to indicate how severe or restrictive Mr. Rockwell's lung condition was.

Officer Serna submitted to the Department of Licensing a report of Mr. Rockwell's refusal to take a test. The Department then revoked his license, and he appealed to the superior court.

Based upon these findings, the superior court concluded the Department had established by a preponderance of the evidence that Mr. Rockwell refused the breath test. The court further concluded that Mr. Rockwell failed to prove by a preponderance of the evidence that he was physically incapable of taking the breath test. The court concluded the Department's order of revocation was lawful under RCW 46.20.308.

ISSUE AND RULING: Did Rockwell's failure to produce two BAC test samples constitute a refusal of testing? (ANSWER: Yes) Result: Affirmance of Grant County Superior Court order upholding DOL's revocation of William Michael Rockwell's driver's license.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A driver is deemed to have refused a breath test if he refuses to comply with testing procedures. Whether a driver has refused a blood/alcohol test by refusing to comply with the testing procedure is a question of fact.

Absent a showing of impossibility of compliance, a person's failure to blow enough air into the breathalyzer machine to cause it to operate is a nonverbal act amounting to a refusal. The burden of proof shifts to the driver to present evidence excusing his inability to comply.

It is undisputed here that two samples are required to have a valid breath test. Mr. Rockwell gave only one reading, so there was no valid test. The question presented is whether the court correctly determined Mr. Rockwell's failure to blow enough air into the machine to give a second reading is tantamount to a refusal. The court essentially found from the testimony that Mr. Rockwell was not really blowing into the machine at all, as evidenced by the lack of condensation in the mouthpiece.

The court's findings that Mr. Rockwell failed to show any restriction of lung capacity or evidence of any medical condition that prevented him from performing the breath test are all supported by substantial evidence. He did not mention any breathing problem to the officer, and at trial he failed to establish any medical reason why he could not perform. The court thus found, with ample support in the evidence, that Mr. Rockwell was really refusing to take the test.

Mr. Rockwell argues it is undisputed that no air escaped from his mouth or nose when he was trying to give the sample and that if he was holding his breath he would have had to have done so for a period of two to five minutes. Mr. Rockwell mischaracterizes the testimony. Officer Serna actually testified nothing would have prevented Mr. Rockwell from holding his mouth over the machine's mouthpiece and at the same time breathing through his nose. The officer believed Mr. Rockwell was definitely holding his breath, but did not know if he was breathing through his nose. However, the officer made no concession that Mr. Rockwell was not breathing through his nose. Officer Serna also did not testify that Mr. Rockwell held his breath for five or four or even three minutes. The machine is self-timed to run a two-minute test.

Nonetheless, Officer Serna testified Mr. Rockwell gave the appearance of faking. The specific actions that caused Officer Serna to believe so were that Mr. Rockwell put his mouth on the mouthpiece and puffed up his cheeks and was just pretending he was blowing air because the mouthpiece did not fog up. Also, the machine indicated it was receiving no air and there was no reason to believe anything was wrong with the machine. The objective facts justify a reasonable belief that Mr. Rockwell was faking.

Mr. Rockwell further argues that Officer Serna performed an unauthorized hand-blown breath test to determine Mr. Rockwell's capabilities. Officer Serna showed him how to blow into the machine by blowing on his palm and having Mr. Rockwell do the same to him. This is a standard technique taught at the academy. It was after this demonstration that Mr. Rockwell gave the one valid reading. By doing this, Officer Serna did not

incorporate any extraneous activity into the prescribed testing procedures. The same is true for the presence or not of condensation in the mouthpiece. Officer Serna testified that condensation is typically seen when a person is blowing into the mouthpiece and that he did not see any on this occasion. This evidence is an observation that is a matter of weight of the trier of fact to consider when evaluating the objective facts.

Mr. Rockwell did not blow enough air into the machine to cause it to operate. Under Woolman [Woolman v. DMV, 15 Wn. App. 115 (1976)], this was a refusal. The burden then shifted to Mr. Rockwell to prove by a preponderance of the evidence an excuse for his noncompliance. The court rejected his excuses; he failed to carry his burden.

Once a driver refuses a test, that refusal cannot be rescinded. Therefore, when Mr. Rockwell refused the breath test, Officer Serna was not required to offer a blood test.

The record supports the superior court's order affirming the revocation. We affirm the superior court's order.

[Some footnotes and citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) IN CIVIL SUIT OVER ARREST, COURT HOLDS POSSIBILITY OF SELF DEFENSE CLAIM IS GENERALLY NOT AN ELEMENT OF PROBABLE CAUSE TO ARREST – In McBride v. Walla Walla, 95 Wn. App. 33 (Div. III, 1999), the Court of Appeals rules on a civil liability question. The McBride Court rules that the possibility that a citizen will be able to justify as self defense the use of force against another citizen does not generally enter into an officer's determination of probable cause to arrest.

The McBride case involved an officer's arrest of a father who broke his 18-year-old son's jaw with a punch. Prior to his arrest, the father claimed self defense to the officer. The prosecutor filed charges but then dropped the charges within several days based on the father's claim of self defense. Mr. McBride then sued the police for not taking his claim of self defense into account in their probable cause determination. The McBride Court explains as follows why this lawsuit of Mr. McBride must be dismissed:

Self-defense is an affirmative defense which can be asserted to render an otherwise unlawful act lawful. But the arresting officer does not make this determination. The officer is not judge or jury; he does not decide if the legal standard of self-defense is met. Moreover, Officer Bolster was unable to speak with Bryan at the time of the arrest. He only had one side of the story. Mr. McBride's claim of self-defense was then a mere assertion, not fact. The self-defense claim did not vitiate probable cause and the officer had a mandatory duty to arrest pursuant to the Domestic Violence Protection Act. The court did not err by granting the County's motion for summary judgment.

Result: Affirmance of Walla Walla County Superior Court summary judgment order dismissing lawsuit of Robert McBride against the County of Walla Walla.

(2) SELF DEFENSE RULE LIMITING RESPONSIVE ASSAULTS ON LAW ENFORCEMENT OFFICERS LIMITS SUCH ASSAULTS ON CORRECTIONAL OFFICERS TOO -- In State v. Bradley, ___ Wn. App. ___ (Div. I, 1999) [980 P.2d 235], the Court of Appeals rules in a criminal case that the common law rule restricting a citizen's assault on a law enforcement officer purportedly in "self defense" also applies where the assault is by a prisoner against a correctional officer.

The Bradley Court summarizes as follows the basic difference between the self defense theory where: a) it is asserted in an ordinary assault case and b) it is asserted in a case of assault on a law enforcement officer:

When the victim is not a law enforcement officer, the standard for self-defense contains both subjective and objective components. The jury is called upon to evaluate whether the defendant had a reasonable belief in imminent danger in light of all the defendant knew and saw at that time. In such cases, actual imminent danger is not required.

However, Washington cases have held that a reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer engaged in performance of official duties. State v. Valentine, 132 Wn.2d 1 (1997) [**Aug 97 LED:16**]. "An arrestee's resistance of excessive force by a known police officer,

effecting a lawful arrest, is justified only if he was actually about to be seriously injured.” The stricter self-defense standard is in place to protect correctional officers and third parties from the dangers of physical violence related to arrests.

[Most citations omitted]

The Bradley Court indicates that the reasons for a civilized society having a restricted self defense rule for assaults on law enforcement officers are also applicable to assaults on correctional officers.

Result: Affirmance of King County Superior Court conviction of Alonzo Bradley for custodial assault.

(3) IN BAC TESTING PROCESS, OFFICERS MUST ACTUALLY WATCH THE DUI ARRESTEE FOR THE 15-MINUTE OBSERVATION PERIOD [AND ADMINISTRATIVE LAW JUDGE MUST SO FIND WHERE ISSUE RAISED] – In Walk v. DOL, 95 Wn. App. 653 (Div. III, 1999), the Court of Appeals reverses a trial court decision upholding BAC testing of a DUI arrestee.

Larry Walk was arrested for DUI. The arresting officer took Walk to the police station. The arresting officer checked Walk’s mouth for foreign substances and then watched him for 20-plus minutes, ensuring that Walk did not eat, drink, smoke, or vomit during that time. Another officer then arrived at the station to administer the BAC test. Walk blew a 0.144 and a 0.148.

When DOL ordered Walk to obtain a probationary license, he sought review. Walk lost the DOL administrative hearing, and the superior court later affirmed that decision. However, the Court of Appeals has reversed the DOL order, because the administrative law judge failed to make a key finding of fact.

WAC 448-13-040 provides as follows for administration of breath test on the BAC Verifier DataMaster:

The following method for performing a breath test is approved by the state toxicologist pursuant to WAC 448-13-130 and includes the following safeguards to be observed by the operator prior to the test being performed. It must be determined that: 1) The person does not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test; and 2) the subject does not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen minute observation period. Such determination shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substance in mouth.

The Walk Court declares that, to prove compliance with WAC 448-13-040, the State must prove that an officer or officers watched, individually or in combination, the arrestee continuously throughout the 15-minute observation period. While that may have occurred in this case, the DOL administrative law judge failed to make a finding to that effect. Accordingly, the Court of Appeals sets aside DOL’s order that Walk obtain a probationary driver’s license.

Result: Reversal of Kittitas County Superior Court order which had affirmed DOL’s order that Larry Clinton Walk obtain a probationary driver’s license.

(4) DELAY IN GETTING PRINTOUT FROM BAC MACHINE DOES NOT INVALIDATE BAC TEST – In City of Mount Vernon v. Mount Vernon Municipal Court, 93 Wn. App. 501 (Div. I, 1998), the Court of Appeals rules that WAC 448-13-050, which prescribes the protocol for performing a breath alcohol test using a BAC Verifier DataMaster, does not necessarily require that the test results be printed out immediately after the test is completed.

In the City of Mount Vernon case, at the conclusion of testing, the BAC machine had failed to eject a ticket reflecting the results of the breath test on a DUI arrestee, Kathryn McEuen. The WSP DataMaster technician was called, and he arrived several hours later. The technician was able to get the machine to eject a ticket with readings of .170 and .174 on Kathryn McEuen. Interpreting the requirement of WAC 448-13-050 that the printout be made “on” completion of testing, the Court of Appeals holds that the delay in getting the printout did not invalidate the test. Because the evidence showed a logical and sequential connection between the printout and the completion of the test, the statutory requirement was met.

Result: Reversal of Skagit County Superior Court order which had upheld a Mount Vernon Municipal Court order suppressing the results of the BAC test; case remanded to Mount Vernon Municipal Court for trial of Kathryn McEuen.

(5) DOL LICENSE REVOCATION UPHELD DESPITE OFFICER’S FAILURE TO SEND REPORT OF BREATH TEST REFUSAL TO DOL WITHIN 72 HOURS OF REFUSAL PER IMPLIED CONSENT STATUTE – In Frank v. DOL, 94 Wn. App. 306 (Div. III, 1999), the Court of Appeals rules that, while the

requirement of the implied consent law that a law enforcement officer make and send a sworn report of a DUI arrestee's refusal of a breath alcohol content test to DOL is jurisdictional, the requirement of RCW 46.20.308(6) that the officer do so within 72 hours is not jurisdictional.

An officer lawfully arrested Lee Frank on PC for DUI. The officer gave Frank all necessary implied consent warnings at the stationhouse. Frank refused a breath test, and the officer made out a sworn report of that fact. Unfortunately, DOL did not receive the report until 10 days after the date of the arrest, and there was no date stamp to show the date of the officer's mailing of the sworn report.

No matter, rules the Court of Appeals. While RCW 46.20.308(6) does specify that the report "shall" be sent to DOL within 72 hours, this requirement is not jurisdictional. The 72-hour requirement was intended by the Legislature to benefit DOL, not the DUI arrestee, the Frank Court declares. Accordingly, the apparent failure in this case of the officer to meet the 72-hour requirement did not affect the revocation process.

Result: Affirmance of Yakima County Superior Court order upholding DOL's revocation of Frank's license to drive.

(6) ABBREVIATION AS TO "PLACE SIGNED" ON IMPLIED CONSENT FORM IS MERE TECHNICAL DEFECT; DEPARTMENT OF LICENSING HAD JURISDICTION TO REVOKE DRIVER'S LICENSE – In Veranth v. DOL, 91 Wn. App 339 (Div. I, 1998), the Court of Appeals rules that DOL did not lack jurisdiction to revoke Michael Veranth's driver's license where officers making out a "Report of Refusal" used an abbreviated place name on their sworn statement about the arrestee's refusal to take a breath test. The Court of Appeals rules that "SPD N. PCT" was a sufficient abbreviation for "Seattle Police Department North Precinct" in the context of the report at issue.

Result: Reversal of King County Superior Court order which had reversed DOL revocation of driver's license of Veranth; thus DOL's revocation order is reinstated.

(7) SHOOTING GUN FROM ONE MOVING VEHICLE AT ANOTHER MOTOR VEHICLE SUPPORTS 1ST DEGREE MURDER CONVICTION PER "EXTREME INDIFFERENCE" VARIATION OF CRIME – In State v. Pastrana, 94 Wn. App. 463 (Div. II, 1999), the Court of Appeals rejects defendant's challenge to the sufficiency of the evidence to support his conviction for first degree murder by extreme indifference.

In a fit of "road rage," Pastrana grabbed a gun, reached across the face of his girlfriend-passenger, and fired through the open front-seat passenger window at another vehicle. The shot hit and killed one of the three occupants of the other vehicle. Defendant was charged with and convicted of first degree murder by extreme indifference. RCW 9A.32.030(1)(b). On appeal, he argued that the Washington precedents on "extreme indifference" murder hold that the statute does not apply where the perpetrator's assault is directed at a specific victim. The Court of Appeals rejects this argument under the following analysis:

Pastrana argues that he did not violate RCW 9A.32.030(1)(b) because his conduct was directed at a specific victim, the driver of the other car. And, continues Pastrana, "where the act causing a person's death was specifically aimed at and inflicted upon that particular person and none other, the perpetrator of the act cannot properly be convicted of murder in the first degree under sub[section (b)]...." State v. Anderson, 94 Wn.2d 176 (1980) (subsection (b) not applicable where defendant immersed two-year-old stepdaughter in tub of scalding water causing death); State v. Berge, 25 Wn. App. 433, 1980) (defendant who shot sleeping victim did not exhibit manifest indifference to human life in general).

We recently held that the State could charge a defendant who shot at a moving vehicle containing only one person under RCW 9A.32.030(1)(b). Pettus, 89 Wn. App. 688 (1998). Pettus, like Pastrana, claimed not to be shooting at a specific victim, but rather at the victims' vehicle. But because the shooting took place in a residential neighborhood and placed many others at grave risk of death, we held that the statute applied.

Anderson and Berge are distinguishable because in each only the life of the victim was endangered. But here, as in Pettus, the bullet created a grave risk of death to others who were in the vicinity. In fact, Pastrana killed an unintended victim, Vargas. In addition, Pastrana jeopardized the life of Jesus Morales, Angel Morales, Tasha Deptula and other drivers and passengers on the crowded freeway. Accordingly, the evidence supports his conviction of first-degree murder by extreme indifference.

[Some citations omitted]

Result: Affirmance of Pierce County Superior Court conviction of Robert Nathaniel Pastrana on one count of first degree murder by extreme indifference and on two counts of reckless endangerment.

(8) JAILED DV VIOLATOR VIOLATES DV ORDER BY TELEPHONING VICTIM FROM JAIL – In State v. Rodman, 94 Wn. App. 930 (Div. I, 1999), the Court of Appeals rejects defendant’s argument that he should not have been convicted for violating a domestic violence no-contact order where he telephoned his domestic violence victim from jail.

Rodman asked the Court of Appeals to interpret RCW 10.99.040 in a manner that would require that the subject of a DV order have been released from custody at the time that any alleged violation of the DV order occurred. The Court of Appeals rejects the argument, holding that RCW 10.99.040(3) authorizes “issuance of any immediately enforceable no contact order whether the defendant is in custody or not.”

Result: Affirmance of King County Superior Court order which had reversed a King County District Court order dismissing charges against Lawrence Rodman; case remanded for trial.

(9) NO PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS WITH LICENSED NURSES – In State v. Vietz, 94 Wn. App. 870 (Div. II, 1999), the Court of Appeals holds that the privilege statute for registered nurses (chapter 5.62 RCW) does not apply to licensed practical nurses (LPN’s).

The facts of the Vietz case are described by the Court of Appeals as follows:

Vietz entered the emergency room of a hospital and told a LPN that he had something crawling in his blood. Because he was acting strangely, the LPN asked whether he was using drugs. He replied that he was and handed her a baggie of methamphetamine, saying, "I don't want this."

The statutory provision argued by defendant Vietz, RCW 5.62.020, provides in relevant part:

No registered nurse providing primary care or practicing under protocols, whether or not the physical presence or direct supervision of a physician is required, may be examined in a civil or criminal action as to any information acquired in attending a patient in the registered nurse's professional capacity, if the information was necessary to enable the registered nurse to act in that capacity for the patient, unless:

- (1) The patient consents to disclosure ... or
- (2) The information relates to the contemplation or execution of a crime in the future....

The Court of Appeals then explains the statutory scheme a little further:

The definition section of this chapter states that " 'registered nurse' means a registered nurse or advanced nurse practitioner licensed under chapter 18.79 RCW." RCW 5.62.010(1). RCW 18.79 describes various nursing classifications and sets forth different licensing requirements for registered nurses, RCW 18.79.040; advanced registered nurse practitioners, RCW 18.79.050; and licensed practical nurses, RCW 18.79.060. The category mentioned in RCW 5.62.010(1) of "advanced nurse practitioner" is not found in RCW 18.79.

The Court of Appeals then proceeds to analyze this statutory language in light of the legal presumption that privilege statutes are contrary to the common law and therefore are to be narrowly construed. The Vietz Court concludes that LPN’s are not included in the statutory privilege for RN’s.

Result: Affirmance of Pierce County Superior Court conviction of Stephen Allen Vietz for possession of a controlled substance.

NEXT MONTH—STATE SUPREME COURT LIMITS FERRIER

In the November 1999 LED, we will digest a September 9, 1999 Washington Supreme Court issued a decision which puts limits on its ruling last year in State v. Ferrier, 136 Wn.2d 103 (1998) Oct. 98 LED:02; Nov. 98 LED:20. Because this new decision in State v. Bustamonte-Davila (Supreme Court No. 67320-9) comes so close to our LED deadline, we are able to provide only a brief account of the decision this month. We will digest the decision in greater depth next month.

In State v. Ferrier, the State Supreme Court ruled on “independent grounds” under article 1, section 7 of the Washington Constitution that, where law enforcement officers go to a private residence and use a “knock and talk” consent procedure to search for contraband, the officers must advise the person from whom consent is requested of the “3-R’s” of consent rights; the right: (1) to refuse consent, (2) to retract the consent at any time, and (3) to restrict the scope of the search under the consent. Now, in a 5-4 ruling in State v. Bustamonte-Davila, the Court has held that the Ferrier rule does not apply to circumstances where officers go to a residence seeking consent to enter for purposes other than to search for contraband or evidence.

In Bustamonte-Davila, an INS agent had gone to defendant’s home with the intent to arrest him on a deportation order. The INS agent was accompanied by several county and city officers. Without advising defendant of his right to refuse consent or of the other Ferrier rights, and without advising defendant of the purpose of his visit, the INS agent asked defendant for permission to enter. Defendant consented to the entry. After the officers entered, they observed a rifle in “plain view.” At that point, the officers had probable cause to seize the rifle and arrest defendant, both because he was an illegal alien (firearms possession by an illegal alien is a violation of the federal statute at 18 U.S.C. sec. 922 (g)(5)), and because he had a felony record (firearms possession by a felon is a violation of the state statute at RCW 9.41.040). The Washington Supreme Court majority holds that the totality of the circumstances demonstrated that the consent to entry was valid, even though the Ferrier warnings were not given. And the seizure of the rifle was lawful under the “plain view” rule which permits officers to seize evidence or contraband which is in plain view while they are lawfully inside private premises.

SORRY ABOUT THE EYE STRAIN

As we try to deal with a backlog of court decisions, we will from time to time use smaller print size on some digest entries. We will strive to keep this practice to a minimum.

INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. One address provides just decisions which have been issued within the preceding 14 days [<http://www.wa.gov/courts/opinpage/recent.htm>]. Two other addresses provide more court information and also include decisions issued within the preceding 90 days [<http://www.wa.gov/courts/home/htm>] and [<http://www.wa.gov/courts/opinpage/home.htm>].

United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [<http://slc.leg.wa.gov/WACBYTitle.htm>]. Washington Legislation and other state government information can be accessed at [<http://access.wa.gov/>] clicking on “L” and then “legislation” or other topical entries in the “Access Washington Home Page “Index.”

The Law Enforcement Digest is edited by Senior Counsel, 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>]. Also available on the CJTC Home Page are five-year cumulative subject matter indexes for 1989-1993 and for 1994-1998.