



# Law Enforcement

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# Digest

## HONOR ROLL

### **534<sup>th</sup> Session, Basic Law Enforcement Academy – April 24<sup>th</sup> through August 29<sup>th</sup>, 2001**

President: Guy Barattieri - Seattle Police Department  
Best Overall: Benjamin J. Hagglund - Skagit County Sheriff's Office  
Best Academic: Jennifer G. Hubenthal - Vancouver Police Department  
Best Firearms: Joel P. Turner - Thurston County Sheriff's Office  
Tac Officer: Officer Adam Wood - Yelm Police Department

### **535<sup>th</sup> Session, Basic Law Enforcement Academy – May 22<sup>nd</sup> through September 27<sup>th</sup>, 2001**

President: Gervol Magnus - Whatcom County Sheriff's Office  
Best Overall: Jeffery W. Salstrom - Hoquiam Police Department  
Best Academic: Jeffery W. Salstrom - Hoquiam Police Department  
Best Firearms: Jesse L. Hotz - Pierce County Sheriff's Office  
Tac Officer: Officer Rafael Padilla - Kent Police Department

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**CONTINUING LAW ENFORCEMENT STATUS FOR THOSE CALLED TO ACTIVE MILITARY DUTY**

The criminal justice training commission has received a number of inquiries regarding training and certification requirements associated with any lapse in service of law enforcement and corrections officers who are called to active military duty in upcoming months. Commission staff will not consider this time as a break in service for purposes of the training commission’s statutes and rules. However, it is possible that upon return, the employing agency may request than an officer attend an equivalency academy, or complete other refresher training as necessary.

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**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

**(1) FIRST AMENDMENT DOES NOT BAR WARRANTLESS ARREST OF NUDE DANCERS FOR OBSCENE SELF-TOUCHING--**In Furfaro v. City of Seattle, 144 Wn.2d 363 (2001), the Supreme Court agrees with the Court of Appeals (see **March 2000 LED:15**) that the manager and two dancers from Ricks, a nude-dancing business in Seattle, are entitled to a new trial in their lawsuit against the City of Seattle relating to their arrests for violating the City of Seattle’s standards-of-conduct ordinance. However, the Supreme Court disagrees with the Court of Appeals and sides with the police on one important issue. The Supreme Court’s 6-3 majority hold that police may make warrantless arrests of nude dancers when officers observe the dancers engaged in what the officers reasonably believe to be obscene self-touching in violation of law.

In 1995, City of Seattle police officers physically arrested thirteen nude dancers on-site when they observed the dancers engaged in what the officers believed were violations of Seattle’s “standards-of-conduct” ordinance. The business manager and two dancers later sued the arresting officers and the City of Seattle on a variety of theories.

The King County Superior Court dismissed the plaintiffs' state law claims, ruling as a matter of law: 1) that the warrantless, on-view, probable cause arrests were lawful as a matter of state law; and 2) that the individual officers were entitled to qualified immunity under federal law (because federal case law under the First Amendment was not clearly established when the officers made the warrantless arrests). The jury then found that the City of Seattle was not liable for unlawful arrest under the Fourth Amendment as to either of the two arrests, because the officers had probable cause to believe the dancers were violating the standards-of-conduct ordinance. Plaintiffs appealed.

The Court of Appeals reversed, holding that nude dancing is a form of speech and that, as with seizure of suspected obscene written materials (where case law requires a prior search warrant), an arrest warrant is required prior to arresting nude dancers suspected of violating nude-conduct ordinances such as Seattle's. (See **March 2000 LED:15** for summary of Court of Appeals decision). The City of Seattle then obtained review in the Supreme Court.

Now-retired Justice Guy authors the Supreme Court majority opinion, joined by four other justices, concluding that: 1) arrest warrants are not constitutionally required in order to effect arrests in these on-view circumstances; 2) the individual officers were entitled to qualified immunity due to the unsettled nature of federal constitutional law at the time of the arrests; and 3) the plaintiffs' claims based on state constitutional law could not support their actions based on the federal civil rights lawsuit. However, the majority opinion also holds that the officers needed not only probable cause to believe the dancers were violating the Seattle ordinance, but also probable cause to believe the dancers' conduct was obscene. Therefore, the jury verdict must be set aside and the jury must be instructed to that effect in any re-trial.

DISSENT: Justice Sanders authors a dissenting opinion joined by Justices Alexander and Johnson. They would have held that the Court of Appeals was correct in holding that arrest warrants were required to arrest nude dancers suspected of engaging in obscene conduct.

Result: Affirmance (although on alternative grounds) of Court of Appeals decision which had reversed a judgment for the City of Seattle on a jury verdict finding the arrests were lawful. The case is remanded to the King County Superior Court for re-trial in which the jury will be asked whether the officers had probable cause to believe that the dancers were violating the ordinance by engaging in prohibited obscene conduct.

**(2) COURTS LACK AUTHORITY TO ISSUE ADMINISTRATIVE SEARCH WARRANTS TO SEARCH FOR CIVIL VIOLATIONS OF COUNTY CODE** -- In State v. Lansden, \_\_\_ Wn.2d \_\_\_, 30 P.3d 483 (2001), the Washington Supreme Court unanimously holds that a Yakima County District court lacked authority under current law to issue an administrative search warrant for county civil code violations. Therefore, the Lansden Court rules that law enforcement officer participating with a code inspector in executing the administrative search warrant were not entitled to use their observations of drug crimes to obtain a subsequent criminal search warrant. Along the way, the Supreme Court rejects defendant Lansden's "pretext" argument.

The Lansden Court's legal analysis is as follows:

1) Pretext

Lansden's primary claim is that the initial warrant issued to search for code violations was a pretext to enable law enforcement personnel to search the defendant's property for evidence of drugs. Lansden analogizes to this Court's line of pretext traffic stop cases, where minor traffic infractions led to searches for drugs or other criminal activity.

Lansden argues that the reasoning of State v. Ladson, a pretext case in the context of a traffic stop, applies to the case before us. The Ladson court concluded that there is "a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. Where a valid warrant is issued, the result reached in Ladson is not applicable, as the search in Ladson was warrantless.

The defendant also cites to State v. Bartholomew, 56 Wn. App. 617 (1990) **April 90 LED:03**, for the proposition that even when the police have a valid warrant, unauthorized law enforcement personnel may not be present to search and arrest for their own purposes. In the case before us, the search warrant was directed "to the Sheriff of Yakima County, State of Washington, his deputies or to any peace officer of the State of Washington duly authorized to enforce or assist in enforcing any law thereof." Even though the police may have suspected drug activity at Pence Road, there is no evidence that the officers who executed the warrant failed to conform with its directive.

We decline to apply a pretext analysis to searches pursuant to a valid warrant.

## 2) Validity of Administrative Search Warrant

However, we must also scrutinize the validity of the initial search warrant itself. We apply a fundamental provision of state constitutional law: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. In Washington, an "absolutely necessary component of a valid warrant is that it be issued by a magistrate with the legal authority to issue it." City of Seattle v. McCready, 123 Wn.2d 260 (1994) **May 94 LED:03**.

Our state courts of limited jurisdiction have no inherent authority to issue administrative search warrants. Therefore, they must rely on an authorizing statute or court rule for such authority. City of Seattle v. McCready, 124 Wn.2d 300 (1994) **Feb 95 LED:09**. RCW 10.79.015 and CrRLJ 2.3(b) provide for the issuance of warrants to search for evidence of a crime. However, no statute or court rule has been cited by the parties to authorize the issuance of administrative search warrants supported by probable cause for civil infractions. *[Court's Footnote: Several statutes authorize administrative inspection warrants. See, e.g., RCW 15.09.070 (horticultural pests and diseases); RCW 15.17.190 (grade of fruits and vegetables); RCW 16.57.180 (livestock and hides); RCW 17.24.021 (plant and bee pests and diseases); RCW 19.94.260 (weights and measures); RCW 69.50.502 (pharmaceutical premises). No such statute is applicable to the circumstances of the instant case.]*

In the case before us, although the affidavit for the warrant alleged probable cause to believe there were "violations of the Yakima County Code relating to nuisances, zoning and/or dangerous buildings," there was no allegation that those violations constituted a crime.

In his return memorandum to Judge Reukauf, [the county code inspector] cited violations including illegally occupied recreational vehicles and campers, illegal burn barrels and trash, junk or inoperable vehicles and junk vehicle parts, and miscellaneous trash, debris, garbage and junk. These violations are all civil infractions.

The State has provided no valid legal basis for issuance of the initial search warrant. Consequently, the warrant must be quashed because the district court lacked the "authority of law" required by our constitution.

Drug evidence was found in plain view during the initial search. However, "an object in plain view cannot be seized on that basis alone, if it is 'situated on private premises to which access is not otherwise available for the seizing officer.'"

Because they were executing an invalid search warrant, the officers were not lawfully present on the Pence Road property. The plain view doctrine "does not apply to render lawful a seizure of evidence procured or brought into view by invasion of an accused's constitutional rights." Such evidence is inadmissible against the defendant.

[Some citations omitted]

**Result:** Reversal of unpublished Court of Appeals' decision which had affirmed a Yakima County Superior Court conviction of Kenneth Lansden for manufacturing and possessing methamphetamine; remand to trial court for order of dismissal.

**Status:** The Yakima County Prosecutor has moved for reconsideration, asserting that the Supreme Court overlooked the fact that the code inspector was searching for misdemeanor violations of the county code, and hence that the Supreme Court's characterization of the warrant authorization as being purely civil was incorrect.

**LED EDITORIAL COMMENT:** While the warrant in this case was issued by a district court judge, our best guess is that the analysis would be the same if a superior court judge had issued the administrative search warrant. That is, the Washington Supreme Court apparently would also require express statutory or court rule authorization to support issuance of an administrative search warrant by a superior court judge. See Seattle v. McReady, 123 Wn.2d 260, 277 (1994).

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### **WASHINGTON STATE COURT OF APPEALS**

#### **FERRIER PRECEDENT REQUIRES "KNOCK-AND-TALK" CONSENT SEARCH WARNINGS IN NON-EXIGENT INVESTIGATION OF REPORTED DRUG-DEALING IN HOTEL ROOM**

State v. Kennedy, \_\_\_ Wn. App. \_\_\_, 29 P.3d 746 (Div. II, 2001)

Facts and Proceedings below: (Excerpted from majority opinion)

Following a CrR 3.6 hearing on Kennedy's motion to suppress, the trial court found that [two] police officers had received a complaint about a narcotics transaction in progress between the complainant's girlfriend and Kennedy at a local motel. The officers went to Kennedy's motel room where they listened for a short time to two voices, one male and one female, coming from inside. The officers heard a reference to a "razor" and to something being "smooth."

The officers then knocked and identified themselves as police officers, whereupon they heard the sound of drawers shutting. When Kennedy opened the door, the officers told him that they had received a complaint about the room and asked if they could come in to talk about it. Kennedy waved the officers in.

Once inside, the officers told Kennedy they had received a narcotics complaint involving his room. While [one officer] spoke with Kennedy, [the other officer] noticed a plastic baggie with a white powder residue laying on top of a pile of clothes on a credenza. The baggie contained methamphetamine.

The State charged Kennedy with unlawful possession of a controlled substance with intent to deliver, RCW 69.50.401(a)(1)(ii). But the trial court granted Kennedy's motion to suppress evidence obtained from the police entry into the motel room and thereby terminated the case. The trial court ruled that Kennedy's apparent consent to the entry was not voluntary because the police had not advised him of his right to refuse consent.

ISSUE AND RULING: Do the facts of this case -- investigation of report of drug-dealing in a hotel room -- fall under the rule of State v. Ferrier, governing "knock-and-talk" consent searches, such that the officers were required to warn the occupants of their right to refuse consent, restrict the scope of the search, and to retract consent at any time? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Thurston County Superior Court order suppressing evidence and terminating the case against Michael F. Kennedy for possession of controlled substances.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

The State concedes that Kennedy had the same expectation of privacy in his motel room as he would in his private residence. But it argues that the police did not employ a traditional "knock-and-talk" procedure in this case and, thus, the trial court erred in applying Ferrier [State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**].

In Ferrier, the Supreme Court adopted the following rule:

[W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

The Ferrier court held that a police entry without providing this information violates the Washington State Constitution's protection of the right to privacy in one's home, thus vitiating any consent. The court noted that it was significant to its holding that Ferrier was in her home when the police initiated contact and that the officers "admitted that they conducted the knock-and-talk in order to avoid the necessity of obtaining a search warrant authorizing a search of the home." The Ferrier rule applies only where officers employ a "knock-and-talk" procedure; the rule is not applicable where officers have an arrest or search warrant or in good faith believe they do. State v. Johnson (Larry E.), 104 Wn. App. 489 (2001) **May 2001 LED:05**; State v. Johnson (Donovan Q.), 104 Wn. App. 409 (2001) **April 2001 LED:09**.

[I]n State v. Bustamante-Davila, 138 Wn.2d (1999) [**See LED Editorial Comment below**], the court found Ferrier inapplicable where local law enforcement officers accompanied an Immigration and Naturalization Service (INS) agent to the defendant's home to arrest him under a removal order issued by an immigration judge. When the defendant allowed both the INS agent and

the local officers into his home, they noticed a rifle in plain view. The State then charged him with unlawful possession of a firearm.

The Supreme Court affirmed the denial of the defendant's suppression motion and limited Ferrier to situations where

not having obtained a search warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. After being allowed to enter, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises.

As the law enforcement officers in Bustamante-Davila were not looking for contraband -- they merely accompanied the INS agent as backup -- the Ferrier rule did not apply. See also State v. Leupp, 96 Wn. App. (1999) **Oct 99 LED:05** (Ferrier rule did not apply where officer responded to 911 "hang-up" call and obtained permission to enter residence believing someone might be injured inside).

The Supreme Court again distinguished Ferrier in State v. Williams, 142 Wn.2d 17 (2000) **Dec 2000 LED:14**, where officers went to a residence to execute an arrest warrant for Williams after a citizen told the police where Williams was currently located. The Williams court applied Bustamante-Davila, noting that it limited "the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant."

The State contends that Williams, Bustamante-Davila, and Leupp govern the analysis here. It argues that the officers did not approach Kennedy's room with the intent to search for contraband without a search warrant.

The Ferrier rule is applicable to the facts of this case. The sole reason for the officers' visit to Kennedy's motel room was to investigate a narcotics complaint; there was no arrest warrant or 911 emergency. One of the officers testified: "[W]e decided to go knock -- go up to [the room] and knock on the door and investigate the narcotics complaint." The officers did not believe they had probable cause to support a search warrant when they knocked on Kennedy's door, and they stated that they would "probably" have asked to search his room once inside.

The State's attempt to distinguish receiving consent to enter from consent to search is not persuasive. In Ferrier, as a first step, the police sought to gain access to the interior of Ferrier's home where they could see what was in plain view and then decide whether to conduct a further search. But the purpose of the Ferrier rule is to mitigate the inherently coercive nature of this type of police procedure and to ensure that the "home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision." Requiring the police to inform the resident of his right to refuse consent before they enter the home promotes this purpose. Thus, the officers' request for permission to enter is, in effect, a request for permission to "search" for anything in plain view.

Because the Ferrier rule applies here, the officers were required to inform Kennedy of his right to deny consent. As they failed to do so, the trial court did not err in granting Kennedy's suppression motion.

[Footnote and some citations omitted]

DISSENT: Judge Quinn-Brinrnall dissents, arguing that this case involved police response to a report of a single crime-in-progress, rather than an on-going investigation of continuous criminal activity, such as marijuana growing. This circumstance, she argues, is distinguishable from Ferrier's knock-and-talk, consent-request circumstances where police planned their "knock-and-talk" approach to the suspect.

**LED EDITORIAL COMMENT**: It is unclear exactly where the subtly nuanced lines will be drawn to distinguish Ferrier from non-Ferrier consents. Officers probably should assume that all warrantless, non-exigent residential entries (including entries of motel and hotel rooms) are covered by Ferrier. As always, agencies are urged to check with their prosecutors and/or legal advisors.

**THIRD-PARTY CONSENT SEARCH RULE OF LEACH NARROWLY CONSTRUED TO RECOGNIZE THAT ONE CO-HABITANT ALONE CAN CONSENT TO RESIDENTIAL ENTRY, THOUGH NOT FULL RESIDENTIAL SEARCH, WHILE OTHER CO-HABITANT IS PRESENT**

State v. Hoggatt, \_\_\_ Wn. App. \_\_\_, 30 P.3d 488 (Div. II, 2001)

Facts and Proceedings below:

Jack Hoggatt was living in a house leased by his girlfriend, Ms. Clark. The house was very small, and its living room and kitchen were essentially the same room. The front door of the house opened into the living room.

Hoggatt unlawfully took his father's .380 handgun, demanding money from his father for the gun's return. Hoggatt also had a record of several felony convictions. An officer spent much of a day trying to track down the elusive Hoggatt. In a phone conversation during that day, Hoggatt told the officer he would not turn himself in. After receiving a 911 call informing him that Hoggatt had returned home, the officer went to the house that Hoggatt shared with his girlfriend.

The Court of Appeals describes as follows what happened next:

[The officer] went back to Hoggatt's house and knocked on the front door. Clark "pulled the front door wide open and pointed to the kitchen." When [the officer] looked where Clark was pointing, he saw Hoggatt standing in the kitchen with his back turned, talking on the phone. As [the officer] stepped over the threshold, he also saw a handgun on a table within Hoggatt's reach. [The officer] entered the house, arrested Hoggatt, and seized the gun.

Hoggatt was charged with theft of a firearm and unlawful possession of a firearm. He moved to suppress the gun, claiming the search was unlawful. The trial court ruled that the search was justified by consent, but not by exigent circumstances. A jury then convicted Hoggatt on both charges.

ISSUE AND RULING: Did the consent search violate the all-cohabitants-present third-party-consent search rule of State v. Leach? (ANSWER: No, Leach should be limited to its facts involving a full search of a residence; where, as here, a co-habitant gives consent only to entry into the living room, and not to a search of the premises, the Leach rule does not apply.)

Result: Affirmance of Cowlitz County Superior Court conviction of Jack DeWayne Hoggatt, Jr. for unlawful possession of a firearm and theft of a firearm.

ANALYSIS:

The Hoggatt Court analyzes federal and state decisions on third party consent searches. The Court declares that the federal Fourth Amendment rule is based on two related concepts: 1) "assumption of risk" (i.e., generally, one cohabitant must assume that another cohabitant would consent to a search of the jointly occupied area), and 2) shared right to control access to an

area. Under federal case law, Ms. Clark arguably had authority under the Fourth Amendment to consent to entry of the officer into the house, as well as to permit a search, even though Hoggatt was also present at the time.

Washington court decisions, even though purportedly grounded in the federal (not the state) constitution, present a closer question. Most troublesome in this context are the Washington Supreme Court decisions in State v. Leach, 113 Wn.2d 735 (1989) **Feb 90 LED:03** and State v. Walker, 136 Wn.2d 678 (1998) **Jan 99 LED:03**. Thus, purportedly based on the Fourth Amendment, Leach and Walker held that, in order to obtain consent to search the jointly occupied premises, officers must make the request to all co-occupants of a fixed premises who are known to be present at the time that the officers execute the search.

The Hoggatt Court ultimately concludes under Leach/Walker that there is difference between requesting consent **to enter** a place and requesting consent **to search** it. Where the request is merely for permission to enter the living room, as here, the Leach/Walker, all-present-parties-consent rule does not apply.

**LED EDITORIAL COMMENT: It is a toss-up whether the Washington Supreme Court would agree with the Court of Appeals that there is a mere-request-for-entry exception to the Leach-Walker rule. As always, we urge that agencies consult their prosecutors and/or legal advisors on this difficult question.**

**“APPROPRIATELY MARKED” PHRASE IN FELONY-ELUDING STATUTE REQUIRES THAT POLICE VEHICLE BEAR SOME INSIGNIA IDENTIFYING IT AS OFFICIAL POLICE VEHICLE**

State v. Arqueta, \_\_\_ Wn. App. \_\_\_ (Div. I, 2001) [2001 WL 1179431]

Facts and Proceedings below:

The Court of Appeals describes as follows the facts relating to the nature of the vehicle that the law enforcement officer was driving in this “felony-eluding” case:

On the evening of July 23, 1998, [a trooper with] the Washington State Patrol (WSP) was on routine patrol in King County. He was in uniform. He was driving a green 1997 Ford Crown Victoria that bore no official decals or other markings to identify it as a state patrol vehicle. The car was equipped with black push bars on the front bumper, which are used to push disabled vehicles to the side of the road. The car was also equipped with several antennas and an exterior spotlight mounted on the driver's door post. The car had numerous emergency lights, visible only when activated: white strobe lights in the parking light area, wig-wag headlights that alternate from left to right and from high to low beam, a red and blue flashing light mounted on the passenger's side of the front dashboard, red strobe lights in the rear parking lights, blue flashing strobe lights in the rear window dash, and an arrow indicator that flashes amber to signal vehicles approaching from the rear to move to the right or left. The car was also equipped with a three-tone siren. The car's license number [includes the trooper's] badge number and "WSP" [on the license] signifies that the car is owned by the Washington State Patrol.

[The trooper] spotted Arqueta's vehicle driving recklessly. The trooper attempted to stop him. Arqueta fled, driving recklessly in his effort to elude arrest. Ultimately, Arqueta stopped and the trooper arrested him.

Arqueta was charged and convicted of attempting to elude a pursuing police vehicle and driving while under the influence.

ISSUE AND RULING: Did the State fail to prove an element of its felony-eluding case, i.e., that the pursuing police vehicle was “appropriately marked?” (ANSWER: Yes)

Result: Reversal of King County Superior Court conviction of Nelson Argueta for felony-eluding; remand for entry of judgment on the lesser-included offense of reckless driving. (Note: Argueta’s conviction for DUI was not at issue in this appeal).

ANALYSIS: (Excerpted from Court of Appeals opinion)

The eluding statute provides in part:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

The statute does not define “appropriately marked.” Nor does it indicate that a definition or standards set forth elsewhere are incorporated into the statute for purposes of defining that term. Because the dictionary provides an adequate and workable definition and is the proper means to interpret nontechnical terms in a statute, we reject the argument that we should apply the requirements of the statute setting forth the marking requirements for government vehicles, RCW 46.08.065 (the marking statute), to determine what makes a police vehicle appropriately marked. [*Court’s Footnote: Under the marking statute, all vehicles owned by the State “must be plainly and conspicuously marked on the lower left-hand corner of the rear window with the name of the operating agency or institution or the words ‘state motor pool,’ as appropriate, the words ‘state of Washington-for official use only,’ and the seal of the state of Washington or the appropriate agency or institution insignia, approved by the department of general administration.” RCW 46.08.065(2). All vehicles owned or controlled by a county, city, town, or public body must contain “in letters of contrasting color not less than one and one-quarter inches in height in a conspicuous place on the right and left sides thereof, the name of such county, city, town, or other public body, together with the name of the department or office upon the business of which the said vehicle is used.” RCW 46.08.065(1).*] Nothing in the eluding statute even refers to the marking statute. Further, the marking statute does not apply to many kinds of police vehicles. Most significantly, the marking statute’s requirement that the vehicle have a small decal in the rear window does nothing to assure the driver being pursued that the pursuing vehicle is a police vehicle and not someone impersonating an officer, which is the purpose of requiring appropriate markings. We therefore disagree with the court’s holding in State v. Ritts, 94 Wn. App 784 (Div. III, 1999) **June 99 LED:16** that to be “appropriately marked” for purposes of the eluding statute, a police vehicle must comply with the marking statute.

The dictionary defines “appropriately” as “in an appropriate manner,” and “appropriate” as “specially suitable.” “Marked” is defined as “having a mark.” “Mark” is defined as “a character, device, label, brand, seal, or other sign put on an article esp. to show the maker or owner, to certify quality, or for identification.”

Applying these definitions to police vehicles, we conclude that to be "marked" under the eluding statute, a vehicle must bear some type of insignia that identifies it as a police vehicle. Emergency equipment does not constitute a "mark" under the ordinary dictionary definition of the term. Emergency equipment is a signaling device, not an identifying device. The ordinary meaning of the term "mark" connotes writing or other characters affixed to the vehicle that conveys its identity or ownership, such as a decal bearing the name of the police department to which the vehicle belongs. We therefore hold that to be "appropriately marked" for purposes of the eluding statute, a vehicle must bear an insignia that identifies the vehicle as an official police vehicle.

Here, it is undisputed that the car [the trooper] was driving when he signaled Argueta to stop did not bear an insignia that identified it as an official police vehicle. Accordingly, [the trooper's] car was not "appropriately marked" for purposes of the eluding statute. The evidence was therefore insufficient to support Argueta's conviction, and it must be reversed.

Our conclusion that the evidence was insufficient to support Argueta's conviction is compelled by the language of the eluding statute as interpreted through application of rules of statutory construction. The logic and practicality of this result are, in our view, matters worthy of the Legislature's attention. The eluding statute as presently worded requires the presence of some identifying insignia in order for a vehicle to be appropriately marked. Without it, a defendant cannot be convicted under the statute as it is written.

[Some citations and footnotes omitted]

**LED EDITORIAL NOTE:** Other felony-eluding cases cited by the Arqueta Court (other than those cited in the excerpt above) include: State v. Refuerzo, 102 Wn. App. 341 (2000) November 2000 LED:11 (the Refuerzo Court stated that a marked police bicycle would likely qualify as an "appropriately marked" vehicle); and State v. Trowbridge, 49 Wn. App. 360 (Div. I, 1987) March 88 LED:17 (the Trowbridge Court made an arguably less strict reading of the "appropriately marked" phrase in RCW 46.61.024).

### **SOCIAL GUEST IN HOME WHICH OFFICERS ENTERED UNDER UNLAWFUL SEARCH WARRANT HELD TO HAVE AUTOMATIC STANDING TO CHALLENGE THE ENTRY**

State v. Magneson, 107 Wn. App. 221 (Div. II, 2001)

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

The Kitsap County Sheriff's Department searched Larry Felt's house using a search warrant. Officers found Magneson, who was a guest in Felt's home, and three other men sitting at a table with methamphetamine, baggies, pipes, razors and a scale. They also found baggies of methamphetamine on Magneson.

The State charged Magneson and Felt with possession of a controlled substance with intent to deliver. Felt challenged the validity of the search warrant and persuaded the trial court that it was defective. The trial court suppressed the evidence seized under the warrant and excluded it from the case against Felt.

**ISSUES AND RULINGS:** 1) Is the "automatic standing" rule part of article 1, section 7 of the Washington constitution? (ANSWER: Yes); 2) Does defendant Magneson qualify for automatic standing? (ANSWER: Yes); 3) Should the evidence be suppressed based on the officers' unlawful entry? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court order suppressing evidence and dismissing charges against Chris Magneson. Status: The Kitsap County Prosecutor is seeking review in the Washington Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) “Automatic standing” rule under Washington constitution

In a recent decision, our State Supreme Court noted that the U.S. Supreme Court has eliminated automatic standing under the Fourth Amendment to the federal Constitution; then, by way of comparison, it stated, “[A]utomatic standing still maintains a presence in Washington.” State v. Williams, 142 Wn.2d 17 (2000) **Dec 2000 LED:14**. Although ruling that Williams did not have automatic standing in that case, the Court went on to discuss the doctrine's applicability.

We recognize that Williams' discussion of automatic standing was dicta. But we cannot ignore the Court's clear message that automatic standing remains viable in Washington. Had the Court intended to follow the federal courts' lead in extinguishing automatic standing, it could have done so. Instead, the Court analyzed the doctrine, found it inapplicable to the facts before it, yet underscored its continued viability. Following our Supreme Court's clear directive in Williams, we hold that automatic standing remains a valid doctrine in Washington.

Thus, a defendant who meets the following three criteria has automatic standing to challenge a search: (1) he was legitimately on the premises where the search occurred; (2) the State intends to use fruits of the search against him; and (3) he did not stipulate to facts that establish lack of a reasonable expectation of privacy in the premises searched or item seized. If these criteria are met, the trial court should next determine whether the search or seizure violated the defendant's constitutional right to be free of unreasonable searches and seizures, invasions of his home, or disturbances of his private affairs. The defendant must, however, be asserting that his or her own rights were violated.

2) Application of automatic standing to Magneson

Magneson meets these criteria for automatic standing. First, as a guest in Felt's house at the time of the search, Magneson was legitimately on the premises. Second, the State sought to use the fruits of the defective search to prove that Magneson was guilty of possession of methamphetamine. Third, Magneson did not do anything to defeat his expectation of privacy as a guest.

The facts here differ from those in Williams. Williams stipulated that he was merely a "casual visitor." More importantly, the police had a valid arrest warrant for Williams, which allowed his arrest and search incident to arrest anywhere they found him, whether in his own home or in the home of another. In contrast, here, the police did not have a warrant for Magneson's arrest and Magneson did not stipulate that he was merely a casual visitor.

Accordingly, we hold that Magneson has automatic standing to challenge the legality of the seizure of the evidence used against him.

3) Suppression of evidence -- “plain view” rule not applicable

The officers entered Felt's house using what they understood to be a legal search warrant. But the trial court later found the warrant defective, thereby rendering their entry and search illegal. Consequently, the officers were not at a lawful vantage point when they saw Magneson near the methamphetamine and

manufacturing equipment. As such, the evidence was not admissible under the plain view doctrine. Thus, Magneson's arrest and seizure of drugs from his person were "fruit of the poisonous tree" and, therefore, were similarly illegal. The trial court properly suppressed this illegally seized evidence and dismissed the State's prosecution of Magneson.

[Some citations omitted]

**LED EDITORIAL COMMENT:**

If this case had been tried in the federal courts, U.S. Supreme Court Fourth Amendment case law would have precluded the defendant from claiming that his rights were violated and also from claiming that he had "automatic standing" to assert the homeowner's right against warrantless entry of the premises. The U.S. Supreme Court has held that a mere day-visitor to a home who is not at least an overnight houseguest cannot claim Fourth Amendment privacy protection. And, the U.S. Supreme Court has also held under the Fourth Amendment that there is no longer an "automatic standing" doctrine.

The Magneson court did not address whether a day-visitor to a home has privacy protection under the *Washington* constitution, and no Washington appellate court has ever addressed that question. The sole issue in Magneson is the thorny question, under the confusing decisions from the Washington appellate courts interpreting article 1, section 7 of the Washington Constitution, as to whether and to what extent there is "automatic standing" in Washington. As noted above, the Kitsap County Prosecutor is seeking clarification on that question in the Washington Supreme Court.

Meanwhile, Washington law enforcement officers should not rely on doctrines such as "standing" to save their actions. Officers must strive to follow the substantive rules for search and seizure under the Washington constitution and under the federal constitution, leaving it to the prosecutors to try to occasionally salvage cases by arguing over issues such as "standing," "inevitable discovery," and the like.

**CONSENT SEARCH AT MOTHER'S HOME DID NOT VIOLATE DEFENDANT'S RIGHTS; UNDER TOTALITY OF CIRCUMSTANCES, HE LACKED PRIVACY RIGHTS THERE**

State v. Francisco, 107 Wn. App. 247 (Div. I, 2001)

**Facts and Proceedings Below:**

Seattle police officers investigating a shooting (two killed, three injured) on the West Seattle Bridge were told by an acquaintance of Francisco that the gun used in the shooting was in a front closet at Francisco's mother's home. Officers obtained consent from Francisco's mother to search her home.

The consent form used in this 1997 search apparently advised the mother that she had a right to refuse consent, but the form did not advise her that she could revoke consent at any time or that she could restrict the scope of the search. See State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02** (requiring, as to "knock-and-talk" consent requests, that officers advise of the right to refuse, right to restrict scope, and right to retract at any time) Officers found the murder weapon in the closet.

Francisco was charged with two counts of aggravated first degree murder and three counts of attempted first degree murder. In the pretrial suppression proceedings, Francisco established that he occasionally stayed overnight at his mother's home, that he sometimes did his laundry there, and that he was welcome there as a visitor. He admitted however, that he usually resided at his girlfriend's apartment elsewhere.

ISSUE AND RULING: Were defendant's Fourth Amendment privacy rights implicated when police searched his mother's home, where defendant occasionally stayed but where he was not present at the time of the search? (ANSWER: No)

The trial court denied Francisco's challenge to the consent search, ruling that the search did not violate Francisco's constitutional privacy rights, even if his mother's consent was not voluntary (**LED EDITORIAL NOTE: "Voluntariness" was not addressed by either the trial court or the Court of Appeals**). Francisco was convicted on all counts, and he was sentenced to life without the possibility of parole.

Result: Affirmance of King County Superior Court conviction of Marvin J. Francisco for two counts of aggravated first degree murder and three counts of attempted first degree murder.

**ANALYSIS:**

1) Voluntariness of mother's consent not addressed

As noted above, the Court of Appeals does not address whether the mother's consent was voluntary. It is still too early to tell where the Washington constitutional Ferrier rule will end up, but we think that recent Washington appellate court decisions suggest that Ferrier will ultimately be limited to its "knock-and-talk" context involving requests from suspects for searches of residential premises (including motel rooms -- see the State v. Kennedy entry above in this month's LED). We think there is a good chance that the third-party consent request here would have been held not to be subject to Ferrier, and therefore the consent would have been held voluntary.

**LED EDITORIAL COMMENT: However, it may be safer, constitutionally, to give Ferrier warnings in all requests for consent to search residences. Agencies are urged to consult their prosecutors and/or legal advisors.**

2) "Automatic standing" not at issue

The charge in this case did not involve possession as an element. Therefore, this case did not involve the unsettled Washington case law on that extent to which article 1, section 7 of the Washington constitution provides for "automatic standing" to raise search-and-seizure challenges where the rights of others have been violated. See State v. Williams, 142 Wn.2d 17 (2000) **Dec 2000 LED:14** and see State v. Magneson entry above in this month's LED.

3) Francisco's lack of Fourth Amendment privacy rights in mother's residence

On the question of whether Francisco's Fourth Amendment privacy rights would have been violated by an unlawful search of his mother's house, the Court of Appeals rejects the theory under the following analysis:

Constitutional privacy rights are personal rights that cannot be vicariously asserted. Rakas v. Illinois, 439 U.S. 128 (1978), . . . rejected the argument that any defendant at whom a search was "directed" could contest the legality of the search on that basis. On the other hand, the Rakas court did not adopt a bright line rule requiring the defendant to have an ownership interest in the place searched in order to challenge the legality of a search. The capacity to claim the protection of the Fourth Amendment "depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."

Francisco argues he had the capacity to claim the protection of the Fourth Amendment in his mother's home. But the fact that the house belonged to his mother was not, in itself, enough to make that home a Fourth Amendment

sanctuary for an adult child not living there. Nevertheless, it is clear that "a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." Property ownership is merely one factor to be considered.

Persons may challenge searches of the premises they occupy even though they are not parties to the legal arrangements concerning the possessory interest. Even part-time or temporary residence may create a legitimate expectation of privacy. But here, the testimony supports the trial court's conclusion that Francisco lived with his girlfriend at her Tukwila apartment, and that he did not occupy or reside at his mother's house even on a part-time or temporary basis.

Francisco contends, however, that he had a legitimate expectation of privacy in his mother's residence created by the familial nature of his relationship with her as well as the fact that he was a welcome visitor in her home, occasionally staying there overnight.

Francisco's intermittent use of his mother's house as a place to stay overnight, do laundry, and store clothes does not suggest that he had authority to exclude anyone from the premises or that he could legitimately expect that items he left there would remain undisturbed. His mother testified that she did not know the guns were in her closet, and that she did not allow guns in her home. And, . . . Francisco did not claim to be the owner of the gun, so he cannot claim an expectation of privacy arising from a possessory interest.

In addition to his reliance on the familial relationship, Francisco also claims that his status as an occasional guest in his mother's home allows him to challenge the legality of the search. Courts have permitted guests to challenge searches and seizures in the home of a host. In such cases, the fact that the guest does not have the authority to exclude others from the premises is not a consideration. But . . . guest cases cited by Francisco differ from the case at hand in that, in each case, the defendant was a current guest and was physically present at the time of the search. Francisco was not a guest in his mother's house at the time of the challenged search, nor was he physically present.

In summary, from the evidence presented, the trial court correctly concluded that Francisco's challenge to the search and seizure of the guns lacked the necessary threshold showing of his legitimate expectation of privacy in the premises.

[Some text and citations omitted]

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

**(1) TRIAL COURT'S FAILURE IN 1998 SENTENCING PROCEEDING TO WARN DEFENDANT OF FIREARMS POSSESSION BAR, PLUS OTHER FACTS, PRECLUDE HIS CONVICTION UNDER RCW 9.41.040 FOR UNLAWFUL FIREARMS POSSESSION** -- In State v. Leavitt, 107 Wn. App. 361 (Div. II, 2001), the Court of Appeals rules that, because defendant was misled regarding the effect of his conviction on his firearms-possession rights in 1998 sentencing proceedings for gross misdemeanor violation of a DV protection order under RCW 26.50.110(1), defendant could not be convicted for his possession of firearms the following year.

On July 28, 1999, the police arrested Leavitt at a domestic violence call. Leavitt volunteered to police that he had firearms in his car. Leavitt was ultimately charged with and convicted of unlawful possession of a firearm in violation of RCW 9.41.040. This 1999 firearms-possession

conviction under RCW 9.41.040 was based on his 1998 DV-order conviction under RCW 26.50.110(1).

On appeal, Leavitt argued that, while ignorance of the law is usually not an excuse (and knowledge of the illegality of firearms possession is not an element of the crime), his case was unusual, because he was *mised* into believing that his possession of a firearm would be lawful once the probation period had expired on his 1998 conviction. The Court of Appeals agrees with Leavitt.

The Leavitt Court describes as follows the facts regarding the 1998 conviction and sentencing, as well as Leavitt's actions in reliance on the sentencing court's actions:

In 1998, Leavitt pled guilty to one count of violation of a protective order, a gross misdemeanor, contrary to RCW 26.50.110(1). His Statement of Defendant on Plea of Guilty listed as the maximum sentence "1 yr/\$5000." Among the sentencing recommendations that the prosecutor promised to make were "law abiding behavior and no possession of firearms."

The court imposed a one-year sentence, suspended on several conditions, including: "1) no hostile contact with Sharon Edvalds-Leavitt, no contact with Chris Hardy or Karin Klepfer, 2) no possession of firearms (forfeit guns), 3) no violation of criminal law, 4) 365 days in jail with 363 days suspended. Credit for 2 days served." The Conditions on Suspended Sentence provided, "Termination date is to be 1 year(s) after date of sentence."

The court did not require Leavitt to relinquish his concealed weapon permit or his firearms. Nor did the court instruct Leavitt that RCW 9.41.047's prohibition against possessing firearms applied and extended beyond his one-year probationary period, such that he could not again possess firearms without first petitioning for restoration of that privilege. Moreover, the Conditions, Requirements and Instructions that the Department of Corrections furnished to Leavitt left blank the box next to the paragraph explaining RCW 9.41.047's firearm possession prohibition, thereby suggesting that this particular condition did not apply to Leavitt.

Assuming that all the probation conditions applied for the same 365-day period, Leavitt kept his concealed weapons permit but relinquished his firearms by delivering them to his brother in Utah. One year later, Leavitt received a letter that his probation had ended. Believing that he once again could legally possess firearms, he returned to Utah to retrieve his firearms from his brother.

The Leavitt Court begins its analysis by excerpting from RCW 9.47.047(1), which provides in pertinent part:

At the time a person is convicted of an offense making the person ineligible to possess a firearm, . . . the convicting . . . court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record.

The Leavitt Court then engages in discussion of "due process" case law where parties have claimed they were misled by public officials into violating the law. The Leavitt Court concludes under the facts of this case that Leavitt's due process rights were violated:

[The sentencing court] failed to advise Leavitt that he lost his right to possess firearms for an indefinite period as required by statute, gave Leavitt written notice of an apparently one-year firearm-possession restriction, and implicitly allowed Leavitt to retain his concealed weapon permit. These combined actions and

inactions of the predicate-sentencing court misled Leavitt reasonably to understand that his firearm possession restriction was limited to one year. Consistent with this understanding, Leavitt dutifully complied by taking his guns to his brother out-of-state for safekeeping for one year.

Under these unique circumstances, it would be a denial of due process to require Leavitt to speculate about additional firearm-possession restrictions beyond his one-year probation where the sentencing court did not inform him otherwise, in spite of the Legislature's clear requirement to do so.

Accordingly, we hold that where a defendant can demonstrate actual prejudice arising from a sentencing court's failure to comply with the statute's mandate to advise him about the statutory firearm-possession prohibition, RCW 9.41.047 cannot serve as the basis for convicting him of unlawful firearm possession. We reverse Leavitt's 1999 convictions for unlawful possession of a firearm. *[Court's Footnote: We need not and do not address the issue of whether failure to follow RCW 9.41.047 alone, absent prejudice to the defendant, would similarly warrant reversal.]*

**Result:** Reversal of Pierce County Superior Court convictions of David Shane Leavitt for unlawful possession of firearms under RCW 9.41.040.

**(2) COURT REJECTS CONSTITUTIONAL CHALLENGES TO CONVICTION FOR UNLAWFUL POSSESSION OF FIREARMS IN VIOLATION OF RCW 9.41.040** -- In State v. Krzeszowski, 106 Wn. App. 638 (Div. I, 2001), the Court of Appeals rejects defendant's constitutional challenges to his conviction for unlawful possession of a firearm in violation RCW 9.41.040.

During a successful search for a marijuana grow under a warrant, officers also found a shotgun and a rifle in Krzeszowski's residence. At the time, Krzeszowski had a prior conviction for second degree burglary. He was charged with and convicted on drug charges under chapter 69.50 RCW and on firearms possession charges under RCW 9.41.040.

The Court of Appeals rejects Krzeszowski's arguments on appeal: that the state prohibition on possession of firearms by felons violates state and federal constitutional protections of the "right to bear arms;" and that the Washington Legislature violated constitutional ex post facto prohibitions or constitutional due process protections when the Legislature expanded firearms possession prohibitions after his civil rights (though not his firearms rights under RCW 9.41) were restored on his prior burglary conviction.

The Krzeszowski Court also rejects his "entrapment by estoppel" argument that the government should be estopped from prosecuting him for firearms possession because, at the time his civil rights were restored on his prior burglary conviction, he was not told that he was prohibited from possessing all types of firearms. The Court distinguishes a failure-to-warn situation, as here, from a situation where a court or government official has affirmatively advised, or in some way has *misled*, a convicted person into believing that gun possession is lawful. **(LED EDITORIAL NOTE: See, e.g., the decision of Division Two of the Court of Appeals in State v. Leavitt, digested above in this month's LED.)**

In addition, the Krzeszowski Court explains how it is possible to have one's right to possess a firearm restored for federal law purposes but not for Washington state law purposes. **(LED EDITORIAL NOTE: This subarea of the law is confusing, as the restoration standards differ, even though federal law purportedly looks to state law to determine restoration of firearms rights on state law convictions. The Court of Appeals' analysis of this question will be useful to those seeking to understand this federal-state law relationship.)**

Result: Affirmance of Snohomish County Superior Court convictions of Brian Stefan Krzeszowski for manufacture of a controlled substance and unlawful possession of a firearm in the first degree.

**(3) UP-SKIRT PHOTOGRAPHING AT MALL PUNISHABLE UNDER VOYEURISM STATUTE** -- In State v. Glas, 106 Wn. App. 895 (Div. III, 2001), the Court of Appeals rejects defendant's constitutional challenge to his conviction under the voyeurism statute at RCW 9A.44.115(2).

Without consent of the women involved, Glas took photographs up the skirts of two women who were working in public areas at the Union Gap Mall. His intent was to send the photos to an "up-skirt voyeurs" internet web site. He was charged and convicted under RCW 9A.44.115, which provides in relevant part:

(1) As used in this section:

(b) "Place where he or she would have a reasonable expectation of privacy" means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

The Glas Court rejects defendant's arguments on appeal that: 1) a public area of a shopping mall is not a protected area under the "voyeurism" statute; 2) the sexual arousal or gratification purpose element of the statute was not met by the facts of this case; and 3) the statute's "hostile intrusion" phrase is unconstitutionally vague or overbroad.

Result: Affirmance of Yakima County Superior Court conviction of Sean Tyler Glas for voyeurism in violation of RCW 9A.44.115.

**(4) NO-CONTACT ORDER ISSUED PRE-CONVICTION REMAINS VALID POST-CONVICTION** -- In State v. Schultz, 106 Wn. App. 328 (Div. I, 2001), the Court of Appeals rules that a pre-conviction, no-contact order can serve as the basis for a criminal prosecution even after conviction for the assault which triggered issuance of the pre-conviction order. The Court of Appeals holds that the pre-conviction order in the Schultz case remained valid even after conviction. Accordingly, in Schultz's appeal from a conviction for violating the order, the Schultz Court rejects Schultz's contention that the State failed to prove the validity of the order beyond a reasonable doubt.

Result: Affirmance of Snohomish County Superior Court conviction of Karl Alan Schultz non-felony violation of a no-contact order.

**(5) "IMMEDIATE AREA" PHRASE IN DRIVE-BY SHOOTING STATUTE HELD VOID-FOR-VAGUENESS AS APPLIED TO FACTS OF CASE WHERE SHOOTING OCCURRED TWO BLOCKS FROM TRANSPORT CAR** -- In State v. Locklear, 105 Wn. App. 555 (Div. II, 2001), the Court of Appeals holds that the "drive-by-shooting" statute, RCW 9A.36.045, is unconstitutionally vague as applied to the facts of the case before it.

Locklear was a passenger in a car. When the car stopped and parked, he and another passenger got out, walked two blocks to a predetermined target house, and fired shots into the occupied house. No one was hurt by the shots, though the risk of injury to the occupants was great. The two shooters returned to the car, and Locklear and his two accomplices then drove away from the scene. Locklear was charged with and convicted at trial of drive-by shooting under RCW 9A.36.045.

RCW 9A.36.045(1) provides in pertinent part:

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle *or from the immediate area* of a motor vehicle that was used to transport the shooter or the firearm, or both, to the *scene of the discharge*.

[Emphasis added by LED Eds.]

On appeal, the focus was on the above-italicized phrase, "immediate area of a motor vehicle." Under the following analysis, the Court of Appeals holds that defendant Locklear's conduct did not fall within the core of the statutory phrase, and that the phrase is void-for-vagueness when applied to Locklear's conduct:

Undoubtedly, a person of ordinary intelligence would know without guessing that the required nexus exists when a shooter is transported to the scene in a car, gets out, and fires from within a few feet or yards of the car. RCW 9A.36.045(1) provides that a person commits a felony "when he or she recklessly discharges a firearm . . . and the discharge is . . . from the immediate area of a motor vehicle that was used to transport the shooter or the firearm . . . to the scene of the discharge." Moreover, the term "immediate area of a motor vehicle" includes, at its core, the area within a few feet or yards of such motor vehicle.

In contrast, however, a person of ordinary intelligence would not know without guessing whether the required nexus exists when a shooter is transported to the scene in a car, walks two blocks away, then fires the gun. Although the term "immediate area of a motor vehicle" includes at its core the area within a few feet or yards of the motor vehicle, how is one to know whether it includes a location two blocks away? Although the term "scene of the discharge" includes at its core the area within a few feet or yards of the gun when the gun is fired, how is one to know whether it includes a location two blocks away? A person of common intelligence cannot answer these questions without guessing, and the statute is unconstitutionally vague as applied to this case.

This conclusion finds support in the fact that "immediate area" lacks a specific meaning in Washington law. Sometimes, it seems to mean a few feet or yards. Other times, it seems to mean many miles. As used in the context of RCW 9A.36.045, it seems to mean more the former than the latter, for it is used in the same breath as the inside of a car. For today, however, it is enough to note that a person of common intelligence would have no way of knowing, without guessing, whether a citizen who discharges a gun two blocks away from a motor vehicle is discharging the gun "from the immediate area" of the motor vehicle.

Result: Reversal of Pierce County Superior Court conviction of James Locklear for drive-by shooting; remand to Superior Court for further proceedings.

**LED EDITORIAL COMMENT: It is not particularly surprising that the Court of Appeals reversed Locklear's conviction for drive-by assault under these facts. It is harder to**

understand, however, why the Court did not simply rule that the statute does not apply to these facts, instead of holding the statute void-for-vagueness as applied in this context. We don't think that the Court's choice of rationales for resolving the case will make any difference for future drive-by assault prosecutions, or for other void-for-vagueness arguments, but only time will tell.

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### NEXT MONTH

The December 2001 LED will include, among other things, our Subject Matter Index for LED's from January through December, 2001, plus an entry regarding the October 11, 2001 decision of the Washington Supreme Court in Kent v. Beigh. The result of the Beigh decision is adverse to the City of Kent on the question of admissibility of a blood test in the DUI prosecution at issue in that case, but, along the way, the Supreme Court makes an important pro-government holding on an important issue under RCW 46.20.308. Five justices sign a majority opinion in Beigh holding that a motorist whose breath three times caused a BAC Verifier Datamaster to report "interference detected" cannot be deemed under current WAC rules to have a "physical incapacity, or other physical limitation, of providing a breath sample" for purposes of RCW 46.20.308(2). However, all nine justices agree that the Court of Appeals was wrong in its decision last year (see January 2001 LED at 14-15) when the Court of Appeals ruled that RCW 46.20.308(3) provides the sole authority for an officer to request that a motorist submit to a blood test.

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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

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