



Law Enforcement

April 2003

Digest

APRIL LED TABLE OF CONTENTS

LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 5, 2003	2
2003 LEGISLATIVE UPDATE -- PART ONE	2
WASHINGTON STATE SUPREME COURT	3
MULTIPLE ISSUES DECIDED: 1) NO "SEIZURE" OCCURRED IN ID REQUEST AND FIR QUESTIONING; 2) "PLAIN VIEW" JUSTIFIED TAKING "COOK SPOON" FROM CAR; 3) SEARCH WAS NOT "INCIDENT TO ARREST" BECAUSE ACTUAL ARREST DID NOT OCCUR BEFORE SEARCH; 4) CONSENT WAS NOT VOLUNTARY; 5) "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE NOT APPLICABLE <u>State v. O'Neill</u> , ___ Wn.2d ___, 62 P.3d 489 (2003)	3
BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT.....	14
CITY OF SUMNER JUVENILE CURFEW ORDINANCE INVALIDATED FOR VAGUENESS IN VIOLATION OF FEDERAL CONSTITUTIONAL DUE PROCESS PROTECTIONS <u>City of Sumner v. Walsh</u> , __ Wn.2d __, 61 P.3d 1111 (2002)	14
AFFIDAVIT ESTABLISHES INFORMANT-BASED PROBABLE CAUSE TO SEARCH (HYPERTECHNICAL CHALLENGES TO PC REJECTED, INCLUDING CLAIM THE INFORMANT'S BASIS OF KNOWLEDGE WAS NOT SHOWN); ALSO, PHOTO ID PROCEDURE WAS NOT IMPERMISSIBLY SUGGESTIVE <u>State v. Vickers</u> , 148 Wn.2d 91 (2002)	15
BEFORE FINDING THAT FRIGHTENED CHILD RAPE VICTIM WAS "UNAVAILABLE" TO TESTIFY UNDER CHILD-HEARSAY STATUTE, TRIAL COURT SHOULD HAVE CONSIDERED USE OF CLOSED CIRCUIT TV <u>State v. Smith</u> , 148 Wn.2d 122 (2002)	17
WASHINGTON STATE COURT OF APPEALS	18
EVIDENCE REGARDING 911 AUDIO TAPE MEETS AUTHENTICATION AND "EXCITED UTTERANCE" ADMISSIBILITY REQUIREMENTS <u>State v. Jackson</u> , 113 Wn. App. 762 (Div. II, 2002)	18
BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS	20
PRESCRIPTION DRUG RECORDS MAY, PER WASHINGTON STATE STATUTE AND PER FEDERAL AND STATE CONSTITUTIONS, BE INSPECTED BY PHARMACY BOARD OR LAW OFFICERS, AND THAT INFORMATION MAY BE PASSED ON TO PROSECUTOR <u>Murphy v. State</u> , ___ Wn. App. ___, 62 P.3d 533 (Div. I, 2003)	20
TEST MET FOR "DYING DECLARATION" HEARSAY EXCEPTION <u>State v. Johnson</u> , 113 Wn. App. 482 (Div. I, 2002)	22
NEXT MONTH	22

LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 5, 2003

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Monday, May 5, 2003 at the St. Martin's College Pavilion, 5300 Pacific Avenue S.E. in Lacey, Washington, commencing at 1:00 PM. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

2003 LEGISLATIVE UPDATE -- PART ONE

LED Introductory Editorial Notes: This is Part One of what we expect to be at least a three-part update of 2003 Washington legislative enactments of interest to law enforcement. Part One includes only one enactment, immediately effective, that retroactively overrules the felony-murder law interpretation by the Washington Supreme Court in In re Personal Restraint of Andress, 147 Wn.2d 602 (2002) Dec 02 **LED:16**. Part Two may not follow for a few months; it will depend on whether the Legislature adopts other significant legislation with immediate effective dates.

ASSAULT AS PREDICATE FELONY UNDER WASHINGTON'S FELONY MURDER STATUTE – RETROACTIVE RESTORATION OF ORIGINAL LEGISLATIVE INTENT

CHAPTER 3 (SB 5001)

Effective Date: February 12, 2003

Section 1 is a new section stating legislative intent: A) to overrule the recent Washington Supreme Court decision in In re Personal Restraint of Andress, 147 Wn.2d 602 (2002) **Dec 02 LED:16**; and B) to make the clarifying amendment apply retroactively. Section 1 provides:

The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in State v. Andress, Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree. To prevent a miscarriage of the legislature's original intent, the legislature finds in light of State v. Andress, Docket No. 71170-4 (October 24, 2002), that it is necessary to amend RCW 9A.32.050. This amendment is intended to be curative in nature. The legislature urges the supreme court to apply this interpretation retroactively to July 1, 1976.

Section 2 amends RCW 9A.32.050 to as follows (underlining indicates new language):

(1) A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant: (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. (2) Murder in the second degree is a class A felony.

Section 3 is the effective date clause providing: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately."

WASHINGTON STATE SUPREME COURT

COURT ADDRESSES MULTIPLE ISSUES: 1) NO "SEIZURE" OCCURRED IN ID REQUEST AND FIR QUESTIONING; 2) "PLAIN VIEW" JUSTIFIED TAKING "COOK SPOON" FROM CAR; 3) SEARCH CANNOT BE DEEMED "INCIDENT TO ARREST" BECAUSE ACTUAL ARREST DID NOT OCCUR BEFORE SEARCH; 4) CONSENT WAS NOT VOLUNTARY; 5) "INEVITABLE DISCOVERY" EXCEPTION TO EXCLUSIONARY RULE NOT APPLICABLE

State v. O'Neill, ___ Wn.2d ___, 62 P.3d 489 (2003)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

The unchallenged findings in this case establish that on June 7, 1999, [a City of Bellingham police officer] was traveling on a road in Bellingham when he saw a car parked in front of a store that had been closed for about an hour. [The officer] knew that it had been burglarized twice in the previous month. [The officer] pulled up behind the car and activated his spotlight in order to see the license plate and run a computer check on the plate. He ran the check, and learned that the vehicle had been impounded within the previous two months due to a drug situation. [The officer] noticed that the windows of the parked vehicle were fogged over, and he formed the opinion that someone was in the car. He also believed the car had been there for a period of time sufficient for the windows to fog.

[The officer] approached the driver's side of the car and shined the light from his flashlight in the driver's face. The driver was later identified as O'Neill. [The officer] asked Mr. O'Neill to roll the window down, which he did. [The officer]

asked Mr. O'Neill what he was doing there, and O'Neill answered that he had come from Birch Bay and his car had broken down. He said that his car would not start, and that he was waiting for a friend to come with jumper cables. [The officer] asked Mr. O'Neill to try to start the car. O'Neill tried, but the car would not start.

[The officer] then asked O'Neill for identification. Mr. O'Neill said that he did not have any on him, and then stated that his driver's license had been revoked. [The officer] asked for registration and insurance papers. Mr. O'Neill produced registration that showed that the vehicle was registered to Harold Macomber. There was a handwritten date of birth on the registration. [The officer] asked O'Neill if he was Macomber, and O'Neill said he was. [The officer] asked O'Neill to step from the vehicle and then patted him down for identification.

When Mr. O'Neill got out of the car, [the officer] saw a spoon on the floorboard next to the driver's side. [The officer] saw a substance on the spoon that looked granular with a slickness or wet look. Based upon his training and experience, [the officer] thought that a narcotic had been cooked on the spoon. When [the officer] asked Mr. O'Neill about the spoon, O'Neill said that it was an ice cream spoon.

[The officer] then asked O'Neill for consent to search the vehicle. Mr. O'Neill said "no" and said that [the officer] needed a warrant to search the car. [The officer] responded that he did not need a warrant but could simply arrest O'Neill for the drug paraphernalia and search the car incident to that arrest. [The officer] asked for consent again. The discussion went back and forth several times, with O'Neill eventually consenting. [The officer] got into the car and saw a pipe that he recognized as drug paraphernalia on the driver's seat. He moved the pipe and sat down. From a sitting position, he could see a baggie in the open containing what he believed to be cocaine.

[The officer] arrested O'Neill, who was charged with unlawful possession of a controlled substance. O'Neill moved for suppression of the evidence of the "cook spoon," the pipe and the cocaine. On September 2, 1999, the superior court granted the motion, which had the practical effect of terminating the case against O'Neill. The court ruled that the search of the car was invalid under the fourth amendment to the United States Constitution because O'Neill did not give valid consent to the search. The court also rejected the State's arguments that evidence obtained during that search was admissible under the "inevitable discovery" rule, and that the pipe and cocaine were seized incident to a lawful arrest. Although the superior court concluded that the "cook spoon" was admissible evidence under the Fourth Amendment, it suppressed the evidence under article I, section 7 of the Washington State Constitution. The court reasoned that because the officer had no probable cause or reasonable articulable suspicion that a crime was in progress or had been committed at the time he asked for identification, the state constitutional provision was violated and any evidence discovered thereafter is inadmissible and must be suppressed.

The State appealed and the Court of Appeals reversed.

ISSUES AND RULINGS: 1) Was O'Neill seized prior to the officer's request that O'Neill get out of the vehicle? (ANSWER: No, use of spotlight and flashlight, along with mere questioning and a request for ID, under the totality of the circumstances, did not add up to "seizure"); 2) Did the officer have authority to direct O'Neill to step from the vehicle? (ANSWER: Yes) 3) Did the

officer lawfully enter the car and seize the suspected “cook spoon” under the “plain view” doctrine? (ANSWER: Yes) 4) Was the subsequent search of the vehicle a lawful search incident to arrest where the officer did not place O’Neill under arrest until after conducting the search? (ANSWER: No), 5) Under the totality of the circumstances -- including the facts that O’Neill initially refused consent, only consented after the officer made repeated requests and stated that he could search without consent -- did the officer have voluntary consent to search the vehicle? (ANSWER: No); 6) Does the “inevitable discovery” rule apply to these circumstances as an exception to the “exclusionary rule”? (ANSWER: No)

Result: Reversal of Court of Appeals decision (see **May 01 LED:18**); remand of case to Whatcom County Superior Court for possible further proceeding (though among the seized evidence at issue, only the “cook spoon” is admissible)

ANALYSIS: (Analysis excerpted from O’Neill’s majority opinion, subheadings supplied by **LED Eds.**)

1) No “seizure” occurred prior to officer’s request that O’Neill get out of his car

Under article I, section 7, a person is seized “only when, by means of physical force or a show of authority” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, [State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**] or (2) free to otherwise decline an officer’s request and terminate the encounter. The standard is a “a purely *objective* one, looking to the actions of the law enforcement officer.” Mr. O’Neill has the burden of proving that a seizure occurred in violation of article I, section 7.

Before assessing the officer’s actions in this case, we note that underlying much of O’Neill’s argument appears to be the premise that an officer cannot approach citizens when the officer has suspicions of possible criminal activity or engage in investigation unless the suspicion rises to the level justifying a Terry stop. O’Neill reasons that if an officer is investigating suspicious circumstances, the officer cannot question the driver of the car and ask for identification unless those suspicions rise to the level necessary for a Terry stop.

That premise is contrary to this court’s decision in Young, and contrary to the principle that a seizure depends upon whether a reasonable person would believe, in light of all the circumstances, that he or she was free to go or otherwise end the encounter. Whether a seizure *occurs* does not turn upon the officer’s suspicions. Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer.

Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens’ questions, comments, and information citizens may offer. Of course, *if* a police officer’s conduct or show of authority, objectively viewed, rises to the level of a seizure, that seizure is valid only where there are “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the detention of the person. The officer’s reasonable suspicions are, therefore, relevant *once a seizure occurs*, and relate to the question whether the seizure is *valid* under article I, section 7.

Accordingly, we reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry stop. *[In a footnote, the O'Neill majority rejects defendant's argument that the Court's "pretext stop" rule is relevant in this context.]* Once a seizure is found, however, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding the validity of the seizure.

There is no issue of physical force in this case, so the next question is whether a reasonable person in the defendant's position would have believed he or she was free to go or otherwise terminate the encounter, given the actions of the officer. Whether there was any show of authority on the officer's part, and the extent of any such showing, are crucial factual questions in assessing whether a seizure occurred.

As the Court of Appeals has properly pointed out:

Where an officer *commands* a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away.

When [the officer] pulled into the parking lot he shined his spotlight on O'Neill's car. No seizure occurred at that point. [The officer] then approached the car and shined a flashlight into it, illuminating the driver and the passenger compartment. The use of a flashlight to illuminate at night what is plainly visible during the day is not an unconstitutional intrusion into a citizen's privacy interests. As Young notes, this court in State v. Rose, 128 Wn.2d 388 (1996) reasoned that use of a flashlight is not an intrusive method of viewing what is there to be seen but for the dark of night. A flashlight is, instead, an exceedingly common device that can do no more than reveal what would be visible in natural light. This court concluded: "[W]e hold that the fact that a flashlight is used does not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness falls." Thus, in Young, this court found no disturbance of private affairs under article I, section 7 where a police officer shined a spotlight on a person in a public street at night, under the same reasoning employed in Rose. [The officer's] use of a flashlight to see what would be observable in daylight was not an unreasonable intrusion into O'Neill's private affairs.

[The officer] then asked O'Neill to roll his window down. It is not improper for a law enforcement officer to engage a citizen in conversation in a public place. O'Neill was parked in a public place. The occupant of a car does not have the same expectation of privacy in a vehicle parked in a public place as he or she might have in a vehicle in a private location--he or she is visible and accessible to anyone approaching. Significantly, this court has concluded that there was no seizure of a person in a vehicle parked at night in the parking lot of a closed public park, where a police officer approached the vehicle after seeing a light in it, and asked, "Where is the pipe." State v. Thorn, 129 Wn. 2d 347 (1996) **Aug**

96 LED:13. Thorn is a Fourth Amendment case, but it demonstrates that no unreasonable intrusion by police occurs when an officer approaches the driver of an automobile parked in a public parking lot and engages him or her in conversation. Additionally, the Court of Appeals determined, under article I, section 7 and the Fourth Amendment, that an officer who approached a vehicle parked on a ferry with the driver apparently asleep, asked repeatedly for the driver to roll the window down, and asked several questions about whether the driver was okay, did not effect a seizure. State v. Knox, 86 Wn. App. 931 (Div. II, 1997) **Oct 97 LED12.** The court concluded that where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates. We agree.

The occupant is free, of course, to refuse an officer's request to open the window, and is under no obligation to engage in conversation with the officer. By the same token, the occupant is just as free to open a window and engage in conversation. The officer's approach and conversation with O'Neill did not, because O'Neill was inside a vehicle, rise to the level of an unconstitutional intrusion into private affairs.

O'Neill next challenges the propriety of [the officer's] request that he try to start the vehicle. The unchallenged findings do not suggest any show of authority that would lead a reasonable person to believe he was being detained as a result of this request.

The next question is whether [the officer's] request for identification was an unconstitutional intrusion into O'Neill's private affairs under article I, section 7. The superior court felt bound by the Court of Appeals' decision in State v. Markgraf, 59 Wn. App. 509 (1990). There, police had received a tip that a woman might be in trouble in a parked car. The Court of Appeals reasoned that under their community caretaking function the officers properly approached the car to determine whether the occupants were experiencing trouble. However, the court in Markgraf further reasoned, once the officers determined the occupants were not in need of assistance, the officers' subsequent request for identification violated the state constitution since the officers had no reasonable suspicion justifying a Terry stop.

As the Court of Appeals in this case observed, Markgraf was decided before this court's decision in [State v. Armenta, 134 Wn.2d, 1 (1997) **March 98 LED:05**]. Markgraf also was decided before Young. In Young, we concluded that for purposes of article I, section 7,

"[a] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention."
[Court's Footnote: State v. Larson, 93 Wn.2d 638 (1980), cited by O'Neill, also does not dictate that the request for identification was unconstitutional under article I, section 7. Larson never discusses article I, section 7 independently of the Fourth Amendment, and Young, which does address article I, section 7, is to the contrary. Larson is also factually distinguishable because it concerns a request for a passenger's identification after the driver was lawfully stopped, unlike this case.]

[The officer's] actions in their entirety, viewed objectively, do not warrant the conclusion there was a show of authority amounting to a seizure prior to the request that O'Neill exit the car. It is important to bear in mind that the relevant question is whether a reasonable person in O'Neill's position would feel he or she was being detained. The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a Terry stop. If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures. The actions of the officer in this case, up to and including his request for identification, do not come close to the circumstances described in Young.

2) Order to driver to get out of car (no justification needed)

When [the officer] asked O'Neill for identification, O'Neill responded by saying that his driver's license was revoked. (He had already told the officer that he had driven the vehicle to the parking lot.) [The officer] then asked for registration and insurance papers. When O'Neill produced a registration in the name of Macomber with a handwritten birth date, [the officer] asked O'Neill to get out of the car to check for identification.

At that point, [the officer] had probable cause to believe that O'Neill was involved in criminal activity: driving while his license was revoked. Because probable cause exceeds the reasonable suspicion standard for a Terry stop, there were, at the least, grounds for a valid Terry stop. [The officer] then lawfully asked O'Neill to exit the vehicle. Once a driver has been validly stopped, a police officer may order him or her to get out of the vehicle, "regardless of whether the driver is suspected of being armed or dangerous or whether the offense under investigation is a serious one." Such an intrusion is de minimis. [The officer] was therefore justified in asking O'Neill to exit the vehicle. *[Court's footnote: The officer conducted a pat down search for identification. O'Neill does not raise any issue regarding the propriety of the pat down search itself.]* At that point, a reasonable person in O'Neill's position would not believe himself free to leave.

3) "Plain view" seizure of "cook spoon"

Once O'Neill opened the door and got out of the car, [the officer] saw the "cook spoon" on the floorboard next to the driver's seat. The superior court held that under the Fourth Amendment the spoon was lawfully discovered in plain view. The "plain view" doctrine is an exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. The doctrine requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime. *[Court's footnote: In 1990, the United States Supreme Court eliminated a third requirement, i.e., that the officer's discovery of the evidence be inadvertent. Horton v. California, 496 U.S. 128 (1990).] [Court's footnote: The Court has said that there must be probable cause for the seizure of the item, which it has described as a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). The Court said that "[a] 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.]* [The officer] was justified in asking O'Neill to exit the vehicle, saw the spoon on the floorboard next to the driver's seat, and based upon his experience and training, recognized it as drug paraphernalia. The spoon was therefore admissible as evidence under the plain view exception.

4) No “search incident to arrest” authority when search occurs after PC develops but before actual custodial arrest occurs

As to the warrantless search of the car that followed, the State argues that this search was proper as a search incident to probable cause to arrest O’Neill either for driving while his license was revoked or for the drug paraphernalia. The State reasons that it makes no difference that the search preceded an arrest, relying on cases holding that a search incident to arrest may precede arrest provided that probable cause exists at the time of the search, and the search and arrest are contemporaneous. E.g., State v. Harrell, 83 Wn. App. 393 (1996). The superior court ruled under the Fourth Amendment that there was no valid search incident to arrest. The Court of Appeals reversed this ruling, accepting the State’s argument.

Here, [the officer] did not arrest O’Neill for driving while his license was revoked, or for either possession or use of drug paraphernalia. *[Court’s footnote: [The officer] could not have lawfully arrested O’Neill for possession of drug paraphernalia or use of drug paraphernalia in any event. Possession of drug paraphernalia is not a crime, and [the officer] could not have arrested for possession of the “cook spoon.” See RCW 69.50.412; State v. McKenna, 91 Wn. App. 554 (1998) Oct 98 LED:12. While use of drug paraphernalia is a misdemeanor, RCW 69.50.412(1), there is no evidence that the “cook spoon” was used in [the officer]’s presence. Thus, the officer could not have arrested O’Neill for use of the drug paraphernalia because he could not arrest for this misdemeanor if it was not committed in his presence. See RCW 10.31.100.]* The Court of Appeals reasoned, however, that a search incident to arrest can occur before an actual custodial arrest so long as probable cause exists to arrest at the time of the search. That court concluded that [the officer] had probable cause to arrest for possession of a controlled substance based on the residue on the spoon, and therefore a search incident to arrest was proper. We disagree.

Article I, section 7 provides greater protection of a person’s right to privacy than the Fourth Amendment. The state recognizes a person’s right to privacy with no express limitations. The right to be free from unreasonable governmental intrusion into one’s private affairs encompasses automobiles and their contents.

It is also well settled that under article I, section 7 the search incident to arrest exception to the warrant requirement is narrower than the Fourth Amendment. For example, under article I, section 7 law enforcement officers cannot search locked containers in a vehicle incident to arrest of the driver.

The exact formulation of when an arrest occurs justifying a search incident to arrest under the Fourth Amendment has sometimes been unclear. See generally Wayne A. Logan, An Exception Swallows a Rule: Police Authority To Search Incident to Arrest, 19 YALE L. & POL’Y REV. 381 (2001). However, for purposes of article I, section 7, the court has provided clear guidance:

Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. It is the fact of arrest itself that provides the “authority of law” to search, therefore making the search permissible under article I, section 7. Thus, while the search

incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made.

[State v. Parker, 139 Wn.2d 486 (1999) Dec 99 LED:13]

Thus, probable cause for a custodial arrest is not enough. There must be an actual custodial arrest to provide the "authority" of law justifying a warrantless search incident to arrest under article I, section 7.

Because a search cannot occur without "authority of law," and the search incident exception to the warrant requirement is a narrow one, we conclude **that the state constitution requires an actual custodial arrest before a search occurs**. Otherwise, the search is in fact conducted without an arrest, and thus without authority of law existing at the time of the search. As recognized in Parker, it is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest.

We note that the Court of Appeals cited one of this court's cases for the proposition that a search may precede the actual arrest where there is probable cause for the arrest, and the arrest is reasonably contemporaneous with the search. O'Neill, 104 Wn. App. at 861 (citing State v. Smith, 88 Wn.2d 127 (1977)). The comments in Smith were dicta, since the arrest occurred well after the search, and the court concluded that the search was valid based upon exigent circumstances as well as pursuant to valid consent to the search.

The origin of the principle stated in Smith is State v. Brooks, 57 Wn.2d 422 (1960). In Brooks the court said the issue was one of first impression, and adopted the reasoning of the California court in People v. Martin, 290 P.2d 855 (1955), that if there was reasonable cause before the arrest, it was immaterial whether the seizure of certain items preceded rather than followed the arrest. The California opinion was quoted at some length, and included the justification that if the person was innocent and the search convinced the officer his reasonable belief was wrong, it was to the advantage of the person searched not to be arrested; on the other hand, if the person searched was not innocent, "security of his person, house, papers, or effects suffer[ed] no more from a search preceding his arrest than it would from the same search following it."

The motion to suppress in Brooks was made pursuant to article I, section 7, but for several reasons we decline to follow that decision. First, there was no discussion in Brooks of whether the state constitutional analysis is the same as under the Fourth Amendment. As noted, the court adopted the reasoning of the California court, but this court did not undertake any analysis of article I, section 7 itself. Second, the cases relied on by the California court are not relevant to our state constitutional provision, and, indeed, confirm that the decision in Brooks was not the result of a Washington state constitutional analysis.

Moreover, the reasoning of the California court accepted in Brooks is suspect. Whether or not the search discloses any exculpatory or inculpatory evidence is not an appropriate consideration in determining whether a search incident to arrest is constitutionally valid. Finally, Brooks is not consistent with more recent analysis by this court recognizing the necessity of authority of law for a search under article I, section 7, and specifically, that a lawful, actual custodial arrest is a "constitutionally required prerequisite to any search incident to arrest."

We hold that a valid custodial arrest is a condition precedent to a search incident to arrest as an exception to the warrant requirement under article I, section 7. *[Court's footnote: This holding does not affect the validity of the limited pat down search exception permissible under Terry.]*

5) "Consent" voluntariness is questionable where given after claim of authority and after multiple requests

To show that valid consent to a search has been given, the prosecution must prove that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). Whether consent was voluntary or instead the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. Factors which may be considered in determining whether one has voluntarily consented include whether Miranda warnings were given, the degree of education and intelligence of the individual, and whether he or she had been advised of the right to consent. However, under the Fourth Amendment, when the subject of a search is not in custody and the question is whether consent is voluntary, knowledge of the right to refuse consent is not a prerequisite of a voluntary consent.

Here, no Miranda warnings were given, but none were required. Mr. O'Neill was not advised that he had a choice whether to consent, but he was aware of the warrant requirement and aware in general that consent could be denied. The record does not disclose his level of intelligence or degree of education.

Although the factors identified in [State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02**] are not particularly helpful in resolving the question of voluntariness, other circumstances show that the consent was not voluntary, as the superior court held. As noted, we consider the totality of the circumstances rather than merely applying a multifactor analysis.

The findings establish that when [the officer] asked for consent to search the car, O'Neill's liberty was restrained in that while not in custody or under arrest, he was not free to leave, i.e., he had been seized within the meaning of Terry. While voluntary consent can be given even in a custodial situation, any restraint is a factor to consider. O'Neill denied consent, and stated that the officer had to have a warrant to search. [The officer] responded that he did not need a warrant, that he could simply arrest O'Neill for the drug paraphernalia and search incident to that arrest. [The officer] did not, however, arrest O'Neill for any offense at any time prior to searching the vehicle. O'Neill continued to refuse to grant consent, and the matter went back and forth several times. Only after [the officer] repeatedly pressed the issue did O'Neill relent and give consent.

By his conduct, [the officer] showed that he had no intention of arresting Mr. O'Neill and then searching incident to arrest. He simply claimed he could do so. Had he actually done so, he would not have needed Mr. O'Neill's consent to search the vehicle. Thus, the only reason for the representations that he could and would simply arrest O'Neill and search incident to arrest if he did not obtain consent was to obtain that consent.

The Court has noted that "consent" granted "*only* in submission to a claim of lawful authority" is not given voluntarily. In Bumper, the Court reasoned that where an officer claimed authority to conduct a valid search without consent, he effectively stated that the individual asked to consent had no right to resist the search.

The State, however, relies on State v. Murray, 84 Wn.2d 527 (1974) for the proposition that consent was not vitiated where officers represented that they could obtain a search warrant if the individual did not consent, and said that they would leave an officer at the premises while doing so. The State suggests the same is true where an officer informs an individual that a search incident to arrest can be made if consent is not granted.

Murray is not helpful because the court did not address the voluntariness of the consent in the case. Nonetheless, we acknowledge that not every advisement of authority to search in the absence of consent vitiates any consent given. For example, in Commonwealth v. Mack, 568 Pa. 329, 796 A.2d 967, 970-71 (2002), the court distinguished Bumper on the ground that, unlike the situation in Bumper, the officers informed the appellant that they did not possess a warrant, that she was free to decline permission to search, and that if she refused permission they would have to get a search warrant. The court observed that the statement that the officers would have to get a warrant was a factor to consider in assessing voluntariness, but concluded that the officers simply advised the appellant, truthfully, of the consequences of denying permission.

Here, [the officer] did not merely advise O'Neill of the consequences of refusal. Instead, in response to O'Neill's contention that [the officer] could not search without a warrant, [the officer] claimed that he could search without a warrant regardless of whether consent was given. As noted, however, for whatever reason [the officer] was not inclined to effect an arrest prior to searching the vehicle. He thus used the claim that he could search in any event to pressure O'Neill to consent, i.e., to give in because it was futile not to. Moreover, [the officer] repeated the statement several times, and thus it was not just informative, but instead was coercive.

A number of courts have found that repeatedly requesting consent is a factor to consider in assessing the voluntariness of consent. We agree with these courts that repeated requests for consent is another indicator that the consent was not voluntary.

Under the totality of the circumstances, the superior court's ruling that under the Fourth Amendment there was no valid consent to search must be upheld.

6) Applicability of inevitable discovery exception to exclusionary rule

Finally, the State argued to the Court of Appeals that the pipe and cocaine were admissible under the inevitable discovery rule despite any constitutional violation. Under this rule, the prosecution must prove by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful procedures. The State reasons that it is clear from the record that if [the officer] had not received consent he would have arrested O'Neill because he had "probable cause to arrest for driving while license suspended/revoked, and also for use of drug paraphernalia." The State reasons that [the officer] would then have searched incident to arrest. The State concludes that if [the officer] had utilized this "proper and predictable investigatory procedure" the cocaine and pipe would inevitably have been discovered.

We conclude that the inevitable discovery rule cannot be applied in these circumstances, [Court's footnote: *We leave for another case the question whether the rule might apply in another context under article I, section 7, a question we have not decided.*] because it would undermine our holding that a

lawful custodial arrest must be effected before a valid search incident to that arrest can occur. If we apply the inevitable discovery rule, there is no incentive for the State to comply with article I, section 7's requirement that the arrest precede the search.

[Some citations and footnotes omitted; bolding added]

CONCURRENCE/DISSENT (with LED Editorial comments): Justice Chambers authors an opinion that concurs in the result (suppression) and apparently in some aspects of the doctrinal analysis by the majority. However, Justice Chambers' opinion, joined by Justices Sanders, Johnson and Owens, contains some discussion that is ominous for law enforcement in Washington. Of the most concern is what appears to be an invitation from Justice Chambers to the criminal defense bar to challenge the constitutionality under the Washington constitution of RCW 10.31.100's probable cause exceptions to the common law "misdemeanor presence" rule for arrest. Justice Chambers also indicates that a subjective element generally should be considered when trying to decide whether a seizure is reasonable; he cites case law that, in our view, does not support his doctrinal claim. Prosecutors will no doubt be seeing new suppression theories based on the theories in Justice Chambers' opinion.

LED EDITORIAL COMMENTS:

1) **The "actual" arrest requirement under article 1, section 7 of the Washington constitution.** We do not have anything to add to our comments in last month's LED (at page 6) re the ramifications of O'Neill's requirement of actual arrest as a prerequisite to "search incident to arrest authority," other than to make those comments generic to all arrest situations. Thus, as we did last month, we suggest: 1) prior to conducting a "search incident to arrest" for any crime, officers should expressly tell a person that he or she is under arrest for that crime or crimes or under arrest on a warrant; 2) officers should not tell the arrestee that they plan to cite and release the person if they find nothing in the search; 3) officers probably should handcuff and secure the "arrestee" before conducting the search; and 4) if officers find evidence of a more serious crime in the search, officers probably should transport the arrestee for at least administrative booking. Also remember that, under prior case law, a search will not be deemed to be "incident to arrest" unless the search is conducted as soon as practicable after the arrest and while the arrestee is still at the scene. As always, we urge officers and law enforcement agencies to seek advice on these and other matters from their own legal advisors and prosecutors.

2) **The breadth of the "plain view" ruling in O'Neill is not entirely clear.** The majority opinion indicates without a great deal of explanation that, where the officer was standing outside the car and saw contraband inside the car through the open door, the officer was authorized under the "plain view" doctrine to go inside the car to retrieve the item based solely on the probable cause that his sense of sight gave him. We are not certain that the O'Neill majority thought through the ramifications of rather conclusorily invoking the "plain view" doctrine in this circumstance. The "plain view" doctrine would not justify entry of a residence under similar circumstances. We do not like to raise questions without offering answers but -- What if the car door had remained closed at all times? What if the car had been locked? What if the car had been unoccupied at all times? Absent officer-safety considerations, would an officer's observation through a window of contraband or other evidence provide justification for making a warrantless, non-consenting, non-exigent entry of a car located in a public place to seize that contraband or evidence? We are certain that we have not heard the last of the arguments on the "plain view" car entry issue, and we would suggest caution in relying on this rationale for warrantless car entries, at least as to unoccupied, locked vehicles.

3) **“Consent” requests when there is other authority for searching.** Washington precedent and case law in other jurisdictions indicates that it does not hurt to ask for consent to search in circumstances where an officer believes that he or she already has authority under a warrant or under another exception to the warrant requirement. See **State v. Johnson**, 104 Wn. App. 489 (Div. II, 2001) May '01 **LED:05**. We still think that is a reasonable approach, but the facts and outcome of the **O’Neill** case serve as a caution to officers against trying to lever consent by insisting that they have authority to search regardless of the response of the request. If officers are going to ask for consent where they already have a search warrant, or where they believe that another exception to the warrant requirement will justify the search anyway, **O’Neill** is a caution that officers should not bring up the alternative theory until after voluntary consent has either been granted or denied. Also, if officers do not yet have a search warrant, but officers believe that they have probable cause to obtain a search warrant, then the most that should be said in that regard while seeking consent is that officers will secure the subject vehicle or premises as necessary and seek a search warrant (not that they will GET a warrant, as that suggests to the subject that the person has no real choice in the matter).

4) **“Inevitable discovery” exception to “exclusionary rule.”** Washington courts have been reluctant in recent years to apply the “inevitable discovery” exception to the exclusionary rule, and the **O’Neill** Court followed suit. The Court added a footnote (see above) indicating that the question of whether the “inevitable discovery” doctrine can ever be applied under article I, section 7 of the Washington constitution is a question reserved for future consideration by the Court. Washington prosecutors face a tough battle asserting a theory of “inevitable discovery.”

5) **Drug paraphernalia -- mere possession is not a crime under state statutes.** The **O’Neill** Court points out that mere possession, as opposed to use, of drug paraphernalia is not a crime under RCW 69.50. As we have pointed out in the past, however, local jurisdictions are free to make mere possession a crime through ordinance.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **CITY OF SUMNER JUVENILE CURFEW ORDINANCE INVALIDATED FOR VAGUENESS IN VIOLATION OF FEDERAL CONSTITUTIONAL DUE PROCESS PROTECTIONS** – In **City of Sumner v. Walsh**, ___ Wn.2d ___, 61 P.3d 1111 (2002), the Washington Supreme Court rules, 5-4, that the City of Sumner’s juvenile curfew ordinance violates federal constitutional due process protections.

Thomas Edward Walsh was found, in the Sumner Municipal court, to have committed two civil infractions under the parental-responsibility provisions of Sumner’s juvenile curfew ordinance by allowing his 14-year-old son, Justin, to be in public places during curfew hours. The Pierce County Superior Court affirmed that decision on Walsh’s appeal.

Walsh appealed to Division Two of the Court of Appeals, and that Court transferred review to the Washington Supreme Court. The Supreme Court has ruled that the curfew ordinance is unconstitutionally vague for two reasons stated in the lead opinion authored by Justice Alexander and joined by Justices Owens and Smith: 1) the provisions in the curfew ordinance making it lawful for juveniles to “remain” in public places during certain hours, defining “remain” as “linger or stay,” but providing no definition for “linger” or “stay,” are unconstitutionally vague; and 2) the provisions making it unlawful for juveniles to remain in public places during certain hours, providing an exception for a juvenile who “is on an errand as directed by his or her parent,” but providing no definition of “errand,” are unconstitutionally vague.

A concurring opinion authored by Justice Chambers and joined by Justice Sanders would place greater restrictions on the government's ability to enforce curfew laws than the lead opinion. The Chambers-Sanders view is that juveniles have a qualified right to move freely, such that laws in derogation of this right must be narrowly tailored to meet compelling governmental interests, Justices Chambers and Sanders indicate that they would not approve of any law that would impose "a permanent, blanket curfew covering every public place in a jurisdiction and every young person in that jurisdiction."

Justice Madsen files a dissent joined by Justices Ireland, Bridge and Johnson. The dissent argues in vain that the ordinance is clear enough to meet the constitutional vagueness standards; that the ordinance is narrowly tailed enough to meet Walsh's overbreadth challenge; and that the ordinance does not violate Mr. Walsh's qualified constitution right to raise his child as he wishes.

Result: Reversal of Pierce County Superior Court and Sumner Municipal Court determinations that Thomas Edward Walsh committed civil infractions.

Status: The City of Sumner has moved for reconsideration.

(2) AFFIDAVIT ESTABLISHES INFORMANT-BASED PROBABLE CAUSE TO SEARCH (COURT REJECTS DEFENDANT'S HYPERTECHNICAL CHALLENGES TO PC, INCLUDING A CLAIM THAT THE INFORMANT'S BASIS OF KNOWLEDGE WAS NOT SHOWN); ALSO, PHOTO ID PROCEDURE WAS NOT IMPERMISSIBLY SUGGESTIVE – In State v. Vickers, 148 Wn.2d 91 (2002), the Washington Supreme Court unanimously rejects the challenges of two murderers to their convictions. The Vickers Court rejects challenges: 1) to probable cause support for search warrant; and 2) to a photo montage identification procedure.

1) Probable cause support for search warrant

Two men wearing ski masks robbed a bar/casino in Tacoma. The men came in shooting with an automatic rifle and shotgun. One patron was killed and a security guard was injured.

The next day, a female acquaintance of brothers John Vickers and Paul Vickers, contacted the Tacoma Police Department. She reported that she had heard about the robbery and murder. She said: A) that the men had previously discussed doing a bank robbery by going in shooting; B) that they owned weapons consistent with those used in the attack; C) that one of the men owned a car meeting the very distinctive description of the possible getaway car (a flat-black 1980 Plymouth Arrow); and D) that they had left Anderson Island on a ferry the previous day without money and had come back that day with money. Phil Vickers, a brother of the two suspects, also reported his suspicions of his brothers to Tacoma Police Department.

Investigators obtained a search warrant to search residences, a trailer and the Plymouth. In addition to the above described informant information, the information supporting the warrant was: 1) the lengthy criminal histories of the suspects (including a conviction of one of them for a masked, armed robbery); and 2) the results of a photo montage ID procedure that had matched the bandana-wearing Vickers' brothers to two bandana-wearers who had come into the bar a few hours before the robbery and had seemed to be casing the bar.

The appellate challenges to the search warrant affidavit by the Vickers were hypertechnical and easily rejected by the Supreme Court. Because space is precious, and some of the challenges to the warrant affidavit seem specious, this **LED** entry will not address all of those challenges.

One of the challenges was that the affidavit included a wrong date regarding the date that the brothers left Anderson Island. The Supreme Court declares that this was obvious clerical (or "scrivener's") error, and in any event it made no difference to the probable cause determination.

A second challenge to the probable cause was that the female informant said that the brothers had discussed a "go-in-shooting" bank robbery, not a "go-in-shooting" bar robbery. The Vickers' Court says this difference (bank vs. bar robbing) was inconsequential to the PC question.

The defendants also asserted that the affidavit did not adequately establish that the female informant had first-hand information about the suspects. However, with the exception of one piece of information that the female informant had gotten by hearsay, this was simply not so, as the Vickers Court explains:

In this case, the informant indicated she had personal knowledge of conversations Petitioners had concerning commission of a robbery, and of Petitioner Paul Vickers saying he would commit the robbery by firing shots immediately upon entering the premises to catch everyone off guard. In addition, the informant stated she personally observed Petitioners board the ferry bound for Steilacoom on January 24, 1998 and that they did not return to Anderson Island that night. Personal observations in this case sufficiently satisfied the Aguilar-Spinelli basis of knowledge test.

2) Photomontage

The Vickers Court explains that minor differences in the photos used in the ID procedure did not make misidentification likely, and therefore that the defendants' challenge to the photo montage must be rejected:

Petitioner Paul Vickers claims that admission of identification evidence by an impermissibly suggestive photomontage violated his due process rights. He argues that the photomontage was suggestive because his picture was the only driver's license photograph among the five other MUGGIS (mug) shots because the background of his photograph was lighter; and he was the only person in the photomontage not wearing coveralls. This suggestiveness, he argues, made the identification unreliable.

An out-of-court photographic identification violates due process if it is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. To establish a violation, Petitioner Paul Vickers bears the burden of showing that the identification procedure was impermissibly suggestive. If he fails, the inquiry ends. If he proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.

Petitioner Paul Vickers does not make a preliminary showing that the photomontage was impermissibly suggestive. The trial court examined the photomontage and concluded that any differences between the individual photographs were so minor as not to be impermissibly suggestive. The photographs were black and white and appeared to be the same size, showing men in the same front face format. All the men had facial hair (moustaches and goatees) and were approximately the same age. The lighter background in Petitioner Paul Vickers' photograph does not unduly draw attention to it, nor do the photographs show enough clothing to draw attention. These minor differences are not sufficient to warrant further inquiry. The Court of Appeals did not err in holding that the photomontage satisfied due process requirements.

[Citations and footnotes omitted]

Result: Affirmance of Pierce County Superior Court convictions of: 1) John Phillip Vickers for first degree-felony murder and attempted first degree murder while armed with a firearm; and 2) Paul Thomas Vickers for aggravated first degree murder and attempted first degree murder while armed with a firearm.

(3) BEFORE FINDING THAT FRIGHTENED CHILD RAPE VICTIM WAS “UNAVAILABLE” TO TESTIFY UNDER CHILD-HEARSAY STATUTE, TRIAL COURT SHOULD HAVE CONSIDERED USE OF CLOSED CIRCUIT TV – In State v. Smith, 148 Wn.2d 122 (2002), the Washington Supreme Court rules in a child rape case that the trial court made an error in determining that a child witness was unavailable for purposes of the child sex abuse hearsay exception of RCW 9A.44.120.

Under RCW 9A.44.120 child hearsay is not admissible unless, among other things, the child either testifies or is “unavailable.” In Smith, the evidence in a pre-trial hearing showed that the five-year-old witness was afraid to testify in open court with the defendant present. The trial court judge ruled that, since the Jefferson County courtrooms were not set up for presenting testimony of child victims by closed circuit television (see RCW 9A.44.150), the child witness was “unavailable” for purposes of RCW 9A.44.120.

The Supreme Court rules in Smith that the trial court erred by not considering whether arrangements could have been made to allow the witness to testify by closed circuit TV. The Smith Court leaves some room for the using possibility that there might be unusual cases where the State might be able to show that closed-circuit TV is not a practicable option:

The fact that closed-circuit television was not installed in the courtroom in this case does not affect the State's burden under the good faith requirement. The use of RCW 9A.44.150 is not limited to courtrooms where closed-circuit television is readily available. To the contrary, by providing that the "state shall bear the costs of the closed-circuit television procedure," the statute anticipates situations in which county facilities may not have closed-circuit television installed.

The State also argues that this court should not require the use of closed-circuit television in situations where a child victim is unable to testify in open court because of the potentially large cost involved. However, our holding is limited to situations in which evidence is presented that the child victim may be able to testify through alternative means. In addition, what the State must do to produce a witness is still governed by the overall reasonableness standard. Therefore, the potentially large cost of requiring testimony by closed-circuit television is tempered by the State's ability to show that the use of closed-circuit television would not be reasonable where the equipment is not already installed in the courtroom *and* the cost of bringing in outside equipment would be very high. The State made no such showing in this case.

[Citations omitted]

Concurring opinion: Justice Sanders writes a concurring opinion (joined by no other justice) offering his view that the pertinent statute and constitutional provisions must be read more restrictively against the State than the majority reads them.

Result: Reversal of Jefferson County Superior Court conviction of Wallace Michael Smith for first degree rape of a child; case remanded for hearings on availability question and for possible re-trial.

WASHINGTON STATE COURT OF APPEALS

EVIDENCE REGARDING 911 AUDIO TAPE MEETS AUTHENTICATION AND “EXCITED UTTERANCE” ADMISSIBILITY REQUIREMENTS

State v. Jackson, 113 Wn. App. 762 (Div. II, 2002)

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

Warren Jackson and Katreace Moore had a child together but were not living together. On evening of April 8, 2000, he went to her apartment and entered her bedroom, where he found another man. According to the State's witnesses at trial, he walked to the kitchen, grabbed a knife, and returned to the bedroom. A fight ensued, during which both men were stabbed. Jackson fled and was arrested later at a friend's apartment.

While the fight was in progress, Moore called 911 and excitedly asked for help. As is normal, 911 recorded her call.

Jackson was tried before a jury for first degree assault and first degree burglary. During the State's case in chief, it offered the 911 tape. To lay a "foundation," it called Moore and asked her the following questions:

Q: You called 911?

A: Yes.

Q: Have you had an opportunity . . . to review the audio recording of your call to 911?

A: Is that the tape? Yeah.

Q: Do you remember making the call?

A: Yes.

Q: When you reviewed the recording were there any changes or deletions or anything that was done to the tape?

A: No.

Q: Was it an accurate tape of a call that you made?

A: Yes.

When the State offered the tape, Jackson objected on two grounds: 1) failure to authenticate and 2) hearsay not within a hearsay exception. The trial court overruled, and the State played the tape for the jury.

The jury convicted Jackson of assault but acquitted him of burglary. The court sentenced Jackson to 342 months in prison. Jackson then filed this appeal.

ISSUES AND RULINGS: 1) Does the evidence properly authenticate the 911 audio tape? (ANSWER: Yes); 2) Is the hearsay on the 911 audio tape admissible as an “excited utterance”? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Warren G. Jackson for first degree assault and first degree burglary.

ANALYSIS:

1) Authentication

The Jackson Court first explains the law generally in this state and in other jurisdictions regarding how to authenticate tangible evidence:

Subject to the exceptions in ER 902 and 904, none of which apply here, ER 901 provides that the proponent of tangible evidence (e.g., a writing, recording, photograph, weapon, or other touchable object) must authenticate it. It further provides that the proponent can do that by producing "evidence sufficient to support" two basic findings. One, which the rule calls "identification," is that the item is what the proponent claims. The other, which the rule calls "authentication," is that the item is "in substantially the same condition as when the crime was committed."

In most circumstances, a proponent can meet these requirements in more than one way. To authenticate the photograph of a crime or accident scene, for example, a proponent can call a witness (a) who has personal knowledge of the scene the photo depicts, (b) who has compared the photo to that scene, and (c) who states that the photo accurately portrays the scene. Alternatively, the proponent can call the photographer (or someone else with equivalent knowledge) to describe the equipment that was used, where and how it was used, that it generally produces accurate pictures, that it produced the particular picture in question, and that such picture has not been altered since being developed. In the first situation, evidence of an "eyewitness comparison" of the scene and the photo directly supports findings of identification and authentication. In the second situation, evidence that the equipment generally operates reliably supports an intermediate inference that the equipment operated reliably on the occasion in question and that the equipment produced the picture in question, and those inferences rationally support findings of identification and authentication. These methods are not exclusive, of course, and under specific circumstances a proponent may authenticate in other ways also.

Just as a proponent can authenticate a photo by "eyewitness comparison," a proponent can authenticate a tape recording by "earwitness comparison" -- i.e., by calling a foundational witness to testify (a) that the witness has personal knowledge of the events recorded on the tape; (b) that the witness has listened to the tape and compared it with those events; (c) and that the tape accurately portrays those events. If the tape records human voices, the foundational witness (or someone else with the requisite knowledge) usually must identify those voices. The witness' testimony provides the necessary "foundation" if it is sufficient to support findings (1) that the tape is what it purports to be and (2) that the tape's condition at trial is substantially the same as its condition on whatever earlier date is relevant (usually the date on which the tape was recorded).

[Footnotes and citations omitted]

Then, after explaining that Washington case law, though incomplete, is consistent with the above-noted general propositions, the Jackson Court concludes regarding authentication:

[I]n proper circumstances, a proponent can authenticate a tape recording with conversation on it by calling a witness who has personal knowledge of the original conversation and the contents of the tape; who testifies that the tape accurately portrays the original conversation; and who identifies each relevant

voice heard on the tape. This method is not exclusive, and a proponent may also use any other that produces evidence sufficient to support the basic findings of identification and authentication. This method was the one used here, and the trial court did not err by overruling Jackson's failure-to-authenticate objection.

[Footnotes and citations omitted]

2) "Excited utterance"

The Jackson Court analyzes the "excited utterance" issue as follows:

The rules on authentication and hearsay serve different though related functions. The rule on authentication, ER 901, requires indicia of reliability tending to show that the evidence is as reliable at trial as at some earlier relevant time (usually the time at which the evidence was created or discovered). The rule on hearsay, ER 801, requires indicia of reliability tending to show that the evidence was reliable at the earlier relevant time. If a proponent offers tangible evidence that incorporates an out-of-court statement, and the proponent wants to use the out-of-court statement to prove the truth of the matter asserted, the proponent must meet *both* rules.

Each hearsay exception is nothing more nor less than an indicator of reliability deemed adequate to satisfy the hearsay rule. One such exception, known as the excited utterance exception, provides that a statement will be admissible, even though it is hearsay, if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

In this case, the tape itself shows beyond question that Moore was excited when she called 911; she sounds frantic, and two men can be heard fighting in the background. The trial court ruled at trial that she was still excited when an officer arrived at the house. The tape was clearly an excited utterance; the State satisfied the hearsay rule as well as the authentication rule; and the trial court did not err by admitting the 911 tape.

[Footnotes and citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **PRESCRIPTION DRUG RECORDS MAY, PER WASHINGTON STATE STATUTE AND PER FEDERAL AND STATE CONSTITUTIONS, BE INSPECTED BY PHARMACY BOARD OR LAW OFFICERS, AND THAT INFORMATION MAY BE PASSED ON TO PROSECUTOR** - In Murphy v. State, ___ Wn. App. ___, 62 P.3d 533 (Div. I, 2003), the Court of Appeals reverses a jury verdict for over \$3 million against the Washington State Pharmacy Board. The jury had found that the Board was negligent in disclosing information about then-Snohomish County Sheriff Patrick Murphy's prescription drug records to the Snohomish County Prosecutor. The Murphy Court summarizes its decision as follows:

Patrick Murphy and his family sued the State for damages they claimed were caused by the Washington State Pharmacy Board's negligent disclosure of Murphy's prescription records to the prosecuting attorney. The disclosure of those record resulted in Murphy's prosecution for obtaining prescription drugs by deceit, but the criminal charges were dismissed because the Board failed to obtain a warrant before examining the records. In the civil trial, the jury found the Board was negligent and awarded Murphy damages he allegedly suffered when stress from the prosecution exacerbated his prior injuries. The main issue on

appeal is whether the trial court erred in holding that the Board had a duty to prevent disclosure of Murphy's prescription information to the prosecuting attorney.

We reverse and dismiss Murphy's claim for negligent disclosure. The trial court erred in holding that the Board needed a warrant to search prescription records; pharmacy records are open to inspection by the Board under state statutes [see RCW 18.64.245], and those statute do not violate federal or state constitutional privacy protections. Further, there is no implied statutory cause of action or common law negligence theory that subjects the Board to liability for disclosing Murphy's prescription records to the Snohomish County prosecutor. Given these conclusions, we find it unnecessary to reach the remaining issues raised by the State's appeal, and we affirm the trial court with regard to the issues raised in Murphy's cross-appeal.

The Murphy Court rejects plaintiff Murphy's "independent grounds" argument, under the Washington Constitution, article 1, section 7, challenging RCW 18.64.245. The statute authorizes warrantless inspection of prescription records by the Pharmacy Board and by law enforcement officers. The Murphy Court explains as follows its view that the statute does not violate article I, section 7 of the Washington State Constitution:

When a patient brings a prescription to a pharmacist, the patient has a right to expect that his or her use of a particular drug will not be disclosed arbitrarily or randomly. But a reasonable patient buying narcotic prescription drugs knows or should know that the State, which outlaws the distribution and use of such drugs without a prescription, will keep careful watch over the flow of such drugs from pharmacies to patients.

Further, this is not a case of a long-held privacy protection being eroded by gradual government intrusion or modern technological advances. Compare State v. Myrick, 102 Wn.2d 506 (1984) (holding aerial surveillance violated state privacy clause) and State v. Young, 123 Wn.2d 173 (1994) (invalidating warrantless use of thermal imaging device to detect heat sources within home) with State v. McKinney, 60 P.3d 46 (2002) **Jan 03 LED:05**, (distinguishing Young because information originally kept for law enforcement purposes). Pharmacies and drug stores selling narcotics have been required to retain records of sales and make them available to law enforcement since as early as 1891. Given this long history of government scrutiny, patients who fill prescriptions for narcotic drugs in this state should reasonably expect that their prescription records will be available to appropriate government agents, subject to safeguards against unauthorized further disclosure.

We therefore hold that the trial court erred when it concluded that the Board did not have the authority to conduct a survey of Murphy's prescription records without first obtaining a search warrant. We recognize, as have other courts, that patients have a limited expectation of privacy in prescription records. But in this case, that limited expectation was not violated by the State's exercise of its statutory right to inspect such records in order to ensure conformity with prescription drug laws.

[Some citations and one footnote omitted]

Result: Reversal of Snohomish County Superior Court judgment on jury verdict for Patrick Murphy and for members of his family; all claims ordered dismissed.

Status: Plaintiffs have filed a petition seeking review in the Washington Supreme Court.

(2) TEST MET FOR “DYING DECLARATION” HEARSAY EXCEPTION – In State v. Johnson, 113 Wn. App. 482 (Div. I, 2002), the Court of Appeals rules that the facts of the murder case support the trial court’s admission of the victim’s hearsay under the “dying declaration” exception of Evidence Rule (ER) 804(b)(2).

After being stabbed seven times, the victim, who was bleeding profusely, told a witness trying to help him that he was “ready to go.” Then the victim explained to the witness that defendant Johnson had stabbed him because defendant thought the victim was tampering with defendant’s car. The victim died from the wounds, and Johnson was later convicted of murder in the second degree.

ER 804(b)(2) provides a hearsay exception for dying declarations as follows:

(b) Hearsay Exceptions. The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

...

(2) *Statement Under Belief of Impending Death*. In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant’s impending death.

The rule allowing “dying declaration” hearsay from an unavailable witness in a criminal homicide prosecution thus requires proof that: 1) the declarant’s statement concerned the cause or circumstances of apparent impending death, and 2) the declarant’s actual belief that he or she was about to die. The first part of the test was clearly met and is not discussed by the Johnson Court -- the victim’s statement identified who had stabbed him and why. As to the second part of the test under ER 804(b)(2) (whether the victim/declarant actually believed he was about to die), the Johnson Court explains as follows that the statement by the victim to the assisting witness meets that test:

Ruff’s statements identifying Johnson as his attacker were admissible as dying declarations. Ruff’s statements about Jesus and being ready to go, together with his wounds and the very large quantity of blood he shed, showed he understood he had suffered fatal injuries.

Result: Affirmance of King County Superior Court convictions of Anthony Paul Johnson for murder in the second degree.

NEXT MONTH

The May 2003 LED will include an entry regarding the February 27, 2003 decision of the Washington Supreme Court in State v. Acrey. In an 8-1 decision, the Supreme Court ruled that, where a 12-year-old boy was lawfully stopped after midnight in an isolated commercial area with no open businesses and no nearby residences, officers were justified under their “community caretaking function” in holding the boy, after they had cleared him of suspicion of criminal behavior, long enough to call his mother.

Also included in the May 2003 LED will be an entry regarding the February 13, 2003 decision of the Court of Appeals, Division Three, in City of Yakima v. Mollett, 63 P.3d 177 (Div. III, 2003). The Court of Appeals ruled that CrRLJ 3.2(a) did not authorize a lower court to order “cash only” bail under the circumstances of the case.

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. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links 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 2003, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 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. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. 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 home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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 [ledemail@cjtc.state.wa.us]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LED's from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].