



Law Enforcement

August 2006

Digest

592nd Session, Basic Law Enforcement Academy, Spokane Police Academy
February 21, 2006 through June 27, 2006

Highest Scholarship: Todd J. Dow – Pullman Police Department
Highest Mock Scenes: Mikeal Suniga – Medical Lake Police Department
Outstanding Officer: Todd J. Dow – Pullman Police Department
Pistol Marksmanship: Todd J. Dow – Pullman Police Department

593rd Basic Law Enforcement Academy – February 23, 2006 through June 29, 2006

President: Eric Faust – Seattle Police Department
Best Overall: Steven Smith – Mill Creek Police Department
Best Academic: Kevin Shoblom – King County Sheriff's Office
Best Firearms: Todd Osborn – Western Washington University Police Department
Tac Officer: Deputy Glen Carpenter – Pierce County Sheriff's Office

AUGUST 2006 LED TABLE OF CONTENTS

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT 2

VIOLATION OF THE FOURTH AMENDMENT KNOCK-AND-ANNOUNCE REQUIREMENT DOES NOT REQUIRE SUPPRESSION OF EVIDENCE; BUT BEWARE: WASHINGTON SUPREME COURT LIKELY WOULD REQUIRE SUPPRESSION BASED ON RCW 10.31.040 OR ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION

***Hudson v. Michigan*, 126 S.Ct. 2159 (2006) 2**

DEPUTY PROSECUTOR'S LINE-OF-DUTY QUESTIONING OF DEPUTY SHERIFF'S VERACITY HELD NOT PROTECTED UNDER FIRST AMENDMENT

***Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) 5**

BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS 5

UNCONSTITUTIONALITY RULING ISSUED AS TO CALIFORNIA COUNTY JAIL'S POLICY THAT LED TO STRIP SEARCHING OF WOMAN ARRESTED ON A MISDEMEANOR CHARGE OF BEING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

***Way v. Ventura County*, 445 F.3d 1157 (9th Cir. 2006)..... 5**

WASHINGTON STATE SUPREME COURT 6

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES – 1) DAD TELLING VICTIM-DAUGHTER ABOUT DEFENDANT'S MESSAGE AND 2) DISCOVERY BY NON-READING CHILDREN OF ANOTHER MESSAGE WERE EACH PROHIBITED "COMMUNICATION" CIRCUMSTANCES

***State v. Hosier*, ___ Wn.2d ___, 133 P.3d 936 (2006) 6**

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT 11

DEFENDANT MAY BE CONVICTED OF ATTEMPTED POSSESSION OF CHILD PORNOGRAPHY BASED UPON THE DEFENDANT'S POSSESSION OF MATERIALS THAT APPEAR TO BE CHILD

PORNOGRAPHY EVEN IF THE MATERIALS IN FACT DO NOT DEPICT ACTUAL MINORS
State v. Luther, __Wn.2d __, 134 P.3d 205 (2006) 11

WASHINGTON STATE COURT OF APPEALS 12

“PRETEXT STOP” ISSUE MUST BE ADDRESSED ON REMAND IN CASE WHERE OFFICER TESTIFIED THAT, BEFORE THE OFFICER OBSERVED A DRIVER COMMIT A TRAFFIC VIOLATION, THE OFFICER NOTICED A “DEER IN THE HEADLIGHTS” LOOK ON THE FACE OF THE DRIVER
State v. Meckelson, __ Wn. App. __, 135 P.3d 991 (Div. III, 2006) 12

“MINOR IN POSSESSION” EVIDENCE HELD INSUFFICIENT TO SUPPORT CONVICTION
State v. A.J.P-R., 132 Wn. App. 181 (Div. III, 2006)..... 16

PARTIALLY HANDCUFFED MURDER SUSPECT’S WAIVER OF FIFTH AND SIXTH AMENDMENT RIGHTS PRIOR TO CUSTODIAL QUESTIONING BY FBI AGENTS VALID - - AND CRIMINAL RULE 3.1 NOT VIOLATED - - BECAUSE, ALTHOUGH SUSPECT ASKED AGENTS ABOUT THE PROCESS FOR APPOINTING COUNSEL, HE MADE CLEAR THAT HE WAS WILLING TO BE QUESTIONED WITHOUT A LAWYER; ALSO, JAILHOUSE INFORMANT COULD TESTIFY BECAUSE POLICE DID NOT MAKE HIM THEIR “AGENT” FOR SIXTH AMENDMENT PURPOSES
State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) 18

NEXT MONTH 24

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) VIOLATION OF THE FOURTH AMENDMENT KNOCK-AND-ANNOUNCE REQUIREMENT DOES NOT REQUIRE SUPPRESSION OF EVIDENCE; BUT BEWARE: WASHINGTON SUPREME COURT LIKELY WOULD REQUIRE SUPPRESSION BASED ON RCW 10.31.040 OR ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION – In Hudson v. Michigan, 126 S.Ct. 2159 (2006), the U.S. Supreme Court rules, 5-4, that the Exclusionary Rule does not apply to police officers’ violation of the Fourth Amendment’s knock-and-announce requirement for making forcible entries into fixed premises to arrest or search.

Under the Fourth Amendment and under article 1, section 7 of the Washington constitution (and under RCW 10.31.040), officers must knock and announce their presence and purpose - - and wait a reasonable period of time for a response - - before forcibly entering a fixed private premises. The purposes of the rule are: 1) to reduce the potential for violence to both officers and occupants of fixed premises; 2) to guard against needless destruction of doors, windows, and other such property; and 3) to protect the privacy of the premises.

There are three categorical exceptions to the knock-and-announce requirement. Those exceptions - - justifying no-knock entry - - are where police have individualized (case-specific) reasonable suspicion that knocking and announcing: 1) presents a threat of physical violence (for example, a suspected drug-dealer has is known to keep a loaded shotgun by the door); 2) presents a threat that evidence will be destroyed (for example, suspects are known to have a plan to flush evidence down the toilet if police come to the residence); 3) will be futile or a useless gesture (for example, the occupants already know of the officers’ presence and purpose without need for an announcement).

In the Hudson case, Michigan police officers obtained a warrant to search the residence of a felon, Mr. Hudson, for illegal drugs and for firearms. The officers executing the warrant knocked and announced their presence and purpose, but they waited only three to five seconds without response before opening the unlocked front door, going inside, and arresting Mr. Hudson, who was sitting in a chair. The officers found large quantities of cocaine inside the residence. They

also found considerable cocaine on Mr. Hudson's person, and they found a loaded handgun lodged between the armrest and cushion of the chair in which Mr. Hudson had been sitting when the officers entered.

All members of the U.S. Supreme Court apparently recognized (and reasonably so) that three to five seconds is an insufficient amount of time to wait for a response to a knock and announcement at the door of an apartment, absent exigent circumstances. But a question was raised in the dissenting opinion in the U.S. Supreme Court in Hudson as to why the prosecutor did not try to make a case for no-knock justification based on the evidence that the drug-dealer suspect was reasonably believed to have firearms in the apartment. For reasons that are not disclosed in the U.S. Supreme Court opinions in the case, the prosecutor conceded in proceedings in the Michigan courts that the danger-to-officers exception to application of the knock-and-announce requirement did not apply in the case.

The Michigan trial and appellate courts held that the officers violated Mr. Hudson's Fourth Amendment rights, but that this knock-and-announce violation did not require suppression of the evidence. As noted above, a 5-4 majority of the U.S. Supreme Court agrees with that result.

The Hudson case is about the Fourth Amendment Exclusionary Rule's application in a narrow circumstance, i.e., a knock and announce violation. The case is not about the substance of the knock-and-announce rule, which remains in effect. The lead opinion in Hudson by Justice Scalia states several reasons for not suppressing evidence based solely on a knock-and-announce violation, including his belief and that of three other Justices signing onto his opinion - 1) that a person whose knock-and-announce rights are violated can sue under section 1983 of the Civil Rights Act and obtain an award of damages for a federal civil rights violation and also can obtain an award of attorney fees under section 1988 of the Civil Rights Act even for a low-damages case; and 2) that modern professional law enforcement agencies will require that officers try to comply with the knock-and-announce rule despite the lack of a suppression consequence.

Justice Kennedy is the fifth vote for the majority result of non-exclusion. He concurs in the view in the Justice Scalia opinion that exclusion is not required for a knock-and-announce violation by police, but Justice Kennedy does not join in some of the statements of Justice Scalia that might undercut application of the Exclusionary Rule in some other circumstances.

Justice Breyer authors a strongly worded dissenting opinion for the other four Justices, taking issue with almost every point asserted in Justice Scalia's opinion.

Result: Affirmance of Michigan appellate courts' affirmance of Booker T. Hudson's trial court conviction for illegal drug possession.

LED EDITORIAL COMMENTS AND NOTES:

1. It remains to be seen whether exclusion of evidence will be required in the Washington courts for a knock and announce violation. The Washington Supreme Court has been very willing in decisions since 1980, based on article 1, section 7 of the Washington Constitution, to reject U.S. Supreme Court Fourth Amendment substantive and exclusionary standards, and to impose higher standards on Washington law enforcement. The Washington Supreme Court has not addressed whether article 1, section 7 of the Washington Constitution provides broader knock-and-announce protection or exclusionary consequences than the Fourth Amendment. But it also must be noted that RCW 10.31.040 contains a knock-and-announce rule that has been held by the Washington Supreme Court to require exclusion for its violation. We expect that now Washington prosecutors will be drawn into cases asking whether exclusion is required, notwithstanding Hudson's Fourth Amendment ruling, under article 1, section 7 or under

RCW 10.31.040. We guess that the Washington Supreme Court will ultimately hold that either article 1, section 7 or RCW 10.31.040, or both, require exclusion of evidence for a knock-and-announce violation.

Regardless of what develops in the Exclusionary Rule area of law in Washington, state and local officers in Washington should, of course, try to comply with substantive requirements for knocking and announcing.

2. Past Washington decisions digested in the LED have addressed the knock-and-announce rule. We have set forth below brief summaries of the rulings in some past Washington decisions (NOTE: the LED entries for these post-1991 decisions are accessible on the CJTC LED internet page):

Ruling: Where officers waited 15 to 20 seconds after knocking and announcing, and where they got no response and heard nothing from within the apartment, the officers had waited long enough to justify forcible entry under the Fourth Amendment knock and announce rule in light of the fact that the warrant was for narcotics that could easily be destroyed if they continued to wait (note: unbeknownst to the officers and irrelevant to the Court's analysis, the suspect was in the shower when the officers knocked, and hence the suspect did not hear their knock and announcement. U.S. v. Banks, 540 U.S. 31 (2003) Jan 04:02

Ruling: Where officers knocked at an apartment door and announced that they had a search warrant, and the officers then heard scurrying noises consistent with panic inside and not consistent with someone coming to the door to greet them, the officers' wait of only five to ten seconds after announcing was justified under the destruction-of-evidence exception to the rule's wait requirement. State v. Johnson, 94 Wn. App. 882 (Div. I, 1999) Oct 99 LED:11

Ruling: Where officers who were investigating a just-committed, nearby, armed robbery could see inside a motel room through an open curtain, and, after the officers knocked (but did not announce their presence or purpose), the officers saw the occupants of the motel room running to the back of the motel room, the officers were justified in making immediate entry under the danger-to-officers and destruction-of-evidence exceptions to the rule's wait requirement. State v. Cardenas, 146 Wn.2d 400 (2002) July 02 LED:07.

Ruling: "Useless gesture" exception (also known as "futile gesture" exception) was applicable in a case where officers, after announcing they were officers with a search warrant, could see the home occupant standing inside looking at them through a sliding patio screen door (the sliding glass door was already open); the officers did not have to wait for the occupant to deny or grant them permission to enter. State v. Richards, 136 Wn.2d 361 (1998) Nov 98 LED:03

Ruling: Where officers had reasonable suspicion that an escapee had a stash of several firearms, the officers were justified in making a no-knock entry. Also, the fact that the officers broke a window in the course of making their no-knock entry did not make the entry unlawful under the Fourth Amendment or under a federal statute that mirrors the Fourth Amendment knock-and-announce requirement. U.S. v. Ramirez, 523 U.S. 65 (1998) April 98 LED:03

Ruling: Just because a search warrant is for narcotics, that fact does not, by itself, justify a "no-knock" entry; case-by-case analysis of the facts to is necessary to determine the likelihood of danger to officers or of destruction of evidence. Richards v. Wisconsin, 520 U.S. 385 (1997) Aug 97 LED:07

Ruling: If officers who are executing a search warrant knock and announce, and if a home occupant then opens the door and the officers show that occupant a copy of the search warrant, then the officers are not required to seek consent to enter or to wait for denial of permission to enter before stepping inside over the threshold. State v. Allredge, 73 Wn. App. 171 (Div. II, 1994) Aug 94 LED:07.

(2) DEPUTY PROSECUTOR’S LINE-OF-DUTY QUESTIONING OF DEPUTY SHERIFF’S VERACITY HELD NOT PROTECTED UNDER FIRST AMENDMENT – In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), the U.S. Supreme Court rules 5-4 that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment [free speech] purposes, and the Constitution does not insulate their communications from employer discipline.” The statement at issue in Garcetti was a memorandum from a deputy prosecutor in the Los Angeles County District Attorney’s Office asserting that a deputy sheriff had materially misrepresented facts in an affidavit supporting a search warrant. The deputy prosecutor’s employer, after a heated meeting involving the deputy prosecutor and deputy sheriff and others from the two offices, chose to go ahead in defense of the affidavit and warrant. In the suppression hearing in the criminal case, the deputy prosecutor was called by the criminal defense attorney, and the deputy prosecutor testified as to his concerns about the affidavit, but the California trial court rejected the defendant’s challenge to the affidavit and warrant.

The deputy prosecutor subsequently filed a section 1983 civil rights lawsuit alleging that he had been transferred and otherwise dealt with unfairly by his employer based on his statements in relation to the deputy sheriff’s search warrant affidavit. The U.S. Supreme Court reverses a Ninth Circuit decision that held in favor of the deputy prosecutor. The U.S. Supreme Court rules that, because the deputy prosecutor’s statements were made as part of his official duties, there could be no First Amendment protection of his statements under the facts of the case. The Supreme Court does suggest, however, that the analysis and result might have been different if the deputy prosecutor’s statements had been uttered outside of the context of performing his work duties.

Those who wish to read the majority and dissenting opinions in Garcetti may go to the following Internet address and look for the Garcetti decision of May 30, 2006 (decisions are arranged at the website by date of issuance).

<http://supct.law.cornell.edu/supct/index.html>

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

UNCONSTITUTIONALITY RULING ISSUED AS TO CALIFORNIA COUNTY JAIL’S POLICY THAT LED TO STRIP SEARCHING OF WOMAN ARRESTED ON A MISDEMEANOR CHARGE OF BEING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE – In Way v. Ventura County, 445 F.3d 1157 (9th Cir. 2006), the Ninth Circuit of the U.S. Court of Appeals upholds a U.S. District Court ruling for a plaintiff in a “section 1983” civil rights lawsuit. The Ninth Circuit finds unconstitutional the conducting of a strip search of Ms. Noelle Way, a misdemeanor arrestee booked into a California detention facility. The strip search was not improper as to the manner and by whom it was conducted; the only question in the Way case is whether a strip search was justified at all.

The strip search of Ms. Way was conducted upon booking her on a misdemeanor charge of being under the influence of a controlled substance (note: there is no such crime under Washington law). The strip search was conducted without individualized suspicion as to the

presence of illegal drugs on Ms. Way's person. Rather, the strip search was conducted solely on the basis of a blanket jail policy of conducting such searches of any person arrested for any controlled substances offense. The Ninth Circuit notes that Ms. Way was detained only in a holding cell until she could post bail, and she was never placed in the jail's general population. The Court rules in the Way case that the County failed to show a necessary link between the jail's blanket strip search policy and legitimate penological concerns as to persons arrested and temporarily detained on such minor charges as the California under-the-influence charge.

The Way Court does hold, however, by 2-1 vote, that the deputy sheriffs involved in the strip search at the jail are entitled to qualified immunity because the constitutionality of the jail policy was not "clearly established" at the time of the search.

Result: Affirmance of California U.S. District Court summary judgment ruling against Ventura County as to unconstitutionality of the County's blanket strip search policy; reversal of District Court ruling denying qualified immunity to the deputies.

LED EDITORIAL COMMENT: The Way Court is careful in the lead opinion to explain that the Court is ruling on constitutionality of the blanket search policy only as applied to the particular facts of Ms. Way's case - - where she was arrested for the under-the-influence misdemeanor, where she was not at any point placed in the general jail population before she posted bail and was released, and where there was no showing by the County of a need for its blanket policy in these circumstances. However, we are concerned that the principles stated in the decision and in the other federal court decisions cited in the Way opinion would support a similar attack on the blanket strip search authorization that is provided in Washington's RCW 10.79.130(2)(c), which provides blanket strip search authority as to any person being admitted to jail who has been arrested for:

An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 or any successor statute.

Washington agencies that administer jails may wish to consult their agency legal advisors and/or local prosecutors.

WASHINGTON STATE SUPREME COURT

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES – 1) DAD TELLING VICTIM-DAUGHTER ABOUT DEFENDANT'S MESSAGE AND 2) DISCOVERY BY NON-READING CHILDREN OF ANOTHER MESSAGE WERE BOTH PROHIBITED "COMMUNICATION" CIRCUMSTANCES

State v. Hosier, ____ Wn.2d ____, 133 P.3d 936 (2006)

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

On May 2, 2002, at approximately 8:15 a.m., Shari Engberg, an employee of Kids 'N Us Child Care & Learning Center located in Marysville, Washington, saw a pair of hot pink, young girl's underpants placed in a chain link fence in the children's playground area. The underpants were a girl's size seven. Written on the front, crotch, and back of the underpants with a dark marker was a message fantasizing about sexual contact with a 7-year-old girl. The underpants were placed in the fence at the eye level of the children who commonly use the playground area. Engberg saw the underpants while she was in the process of moving the day care center's vans. She testified that she noticed that the underpants had been written on with a black marker, but she did not approach or

inspect the underpants. She thought that it odd that the underpants was placed in the fence and thought that it might have been a teenage prank using clothing from a Goodwill store nearby. She proceeded to move the vans around the building and to transport the older children to school and did not have a chance to mention the underpants to anyone at the day care center.

Later that morning, seven to eight children playing in the area found the little girl's underpants in the fence. The children poked the underpants through the fence with a stick, knocking it to the ground. The children reported their find to Jodie Kaullen, a teacher at the day care center, and led her to the fence. Kaullen put on latex gloves and picked up the underpants and read the message. She then brought them to her supervisor who called the police. The children who found the underpants were between the ages of 3 and 5 and could not read because of their ages.

On June 23, 2002, Michael Smith found two handwritten paper notes in his yard while mowing the lawn. The two notes were close together on the grass, dry and in good condition near the family's vehicles. The notes referred to having sex with a young girl matching the age and description of Smith's daughter.

M.S., Smith's 13 year old daughter, who frequently played in the front yard, had been playing in the front yard earlier that day. Shortly after finding the two notes, Smith told his daughter M.S. that he had found two sexually explicit notes in the front yard. He did not show or read the notes to her, but he told her that:

I found some notes that were very sexual and they were seemingly threatening and that I didn't know who had written them, but to be extra careful and don't be alone on the street and that I was going to take the notes to the police.

He also told her that the notes "kind of described her." He thought the contents of the notes might be about her due to the physical description in one of the notes. In telling her to be careful, he said to "especially stay away from the house across the street, I don't know if he [Hosier] wrote them or not, but be careful anyway." In June 2002, Hosier, a 54-year-old adult male, lived directly across the street from the Smiths. Various windows in Hosier's house provide a direct view of M.S.'s front yard and her bedroom. Smith made copies of the notes, took the copies across the street, and confronted Hosier, Smith knew that Hosier was a Level III sexual offender. Hosier denied authoring or leaving the notes. On June 24, 2002, Smith turned the notes over to the police.

On August 1, 2002, the police arrested Hosier. The police interviewed Hosier, who admitted that he wrote the notes and placed them on M.S.'s lawn. During the interview, Hosier described M.S. as a girl that "lives across the street" and is "heavy set, probably 12, 13, maybe younger I don't know for sure." While Hosier could describe M.S., he did not know her name. He said that a few days before leaving the notes, he had observed M.S. in her bedroom undressing. At the time, Hosier said to a friend, "I can't watch this anymore or I will be in trouble in a second." Hosier told police that he constantly fought "the battle" against the urges he had to commit sexually related crimes. Hosier said that he had sexual fantasies about a girl with M.S.'s physical characteristics. Pursuant to a search warrant, the police searched Hosier's residence. Evidence collected included child pornography, pens, paper and writing samples, and children's underpants.

Following a bench trial, Hosier was convicted of two counts of communication with a minor for immoral purposes, one count of attempted communication with a minor for immoral purposes, and two counts of harassment. Hosier appealed, claiming that there was insufficient evidence to support all five of the convictions. He also challenged the trial court's denial of his motion to suppress evidence found during a search of his residence pursuant to a search warrant. In a unanimous published opinion, the Court of Appeals affirmed the trial court on all issues. See State v. Hosier, 124 Wn. App. 696 (2004) **May 05 LED:15**.

ISSUES AND RULINGS:

1) As to Count One of the two "communicating" charges, where the only evidence of "communication" to a 13-year-old child was that the father informed his child to some extent regarding the content of notes intended for the child, was the evidence sufficient to support Hosier's conviction? (ANSWER: Yes, rules an 8-1 majority);

2) As to Count Two of the two "communicating" charges, where the only evidence of "communication" was that children who were so young that they had not yet learned to read found an object containing a message manifesting the author's immoral purposes, was the evidence sufficient to support the conviction? (ANSWER: Yes, rules an 8-1 majority)

Result: Affirmance of Court of Appeals opinion that affirmed a Snohomish County Superior Court conviction of Richard Leon Hosier for communicating with a minor for immoral purposes (two counts) plus (on matters not before the Supreme Court) one count of attempted communication with a minor for immoral purposes and two counts of criminal harassment.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

General discussion of RCW 9.68A.090

Hosier first asks this court to define the term "communicate" in former RCW 9.68A.090 to mean both "transmission" and "reception" of a message to a minor for immoral purposes. Hosier points to the various dictionary definitions that define "communicate" as "to make known: inform a person of," quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1993) and as "the expression or exchange of information by speech, writing, or gestures," citing BLACK'S LAW DICTIONARY 273 (defining "communication") (7th ed.1999). On review, the State does not disagree with this definition. Hosier claims if "communicate" is defined to only mean "transmission" of an inappropriate message to a minor, rather than transmission and receipt, a person could be found guilty of the crime when only an "attempt" to communicate with a child was undertaken. We agree.

As this court has made clear, RCW 9.68A.090 is designed to prohibit "communication *with children* for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 120 Wn.2d 925 (1993) **May 93 LED:07**. Unless a person's message is both transmitted by the person and received by the minor, the person has not communicated "with children," the act the statute is designed to prohibit and punish. Requiring both transmittal and receipt is consistent with our prior case law and supported by common sense.

Count 1 (Dad telling daughter about the note)

Applying the definition discussed above, Hosier contends that the Court of Appeals erred in affirming his conviction in count 1 because he only transmitted

his message. He claims that there was insufficient evidence supporting the court's finding that M.S. received his message. Hosier claims that M.S. did not receive the message because M.S. did not "read or even see" the two notes he left for her in her front yard. At worst, Hosier claims he only *attempted* to communicate with M.S.

The State claims that Hosier is asking this court to add an element, the exposure of the victim to the exact wording of the obscene notes, to the crime of communicating with a minor for immoral purposes. Requiring that the victim receive the precise message transmitted by the defendant, the State contends, would frustrate the clear intent of the legislature. RCW 9.68A.001 provides that "The care of children is a sacred trust and should not be abused by those who seek commercial gain or *personal gratification* based on the exploitation of children." The State argues that neither commercial gain nor personal gratification of the offender requires the minor to be exposed to the specific language of the communication. Rather the statute is aimed at protecting children from exposure to sexual misconduct for the gratification of another. Requiring that a child receives the complete message, according to the State, frustrates this aim. Thus, the State contends, Smith's communication to his daughter, M.S., of the sexual nature of the notes satisfies the communication element in count 1.

We agree. Although M.S. did not read the notes, the trial court correctly found that Smith, her father, was a conduit for Hosier's communication with M.S. Smith testified that he told M.S. that he found two sexually threatening notes in the front yard that described M.S. Thus, M.S. knew that someone had been watching her in order to describe her, had written threatening notes of a sexual nature about her, and had physically placed the notes on her front yard where she regularly played. As the Court of Appeals noted, although Smith did not read the notes verbatim to M.S. (or give her the notes), "it is clear that he conveyed the sexual and threatening nature of the content of the notes to her in an effort to caution and protect her."

Hosier contends, though, that there was no transmission of his sexual message to M.S. because, as the Court of Appeals observed, Smith's message served to caution M.S. Hosier claims that the State did not prove he conveyed the "distasteful content" of the notes and instead, he only conveyed a message to his daughter to be "extra careful and don't be alone on the street." However, this argument ignores the rest of the message, as well as his conduct, that was communicated to M.S. M.S. knew that the notes "described her," she knew that the notes were threatening and of a sexual nature about her, she knew that the author had placed the two notes in her front yard where she commonly plays, and that the author might be the man that lives across the street.

Hosier next claims that to the extent there was any communication between Hosier and M.S., it was not prohibited by the statute. He cites McNallie, claiming that the statute is instead targeted against communication which "grooms children into becoming *less careful* around adults" with the predatory purpose of promoting their exposure to and involvement in sexual misconduct. He says that Smith's editorial changes to the notes completely changed their content to encourage his daughter to be *more careful*. Thus, Hosier concludes, at worst, the State showed a substantial step taken by Hosier to communicate with M.S., successfully blocked by Smith.

This argument overlooks the legislative findings contained in RCW_9.68A.001, which reflect legislative concern with adults who exploit children for personal gratification. Here, based on Hosier's own statements, Hosier "communicated" with M.S. because it sexually excited him to do so. Hosier's communication with M.S. is exactly the sort of conduct the legislature intended to prohibit.

Courts have construed "communicate" in former RCW 9.68A.090 to include "conduct as well as words." Courts have also defined "immoral purpose" as used in the statute as referring to "sexual misconduct."

Hosier does not dispute that he wrote the notes with the requisite "predatory purpose" of promoting a minor's exposure and involvement in "sexual misconduct" as required by McNallie. Nor does he dispute that he left the notes in a location that M.S. was likely to find them. Hosier's message to M.S. expressing his desire to expose and involve M.S. in sexual misconduct, which included both "words and conduct," was sufficiently communicated to M.S. to satisfy the communication element of former RCW 9.68A.090.

Count 2 (Pre-readers finding note on panties)

Turning to court 2, Hosier argues that there was insufficient evidence to support his conviction because the minors who received the communication, the message written on children's underpants, could not read the message. Hosier contends that his actions are no more criminal than leaving a message in Klingon (a language spoken on *Star Trek*) or Kanji (a Japanese language). He claims that his actions were, at worst, an attempt to communicate with a minor.

The State responds that although the children may not have understood the communication, the communication was nevertheless received by the children. First, the State points out that Hosier's argument that the victim must understand the communication in order to meet the "communication" element conflicts with his argument concerning count 1. In count 1, Hosier claimed that since the victim was not exposed to the explicit language in the notes, the victim did not receive the communication. In count 2, though, the State says there was no issue of whether the children were exposed to the explicit sexual language on the underpants. Under Hosier's theory in count 1, the communication would have been completed. Instead, Hosier adds an additional requirement: "that the children be able to understand what he wrote." The State claims that the message on the underpants left at the day care was clearly a communication made for the "personal gratification" of the sender and the minors were exposed to that communication.

As the Court of Appeals correctly points out, Hosier cites no authority suggesting that a victim must understand the sexual nature of a communication. The court declined to interpret RCW 9.68A.090 as requiring that a victim "must understand the prurient nature of a communication." The court reasoned that to require the State to prove that a minor understands the explicitly prurient nature of a communication in order to meet the elements of the crime of communicating with a minor for immoral purposes would restrict the statute's application to victims sexually mature beyond their years, or omit from its reach the very victims it is intended to protect. The court found no reasonable basis to presume that the legislature intended such an absurd result. The court held that the children's

exposure to the underpants with its sexually explicit message was sufficient to support the finding that Hosier completed his communication with the children for an immoral purpose.

We agree with the Court of Appeals that requiring children to fully understand a sexual message would thwart the legislature's intent in protecting children. It is also inconsistent with the results in two of this court's opinions. In State v. Schimmelpfennig, 92 Wn.2d 95 (1979), a man stopped his van near a group of young girls. He engaged a 4-year-old girl in conversation, attempting to lure her into his van and asking her in explicit terms to engage in various sexual acts with him. Schimmelpfennig. The court affirmed the defendant's conviction of communicating with a minor for immoral purposes despite the fact that the young girl was only four years old and likely did not understand the nature of the man's requests. Similarly, in McNallie, a man discussed sexual acts with three young girls, ages 10 and 11, and exposed his penis. There, the court did not require proof that the girls understood the sexual language when affirming his conviction for communicating with a minor for immoral purposes.

Moreover, Hosier's message to the children at the day care was not simply a sexually explicit note. Rather, his sexual message consisted both of words and also a symbolic message using little girl's underpants, bright pink in color to attract children. The conduct of placing attractive and sexual objects directed at children, combined with the sexual message, written in black marker and plainly visible, illustrates Hosier's overall intent: to convince a young girl to take off her underpants to engage in sexual misconduct.

Viewing the evidence in the light most favorable to the State, we hold that Hosier's message, both a written message and a symbolic message, was transmitted and received by the children. Accordingly, we hold that there was sufficient evidence to support Hosier's conviction for communicating with the minors at the day care for an immoral purpose.

[Some citations omitted]

DISSENT BY JUSTICE SANDERS: Justice Sanders disagrees with the majority's analysis on both counts. We will not address the details of his lone dissenting position here.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

DEFENDANT MAY BE CONVICTED OF ATTEMPTED POSSESSION OF CHILD PORNOGRAPHY BASED UPON THE DEFENDANT'S POSSESSION OF MATERIALS THAT APPEAR TO BE CHILD PORNOGRAPHY EVEN IF THE MATERIALS IN FACT DO NOT DEPICT ACTUAL MINORS – In State v. Luther, __Wn.2d __, 134 P.3d 205 (2006), the Washington Supreme Court unanimously rules that Washington statutes that prohibit 1) attempt crimes (generally), and 2) possession of depictions of minors engaged in sexually explicit conduct (specifically), are not unconstitutionally overbroad when applied together. In acquitting Luther of an actual possession charge, the trial court ruled that the State could not prove beyond a reasonable doubt that the images obtained from Luther's computer were depictions of actual minors. The Supreme Court does not overturn that ruling. The Supreme Court agrees with the rulings of the Court of Appeals (see **March 05 LED:21**) and trial court, however, that the evidence was sufficient to support a conviction for attempted violation of RCW 9.68A.070.

A person may be convicted of “attempt” to commit a crime even if the actual commission of the crime was factually or legally impossible. RCW 9A.28.020(2); State v. Townsend, 147 Wn.2d 666 (2002) **Match 03 LED:11**. Thus, even if the people depicted in the images of sexually explicit conduct were not minors, Luther did not have a valid defense to a charge of attempted violation of RCW 9.68A.070 under his theory that the crime was legally or factually impossible to commit under the attendant circumstances.

Because the crime of attempted possession of child pornography requires a specific intent to possess materials depicting minors engaged in sexually explicit conduct and a substantial step toward possession of such specific materials, the Supreme Court finds no merit in the defendant’s overbreadth argument under the Federal constitution’s First Amendment, under which defendant asserted that the statute might be used to criminalize possession of constitutionally-protected adult pornography. The Luther Court concludes that the defendant’s conviction was well supported by facts that: (1) Luther engaged in sexual-content conversations via the Internet with persons who portrayed themselves as minors, and (2) Luther sought out and received via the Internet sexually explicit pictures of persons who claimed to be minors and appeared to be minors.

Result: Affirmance of Court of Appeals decision affirming the King County Superior Court conviction of Ronald Joseph Luther for attempted possession of depictions of minors engaged in sexually explicit conduct.

LED EDITORIAL NOTE: While not relevant to this case, chapter 139, Washington Laws of 2006, amended RCW 9.68A.070 (effective June 7, 2006) to increase the classification of the offense from a class C felony to a class B felony. That makes attempted violation of RCW 9.68A.070 a class C felony per RCW 9A.28.020(3)(c).

WASHINGTON STATE COURT OF APPEALS

“PRETEXT STOP” ISSUE MUST BE ADDRESSED ON REMAND IN CASE WHERE OFFICER TESTIFIED THAT, BEFORE THE OFFICER OBSERVED A DRIVER COMMIT A TRAFFIC VIOLATION, THE OFFICER NOTICED A “DEER IN THE HEADLIGHTS” LOOK ON THE FACE OF THE DRIVER

State v. Meckelson, __ Wn. App. __, 135 P.3d 991 (Div. III, 2006)

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

[A City of Spokane law enforcement officer] was on patrol duty on May 18, 2004. He was driving east on Mission at around 6:00 p.m., when he pulled alongside a car. The car was traveling at between 25 and 30 miles an hour and was being driven normally. [The officer] was not pursuing the car. But “[i]t’s my job to be observant and look for crime out on the street. And, so, I observed other drivers and their reactions.”

The two cars were within 100 feet of the intersection at Mission and Crestline. As [the officer] pulled alongside the car, he saw the driver turn and look at him. [The officer] thought the driver looked alarmed, with a “deer-in-the-headlight” look. [The officer] wondered if the driver might be nervous because the car was stolen. He dropped behind the car in order to check the registration to see if the driver had a suspended license. As [the officer] was slowing down, the other driver suddenly turned right onto Crestline. [The officer] did not see a turn signal, so he pulled the driver over for failing to signal 100 feet before turning.

As the car pulled over the Sergeant could see the passenger, Mr. Meckelson, reaching toward the floor. Mr. Meckelson's hands were still under the seat when [the officer] approached the driver's side. He instructed Mr. Meckelson to put his hands up. Mr. Meckelson appeared nervous. [The officer] decided to remove Mr. Meckelson from the car for officer safety. As he opened the door, [the officer] saw two baggies containing a white crystalline substance on the floor. He eventually arrested Mr. Meckelson for possession of methamphetamine. Two more baggies turned up during the search incident to arrest.

[The officer] noticed a strong smell of solvents while searching the vehicle. He pulled a seat down and gained access to the trunk. He saw a propane tank, a cardboard box with some coffee filters, and Mason jars containing liquids that he believed to be components of a meth lab.

The State charged Mr. Meckelson with possession of methamphetamine, delivery of methamphetamine, and manufacture of methamphetamine.

Mr. Meckelson moved to suppress the drugs. He claimed that the grounds alleged by [the officer] for stopping the car were pretextual. Defense counsel and the State agreed to stipulate to the facts in the police report and the affidavit of probable cause. Mr. Meckelson requested an evidentiary hearing to challenge some of the facts. The court denied the request for an evidentiary hearing. The court also denied the motion to suppress. The judge told Mr. Meckelson that he could argue the constitutional merits of the search and seizure at his trial and the jury would decide.

The case was tried to a jury. Mr. Meckelson was acquitted of delivery and manufacture of methamphetamine, but was convicted of possession.

ISSUE AND RULING: In this methamphetamine-possession prosecution, the arresting officer testified that, before seeing the defendant make a traffic turn without signaling, the officer became generally suspicious of the driver based on the driver's apparent alarm at seeing the officer looking at him. Under this circumstance, did the defendant's attorney render ineffective legal assistance when the attorney did not challenge - - as a "pretext stop" - - the traffic stop that led to discovery of the methamphetamine and the charges for its possession? (**ANSWER:** Yes)

Result: Reversal of Spokane County Superior Court conviction of David Lloyd Meckelson for possessing methamphetamine; remand of case to Superior Court for suppression hearing on the "pretext stop" issue.

Status: The Spokane County Prosecutor's Office has filed a petition seeking discretionary Washington Supreme Court review. The Supreme Court usually takes at least six months to decide whether to accept review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

INEFFECTIVE ASSISTANCE

In evaluating alleged ineffective assistance of counsel, we apply the two-prong [test of Strickland v. Washington, 466 U.S. 668 (1984)]. The appellant must show (1) that his lawyer's performance fell below an objective standard of reasonableness considering all the circumstances; and (2) that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different.

As to the first Strickland prong, we will conclude that counsel's representation is ineffective if we can find no legitimate strategic or tactical reason for a particular trial decision. Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.

Mr. Meckelson's trial lawyer misapprehended the principle set out in State v. Ladson and its proper application in this case. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. The question before the court is not whether [the officer] had the right to stop the car in which Mr. Meckelson was a passenger for a minor traffic infraction (failure to signal for 100 feet before an intersection). He did. RCW 46.61.021(1). The question is whether [the officer] would have done so but for the legally insufficient reason that he thought the driver looked at him funny when he pulled alongside the car. This in turn led him to conclude that both the driver and passenger must be up to no good. Mr. Meckelson's lawyer rendered ineffective assistance of counsel by failing to argue that the stop was pretextual.

PRETEXT

Whether a vehicle stop is pretextual is a factually nuanced question. The court must consider the totality of the circumstances. The relevant circumstances include the subjective intent of the officer as well as the objective reasonableness of the stop. Ladson. This necessarily involves an inquiry into the officer's subjective intent. So the necessary inquiry here was: Was the officer's stop solely for the driver's failure to signal, or was the officer's purpose (as he candidly suggests) to look for evidence of another crime? It is not enough for the State to show that there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.

Mr. Meckelson's lawyer walked away from this inquiry:

I recognize [the officer]. I know he has been a law enforcement officer for many years, and as an officer of the court I don't challenge his representations as made in the police report that he smelled solvents, nor do I challenge his representations that a traffic infraction occurred justifying a stop.

It's not my intent to move the Court as Mr. Meckelson's attorney to make a finding that the officer lied in this case making a stop of the car and the seizure unlawful.

These comments suggest a misapprehension of the Supreme Court's holding in Ladson. [The officer] became suspicious because the driver was alarmed not because of any driving conduct:

I think it's my job that, if people give me a reason to believe they're alarmed for some reason that the police are around, to further—

Moreover, one reason the court denied a fact-finding hearing on Mr. Meckelson's motion to suppress was the court's thought that a jury was the appropriate body to make those findings of fact. The judge suggested that Mr. Meckelson could address the pretext issue at trial. And indeed he attempted to. If the court had suppressed the drug evidence, there would have been no trial. And the court

would have suppressed the evidence if it had concluded that the stop was pretextual.

And the jury would never pass upon the question of whether the officer's subjective motivation for the stop was the minor traffic offense-an offense for which the driver here was never cited. The reason for the stop leading to arrest was not an element of any crime the State had to prove here. Once suppression was denied, therefore, and the drugs were admitted into evidence, the suppression issue was moot. This is why CrR 3.6 calls for a pretrial proceeding.

Defense counsel's job here was to represent Mr. Meckelson's interests, and that included challenging the officer's subjective reason for the stop. [The officer] was never given the opportunity to testify whether he would have stopped this car but for his inchoate and legally unsupportable suspicions. And, even if the officer had testified that he would have stopped the car for failure to signal, it would have been up to the judge to believe or disbelieve that testimony.

The suppression ruling stands and falls on its own merits, based upon the evidence before the suppression judge, not what is later developed at trial. Ladson (stop must be justified at its inception). The possession of methamphetamine charge would have been dismissed without the drug evidence. Counsel's ineffective assistance here was, then, prejudicial.

We reverse and remand for an evidentiary suppression hearing on the question whether [the officer]'s stop of this vehicle was pretextual.

[Some citations omitted]

LED EDITORIAL COMMENTS:

Readers may wish to review our comments on Ladson in the September 1999 LED accessible on the CJTC LED internet page.

We wish success to the Spokane County Prosecutor's Office in its request for Washington Supreme Court review in Meckelson.

We believe from our current research (admittedly not completely exhaustive) that as of the present time - - July of 2006 - - only one or two jurisdictions in the U.S., if any, might seriously entertain a "pretext stop" challenge under facts such as those in this case. But, unfortunately for Washingtonians who appreciate effective law enforcement, the Meckelson decision, assuming that the Court has accurately and in proper context described the facts and record in the case, is at least plausibly consistent with the Washington Supreme Court's extremely broad "pretext stop" rule announced in its 5-4 decision in State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05 (majority opinion authored by Justice Richard Sanders).

Ladson's majority essentially held that a stop for a traffic infraction (or minor traffic misdemeanor) is unlawfully pretextual if the stop was primarily motivated by intent to investigate more serious criminal matters where officers lacked reasonable suspicion as to those more serious criminal matters, and that pretext can be proven to be: 1) subjectively pretextual - - by proving through admissions of the officer or through circumstantial evidence that the officer was primarily motivated by the wrong goal when making the stop; or 2) objectively pretextual - - by proving that the officer, perhaps in a specialized role at the time of the stop, made a stop under circumstances where a reasonable officer would not have made the stop if following his or her normal or standard practices or procedures.

A number of legal commentators have criticized “pretext” doctrine for a variety of reasons, two of which are: 1) the extreme difficulty of determining with any accuracy what a law enforcement officer was actually thinking or primarily motivated by at the time of a stop, and 2) the strong incentive such a rule gives officers to not be forthcoming in their reports and testimony. This case illustrates the problems that these commentators recognized in such a rule but that a majority of the Washington Supreme Court apparently discounted in Ladson.

The Meckelson decision may be correct as to the current unique law of Washington under Ladson. A police report by a Washington officer that even merely suggests that an officer’s primary motivation for making a traffic stop might have been a reason unrelated to the observed traffic violation (unless the report and testimony also indicate that the officer had reasonable suspicion as to more serious criminal behavior) arguably triggers a need for a Ladson-based, “pretext stop” suppression inquiry to determine if the officer would have made the stop but for the other motivating factor in the case. This approach goes against the common sense approach followed in other jurisdictions in this country, and, we believe, is contrary to the public interest, but it may be the current law of Washington under Ladson. We can always hope that the Washington Supreme Court will grant the prosecutor’s petition for review in this case and will explain why Ladson is not as extreme as we fear or as held by the Meckelson Court.

“MINOR IN POSSESSION” EVIDENCE HELD INSUFFICIENT TO SUPPORT CONVICTION

State v. A.J.P.-R., 132 Wn. App. 181 (Div. III, 2006)

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

One afternoon in May 2004, [a city police officer] saw a group of boys playing basketball in a [city] park. Two boys were standing together away from the others. One of the two was holding a bloodstained cloth to his face, while the other was smoking a cigarette and did not look old enough to possess tobacco products. [The officer] parked his patrol car and went over to talk to the two boys.

Mr. P.-R., who was holding the cigarette, told [the officer] his name and that he was 17 years old. His 15-year-old friend, J.G., was holding a cloth to his nose, bloodied during the basketball game. Mr. G. was attempting to hide something from the officer. When [the officer] asked to see what was in his hand, Mr. G. showed him an open 40-ounce bottle of beer. [The officer] told both boys to sit on the ground. He called for backup when Mr. G. refused to cooperate, then placed Mr. G. in handcuffs and put him in the back of his patrol car. After securing Mr. G., [the officer] went back to Mr. P.-R., asked him to stand up, and began questioning him regarding his address and guardian. The officer smelled alcohol emanating from Mr. P.-R.’s body.

Mr. P.-R. was charged with being a minor in possession of alcohol, RCW 66.44.270(2)(a). Pretrial, he unsuccessfully moved to suppress the evidence as the fruits of an unlawful seizure. Finding that the odor of alcohol emanating from Mr. P.-R.’s body, coupled with his close proximity to a person who possessed alcohol, circumstantially proved that Mr. P.-R. possessed or consumed alcohol, the juvenile court found him guilty.

ISSUE AND RULING: Was the evidence sufficient to support the conviction for minor in possession of alcohol under RCW 66.44.270? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of juvenile court adjudication (Yakima County Superior Court) of guilt of Mr. A.J. P.-R. for minor in possession of alcohol.

ANALYSIS: (Excerpted from majority opinion)

Pursuant to RCW 66.44.270(2)(a), “[i]t is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor.” Possession is not defined by the statute, but case law has established that a person possesses alcohol “if he or she knows of the substance's presence, it is immediately accessible, and he or she exercises dominion or control over it.” State v. Dalton, 72 Wn. App. 674 (Div. III, 1994) **Sept 94 LED:14**. If possession is not actual, it may be constructive, and constructive possession may be joint.

Mr. P.-R. did not have actual possession of alcohol, but he stood near Mr. G., who held an open bottle of beer. Additionally, the officer detected the odor of alcohol on Mr. P.-R.'s body. A defendant's close proximity to an object is insufficient alone to establish constructive possession. Some other indicia of dominion and control must exist, such as the defendant's ability to actually possess the object. Even the presence of liquor in the suspect's system is not enough on its own to support conviction. When combined with other corroborating evidence, however, assimilation of alcohol can be sufficient to prove possession.

In this case, the State provided no evidence that there was alcohol in Mr. P.-R.'s system. [the officer] testified that he smelled a “medium” odor of alcohol coming from Mr. P.-R.'s body, but he did not state that Mr. P.-R. appeared intoxicated or showed any effects of alcohol consumption. Ultimately, the only evidence to support constructive possession of alcohol was Mr. P.-R.'s proximity to a person holding a beer. Not only is mere proximity insufficient to prove constructive possession, but in this case Mr. P.-R. did not have immediate access to the alcohol. The beer was in Mr. G.'s possession, to the exclusion of Mr. P.-R.'s dominion and control.

Even after considering the record in the light most favorable to the State, we find insufficient evidence to support Mr. P.-R.'s disposition on the basis of constructive possession or consumption of alcohol. Accordingly, we reverse and dismiss with prejudice.

[Some citations omitted]

ANALYSIS BY DISSENT: In dissent, Judge Brown disagrees with the majority judges under the following analysis:

“A person possesses alcohol if he or she knows of the substance's presence, it is immediately accessible, and he or she exercises dominion or control over it.” “[E]vidence of assimilation is circumstantial evidence of prior possession. Although insufficient by itself to support a conviction, when combined with other corroborating evidence of sufficient probative value, evidence of assimilation can be sufficient to prove possession beyond a reasonable doubt.”

Mr. P.-R.'s (like J.G.'s) alcohol assimilation is shown beyond breath smell by portable blood alcohol testing. Assimilation is corroborated by evidence of Mr. P.-R. and Mr. G., two minors, standing together on a basketball court conversing as friends with no other individuals nearby when contacted. Mr. P.-R. was in

easy reach and eyesight of the beer carried by and partly consumed by Mr. G. The corroborative evidence permits inferences of knowledge, immediate accessibility, proximity, friendly-shared consumption, leading to joint dominion and control of alcohol. Notably, even constructive possession may be joint. Basically, we have evidence of two minors standing alone together on a basketball court sharing a friendly beer.

Contrary to Mr. P.-R.'s argument, intoxication evidence is not required under Dalton. The Dalton standard is assimilation combined with any corroborative facts, a standard met here.

LED EDITORIAL COMMENT: We repeat here some of our comments from the April 2006 LED regarding Division Three's decision in State v. Roth, 131 Wn. App. 556 (Div. III, 2006) April 06 LED:05 - -

The P.-R. Court [like the Roth Court] discusses State v. Dalton, where the appellate court ruled that there was sufficient evidence to prove possession of alcohol by the minor. Two other cases finding sufficient proof of possession of alcohol for purposes of MIP prosecution are: State v. Preston, 66 Wn. App. 494 (Div. II, 1992) Oct 92 LED:08 (defendant's admission to prior drinking and officer's observation of discarding of empty beer bottles was sufficient evidence to support conviction for MIP); and State v. Fager, 73 Wn. App. 617 (Div. III, 1994) Sept 94 LED:12 (beer breath plus signs of intoxication plus presence of closed beer bottles within reach was sufficient evidence to support conviction for MIP). Remember that LEDs from 1992 forward are available on the Criminal Justice Training Commission's LED webpage.

In any event, we believe that the Roth and P.-R. decisions do not undercut prior Court of Appeals rulings in Preston, Fager, and Dalton to the effect that there is sufficient evidence to support arrest (on probable cause), citation (on probable cause) and conviction (under the beyond a reasonable doubt standard) if there is: 1) evidence that a minor has been drinking alcohol (e.g., beer breath, bloodshot eyes, unsteadiness); plus 2) evidence of the minor's contemporaneous close proximity to alcohol. As always, we suggest that officers consult their prosecutors and/or legal advisors.

PARTIALLY HANDCUFFED MURDER SUSPECT'S WAIVER OF FIFTH AND SIXTH AMENDMENT RIGHTS PRIOR TO CUSTODIAL QUESTIONING BY FBI AGENTS VALID - - AND CRIMINAL RULE 3.1 NOT VIOLATED - - BECAUSE, ALTHOUGH SUSPECT ASKED AGENTS ABOUT THE PROCESS FOR APPOINTING COUNSEL, HE MADE CLEAR THAT HE WAS WILLING TO BE QUESTIONED WITHOUT A LAWYER; ALSO, JAILHOUSE INFORMANT COULD TESTIFY BECAUSE POLICE DID NOT MAKE HIM THEIR "AGENT" FOR SIXTH AMENDMENT PURPOSES

State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006)

Facts and Proceedings below:

[LED Introductory Editorial Note: Much of the factual information in this case is provided in excerpts from the Court's "Analysis" provided two sections below in this LED entry.]

John Whitaker participated with numerous other male members of a group of drug dealers in the brutal abduction and murder of Rachel Burkheimer, who had at one time dated a member of the group, and who was killed for talking about the group's illegal activities with others outside the group (and likely also for dating someone outside the group).

Whitaker fled to California. Charges were filed in Snohomish County and an arrest warrant was issued. A Snohomish County Sheriff's Office detective asked FBI agents in Los Angeles to help Los Angeles County Sheriff's Office deputies find and arrest Whitaker. Whitaker was arrested by the LACSO deputies and two FBI agents.

The FBI agents then conducted an interrogation. They obtained a waiver of rights and questioned Whitaker. Throughout the waiver process and questioning, Whitaker was at least partially handcuffed. At one point in the waiver process, Whitaker asked "when in the process an attorney would be appointed" for him. The FBI agents told Whitaker the court "would deal with this" when he went to court in the morning, but the agents also told him he could request an attorney "at that moment" and, if he did, questioning would immediately stop.

Prior to trial, Whitaker challenged, among other things, admissibility of his statements to the FBI agents, as well as admissibility of statements he made to a jailhouse informant while Whitaker was in the Snohomish County jail awaiting trial. The Superior Court rejected those challenges, and Whitaker was convicted of aggravated murder and conspiracy to commit first degree murder, and he was sentenced to life without parole.

ISSUES AND RULINGS: 1) Where the 22-year-old suspect was partially handcuffed during his interrogation, and where an FBI interrogator, in response to the suspect's question about possible court-appointment of an attorney, told him the court would deal with that in the morning, but the agent also told him that, if he requested an attorney at any time, the questioning would immediately cease, was his Miranda waiver voluntary, intelligent and knowing, and therefore valid? (ANSWER: Yes, because the suspect was adequately advised of his rights and freely chose to talk to the agents);

2) Assuming that Washington Criminal Rule 3.1 applied to the questioning of the suspect by the FBI agents, was there a prejudicial violation of the suspect's rights under CrR 3.1 (right to telephonic contact with an attorney upon request by arrestee) in light of the above-described exchange between the suspect and FBI agents regarding court appointment of an attorney? (ANSWER: No, because the suspect was adequately advised of his rights and freely chose to talk to the agents);

3) Where the trial court found that, after a detective first received information from a jailhouse informant acting on his own regarding a jailhouse statement by the previously charged and arraigned defendant – A) the detective told the informant in good faith not to obtain any more statements from the defendant, and B) logistical problems and time constraints in jailhouse operations prevented the immediate moving of the informant to prevent his further contact with the defendant – was it a violation of defendant's Sixth Amendment right to counsel for the informant to testify at trial regarding further jailhouse communications the informant, acting on his own, had with defendant? (ANSWER: No)

Result: Affirmance of Snohomish County Superior Court conviction of John A. Whitaker for aggravated murder and conspiracy to commit first degree murder (also affirmed was a sentence to life without parole).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Waiver of Fifth and Sixth Amendment Rights

The trial court found that a Snohomish County arrest warrant was issued for Whitaker while he was in California. A Snohomish County detective asked FBI agents in Los Angeles to help find and arrest Whitaker. Two FBI agents were

present when the Los Angeles County Sheriff's office arrested Whitaker on the warrant. At the request of the County detective, the FBI agents interviewed Whitaker two hours later at the Sheriff's Office in an interview room.

Whitaker was handcuffed during the interview, although the agents removed the handcuffs from one hand so Whitaker could write. The agents explained why they were there, told Whitaker the charges he faced, and told him where those charges were filed. They explained the extradition process and informed Whitaker about his constitutional rights.

Whitaker waived his rights and signed a waiver form. He wrote a statement and gave oral statements. In these statements he admitted that he may have helped to place Burkheimer in the bag, to carry her in the bag to the truck, to dig her grave, and to bury the body. He reviewed his written statement and made some changes.

Both the Fifth and Sixth amendments to the federal constitution (and their State counterparts) include guarantees of the right to counsel. The Fifth Amendment prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. **LED EDITORIAL NOTE: The Sixth Amendment right to counsel was implicated in this case because Whitaker had been charged by the prosecutor in Washington (though not arraigned) before the interrogation occurred.** However, the person being interrogated may validly waive the right to counsel. If the interrogation takes place without an attorney present, the State has the heavy burden of establishing the defendant's waiver of his privilege against self-incrimination and his right to retained or appointed counsel.

To be valid, the Fifth and Sixth Amendment waivers must be voluntary, knowing, and intelligent. Edwards v. Arizona, 451 U.S. 477 (1981) (Fifth Amendment); Patterson v. Illinois, 487 U.S. 285 (1988) (Sixth Amendment). Validity of a waiver depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Absent coercion, a suspect's Fifth Amendment waiver is valid as a matter of law when the State shows he knew he could remain silent and request an attorney, and he understood that the State could use his statements against him. The same analysis applies with respect to a waiver of the Sixth Amendment right.

Whitaker both signed and wrote statements indicating he understood his rights. He reviewed his written statements and made some changes. While he was writing the statements, the agents were in and out of the interview room. Whitaker appeared awake, alert, and sober. He asked questions about the extent of his rights, and was neither threatened nor promised anything in exchange for his waiver.

Whitaker had at least one hand handcuffed during the interview. But as the trial court concluded, that fact did not establish coercion per se. And Whitaker was not so young at age 22 as to be incapable of waiving his rights. See State v. Jones, 95 Wn.2d 616 (1981). There, a 15 year-old Canadian boy who was charged with second-degree murder waived his Miranda rights and gave a custodial statement. The boy testified he had only once visited this country, had dropped out of high school in the 10th grade, and did not understand the rights read to him. However, he had signed an appropriate waiver form, appeared of

normal intelligence and understanding, and his answers were responsive to the interrogator's questions. The Jones court affirmed the trial judge's ruling that the boy understood his rights. Similarly here, Whitaker's youth is not a basis to discount the trial court's determination that he was capable of waiving his rights.

Whitaker also contends the FBI agents "affirmatively misrepresented" his right to counsel. At some point during the time the agents were advising Whitaker of his rights, he asked "when he could talk to an attorney." The agents asked Whitaker whether he had an attorney or he would need an appointed attorney. Whitaker replied that he was talking about "when in the process an attorney would be appointed" for him.

The agents told Whitaker the court "would deal with this" when he went to court the next morning. Whitaker contends this was the misrepresentation. If this had been the agents' only response to his inquiry, we might agree. But the agents also told Whitaker he could request an attorney "at that moment." They clearly stated that if he asked for an attorney all questioning would stop. Whitaker chose not to ask for an attorney, and instead waived his rights. After the colloquy reflected in the court's findings, Whitaker could not have reasonably believed that he did not have the right to counsel at that moment. We find no error in the trial court's conclusion that Whitaker's waivers of his Fifth and Sixth Amendment rights were voluntary, knowing, and intelligent.

2) Criminal Rule 3.1

Whitaker finally argues that the agents deprived him of his right to counsel by violating a court rule. The rule in question provides:

At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c)(2). Whitaker contends this rule applies to federal agents in California by virtue of an alleged agency relationship between the Snohomish County detective and the FBI interrogators. Assuming the rule does apply, we conclude the FBI interrogators did not violate it. The rule applies only to a person "who desires a lawyer". The court's findings make clear that Whitaker did not express a desire to have a lawyer on hand before or during the interrogation. He asked a question about the process by which a lawyer would be appointed.

Whitaker's question might have been understood as an equivocal invocation of his right to counsel. When an invocation is equivocal, interrogators are generally allowed to ask questions clarifying the suspect's request. The agents sought to clarify Whitaker's question by explaining that he could ask for an attorney any time and if he did so, all interrogation would stop. Because Whitaker did not respond to that offer, he made it clear that he was willing to be questioned without invoking his right to communicate with a lawyer. We conclude there was no violation of CrR 3.1(c)(2).

Because Whitaker validly waived his constitutional rights, the court properly ruled his statements admissible. **[LED EDITORIAL NOTE: Another recent Court of Appeals decision addressing a defendant's waiver to an officer of CrR 3.1 rights is State v. Kronich, 131 Wn. App. 537 (Div. III, 2006) April 06 LED:03]**

3) Jailhouse Informant and Sixth Amendment

At trial, over Whitaker's objection, the court allowed jail informant Christian White to testify about conversations he had with Whitaker when they were housed in neighboring cells at the jail. According to White, Whitaker told him he had kicked Burkheimer in the head just after Anderson first attacked her. According to White, Whitaker also said he did not try to stop Anderson from shooting Burkheimer because he wanted to see what it was like to see someone murdered. White said Whitaker told him he was going to claim at trial that he was afraid of Anderson on the day in question, and would try to convince his codefendants to lie at trial to the same effect.

Whitaker contends the State made White an agent for the purpose of getting incriminating statements from Whitaker without counsel being present. Therefore, he contends, admission of White's testimony violated his Sixth Amendment right to counsel.

The prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the Sixth Amendment right to counsel. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present violates the right to counsel.

The fact that an inmate has an existing relationship with law enforcement, has previously been an informant, or has received some benefit for reporting a defendant's statements may be evidence of his status as a government agent. In re Benn, 134 Wn.2d 868 (1998) **July 98 LED:19**. But none of these factors is dispositive. The informant's understanding from past conduct as an informant that cooperation with the authorities may prove beneficial does not necessarily make the informant an agent. For there to be an agency relationship, there must be at least an implicit agreement between the parties with respect to the current undertaking, and the principal must have the ability to control that undertaking.

After Whitaker moved to suppress information gained from White, the court conducted a hearing to decide whether White was a state agent. In deciding that he was not, the court relied on testimony by [a Snohomish County detective] and transcripts of [the detective]'s interviews with White.

[The detective] testified that White was housed next to Whitaker at the jail while awaiting trial on third degree assault charges. White had known Whitaker for years, and befriended him in jail by protecting him. White had approached another officer, seeking to give information about the Burkheimer case and another case. The officer referred White to [the detective]. On February 7, 2004, White met with [the detective] to tell him things he had heard about two cases, one of which was Whitaker's. During this first meeting, White told the detective much of what he testified to at Whitaker's trial. White hoped to get favorable consideration from the prosecutor's office. He offered to get more information, but [the detective] told him not to try. [The detective] told White he would present the information to the prosecutor's office, who would decide whether a deal could be worked out.

Later, White sent a letter to [the detective] indicating he had more information. He said he knew he was not supposed to be looking for information, but he accepted it freely when it came to him. He concluded by mentioning his upcoming trial date and asking what [the detective]'s plan was. After receiving this letter, [the detective] and a prosecuting attorney met with White again on February 26. At the interview, White said Whitaker was arranging with one of his codefendants to testify falsely that Whitaker was afraid of Anderson. White acknowledged there had been no agreement between him and the State to get more information, and that he had been told not to do so. White admitted, though, that once Whitaker began telling him things, White encouraged him to say more. [The detective] testified that this information had caused him to reinterview Maurice Rivas, who testified at trial that he was contacted by Whitaker through another person with instructions on how to testify.

[The detective] testified that he had no implied agreement with White. At their first meeting on February 7, White told him he hoped to be released from jail pending his trial in exchange for the information. This hope went unfulfilled. [The detective] said he stressed to White that the reason he was recording the February 7 statement was because he did not want any more information from White other than what he had already received at that meeting. [The detective] testified that logistical problems and time constraints prevented him from having White moved to another cell. He said the jail was overwhelmed with the Burkheimer case because so many people already needed to be kept separate.

Whitaker withdrew his motion to exclude information collected from the February 7 interview with White, acknowledging there was no evidence White was an agent at that time. However, he argued the court should exclude the fruits of White's second interview: evidence that Whitaker was trying to convince Rivas to lie on his behalf. The court found no implicit agreement:

[I]t would have been best if [the detective] had arranged at that time for Mr. White to be moved to a different housing unit in the Snohomish County Jail so he would not have been able to have further contact with Mr. Whitaker. However, even though this was not done there is no evidence to suggest that the failure was because of some hope or intention that Mr. White would continue to try to get information from Mr. Whitaker. There's nothing to suggest that [the detective] was in any way trying to undermine or suggest that his plain language, indicating that Mr. White was to do nothing more, meant anything other than exactly what he was saying. As I said, it's unfortunate that [the detective] didn't have the opportunity right then to make arrangements. I think it's clear from [the detective]'s own testimony that he would have preferred to have done something immediately, in retrospect.

.... I'm also persuaded by the testimony that Mr. White did not make any actual effort to obtain that information.

The court denied the motion to suppress the fruits of White's second interview.

Proof that the State "must have known" that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to

show a Sixth Amendment violation. United States v. Henry, 447 U.S. 264 (1980). Whitaker contends White was a state agent because the State, like in Henry, must have known that White would seek out more information from Whitaker.

In Henry, a defendant was incarcerated pretrial on a bank robbery charge. Nichols, a regular government informant, was incarcerated near Henry. An agent told Nichols to be alert to anything Henry (and others) said, but not to initiate any conversation with Henry regarding the bank robbery. The agent later contacted Nichols, who said he and Henry had spoken about the robbery. The FBI paid Nichols for the information, and Nichols testified at Henry's trial about what Henry told him. Henry's conviction was reversed on appeal based on the violation of his Sixth Amendment right to counsel. The Court set out three important factors leading to this conclusion: (1) Nichols was acting under instructions as a paid government informant; (2) Nichols was ostensibly no more than a fellow inmate of Henry; and (3) Henry was in custody and under indictment at the time he was engaged in conversation by Nichols. "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." The Court was untroubled, however, by the testimony of another of Henry's cellmates, who was not a paid informant and had no arrangement to monitor or report on conversations with Henry.

The paid informant in Henry had been told to listen to everything Henry said, and was paid according to an existing agreement. White, by contrast, was told not to seek out information and was promised nothing (though he eventually made a plea deal). The court believed [the detective]'s explanation for why White was not moved to a different area in the jail. The trial court's conclusion that [the detective] acted in good faith is supported by the hearing testimony. Moreover, like in Benn, there was neither an implicit agreement nor any evidence that [the detective] could control White. White directly contradicted [the detective]'s instructions. Whitaker's arguments to the contrary are essentially invitations to revisit the trial court's credibility determinations. This we cannot do.

[Some citations omitted]

NEXT MONTH

The September 2006 LED will include, among other entries, summaries regarding the following two U.S. Supreme Court decisions issued in June 2006:

Sanchez-Llamas v. Oregon, Bustillo v. Johnson, __ S.Ct. __, 2006 WL 1749688 (2006), where a majority of the U.S. Supreme Court addresses the international treaty known as the Vienna Convention on Consular Relations ("Vienna Convention"), and: 1) assumes, without deciding in this case (and hence reserving that issue to be resolved in a future case), that the Vienna Convention provides individually enforceable rights; and 2) holds, however, that there is no suppression remedy for criminal cases as to statements that police obtain without complying with the Vienna Convention.

Davis v. Washington, Hammon v. Indiana, 126 S.Ct. 2266 (2006), where the U.S. Supreme Court rules in two unrelated cases (consolidated for U.S. Supreme Court review) that: 1) in the first case, a domestic violence victim's excited utterances reporting an ongoing DV crime, in

response to a 911 operator's questioning, were "nontestimonial" under the rule of Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**, and therefore were not subject to exclusion under the Sixth Amendment Confrontation Clause (Davis v. Washington); and 2) in a separate case, a domestic battery victim's written statements in an affidavit given to a police officer immediately following a DV battery, were testimonial, and therefore were subject to exclusion under Crawford's interpretation of the Confrontation Clause (Hammon v. Indiana).

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

The Washington Office of the Administrator for the Courts maintains a website 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/court-rules/>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website 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/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [<http://www.law.cornell.edu/uscode/>].

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 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 proposed WAC amendments is at this address too. 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 [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], while the address for the Attorney General's Office home page is [<http://insideago>].

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. **LEDs** from January 1992 forward are available via a link on the CJTC Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]