



# Law Enforcement

August 2001

# Digest

## HONOR ROLL

### **530<sup>th</sup> Session, Basic Law Enforcement Academy – January 31<sup>st</sup> through June 7<sup>th</sup>, 2001**

President: David Terry - Seattle Police Department  
 Best Overall: Jennifer L. DeSmith - Washington State Gambling Commission  
 Best Academic: Christopher R. Johnson - Seattle Police Department  
 Best Firearms: Jason M. Stolt - Seattle Police Department  
 Tac Officer: Deputy Patrick McCurdy - King County Sheriff's Office

### **531<sup>st</sup> Session, Basic Law Enforcement Academy – February 27<sup>th</sup> through July 3<sup>rd</sup>, 2001**

President: Brian Thompson - Pierce County Sheriff's Office  
 Best Overall: Christopher R. Johnstone - Olympia Police Department  
 Best Academic: Christopher R. Johnstone - Olympia Police Department  
 Best Firearms: Carl M. Shanks - Pierce County Sheriff's Office  
 Tac Officer: Sergeant H.-J. Krenz - Auburn Police Department

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**CJTC INSTRUCTOR CERTIFICATION -- ATTENTION TO ALL INCUMBENT INSTRUCTORS**

The Instructor Certification Program (ICP) was approved and implemented by the Washington State Criminal Justice Training Commission (WSCJTC) in March 2001. The goal of ICP is to prepare a cadre of highly skilled trainers, ensure consistency in Commission training programs, and recognize achievement of education, training, and experience by instructors with demonstrated levels of competence.

If you are currently instructing for the WSCJTC, you need to apply for certification to maintain your status as an instructor. The deadlines for certification are as follows:

- BLEA and Telecommunicator Instructors - must be received by July 31, 2001
- Corrections Instructors - must be received by September 30, 2001
- Professional Development Division Instructors - must be received by December 31, 2001

For complete information regarding the ICP, please consult the WSCJTC website at <http://www.wa.gov/cjt>

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**2001 LEGISLATIVE UPDATE -- PART TWO**

**LED Introductory Notes:** This is Part Two of a two-part update of 2001 Washington legislative enactments of special interest to law enforcement. We tried to include in Part One in last month's July LED most of the significant enactments which take effect on or before July 22, 2001 (note that unless a different effective date is specified, enactments adopted during the regular session take effect on July 22, 2001, i.e., 90 days after the end of the regular session).

Consistent with our past practice, these updates for the most part do not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. At the end of Part Two is an index of enactments covered in the first two parts. It is still possible that there will be a

Part Three, but only if the Legislature adopts legislation of interest in its second special session in July. The text of the 2001 legislation is available on the Internet, chapter by chapter, at [[http://www.leg.wa.gov/pub/billinfo/2001-02/chapter\\_to\\_bill\\_table.htm](http://www.leg.wa.gov/pub/billinfo/2001-02/chapter_to_bill_table.htm)]

We have tried to incorporate RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

The editors of the LED remind our readers that any legal interpretations that we express in the LED are the views of the editors and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

**"BORDER AREA" INCLUDES "UNINCORPORATED AREA" UNDER FUNDING LAW**  
CHAPTER 8 (SSB 5015) Effective Date: July 22, 2001

Expands the definition of "border area" in chapter 66.08 RCW (dealing with distribution of funds to law enforcement for drug enforcement purposes) to include "unincorporated area(s)."

**EXPANDING VENUE FOR CIVIL BAD CHECK CASES**  
CHAPTER 45 (SSB 5241) Effective Date: July 22, 2001

Amends RCW 3.66.040 to allow a civil action on a bad check to be brought in any district: 1) in which the defendant resides, 2) in which the check was issued, or 3) in which the check was presented.

**NON-DISCLOSURE OF PERSONAL INFORMATION RE PUBLIC EMPLOYEES, VOLUNTEERS**  
CHAPTER 70 (HB 1002) Effective Date: July 22, 2001

Amends RCW 42.17.310 to clarify the exemption from public disclosure for residential addresses and phone number of public employees and volunteers.

**MILITARY LEAVE -- NON-CALENDAR YEAR**  
CHAPTER 71 (HB 1028) Effective Date: October 1, 2001

Amends RCW 38.40.060 to change from a calendar-year to an October 1 through September 30 schedule for counting the days of military leave which must be granted to public employees.

**COMMISSIONING RAILROAD POLICE**  
CHAPTER 72 (HB 1067) Effective Date: July 22, 2001

Amends several sections in chapter 81.60 RCW transferring the power to commission railroad police from the Governor to the Criminal Justice Training Commission.

**PUBLIC DISCLOSURE ACT EXEMPTION FOR TERRORISM RESPONSE PLANS**  
CHAPTER 98 (SSB 5255) Effective Date: July 22, 2001

Adds a new exemption to RCW 42.17.310 of the Public Disclosure Act to protect from disclosures, under certain specified circumstances, public agency plans for response to terrorist acts.

**MOTOR VEHICLE REGISTRATION -- WSP VIN INSPECTION PROGRAM ELIMINATED**

CHAPTER 125 (HB 2029)

Effective Date: July 1, 2001

Among other things, this bill eliminates the WSP VIN inspection requirement for registering vehicles coming from other jurisdictions.

**EMPLOYMENT RIGHTS OF MEMBERS OF RESERVE NATIONAL GUARD**

CHAPTER 133 (SSB 5263)

Effective Date: May 2, 2001

Makes a number of changes in chapter 73.16 RCW enhancing protections against discrimination and protection for re-employment for members of military reserve and national guard. The enforcement of these provisions is transferred from local prosecuting attorneys to the Washington Attorney General.

**EXPANDING SMALL CLAIMS COURT JURISDICTION**

CHAPTER 154 (SB 5389)

Effective Date: July 22, 2001

Amends RCW 12.40.010 to increase from \$2500 to \$4000 the amount that may be claimed in a "small claims" civil action.

**PROHIBITING SALE OF BABY FOOD AT SWAP MEETS**

CHAPTER 160 (ESB 5374)

Effective Date: July 22, 2001

Adds a new chapter to Title 19 RCW that makes it unlawful to sell baby food, infant formula or certain medications and medical devices at a swap meet, flea market, or similar commercial venture. The first violation is a misdemeanor; the second violation is a gross misdemeanor; and the third and subsequent violations are class C felonies.

**TRUANCY RECORD -- DELETION WHEN NO LONGER SUBJECT TO SCHOOL ATTENDANCE LAW**

CHAPTER 162 (SB 5393)

Effective Date: July 22, 2001

Amends RCW 13.50.100(3) to add the following provision:

However, truancy records associated with a juvenile who has no other case history, and records of a juvenile's parents who have no other case history, shall be removed from the judicial information system when the juvenile is no longer subject to the compulsory attendance laws in chapter 28A.225 RCW. A county clerk is not liable for unauthorized release of this data by persons or agencies not in his or her employ or otherwise subject to his or her control, nor is the county clerk liable for inaccurate or incomplete information collected from litigants or other persons required to provide identifying data pursuant to this section.

**UNIDENTIFIED HUMAN REMAINS -- SUBMISSION OF DENTAL RECORDS**

CHAPTER 172 (HB 1613)

Effective Date: July 22, 2001

Amends RCW 68.50.330 to impose a time limit (30 days from the date a body or unidentified human remains are found) on the requirement that a coroner or medical examiner send to WSP's dental ID system the dental records on an unidentified body or human remains.

**VOLUNTEER FIREFIGHTERS -- EMPLOYMENT PROTECTION**

CHAPTER 173 (ESHB 1420)

Effective Date: July 22, 2001

Adds a new section to chapter 49.12 RCW precluding an employer from discharging or disciplining a volunteer fire fighter because of leave taken by the fire fighter related to an emergency call.

**PROTECTION AGAINST CIVIL LIABILITY FOR VOLUNTEERS**

CHAPTER 209 (SHB 1642)

Effective Date: July 22, 2001

Adds a new section to chapter 4.24 RCW to provide qualified protection against civil liability for volunteers of non-profit organizations or governmental entities.

**NO SUSPENSION OF IGNITION INTERLOCK SENTENCE**

CHAPTER 247 (SSB 5558)

Effective Date: July 22, 2001

Amends RCW 46.20.720 to provide that a sentence requiring a person to drive only a motor vehicle equipped with an ignition interlock device may not be suspended.

**IN-HOUSE CONTROLLED PURCHASE PROGRAM FOR ALCOHOL-SELLING EMPLOYERS**

CHAPTER 295 (SB 5604)

Effective Date: July 22, 2001

Amends RCW 66.44.290 to create an exception to the age-21 liquor-purchase restriction, allowing employers to conduct "in-house controlled purchase programs" approved by the Liquor Control Board.

**BACKGROUND CHECKS AT STATE SCHOOLS FOR DEAF, BLIND**

CHAPTER 296 (ESSB 5606)

Effective Date: July 22, 2001

Among other things, this act requires background checks on certain types of employees at the state school for the deaf and state school for the blind.

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**YEAR 2001 WASHINGTON STATE LEGISLATIVE ENACTMENTS DIGESTED IN JULY AND AUGUST LED**

**ENACTMENTS DIGESTED IN JULY LED**

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The July 2001 LED also digested (at pages 17 and 18) chapter 115, Laws of 2000 (effective July 1, 2001) on intermediate drivers' licenses for drivers under age 18.

### **ENACTMENTS DIGESTED IN AUGUST LED**

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### **BRIEF NOTES FROM THE UNITED STATES SUPREME COURT**

(1) **THERMAL IMAGING OF RESIDENCE HELD TO REQUIRE SEARCH WARRANT UNDER FOURTH AMENDMENT** -- In Kyllo v. U.S., 121 S.Ct. 2038 (2001), the U.S. Supreme Court rules, 5-4, that the government's use of a thermal imaging device ("Thermovision imaging") aimed at a residence from a public street violates the Fourth Amendment of the U.S. Constitution.

The Kyllo majority opinion (somewhat surprisingly authored by conservative Justice Scalia) sums up the Court's self-described "bright line" standard as follows:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search -- at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in the case was the product of a search.

The majority opinion rejects the Government's argument that, because the device detects only heat radiating from the home's external surface, thermal imaging is not a search of the home. Such a mechanical view of Fourth Amendment protection, the Kyllo Court asserts, was rejected by the U.S. Supreme Court in its landmark decision in Katz v. U.S., 389 U.S. 347 (1967), where the Court established a "reasonable expectation of privacy" test for Fourth Amendment privacy protection over more mechanical or property-law-based tests. Reversing the Katz approach would leave homeowners at the mercy of advancing technology, Justice Scalia asserts, including imaging technology of the future that could detect all activity going on inside the home.

Scalia's majority opinion also rejects the Government's argument that the thermal imaging should be held lawful because it did not detect "intimate details" of what was going on inside the home. Scalia's opinion responds that, where the sanctity of the home is concerned, "all details are intimate details." Also, an "intimate details" test would be impractical in application, the majority opinion asserts, because it would not provide sufficient clarity to guide law enforcement or to protect the privacy of the home.

#### **LED EDITORIAL COMMENTS:**

##### **1) Washington constitutional restriction is the same**

In State v. Young, 123 Wn.2d 174 (1994) April 94 LED:02, the Washington Supreme Court ruled on independent state constitutional grounds under article 1, section 7 of the Washington constitution that thermal imaging of residences requires a search warrant. The standards apparently are now the same for federal, state and local officers in their use of thermal imaging devices on residences in the state of Washington.

##### **2) The Kyllo and Young restrictions may be limited to residential or fixed premises usage of thermal imaging devices**

The Kyllo majority opinion is narrowly restricted to the facts at hand, warrantless use of thermal imaging devices on residences. Warrantless use of such devices on other fixed premises (for example, industrial warehouses) may or may not be barred (we think it probably is so limited, at least, per Young, under the Washington constitution), but we believe neither Kyllo nor Young bars use of thermal detection devices in open areas, and we believe that the restrictions of those decisions do not extend to vehicles located outside protected private areas.

Although the Kyllo opinion was written narrowly (tied to technology not generally available to the public and to residential privacy protection), criminal defense attorneys may rely on the decision to try to take another run under the Fourth Amendment at challenging use of canines to sniff for drugs and other substances. For recent past LED commentary on law enforcement use of canines and technology, see the editorial

comments following the LED entries regarding: State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov 98 LED:06 (holding, in an “independent grounds” reading of the Washington state constitution that a search warrant is required for police to use a dog to sniff for drugs at a residence, even though no warrant is required from random package dog-sniffs); and B.C. v. Plumas (Cal.) Unified School District, 192 F.3d 1260 (9<sup>th</sup> Cir. 2000) Dec 99 LED:12 (holding under the Fourth Amendment that using a dog to randomly sniff school children for illegal drugs is an unlawful search).

(2) **NO “MEDICAL NECESSITY” DEFENSE UNDER FEDERAL DRUG LAWS FOR OAKLAND CANNABIS BUYER’S COOPERATIVE** -- In U.S. v. Oakland Cannabis Buyers’ Cooperative, 121 S.Ct. 1711 (2001), the U.S. Supreme Court unanimously rejects the argument that a common-law “medical necessity” defense should be considered included in the federal Controlled Substances Act.

Under a 1996 initiative in that state, California statutes provide a limited “medical necessity” exception for possession and cultivation of marijuana by those in need and by their primary caregivers. The Oakland Cannabis Buyers’ Cooperative relied on the California statute to set up a marijuana distribution outlet. In 1998, the federal government went to federal court to stop this activity. The federal district court issued an injunction barring the activity, but the Ninth Circuit Court of Appeals reversed. Now, the U.S. Supreme Court has authorized reinstatement of the injunction against the distribution scheme.

Result: Reversal of decision of the Ninth Circuit of the U.S. Court of Appeals, and reinstatement of injunctive relief against the marijuana distributors.

#### **LED EDITORIAL NOTES COMPARING WASHINGTON LAW AND FEDERAL LAW:**

The federal Oakland Cannabis Buyers’ Cooperative decision does not affect prosecutions under state laws. Washington voters passed a “medical necessity” initiative in 1998. That law is codified in chapter 69.51A. We digested this Washington initiative in the January 1999 LED at pages 21-22. We believe that a Washington marijuana defendant would not be able to argue common law “medical necessity” under grounds different from those specified in RCW 69.51A. See discussion in State v. Williams, 93 Wn. App. 340 (Div. II, 1998) April 99 LED:16, indicating that, prior to the adoption of the “medical marijuana” law, there was no common law “medical necessity” defense for possession or use of marijuana.

In addition, we question whether all those involved in a “buyers’ cooperative,” such as the distribution scheme at issue in the Oakland case, could qualify as “primary caregivers” or “qualified patients” under chapter 69.51A RCW. To the extent that some participants in such a scheme did not qualify as one or the other under the Washington statute, they apparently could not avail themselves of the “medical necessity” defense in a Washington prosecution under chapter 69.50 RCW.

As to federal prosecution under federal law, the facts of the Oakland Cannabis Buyers’ Cooperative case involved distributors of marijuana, so the decision does not set a binding precedent under the Federal statute for those who merely possess marijuana. However, the lead opinion signed by five of the justices signals that those justices would likely reject the “medical necessity” defense in a federal possession case as well. But, while the Oakland Cannabis Buyers’ Cooperative decision theoretically would support federal prosecution in a “mere possession” case, the reality is that federal prosecutors are unlikely to exercise their discretion to prosecute “mere possession” cases where the would-be defendant would qualify as a “qualifying patient” or “primary caregiver” under

**RCW 69.51A. As always, we suggest that law enforcement agencies consult their prosecutors and/or legal advisors for guidance.**

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**WASHINGTON STATE COURT OF APPEALS**

**RANDOM CHECKING OF MV LICENSE PLATE NUMBERS AGAINST DOL DATA UPHeld**

State v. Martin, \_\_\_ Wn. App. \_\_\_ (Div. I, 2001) [2001 WL 705848]

Facts and Proceedings below:

Martin: A Seattle police officer followed up a citizen tip regarding possible illegal drug activity by a man driving a pickup truck with a specified license number. The officer ran the number through the DOL database, and then ran “Ralph Martin,” the registered owner’s name, through the WACIC database. Martin was shown as having two outstanding arrest warrants. Officers went to Martin’s residence and arrested him on the outstanding arrest warrants. A booking search at the precinct yielded cocaine. Martin was charged with and convicted of cocaine possession.

McKinney: A Federal Way police officer randomly ran a DOL check on the license number of a vehicle parked at an AM/PM market. DOL records showed that the registered owner, Lonnie McKinney, had a suspended driver’s license. The person who drove the vehicle from the market parking lot met the DOL description of McKinney. The officer pulled the vehicle over. After arresting McKinney for driving while suspended, the officer determined that a woman in the vehicle was McKinney’s wife, and that there were two DV “no-contact” orders prohibiting McKinney’s contact with his wife. McKinney was charged with and convicted of violating the no-contact orders.

Schroeder: An Everett police officer doing a DOL-WACIC check against license plates of vehicles in a hotel parking lot determined that the registered owners of two vehicles parked side-by-side were, respectively, a husband and wife. There was an outstanding DV protection order prohibiting the husband Randal Schroeder from having contact with his wife. On further investigation, the officer found Schroeder in a motel room with his wife. Schroeder was charged and convicted of violating the DV protection order.

ISSUE AND RULING: Does an officer’s search of the DOL database without probable cause or reasonable suspicion violate article 1, section 7 of the Washington constitution? (ANSWER: No)

Result: Affirmance of King County Superior Court convictions of Ralph Matthew Martin (cocaine possession) and Lonnie D. McKinney (no-contact order violation); affirmance of Snohomish County Superior Court conviction of Randal Dale Schroeder (protection order violation).

Status: Time remains for the defendants to seek reconsideration or to petition the Washington Supreme Court for review.

ANALYSIS: The Court of Appeals begins its analysis by acknowledging that privacy protection under the Washington constitution, article 1, section 7, has been held to be broader than under the federal Fourth Amendment in a number of categorical circumstances. The Court of Appeals goes on to conclude, however, that there is no constitutional protection against police access to DOL information.

The Martin Court explains as follows that the Washington Legislature has approved broad and qualitative unrestricted police use of DOL information:

In each of these cases, law enforcement action began with the officer's knowledge of the target vehicle's license number, which was openly displayed as required by law. See RCW 46.12.240(requiring that license plates "be attached conspicuously at the front and rear of each vehicle . . . in such a manner that they can be plainly seen and read at all times[.]"). With the license number, the officer was able to access information about the vehicle's registered owner from the DOL database. Unlike vehicle license numbers, information about individual vehicle owners is not freely available to the public. RCW 46.12.380 restricts the release of such information but states specifically that the restrictions do not apply to requests for information by governmental entities. RCW 46.12.380(5). The legislative history of this section indicates that it was drafted with consideration given both to the privacy interests of vehicle owners and the practical need for law enforcement access to registration information:

The legislature recognizes the extraordinary value of the vehicle title and registration records for law enforcement and commerce within the state. The legislature also recognizes that indiscriminate release of the vehicle owner information to be an infringement upon the rights of the owner and can subject owners to intrusions of their privacy. *The purpose of this act is to limit the release of vehicle owners' names and addresses while maintaining the availability of the vehicle records for the purposes of law enforcement and commerce.*

1990 c 232 § 1 (emphasis added). Based on the information from the DOL database, the officers in each of these cases either stopped the appellant for driving with a suspended license (McKinney) or cross-referenced the WACIC database and discovered other information sufficient to justify further investigation (Martin and Schroeder).

At no point in any of these cases did the officers gain access to information that citizens of this state could reasonably expect to be protected from access by law enforcement. In fact, the personal information in the DOL database is generally analogous to that which could be learned about an individual by passing him or her on the street (e.g., height, weight, hair color, eye color, etc.). Furthermore, none of the appellants were detained, restrained, or otherwise intruded upon by the officers' access to either the DOL or WACIC databases.

Next, the Martin Court distinguishes Washington "independent grounds" privacy-protecting precedents restricting: DUI checkpoints, access to long distance toll records, and use of thermal detection devices. In distinguishing those precedents, the Martin Court notes a more recent and more on-point decision:

By contrast, State v. Harlow, 85 Wn. App. 557 (1997) **June 97 LED:05** involved a minimally intrusive law enforcement practice similar to those complained of in the cases before this court. In Harlow, a police officer kept a list of local drivers with suspended licenses. The officer maintained the list by performing a weekly check of the listed drivers' license statuses. Appellant Harlow was stopped after the officer saw her driving and remembered her name from his list. In response to Harlow's argument that maintenance of the list violated article I, section 7 and the Fourth Amendment, the Division III court specifically stated that "[d]riving records kept by the department of licensing, like warrants records, are neither subjectively nor reasonably expected to be unavailable to police officers."

Next, the Martin Court discusses cases from other jurisdictions where courts have upheld random license plate checks against state and federal constitutional challenges. Finally, the Martin Court concludes its analysis, noting, among other things, that the Court's ruling might have been different if there had been evidence of unlawful discrimination by any of the officers involved in these consolidated cases:

Appellants and amicus ACLU astutely point out the potential threats to personal privacy posed by recent advances in technology, and specifically, by allowing law enforcement unfettered access to such technology. In the cases before this court, however, there is no evidence that the officers either improperly gained access to the appellants' license records or made improper use of the information after accessing it (and indeed, evidence of such misuse would present us with a different case entirely). Again, the officers' searches of the DOL database were not invasive and the information accessed was not highly personal. Furthermore, there is no evidence here that the officers specifically targeted the appellants for investigation based on their race, gender, physical characteristics, or for any other improper purpose.

**While it is well established that article I, section 7 of the Washington Constitution provides greater protection of personal privacy rights than does the Fourth Amendment, these are not cases in which that enhanced protection is implicated. Drivers in this state do not have a reasonable expectation of privacy in their DOL records such that the police are precluded from engaging in the conduct complained of in these cases. Thus, we affirm the decisions entered below.**

[Bolding added by LED Eds.]

**OK TO STOP CAR BASED ON DOL RECORD SHOWING LICENSE OF REGISTERED OWNER IN SUSPENDED STATUS, BUT IF FURTHER INVESTIGATION REVEALS DRIVER NOT TO BE THE REGISTERED OWNER, DETENTION MUST END IMMEDIATELY**

State v. Penfield, \_\_\_ Wn. App. \_\_\_, 22 P.3d 293 (Div. III, 2001)

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

Officer Kevin Vaughn ran a license check on a red Camaro's license number and found that the driver's license of the registered owner, Lisa Gariepy, was suspended. He signaled the driver to stop and followed him into a nearby parking lot.

Prior to the stop, Officer Vaughn did not have a clear view of the driver because the back window of the Camaro was tinted. He was only able to see that the driver had a ponytail. As he approached the car, Officer Vaughn immediately noticed that the driver was a man. He nonetheless asked the driver for his license. The driver responded that he did not have a license-it was suspended. He identified himself as Dennis Penfield.

Officer Vaughn recognized Mr. Penfield's name and knew that he had an outstanding arrest warrant. He therefore had Mr. Penfield get out of the Camaro. He handcuffed him and searched him. Officer Vaughn found a bud of marijuana in a cigarette pack that he seized from Mr. Penfield. He then called for a K-9 drug search. The dog found a baggie with a large amount of methamphetamine located underneath the vehicle.

Mr. Penfield moved to suppress the drug evidence. The superior court denied his motion based on RCW 46.20.349. That statute permits a vehicle stop of a registered owner who has a suspended license:

Any police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked. The driver of such vehicle shall display his driver's license upon request of the police officer.

The court reasoned that because the initial contact was authorized by statute, Officer Vaughn had a "valid and limited ability from a legal perspective . . . to further ask for identification and license from Mr. Penfield. The court found him guilty following a bench trial.

**ISSUE AND RULING:** Where an officer lawfully stops a car on grounds that the driver's license of the registered owner is suspended, and the officer then learns that the driver stopped is not the registered owner, must the officer immediately terminate the detention and not request the license of that driver? (**ANSWER:** Yes)

**Result:** Reversal of Spokane County Superior Court conviction of Dennis Ray Penfield for possession of methamphetamine.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

The narrow issue before us is whether Officer Vaughn could lawfully ask Mr. Penfield to identify himself when the basis for the stop was the license suspension of a female registered owner.

We begin by noting that statutes similar to RCW 46.20.349 have withstood constitutional scrutiny. See, e.g., City of Seattle v. Yeager, 67 Wn. App. 41 (1992) [**Feb 93 LED:10**]. In Yeager, the defendant challenged RCW 46.16.710(3), which permits an officer to stop a vehicle with a marked tab. The mark indicates that the owner of the vehicle has violated one of the statutes prohibiting driving without a valid license. The court held that "the presence of the special tab on the license plate was a specific and articulable fact from which the officer could reasonably infer that there was a substantial possibility the driver of the vehicle did not possess a valid license." The stop is then a valid investigative stop that is supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." An investigative stop under RCW 46.20.349 (the statute under scrutiny here) is also constitutional then because the law enforcement officer has an articulable suspicion of criminal conduct-i.e., that the driver is the registered owner who has a suspended license.

Other jurisdictions have upheld stops even when the driver turns out to be someone other than the registered owner. But in those cases that determination (that the driver was someone other than the registered owner) was not evident from simply looking at the driver.

In [City of Tallmadge v. McCoy, 645 N.E.2d 802 (Ohio App. 1994)] the officer who stopped the vehicle recognized that the driver was not the owner as soon as he got up to the car window. But there, the court was able to uphold the admission of evidence the officer thereafter obtained because, at that point, the officer smelled alcohol on the driver and observed that his eyes were red and watery. These facts supported the officer's continued inquiries.

Here, Officer Vaughn could not point to any articulable suspicion of criminal activity on the part of Mr. Penfield, once it became evident that he was not the registered owner of the vehicle. The fact the registered owner was a woman and the fact the driver here was a man indicated conclusively to Officer Vaughn that the driver was not the person who the Department of Licensing had reported as having a suspended license.

Other facts indicating discrepancies between the description of the owner and the physical attributes of the driver may not be so conclusive as to negate the officer's reasonable, articulable suspicion. For example, slight differences in weight, height, or hair color do not eliminate the driver as the owner.

In State v. Chatton, [another Ohio case] the court considered a similar situation. There, the officer stopped the defendant's vehicle because it had neither a front nor a back license plate. However, as the officer approached the defendant's vehicle, he saw a temporary license placard lying on the rear deck of the vehicle directly beneath the rear window. This display conformed with the applicable Ohio law. State v. Chatton, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984). The officer nevertheless continued to the driver's window and requested the driver's license. A check revealed the license was suspended. After arresting the driver for that violation, the officer searched the vehicle and found a revolver under the driver's seat.

The court framed the issue as "whether the police officer has continuing justification to detain appellee and demand production of his driver's license once the police officer viewed the temporary tags lying on the rear deck of appellee's vehicle." The court held that once the officer's reasonable suspicion that the vehicle was not properly licensed was dispelled, he should have allowed the driver to leave. The officer could continue to detain the driver only if some other fact gave rise to an articulable suspicion of criminal activity.

Here, Officer Vaughn's only articulable suspicion of criminal activity was information that the driver's license of the vehicle's owner was suspended. He had no other reason to ask Mr. Penfield for his driver's license after he realized Mr. Penfield was not the registered owner. Other facts may exist to create a suspicion that the driver may not have the owner's permission to use the automobile or that the driver is engaged in some other criminal activity. Officer Vaughn had none to offer here. Officer Vaughn violated Mr. Penfield's Fourth Amendment right to be free of unreasonable searches and seizures when he asked Mr. Penfield to produce his driver's license.

[Some citations omitted]

**LED EDITORIAL CROSS REFERENCE NOTE:** Defendant Penfield's appeal did not challenge the officer's authority to run a check on his license plate number. See the LED entry above at pages \_\_ digesting the Division One Washington Court of Appeals decision in State v. Martin, \_\_ Wn. App. \_\_ (Div. I, 2001) (upholding random checking of license plates for information about the vehicles' registered owner).

#### **OFFICER IN HOT PURSUIT OF MIP SUSPECT LACKED AUTHORITY TO MAKE FORCIBLE WARRANTLESS ENTRY OF THIRD PARTY'S RESIDENCE**

State v. Bessette, 105 Wn. App. 793 (Div. III, 2001)

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

Someone complained about juveniles making noise and throwing things. This took place in Omak, Washington, on the Colville Indian Reservation. Officer James E. Bucsko arrived and saw a juvenile holding a beer bottle. That juvenile ran to Harry Bessette's house. [The officer] ordered him to stop. The juvenile ignored the command and ran inside.

[The officer] pounded on the door and demanded that he be allowed inside the house.

Mr. Bessette opened the door. [The officer] again ordered Mr. Bessette to let him in. [The officer] said he was in hot pursuit. Mr. Bessette responded that no one was in the house except him and his wife. And he asked for a search warrant. [The officer] said he did not need one. Mr. Bessette told [the officer] to leave.

[The officer] told Mr. Bessette that he was obstructing a police officer.

Mr. Bessette threatened to go to the officer's residence and camp out. He demanded, and [the officer] provided, his badge number and department. [The officer] called his supervisor who told him to leave until they could determine whether Mr. Bessette lived on trust or fee land. [The officer] left.

The State charged Mr. Bessette with obstructing a law enforcement officer.

The district court found, on stipulated facts, that Mr. Bessette lived on fee land, and that [the officer] acted in the discharge of his official duties. The court also found that Mr. Bessette willfully hindered, delayed, and obstructed a law enforcement officer in the discharge of his official duties and convicted Mr. Bessette of obstructing a law enforcement officer.

Mr. Bessette appealed to the Okanogan County Superior Court. It concluded that Mr. Bessette's actions did not constitute obstruction because there were no exigent circumstances:

This is a case of a non-violent insistence that police obtain a warrant in a situation when the exigencies are not obvious, the homeowner is not armed and no danger is presented to the public or the officer. Mr. Bessette's rights to be free of unreasonable searches under the fourth amendment and article I, section 7 prohibit conviction as a matter of law in these circumstances. In addition, no reasonable trier of fact could find that defendant acted willfully beyond a reasonable doubt.

ISSUE AND RULING: Were there exigent circumstances justifying the officer's warrantless, forcible entry into Bessette's home, such that Bessette's refusal of entry constituted the crime of obstructing? (ANSWER: No, in light of the minor nature of the offense and the other circumstances in the case, the circumstances were not exigent, and Mr. Bessette had a right to refuse entry to the officer.)

Result: Affirmance of Okanogan County Superior Court order that had overturned an Okanogan County District Court conviction of Harry Joseph Bessette for obstructing a law enforcement officer.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant. They must then show reasons why it is impractical, or unsafe, to take the time to acquire a warrant or why a warrant would, other than for constitutional reasons, be unavailable.

Our Supreme Court has articulated six factors to determine whether police entry into a home without a warrant is justified: (1) a grave offense, particularly a crime of violence; (2) a suspect who is reasonably believed to be armed; (3) trustworthy information that the suspect is guilty; (4) strong reason to believe that the suspect is on the premises; (5) likelihood of escape if the suspect is not swiftly apprehended; and (6) entry can be made peaceably. These six elements supplement the five different exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or the public; (4) mobility of a vehicle; and (5) mobility or destruction of the evidence.

The home [the officer] proposed to search was Mr. Bessette's. Mr. Bessette was a third party; he had committed no crime.

The judge's ruminations on this record suggest that his consideration of these factors appropriately led to the conclusion that these were not exigent circumstances: "the exigencies are not obvious, the homeowner is not armed and no danger is presented to the public or the officer." Our review of the record supports his judgment.

First, this, by any stretch, is not a grave offense. The offense under consideration is a minor in possession of alcohol. That is a gross misdemeanor. RCW 66.44.270(2). There is, moreover, a substantial body of federal law that the exigent circumstances exception to the warrant requirement is limited to felony arrests. **LED EDITORIAL COMMENT: We believe this sentence does not accurately describe the current state of the law. See our further comments below.** But, in any event, minor in possession is not a grave offense--as a matter of law.

Second, no one has suggested that the minor here was armed or, for that matter, dangerous.

Third, there is certainly trustworthy information that the minor was guilty of a crime, albeit a gross misdemeanor.

Fourth, certainly he was on the premises since the officer saw him run into Mr. Bessette's home.

Fifth, the record is again devoid of information that this suspect is likely to escape if not swiftly apprehended. But even if the suspect did escape, he was hardly a threat to the health, safety, or welfare of the citizens of Omak.

Sixth, the entry here could not be made peaceably of course, given Mr. Bessette's insistence on a search warrant.

Finally, reasonably available judicial procedures could have been brought to bear on Mr. Bessette or others at the scene to find out who the minor was and apprehend him. Not the least of these would have been to simply obtain a telephone warrant to search and arrest a suspect who had committed the gross misdemeanor in the officer's presence. See City of Seattle v. Altschuler, 53 Wn. App. 317 (1989) [April 89 LED:17; May 89 LED:19] (holding police could have watched defendant's home while obtaining "the usual warrant or a telephonic warrant" rather than entering the defendant's home when defendant committed only a minor offense).

In short, the circumstances here were not exigent and, therefore, did not justify [the officer]'s entry into Mr. Bessette's home without a warrant. This is particularly true given the stricter protection afforded by Washington State Constitution, article I, section 7.

[Some citations omitted]

### **LED EDITORIAL COMMENTS ON BESSETTE:**

#### **1) "Hot pursuit" of misdemeanants and gross misdemeanants into residences**

The law is not settled on this point, but we think that officers should assume that exigency, beyond "hot pursuit," is required to justify non-consenting, warrantless entry of a residence to arrest a fleeing misdemeanant or fleeing gross misdemeanant. Thus, the arrest of a fleeing DUI suspect in State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept 99 LED:18 just inside the threshold of her front door was lawful, but apparently only because the officer had PC as to DUI before entering, and the alcohol would be significantly dissipated if the officer waited for a search warrant or arrest warrant before entering.

#### **2) Warrantless "hot pursuit" of felons into residence**

Division Three's Bessette opinion does not discuss the rule for felony "hot pursuit" into a residence (reasonably so, we note, as the facts there did not involve a felony). We would note, however, that in U.S. v. Santana, 427 U.S. 38 (1976), the U.S. Supreme Court held that an officer was legally justified in chasing a felon from a public location into her home, even though there was no arrest warrant or search warrant supporting that entry. We know of no case law, in this state or elsewhere, suggesting that the "bright line" of Santana does not apply in all felony "hot pursuit" situations.

#### **3) Stock search warrants should be considered**

Washington law enforcement agencies might want to develop stock search warrants to deal with misdemeanor "hot pursuit" situations. The fact that such search warrants can be issued telephonically: a) makes this a practical option, and b) is a factor that will be considered by any court attempting to decide whether circumstances were truly exigent. Alternatively, arrest warrants would also suffice to justify forcible entry to make arrests in these situations.

#### **4) Other comments on Bessette Court's analysis**

The following string of random editorial comments and notes on the Bessette opinion may be of more interest to government attorneys (if anyone) than to law enforcement officers, but for what the comments and notes are worth, here goes:

...We know of no case law or logic to support the Bessette Court's suggestion that "exigent circumstances" analysis is affected by the fact that the place to be entered is that of a third party who is not himself or herself a criminal suspect...

...We believe that the case law generally (see, e.g., Professor LaFave's treatise at section 6.1) does not support the Bessette Court's statement regarding the Payton entry-to-arrest rule) that there is "a substantial body of federal law that the exigent circumstances exception to the warrant requirement is limited to felony arrest"...

...Footnote 2 of the Bessette opinion, quoting a 1947 Washington Supreme Court decision, overlooks the fact that, just four years ago, in State v. Groom, 133 Wn. 2d 679 (1997) Jan. 98 LED:06, the Washington Supreme Court held that RCW 10.79.040-045 implicitly permits law enforcement's warrantees entry of a residence based on the established constitutional exceptions to warrant requirement...

...Note also our comments in the June 2001 LED criticizing some of Division Three's analysis in State v. Anderson, 105 Wn. App. 223 (Div. III, 2001) June 2001 LED:13, where we discuss the law regarding entering residences to arrest on misdemeanor arrest warrants and/or on search warrants.

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#### **BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

(1) **NO EXCLUSION OF CONFESSION FOR POLICE VIOLATION OF VIENNA CONVENTION REQUIREMENT THAT GOVERNMENT OFFICIALS TELL ARRESTED FOREIGN NATIONAL OF RIGHT TO CONSULATE NOTIFICATION** -- In State v. Jamison and State v. Acosta, 105 Wn. App. 572 (Div. I, 2001), two cases consolidated for appeal, Division One of the Washington Court of Appeals agrees with Division Three of the Washington Court of Appeals (see State v. Martinez-Lazo, 100 Wn. App 869 (Div. III, 2000) **Aug 2000 LED:13**) and with the Ninth Circuit of the U.S. Court of Appeals (see U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9<sup>th</sup> Cir. 2000) **May 2000 LED:12**), that suppression of a defendant's statement is not a proper remedy for violation of the rights of foreign nationals under the Vienna Convention on Consular Relations. As did both Division Three of the Washington Court of Appeals in Martinez-Lazo and the Ninth Circuit in Lombera-Camorlinga, Division One does not decide whether the Vienna Convention creates individual rights that are enforceable in some way other than by suppression of evidence.

**LED EDITORIAL COMMENT:** For more information on the Vienna Convention and the obligations it imposes on government officials to foreign nationals, see the **May 99 LED** article on that subject at pages 18-21. See also the internet link to comprehensive U.S. State Department information on this subject on the CJTC LED page accessible from the CJTC HomePage at [<http://www.wa.gov/cjt>]

(2) **SHOWUP ID PROBABLY UNLAWFUL BECAUSE ATTORNEY REQUEST NOT TIMELY HONORED PER COURT RULE, BUT ERROR HELD HARMLESS** --In State v. Jaquez, 105 Wn. App. 699 (Div. II, 2001), the Court of Appeals rules that officers should have tried to put an arrestee in contact with an attorney (per the arrestee's request) before conducting an on-scene show-up ID procedure, but that the error in the trial court's ruling under CrR 3.1 was harmless.

Police officers seized Jaquez on reasonable suspicion as a suspect in a robbery that had just been committed. At that point, the officers discovered an outstanding warrant for Jaquez's arrest on an unrelated matter. The officers placed Jaquez in a patrol car, told him he was under arrest on the outstanding warrant, and advised him of his Miranda rights. Jaquez asked for an attorney. The officers did not immediately try to place Jaquez in contact with an attorney. Instead, within an hour, officers brought the robbery victim to the patrol car to see if she could identify Jaquez in a "show-up" ID procedure.

Jaquez refused to get out of the car or to show his face. The victim was unable to see his face, so she could not ID him. The next day, she picked Jaquez out of a photo montage.

One of the issues in the case was whether officers violated Jaquez's rights when, after he requested an attorney following his arrest, they did not attempt to put him in contact with an attorney before conducting the show-up ID procedures. Under Superior Court Criminal Rule 3.1(c)(2), officers must advise an arrestee of the right to an attorney immediately following the arrest. If the arrestee then asks for an attorney, officers must, as soon as reasonable, make an effort to put the person in telephonic contact with an attorney. See State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) **March 98 LED:12**. Ideally, such access to a phone should be supplemented with a list of attorneys (with their numbers) or at least a phone book.

The Jaquez Court indicates that the officers probably violated Jaquez's rights as an arrestee under CrR 3.1(c)(2) by going ahead with the show-up ID procedures without first trying to put defendant in telephonic contact with an attorney. However, under the following brief analysis, the Jaquez Court concludes that any error by the trial court in ruling on the CrR 3.1 issue was harmless error (**LED Editorial Note – We will spare our LED readers from our tedious analysis explaining why we think the Court's analysis set out below appears to confusingly collapse "harmless error" and "prejudice-from-the-violation" analysis into over-simplistic "harmless error" analysis**):

[T]he other evidence was not so strong that we can say that within a reasonable probability, the verdict would have been the same had the error not been made.

Yet Jaquez has not alleged how the show-up or the trial would have differed had he been able to contact counsel in advance: He did not allege that the show-up was impermissibly suggestive, such that it might have been conducted differently if counsel had been present. Nor does he demonstrate that the show-up might not have occurred at all had counsel been present. Thus, we hold that even if the police violated CrR 3.1(c)(2), the error was harmless.

**Result:** Reversal of Pierce County Superior Court conviction of Pepe Jaquez for first degree robbery (reversal was based on a "shackling-at-trial" issue not addressed in this LED entry).

**LED EDITORIAL COMMENTS:** Jaquez is an unusual case factually, in that the suspect that the officer subjected to a show-up ID procedure was both: 1) an arrestee based on a warrant, and 2) a mere detainee in a Terry stop based on "reasonable suspicion" regarding a robbery just committed. In most "show-up ID" situations, only a Terry stop, not an arrest, has occurred, so the detainee has no pre-show-up right under CrR 3.1 either to a warning (about his attorney right) or to immediate telephonic contact with an attorney. Until there is further guidance from the Washington courts or from local counsel, we think officers would be well-advised to try to follow the mandates of CrR 3.1 (i.e., for warnings and, on request, telephonic consult efforts) for all suspects they have authority to arrest (based on an arrest warrant or on PC), even though the officers, as in Jaquez are, at the same time, detaining the suspect per Terry v. Ohio on another crime.

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**LED EDITORIAL NOTE RE INTERNET ACCESS TO ARTICLE ON ID PROCEDURES:**

The CJTC has placed on its internet LED page an article/outline by Senior Counsel John Wasberg entitled: "Lineups, Showups And Photographic Spreads; Plus Other Legal And Practical Aspects Of Identification Procedures And Testimony." The article will be updated periodically as necessary based on any pertinent case law developments.

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**NEXT MONTH**

In the September 2001 LED, we will digest the July 9, 2001 decision of Division One of the Court of Appeals in consolidated DUI cases involving defendants Templeton, Margienan, Marsh and Post (See 2001 WL 761243). Division One held that Miranda warnings that advise of the right to counsel "before or during questioning," but do not advise of the right to counsel "at this time," do not satisfy the requirements for advice of right-to-counsel under the Washington Criminal Rule, CrR 3.1, for purposes of admissibility of post-warning BAC test results.

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**INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

Many 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 many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, is at [<http://slc.leg.wa.gov/>]. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. Information about bills filed in the 2001 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's webpage is [<http://www.wa.cjt>], while the address for the Attorney General's Office webpage is [<http://www.wa.ago>].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [[johnw1@atg.wa.gov](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the LED should be directed to Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; e mail [[dtangedahl@cjtc.state.wa.us](mailto:dtangedahl@cjtc.state.wa.us)]. LED editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a

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