



Law Enforcement

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Digest

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BRIEF NOTES FROM THE U.S. SUPREME COURT

INDIANAPOLIS' ROADBLOCK PROGRAM TO CHECK FOR ILLEGAL DRUGS IN HIGH CRIME AREAS HELD TO VIOLATE FOURTH AMENDMENT -- In City of Indianapolis v. Edmond, 2000 WL 1740936, (decided November 28, 2000) the United States Supreme Court rules, 6-3, that an Indianapolis drug checkpoint program violates the Fourth Amendment of the U.S. Constitution.

The majority opinion in Edmond describes the Indianapolis drug checkpoint program as follows:

At each checkpoint location, the police stop a predetermined number of vehicles. Approximately 30 officers are stationed at the checkpoint. Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence. The city agreed in the stipulation to operate the checkpoints in such a way as to ensure that the total duration of each stop, absent reasonable suspicion or probable cause, would be five minutes or less.

[C]heckpoint locations are selected weeks in advance based on such considerations as area crime statistics and traffic flow. The checkpoints are generally operated during daylight hours and are identified with lighted signs reading, "NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." Once a group of cars has been stopped, other traffic proceeds without interruption until all the stopped cars have been processed or diverted for further processing. Sergeant DePew also stated that the average stop for a vehicle not subject to further processing lasts two to three minutes or less.

The majority opinion authored by Justice O'Connor concludes that a drug checkpoint program of this sort cannot be justified under the Fourth Amendment. Previously, the U.S. Supreme Court has upheld drunk-driving checkpoints and international border checkpoints. Under the programs that were at issue in those earlier cases, the benefit to the public outweighed the inconvenience to the public, the O'Connor opinion asserts, and accordingly the majority distinguishes those cases.

Justice Rehnquist dissents, joined by Justices Scalia and Thomas.

Result: Affirmance of decision of the 7th Circuit of the U.S. Court of Appeals granting injunctive relief against the Indianapolis program.

LED EDITORIAL COMMENT: The Edmond decision raise several questions that may be of great interest to law professors, and will be of some limited interest to federal officers and officers in other jurisdictions following Fourth Amendment doctrine. However, the decision should have no effect on state and local officers in the State of Washington.

We have two basic reasons for suggesting that the decision will be of limited effect. First, the Edmond majority opinion is carefully written to avoid saying anything about drug investigations or use of drug-sniffing dogs in non-checkpoint situations. Thus, the decision won't impact search-and-seizure doctrine relating to police actions based on individualized suspicion.

Second, the Washington Supreme Court almost certainly would have found a drug checkpoint program like that in Indianapolis to violate the heightened privacy protections of the Washington constitution, article 1, section 7. In Seattle v. Mesiani, 110 Wn.2d 454 (1988) July 88 LED:14, the Washington Supreme Court struck down a City of Seattle drunk-driving checkpoint program. While the Mesiani decision left some room for the Washington Legislature to develop a statute authorizing a non-random, tightly-restricted, drunk-driving checkpoint program, the Mesiani opinion, along with other "independent grounds," article 1, section 7 rulings, makes clear to us that a program like that in the Indianapolis case would have been struck down by the Washington Supreme Court on "independent grounds" in any event.

UPDATE FROM NINTH CIRCUIT, U.S. COURT OF APPEALS

"POINTING GUNS AS EXCESSIVE FORCE" RULING TO BE RECONSIDERED

The U.S. Court of Appeals for the Ninth Circuit announced October 23, 2000 that it would rehear with an 11-judge panel the ruling in Robinson v. Solano County, 218 F.3d 1030 (9th Cir. 2000) **October 2000 LED:10**. In Robinson, a 3-judge panel earlier held, based on the factual record in the case, that law enforcement officers were not entitled to qualified immunity from a civil rights action alleging that they applied excessive force, in violation of the Fourth Amendment, by pointing guns at the plaintiff while investigating a complaint about him.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) WHERE CHARGES WERE POSSESSION OF DRUG PARAPHERNALIA AND POSSESSION OF MARIJUANA, DEFENDANT SHOULD HAVE BEEN ALLOWED TO PUT ON EVIDENCE OF HIS REPUTATION FOR NOT USING DRUGS -- In State v. Day, ___ Wn.2d ___, 11 P.3d 304 (2000), the State Supreme Court unanimously rules, in a case where defendant Doug Day was charged with possession of drug paraphernalia and possession of marijuana, that he should have been allowed to put on evidence of his reputation in the community for not using illegal drugs or alcohol.

Following defendant's probable cause arrest for DUI, a police officer searched defendant's pickup truck. In the console, the officer found a marijuana pipe and a small amount of marijuana. At the time, Day claimed the pipe and marijuana were not his, that he had never seen them before, and that he had just picked up his truck from a repair shop.

After BAC testing produced only a .04 BAC reading, Day was charged with negligent driving in the first degree, possession of marijuana under 40 grams, and possession of drug paraphernalia under the Kennewick Municipal Code. [**LED ED. NOTE:** **Kennewick's Municipal Code, unlike Washington's Uniformed Controlled Substances Act, makes it a crime merely to possess drug paraphernalia with intent to use it.**] At his district court trial, Day asserted, as to the drug-related charges, an "unwitting possession" defense. He claimed that he had not known of the presence of the pipe and the marijuana. Day called the repair shop owner as a witness.

The trial judge allowed Day to ask the shop owner about some recent problems with workers at the shop which might have explained the presence of the marijuana and pipe. However, the trial judge

did not allow Day to ask the owner about Day's reputation in the community for sobriety from illegal drugs and alcohol. The district court jury acquitted Day on the negligent driving charge, but the jury convicted him on the two drug-related charges.

Day appealed, and the superior court reversed his conviction, ruling that the district court judge should have allowed Day to present his reputation evidence. The City of Kennewick then appealed, and the Court of Appeals reversed. Day obtained review in the Supreme Court, which agreed with the superior court decision in Day's favor.

After extensive analysis of the Evidence Rules and pertinent case law, the Supreme Court's lead opinion in Day concludes as follows:

Day's reputation for sobriety from drugs and alcohol is "pertinent" to the charge of possession of drug paraphernalia because "intent to use" is an element of the offense. Further, Day's reputation for sobriety from drugs and alcohol is "pertinent" to the charge of simple possession because he raised the defense of unwitting possession. Day presented evidence tending to establish that the marijuana and marijuana pipe were placed in his truck while it was being repaired. Defendant's presentation of third party testimony regarding his reputation for abstention from the use of drugs was important to his defense.

We believe a reasonable probability exists that "the outcome of the trial could have been materially affected had this evidence been admitted" Accordingly, we reverse and remand for a new trial.

[Citations omitted]

In a concurring opinion, Justice Talmadge criticizes a prior reputation-evidence decision of the Court (the Eakins decision), but Justice Talmadge concludes the Court is bound in the Day case to follow its 1995 precedent in Eakins. Justice Talmadge closes with the following criticism, however:

By our decision today, we cast our imprimatur on even more diversions from the core questions of culpability in a criminal case. The trier of fact will be compelled to try issues of Douglas Day's reputation for truthfulness and sobriety, rather than focus on whether Day possessed the drugs and the drug paraphernalia, limited only by whether the evidence is "pertinent" to our judicially-created defense. Of course, the prosecution will be compelled to rebut this reputation evidence with testimony of Day's odd behavior: driving erratically around officers at an emergency scene, lying about his alcohol use, evaluating his past marijuana use, and so forth. All of this carries the case far afield.

By our decisions in Eakins and here, we leave little substance in ER 404 as a limitation on the use of reputation evidence in criminal cases once the defendant argues lack of intent, whether or not intent is an element of the crime charged. While understandable in the context of our decisions and compelled by stare decisis, I do not believe this is a positive trend in our law.

Result: Reversal of Benton County District Court convictions of Doug R. Day for possession of marijuana and drug paraphernalia; remand to district court for re-trial on those charges.

(2) MULTIPLE CONVICTIONS JUSTIFIED FOR MULTIPLE MARIJUANA GROWS LOCATED IN DIFFERENT PLACES -- In State v. Davis, ___ Wn.2d ___, 12 P.3d 603 (2000), the Washington Supreme Court rules, 7-2, that if a person has multiple grow operations and different locations, the person can receive multiple convictions. Along the way, the Davis Court explains and distinguishes the Court's 1998 "unit of prosecution" ruling in State v. Adel, 136 Wn.2d 629 (1998) **Feb 99 LED:03**.

In Adel, a case involving "mere possession" of marijuana, the State Supreme Court ruled on double jeopardy grounds that only one "unit of prosecution" was involved where the defendant was found to have possessed marijuana in small quantities (less than 40 grams total) in two locations, quite near to each other. He had small amounts in his convenience store and in his car parked just outside at the same point in time. The Davis majority's rationale for not applying the Adel "double jeopardy" rule to

the prosecution of Davis for his two marijuana-growing operations is that the Legislature's focus is different under the statutory prohibition of "simple possession," on the one hand, and the statutory prohibition of "possession with intent to manufacture or deliver," on the other hand.

The focus of the "simple possession" prohibition is quantity, not intent, so the Davis majority believes it made sense for the Adel Court to treat several stashes of drugs located in separate places in fairly close proximity to each other as just "one" unit of prosecution. On the other hand, the crime of "possession with intent to manufacture or deliver," focuses upon intent, the Davis majority declares. With intent as its focus, the Davis majority explains why it believes that defendant Davis committed two crimes in maintaining two separate grow operations:

Here, each of Davis' grow operations was located a significant distance from the other. One operation was in Redmond, the other in Issaquah. Each of Davis' grow operations contained all the equipment necessary to produce marijuana. By setting up two wholly self-contained grow operations, a "separate and distinct" intent to manufacture marijuana at each location is evident. Indeed, as noted by the trial court, by having separate grow operations Davis was able to spread his risks. In the event that only one grow operation had been uncovered, the other would have continued to thrive.

Along the way, the Davis majority also discusses with approval the decisions in two prior "unit of prosecution"/"intent to deliver" Court of Appeals decisions:

RCW 69.50.401(a)(1)(iii) punishes both possession of narcotics with intent to deliver and possession with intent to manufacture; however, most of the decisional authority in this area comes from "intent to deliver" cases. This court's discussion of two such cases, State v. McFadden, 63 Wn. App. 441 (1991) and State v. Lopez, 79 Wn. App. 755 (1995), in Adel is instructive.

In McFadden, the defendant was charged with two counts of possession of cocaine with intent to deliver based on 83.9 grams of cocaine found in his van and another 5.5 grams brought into an apartment by McFadden during a buy bust operation. One unit of prosecution was satisfied by McFadden's possession of drugs in the apartment. He intended to sell the 5.5 grams to the occupants of the apartment The drugs found in McFadden's van clearly formed a second unit of prosecution. McFadden possessed the drugs in the van with an obvious intent to deliver them to unknown buyers in the future. The two crimes charged in McFadden were not premised on the fact that the drug was found in two different locations. The two crimes were premised on the showing that McFadden had two separate and distinct intents to deliver drugs in his possession—one intent to sell in the present to the occupants of the apartment and one intent to sell drugs in the future.

The facts of Lopez stand in contrast to those of McFadden. In Lopez, the defendant "was arrested in a car during a controlled drug buy with an informant. The cocaine he had just purchased was found on the floorboard of the car, and additional cocaine, unrelated to the present deal, was found on Lopez's person." The cocaine found on Lopez's person was packaged in "14 bindles and appeared to be intended for distribution." "Lopez was charged with two counts of possession with intent to deliver, one count based on the cocaine he had just purchased, and the other count based on the separate cocaine found on his person." The facts of Lopez supported only one criminal conviction:

Lopez may have had two distinct quantities of cocaine under his dominion and control, and evidence showed the two quantities came from separate sources, but none of that evidence was relevant to the unit of prosecution for possession with intent to deliver. The evidence failed to establish more than one intent to deliver the drugs in the future—there were not two distinct intents to deliver, as there were in McFadden.

Implicit in Adel's discussion of Lopez and McFadden is the recognition that conduct demonstrating an intent to deliver forms the unit of prosecution under RCW 69.50.401(a)(1)(iii). We conclude that a "separate and distinct" intent to manufacture drugs supports separate units of prosecution under the statute.

Justice Sanders dissents, joined by Justice Johnson. The dissenters would have expanded the concept of "single unit of prosecution" to make multiple drug manufacturing operations located in separate places just one offense.

Result: Affirmance of Court of Appeals decision (See Feb 2000 LED:16), which denied a personal restraint petition of Brent Allen Davis in which he challenged his two convictions for possessing marijuana with intent to deliver.

LED EDITORIAL NOTE: The Day majority rejects an argument by amicus curiae, the Attorney General's Office, that, among other things, would have made each harvest, regardless of whether from the same grow operation or from separate grow operations, a separate unit of prosecution.

WASHINGTON STATE COURT OF APPEALS

STALKING EVIDENCE SUFFICIENT TO CONVICT PARK-AND-WATCH DEFENDANT; ALSO, STALKING STATUTE, THOUGH BROAD, IS NOT UNCONSTITUTIONALLY VAGUE

State v. Ainslie, ___ Wn. App. ___, 11 P.3d 318 (Div. I, 2000)

Facts: (Excerpted from Court of Appeals opinion)

At trial, testimony was elicited that in early May 1995, J.P. began to observe a man, later identified as Ainslie, sitting in a red car near the mailboxes in front of her house. J.P. was 14 years old at the time. J.P. testified that Ainslie sat in his car near the mailboxes about three or four times a week, usually between three and six in the afternoon. Ainslie's car was visible from the front window of her home, located approximately 60-100 feet away.

J.P. and her friend, C.P., sometimes rode their bikes or walked past Ainslie's car and looked in it out of curiosity, thinking that Ainslie was waiting to pick someone up at the nearby park-and-ride. Ainslie never got out of his car or said anything to J.P.

J.P. testified that on one occasion, as she was walking up a hill to a friend's house, Ainslie pulled up on the opposite side of the two-lane street, got out of his car, and stood behind it. This scared J.P., who turned around and ran back toward a nearby store.

J.P.'s father, Daniel Proffitt, testified that as he and J.P. were leaving their home another day, they saw Ainslie parked nearby. Ainslie started his car and left, and Proffitt followed him. Ainslie attempted to elude them, but they cornered him in a cul-de-sac. Proffitt yelled at him through the car window that he "knew what [Ainslie] was up to and ... wasn't going to tolerate it." Proffitt also testified that he saw Ainslie in his yard and took down his license plate number, but by the time Proffitt had called the police, Ainslie had left the property.

Carla Peterson, Proffitt's neighbor and C.P.'s mother, testified that she often observed a red car parked by the mailboxes, and that there was a man standing near the car on a number of occasions. Peterson took down the license plate number of the vehicle, which was registered to Ainslie. She also testified that she had seen a man walking between the Proffitt's house and hers, but could not identify Ainslie in court as the person she saw.

Proffitt sent J.P. to Spokane to live with her sister for about one month. Proffitt and C.P. testified that during J.P.'s absence, Ainslie was not seen near the Proffitt residence. Approximately one month after J.P.'s return, Ainslie again began parking

in the area. Rather than park by the mailboxes, however, Ainslie parked near a mattress store on Aurora Avenue near her home. J.P. observed him in this new location about three times a week.

Detective Thomas Leppich testified that he was assigned to follow up on the complaint and contacted Ainslie in the process. In an interview with Leppich on October 6, 1995, Ainslie told the detective that he liked to go for long rides, but because his car was uncomfortable, he frequently stopped to stretch and happened to pick the same spot. Ainslie acknowledged the presence of a girl between 11 and 13 years of age in the neighborhood, but denied knowing or following her. Ainslie also acknowledged having been followed by Proffitt in his car, and that a police officer had warned him about his parking in front of the residences, and that he responded by parking across the street.

Ainslie testified in his defense. He admitted that he parked in the neighborhood, but explained that he did not intend to frighten anyone. He testified that he worked at his brother's house in a different neighborhood until around 4:00 p.m., but because he lived by himself, he stopped his car on the way home to pass time. He also stated that he took this particular route because the shortest alternative route took him past a cemetery where some of his relatives were buried, which he said "hurts my feelings."

Ainslie confirmed that before Detective Leppich interviewed him, a police officer pulled him over and told him that one of the neighbors complained that he "looked or ... got out of [his] car and looked at three girls." Ainslie testified that he explained why he was there, and the officer believed him and "let [him] go." Ainslie testified that the first time he understood that he frightened J.P. was when he spoke with Detective Leppich, and said he had not returned to the neighborhood since.

Proceedings below:

James F. Ainslie was convicted of stalking in district court, and his conviction was affirmed in his RALJ appeal to King County Superior Court.

ISSUES AND RULINGS: 1) Was the evidence sufficient to convict Ainslie of stalking? (ANSWER: Yes); 2) Is the stalking statute void for unconstitutional vagueness? (ANSWER: No)

Result: Affirmance of King County Superior Court affirmance of King County District Court conviction of James F. Ainslie for stalking.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Sufficiency of evidence

Ainslie argues that the State did not provide sufficient evidence that any of the three elements of stalking under RCW 9A.46.110(1) were met. Ainslie first contends that his actions did not meet the definition of "follow" under RCW 9A.46.110(1)(a) because he did not deliberately maintain contact with a specific person, i.e., J.P. Ainslie argues that the evidence no more establishes that he followed J.P. than any other person in the neighborhood. Ainslie cites State v. Lee, [135 Wn.2d 369 (1998) **Oct 98 LED:11**] in which both defendants followed and came into actual contact with their victims. While it is true that the facts of this case are not those in Lee, the evidence nevertheless supports the conclusion that Ainslie followed J.P. Ainslie regularly parked in front of the mailboxes near J.P.'s house during times when J.P. was in the neighborhood, he got out of his car just as J.P. was walking toward him, and he was seen in J.P.'s yard. Perhaps most telling is the fact that neither Proffitt nor C.P. saw Ainslie while J.P. was in Spokane, but Ainslie reappeared in his parked car once J.P. returned.

Second, Ainslie contends that J.P.'s fear was not objectively reasonable. We disagree. An unknown man repeatedly parked within sight of a 14-year-old girl.

While she was walking alone, the girl witnessed the man exit and stand near his car. And even after this man was chased by the girl's father, he continued to park in the same place near her home. These facts are sufficient to elicit fear that is objectively reasonable.

Third, Ainslie contends that the evidence does not establish that he knew or reasonably should have known that his conduct was frightening to J.P. Once again, the evidence shows otherwise. Ainslie acknowledged that he was informed by an officer that his getting out of his car and looking at three girls had caused alarm. The warning itself may not have placed Ainslie on actual notice that J.P. herself did not want to be followed. But that evidence, in conjunction with Ainslie's knowledge that Proffitt followed him into a cul-de-sac and yelled at him to stop his behavior, was sufficient to support a finding that Ainslie reasonably should have known his conduct created fear in J.P.

The evidence was sufficient for the trier of fact to find each of the elements of stalking under RCW 9A.46.110(1) established.

2) Vagueness

Ainslie contends that the stalking statute is unconstitutionally vague as applied to him because persons of ordinary intelligence would not understand that "following" includes regularly parking a car at a particular location and sitting in it, without intending to scare anyone.

If a statute does not involve First Amendment rights, the court considers only whether the statute is sufficiently definite as applied to the defendant's particular conduct. "A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability."

Here, given the evidence previously described, a person of ordinary understanding would be capable of determining that Ainslie's conduct constituted repeated "following" within the definition in the statute. The statute is therefore not unconstitutionally vague as applied to Ainslie.

[Some footnotes and case citations omitted]

“DRUG HOUSE” EVIDENCE HELD INSUFFICIENT TO SUPPORT CONVICTION

State v. Ceglowski, ___ Wn. App. ___, 12 P.3d 160 (Div. II, 2000)

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

A group of police officers, including members of various city and county drug task forces, executed a search warrant on a bait and tackle shop. Ceglowski was in the back office. The police found a rolled up bill of U.S. currency, a small tray with traces of brown powder, and a small baggie with brown powder in the office desk drawer. The police also found a marijuana pipe, about \$600 in currency, and an additional baggie containing brown powder in the desk. The police later identified the powder as 0.9 grams of methamphetamine between both baggies, with a street value totaling between \$70-\$150. The drug-detecting police dog alerted for narcotic odor on the currency found in the desk and in the store's cash register.

The police also found a small scale in the back office. The office safe contained about ten pages of "[p]ay and owe sheets," consistent with the type kept to record drug transactions. The business license and fish and wildlife license named Ceglowski as the license holder and owner of the store. Ceglowski had money in his pockets later identified by the police as the same money used for a controlled buy minutes before they executed the warrant.

The State charged Ceglowski with four counts of violations of the Uniform Controlled Substances Act, RCW Chapter 69.50. Count I charged unlawful possession of methamphetamine with intent to deliver. Counts II and III charged Ceglowski with possession of two other controlled substances. The State did not charge Ceglowski with the delivery of a controlled substance it claimed occurred that produced the "buy" money found in his pockets.

Count IV alleged that Ceglowski "did knowingly keep and/or maintain a store ... which was used for keeping and/or selling controlled substances," in violation of RCW 69.50.402(a)(6) ("drug house statute"). The jury found Ceglowski guilty only of violation of the drug house statute. The State dismissed Count II during the trial, after Ceglowski testified that the drugs referred to in Count II had been prescribed to him following throat surgery. The jury acquitted Ceglowski of the two remaining counts of unlawful possession with intent to deliver and unlawful possession.

ISSUE AND RULING: Where the totality of the evidence demonstrates no more than a single instance of illegal drug activity, does the evidence support a conviction for "maintain(ing) a "drug house" in violation of RCW 69.50.402(a)(6)? (ANSWER: No)

Result: Reversal of Cowlitz County Superior Court conviction of Michael Ray Ceglowski for violation of RCW 69.50.402(a)(6), the "drug house" statute.

ANALYSIS:

RCW 69.50.402(a)(6) makes it a felony to:

knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.
[Emphasis added]

The Ceglowski Court notes that the question before it is one of first impression in Washington. Considering the dictionary definition of "maintain" and also considering case law from other jurisdictions, the Court of Appeals sets the standard for sufficiency of evidence in "drug house" cases:

We hold that the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity in order to prove that the defendant "maintains" the premises for keeping or selling a controlled substance in violation of the drug house statute.

Analyzing the totality of the evidence in this case, the Court of Appeals explains as follows why it believes that the evidence in the Ceglowski case falls short of the standard for a "drug house" prosecution:

These out of state authorities persuasively support the conclusion that the keeping or maintaining element of our drug house statute contemplates a continuing pattern of criminal behavior, beyond an isolated incident of possession or sale at a defendant's business. The statute was clearly designed to do more than punish mere possession. Therefore, we hold that to constitute the crime of maintaining a premises for the purpose of unlawfully keeping or selling controlled substances there must be: (1) some evidence that the drug activity is of a continuing and recurring character; and (2) that a substantial purpose of maintaining the premises is for the illegal drug activity. This rule does not mean that a small quantity of drugs or evidence found on only "a single occasion cannot be sufficient to show a crime of a continuing nature." The evidence could be sufficient if the totality of the evidence proves that the defendant "maintained" the premises for selling or keeping controlled substances.

Here, taking the evidence in the light most favorable to the State, the evidence does not support the reasonable inference that keeping or selling drugs was a recurring activity at the business. Although the discovery of the informant's cash in Ceglowski's pocket supports the reasonable inference that a single drug sale was conducted in the shop, the drugs allegedly purchased at the buy were not introduced at trial. And there was no evidence that any other drug sale had occurred at the business. The only evidence of possible continuing sale activity was the handwritten "pay and owe" sheets, which may or may not have been drug related. These records, although consistent with the sale of drugs, do not support a reasonable inference that other sales continually took place on the premises.

Neither does the evidence support the reasonable inference that selling drugs was a substantial purpose for maintaining the bait and tackle shop. There was evidence Ceglowski possessed methamphetamine on the premises, because of the 0.9 grams found in his office desk. But we do not find evidence that Ceglowski maintained the business for the purpose of keeping drugs or for selling them. First, Ceglowski was not convicted of possession with intent to deliver; he was acquitted. Second, neither does the existence of baggies and a small scale at a bait and tackle shop lead to a reasonable inference that drugs were kept or sold there. Mere possession of 0.9 grams of methamphetamine, with little else to demonstrate a continuing course of conduct, is not enough evidence by which a rational trier of fact could find that Ceglowski maintained a shop that was used for keeping or selling drugs.

We reverse Ceglowski's conviction for insufficient evidence with instructions to the trial court to dismiss the charge with prejudice.

[Internal case citations omitted]

FINGERPRINTS ON METHAMPHETAMINE "BOX LAB" ITEMS SUPPORTS CONVICTION FOR MANUFACTURING METH, BUT THIS EVIDENCE ALONE DOES NOT SUPPORT CONVICTION FOR POSSESSING METH WITH INTENT TO DELIVER

State v. Todd, 101 Wn. App. 945, 6 P.3d 86 (Div. III, 2000)

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

Officers executed a search warrant at a residence in Spokane. No one was home. But a stolen Chevrolet Blazer was parked under a carport.

The Blazer housed a methamphetamine "box lab." A "box lab" holds materials and chemicals used to manufacture methamphetamine. Police also found matchbook covers. Certain types of methamphetamine manufacturing require the phosphorous found in matches.

Police seized a flask, two glass jars, and a large, three-liter separatory funnel from the "box lab." The flask contained a red phosphorus residue. One jar contained a methamphetamine-producing compound and unfinished, liquid-form methamphetamine that had to be converted into powder-form methamphetamine for use. The large funnel contained chemical residue produced in the creation of methamphetamine.

Mr. Todd's fingerprints were on the flask, jars, and funnel. The methamphetamine manufacture had not been completed. Officers also found a triple beam scale during their search.

The State charged Mr. Todd with manufacture of methamphetamine and possession of methamphetamine with intent to deliver. The jury convicted Mr. Todd of both charges.

ISSUES AND RULINGS: Does the fingerprint evidence provide sufficient evidence to support the convictions for: 1) manufacturing methamphetamine and 2) possessing methamphetamine with intent to deliver? (ANSWERS: 1) Yes, as to the charge of manufacturing; 2) No, as to possession with intent to deliver.)

Result: Affirmance of Spokane County Superior Court conviction of Todd Ryan Todd for manufacturing methamphetamine but reversal of conviction for possession with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

It is undisputed that Mr. Todd's fingerprints were on four different items in the methamphetamine "box lab." Mr. Todd contends the evidence is insufficient to support either crime because he was convicted based only on his fingerprints.

"Fingerprint evidence alone is sufficient to support a conviction where the trier of fact could reasonably infer from the circumstances that it could only have been impressed at the time the crime was committed." But "[w]hen fingerprint evidence is the only evidence linking a defendant to a crime and the fingerprint is found on a moveable object, the State must show that the fingerprint could have been impressed only during the commission of the crime, and not earlier." Thus, it is essential that the State point to sufficient evidence, as reflected in the record, that the fingerprinted object was generally inaccessible to the defendant at a previous time.

The parties rely on State v. Bridge [91 Wn. App. 98 (Div. III, 1998) **Aug. 98 LED:15**] and State v. Lucca [57 Wn. App. 597 (Div. I, 1990) **April 90 LED:09**]. Both "fingerprint only" cases provide limited help. We distinguish moveable objects generally accessible to the public, like those items in this case, from fixed objects generally not accessible to the public, like those in Lucca. The fingerprint in Lucca was impressed on a permanent glass window broken during the crime. The fingerprint in Bridge was found on only one moveable object -- a recently purchased item that still had the price tag on it.

Here Mr. Todd's prints were on four different objects associated with a methamphetamine "box lab." Unlike the object in Bridge, the objects had not been recently purchased. And unlike the object in Bridge, there was more than one fingerprint.

The State had to prove that Mr. Todd manufactured methamphetamine. "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance.

The State argues that an innocent explanation is "much more remote" with fingerprints on two items, "extremely unlikely" with fingerprints on three items, and "nearly impossible" with fingerprints on four different items.

We agree. It was reasonable for the trier of fact to infer that, more likely than not, Mr. Todd manufactured methamphetamine based on his fingerprints. The equipment was used only to manufacture drugs. And Mr. Todd's fingerprints were found on most of the manufacturing equipment.

The State also had to prove that Mr. Todd possessed methamphetamine with the intent to deliver.

Mr. Todd contends that reversal of his conviction for possession with intent to deliver is required by State v. Spruell [57 Wn. App. 383 (Div. I, 1990) **Aug. 90 LED:17**]. But Spruell is distinguishable. There the only evidence tying the defendant to the drugs was his presence at the house and his "fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police." The Court of Appeals reversed. It concluded that this was insufficient to infer the defendant's dominion and control over the drugs.

But here: Police discovered a methamphetamine box lab; The "box lab" indicated that this was an on-going, large-scale operation for methamphetamine manufacture and distribution; Four items contained methamphetamine residue or compounds used in the production of methamphetamine; Mr. Todd's fingerprints were on all four items.

A trier of fact could reasonably conclude that Mr. Todd possessed methamphetamine.

Possession with intent to deliver requires that the defendant have something -- that is that he possess drugs to deliver. Intent to deliver must logically follow as a matter of probability from the evidence presented in addition to possession. Generally, at least one factor, in addition to possession and suggestive of sale, is required to establish an inference of intent to deliver.

Even accepting the State's argument that the "box lab" supported a large-scale operation, there still must have been something to deliver. That is, the manufacturing process must have been completed and the methamphetamine must have been on hand to deliver to someone. Here, the methamphetamine manufacturing process was incomplete. Mr. Todd had no drugs to deliver. He could not therefore possess with the intent to deliver.

[Some footnotes and citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) K-12 SCHOOLS INTIMIDATION STATUTE, RCW 28A.635.100, GETS PRO-STATE INTERPRETATION -- In State v. Avila, ___ Wn. App. ___, 10 P.3d 486 (Div. III, 2000), the Court of Appeals rules that the evidence is sufficient to support 15-year-old Wilson Avila's conviction for intimidating his teacher in violation of RCW 28A.635.100.

Angry at his teacher, Avila told fellow students on two separate occasions on the same day that he was going to kill the teacher. One of the students told the targeted teacher, who told law enforcement. Avila was found guilty in juvenile court of intimidating a teacher in violation of RCW 28A.635.100.

RCW 28A.635.100 provides:

It shall be unlawful for any person, singly or in concert with others, to intimidate by threat of force or violence any administrator, teacher, classified employee, or student of any common school who is in the peaceful discharge or conduct of his or her duties or studies.

The Avila Court concludes that two implied elements of this statute are 1) that the perpetrator have the intent to make a threat, and 2) that the threatened person actually be intimidated by the threat. But the statute contains no element of intent that the threat be conveyed to the target, the Avila Court holds. The Court of Appeals explains why it concludes that Avila's conviction under RCW 28A.635.100 is supported by the evidence:

The unchallenged findings show the incident occurred at a public school, when Mr. Kimes was engaged in his regular teaching activities, and that Mr. Avila said he wanted to blow off Mr. Kimes' head. Mr. Avila issued the threat to two students at different times. Further, Mr. Avila said he did not care if Ms. Scharpp reported the statement to Mr. Kimes. Mr. Kimes sent a referral slip to the school office regarding Mr. Avila's threat. Mr. Kimes contacted law enforcement authorities and sought a restraining order against Mr. Avila. Further, Mr. Kimes testified he notified the authorities because of his concern whether Mr. Avila would carry out his threat. Although the trial court specifically found Mr. Avila did not actually intend to convey the threat to Mr. Kimes, from this record, a reasonable trier of fact could find Mr. Avila intended the statements as threats. Last, a fact finder could decide from this record that the threatening statements intimidated Mr. Kimes. Thus, the evidence supports Mr. Avila's conviction.

Result: Affirmance of Douglas County Juvenile Court conviction of Wilson Avila for violation of RCW 28A.635.100; remand to juvenile court for entry of clarifying findings in support of the conviction.

LED EDITORIAL NOTE: For a similar pro-state interpretation of *the harassment statute* at RCW 9A.46.020, see State v. J.M., 101 Wn. App. 706 (Div. I, 2000) November 00 LED:14, where the Court of Appeals held that the harassment statute does not require that the State prove that a juvenile knew or intended that his “indirect threat” to kill various school personnel would be communicated to the individuals threatened.

(2) INTERFERENCE READING ON BAC MACHINE DOES NOT JUSTIFY BLOOD TEST UNDER IMPLIED CONSENT LAW, COURT OF APPEALS RULES IN CONTROVERSIAL DECISION ON WHICH PROSECUTOR IS SEEKING REVIEW -- In Kent v. Beigh, 102 Wn. App. 269 (Div. I, 2000), the Court of Appeals rules that, where a BAC Datamaster machine gave repeat readings of “interference” on breath samples given by a DUI arrestee, the arresting officer had no authority to make the DUI arrestee choose between taking a blood test or taking the consequences of test refusal under implied consent law.

The Beigh Court appears to say that subsection (2) RCW 46.20.308 does not provide independent authority to test the breath or blood of DUI arrestees, and therefore police may not lawfully substitute a blood test (as opposed to a breath test) as the test of alcohol content under implied consent law following a DUI arrest unless: 1) the person is unconscious; 2) the arrest is for vehicular homicide or vehicular assault; or 3) the arrest follows an accident in which there has been a serious bodily injury to another person. See RCW 46.20.208(3).

Result: Affirmance of Kent Municipal Court and King County Superior Court rulings suppressing blood test results in DUI prosecution of Richard Beigh.

Status: The City of Kent has petitioned the Washington Supreme Court for review.

LED EDITORIAL COMMENT: The Beigh Court bases its decision in part on the Court’s view that subsection (2) of RCW 46.20.308 does not independently provide authority for officers to make blood tests (as opposed to breath tests) the implied consent option for persons arrested for driving under the influence. We think the Court is flat wrong in this regard. The Beigh Court’s interpretation would mean that an officer would lack authority to invoke blood testing under implied consent law where the officer had probable cause to believe the arrestee was under the influence of a drug. The Legislature could not possibly have intended that result.

Subsection (2) of RCW 46.20.308 provides in relevant part (italicized insert by LED Ed.):

The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor’s office, emergency medical vehicle, ambulance, or other similar facility in which a breath testing instrument is not present or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(4). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver that: [*subsection (2) goes on to set forth the elements of the implied consent warning – LED Ed.*]

Subsection (3) of RCW 46.20.308 provides (underlining and italicized insert by LED Ed.) :

Except as provided in this section [*we think that in the underlined phrase the Legislature was referring to the whole of section 308, and we think that the Beigh*

Court misread “section” as “subsection”—LED Ed.], the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

The Beigh Court failed to grasp the respective purposes of subsections (2) and (3). Subsection (2) explains: i) when the implied consent law may be invoked by officers; ii) when the test for the arrestee is of the breath; iii) when the test for the arrestee is of the blood; and iv) what the content of the implied consent warnings must be. The purposes of subsection (3) are: i) to clarify that blood tests are the implied consent option that the officer offers to the arrestee only where so specified in one of the subsections of section 308 (including under subsection (2)); and ii) to specify when officers may force a person to take a blood test even if that person does not wish to submit to any test.

A number of Washington appellate court decisions recognize that subsection (2) of RCW 46.20.308 independently authorizes breath or blood testing, as specified under the subsection, under the implied consent statute. See DOL v Lax, 125 Wn.2d 818 (1995) May 95 LED:04; Mairs v. DOL, 70 Wn. App. 541 (Div. I, 1993); Sheldon v. DOL, 68 Wn. App. 681 (Div. II, 1993).

We believe it would be reasonable for city attorneys or prosecutors to advise officers that, until such time as the Washington Supreme Court makes a further decision or denies review in Beigh, officers may continue to assume that subsection (2) authorizes them to invoke blood testing (instead of breath testing), with appropriate prior warnings, under implied consent law under the circumstances set forth in that subsection. But, as always, LED readers must keep in mind that what we think is not legal advice, and law enforcement agencies should check with their respective legal counsel for advice on this matter.

Meanwhile, if officers get “interference” BAC readings as happened in the Beigh case, they probably should try to test the arrestee on another BAC machine to see if they can get an alcohol content reading from the other machine. Only then should they conclude that the person is incapable such that the arrestee must choose between a blood test and the legal consequences of refusal.

LED EDITORIAL NOTE: The following note addresses a point of law not pertinent under the facts of the Beigh case, but it is a point on which we get occasional questions. Subsection (3) of RCW 46.20.308 is not wholly self-contained as to the full extent of limits on police authority to do warrantless, forcible blood testing (regardless of the arrestee’s wishes) in the narrow subset of traffic arrest settings addressed in that subsection. Subsection (3) does state the statutory limits on such forced blood testing following traffic arrests in the circumstances addressed there. Note, however, that RCW 46.20.308(3) does not expressly state the constitutional restrictions on forced blood testing in this context. Under Fourth Amendment case law, unless police have probable cause to believe that the person was driving the vehicle under the influence of intoxicating liquor or drugs, police may not subject the person to a warrantless, forced blood test, even though officers may have, per RCW 46.20.308(3): 1) arrested an unconscious person; 2) arrested a person for vehicular homicide or vehicular assault; or 3) arrested a person following an accident in which there has been a serious bodily injury.

(3) CIVIL ASSET FORFEITURE HEARING, DELAYED TO ACCOMMODATE RELATED CRIMINAL TRIAL, HELD TO BE TIMELY UNDER UCSA; WIFE’S “INNOCENT OWNER” DEFENSE REJECTED -- In Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742 (Div. III, 2000), the Court of Appeals rules 2-1 that a civil asset forfeiture hearing is timely where claimants were notified, within ninety days of the date they requested a hearing, that a hearing would be held within 90 days of a related criminal trial. The Court of Appeals also holds that there was sufficient evidence to support the hearing officer’s decision, and the Court of Appeals also rejects the “innocent owner” claims of a spouse.

Facts and proceedings below

The majority opinion summarizes the facts of the case as follows:

On December 15, 1994, police arrested Alfonso Escamilla after finding three kilos of cocaine in his truck. The truck and \$180 were seized for forfeiture. On the same day, in the presence of Mr. Escamilla's wife, Maggie, police searched the Escamillas' home. Seized were three packages of cash totaling \$14,000 found under a nightstand and \$3,289 found in a dresser drawer. The next day, officers seized \$10,000 cash that Mrs. Escamilla brought in to post bail for Mr. Escamilla. In all, Metro seized \$27,397.

On December 16 and 20, 1994, Metro sent seizure notices to the Escamillas. On December 29, by letter, the Escamillas requested a hearing. Mr. Escamilla was charged with controlled substance crimes in both state and federal court. The state trial was set to proceed February 13, 1995. According to the forfeiture hearing officer's findings, Metro "advised the claimants that a hearing would be set after the conclusion of Mr. Escamilla's criminal trial." Metro did not give written notice of the hearing date until March 24, 1995, the day the state criminal trial concluded by acquittal. The Escamillas' attorney received this notice on March 30. The hearing was originally scheduled for April 18, then, by agreement subject to a timeliness objection, continued to April 25, when testimony began. The administrative hearing was not completed until April 16, 1997, due to delays attributable to the Escamillas. In February 1996, Mr. Escamilla pleaded guilty in federal court, admitting to dealing drugs and laundering money in a conspiracy related to his December 15, 1994 arrest.

...

Timeliness ruling by majority

RCW 69.50.505 allows law enforcement agencies to seize property when there is probable cause to believe the property was or is intended to be used for illegal drug activity, or is proceeds of illegal drug activity. The seizing agency must provide notice of the seizure within fifteen days of the seizure. A person claiming an interest in personal property seized must notify the seizing agency within forty-five days. Under the statute, persons filing a timely notice "shall be afforded a reasonable opportunity to be heard as to the claim or right." The statute does not provide a time within which the hearing must be commenced.

Relying on a Division One opinion, the Escamilla majority states:

Significantly, Black Corvette, 91 Wn. App. 32 (Div. I, 1997), like this case, was decided using the procedures set out in the Administrative Procedure Act (APA) RCW 34.05. Accordingly, proceedings must be commenced within 90 days of the date a claimant notifies the seizing agency of a claim of ownership or a right to possession of the seized property (here December 29, 1994). RCW 34.05.413(5) provides "[a]n adjudicative proceeding commences when the agency or a presiding officer notifies a party that a preheating conference, hearing, or other stage of an adjudicative proceeding will be conducted." Thus, the Black Corvette court relying on RCW 34.05.413(5) concluded the hearing commences when the agency or hearing officer notifies a claimant that some stage of the hearing will be conducted.

Here, within the 90-day window, Metro first "advised the claimants that a hearing would be set after the conclusion of Mr. Escamilla's criminal trial." Second, at the conclusion of the state criminal trial, on March 24, 1995, Metro gave notice of the April 18 hearing date. Although the hearing date was scheduled more than 90 days from December 29, 1994, both notices were within the 90-day commencement period. The Escamillas do not ask us to consider the delays beyond April 18. Under these circumstances, we conclude, consistent with the holding in Black Corvette, that the adjudicative process was duly commenced within the meaning of RCW 34.05.413(5).

Additionally, because hearing dates are unspecified, we agree with Black Corvette's adoption of a balancing test based upon United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency, 461 U.S. 555 (1983). The test is similar to that used in speedy trial contexts. Trial courts should consider due process timeliness challenges based on forfeiture proceedings based upon: "(1) The length of

the delay; (2) the reason for the delay; (3) the claimant's assertions of his [or her] right to a hearing; and (4) whether the claimant suffered any prejudice.”

Here, the length of delay, from March 29 to April 18 is slight. Delaying the civil proceedings until after the criminal matters are resolved avoids schedule conflicts. Moreover, allowing delays recognizes certain practical realities extant when civil drug forfeitures are invoked concurrently with criminal drug prosecutions. Rather than jeopardizing a claimant/defendant's Fifth Amendment right against self-incrimination, permitting delay of forfeiture proceedings until the conclusion of criminal prosecutions strikes a reasonable balance favoring an individual's liberty interests over his or her property interests. Finally, the Escamillas did not assert any need for an earlier hearing or specify any prejudice from the minimal delay. Indeed, rather than following through with the April 1995 hearing, the Escamillas were primarily responsible for delaying the adjudicative hearing to April 1997.

...

In sum, Metro gave timely notice of forfeiture, then upon notice of contest, Metro commenced the adjudicative hearing process against the Escamillas by advising them within 90 days of the notice of contest that notice of hearing would follow the underlying state criminal trial. Additionally, the hearing notice was given March 24 within 90 days of the December 29 notice of contest. And, using the Black Corvette balancing test, we conclude the hearing date was timely.

[Some citations omitted]

“Sufficiency of evidence” ruling by the Court of Appeals

The claimants also challenged the sufficiency of the evidence to support forfeiture. They stipulated to the forfeiture of the \$14,000 found in the nightstand, the \$180 found with Mr. Escamilla when he was arrested, and the truck. However, they alleged that the evidence is insufficient to support the forfeiture of the \$10,000 seized from Mrs. Escamilla at the jail, and the \$3,289 seized at the Escamillas' home. They claim that Metro did not meet its initial burden of showing probable cause because Metro failed to properly segregate or trace drug money from untainted funds. The Escamilla Court rejects this argument, stating that:

The question is whether the findings here were clearly erroneous. The hearing officer found that the \$3,289 seized from the Escamillas' dresser, and the \$10,000 seized from Mrs. Escamilla at the jail represented proceeds from illegal drug sales. In support, the hearing officer found that “[t]here were vast amounts of money coming into the Escamilla household for several years before Mr. Escamilla was arrested, much more than was substantiated by claimants' salaries and other income.” The money seized was decided to be “either proceeds from drug transactions or commingled with proceeds from drug transactions.” Mr. Escamilla was involved in a conspiracy to deal drugs and launder money at the time he was arrested. Based upon this evidence, the hearing officer was not clearly erroneous in his findings.

[Citation omitted]

“Innocent owner” ruling by the Court of Appeals

Finally, rejecting the spouse's “innocent owner” defense, the majority states:

The hearing officer's finding that Mrs. Escamilla knew or should have known the money was illegal proceeds was not clearly erroneous. The hearing officer found Mrs. Escamilla's financial experience as a bank teller indicated the likelihood she knew something was wrong. Her testimony supports the hearing officer's findings. At best, she suspected something was wrong based upon their comparatively affluent lifestyle but chose to look the other way. Her background made it unlikely that she would overlook the vast sums that were commingled with an otherwise austere income. Although she denied specific knowledge of Mr. Escamilla's illegal activity, her “failure to take all reasonable steps” to prevent illicit use of the money is sufficient to support a finding that she tacitly consented to his illegal activity.

[Citation omitted]

Dissenting opinion by Judge Schultheis

Judge Schultheis agrees with the majority that the ninety days runs from the date notice of the claim is received by the law enforcement agency, not from the date of seizure. He also agrees that, once the hearing is timely set, it can be continued under the proper circumstances. However, he argues in vain that the Court should have held that the hearing must actually begin or be scheduled to begin within ninety days of the date of the agency's receipt of the claim. Judge Schultheis disagrees with the majority's view that the commencement of administrative proceedings is accomplished by, as happened here, merely notifying the owner of the delay (based on the pending criminal trial) is sufficient. The Schultheis dissent does not address the "sufficiency of evidence" and "innocent owner" issues.

Result: Affirmance of Benton County Superior Court order upholding administrative forfeiture of \$27,397 and a truck belonging to Alfonso and Maggie Escamilla.

(4) WASHINGTON'S "SEXUAL EXPLOITATION OF A MINOR" STATUTE SURVIVES CONSTITUTIONAL CHALLENGE IN "SHOW ME YOUR BREASTS" HIGH SCHOOL VIDEOTAPING CASE -- In State v. D.H., ___ Wn. App. ___, 9 P.3d 253 (Div. I, 2000), the Court of Appeals upholds against a constitutional challenge the prohibition of "sexual exploitation of a minor" in chapter 9.68A RCW.

Facts and proceedings below

The Court of Appeals describes the facts and the juvenile court proceedings in the case as follows:

15-year-old D.H. brought a video camera to his high school and videotaped three female classmates while they exposed their breasts and buttocks. One of the classmates, 15-year-old K.S., who was approximately four months older than D.H., reluctantly agreed to expose her breasts for the camera only after D.H. followed her around and repeatedly asked her. D.H. then showed the video recording to several classmates.

D.H. was charged in juvenile court with three counts of sexual exploitation of a minor. See RCW 9.68A.040(1)(b). At the fact-finding hearing, D.H. testified that the videotaping was part of a contest with a friend to see who could persuade the most female classmates "to flash on camera." He denied that the recording was for sexual stimulation and maintained that he would not be "turned on" by the naked breast of a 17-year-old female, although he acknowledged that he would be aroused by the naked breast of an 18-year-old female. D.H. also acknowledged a prior incident in which he had held a video camera under the skirt of another classmate.

The juvenile court found D.H. guilty of the charge involving K.S., but not guilty of the two remaining counts because the participants had exposed themselves without any encouragement or communication from D.H. The court imposed a standard-range disposition and waived the requirement that D.H. register as a sex offender.

Constitutional analysis

The primary focus of D.H.'s appeal was the language of two statutory sections. First, RCW 9.68A.040(1)(b), provides in relevant part that a person is guilty of "sexual exploitation of a minor" if he or she "aids, invites, employs, authorizes, or causes a minor to engage in sexual explicit conduct knowing that such conduct will be photographed or part of a live performance." Second, RCW 9.68A.011(3)(a) defines "sexually explicit conduct" in part as "actual **or simulated**...(e) exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." [Emphasis added]

D.H.'s primary constitutional attack was that the statutory definition of "sexually explicit conduct" is overbroad in violation of free speech protection of the First Amendment. He argued that the above-bolded statutory term, "simulated," modifies the term "minor," such that the statute impermissibly addresses "virtual" or computer-generated depictions of prohibited conduct. D.H.'s argument in this regard relied on the Ninth Circuit U.S. Court of Appeals decision in Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) **April 00 LED:04**. In Free Speech Coalition, the Ninth Circuit of the U.S. Court of Appeals invalidated "virtual pornography" provisions of Federal pornography law.

The Washington Court of Appeals rejects D.H.'s Free Speech Coalition argument, declaring that the term "simulated" in the Washington statute modifies only the term "exhibitions." Accordingly, since the Washington statute prohibits only activity involving actual minors and does not prohibit mere "virtual," or computer-generated, images of minors, the Washington statute does not suffer from the constitutional overbreadth problems found by the Ninth Circuit in Free Speech Coalition.

Result: Affirmance of King County Juvenile Court adjudication of guilt against D.H. for sexual exploitation of a minor.

(5) POLICE AWARENESS OF LONG-TERM, INTENSE, INDEPENDENT INVESTIGATION OF SON'S DEATH BY HIS FATHER DID NOT MAKE THE FATHER A "GOVERNMENT AGENT" FOR PURPOSES OF SEARCH & SEIZURE LAW -- In *State v. Swenson*, ___ Wn. App. ___, 9 P.3d 933 (Div. I, 2000) the Court of Appeals rejects a robbery-murder defendant's argument that the victim's father acted as a government agent; and that, as such, the father obtained evidence in violation of the Fourth Amendment, which evidence, along with its fruits, should be suppressed.

Facts and proceedings below

Following the murder of his son, David Loucks, in David's Seattle recording studio, Allan Loucks, a private attorney, began investigating on his own. Over the course of the next year, the father gathered information and shared it with the Seattle Police Department detectives on the case. The detectives shared limited information with Loucks.

At one point, Loucks got some highly incriminating phone records of Swenson (under Swenson's assumed name, "Weller"). Loucks got the records through contacts with phone company employees. Knowing that he had gotten the records unlawfully, Loucks encouraged the detectives on several occasions to try to get the records through a search warrant. One of the detectives told Loucks that police could not get the records without probable cause. The detectives never said anything to Loucks to suggest that they wanted him to obtain or provide the phone records, and in fact the detectives suggested to him that he should curtail or stop his investigation.

Later, "CrimeStoppers" received an anonymous phone call providing information regarding the contents of the phone records. A few months later, Loucks met with a King County Deputy Prosecutor, to whom Loucks provided even more detailed information as to what was in Swenson's phone records. Shortly after that meeting, a warrant for Swenson's arrest was issued on another matter. The Seattle officers called Loucks to tell him about the warrant and to tell him that they would interview Swenson once he was arrested on the warrant.

Loucks subsequently staked out the Spokane apartment of Swenson's girlfriend. Loucks spotted Swenson. Loucks then called the Spokane Police Department. Spokane officers responded and arrested Swenson. The next day, the Seattle detectives went to Spokane and, in the words of the Court of Appeals, the following developments then occurred:

[The detectives] confronted Swenson with the information provided by Allan Loucks and the fact that they now had his fingerprints. Swenson eventually admitted that he was at the studio on the night David Loucks was killed. Swenson then gave a taped statement to the police, implicating someone named "Joe" in David Loucks' death. Swenson later identified "Joe" as Joseph Gardner. The police interviewed Gardner, who was already in prison for another crime, and Gardner implicated himself and Swenson in the robbery at David Loucks' studio.

Based on the information obtained from Swenson and Gardner, the police obtained several search warrants. With the search warrants, the police seized Swenson's phone records - which confirmed the information provided to Eakes by Allan Loucks - a stun gun from Swenson's apartment, and various pieces of recording equipment.

Swenson was then charged with first degree felony murder based on the robbery and killing of Loucks' son. Swenson moved to suppress the phone records that Loucks had gotten unlawfully, as well as the alleged "fruits" of that unlawfully obtained evidence, i.e., the statements taken from him following his arrest. His motion was based on his claim that Loucks was a "government agent." The trial court denied Swenson's motion, and he was convicted of first degree murder. He appealed.

Legal analysis of "government agent" issue

On appeal, Swenson again argued that Loucks was a “government agent.” Rejecting this argument, the Court of Appeals explains as follows that Loucks was not a government agent because there was no evidence that police instigated, encouraged, counseled or directed Loucks to obtain the phone records:

Put simply, law enforcement officers cannot use private citizens to obtain evidence without a search warrant where a search warrant would otherwise be required.

"Critical factors in determining whether a private person acts as a government agent include [1] whether the government knew of and acquiesced in the intrusive conduct and [2] whether the party performing the search intended to assist law enforcement efforts or to further his [or her] own ends." **[LED Note: See U.S. v. Miller, 688 F.2d 652 9th Cir. 1982]**

In this case, Allan Loucks' conduct clearly satisfies the second part of the so-called Miller test. Although Allan Loucks had a personal interest in identifying his son's killer or killers, he obtained Swenson's phone records to assist law enforcement officers in their investigation. Therefore, the only question is whether Swenson has met the first part of the Miller test - did the government know of and acquiesce in Allan Loucks' obtaining Swenson's phone records?

Swenson contends that Allan Loucks' investigation was not independent of the police department's investigation, and that the police acquiesced and encouraged Allan Loucks' illegal seizure of Swenson's phone records by accepting other information that the police suspected was obtained by Allan Loucks through illegal means. But even if this court accepts Swenson's characterization of the testimony from the CrR 3.6 hearing, this does not establish that Allan Loucks was acting as a government agent when he obtained Swenson's phone records.

"[M]ere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." "It must be shown that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person."

In this case, although one could conclude from the conflicting evidence that the police encouraged Allan Loucks to help them with their investigation, there is no evidence that the police instigated, encouraged, counseled, or directed Allan Loucks to obtain Swenson's phone records. In fact, the evidence shows that Allan Loucks was continually frustrated at police failure to take advantage of the information he provided regarding the phone records, and that the police did not seize the records until they were able to obtain a search warrant based on their interviews with Swenson and Gardner. Moreover, Swenson does not even challenge the trial court's finding that "[t]he police never articulated for Mr. Loucks any specific type of information they were seeking in their own investigation." Without some evidence that the police indicated to Allan Loucks that they wanted Swenson's phone records, it cannot be said that the police were using Allan Loucks to obtain evidence without a search warrant where a search warrant would otherwise be required. Therefore, the trial court's finding that Allan Loucks was not acting as a government agent when he obtained Swenson's phone records is supported by substantial evidence, and the trial court properly denied Swenson's motion to suppress.

[Some citations omitted]

Result: Affirmance of King County Superior Court conviction of Shawn Daniel Swenson for first degree felony murder.

LED EDITORIAL NOTE: For another recent Court of Appeals decision addressing whether a pencil-rigged spear can constitute a “deadly weapon,” see State v. Skenandore, 99 Wn. App. 494 (2000) Sept 00 LED:19. Under distinctly different circumstances, the Court of Appeals held in Skenandore that the pencil-weapon in that case was not a “deadly weapon.”

(6) ADDITIONAL FACT-FINDING REQUIRED TO DETERMINE WHETHER JAIL OFFICERS' INSPECTION OF CRIMINAL DEFENDANTS' LEGAL DOCUMENTS WERE JUSTIFIED BY

SECURITY CONCERNS -- In State v. Garza, 99 Wn. App. 291 (Div. III, 2000), the Court of Appeals remands a case back to the superior court to determine whether security concerns justified jail officers' inspection of inmate defendants' legal documents.

Facts

The defendants in this case were all incarcerated in the Benton County Jail. The facts are described by the Court of Appeals as follows:

On July 25, 1998, officers at the Benton County Jail discovered that a window bar had been partially cut with what appeared to be a hacksaw blade. They also discovered that a desk's base support and a window screen had been damaged.

Concluding one or more inmates had attempted to escape from the jail, officers conducted an extensive search of the pod where the damage occurred. They strip-searched the inmates and issued new clothes, removed mattresses and checked them with metal detectors, and examined drains, light fixtures, and the insides of television sets. The inmates' personal property, including legal documents containing private communications with their attorneys, was seized and "gone through."

...

The inmates testified they were deprived of their legal materials for up to 32 days, during which time their trial dates were approaching. Mr. Garza testified he saw an officer reading his legal materials. Mr. Mendenhall and Mr. Casebeer testified that when their materials were returned, they were out of order and appeared to have been read or copied. The superior court's written findings of fact do not expressly determine whether the inmates' legal materials were read or copied. In its oral ruling the court stated: "It's pretty clear that the inmates, all three of the inmates' legal papers were seized and then looked through and in one case read by [one of the correctional officers]." [Footnote omitted]

Proceedings below

The trial court found that the correctional officers seized the documents and read them, but ruled that the officers' actions were justified due to legitimate security concerns. Accordingly, the trial court denied the defendants' motions to dismiss.

"Right to counsel" analysis

On appeal the defendants contended that their right to counsel under the Sixth Amendment and article I, section 22 of the Washington State Constitution was violated by the jail officers' inspection of their legal materials, which, they allege, contained confidential information. The Court of Appeals discusses several cases that consider whether a state actor's actions were purposeful and without justification. When actions are found to be purposeful and without justification, prejudice is presumed, and courts must then consider the appropriate remedy. The Garza Court concludes:

In this case, the superior court's written and oral findings indicate the jail officers' examination of the defendants' legal materials was purposeful. The court concluded, however, that the examination of the legal materials was justified by the jail's legitimate concerns about the attempted escape. This conclusion misses the point. Certainly the escape attempt justified the search, but the precise question is whether the security concerns justified such an extensive intrusion into the defendants' private attorney-client communications. This determination requires a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examining or reading the materials was required. . . . Without more specific factfinding, it is impossible to determine whether the officers' actions were justified. If, on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation.

On the other hand, even if there is no presumption of prejudice, the defendants still may demonstrate prejudice by demonstrating: (1) that evidence gained through the intrusion will be used against them at trial; (2) that the prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed their confidence in their attorneys; or (4) that the intrusions will otherwise give the State an unfair advantage

at trial. Again, this determination requires a more thorough examination of the facts, which the superior court should conduct on remand.

Finally, if the defendants establish the jail officers' actions violated their right to counsel in any of these ways, the superior court in its discretion should fashion an appropriate remedy, recognizing that dismissal is an extraordinary remedy.

[Citation and footnote omitted]

Result: Remanded to Benton County Superior Court for additional fact-finding.

LED EDITORIAL COMMENT/QUERY: The result might have been different in Garza if the officers had briefly scanned the legal materials in the inmates' presence.

WASHINGTON ATTORNEY GENERAL OPINION ADDRESSES CODE CITIES CONTRACTING WITH NONGOVERNMENTAL ENTITIES RE JAILS

In AGO 2000 No. 8, a formal opinion of the Office of the Washington Attorney General, the AGO concludes as follows as to authority of code cities to contract with nongovernmental entity to construct lease or operate a jail:

1. A code city may contract with a nongovernmental entity for the construction of a jail for the city.
2. A code city lacks authority to enter into an operating lease agreement for a city jail with a nongovernmental entity.
3. A code city lacks authority to contract with a nongovernmental entity to provide overall management or law enforcement services in a city jail; however, the city may contract with a private entity for other jail-related services.

The full text of the opinion may be accessed on the internet at [http://www.wa.gov/ago/opinions/opinion_2000_8.html]

INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT 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 accessed through a separate link clearly designated.

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.

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>]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [<http://www.leg.wa.gov/wsladm/ses.htm>]. The text of acts adopted in the 2000 Washington legislature is available at the following address: [<http://www.leg.wa.gov>]. Look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.

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]. Questions regarding the distribution list or delivery of the **LED** should be directed to Kim McBride of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; Fax (206) 439-3752; e mail [kmcbride@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court

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