



Law Enforcement

June 2006

Digest

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2006 WASHINGTON LEGISLATIVE UPDATE – PART TWO OF TWO PARTS

LED EDITORS’ INTRODUCTORY NOTE: This is Part Two of our two-part 2006 Washington Legislative Update. Part Two consists only of an index to the 2006 legislation addressed in Part One in last month’s LED. We have no additional 2006 legislation to address.

Text of each of the 2006 Washington acts is accessible on the Internet at [<http://www.leg.wa.gov/legislature/>]. In Part One last month, we provided some RCW references in our entries, but we noted that where new sections or chapters were created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) **UNDER THE FOURTH AMENDMENT, AN ANTICIPATORY SEARCH WARRANT NEED NOT DESCRIBE THE TRIGGERING CONDITION SO LONG AS THE AFFIDAVIT DESCRIBES THAT CONDITION AND OTHERWISE ESTABLISHES PROBABLE CAUSE** – In U.S. v. Grubbs, 126 S.Ct. 1494 (2006), the U.S. Supreme Court issues a unanimous decision reversing a Ninth Circuit Court of Appeals decision that was reported in the **October 2004 LED**. The U.S. Supreme Court holds that the Fourth Amendment does not require as to anticipatory search warrants that the triggering condition for the anticipatory warrant be set forth in the search warrant itself, so long as probable cause for the search is established in the supporting affidavit, including a description of the triggering condition in the affidavit.

The Grubbs case deals with an anticipatory search warrant for child pornography. Investigators were responding to a purchase order that Mr. Grubbs placed for child pornography. The purchase order by Mr. Grubbs requested that the child pornography be delivered to his home address.

The search warrant in Grubbs described the place to be searched (Grubbs' home) and the item to be searched for and seized (the child pornography). The search warrant did not describe the event that would trigger lawful execution of the warrant. An affidavit in support of the search warrant did describe the triggering event (i.e., delivery of the child porn to Grubbs' home by an undercover postal inspector), but the search warrant did not incorporate the affidavit by reference. Consistent with standard lawful practice where the affidavit has not been incorporated in the warrant, the officers executing the search warrant in the Grubbs case did not show the affidavit to the residents at the premises, nor did they leave a copy of the affidavit after completing the search and leaving a copy of the warrant.

“Anticipatory search warrants” are search warrants that become operative only when some future event occurs. The U.S. Supreme Court declares in the Grubbs case that an anticipatory search warrant is properly supported if the affidavit supporting the search warrant satisfies **two requirements**: 1) the affidavit establishes that the triggering event - - usually, a controlled delivery of contraband to a residence - - probably will occur; and 2) the affidavit’s description of the triggering event, together with other facts described in the affidavit, establishes probable cause to search a particular premises. Compare State v. Goble, 88 Wn. App. 503 (Div. II, 1997) **Jan 98 LED:15** In Goble, the affidavit described an anticipated controlled delivery of illegal drugs to a post office box in town, not to the person’s home, and the affidavit for the anticipatory warrant in that case was held not to justify a search of the home - - the Washington Court of

Appeals held that it was not probable that the suspect would pick up the package at the post office and take it home.

Anticipatory search warrants are most often used when contraband (usually illegal drugs) is first lawfully intercepted in transit (whether by government agents or private citizens), and then is transmitted by law enforcement agents to the particular fixed premises (a residence or business) intended by the sender. The anticipatory search warrant will authorize a search of the addressee's premises at the point when the delivery and taking of the item into the home - - the "triggering event" - - has occurred. Compare the Washington Court of Appeals decision in State v. Nusbaum, 126 Wn. App. 160 (Div. II, 2005) **April 05 LED:20**, where the officers jumped the gun by arresting the suspect on his porch before he took the package into his home, thus defeating their anticipatory search warrant authority.

In Grubbs, the Ninth Circuit of the U.S. Court of Appeals had held that there was a **third paperwork requirement for anticipatory search warrants**, this one relating to the warrant itself. The Ninth Circuit held that the warrant must describe the triggering event with particularity. As noted above, ordinarily an affidavit that is not incorporated in a search warrant would not have to be shown to persons at premises searched or left there after the search. The Ninth Circuit held, however, that as to anticipatory search warrants: 1) either the warrant itself must describe the triggering event and the warrant must be shown to those at the residence and left there after the execution; or 2) the affidavit must be incorporated in the warrant and then both the warrant and the incorporated affidavit must be presented when the warrant is executed, and both the affidavit and the warrant must be left at the scene following the search. Thus, the Ninth Circuit Court of Appeals held that the Grubbs warrant was invalid under the particularity requirement of the Fourth Amendment because the search warrant did not describe in the warrant itself the triggering condition (i.e., the resident's taking of the package into the residence) for executing the warrant.

As noted above, however, the U.S. Supreme Court reverses on grounds that the particularity requirement of the Fourth Amendment does not require the description of the triggering event in the warrant. The search under the anticipatory search warrant is valid so long as: (1) the warrant describes the place, persons and things to be searched for and seized; and (2) the affidavit supporting the warrant describes the triggering event and otherwise establishes probable cause for the search. These requirements were met in this case, the U.S. Supreme Court holds.

Result of Supreme Court decision: Reversal of Ninth Circuit decision and reinstatement of U.S. District Court conviction of Jeffrey Grubbs for receiving child pornography in violation of federal child pornography laws.

LED EDITORIAL COMMENT: Maybe in an abundance of caution (out of concern that the ever-unpredictable Washington Supreme Court might adopt the Ninth Circuit view of the particularity requirement for anticipatory search warrants as an "independent grounds" reading of the Washington constitution, article 1, section 7), Washington officers drawing up paperwork for anticipatory search warrants to be issued by Washington state courts may wish to describe the triggering condition in both the warrant and in the affidavit.

(2) UNDER THE FOURTH AMENDMENT, IF ONE COHABITANT CONSENTS TO A WARRANTLESS, NON-EXIGENT POLICE SEARCH OF A RESIDENCE AND ANOTHER COHABITANT IS PRESENT AND OBJECTS TO THE SEARCH, POLICE DO NOT HAVE VALID CONSENT TO SEARCH AS AGAINST THE OBJECTING COHABITANT;

WASHINGTON'S CONSTITUTION IS MORE RESTRICTIVE AND WOULD REQUIRE EXPRESS CONSENT FROM ALL PRESENT COHABITANTS, NOT JUST THE ABSENCE OF OBJECTION FROM ONE – In Georgia v. Randolph, 126 S.Ct. 1515 (2006), the U.S. Supreme Court issues a 5-3 decision holding that a warrantless search for evidence in a shared dwelling under non-exigent, non-emergency circumstances cannot be justified under the Fourth Amendment based on consent of one cohabitant when another cohabitant of the dwelling is present and expressly refuses consent prior to the search.

In Randolph, Georgia police officers were called to a private residence during a married couple's argument over a child custody matter reported to police by the wife. No domestic violence had occurred and no other crime was suspected when officers arrived at the residence. The wife told police about the child custody matter, and she also reported that her husband was a cocaine user. The husband arrived home while the wife was talking to police. She then volunteered that there was evidence of her husband's cocaine use in the home. An officer asked the husband for consent to search the home, and he refused. The officer then asked the wife for consent to search, and she said "yes." Officers searched and found drug paraphernalia and cocaine residue. They then stopped the consent search and obtained a search warrant, which turned up more evidence of drug use by the husband.

The husband was charged with possession of cocaine. He moved to suppress the evidence. The trial court denied his motion, but the Georgia appellate courts reversed, holding the consent search to be invalid. The U.S. Supreme Court granted discretionary review.

As noted above, five of the eight justices of the U.S. Supreme Court voting in this case (Justice Alito did not participate) agree in Randolph that refusal of consent by a present expressly objecting cohabitant bars use of evidence against that cohabitant where the evidence is obtained in a search of a residence based solely on consent of another cohabitant. Two of the justices in the Randolph majority write separate opinions, and all three of the dissenting justices write separate opinions. Because the views of the five justices in the majority do not deviate from the general summary of the holding that we have presented above, and because we believe that the differences in analysis among the U.S. Supreme Court justices in this case are not critical to Washington officers (see our editorial commentary below), we will not explore those differences of opinion in this **LED** entry.

Result: Affirmance of Georgia Supreme Court decision directing the Georgia trial court to suppress the evidence against Scott Fitz Randolph.

LED EDITORIAL COMMENTS:

1) **Washington consent search case law is more restrictive than Fourth Amendment case law and requires consent from all present cohabitants:** We think that the Randolph decision should have no effect on Washington court rulings on consent searches of residences and buildings by Washington officers. We reach this conclusion based on the more restrictive Washington Supreme Court decisions in the following cases: State v. Leach, 113 Wn.2d 735 (1989) (announcing a mutual-consent-of-all-present-cohabitants rule); State v. Walker, 136 Wn.2d 767 (1998) Jan 99 **LED**:03 (applying the Leach rule to exclude evidence only as to the cohabitant who was not asked for consent); and State v. Morse, 156 Wn.2d 1 (2005) Feb 06 **LED**:02 (establishing the Washington rule as an "independent grounds" rule under article 1, section 7 of the Washington constitution; rejecting "apparent authority" as a consent search rationale under article 1, section 7; and also tightening the rule under the Washington constitution by requiring consent

even from a present co-occupant not known by police to be present at the time that they are requesting consent to search).

Note, however, that in State v. Cantrell, 124 Wn.2d 183 (1994) Sept 04 LED:05, the Washington Supreme Court held that the mutual-consent rule of Leach does not apply to consent searches of vehicles. Reading the Randolph decision together with the Cantrell decision, we think that in requesting consent to search a vehicle, Washington officers generally would not be required to request consent from two or more persons in the vehicle with co-equal authority to consent to a search (per Cantrell), but that (per Randolph) Washington officers would not have a valid consent to search as to the non-consenting person if that person expressly objected to the search.

Finally, note also that in State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) Nov 01 LED:08, Division Two of the Washington Court of Appeals held that the Leach rule does not preclude officers from obtaining consent from just one of two present cohabitant where the consent is merely to police entry into the living room of a home through the front door of the home. In light of the tenor, though not necessarily the text, of the Morse decision of the Washington Supreme Court cited above (which actually cited Hoggatt with approval), we are not certain how the Washington Supreme Court would rule if squarely presented with this issue. Washington officers contacting a cohabitant at the front door probably should try to get all present cohabitants to come to the door, and then should ask all present cohabitants for consent to entry before asking for consent to even enter the premises. Note also that the U.S. Supreme Court's lead opinion in Randolph appears to suggest that, if officers are seeking even just mere permission to enter (as opposed to search) a premises, an objection from any cohabitant makes entry non-consenting.

2) No exigent or emergency circumstances were present in Randolph: In the aggregate, the U.S. Supreme Court opinions by the several justices in Randolph make clear that the Court would have allowed the warrantless search if there had been exigent circumstances (such as an investigation of domestic violence where a victim was at risk of further assault) or emergency circumstances. For some illustrative Washington decisions on exigent circumstances and emergency circumstances in this context, see: State v. Johnson, 104 Wn. App. 409 (Div. II, 2001) Apr 01 LED:09 (where police responded to a 911 call reporting DV assault committed by a man against a woman reported by the caller to now be hiding in a bathroom, the emergency exception to the warrant requirement permitted the officers, even after they arrested a male suspect and talked to a likely female victim, to go into the target home in search of another possible victim); State v. Jacobs, 101 Wn. App. 80 (Div. II, 2000) Nov 2000 LED:15 (where a home owner who was currently protected by a DV no-contact order placed a 911 call to report DV, but then told police upon their arrival at his home that "It's fine, he's left", police were justified by exigent circumstances in entering the target home to see if someone inside was in need of assistance); State v. Menz, 75 Wn. App. 351 (Div. II, 1994) Feb 95 LED:17 (where an anonymous 911 caller reported sounds of DV, and, upon police arrival at the target residence, the front door was open on a cold winter night, the TV was on, and no one responded to the officers' knock and announce, exigent circumstances justified the officers going inside the target residence to check on the status of the occupants); State v. Raines, 55 Wn. App. 459 (Div. I, 1989) (where officers were responding to a DV report from a neighbor, the officers knew of a history of DV between the residents at the target residence, the officers saw a man looking out of a window as they arrived, and a woman answered the door and said there was no problem and no one else was there but she and son, the officers were justified under the exigent circumstances exception in making a warrantless

entry to look for a suspect); State v. Lynd, 54 Wn. App. 18 (Div. I, 1989) (where 911 received a hang-up call from a residence, a “busy” signal was gotten on attempted call-back, and the dispatched officers, upon their arrival, encountered a man outside of the target house with a cut on his face, and the man admitted to exchanging facial blows with his wife, but said that she was no longer in the home, the officers were justified under the exigent circumstances exception in making a warrantless entry to search for the man’s spouse).

3) The Georgia police officers in Randolph might instead have secured the premises and sought a search warrant: Sometimes officers seek consent to search because they do not have probable cause to search and hence seeking a warrant would be futile. But as the majority opinion in Randolph suggests, it is possible that the Georgia officers quickly could have developed probable cause to search the home by getting a few details about the drug-use evidence from the wife. Then, based on exigency plus probable cause, they could have secured the residence and immediately sought a search warrant. See Illinois v. McArthur, 531 U.S. 326 (2001) April 01 LED:02 (U.S. Supreme Court holds that officers who develop PC to search residence while there for an unrelated purpose may secure the premises without searching it and expeditiously seek a search warrant); State v. Solberg, 66 Wn. App. 66 (Div. I, 1992) Nov 92 LED:10) (Washington Court of Appeals makes similar ruling; case was further reviewed by Washington Supreme Court, but this issue was not addressed in the Supreme Court opinion in the case).

9TH CIRCUIT, U.S. COURT OF APPEALS

FEDERAL CIVIL RIGHTS LAWSUIT – KNOWN FACTS GIVING PROBABLE CAUSE FOR A LAWFUL ARREST AS TO CRIME OF IMPERSONATING AN OFFICER HELD TO SUPPORT ARREST FOR PURPOSES OF DEFENDING AGAINST SECTION 1983 CIVIL RIGHTS ACTION UNDER “QUALIFIED IMMUNITY” DOCTRINE

Alford v. Haner, ___ F.3d ___, 2006 WL 1084346 (9th Cir. 2006)

LED EDITORIAL INTRODUCTORY NOTE: We reported in the February 2005 LED that the WSP and its officers prevailed on a “qualified immunity” issue in the U.S. Supreme Court in Devenpeck v. Alford, 543 U.S. 146 (2004) Feb 05 LED:02. The U.S. Supreme Court decision is again excerpted here, followed by description of and excerpting from the Ninth Circuit’s action after the remand of the case from the Supreme Court.

Facts as described in the U.S. Supreme Court opinion:

On the night of November 22, 1997, a disabled automobile and its passengers were stranded on the shoulder of State Route 16, a divided highway, in Pierce County, Washington. Alford v. Haner, 333 F.3d 972, 974 (C.A.9 2003) **Sept 03 LED:03**. Respondent Jerome Alford [plaintiff in the subsequent lawsuit] pulled his car off the road behind the disabled vehicle, activating his "wig-wag" headlights (which flash the left and right lights alternately). As he pulled off the road, Officer Joi Haner of the Washington State Patrol, one of the two petitioners here, passed the disabled car from the opposite direction. He turned around to check on the motorists at the first opportunity, and when he arrived, [Alford], who had begun helping the motorists change a flat tire, hurried back to his car and drove away. The stranded motorists asked Haner if [Alford] was a "cop"; they said that

[Alford]'s statements, and his flashing, wig-wag headlights, had given them that impression. They also informed Haner that as [Alford] hurried off he left his flashlight behind.

On the basis of this information, Haner radioed his supervisor, Sergeant Gerald Devenpeck, the other petitioner here, that he was concerned [Alford] was an "impersonator" or "wannabe cop." He pursued [Alford]'s vehicle and pulled it over. Through the passenger-side window, Haner observed that [Alford] was listening to the Kitsap County Sheriff's Office police frequency on a special radio, and that handcuffs and a hand-held police scanner were in the car. These facts bolstered Haner's suspicion that [Alford] was impersonating a police officer. Haner thought, moreover, that [Alford] seemed untruthful and evasive: He told Haner that he had worked previously for the "State Patrol," but under further questioning, claimed instead to have worked in law enforcement in Texas and at a shipyard. He claimed that his flashing headlights were part of a recently installed car-alarm system, and acted as though he was unable to trigger the system; but during these feigned efforts Haner noticed that [Alford] avoided pushing a button near his knee, which Haner suspected (correctly) to be the switch for the lights.

Sergeant Devenpeck arrived on the scene a short time later. After Haner informed Devenpeck of the basis for his belief that [Alford] had been impersonating a police officer, Devenpeck approached [Alford]'s vehicle and inquired about the wig-wag headlights. As before, [Alford] said that the headlights were part of his alarm system and that he did not know how to activate them. Like Haner, Devenpeck was skeptical of [Alford]'s answers. In the course of his questioning, Devenpeck noticed a tape recorder on the passenger seat of [Alford]'s car, with the play and record buttons depressed. He ordered Haner to remove [Alford] from the car, played the recorded tape, and found that [Alford] had been recording his conversations with the officers. Devenpeck informed [Alford] that he was under arrest for a violation of the Washington Privacy Act, Wash. Rev.Code § 9.73.030 (1994). [Alford] protested that a state court-of-appeals decision, a copy of which he claimed was in his glove compartment, permitted him to record roadside conversations with police officers. Devenpeck returned to his car, reviewed the language of the Privacy Act, and attempted unsuccessfully to reach a prosecutor to confirm that the arrest was lawful. Believing that the text of the Privacy Act confirmed that [Alford]'s recording was unlawful, he directed Officer Haner to take [Alford] to jail.

A short time later, Devenpeck reached by phone Mark Lindquist, a deputy county prosecutor, to whom he recounted the events leading to [Alford]'s arrest. The two discussed a series of possible criminal offenses, including violation of the Privacy Act, impersonating a police officer, and making a false representation to an officer. Lindquist advised that there was "clearly probable cause," and suggested that [Alford] also be charged with "obstructing a public servant" "based on the runaround [he] gave [Devenpeck]." Devenpeck rejected this suggestion, explaining that the State Patrol does not, as a matter of policy, "stack charges" against an arrestee.

At booking, Haner charged [Alford] with violating the State Privacy Act, and issued a ticket to [Alford] for his flashing headlights under Wash. Rev.Code §

46.37.280(3) (1994). Under state law, [Alford] could be detained on the latter offense only for the period of time "reasonably necessary" to issue a citation. § 46.64.015 (1994). The state trial court subsequently dismissed both charges.

Proceedings in the case, as described in the U.S. Supreme Court decision:

[After the jury returned a verdict in favor of the WSP officers] a divided panel of the Court of Appeals for the Ninth Circuit reversed, finding "no evidence to support the jury's verdict." The majority concluded that [officers] could not have had probable cause to arrest because they cited only the Privacy Act charge and "[t]ape recording officers conducting a traffic stop is not a crime in Washington." The majority rejected [the officers'] claim that probable cause existed to arrest [Alford] for the offenses of impersonating a law-enforcement officer, Wash. Rev.Code § 9A.60.040(3) (1994), and obstructing a law-enforcement officer, § 9A.76.020, because, it said, those offenses were not "closely related" to the offense invoked by Devenpeck as he took [Alford] into custody. The majority also held that there was no evidence to support [the officers'] claim of qualified immunity, since, given the Washington Court of Appeals' decision in [State v. Flora, 68 Wn. App. 802 (Div. I, 1992) **July 93 LED:17**], "no objectively reasonable officer could have concluded that arresting [[Alford]] for taping the traffic stop was permissible." Judge Gould dissented on the ground that it was objectively reasonable for [the officers] to believe that [Alford] had violated the Privacy Act.

Analysis in U.S. Supreme Court opinion:

Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. In this case, the Court of Appeals held that the probable-cause inquiry is further confined to the known facts bearing upon the offense actually invoked at the time of arrest, and that (in addition) the offense supported by these known facts must be "closely related" to the offense that the officer invoked. We find no basis in precedent or reason for this limitation.

Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause [under the Fourth Amendment]. Whren v. United States, 517 U.S. 806 (1996) **Aug 96 LED:09**. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. . . .

The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer--eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not "closely related" to that subjective reason. This means that the constitutionality of an arrest under a given set of known facts will "vary from place to place and from time to time," depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable,

veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection.

Those who support the "closely related offense" rule say that, although it is aimed at rooting out the subjective vice of arrests made for the wrong reason, it does so by objective means--that is, by reference to the arresting officer's statement of his reason. The same argument was made in Whren, in defense of the proposed rule that a traffic stop can be declared invalid for malicious motivation when it is justified only by an offense which standard police practice does not make the basis for a stop. That rule, it was said, "attempt[s] to root out subjective vices through objective means." We rejected the argument there, and we reject it again here. Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

Finally, the "closely related offense" rule is condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required. Hence, the predictable consequence of a rule limiting the probable-cause inquiry to offenses closely related to (and supported by the same facts as) those identified by the arresting officer is not, as [Alford] contends, that officers will cease making sham arrests on the hope that such arrests will later be validated, but rather that officers will cease providing reasons for arrest. And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which probable cause could conceivably exist.

The facts of this case exemplify the arbitrary consequences of a "closely related offense" rule. Officer Haner's initial stop of [Alford] was motivated entirely by the suspicion that he was impersonating a police officer. Before pulling [Alford] over, Haner indicated by radio that this was his concern; during the stop, Haner asked [Alford] whether he was actively employed in law enforcement and why his car had wig-wag headlights; and when Sergeant Devenpeck arrived, Haner told him why he thought [Alford] was a "wannabe cop." In addition, in the course of interrogating [Alford], both officers became convinced that he was not answering their questions truthfully and, with respect to the wig-wag headlights, that he was affirmatively trying to mislead them. Only after these suspicions had developed did Devenpeck discover the taping, place [Alford] under arrest, and offer the Privacy Act as the reason. Because of the "closely related offense" rule, Devenpeck's actions render irrelevant both Haner's developed suspicions that [Alford] was impersonating a police officer and the officers' shared belief that [Alford] obstructed their investigation. If Haner, rather than Devenpeck, had made the arrest, on the stated basis of *his* suspicions; if Devenpeck had not abided the county's policy against "stacking" charges; or if either officer had made the arrest without stating the grounds; the outcome under the "closely related offense" rule might well have been different. We have consistently rejected a conception of the Fourth Amendment that would produce such haphazard results, see Whren.

[Alford] contended below that [the WSP troopers] lacked probable cause to arrest him for obstructing a law-enforcement officer or for impersonating a law-enforcement officer. Because the Court of Appeals held that those offenses were legally irrelevant, it did not decide the question. We decline to engage in this inquiry for the first time here. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

[Footnotes, some citations omitted]

Post-remand action by Ninth Circuit:

After remand from the U.S. Supreme Court, on August 9, 2005 a three-judge Ninth Circuit panel voted to remand the case to the U.S. District Court for hearings to determine whether the officers had probable cause to arrest Alford for impersonating an officer. However, WSP and the officers then moved for a re-hearing, arguing that remand was unnecessary, and that the Ninth Circuit should decide as a matter of law that the officers did have probable cause to arrest Alford for impersonating an officer. On April 26, 2006, the Ninth Circuit entered a 2-1 decision granting re-hearing and agreeing with WSP and the officers that the arrest for impersonating an officer was justified by probable cause. The Court's analysis of this probable cause question is as follows:

After careful review, the majority finds that there is sufficient evidence in the record to support a finding of objective probable cause to arrest Alford for the misdemeanor offense of criminal impersonation in the second degree. See Wash. Rev.Code § 9A.60 .040(3) (West 1996). [*Court's footnote: In relevant part § 9A.60.040(3) states: A person is guilty of criminal impersonation in the second degree if the person: (a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and (b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person would believe the person is a law enforcement officer.*]

Specifically, the jury heard testimony that, at the time he arrested Alford, Officer Haner had been told by the motorists Alford aided that they thought he was a police officer and he had been using wig-wag headlights when he pulled in behind them. [*Court's footnote: Alford has argued that there could not have been probable cause for this offense because his alleged use of wig-wag lights and original interaction with the motorists did not occur in Officer Haner's presence. It may be that Alford's arrest violated Washington law in this regard. See Wash. Rev.Code § 10.31.100 (West 1996) (authorizing warrantless misdemeanor arrest only when the offense is committed in the presence of the officer or is a listed offense). However, in the absence of direction from the [U.S.] Supreme Court, we have held that the common law "in the presence" requirement is not a constitutional one. See Barry v. Fowler, 902 F.2d 770, 772 (9th Cir.1990).*]

Additionally, Haner himself observed a police-style radio, a portable radio scanner, and handcuffs in Alford's car prior to the arrest. We conclude that those facts and circumstances are sufficient to warrant a reasonable officer in Haner's position to believe that Alford had impersonated a law enforcement officer.

[Some citations omitted]

Status: Review at the Ninth Circuit is complete. Time remains for Alford to seek discretionary review in the U.S. Supreme Court (acceptance of any such petition seems very unlikely, however).

LED EDITORIAL NOTE: The final footnote quoted above from the Ninth Circuit's post-remand decision is consistent with the Washington Court of Appeals decision in Torrey v. City of Tukwila, 76 Wn. App. 32, 37 (Div. I, 1994) May 95 LED:19 (even if arrest violates Washington's "misdemeanor presence" rule, and would support suppression of evidence in a Washington prosecution, that would not make the arrest a Fourth Amendment violation, and hence would not be support for a federal civil rights lawsuit).

BRIEF NOTE FROM THE 9TH CIRCUIT, U.S. COURT OF APPEALS

PROBABLE CAUSE TO SEARCH SUSPECT'S COMPUTER FOR CHILD PORN ESTABLISHED BY AFFIDAVIT EXPLAINING, AMONG OTHER THINGS, THAT THE SUSPECT SUBSCRIBED TO A CHILD PORN WEBSITE FOR THE WEBSITE'S FINAL TWO MONTHS BEFORE THE GOVERNMENT SHUT THE WEBSITE DOWN – In U.S. v. Gourde, 440 F.3d 1065 (9th Cir. 2006), the Ninth Circuit of the U.S. Court of Appeals votes, 9-2, in what is known as "en banc" review, to overturn an earlier Ninth Circuit three-judge-panel's ruling that had invalidated an FBI search under a search warrant (the earlier, now-overturned, Ninth Circuit decision was reported in the **November 2004 LED**). The en banc majority opinion holds that the search warrant affidavit describing the FBI investigation established probable cause to seize the computer of Micah Gourde, a man from Castle Rock, Clark County, Washington, for evidence that he had "uploaded, downloaded or transmitted child pornography" over the Internet.

At the trial court level, the U.S. District Court (in Tacoma) denied Micah Gourde's motion to suppress more than 100 images of child pornography found on his home computer. Gourde claimed the affidavit supporting the search warrant did not establish probable cause because the affidavit contained no evidence that he actually downloaded or possessed child pornography. According to the search warrant affidavit, Gourde intentionally joined a child porn website ("Lolitagurls.com"), maintained his subscription for a few months, and had not un-subscribed at the point when the federal government shut down the website. Because of the set-up of the site, it was almost a certainty that Gourde would have seen the child porn pictures on the website when he visited the site. The district court concluded that it was a reasonable inference that Gourde had in fact downloaded child-porn images, and that such images were still in his computer, and that this met the "fair probability" test for the probable cause necessary to satisfy the Fourth Amendment. Part of the probable cause information in the affidavit was "profile" information about child porn collectors (note that "profile" information may be reviewed more stringently by the Washington courts than by the federal courts - - see State v. Thein, 138 Wn.2d 1343 (1999) **Aug. 99 LED:15**).

Gourde then pleaded guilty while preserving his right to appeal the suppression ruling. As was previously reported in the LED, a three-judge panel voted unanimously to reverse, concluding that there was not probable cause to believe that Gourde had actually downloaded any of the images from the website. See **Nov 04 LED:02**. Then the Ninth Circuit granted en banc (11-

judge) review, and, as noted above, reversed the three-judge panel's ruling and held that the U.S. District Court had made a "practical, common sense decision" that there was a "fair probability" that Gourde had downloaded child porn, and that child porn would be found on Gourde's computer.

The difference of opinion between the nine judges in the majority and the two dissenters is mostly a difference of opinion as to how demanding the "probable cause" standard is, but there may also be some differences in their respective views of the nature of computers and the internet and end-users' interactions with each. The majority judges note that the affidavit included facts that made it "fairly probable" that Gourde collected child porn. As noted, the affidavit established that Gourde intentionally joined and did not unsubscribe from a website ("Lolitagurls.com") that included sexually explicit child-porn pictures. The majority finds that the reasonable inference that Gourde had in fact downloaded child-porn images, and that such images were still in his computer, easily met the "fair probability" test for probable cause necessary to satisfy the Fourth Amendment. In part, the majority relies on the child porn collector "profile" information in the FBI agent's affidavit.

Dissenter Judge Reinhardt, who often is critical of law enforcement actions, criticizes the majority opinion for ignoring what he believes was an important factual circumstance in the case. At the time the government sought the warrant, the government already had in its possession, but chose not to use, possible direct evidence that could have established whether Gourde in fact had downloaded illegal images. The government had in its possession the website operator's computer. The affidavit for the warrant stated that the government had the website owner's computer, but the affidavit did not report whether the website owner's computer had been searched for downloads sent to the suspect Gourde. At worst, Judge Reinhardt says, the government's choice not to use this information suggests that the government had in fact accessed the information and found that Gourde had not actually downloaded any illegal images (which, if true, is information the government would be required to include in the affidavit). The majority refuses to engage in such speculation and asserts that this circumstance of concern to Judge Reinhardt does not negate probable cause.

Dissenter Judge Kleinfeld addresses more general concerns about privacy of computer users. He notes his concern that "[t]here are just too many secrets on people's computers... for loose liberality in allowing search warrants." Judge Kleinfeld distinguishes the mere viewing of child porn and the downloading of child porn, and he points out that the two child pornography statutes at issue do not say that merely viewing child pornography is a crime. Judge Kleinfeld contends that the fear of legal trouble might have dissuaded Gourde from downloading images as opposed to merely looking at them. Judge Kleinfeld opines that "looking" at computer images is not "receiving" such images, just as looking at the Mona Lisa at the Louvre in France is not "receiving" the Mona Lisa.

Result: Affirmance of Micah J. Gourde's U.S. District Court (Western District, Tacoma) conviction on guilty plea to one count of possession of child pornography.

LED EDITORIAL NOTES: This case could end up in the U.S. Supreme Court on further review. It is a helpful case for officers who investigate cases involving possible computer-transmitted child porn. Drafting affidavits and search warrants to search computers and to search for child and adult pornography requires special expertise. For those who wish to read the entire final Ninth Circuit decision in Gourde, see the information in the "Internet Access" entry at the end this LED (and all other LEDs) about accessing the Internet website containing the Ninth Circuit's decisions. The date of the

final Ninth Circuit Gourde decision, needed for finding the opinion on the Ninth Circuit website, is March 9, 2006. Another recent instructive Ninth Circuit decision upholding a child porn search warrant is U.S. v. Williamson, 438 F.3d 1125 (9th Cir. 2006), decided by the Ninth Circuit on March 13, 2006.

WASHINGTON STATE SUPREME COURT

SUPREME COURT UPHOLDS SEARCHES INCIDENT TO ARRESTS FOR DWLS IN THE THIRD DEGREE THAT WERE MADE BEFORE THE COURT DECIDED REDMOND V. MOORE

State v. Potter, State v. Holmes, ___ Wn.2d ___, ___ P.3d ___, 2006 WL 1119261 (2006)

Factual and Procedural Background: (Excerpted from brief summary in the Supreme Court opinion)

In City of Redmond v. Moore, 154 Wn.2d 664 (2004) **July 04 LED:06** we held that some procedures by which the Department of Licensing (DOL) automatically suspended driver's licenses violated due process. In this consolidated case, police officers arrested petitioners for the offense of driving while license suspended (DWLS). During searches incident to their arrests, police officers found evidence of controlled substances. The incidents occurred prior to our decision in Moore. The State charged petitioners with unlawful possession of controlled substances. Relying on Moore, the trial courts granted their motions to suppress the evidence and dismissed the charges. Divisions One and Three of the Court of Appeals reversed. [See **Jan 06 LED:22.**]

ISSUE AND RULING: Where the law enforcement officers made DWLS-three arrests based on probable cause, and where the arrests were made before the Supreme Court decided the case of Redmond v. Moore that made it impossible to successfully prosecute some DWLS-three cases, were the arrests valid and the searches incident to those arrests also valid? (ANSWER: Yes, rules a unanimous Court).

Result: Affirmance of Division three decisions that reversed a Spokane County Superior Court suppression order in a methamphetamine-possession prosecution against Jacob James Potter; Affirmance of Division One decision that reversed a Snohomish County Superior Court suppression order in heroin-possession prosecution against Wayne H. Holmes; cases remanded to the respective superior courts for possible trial.

ANALYSIS: (Excerpted from Supreme Court opinion)

In Moore, we held the procedure by which the DOL automatically suspended an individual's driver's license for failing to appear, pay, or comply with a traffic citation violated due process. We held that former RCW 46.20.289 (2002), which authorized the mandatory suspension of a driver's license without an opportunity for an administrative hearing, and former RCW 46.20.324(1) (1965), which provided that a person shall not be entitled to a driver improvement interview or formal hearing, failed to provide adequate due process. We did not invalidate the crime of DWLS under RCW 46.20.342(1), but dismissed the DWLS charges on

the grounds that a driver could not be convicted of the offense of DWLS where the underlying suspension violated due process.

[Potter and Holmes] argue that Moore renders their arrests invalid because Moore held the procedures by which the DOL suspended their licenses unconstitutional. They contend that RCW 46.20.342(1)(c)(iv), which defines the crime of DWLS, is necessarily invalid in light of Moore because the statute incorporates, depends upon, and uses the precise language from the statutes Moore declared unconstitutional.

The State argues that the arrests were valid because the police had probable cause to believe the petitioners had committed the crime of DWLS based on the DOL records indicating their licenses were suspended. The State points out that since Potter and Holmes were not charged with DWLS, the question is whether police had probable cause to believe they had committed a valid crime at the time of their arrests. Because we had not ruled on the constitutionality of the license suspension procedures at the time of their arrests, the State contends that [Potter and Holmes] could be convicted of DWLS regardless of the procedures by which the DOL had suspended or revoked their licenses. Therefore, the State argues, their arrests were valid.

We agree that to support [Potter's and Holmes'] arrests, police needed probable cause to believe [Potter and Holmes] had committed the crime of DWLS. In State v. Gaddy, 152 Wn.2d 64 (2004) **Sept 04 LED:19**, we held that information supplied by the DOL record check is presumed reliable and may form the basis of probable cause to arrest an individual for driving with a suspended driver's license. Police must have reliable information about the status of an individual's license, not necessarily the specific basis for which an individual's license was suspended. Here, information from the DOL records provided officers with reasonably trustworthy information sufficient to establish probable cause to believe [Potter's and Holmes'] licenses were suspended. The subsequent invalidation of some of the license suspension procedures does not void the probable cause that existed to arrest [Potter and Holmes] for the crime of DWLS. Even after our decision in Moore, the crime of DWLS still exists. That a conviction for DWLS could not be later supported at trial, for whatever reason, does not invalidate the probable cause foundation for the arrest.

[Potter and Holmes] rely on State v. White, 97 Wn.2d 92 (1982), where we recognized a narrow exception to the general rule that police are charged to enforce laws until and unless they are declared unconstitutional. Under this general rule, an arrest under a statute that is valid at the time of the arrest and supported by probable cause remains valid even if the basis for the arrest is later held unconstitutional. The rule comes from the United States Supreme Court holding in Michigan v. DeFillippo, 422 U.S. 31 (1979), that "[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality--with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." In White, we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception for a law " 'so grossly and flagrantly unconstitutional' " that any

reasonable person would see its flaws. We deemed the exception applied to the stop-and-identify statute because "substantially the same language in a different statute has been adjudicated unconstitutional by a court of this state," and therefore, police should have known "by virtue of [the] prior dispositive judicial holding that it may not serve as the basis of a valid arrest." For that reason, we held the evidence in White's case inadmissible.

That exception, however, does not apply here. [Potter and Holmes] were arrested for the crime of DWLS. Moore invalidated some of the statutes setting forth license suspension procedures, but did not invalidate the DWLS statute that provided the basis for petitioners' arrests. As noted, DWLS remains a valid crime. This is unlike White, where we held the basis for White's arrest, the stop-and-identify statute, was unconstitutional.

Moreover, in White, we deemed the narrow exception for a "grossly and flagrantly" unconstitutional statute applied because of the prior dispositive ruling, holding the language of the statute at issue unconstitutional. In contrast to White, no cases have held that license suspension procedures generally are unconstitutional. Accordingly, White does not apply here.

[Some citations omitted]

WASHINGTON STATE COURT OF APPEALS

PROBABLE CAUSE FOUND FOR ARREST FOR POSSESSING DRUG PARAPHERNALIA IN VIOLATION OF COUNTY ORDINANCE; ALSO, COUNTY ORDINANCE PROHIBITING POSSESSION OF DRUG PARAPHERNALIA WITH INTENT TO USE IS UPHOLD AGAINST A PREEMPTION ATTACK BASED ON THE LESS PROHIBITIVE STATE STATUTE

State v. Fisher, ___ Wn. App. ___, 130 P.3d 382 (Div. I, 2006)

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

On August 4, 2004, Snohomish County Sheriff's Deputy Mike Wilson and another officer encountered Keith Fisher and two other men while investigating a possible disturbance at a local park. Wilson recognized Fisher and knew that Fisher had a criminal history and was a suspect in a recent theft of a firearm.

With Fisher's assent, Wilson conducted a pat-down search for weapons. He detected in Fisher's pants pocket an object that Fisher said was a pipe. Wilson removed it and saw that it was a glass pipe with a bulb at one end and burnt residue. He recognized the pipe as drug paraphernalia. Fisher stated that the pipe was not his. Wilson arrested him for possession of drug paraphernalia. SCC [Snohomish County Code] 10.48.020 prohibits possession of drug paraphernalia with intent to use.

Wilson conducted a search incident to arrest. He found a baggie containing 13 smaller baggies. Five of the smaller baggies contained a white powder residue. The white powder residue tested positive for methamphetamine. The State charged Fisher with possession of a controlled substance.

Prior to the trial for the charge for possession of a controlled substance, Fisher moved to suppress the evidence. The trial court ruled that state law did not preempt or conflict with the nonpunishment provisions of SCC 10.48.020, and it denied Fisher's motion. Fisher was tried and convicted.

ISSUES AND RULINGS: 1) Was the arrest under the Snohomish County drug paraphernalia ordinance supported by probable cause to believe that Fisher intended to use the drug pipe? (ANSWER: Yes; Fisher had the pipe on his person, and the pipe contained residue); 2) Does the state's Uniform Controlled Substances Act (chapter 69.50 RCW) – which does not prohibit possession of drug paraphernalia with intent to use – preempt or otherwise conflict with the prohibition to this effect in the Snohomish County ordinance? (ANSWER: No)

Result: Affirmance of Snohomish County Superior Court conviction of Keith Burlin Fisher for possession of methamphetamine that police found on Fisher's person in the search incident to arrest for possessing drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause

We begin by analyzing Fisher's claim that the sheriff's deputy lacked probable cause to make an arrest for possession of drug paraphernalia with intent to use and that the subsequently gathered evidence should have been excluded. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." Fisher argues that his possession of the glass pipe was insufficient to create probable cause for possession with intent to use. He contends that possession with intent must involve evidence of intent beyond mere possession and that the facts of his arrest do not present such evidence. The circumstances of the deputy's encounter with Fisher, however, provide evidence beyond mere possession. The pipe contained burnt residue. Fisher told the deputy that the pipe was not his, but gave no other explanation for the pipe's presence on his person. The lack of explanation gave the deputy reasonable grounds to disbelieve Fisher's denial. Because the pipe was on Fisher's person and because it had been used to inhale a controlled substance, it was reasonable to conclude that Fisher possessed it with the intent to use it in the future. The deputy had probable cause to arrest Fisher.

2) Preemption, conflict issues

In City of Tacoma v. Luvene, 118 Wn.2d 826 (1992) **Aug 92 LED:09** our Supreme Court ruled that RCW 69.50.608 does not preempt the field of criminalization of drug-related activity. The statute "expressly contemplates the existence of 'ordinances relating to controlled substances that are consistent' with the UCSA." RCW 69.50.608 preempts only the setting of penalties for acts that violate the Act. SCC 10.48.020 is not inconsistent with the Act merely because it criminalizes possession of drug paraphernalia with intent to use and the state law does not. For this reason, the Act does not preempt the nonpenalty portion of SCC 10.48.020.

Fisher also contends that SCC 10.48.020 conflicts with [Washington's Uniform Controlled Substances Act]. (**LED EDITORIAL NOTE: We have omitted the Court's earlier explanation that the UCSA does not prohibit mere possession of drug paraphernalia with intent to use. RCW 69.50.412(1); State v. O'Neill, 148 Wn.2d 564 (2003) Apr. 03 LED:03**). "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." A local ordinance prohibiting certain behavior conflicts with a state statute only when the language of the state statute expressly or implicitly permits the behavior. See RCW 69.50.412(1). The nonpenalty portion of the Snohomish County ordinance prohibiting possession of drug paraphernalia with intent to use does not conflict with the Act. Fisher's suppression argument fails.

[Some citations and footnotes omitted]

EXPANSION OF TRAFFIC STOP BASED ON DRIVER'S DILATED PUPILS HELD JUSTIFIED

State v. Santacruz, ___ Wn. App. ___, ___ P.3d ___, 2006 WL 1099277 (Div. III, 2006)

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

An officer pulled Edward Santacruz over for driving with an expired vehicle registration. Mr. Santacruz admitted he had no driver's license. The officer noticed that the pupils of Mr. Santacruz's eyes were unusually dilated, but he did not smell any odor of alcohol. He asked Mr. Santacruz if he had recently "taken any type of drugs." Mr. Santacruz said he had used methamphetamine earlier in the day.

The officer then asked Mr. Santacruz if he had any drugs or paraphernalia in the car. Mr. Santacruz said no, but he did have a couple of syringes in his pocket. He consented to a quick search of his person and got out of the car. The officer found two syringes and a silver spoon with meth residue. The State charged Mr. Santacruz with possession.

Mr. Santacruz moved to suppress the evidence of drugs. The trial court considered affidavits and argument of counsel, and ruled that asking Mr. Santacruz about recent drug use was beyond the scope of the Terry stop. The focus of the stop was a defective registration. The court ruled, therefore, that only questions about registration and licensing were permissible. The court concluded that exceeding the justifiable scope of the initial stop invalidated Mr. Santacruz's admission that he used methamphetamine and his consent to the search.

The trial court then suppressed the evidence.

ISSUE AND RULING: Does the fact that defendant Santacruz had dilated pupils justify the officer's expansions of the traffic stop to ask Santacruz if he had recently taken drugs? (ANSWER: Yes)

Result: Reversal of Spokane County Superior Court suppression order; remand for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State contends that once Mr. Santacruz confirmed the officer's suspicion that he had used meth that day, it was reasonable and lawful to extend the scope of the stop to investigate possible driving under the influence. Mr. Santacruz contends that asking him about his dilated pupils was an improper extension of the scope of an otherwise legitimate Terry stop. The stop therefore had to be justified by an articulable suspicion of some further criminal activity. And dilated pupils, standing alone, were not sufficient to justify asking a question about drug use. Said another way, dilated pupils are an innocuous fact.

...

A Terry stop " 'is reasonable if the State 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 criminal activity." ' " This means the stop must be based on more than an officer's "inarticulate hunch."

The lawful scope of a Terry stop may be enlarged or prolonged as needed to investigate unrelated suspicions that crop up during the stop. The officer may " 'maintain the status quo momentarily while obtaining more information.' " But, to detain a suspect beyond what the initial stop demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity. State v. Henry, 80 Wn. App. 544 (Div. III, 1995) **Aug 96 LED:19**; **Oct 96 LED:19**; State v. Tijerina, 61 Wn. App. 626 (Div. III, 1991) **Oct 91 LED:12**.

The trial court here accepted Mr. Santacruz's implied premise that an officer needs more than a hunch before asking a question during an otherwise well-founded investigatory stop. While certainly an "inchoate hunch" is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions. They may expand the scope of the initial stop to encompass events occurring during the stop. They may ask a few questions to determine whether a further short intrusion is necessary to dispel their suspicions.

And we judge the lawfulness of the conduct on the information known to the officer at the time. The action must be " 'justified at its inception' " and " 'reasonably related in scope to the circumstances' " that justified the interference. Here, the officer's curiosity about Mr. Santacruz's condition was based on more than an inchoate hunch. Mr. Santacruz's pupils remained significantly dilated even after a flashlight was shined in his face. This was a specific, articulable reason to inquire further. Our focus here is on the officer's question, not Mr. Santacruz's reply. The officer tried to determine why Mr. Santacruz's eyes were dilated. That was a reasonable thing to do.

The trial court relied on three cases. All are distinguishable.

In [State v. Armenta, 134 Wn.2d 1 (1997) **March 98 LED:05**], two men asked a uniformed officer for help with their car. The officer became suspicious because

the men had large amounts of cash and gave only sketchy accounts of their recent whereabouts. The reviewing court held that an unlawful seizure occurred when the officer put their money in his patrol car. The possession of large amounts of cash by a couple of Hispanic men was not, by itself, a reason to detain them. This then vitiated their subsequent consent to be searched.

Here, clearly a lawful seizure occurred before the officer's concern was aroused by the appearance of Mr. Santacruz's eyes.

In Henry, a driver had glassy eyes, moved slowly, and acted "kind of like he was in some type of a daze" when pulled over for a traffic infraction. Based on this, the officer asked if the vehicle had been used in recent burglaries or drug transactions in the area. The driver said, "No." The deputy nonetheless asked for consent to search the vehicle. The officer could not point to a specific articulable basis for his suspicion connecting this driver with burglaries or drug transactions. And the driver's appearance had no connection with burglaries or drug transactions.

Here, the officer did not ask about drugs in the vehicle until after Mr. Santacruz said he had used some that day. The officer's initial question was prompted by specific articulable facts. Dilated pupils might well be the sign of something seriously wrong. The question was justified at its inception and reasonably within the scope of the circumstances.

In Tijerina, an officer conducted a routine traffic stop; he noticed several bars of motel soap in the car's glove box. He decided not to issue a traffic citation, but detained the Hispanic occupants under suspicion of drug trafficking solely because he had heard about Hispanics doing drug deals in motels.

Again that is not the case here. The officer performed a lawful seizure based on an articulable suspicion of a traffic infraction. During that investigation, the officer learned that the driver had no operator's license. Eventually, he did write Mr. Santacruz a ticket. In Tijerina, the officer asked about guns or drugs in the vehicle based solely on ethnicity and motel soap. Here, an officer investigating vehicle registration irregularities observed that the driver's pupils were unusually dilated. This aroused his suspicion that the driver was under the influence of drugs of some kind. This broadened the scope of the stop. It was a reasonable extension, not an unreasonable intrusion.

The drug investigation here was within the expanded scope of the original lawful stop. We therefore reverse the suppression order.

[Some citations omitted]

LED EDITORIAL NOTE: For some further discussion of questions about the limits, or lack thereof, on police expanding the scope of traffic stops, see the LED entry (including our commentary) regarding State v. Caballes, 125 S.Ct. 834 (2005) March 05 LED:03.

INTIMIDATION OF A PUBLIC SERVANT EVIDENCE HELD INSUFFICIENT IN CASE INVOLVING AN OFFICER BREAKING UP AN UNDERAGE DRINKING PARTY

State v. Burke, ___ Wn. App. ___, ___ P.3d ___, 2006 WL 1074670 (Div. II, 2006)

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

[A law enforcement officer] was on duty in the early morning of July 24, 2004, when he was called to check on a party at a residence. In the residence's front yard, he noticed some people drinking beer who appeared to be under 21 years of age. [The officer] chased these people into the house. Once in the house, [the officer] saw them run out the back door.

In the house, Juliet Gaines, the tenant, confronted [the officer]. She yelled at him, telling him that he did not have permission to be there and that he needed a warrant. [The officer] got around her and ran through the back door.

[The officer] then found himself on a deck with about 50 party attendees, most with beer bottles in their hands. A few of these people, whom [the officer] thought were under 21 years of age, ran off the deck. But [the officer] did not pursue them. Gaines followed [the officer] through the back door and continued screaming at him.

The crowd became angry, yelling profanities. Feeling outnumbered, [the officer] attempted to exit the deck back into the house. But the crowd closed in around him, preventing his exit. [The officer] yelled at the crowd to "[b]ack off," but the crowd continued closing in.

At that point, a large male, never identified, came out of the crowd and bumped into [the officer]. [The officer] ordered the man to stop, and the man backed off.

Then, [the officer] noticed Burke charging him. Burke "belly bump[ed]" [the officer]. Based on Burke's eye contact and his movement, [the officer] believed that Burke's assault was intentional. The force of the blow nearly knocked [the officer] off his feet. As [the officer] fell backwards, Burke immediately followed. [The officer] yelled at Burke to get back, but Burke refused. After a second or two, [the officer] pushed Burke back. [The officer] testified that Burke's demeanor was "[e]nraged."

After [the officer] pushed Burke back, Burke yelled profanities and "fighting threats" at [the officer]. But neither [the officer] nor any other witness testified as to what Burke exactly said. Burke then got into a "fighting stance" with closed fists. At that time, Burke was a foot or two away from [the officer].

[The officer] testified, "[B]efore I knew it, [Burke] swung one of his arms ... towards my face, and in a punch." [The officer] blocked the swing with both hands. In the same motion as the block, [the officer] turned Burke around and pushed him out of the crowd and off the deck. Once there, [the officer] struggled with Burke and eventually got him into handcuffs. While [the officer] was struggling with Burke, the crowd approached, yelling "He is alone," "Let's get the cop," and "Let's take him out." But the crowd backed off when it heard sirens.

During trial, Burke testified that he was drunk. When Burke first noticed [the officer], he thought, "Uh-oh, the party's over." Burke moved closer to hear what Gaines [the tenant] and [the officer] were talking about. He heard [the officer] and Gaines talking about the underage drinkers. Burke testified that he was "disappointed" that the party might be over, but not angry. He also testified that it was [the officer] who initiated the contact with him, despite his attempts to comply with [the officer]'s requests.

The jury found Burke guilty of third degree assault (RCW 9A.36.031(1)(g)) and intimidating a public servant (RCW 9A.76.180(1)).

ISSUE AND RULING: Was the evidence sufficient to support Burke's conviction for intimidation of a public servant? (**ANSWER:** No, because there is no evidence that his angry statements to the officer were intended to influence the officer's behavior.)

Result: Reversal of Pierce County Superior Court conviction of Chris Alfred Burke, Jr., for intimidation of a public servant (affirmance of conviction of third degree assault under issue and analysis not addressed in this **LED** entry).

ANALYSIS: (Excerpted from Court of Appeals opinion)

To convict Burke of intimidating a public official, the State must prove that, by use of a threat, Burke "attempt[ed] to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180(1). The statute defines "[t]hreat" as, "to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." RCW 9A.76.180(3)(a). But threats are not enough; the defendant must attempt to influence the public servant's behavior with these threats. *State v. Stephenson*, 89 Wn. App. 794 (Div. II, 1998) **May 98 LED:19**. A police officer is a public servant.

Burke contends that there is insufficient evidence to prove two elements: (1) that he threatened [the officer] and (2) that he attempted to influence [the officer]'s behavior.

Burke correctly contends that the testimony was vague regarding oral threats. [The officer] testified that Burke was "yelling profanities and threats ... fighting threats I guess would be the best way to describe them. I can't quote him at the time word for word."

But the State directs our attention to other evidence besides oral threats, such as the fighting stance. [The officer] testified, "Once I pushed him off, he started yelling the profanities. Then he got up into a fighting stance, with his fists closed, something, you know, like a boxer, I guess it would be." Burke was "maybe a foot or a foot and a half" away from [The officer] when he assumed this stance. This physical behavior meets the definition of a "[t]hreat" under the statute. RCW 9A.76.180(3)(a). Moreover, the jury could have interpreted Burke's initial contact with [the officer] and the attempted punch as part of the threat. Thus, substantial evidence of Burke's threat exists.

Burke also contends that there was insufficient evidence to prove that he tried to influence [the officer]'s behavior. We agree.

There is no direct evidence that Burke intended to influence [the officer] other than that he used profanities and "fighting threats." And the manner of Burke's physical attack does not demonstrate his attempt to communicate, however subtly, a suggestion that [the officer] take, or not take, a course of action.

The State suggests that a reasonable jury could infer intent to influence [the officer] from Burke's behavior. It argues that there could be no other reason for Burke to take a fighting stance and to yell profanities. It also argues that the

degree of Burke's anger, evidenced by his demeanor and actions, invites an inference that he was attempting to influence [the officer].

But the State fails to explain how simple anger implies intent to influence. The evidence shows only that Burke was drunk and angry. Evidence of anger alone is insufficient to establish intent to influence [the officer]'s behavior. The State must show that Burke's anger had some specific purpose to make [the officer] do or not do something.

The State next suggests that the circumstances surrounding the incident allow this inference. In particular, the State asserts that the evidence supports the inference that Burke attempted to prevent [the officer] from ending the party or from pursuing the underage drinkers. Burke admitted that he did not want the party to end. And, he admitted to overhearing [the officer] talk to the home's tenant about the underage drinkers.

But there is no evidence linking these circumstances and Burke's actions. Nothing Burke said or did that night to make this connection evidences his intent to prevent the party's closure or to prevent [the officer] from chasing the underage drinkers. And [the officer] had discontinued his pursuit of underage drinkers by the time Burke assaulted him. The evidence must show a connection, however weak, between Burke's anger and intent to influence [the officer].

An assault on a law enforcement officer does not, without more, imply an attempt to influence that officer's behavior. In this case, there is no evidence that anything more than anger motivated Burke's assault on [the officer]. Therefore, there was insufficient evidence to prove, beyond a reasonable doubt, that Burke attempted to influence [the officer]'s behavior. We reverse the conviction for attempting to intimidate a public servant.

[Footnote and citations omitted]

LED EDITORIAL COMMENT: We believe that this case presented a close question as to whether there was a sufficient link between (1) the belly-bump, profanities and threats and (2) the alleged intent to influence the officer. This ruling does not suggest that intimidation-of-a-public-servant charges cannot be successfully prosecuted in cases involving law enforcement officers. But apparently officers will need to report in detail exactly what was said by the defendant and to do their best to show the link between the actions of the defendant and the alleged intent to influence the officer.

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