



# Law Enforcement

September 2003

# Digest

## HONOR ROLL

**560<sup>th</sup> Basic Law Enforcement Academy – March 11 through July 16, 2003**

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Best Academic: Roman Rozhavsky – Anacortes Police Department  
Best Firearms: Brian Bassage – Federal Way Police Department  
Tac Officer: Officer Paul Guest – Des Moines Police Department

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**UNITED STATES SUPREME COURT**

**SECTION 1983 CIVIL RIGHTS ACTION – OFFICER’S VIOLATION OF MIRANDA OR COERCION OF SUSPECT’S CONFESSION DOES NOT VIOLATE SUSPECT’S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION UNLESS THE SUSPECT’S STATEMENT IS USED IN A CRIMINAL PROSECUTION, BUT SOME SUCH UNLAWFUL QUESTIONING MAY “SHOCK THE CONSCIENCE” AND THEREFORE VIOLATE FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS**

Chavez v. Martinez, 123 S.Ct. 1994 (2003) 1234

**INTRODUCTORY LED EDITORIAL NOTE:** The Chavez case involves a clear violation of Miranda, as well as other coercive conduct by a law enforcement officer. The unlawful conduct of the officer would have triggered application of the Exclusionary Rule if the defendant had been criminally prosecuted. There was, however, no criminal prosecution in the case. The issues in this civil lawsuit concern whether the officer’s conduct constituted a constitutional violation under the Fifth or Fourteenth Amendments such that the subject of the unlawful questioning could recover damages in a § 1983 civil rights action.

Facts and Proceedings below :

Oliverio Martinez, the plaintiff in this civil rights lawsuit, was shot five times by police officers during a struggle on the street. As Martinez was being treated in the emergency room, Officer Ben Chavez (a patrol supervisor in the Oxnard, California Police Department) questioned Martinez about the events surrounding the shooting. At no point in the questioning did Officer Chavez give Miranda warnings to Martinez.

Martinez had been shot in the face, back and leg; he was in great pain, stating that he was dying; Martinez ended up blind and paralyzed from the gunshot wounds. Officer Chavez continued the questioning in spite of the suspect’s repeated pleas that the suspect did not want to talk until after he received treatment. Also, while there was no evidence that Officer Chavez actually interfered with medical treatment efforts, and Officer Chavez left the room several times while Martinez was being treated, Officer Chavez (according to the Ninth Circuit opinion in this case) did ignore several requests from hospital personnel that Officer Chavez leave the room so that they could more easily provide treatment to Martinez.

During the questioning by Officer Chavez, Martinez ultimately admitted that he had taken an officer's gun and aimed it at the police officers involved in the struggle. The State never filed criminal charges against Martinez. However, Martinez filed a 42 USC § 1983 civil rights lawsuit alleging that Officer Chavez had violated his Fifth Amendment privilege against compelled self-incrimination by employing coercive tactics and by ignoring Miranda requirements in order to elicit an involuntary confession, and that he had violated his Fourteenth Amendment substantive due process rights.

A California United States District Court ruled that Officer Chavez was not entitled to qualified immunity, and the Ninth Circuit Court of Appeals affirmed. The Ninth Circuit relied on a line of Ninth Circuit decisions holding that intentional, premeditated and egregious violations of Miranda rules can constitute a Fifth Amendment self-incrimination violation for purposes of a civil rights lawsuit, even if the statements obtained in the questioning are never used in a criminal prosecution. The prior Ninth Circuit decisions included California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9<sup>th</sup> Cir. 1999) **Jan 00 LED:03**; and Cooper v. Dupnik, 963 F.2d 1220 (9<sup>th</sup> Cir. 1992) **Nov 92 LED:02**.

#### ISSUES AND RULINGS:

(1) For purposes of a § 1983 civil rights lawsuit, if a suspect's confession is never used in a criminal prosecution, can a Miranda violation or other coercive police practice that produces the confession ever be deemed to be a violation of the Fifth Amendment protection against self-incrimination? (**ANSWER:** No; it appears that eight Justices (all but Ginsburg) agree that a Miranda violation by itself can never constitute a Fifth Amendment violation in the absence of prosecutorial use of the confession, and that six Justices (all but Kennedy, Stevens and Ginsburg) agree that interrogation methods (over and above Miranda violations) which produce a coerced confession can never constitute a Fifth Amendment violation in the absence of use of the confession in a criminal prosecution);

(2) Should this case be remanded to the Ninth Circuit of the U.S. Court of Appeals for a determination of whether the coercive tactics of Officer Chavez "shock the conscience" and therefore violated the suspect's Fourteenth Amendment right to substantive due process? (**ANSWER:** Yes; it appears that two Justices (Stevens and Ginsburg) believe that the coercive questioning here violated clearly established due process protections, and that three other Justices (Kennedy, Souter and Breyer) agree that the case should be remanded to the Ninth Circuit for a determination of whether the questioning as a whole violated substantive due process protections, and, if so, whether the legal standards in this area were "clearly established" when the conduct occurred).

**Result:** Reversal of Ninth Circuit decision that denied qualified immunity to Officer Chavez on plaintiff's claim of a Fifth Amendment violation; remand to Ninth Circuit to determine whether the officer is entitled to qualified immunity in relation to a possible violation of the Fourteenth Amendment substantive due process rights of Oliverio Martinez.

**Status:** The U. S. Supreme Court decision was entered on May 27, 2003. On July 30, 2003, a three-judge panel of the Ninth Circuit issued an order holding that Officer Chavez is not entitled to qualified immunity because, if the facts alleged by Martinez are true, then the actions of Officer Chavez "shock the conscience" and therefore constitute a violation of the substantive due process rights of Martinez under the Fourteenth Amendment. Accordingly, the Ninth Circuit's July 30, 2003 order remands the case to the District Court for hearings. **LED Editorial Note/Prediction:** **There is a good chance that this case will go back to the United States Supreme Court before it goes to trial in District Court.**

## ANALYSIS:

The nine-member Court is badly splintered on the two main issues before it. Six separate opinions are issued, with several Justices joining in only parts of the opinions of others. As noted above in the “Issues and Rulings” section in this LED entry, a majority of the justices agree that constitutional principles for protecting substantive due process, not the Fifth Amendment privilege against self-incrimination, are the proper focus of this particular civil rights lawsuit. Accordingly, the Court sends the case back to the Ninth Circuit, which, according to a majority of the Court, did not address and must address whether the officer’s conduct violated the substantive due process rights of Martinez. In the remainder of this LED entry, we will separately address the six opinions issued in this case.

### Thomas opinion

In addressing the first issue (whether the Fifth Amendment was violated for purposes of a civil rights lawsuit), the lead opinion by Justice Thomas focuses primarily on the words of the Amendment’s self-incrimination clause, which prohibits only compelling a person to be a “witness” against himself in a “criminal case.” Thomas asserts that the Miranda rule is a “prophylactic” rule that is outside the “core” protection of the self-incrimination privilege. Thomas asserts that violation of such a prophylactic rule does not expand the scope of the constitutional right that the constitutional provision is designed to protect. Therefore, violation of the rule does not by itself constitute a constitutional violation that can support a civil rights lawsuit.

Thomas cautions, however, that this does not mean “that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used in a criminal trial.” Rather, “it simply means that the Fourteenth Amendment’s Due Process Clause, rather than the Fifth Amendment’s Self-incrimination Clause, would govern inquiry in those cases and provide [civil damages] relief in appropriate circumstances.” The above-described portion of the Thomas opinion is joined by Chief Justice Rehnquist and Justices Scalia and O’Connor.

In a part of the Thomas opinion that O’Connor does not join (but the other two justices do join), Thomas goes on to conclude that the interrogation of Martinez in this case was not so egregious or shocking that the conduct violated the due process clause for purposes of a § 1983 action. On the due process question, Thomas notes that the test is whether police conduct “shocks the conscience.” Officers must be shown under this test to have engaged in “conduct intended to injure in some way [that is] unjustifiable by any government interest.” Thomas explains as follows in this regard:

We are satisfied that Chavez’s questioning did not violate Martinez’s due process rights. Even assuming, arguendo, that the persistent questioning of Martinez somehow deprived him of a liberty interest, we cannot agree with Martinez’s characterization of Chavez’s behavior as “egregious” or “conscience shocking.” As we noted in [a prior decision], the official conduct “most likely to rise to the conscience-shocking level,” is the “conduct intended to injure in some way unjustifiable by any government interest.” Here, there is no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment. Medical personnel were able to treat Martinez throughout the interview, and Chavez ceased his questioning to allow tests and other procedures to be performed. Nor is there evidence that Chavez’s conduct exacerbated Martinez’s injuries or prolonged his stay in the hospital. Moreover, the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.

Souter opinion

Justice Souter is joined by Justice Breyer in an opinion that that agrees with Thomas that the Miranda rule is not within the “core” protection of the Fifth Amendment. Souter takes a slightly different approach to this issue, not relying on text of the Fifth Amendment as much as he relies on the lack of practical need for a civil rights remedy for interrogation practices that are unlawful but are not egregious violations that would justify a substantive due process claim under the Fourteenth Amendment.

Putting Justice Souter’s Fifth Amendment analysis (see below) together with that of Justice Thomas yields an effective overruling of the Ninth Circuit’s Fifth-Amendment-based decisions in California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9<sup>th</sup> Cir. 1999) **Jan 00 LED:03** and Cooper v. Dupnik, 963 F.2d 1220 (9<sup>th</sup> Cir. 1992) **Nov 92 LED:02**. Unlike Thomas, however, Souter is of the opinion that Martinez has a strong argument that his Fourteenth Amendment, substantive due process rights were violated by the relentless hospital-room questioning that went beyond mere Miranda violations. Souter adds a footnote reserving for a future case the question of whether some Miranda violations, in and of themselves, may be so egregious that they would support a Fourteenth Amendment substantive due process claim.

In a one-sentence paragraph (the only sentence among all six of the opinions that garners a support from a majority of the justices), Souter is joined by Justices Breyer, Stevens, Kennedy, and Ginsburg in the view that:

Whether [plaintiff] Martinez may pursue a claim of liability for a substantive due process violation is thus an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him.

Kennedy opinion

Justice Kennedy is joined by Stevens and Ginsburg in arguing the minority (i.e., rejected) view that a violation of the Fifth Amendment self-incrimination clause is complete at the time that police use severely coercive tactics, like those used by Officer Chavez in the hospital room, to extract statements from a suspect.

Only Stevens (not Ginsburg) joins Kennedy in the limiting view that a mere Miranda violation would never be deemed serious enough to justify a Fifth Amendment-based civil action. As noted above, Thomas, Scalia, Rehnquist and O’Connor share this view.

Stevens opinion

In an opinion not joined by any of the others, Justice Stevens, after describing the hospital-room questioning, concludes that the actions of Officer Chavez were a clear violation of the suspect’s substantive due process rights under the Fourteenth Amendment.

Ginsburg opinion

In an opinion not joined by any of the others, Justice Ginsburg states her view under the substantive due process theory that the conduct of Officer Chavez was “a clear instance of the kind of compulsion no reasonable officer would have thought constitutionally permissible.”

Scalia opinion

Justice Scalia states that he agrees with the opinion by Justice Thomas that Martinez does not have a valid due process claim, and therefore, Justice Scalia argues in vain, the Court should not have remanded the case to the Ninth Circuit for further review on that issue.

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## **BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS**

**CIVIL RIGHTS ACTION FOR UNLAWFUL ARREST – 2-1 MAJORITY HOLDS THAT WASHINGTON OFFICERS SHOULD HAVE KNOWN THAT CITIZEN CAN SECRETLY TAPE RECORD TERRY STOP CONVERSATION; ALSO, UNDER THE FACTS, JUSTIFICATION FOR ARREST IS LIMITED TO THAT ACTUALLY RELIED ON BY OFFICERS AT THE TIME OF ARREST** – In Alford v. Haner, 333 F.3d 972 (9<sup>th</sup> Cir. 2003), the Ninth Circuit, by a 2-1 vote, overturns a jury verdict that held two Washington law enforcement officers not liable for making an arrest of a suspect who secretly tape-recorded the conversation that occurred during a Terry stop.

In salient part, the Alford majority's description of the facts and lower court proceedings is as follows:

While driving to his night job, Alford noticed a disabled car on the shoulder of a highway. The area was dark and deserted and he pulled over to offer assistance. After helping the motorists jack up their car and giving them a flashlight to use, he began walking back to his car.

[Officer A], driving in the opposite direction, had observed the disabled vehicle and Alford's car pulling in behind it. [Officer A] turned around at the first opportunity.

When [Officer A] arrived, he saw Alford walking back toward his own car. Alford told [Officer A] that the people in the car had a flat tire and that he had given them a needed flashlight. Alford then drove off and [Officer A] went to check on the occupants of the stranded vehicle.

The motorists told [Officer A] that they believed Alford was a police officer, in part because his car had "wig-wag" headlights (headlights that flash alternately). Because [Officer A] was concerned that Alford was pretending to be a police officer, he called his supervisor, [Sergeant B], and drove off in pursuit of Alford. After pulling Alford over, [Officer A] noticed that Alford's license plate was nearly unreadable because of a tinted license plate cover. [Officer A] also saw that Alford had an amateur radio broadcasting the communications of the Kitsap County's Sheriff's Office, a microphone attached to the radio, a portable police scanner, and handcuffs.

[Officer A] asked Alford about the wig-wag headlights and Alford responded that they were part of an alarm system that had been installed that day. [Officer A] then ordered Alford to demonstrate the wig-wag lights, Alford pressed several buttons, but was unable to activate the lights. [Officer A] noticed that Alford had not pushed a button near Alford's right knee, but did not ask Alford to do so. Later, another officer pushed the button and activated the wig-wag lights.

When [Sergeant B] arrived he also asked Alford about the wig-wag lights. While talking with Alford, [Sergeant B] noticed a tape recorder on the passenger seat recording the traffic stop. [Sergeant B] told [Officer A] to remove Alford from the car, and informed Alford that he was under arrest for making an illegal tape recording.

Alford told the officers that he had previously had a similar problem with the Kitsap County Sheriff and that he had a copy of a Washington Court of Appeals opinion in his glove compartment which held that the state Privacy Act does not

apply to police officers performing official duties. The officers did not look at the case. [Sergeant B] later testified that at the time of the arrest, his belief that he had probable cause to arrest Alford was based solely on his view that Alford had violated the Privacy Act.

When Alford was on his way to jail, [Sergeant B] called [a] Deputy Prosecuting Attorney. [Sergeant B] related what had occurred but did not tell [the deputy prosecutor] about the case Alford had cited. [The deputy prosecutor] advised [Sergeant B] that there was "clearly probable cause" for arrest, but at trial [the deputy prosecutor] testified that this determination was based primarily on conduct other than the tape recording. Officer [Officer A] also later admitted that the case Alford cited had previously been mentioned in a law enforcement digest that [Officer A] generally read.

Alford was jailed for the night on the charge of making an illegal audio recording of a private conversation without knowledge or consent. His car was towed and impounded. A state court judge later dismissed the charge.

Alford filed a complaint in federal district court against both the officers and the [employing law enforcement agency]. The [agency] was later dismissed. Alford presented two claims to the jury, a claim and a state law claim for unlawful arrest and imprisonment. The jury found for the defendants. The district court denied Alford's motion for a new trial.

The Alford majority holds:

- 1) Under chapter 9.73 RCW, Washington's electronic surveillance statute, it is not a crime for a citizen to tape record a conversation with police on the street. In State v. Flora, 68 Wn. App. 802 (Div. I, 1992) **July 93 LED:17**, the Washington Court of Appeals held that the conversation is not a "private" conversation, and therefore the requirement under chapter 9.73 for two-party consent to tape record (whether or not done secretly) the conversation. Therefore the arrest of Alford was an arrest without probable cause in violation of the Fourth Amendment.
- 2) The Flora Court's interpretation of chapter 9.73 RCW was "clearly established" when the officers arrested Alford.
- 3) The officers' failure to be aware of the Flora Court's interpretation of chapter 9.73 RCW was not reasonable.
- 4) The officers could not justify the arrest based on probable cause as to other possible crimes not considered at the time of arrest – impersonating a police officer and obstruction of justice – because those crimes are not "closely related" to the crime for which the officers actually based the arrest, violation of chapter 9.73 RCW. The conduct required for impersonation or obstructing is not similar to the conduct for which the officers actually arrested Alford, the Court holds. The Court notes that there is a split of authority among Federal circuit courts on whether an arrest can be constitutionally justified based on probable cause as to any crime, regardless of whether the officer actually based the arrest on that crime and regardless of whether the crime is "closely related" to the crime on which the officer did base the arrest. Some other Federal circuit courts would have upheld the arrest in this case based on the mere fact that the officers had probable cause as to other crimes, even though the officers did not base the arrest on those crimes and even though the crimes were "not related" to the crime on which the officers did base the arrest.

Result: Reversal of U.S. District Court verdict for the officers; case remanded to the District Court, presumably for a determination of damages against the officers.

Status: Counsel for the law enforcement officers and their agency has requested review of the 3-judge decision by an 11-judge panel of the Ninth Circuit; no decision has yet been made on the request.

**LED EDITORIAL COMMENTS:**

1) **SECRET TAPING ON THE STREET – CAN OFFICERS LEGALLY DO IT?** Despite the rulings in Alford v. Haner and State v. Flora, we continue to extra-conservatively warn that officers should not simply conclude that all street conversations are non-private, and hence turn the tables by secretly (i.e., without express announcement of audio taping) recording conversations with citizen contact and detainees on the street. Agency legal counsel should be consulted on this question and on questions relating to applying the audio/video, patrol car taping authorization added to RCW 9.73.090(1) in chapter 195, Laws of 2000.

2) **“STACKING CHARGES” – SHOULD OFFICERS DO IT?** The following comment addresses what our LED decision summary above labels as holding # 4. Officers are generally encouraged NOT to "stack charges" by telling arrestees that the arrestees are being arrested for every crime that the officers can possibly imagine under the circumstances. "Stacking charges," among its other faults, has its own potential for civil liability, as it can inflame the passions of the arrestee, and it can give the appearance of vindictiveness and arbitrariness by the officers, particularly where the "other crime(s)" are only thinly supported, if at all, by the facts. Furthermore, under Washington case law, such charge-stacking does not appear to be necessary; there is a Washington Court of Appeals decision directly on point contrary to the Ninth Circuit's "closely related offenses" doctrine. See State v. Huff, 64 Wn. App. 641 (Div. II, 1992), holding that the existence of probable cause, not the officer's announcement of the "other" crime or even the officer's awareness that the facts add up to probable cause to arrest for some crime other than the one the officer thinks is supported, is all that is needed to justify the arrest. Moreover, there is a split of authority in the federal circuit courts on this question, some following the Huff Court's approach and others following the Ninth Circuit's approach.

Nonetheless, we think the affirmation in Alford v. Haner of the Ninth Circuit's "closely related offenses" doctrine makes it advisable for Washington officers arresting a person on a particular crime to include in their reports (which, of course, should thoroughly recount all relevant facts), a designation of the other crimes, if any, for which the officers reasonably feel there was solid probable cause to arrest at the time of the arrest.

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

(1) **BURGLARY -- STATE NEED NOT SHOW THAT A FENCED AREA WAS USED FOR LODGING OF PERSONS, CARRYING ON BUSINESS, OR PROTECTING GOODS** -- In State v. Wentz, 149 Wn.2d 342 (2003), the Washington Supreme Court holds that, when the State charges a person with burglary for unlawfully entering or remaining in a fenced area with the intent to commit a crime, the State need not prove that the fenced area was used for lodging of persons, for carrying on business in the fenced area, or for the use, sale or deposit of goods. In its decision, the Supreme Court overrules the Court of Appeals' decisions in State v. Flieger, 45 Wn. App. 667 (1986); State v. Brenner, 53 Wn. App. 367 (1989); and State v. Gans, 76 Wn. App. 445 (1994) **Aug 95 LED:17**.

The Wentz Court describes the factual and procedural background in the case as follows:

On the evening of May 29, 1999, police responded to a residential alarm at Patrick Wheeler's home in Spokane. One of the responding officers, Deputy James Melton, found Wentz hiding in the backyard. The officer testified that Wentz said he took a pickup truck from his brother's home in The Dalles, Oregon, without permission that morning. He said he drove the truck to a friend's house and broke in, taking a handgun and some ammunition. Thus prepared, he drove to Spokane, where he intended to confront his ex-wife and sometime girl friend, Janet McFadden, and her new boyfriend, Wheeler.

Wentz told police that upon arriving in Spokane, he proceeded to Wheeler's house, noting McFadden's car in the driveway. He also confirmed that she was there by calling and hanging up when she answered. Parking the truck in a lot a few blocks away, he then walked by and around the house several times. He waited for nightfall before trying to enter Wheeler's home.

Meanwhile, unbeknownst to Wentz, his brother telephoned McFadden in Spokane. Thereafter, she immediately fled, driving back to The Dalles. Wheeler was working a 24-hour shift. Consequently, the house was empty when Wentz arrived.

Officer Melton testified that Wentz told him he climbed the fence into the backyard and found an unlocked sliding door. When he slid it partway open, an alarm sounded. Instead of going into the house, he hid in the boat that was parked on a trailer in the backyard. He decided to wait under the boat's cover until McFadden and Wheeler returned.

A six-foot solid wood fence surrounds the backyard. The fence has two gates, both of which were padlocked. Both Wentz and the police officer who apprehended him had to climb the fence to enter the backyard. Wheeler kept his boat inside the fence next to his house.

Wentz was arrested and charged with two counts of attempted second-degree murder, one count of possession of a stolen firearm, one count of possession of stolen property other than a firearm, and one count of first-degree burglary. At the close of the trial, the judge found Wentz guilty beyond a reasonable doubt on all counts. The Court of Appeals, Division Three, affirmed the convictions. **[See LED entry regarding Court of Appeals' decision at April 02 LED:16]**

Majority opinion:

The majority opinion is authored by Justice Ireland who is joined by five other justices. The majority opinion focuses on statutory language and the rule of statutory interpretation known as the "last antecedent" rule. The burglary-in-the-first-degree statute, RCW 9A.52.020, sets out the elements of the crime as follows:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person. (Emphasis added).

The focus of the Wentz case is the scope of the meaning of “fenced area” within the definition of “building.” The definition of “building” is set forth at RCW 9A.04.110(5):

"Building", in addition to its ordinary meaning, includes any dwelling, **fenced area**, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building...(Emphasis added)

The Court of Appeals' decisions in Flieger (1986), Brenner (1989), and Gans (1994) previously interpreted the above-underlined phrase in the definition of “building” as modifying the terms “dwelling, fenced area, vehicle, railway car, and cargo container,” as well as the term, “structure.” The Wentz Court holds, however, after extensive analysis, that those courts erred, and that the underlined phrase modifies only “structure.” Therefore, an area that is fenced is a “building” for purposes of the burglary statute even if the fenced area is not used for lodging, carrying on business, or for the use, sale or deposit of goods.

The Wentz Court concludes in the following analysis of the facts that the defendant's conduct did occur within a “building” for purposes of the burglary-in-the-first-degree statute:

The evidence is sufficient to sustain Wentz's conviction. The trial court found that Wheeler's backyard was surrounded by a six-foot, solid wood fence with padlocked gates. It was secured such that both Wentz and the officer who apprehended him had to climb over the fence to enter the backyard and to gain access to the sliding door. Wentz was discovered in the boat stored within the locked fence. Under these facts, a rational fact finder could have found beyond a reasonable doubt that Wentz entered a fenced area, and therefore a "building."

Concurring opinion: Justice Madsen writes a concurring opinion joined by Justices Johnson and Sanders. The concurrence argues that the majority has improperly failed to put the definition of “building” in its proper context in the burglary statutes, and that the majority Justices have failed to consider the limited purposes of the burglary statutes -- providing security for persons and property. To illustrate her assertion that the majority has construed “fenced area” too broadly, Justice Madsen provides the following hypothetical example to illustrate her claim that the majority's broad interpretation leads to absurd results:

Imagine for example, an 18-inch high decorative picket fence around a garden area at the front of a home. If a passerby steps across with the intent to pick a flower, he or she has committed burglary in the second degree, a class B felony. Such a result was never intended by the legislature when it amended the definition of "building."

Result: Affirmance of Court of Appeals decision that affirmed the Spokane County Superior Court convictions of Gerald Lee Wentz for first degree burglary and attempted murder.

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

1) **What qualifies as a “fence” for purposes of determining whether an area is “fenced?”** The Wentz majority opinion does not squarely address the outer limits of what constitutes a “fenced area.” We think that most prosecutors would agree that the fence must be an integral part of a closed compound, although it is difficult to say exactly how that abstract general standard applies to the many variations of fact patterns that exist in the real world. In making charging decisions, prosecutors are ultimately left

to try to answer such additional questions, to name a few, as: whether a fence must be of a certain level of solidarity, whether the fence must be of a certain minimum height, and whether the gate must have been locked or shut at the time of the violator's entry. As always, law enforcement agencies will need to work with their local prosecutors who will have to make the best guesses as to legislative intent and future judicial construction on these difficult questions.

2) Does this decision affect interpretations of "building" and "fenced area" for purposes of determining the degree of "criminal trespass" committed? We do not know whether any prosecutors will attempt to apply the Wentz holding regarding the definition of "building" and "fenced area" to "criminal trespass" prosecutions. Fifteen years ago, in State v. Brown, 50 Wn. App. 873 (1988), the Court of Appeals held that, for purposes of the "criminal trespass in the first degree" statute, "building" does not include a fenced area around a business or residence, even if, for instance, there are goods for sale inside the fenced enclosure. If Brown remains good law after Wentz, then obviously the broader definition of "building" in RCW 9A.04.110(5), as construed in Wentz, does not apply to the trespass statute.

It seems to defy logic and statutory interpretation principles for "building" to mean something different for purposes of the burglary statutes than it does for purposes of the trespass statutes. The Brown holding, however, was based on the Brown Court's reading of relatively compelling legislative history indicating that, despite what appears to be fairly clear statutory language to the contrary, "fenced area" has a very narrow meaning under the criminal trespass statutes. The criminal trespass statutes have not since been amended to legislatively overrule Brown. Again, law enforcement agencies will have to work with their local prosecutors who will have to make their best guesses as to legislative intent.

**(2) SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE NOT VIOLATED WHERE MARIJUANA-GROWING PROSECUTION WAS DELAYED AFTER DEFENDANT WAS ARRAIGNED ON DV ASSAULT CHARGE, DESPITE FACT THAT POLICE LEARNED ABOUT THE TWO CRIMES DURING THE SAME DV POLICE RESPONSE** – In State v. Kindsvogel, 149 Wn.2d 477 (2003), the Washington Supreme Court unanimously holds under the speedy trial rule that acts underlying defendant's charges of fourth degree assault and possession of marijuana did not constitute a "single criminal episode" for purposes of the speedy trial rule, and therefore the two charges were not required to be prosecuted under the same speedy trial limits.

The Supreme Court decision reverses an earlier decision, State v. Kindsvogel, 110 Wn. App. 750 (Div. III, 2002) **Sept 02 LED:21**, by the Court of Appeals. The Court of Appeals had ruled that, where a domestic violence assault victim revealed to the responding police officers the DV violator's basement marijuana grow operation, the speedy trial/speedy arraignment period for charges relating to marijuana manufacture began when the defendant was arraigned on the separate and unrelated gross misdemeanor DV assault charge. The Court of Appeals had reasoned that, because, under Washington's speedy trial/speedy arraignment rule of CrR 3.3, if multiple charges arise from the "same criminal episode," then generally the time-for-trial begins to run for all criminal charges at the time when defendant is first arraigned on any of the criminal charges. The Supreme Court holds that there was not a close logical connection of the events such as to make them part of the "same criminal episode," explaining in part:

Fourth degree assault and possession of marijuana do not involve the same physical acts or actions. The actions underlying the two charges had different purposes and did not involve the same victim or victims. The alleged assault, which gave rise to Kindsvogel's conviction for disorderly conduct, involved actions

directed at Ms. Kindsvogel for the purpose of harming her or putting her in apprehension of harm. The possession charge involved the custody or control of 26 marijuana plants for its own sake--no victim was involved.

The ABA Standards for Criminal Justice std. 13-1.2 commentary limits the acts that constitute a "single criminal episode" to offenses which occur in close proximity of time and place, where proof of one offense necessarily involves proof of the other. To prove unlawful possession of a controlled substance the State must prove the nature of the substance and the fact of the defendant's possession. To prove fourth degree assault the State must prove, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, the defendant assaulted another. RCW 9A.36.041(1). Three definitions of criminal assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury on another person; (2) an unlawful touching of another with criminal intent; and (3) putting another in apprehension of harm, with or without the intent or capacity to inflict the harm. Because there are no overlapping elements in the crimes for which Kindsvogel was charged, the acts underlying the assault and possession charges do not constitute a single criminal episode.

Result: Reversal of Court of Appeals decision and reinstatement of Spokane County Superior Court conviction of Kirk R. Kindsvogel for manufacturing marijuana.

**LED EDITORIAL NOTE:** The speedy trial rules were recently amended in an attempt to clarify the rules, reduce the number of cases dismissed as a result of technical violations, and to reduce the need for appellate court interpretation of the rules. The amendments will go into effect on September 1, 2003. Two of the amendments would have been relevant to the Kindsvogel case, although the result would have been the same, i.e., no speedy trial violation. The amended rules will define "related charge" as "a charge based on the same conduct as the pending charge that is ultimately filed in the [same] court." CrR 3.3(a)(3)(ii); CrRLJ 3.3(3)(a)(ii). The rules will further provide that "[t]he computation of the allowable time for trial of a pending charge shall apply equally to all related charges." CrR 3.3(a)(5); CrRLJ 3.3(a)(5) (emphasis added). In Kindsvogel, the assault charge was filed in district court, and the possession charge was filed in superior court. Thus, the charges would not have been "related" because they were not based on the same conduct, and because they were not filed in the same court.

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

**DIVISION THREE HOLDS: 1) TRAFFIC STOP WAS NOT PER SE SEIZURE OF PASSENGERS; 2) ORDER TO PASSENGER TO GET OUT OF CAR WAS JUSTIFIED BY OFFICER-SAFETY CONCERNS UNDER MENDEZ; 3) SUBSEQUENT QUESTIONING OF PASSENGER WAS NOT CUSTODIAL EQUIVALENT OF ARREST, AND THEREFORE NO MIRANDA WARNINGS WERE REQUIRED**

State v. Rehn, 117 Wn. App. 142 (Div. III, 2003)

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

[Deputy A] stopped a vehicle with a loud exhaust driven by Adam Rutherford. Chris Jones sat in the front passenger seat. Mr. Rehn sat in one of the rear seats. Because Mr. Rutherford was driving while his license was suspended, he was arrested. Mr. Jones and Mr. Rehn remained in the car during Mr. Rutherford's search incident to his arrest and placement into the patrol car. During Mr. Rutherford's search, the deputy found a live .22 cartridge.

Concerned about a weapon in the car accessible by the occupants, the deputy decided to search the vehicle for weapons. After asking Mr. Rehn and Mr. Jones to exit the vehicle, [Deputy A] inquired if they had any weapons or if there was a weapon in the vehicle. Both men answered no.

[Deputy A] testified, "I asked if there was anything else in the vehicle that that shouldn't - they shouldn't have." Mr. Rehn responded that there were "mushrooms" under the dash of the car. The deputy associated the term "mushrooms" with psilocyn or psilocybe hallucinogenics and immediately placed Mr. Rehn under arrest.

[Deputy A] then searched the vehicle incident to the arrest of both Mr. Rutherford and Mr. Rehn. The deputy looked under the dash with his flashlight but was reluctant to reach under the dash with his hands due to the possibility of touching needles or other sharp objects. He did not find the mushrooms.

[Deputy B] arrived. The deputies decided to advise Mr. Rehn of his constitutional rights. [Deputy A] testified Mr. Rehn retrieved the mushrooms after he was read his rights, and had waived them. [Deputy A] partly testified:

There's - there was a conversation, and I don't recall if he voluntarily said that he would go up and get - or made the - made the offer. And, I asked him to go ahead and go up and get them.

But it was a - it was - it was a request that he go up and get them. It wasn't an order. I didn't order him to go up there and retrieve the mushrooms.

[Deputy B] testified, "And I think prior to reading the - the rights, he said something to the effect, that let me show you where they're at because [Deputy A] didn't find them." According to [Deputy B], Mr. Rehn's statement was not in response to any question. Mr. Jones and Mr. Rehn testified they were not read their rights until after the mushrooms were retrieved; the trial court decided otherwise. The trial court determined Mr. Rehn retrieved the mushrooms from the vehicle, although contradicted by the defense. According to Mr. Rehn, Mr. Rutherford had merely told him about the mushroom location.

Based upon the State's evidence, the trial court decided Mr. Rehn had admitted after having been advised of his rights that he had purchased the mushrooms and had consumed some. [Deputy B] testified Mr. Rehn admitted consuming mushrooms with Mr. Rutherford. Mr. Rehn testified he had purchased the mushrooms and had given them to Mr. Rutherford, who hid them under the dash of the car.

The trial court found Mr. Rehn guilty and entered written findings of disputed and undisputed facts, and conclusions of law. The trial court imposed a standard range sentence.

ISSUES AND RULINGS: 1) Was the stopping of the car for a traffic violation automatically a "seizure" of passengers in the car? (ANSWER: No); 2) Was the deputy justified by officer-safety concerns under State v. Mendez when he directed passenger Rehn to step out of the car? (ANSWER: Yes); 3) When the deputy questioned Rehn, was Rehn in "custody" that was the equivalent of formal arrest such that the deputy was required to first give prior Miranda warnings? (ANSWER: No, rules a 2-1 majority).

Result: Affirmance of Lincoln County Superior Court conviction of Jack E. R. Rehn for possession of psilocybin mushrooms.

ANALYSIS:

1) Traffic stop not seizure of passenger

The Court of Appeals begins its analysis of the traffic-stop-as-seizure-of-passenger issue by noting that the Washington Supreme Court said in the Mendez case that traffic stop is not automatically a “seizure” of passengers:

[The Washington] Supreme Court has reasoned also: "Stopping the car in which [the defendant] was a passenger did not effect a seizure of [the defendant] or the other passengers." State v. Mendez, 137 Wn.2d 208 (1999) **March 00 LED:04**.

The Rehn Court then discusses in some detail the conflicting signals on this issue in other decisions of the Washington Supreme Court and in decisions from other divisions of the Washington Court of Appeals. The Rehn Court decides, however, to follow the above-quoted guidance from Mendez, as well as Division Three’s own past decisions, explaining as follows that a passenger is not deemed “seized” per se whenever a driver is stopped for a traffic violation:

[T]he Mendez court stated "the trial court's conclusion [the passenger] was seized by the traffic stop is clearly wrong." "Passengers are not automatically seized by the stop. They may get out of the car and walk away." City of Spokane v. Hays, 99 Wn. App. 653 (2000) **May 00 LED:16** (citing State v. Mendez). Accordingly, we reason the initial stop of the Rutherford vehicle alone did not constitute a seizure of Mr. Rehn. Rather, the police contact with Mr. Rehn constituted an incidental citizen encounter.

2) Articulable officer-safety concerns justified ordering passenger out of car

The Court of Appeals explains that the officer was justified in light of officer-safety concerns in asking the passengers to get out of the car. In salient part, the Court’s reasoning is as follows:

Encounters not amounting to seizures between police officers and citizens routinely occur in and out of traffic stop contexts, no matter whether the officer has suspicions of possible criminal activity meriting investigation. In encounter contacts, a police officer may question a citizen and ask for identification without a seizure under Terry v. Ohio. But, "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."

Here, the traffic stop led to Mr. Rutherford's custodial arrest and search. Officer safety concerns arose regarding the possible existence of armed passengers, or a firearm hidden in the interior of the car. Up to this point, Mr. Rehn remained in the car as a passenger and was free to leave. Then, Mr. Rehn was properly asked to step out of the car to facilitate the search of the passenger compartment incident to Mr. Rutherford's arrest. This request was not an unconstitutional seizure of Mr. Rehn, but a step taken to facilitate the vehicle search incident to Mr. Rutherford's arrest, and more akin to controlling the arrest scene.

Again, whether a person has been seized "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." Although under Mendez and Hays Mr. Rehn was initially free to go or end the encounter, when the officer asked him to exit the vehicle and began questioning him, the officer restricted his freedom to leave and intruded to some extent into his private affairs. At least, Mr. Rehn would not feel free to refuse the deputy's request to step out of the car.

"The initial seizure of a car and its occupants does not justify further intrusion by police officers on the rights of the passengers beyond those steps necessary to the officer controlling the scene, or steps justified by exigent circumstances such as officer safety." "To extend their authority beyond the initial seizure of the car and driver and to exert control over the passengers, police officers must have an independent, articulable, and lawful basis for

their actions." "Where no circumstances exist justifying continued detention of vehicle passengers, they enjoy undiminished privacy rights."

In sum, the facts illustrate the deputy's need to control the arrest scene. He had an arrested driver, and an articulable concern about the presence of armed passengers, or firearms within reach of those passengers. The deputy had a legitimate purpose in exerting some control over the passengers while he resolved his officer safety concerns. The detention of Mr. Rehn in connection with the potential firearm issue did not offend either article I, section 7 or the Fourth Amendment.

[Some citations omitted]

### 3) Miranda "custody" issue

On the Miranda "custody" issue, the Rehn majority explains as follows its holding that defendant was not in "custody" for Miranda purposes when the officer questioned him:

Regarding Mr. Rehn's Miranda rights: "Whether an officer should give Miranda warnings to a defendant depends on whether the examination or questioning constituted (1) custodial (2) interrogation (3) by a state agent." "A defendant is in custody for purposes of Miranda when his or her freedom of action is curtailed to a 'degree associated with a formal arrest.'"

A driver stopped for a speeding violation and suspected of driving under the influence "was not free to leave" as officers conducted field sobriety tests and asked him if he had been drinking, but he was not in custody [for Miranda purposes] because "his freedom was not curtailed to the degree normally associated with formal arrest." City of College Place v. Staudenmaier, 110 Wn. App. 841 (Div. III, 2002) **July 02 LED:19**.

As pointed out in our previous discussion, Mr. Rehn's situation as a passenger differs from the Staudenmaier situation where the focus of the inquiry was the driver. Mr. Rehn's seizure was the by-product of the deputy's arrest of Mr. Rutherford. Our analysis now focuses on whether the seizure of Mr. Rehn escalated into the equivalent of an arrest prior to the incriminating statement.

As noted above, a passenger is generally free to walk away from or stay at the scene of a traffic stop. State v. Mendez. While Mr. Jones and Mr. Rehn gave different accounts regarding why they stayed in the car during Mr. Rutherford's arrest as compared to the deputy's account, it is clear no custodial arrest of Mr. Rehn took place until he volunteered that mushrooms were hidden under the dashboard.

Next, [Deputy A] asked the passengers to exit the car while he prepared to search it incident to Mr. Rutherford's arrest. [Deputy A] did not search the passengers, but asked if they had anything in their pockets. He took their driver's licenses for identification purposes. After the deputy indicated he was going to search the car and inquired specifically about weapons and generally about any other items in the car that he might be concerned about, Mr. Rehn volunteered a statement that led to his immediate custodial arrest.

The situation was not as coercive or threatening as to suggest an arrest of Mr. Rehn. There was no pat down or physical restraint. Mr. Rehn was not placed in the patrol car. And there was no repetitive questioning.

The record indicates the deputy, his suspicions aroused to the possible existence of weapons and drugs, reasonably extended the initial encounter with Mr. Rehn and Mr. Jones so he could ask them both a brief and general question about contraband before he

searched the car for weapons. At the time the question was posed, appellant's detention had not yet risen to the level of a formal arrest or its functional equivalent." A reasonable person would have felt detained, but not to a degree associated with formal arrest. Accordingly no Miranda violation occurred.

[Some citations omitted]

DISSENT:

Judge Schultheis dissents on the Miranda "custody" issue. There appears to be little support in the case law or the facts of this case for his dissenting point of view.

**ARREST BY WASHINGTON OFFICERS ON INVALID OREGON WARRANT HELD UNLAWFUL DESPITE FACT THAT THE WASHINGTON OFFICERS DID ALL THEY COULD TO CONFIRM VALIDITY OF WARRANT**

State v. Nall, \_\_\_ Wn. App. \_\_\_, 72 P.3d 200 (Div. II, 2003)

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

The Multnomah County (Oregon) Sheriff's Office faxed the Clallam County Sheriff information indicating that they had an active arrest warrant for Charles Nall. The Oregon authorities wanted Nall for violating a condition of his community supervision. The faxed message requested that the Clallam County deputies serve the warrant. A Clallam County deputy asked central communications to verify the warrant over the phone and it did.

Based on the Oregon warrant, Clallam County deputies arrested Nall at his residence. During a search incident to the arrest, police discovered drugs and drug paraphernalia.

Nall moved to suppress the drug evidence. At the suppression hearing, the evidence showed that Nall had a felony conviction in Oregon and had violated his probation, prompting the Oregon court to revoke it. Three months later, a "Local Supervisory Authority," not the Oregon court, issued a warrant for Nall based on his alleged community supervision violations. Two months later, Nall appeared in the Oregon court on an unrelated matter. During these proceedings, the court terminated Nall's probation, but because of a clerical mistake, the administrative agency that issued the warrant failed to quash it. The trial court ruled that the Oregon warrant was invalid and did not provide probable cause to arrest Nall.

ISSUES AND RULINGS: 1) Was the arrest a valid probable cause arrest under the "fellow officer" or "police team" rule? (ANSWER: No, rules a 2-1 majority); 2) Does the "good faith" of the Washington officers in arresting under a facially valid Oregon arrest warrant preclude application of the exclusionary rule? (ANSWER: No)

Result: Affirmance of Clallam County Superior Court order suppressing illegal drugs found in a search incident to the arrest of Charles Nall.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Invalidity of arrest under "fellow officer" or "police team" rule

The State relies on RCW 10.88.330(1), which provides, in relevant part:

The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year.

The State argues that the Oregon warrant, even though invalid, provided reasonable

information for the Clallam officers to arrest Nall. In a related argument, the State maintains that RCW 10.88.330(1) provides a "good faith" exception, allowing officers to arrest without a warrant if they have "reasonable information" that the person is charged with a felony in another state.

In deciding whether police officers have probable cause to arrest the defendant, we take into account the collective knowledge of the arresting officers. Thus, the "fellow officer" rule allows the arresting officer to rely on what other officers or police agencies know. State v. Mance, 82 Wn. App. 539 (Div. II, 1996) **Nov 96 LED:14**. For example, a police department "hot sheet" bulletin may justify an arrest if the police agency issuing the bulletin has sufficient information to provide probable cause. Mance. But the arresting officer is also limited by any deficiencies in what the issuing police agency knows. Accordingly, if the issuing agency lacks probable cause because its information is out of date, the arresting officer also lacks probable cause. Mance.

In Mance, the defendant purchased a car from a dealer. Because of a misunderstanding between the dealer and the defendant, the dealer reported the car stolen. The misunderstanding was then cleared up, and the dealer canceled the stolen vehicle report. But the police neglected to cancel the stolen vehicle report and later arrested Mance for possessing a stolen car. During the subsequent search incident to arrest, they discovered crack cocaine.

Employing the "fellow officer" rule, we held that the arresting officers were bound by what the agency issuing the hot sheet knew or should have known about its validity. See Mance. And because the State offered no reasonable explanation for the delay in canceling the stolen vehicle report, the arresting officers lacked probable cause to arrest the defendant. Mance.

Here, there is no question but that the Oregon warrant was invalid. It was issued by a supervising authority for Nall's alleged community supervision violations. More than a month later, Nall appeared in the Oregon court and the judge terminated his probation. The arrest warrant should have been quashed at that time. It was not, and more than five months later, the Clallam officers used the warrant to arrest Nall. As in Mance, the State offered no explanation for the delay in canceling the warrant. Indeed, the State concedes that the warrant should have been cancelled. We hold that under the "fellow officer" rule, the Clallam officers were bound by what the Oregon authorities knew or should have known--that the warrant was invalid. Thus, the Clallam officers lacked probable cause to arrest Nall.

2) "Good faith" does not save evidence

We also reject the State's argument that RCW 10.88.330 creates a good faith exception to the probable cause requirement. Article I, section 7 of the Washington Constitution, unlike the federal constitution, explicitly protects the privacy rights of Washington citizens. Moreover, article I, section 7 affords individuals greater protection than does the Fourth Amendment. As a result, we have yet to recognize a "good faith" exception to the valid warrant requirement. But even if we did adopt the federal good faith standard . . . the Oregon court did not issue the warrant here. Instead, an administrative law enforcement agency, the parole and probation office, issued the arrest warrant. Thus, the administrative agency, not the court, was responsible for quashing the warrant. Accordingly, the State's good faith argument fails.

[Some citations omitted]

DISSENT:

Judge Hunt dissents, arguing that the Washington officers acted reasonably under the circumstances.

## **REASONABLE SUSPICION OF ROCK COCAINE POSSESSION JUSTIFIED TERRY SEIZURE**

State v. Jones, \_\_\_ Wn. App. \_\_\_, 72 P.3d 1110 (Div. I, 2003)

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

Jerry Lee Jones was observed by police crouched in a doorway at night, picking up rocks of what appeared to be crack cocaine from the ground. When Jones noticed the presence of officers, he put some of the rocks into his mouth and quickly walked away. When stopped by the officer, Jones began to vigorously chew and swallow. Jones was placed under arrest and, during the search incident to arrest, a crack pipe with cocaine residue was found in Jones' pocket. The officer retrieved the rocks that remained in the doorway. Both the rocks in the doorway and the residue in the pipe tested positive for cocaine.

Jones was charged with two counts of possession of cocaine. After a jury trial, Jones was convicted of the lesser-included offense of attempted possession of cocaine on the count based on the rocks of cocaine left in the doorway, and one count of possession of cocaine. He timely appeals.

ISSUE AND RULING: Did the officer have reasonable suspicion justifying a seizure of Jones? (ANSWER: Yes, the defendant's presence in an area known for narcotics activity, plus his possession of small white rocks that appeared to be cocaine and defendant's evasive behavior after he saw the officer added up to reasonable suspicion.)

Result: Affirmance of King County Superior Court conviction of Jerry Lee Jones for possession of cocaine; reversal of conviction of attempted possession for cocaine on grounds that the attempt conviction, although technically under a separate statute, was for conduct occurring in the same time and place and therefore violated the "double jeopardy" protections of the federal and state constitutions.

### ANALYSIS:

The Court of Appeals explains as follows its conclusion that the officer had "reasonable suspicion" justifying a Terry stop of defendant Jones:

Jones argues pro se that the trial court should have suppressed the cocaine found on his person because the officers lacked reasonable suspicion to detain him. We disagree, because the officer had sufficient information to believe that a crime had been committed.

When evaluating an investigatory detention, we make two inquiries: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place.

An investigative detention is reasonable if a police officer can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in a criminal activity. The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop.

Here, a combination of factors gave rise to the officer's suspicion that Jones may have been involved in a crime. The officer was patrolling an area of Seattle known for narcotics activity. He observed Jones crouched down on the sidewalk, picking up several small items. As he approached, he could see the items were small and white, and appeared to be crack cocaine. When Jones saw the officer, he quickly got up and started walking away. Jones also placed something in his mouth and began to chew vigorously. Given these circumstances, the officer had sufficient information to believe that a crime had been committed.

[Citations omitted]

**LED EDITORIAL NOTE:** The Jones Court does not engage in analysis of the issue of whether officers had probable cause to arrest defendant Jones and to search his person incident to that arrest, perhaps because Jones did not make a separate argument on appeal to that effect. It would appear, however, that the “reasonable suspicion” evidence, coupled with Jones’ attempt to eat the evidence after he was stopped, meets the standard of probable cause for arrest.

**EVEN IF INITIAL, PRE-MIRANDIZED QUESTIONING VIOLATED MIRANDA, SUBSEQUENT MIRANDIZED INTERROGATION RESULTS WERE ADMISSIBLE**

State v. Reed, 116 Wn. App. 418 (Div. III, 2003)

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

On January 13, 2002, [a deputy sheriff] responded to a call of a suspicious vehicle in the area of 5th and Carnahan in Spokane County. As he and another deputy investigated whether the vehicle was stolen, Ms. Reed drove slowly past the scene. [The deputy], who recognized Ms. Reed from a prior encounter, wrote down the license plate number of the vehicle she was driving, just “to be cautious.” Approximately three to five minutes later Ms. Reed approached the deputies’ location on foot. [The deputy] decided to ask Ms. Reed whether she knew anything about the suspicious car they were investigating. Ms. Reed agreed to talk to the deputies. [The deputy] called dispatch regarding the license plate number of the car Ms. Reed had been driving. The vehicle was reported stolen. Ms. Reed claims [the deputy] asked her where the car she was just driving was located. She pointed to the southwest and told him that it was parked around the corner. At that point the deputy informed Ms. Reed that she was being detained while he investigated the dispatch report. He placed her in his patrol car and drove her to where she said the car was parked. Once the license plate and description was verified, he placed Ms. Reed under arrest at which time she was read her constitutional rights. She agreed to talk with the deputy. She told [the deputy] that a friend told her the car was stolen and asked her to remove it from the driveway, which Ms. Reed agreed to do. Ms. Reed was in the process of abandoning the car when she drove past the deputies on 5th and Carnahan.

Ms. Reed was initially charged with first degree possession of stolen property, but the charge was later amended to second degree possession of stolen property. Prior to trial, a CrR 3.5 hearing was held to determine whether certain statements Ms. Reed made prior to and after being informed of her constitutional rights were admissible at trial. The court determined the statements, if any, made prior to being read her rights should be excluded at trial but the statements made after being read her rights were admissible. At the conclusion of a jury trial, Ms. Reed was convicted of second degree possession of stolen property. She was given a standard range sentence based on an offender score of eight.

**ISSUE AND RULING:** Where the statements given in the pre-Miranda questioning were otherwise voluntary, would any statements given in subsequent Mirandized questioning be admissible even if one assumes for the sake of argument that Miranda was technically violated in the first law enforcement questioning? (ANSWER: Yes)

**Result:** Affirmance of Spokane County Superior Court conviction of Chrystal Rachael Reed for second degree possession of stolen property.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Ms. Reed first claims the trial court erred when it denied her CrR 3.5 motion to suppress statements made to law enforcement officers prior to and after being given Miranda warnings. Because custodial interrogation is considered inherently and presumptively coercive, officers must inform a suspect of his or her Miranda rights prior to such interrogation in order to preserve a suspect's right against compelled self-incrimination. State v. Lavaris, 99 Wn.2d 851 (1983). A confession obtained subsequent to an initial, unconstitutionally obtained confession, is inadmissible as "fruit of the poisonous tree," since the post-Miranda confession is tainted by the illegality of the pre-Miranda confession. However, in Oregon v. Elstad, 470 U.S. 298 (1985), the United States Supreme Court held that a voluntary post-Miranda confession will be admissible if the pre-Miranda confession was voluntary and free from coercion. This is the rule that applies under the facts presented.

Ms. Reed complains that [the deputy] asked her to tell him where the car she had been driving was located, which amounts to a custodial interrogation in violation of Miranda. As a result, she claims the confession regarding her knowledge the car she was driving was stolen should have been suppressed as well. She is incorrect.

Although the trial court did not specifically determine whether Ms. Reed made a pre-Miranda confession, it did imply there was no custodial interrogation prior to her arrest. The court ultimately concluded there was no threat or coercion at the location of the initial contact between Ms. Reed and the deputies or at the location of the parked vehicle she had been driving, which makes any statements made voluntary. The record supports this conclusion, which, pursuant to Elstad, automatically makes the post-Miranda confession admissible.

We agree with Ms. Reed that the court's findings incorrectly state that she did not make any type of statement to the deputies prior to receiving her constitutional warnings. The record reveals Ms. Reed told the officers how to find the allegedly stolen vehicle, although it is disputed whether the so-called statement was verbal or nonverbal. Nevertheless, the court's ultimate conclusion, regarding lack of threat or coercion regarding that statement, is supported by the record.

[Some citations omitted]

**LED EDITORIAL COMMENT: We don't see anything in the appellate court description of the deputy's on-scene investigatory questioning of Ms. Reed to indicate that she was in a form of custody that was the functional equivalent of arrest. In its Elstad-based "taint" analysis, the Reed Court apparently assumes that Ms. Reed was in such custody when she made her on-scene admissions, but the Court apparently does so only for the sake of argument.**

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**BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS**

**IMPOUND OF CAR UNDER CITY ORDINANCE MANDATING IMPOUND OF CARS OF DRIVERS WITH SUSPENDED LICENSES HELD TO VIOLATE RCW 46.55.113; ALSO TOWING AND OTHER FEES, BUT NOT LOSS-OF-USE DAMAGES, RECOVERABLE UNDER STATUTE'S "GOOD FAITH" PROVISION; ATTORNEY FEES HELD NOT RECOVERABLE** – In In re 1992 Honda Accord, \_\_\_ Wn. App. \_\_\_, 71 P.3d 226 (Div. III, 2003), the Court of Appeals holds that the March 2001 impound of a car under a City of Worden ordinance mandating impoundment of cars of suspended drivers was unlawful under

RCW 46.55.120 in light of the Washington Supreme Court decision in All Around Underground v. WSP, 148 Wn.2d 145 (2002) **Feb 03 LED:02**. In the All Around case the Washington Supreme Court held under RCW 46.55.113 (when read in light of constitutional requirements), that officers must make a discretionary decision under the totality of the circumstances whether to impound a car operated by a driver whose license is suspended. Because the City of Worden ordinance at issue in this case made impound mandatory, the impound under the ordinance violated RCW 46.55.113 and the All Around Court's interpretation of the statute.

The Court of Appeals goes on to interpret chapter RCW 46.55.120's "good faith" defense as permitting the car owner to recover his costs of impound, fee, towing fee, storage fee and impound-hearing filing fee but not his loss-of-use damages related to the impound.

Finally, the Court of Appeals rejects the car owner's request under RCW 4.84.250 (a statute encouraging out-of-court settlement of small claims and punishment of those who unjustifiably bring or resist small claims) that the City of Worden pay his attorney fees. His attorney fee request fails because he did not frame his legal action as an action for damages and because he did not give notice to the City of Worden that he was seeking attorney fees in this action.

Result: Reversal of Grant County Superior Court decision affirming District Court decision that had upheld the impound of the car; case remanded to Grant County District Court to award recovery of fees previously paid by Jose L. Becerra for impound, towing, storage and impound hearing.

**LED EDITORIAL NOTE**: The 2003 Washington Legislature amended RCW 46.55.113 and RCW 46.55.120 in response to the ruling in the All Around case. See July 03 LED at pages 6-8.

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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. 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. another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]

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>].

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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]. 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>].