



Law Enforcement

August 2007

Digest

606th Basic Law Enforcement Academy – February 7, 2007 through June 14, 2007

President: Craig Bennett – Des Moines Police Department
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Best Firearms: Benjamin J. Crum – Medina Police Department
Tac Officer: Officer Scott Rankin – Kent Police Department

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BRIEF NOTE FROM THE U.S. SUPREME COURT

WHEN OFFICER MAKES UNLAWFUL STOP OF A VEHICLE, BOTH THE DRIVER AND THE PASSENGERS HAVE BEEN UNLAWFULLY SEIZED -- In Brendlin v. California, 127 S.Ct. 2400 (2007), the United States Supreme Court unanimously agrees that when a law enforcement officer makes a traffic stop, both the driver of the car and any passengers in the car have been “seized” within the meaning of the U.S. Constitution’s Fourth Amendment.

Therefore, the Supreme Court rules in the Brendlin case that where an officer, with at most a hunch, stopped a car without reasonable suspicion to check the car’s valid temporary operating permit, the officer unlawfully seized both the driver and passenger. After making the traffic stop and making a contact with occupants, the officer learned that the passenger had an outstanding warrant. But the unlawful stop tainted the subsequent warrant arrest. The Supreme Court thus rules that the illegal drugs and drug paraphernalia seized in the search incident to arrest of the passenger were required to be suppressed.

Result: Reversal of California Supreme Court decision that had affirmed a California trial court’s denial of a suppression motion; reversal of conviction of a felony drug crime.

LED EDITORIAL NOTE: We think that, as a practical matter, the Brendlin decision does not change anything for Washington law enforcement officers. The Brendlin Court notes that under the Court’s Fourth Amendment decision in Maryland v. Wilson, 519 U.S. 408 (1997) April 97 LED:02, an officer has discretion to order a passenger to stay inside or get out of a vehicle stopped for a traffic violation, regardless of whether the passenger has committed any violation of law or poses a possible safety risk to the offender. The Brendelin Court also notes the Washington Supreme Court decision in State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04. In Mendez, the Washington Supreme Court held that an officer generally must be able to articulate a “heightened awareness of danger” in order to justify taking control of a non-violator passenger in a vehicle stopped for a traffic violation where the driver is not subjected to custodial arrest. See also State v. Reynolds, 144 Wn.2d 282 (2001) Oct 01 LED:08 (Holding that the Mendez test of “heightened awareness of danger” does not restrict officer’s authority to control passenger(s) where the driver is placed under custodial arrest, at least where officer is outnumbered 2-1 and the people are not known to the officer). Because Washington law enforcement officers must comply with both the federal constitution’s Fourth Amendment and the Washington constitution’s article 1, section 7, the Brendelin decision, read together with Mendez, apparently means that non-violator passengers in vehicles stopped for traffic violations by Washington officers 1) later, at a suppression hearing, can challenge the basis for the stop; and 2) generally, at the time of the stop, will not be subject to officer-control unless the officer can articulate a “heightened awareness of danger.”

WASHINGTON STATE SUPREME COURT

FAKE-ATTORNEY RUSE BY POLICE TO GET MURDER SUSPECT TO LICK AND SEND ENVELOPE DID NOT VIOLATE CONSTITUTIONAL PRIVACY PROTECTIONS; NOR DID IT VIOLATE RCW 9.73.020; NOR WAS THE RUSE SO OUTRAGEOUS AS TO REQUIRE DISMISSAL OF CASE UNDER CrR 8.3(b); ALSO, DEFENDANT GAVE VALID WAIVER OF HIS MIRANDA RIGHTS PRIOR TO QUESTIONING DESPITE HIS REFUSAL TO SIGN A WAIVER FORM

State v. Athan, ___ Wn.2d ___, 158 P.3d 27 (2007)

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

On November 12, 1982, Seattle police officers found the body of 13-year-old Kristen Sumstad inside a cardboard box in the Magnolia neighborhood of Seattle. Except for a pair of socks, Sumstad's body was nude from the waist down and a ligature was found around her neck. Although no DNA was found under her fingernails, semen was found in Sumstad's vagina and on her leg. An autopsy also revealed microscopic hemorrhaging or bruising in Sumstad's anus, bruising and contusions on Sumstad's face, neck, and legs, and a possible abrasion on her labia. The medical examiner estimated that Sumstad had died between 8 to 24 hours before her body was discovered.

The area where Sumstad's body was found, an alley behind a television store, was a hangout of local neighborhood teenagers, including Sumstad and the appellant, John Nicholas Athan. Police claim Athan's brother reported seeing Athan transporting a "large box" on a "grocery cart" near the area where Sumstad was found. Athan told police that he had been in the neighborhood stealing firewood the night before Sumstad's body was found. Although the police investigated leads related to Athan, he was not charged, and the crime remained unsolved.

Twenty years later, the Seattle Police Department's (SPD) cold case detectives unit reexamined the case and sent preserved biological evidence from the crime scene to the Washington State Patrol Crime Lab. Advances in DNA analysis allowed the lab to isolate a male DNA profile. The profile was tested against state and federal databases, but no match was found. Because Athan had been a suspect at the time of the original investigation, detectives decided to locate his whereabouts and collect a DNA sample for comparison.

The detectives located Athan in New Jersey and also determined, because Athan had family in Greece, he represented a flight risk. The detectives invented a ruse to obtain Athan's DNA without making Athan aware they had resumed investigating Sumstad's murder. Posing as a fictitious law firm, the detectives sent Athan a letter inviting him to join a fictitious class action lawsuit concerning parking tickets. The letterhead contained the names of the "attorneys," all of whom were employed by the SPD. Believing the ruse to be true, Athan signed, dated, and returned the enclosed class action authorization form and attached a hand-written note stating, "if I am billed for any of your services disregard my signature and my participation completely."

Athan's reply was received by [Detective A], one of the "attorneys" listed on the letterhead. Without opening it, [Detective A] gave the letter to another detective who forwarded it to the crime lab. A lab technician opened the letter, removed and photographed the contents, cut off part of the envelope flap, and obtained a

DNA profile from saliva located on the flap. The DNA profile from the envelope matched the DNA profile from the semen found on Sumstad's body. Based primarily on the results of the DNA testing, the prosecuting attorney filed an information and probable cause statement to secure an arrest warrant for Athan.

After obtaining the warrant, two detectives flew to New Jersey to arrest Athan. After reading Athan his Miranda rights, but before arresting him or advising him they already had an arrest warrant for him, the detectives questioned Athan about Sumstad's murder. Athan denied ever having sex with Sumstad or using a grocery cart to carry a box on the night of the murder. Athan admitted to using a handcart to steal firewood from a neighbor in the area on the night before the body was found. When detectives asked Athan for a DNA sample, he stated, "I don't like where this is going," and "maybe I should call my attorney." The interview ceased and the detectives arrested Athan pursuant to the arrest warrant. The detectives obtained a second DNA sample from Athan pursuant to a search warrant. The second DNA sample matched the sample from the envelope and from Sumstad's body.

The State filed first degree murder charges against Athan. Athan made several pretrial motions, including suppression of the DNA evidence and dismissal of the case [under a number of theories]. The trial court denied all of the motions. Additionally, at the end of the State's case, Athan moved for dismissal which the trial court also denied. Athan was found guilty of second degree murder

ISSUES AND RULINGS: 1) Did the fake-attorney envelope ruse by police violate the privacy rights of Athan under the state or federal constitutions? (ANSWER: No); 2) Did the opening of the envelope by the police violate Athan's statutory privacy protections under RCW 9.73.020? (ANSWER: No); 3) Did the ruse constitute such outrageous police behavior as to require dismissal of the case under either CrR 8.3(b) or constitutional due process protections or both? (ANSWER: No); 4) Was there a valid waiver of rights by Athan prior to police questioning even though he refused to sign the waiver form? (ANSWER: Yes, because the totality of the evidence supported the trial court's determination that there was a valid waiver).

Result: Affirmance of King County Superior Court conviction of John Nicholas Athan for second degree murder.

ANALYSIS BY MAJORITY:

1) State and federal constitutional privacy protection

The majority's analysis rejecting Athan's argument that the attorney-envelope ruse violated his privacy protection under article 1, section 7 of the Washington constitution includes the following:

Athan argues that case law and statutory law require us to recognize a privacy interest in one's body and bodily functions. Division One of the Court of Appeals has held, "[t]here is thus no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass." Robinson v. City of Seattle, 102 Wn. App. 795 (2000). Robinson involved a challenge to a pre-employment urinalysis drug testing program, which the court partially invalidated. The appellate court noted the testing was highly invasive in the taking of the sample, the chemical analysis

of its contents, and the possible disclosure of explanatory medical conditions or treatments.

...

The State distinguishes Robinson by arguing the drug-testing program in that case involved the nonconsensual taking of urine samples. . . . The State maintains that DNA obtained from one's saliva is akin to a person's physical description, appearance, or other characteristic voluntarily exposed to the public, thus, it is not a "private affair" at all.

We find there is no inherent privacy interest in saliva. Certainly the nonconsensual collection of blood or urine samples in some circumstances, such as under the facts of Robinson, invokes privacy concerns; however, obtaining the saliva sample in this case did not involve an invasive or involuntary procedure. The relevant question in this case is whether, when a person licks an envelope and places it in the mail, that person retains any privacy interest in his saliva at all. Unlike a nonconsensual sampling situation, there was no force involved in obtaining Athan's saliva sample here. The facts of this situation are analogous to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray. We hold under these circumstances, any privacy interest is lost. The envelope, and any saliva contained on it, becomes the property of the recipient.

Amicus American Civil Liberties Union (ACLU) argues DNA has the potential to reveal a vast amount of personal information, including medical conditions and familial relations, therefore DNA should constitute a privacy interest. While this may be true in some circumstances, the State's use of Athan's DNA here was narrowly limited to identification purposes. What was done with the letter, including DNA testing for the limited purpose of identification, was not within the sender's control. The concerns raised by the ACLU, while valid, are not present in this case. The State used the sample for identification purposes only, not for purposes that raise the concerns advanced by the ACLU.

...

Athan argues Washington law provides a strong privacy protection of communications between attorneys and their clients. Although the police officers here were not actually attorneys, they held themselves out as attorneys, in violation of RCW 2.48.180(2)(a). Athan contends he reasonably relied on the detectives' representations that they were attorneys, and thus he should be entitled to rely on the attorney-client privilege to protect his communications as a "private affair."

The State argues the saliva used to seal the envelope was not a communication and therefore not protected by the attorney-client privilege. The communication, if any, would have been the enclosed letter, which the State notes Athan never moved to suppress at trial. Finally, the letter contained a handwritten note [from Athan] stating, "[i]f I am billed for any of your services disregard my signature and my participation completely." The State suggests this added condition of not wanting to be billed by the "firm" is evidence Athan did not intend to form an attorney-client relationship at that time . . .

As the State notes, Athan did not object to the letter, or its contents, being admitted during the trial. Thus, we need only decide if the saliva on the envelope flap is a “communication” subject to protection by the attorney-client privilege. Because we find saliva is not a communication in this case, we do not need to decide if an attorney-client relationship was even established. We note this case is not about police intercepting mail addressed to someone else. The envelope, its contents, and the saliva contained on it, were addressed to and received by the SPD detectives, albeit through the use of a ruse.

...

Under the facts of this case, Athan's saliva was merely a means by which he could seal the envelope. There was no intent or expectation on Athan's part that his saliva would be an expression or exchange of information. Although the State was ultimately able to gain information from the saliva, it does not mean the saliva was a “communication” as it is ordinarily defined.

...

We find there is no absolute prohibition of police ruses involving detectives posing as attorneys in the state of Washington. While such a ruse has the potential to gather privileged and confidential information, thereby implicating the concerns raised by Athan and amici, that was not the case here. First, we have already found the saliva on the envelope was not a communication. Second, the letter sent to Athan did not ask Athan to provide additional or confidential information. Thus, the detectives were not seeking a confidential communication and the risk of receiving such a communication was minimal. . . . [T]he ruse was not designed to obtain statements or other confidential information about the Sumstad murder; the goal of the ruse was only to induce Athan to mail an envelope. The use of the ruse did not violate a private affair protected by article 1, section 7.

We find further support for police posing as an attorney in the analogous case of State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11**. In Townsend, a Spokane police officer, posing as a 13-year-old girl, engaged in on-line communications with the defendant, Townsend. The police officer saved and later printed the communications for use as evidence against Townsend. Townsend argued the police detective's actions violated Townsend's privacy rights under a similar provision of the state privacy act. In upholding his conviction, we found the communications were private, but that Townsend impliedly consented to the recording of his private email conversations because it was reasonable to infer Townsend was aware it was possible to record the messages. Like Townsend, who presumably was not aware his emails were being sent to and recorded by a police detective for use as evidence against him, Athan impliedly consented to the receipt of his saliva because he mailed it. The fact that he was not aware the recipient was a police detective does not vitiate that consent.

As we note in our discussion of Athan's CrR 8.3(b) motion, police officers are allowed to use some deception, including ruses, for the purpose of investigating criminal activity. Generally, ruses are upheld as long as the actions do not violate a defendant's due process rights. Because we agree with the trial court

that the police ruse used here did not violate Athan's due process rights, we find this ruse permissible.

[Some case citations omitted]

The majority's analysis rejecting Athan's challenge under the federal constitution's Fourth Amendment includes the following:

Police may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect's privacy. No case has been cited challenging or declaring this type of police practice unreasonable or unconstitutional. People constantly leave genetic material, fingerprints, footprints, or other evidence of their identity in public places. There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. Physical characteristics which are exposed to the public are not subject to Fourth Amendment protection. The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment.

...

The Fourth Amendment protects a person's privacy interests in the contents of sealed letters and documents sent through the mail. A similar analysis from Athan's state constitution mail claim applies here. The detectives were listed on the envelope as the intended recipients; no interception of the letter while it was in transit to a third party occurred. There is no Fourth Amendment violation when, as here, the police open and analyze a sealed letter addressed to one or more of their detectives.

...

[Case citations omitted]

2) RCW 9.73.020

The majority's analysis rejecting Athan's argument that, by opening the sealed envelope, the police violated his statutory rights under RCW 9.73.020 includes the following:

According to Athan, a law firm was his intended recipient, not the police. Because the police were not the intended recipients, he argues they violated the act by opening the letter and, at the same time, violated his privacy rights.

The State argues the letter was in fact opened by the intended recipient because it was opened by the detectives listed in the "law firm's" letterhead or by their agents. . .

RCW 9.73.020 reads, "[e]very person who shall wilfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor." Nothing in the statute indicates the intended recipient must be

who the recipient actually claims to be. The detective who actually received the letter was listed on the “law firm” letterhead and thus, under the state privacy act, had authority to open or cause to be opened, the letter. Since the letter was received by the intended addressee, though not an attorney as Athan believed, he has failed to establish a statutory violation.

3) CrR 8.3(b) - - police conduct not so outrageous as to require dismissal of case

The majority’s analysis rejecting Athan’s claims of outrageous government conduct includes the following:

CrR 8.3(b) reads, “[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.” . . . Here, the trial court, in a written opinion, discussed the public policy of allowing some deceitful police conduct in order to detect and eliminate criminal activity. The [trial] court distinguished the facts of this case from other attorney-client cases because the police were not hoping to obtain confidential information, rather they were trying to obtain a sample of saliva. The court denied Athan's motion to dismiss because, after looking at a totality of the circumstances, it found the police were acting to protect the public by solving the crime, the illegal activity engaged in was only a misdemeanor, and the police conduct was not repugnant to a sense of justice.

Athan argues his case should be dismissed under CrR 8.3(b) and the due process clauses of the state and federal constitutions. Athan notes the rule requires two elements: governmental misconduct and prejudice affecting the defendant's right to a fair trial. Athan maintains governmental misconduct is shown through the SPD's violation of RCW 2.48.180(2)(a), unlawful practice of law, and RCW 9.73.020, privacy in sealed letters. In addition, Athan argues the case should be dismissed for public policy reasons. . . . Athan and the WSBA contend public policy allows for some deceitful conduct only when it is necessary to detect criminal activity and the specific ruse used here was not necessary to obtain the evidence the SPD wanted.

. . .

The State contends dismissal for a due process violation requires the additional element of showing the government misconduct is “so shocking that it violates fundamental fairness.” Dismissal is appropriate only in the most egregious of cases, such as where the government agents direct a crime from beginning to end or a crime is fabricated for the sole purpose of obtaining a conviction and not to protect the public from criminal behavior. The State notes Washington courts have repeatedly rejected outrageous conduct claims based on police engaging in illegal activities. Thus, while the State concedes the police conduct was perhaps deceitful, it was not so outrageous as to warrant dismissal of the entire case. The State observes the police ruse was not designed to solicit any privileged information and, in fact, none was communicated by Athan.

Public policy allows for a limited amount of deceitful police conduct in order to detect and eliminate criminal activity. A violation of a criminal statute is not a per

se violation of CrR 8.3(b) and/or due process, and we must examine the totality of the circumstances to determine when the conduct becomes so outrageous that a reversal of a conviction is required. The police's use of a ruse to obtain evidence against a suspect is not determinative. We have upheld police ruses designed to gain warrantless entry into the suspect's house for the purpose of buying illegal drugs. . . . Likewise, there is no Fourth Amendment violation here and the police ruse does not vitiate Athan's voluntary relinquishment of the envelope containing a sample of his saliva. Although the police violated a state statute by posing as lawyers, the trial court noted the effect of the conduct on the integrity of the legal system is not as severe as where the ruse was directed at obtaining confidential information. . . . The claimed misconduct in this case does not involve actions similar to those cases which found misconduct warranting dismissal. The police did not induce Athan to commit any crime here nor did they attempt to gain any confidential information from the ruse. The conduct here is not so outrageous as to offend a sense of justice or require dismissal of this case. We find the trial court properly denied Athan's motion to dismiss under CrR 8.3(b).

[Some citations omitted]

4) Miranda waiver despite refusal to sign waiver form

The majority's analysis rejecting Athan's Miranda waiver challenge includes the following:

Athan argues statements made prior to his arrest in New Jersey should have been suppressed. He contends his Sixth Amendment right to counsel had attached because, although he was not aware of it, he had been formally charged with first degree murder and he was indisputably in police custody. Although the police read Athan his Miranda rights, Athan refused to sign a waiver of those rights. He relies primarily on United States v. Heldt, 745 F.2d 1275 (9th Cir. 1984), for the proposition that refusal to sign a waiver form is an indication that a person wishes to remain silent. He argues he did not waive his rights, thus, any statements made to the police were admitted at trial in violation of the Sixth Amendment.

The State argues Athan made a voluntary, knowing, and intelligent waiver of his Miranda rights when he voluntarily answered police questions and, after being asked for a DNA sample, unequivocally invoked his rights. The State maintains that refusal to sign a waiver is not dispositive of the waiver issue and courts also look to evidence of coercion or threats on the part of the police. In addition, the Ninth Circuit Court of Appeals later distinguished Heldt on the grounds that there were a number of other circumstances indicating the statements were not voluntarily made. United States v. Andaverde, 64 F.3d 1305, 1313-14 (1995). Here, the State contends, there was no evidence or allegation of police coercion and Athan later invoked his rights, suggesting he was aware that he had not previously invoked them.

The State bears the burden of showing a knowing, voluntary, and intelligent waiver of Miranda rights by a preponderance of the evidence. Refusal to sign a waiver may cast doubt on the State's assertion of waiver; however, it is not dispositive of the issue because the trial court must review the totality of the circumstances. We will not disturb a trial court's conclusion that a waiver was

voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding. There is no evidence that the detectives coerced Athan into answering their questions and Athan's subsequent invocation of his Miranda rights supports a finding that he knowingly, voluntarily, and intelligently waived his right to remain silent prior to that point.

[Some citations omitted]

CONCURRING OPINION:

Justice Alexander writes a concurring opinion not joined by other justices. Among several other things, he states his view that the majority opinion may have understated the privacy protection a person has in DNA under the Washington constitution. He notes that even garbage placed on the curb for pickup at a single-family residence has constitutional privacy protection in Washington under State v. Boland, 115 Wn.2d 571 (1990). But Justice Alexander concedes that defendant Athan waived any constitutional privacy protection in his saliva by licking the envelope and sending it off in the mail to the address provided.

DISSENTING OPINIONS:

Justice Fairhurst writes a dissent that is joined by Justice Sanders and concurred in by Justice Chambers. The Fairhurst dissent attacks the constitutional privacy analysis in the majority opinion (as well as questioning a right-of-confrontation hearsay ruling by the majority not addressed in this LED entry). Justice Chambers writes a separate dissent not joined by any other justice in which he argues that the attorney-client privilege was violated by the police in this case, and that this should be sanctioned by suppression of the evidence obtained through the ruse.

WASHINGTON STATE COURT OF APPEALS

ARRESTEE'S EQUIVOCAL MID-INTERROGATION MENTION OF ATTORNEY DID NOT REQUIRE CLARIFICATION BY DETECTIVES OF MIRANDA WAIVER - - U.S. SUPREME COURT'S DAVIS DECISION HELD TO CONTROL

State v. Radcliffe, ___ Wn. App. ___, 159 P.3d 486 (Div. II, 2007)

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

[T]he police arrested Radcliffe and transported him to the police station. Detective [A] told him of S.K.'s complaint [of sexual abuse of the minor S.K.] and advised him of his Miranda rights. After [Detective A] read Radcliffe his rights, Radcliffe said he understood his rights and wanted to talk to her. [Detective A] described S.K.'s allegations and Radcliffe denied them. After about 10 minutes, [Detective A] turned the questioning over to Detective [B].

Radcliffe continued to deny S.K.'s allegations. But when [Detective B] told him that the police had S.K.'s clothing and would test it to see if he had ejaculated on it, Radcliffe admitted that testing would reveal that he had ejaculated on S.K.'s clothing. He then told [Detective B] that he had a sexual relationship with S.K.

When [Detective B] said that he would get a tape recorder to record Radcliffe's story, Radcliffe responded that he did not know how much trouble he was in and did not know if he needed a lawyer. [Detective B] said that he could not give any legal advice, but he again offered to read Radcliffe his rights. Radcliffe said that he knew what his rights were and he did not need [Detective B] to read them again. [Detective B] told Radcliffe that "the ball was in his court" and if he did not feel comfortable giving a taped statement, he could write out a statement or he could give an oral statement.

Radcliffe chose the last option and told [Detective B] he began having sex with S.K. when she was 14 years old, that they had had sexual intercourse two times, and that she would perform oral sex on him and he would perform oral sex on her about once a month.

The State charged Radcliffe with one count of second degree child molestation, one count of second degree child rape, two counts of third degree child rape, and one count of indecent liberties with forcible compulsion.

Radcliffe moved to suppress his statements to [Detectives A and B] . . . The trial court initially decided that because [Detective B] improperly questioned Radcliffe after Radcliffe's equivocal reference to an attorney, it would suppress Radcliffe's statements made after that point. But upon reconsideration and in light of a newly issued Division One opinion, the trial court ruled that [Detective B]'s continued questioning was not improper and therefore denied Radcliffe's motion to suppress.

. . .

The jury convicted Radcliffe of two counts of third degree child rape and one count of indecent liberties.

ISSUE AND RULING: Were the detectives required to stop the questioning and clarify whether Radcliffe was invoking his right to an attorney after he equivocally referred to an attorney? (**ANSWER:** No)

Result: Affirmance of Thurston County Superior Court convictions of James D. Radcliffe for third degree child rape (two counts), indecent liberties with forcible compulsion (one count).

Status: Defendant has petitioned for discretionary Washington Supreme Court review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Radcliffe . . . contends that the trial court erred in relying on Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02**, to conclude that [Detective B] was not required to stop his questioning and clarify whether Radcliffe was invoking his right to an attorney when he equivocally referred to an attorney. Radcliffe maintains that State v. Robtoy, 98 Wn.2d 30 (1982) continues to govern equivocal requests for counsel in Washington.

Under the Fifth and Fourteenth Amendments to the United States Constitution, the police must inform a suspect of his right to remain silent and to the assistance of an attorney before subjecting him to custodial interrogation. In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that once a suspect has "clearly" asserted his right to counsel, the police may not

subject him to further questioning [while he remains in continuous custody] until he has had an opportunity to confer with counsel, unless the suspect himself initiates further communication.

The Washington Supreme Court addressed equivocal references to counsel under the Fifth and Fourteenth Amendments the following year in Robtoy. The court adopted the Fifth Circuit's rule that when a suspect makes an equivocal request for an attorney, an officer must limit further questioning to clarifying that request.

But in 1994, the United States Supreme Court directly addressed equivocal references to counsel. Davis. In Davis, the court held that after a knowing and voluntary waiver of the Miranda rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney. The court declined to extend the Edwards rule to equivocal requests for an attorney because to do so would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. The Miranda warnings themselves provide the primary protection for suspects subject to custodial interrogation; a suspect must affirmatively invoke the additional protection Edwards provides. Requiring an unambiguous request for counsel also avoids forcing police officers to make judgment calls about statements that might or might not be requests for counsel.

A majority of the Washington Supreme Court has not addressed the effect of Davis on the Robtoy rule. In State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED:06**, a plurality [not a majority] of [four of the nine] justices, after concluding that the State did not present sufficient evidence to establish the corpus delicti of the crime, applied Robtoy without discussing Davis and concluded that the defendant's statements made after an equivocal request for counsel were admissible because the defendant had herself initiated further communication. Four concurring justices reasoned that, in light of the conclusion that the State had not established the corpus delicti, it was unnecessary to discuss any further issues. But the concurrence questioned the plurality's reliance on Robtoy in light of Davis, asserting that under Davis, the officers had no duty to cease questioning the defendant after her equivocal statement.

The divisions of the Court of Appeals have also addressed Davis's effect on the Robtoy rule, but have reached conflicting results. In State v. Copeland, 89 Wn. App. 492 (Div. I. 1998) **Aug 98 LED:09**, without citing either Aten or Robtoy, we applied the rule from Davis that officers need not stop questioning a suspect after an equivocal reference to counsel. In State v. Jones, 102 Wn. App. 89 (Div. II, 2000) **Oct 00 LED:16**, however, we said that "Washington follows Edwards but not Davis." We cited both Robtoy and Aten, but we did not further discuss the issue.

Most recently, Division One recognized that Davis controls equivocal references to an attorney. State v. Walker, 129 Wn. App. 258 (Div. I, 2005) **Nov 05 LED:19**, *review denied sub nom.* State v. Garrison, 157 Wn.2d 1014 (2006). The Walker court noted that Robtoy "has continued to appear in Washington case law in spite of the Davis Court's clear directive," and it considered this court's statement in Jones to interpret Aten as a rejection of the Davis rule. But the court declined to assume that our Supreme Court would reject a directive from the United States

Supreme Court without explanation and looked to Davis for guidance on the issue before it, an equivocal invocation of the right to remain silent.

We now hold that Davis, not Robtoy, is the controlling authority on how Miranda applies to a suspect's equivocal request for an attorney. The United States Supreme Court grounded Miranda on the Fifth Amendment, and Robtoy relied on a suspect's rights under the Fifth and Fourteenth Amendments to the United States Constitution, not the Washington Constitution. The United States Supreme Court is the final authority on the federal constitution. As the Walker court noted, our Supreme Court provided no rationale for rejecting a United States Supreme Court interpretation of the federal constitution and we will not presume that it intended to do so.

The trial court did not err in accepting the Walker court's reasoning. Because Radcliffe's reference to an attorney was equivocal, [Detective B] was not obligated to stop his questioning or to clarify Radcliffe's statement. Accordingly, the trial court properly admitted Radcliffe's statements at trial.

[Some citations omitted]

LED EDITORIAL COMMENT: In our September 1994 editorial comment on U.S. Supreme Court's Davis decision, we noted that the U.S. Supreme Court majority opinion in Davis emphasized that there is a risk in not clarifying a suspect's ambiguous reference to his or her attorney right during interrogation. That risk is that, in later review of a suppression motion, a trial judge or appellate court will determine that what the interrogating officer felt at the time was an ambiguous reference to the attorney right was actually a clear invoking of the right.

BABYKILLER LOSES CHALLENGES TO ADMISSION OF BOTH HIS PRE-MIRANDA AND HIS POST-MIRANDA STATEMENTS TO POLICE

State v. Adams, 138 Wn. App. 36 (Div. III, 2007)

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

In the morning hours of May 18, 2004, Jenny Rowe called 911 to report that her infant son, Cadyn, was not breathing. Cadyn was 11 weeks old at the time. Cadyn was the child of Ms. Rowe and her live-in boyfriend, James Adams.

Paramedics were called to the Adams's home. They attempted to resuscitate Cadyn and placed the infant on a heart monitor. While the paramedics worked on Cadyn, Mr. Adams was seated nearby on the couch. Mr. Adams kept repeating that he did not do anything and that it was not his fault. One of the emergency responders also heard Mr. Adams say that he " 'didn't do anything this time,' " and that he " 'just wanted [Cadyn] to be quiet.' "

Mr. Adams explained to the paramedics that he was taking care of Cadyn. He changed the baby's diaper that morning and put him back to bed. According to Mr. Adams, he returned to check on Cadyn after fixing breakfast for his daughter. Cadyn was not breathing.

At the hospital, Cadyn showed signs of significant oxygen deprivation. X-rays of his skull showed fresh fractures. The next day, doctors declared Cadyn dead. The cause of death was determined to be a severe lack of oxygen to the brain.

An examination of Cadyn revealed evidence of broken ribs on both sides of his chest. These fractures were of different ages. Fractures of varying ages indicate that the breaks were nonaccidental. Based on the degree of healing of the bones, Cadyn's ribs were broken well before the day that Cadyn stopped breathing and paramedics performed CPR on him. Medical experts indicated that these types of rib fractures in infants are most likely caused by squeezing. Cadyn's left leg had also previously been fractured. Cadyn's autopsy revealed hemorrhages and swelling in Cadyn's brain.

Police were dispatched to the hospital. Two officers, Detective Rick Grabenstein and Detective Timothy Hines, spoke with Mr. Adams to determine what happened to Cadyn. Mr. Adams reiterated what he told paramedics. He also stated that Cadyn had bumped his head on a swing a few days earlier and that he had bumped his head again the night before he stopped breathing.

When confronted with the fact that Cadyn's injuries were inconsistent with Mr. Adams's account, Mr. Adams asked to speak with his girlfriend, Ms. Rowe. An officer brought her in and allowed them to talk. Detective Grabenstein testified that he and Detective Hines were present in the room during the conversation and that Ms. Rowe was seated on Mr. Adams's lap. The detectives overheard Mr. Adams tell Ms. Rowe that he head-butted Cadyn, but that he did not think this was what caused the baby's death.

After Mr. Adams's conversation with his girlfriend, the officers advised him of his rights. Mr. Adams indicated that he understood his rights and agreed to answer more questions. He admitted to past acts of grabbing Cadyn under the infant's arms and head-butting him, and of squeezing the infant. He further admitted to head-butting Cadyn twice in the back of the head the morning Ms. Rowe called 911. Mr. Adams confessed that he had shoved socks in Cadyn's mouth in the past to stop him from crying. Two bloody socks were later recovered in Mr. Adams's home. Tests revealed that the blood on both socks was Cadyn's.

Mr. Adams also told his father that he had put a sock in Cadyn's mouth that morning to muffle his cries. Mr. Adams told his father that he then went to make his breakfast and, when he returned to check on Cadyn, the baby was not breathing. Mr. Adams's father testified to these admissions at trial.

Medical experts stated that the evidence that Cadyn suffered from a severe lack of oxygen to the brain was consistent with a sock being stuffed in his mouth, and that the skull fracture was consistent with someone having head-butted the baby. There were also lacerations on Cadyn's tongue. These lacerations further corroborated Mr. Adams's admission to his father that he shoved a sock down Cadyn's throat.

The State charged Mr. Adams with homicide by abuse, with an alternative charge of second degree murder. Prior to trial, Mr. Adams sought to suppress some of the statements he made to law enforcement. Specifically, Mr. Adams argued that the court should exclude his statements made to police prior to receiving his rights.

Mr. Adams argued that these statements were made during the functional equivalent of custodial arrest. Mr. Adams was kept in a small room with no windows. There were two officers in the room with him. These officers were

present in the room for purposes of investigating whether Mr. Adams was involved in the death of his son. As a result, Mr. Adams did not feel free to leave.

Mr. Adams also argued that he was coerced into talking with law enforcement prior to receiving his rights. Mr. Adams testified that he was very upset at the hospital when he was questioned. He asserted that he had requested a break to use the bathroom but the police would not permit him to leave. This questioning continued for about two to three hours before Mr. Adams was placed under arrest and received Miranda warnings.

The trial court found that Mr. Adams was not in custody when questioned by Deputy Walter Loucks at the hospital and that Mr. Adams's statements were voluntary. The court further determined that there was no indication that Mr. Adams was threatened or coerced into making any statements to law enforcement. The court did not find Mr. Adams's claims that he was not allowed to leave or to use the bathroom to be credible. Given these findings, the court deemed all of the statements made by Mr. Adams admissible.

The jury found Mr. Adams guilty of homicide by abuse. He was sentenced to 320 months' confinement.

ISSUES AND RULINGS: 1) When officers initially talked to defendant at the hospital without Miranda warnings, was there the functional equivalent of custodial arrest such that Miranda warnings and waiver were required? (ANSWER: No); 2) Does substantial evidence support the trial court's determination that admissions by defendant to the officers were not coerced? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction and 230-month sentence of James Vincent Adams for homicide by abuse of his infant son.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No Miranda custody

The constitutional right against self-incrimination requires that law enforcement inform a suspect of his or her rights to remain silent and to counsel prior to a custodial interrogation. In order for a person to be deemed in custody, his or her freedom to leave must be curtailed to a degree normally associated with formal arrest. This determination is based on whether a reasonable person would have perceived that he or she was free to leave.

Here, the trial court found that Mr. Adams was not in custody at the time he was initially questioned prior to receiving Miranda warnings. The trial court made this determination based on undisputed findings that Mr. Adams was allowed to see his girlfriend, that police would try to arrange time for Mr. Adams to see his son, and that Mr. Adams agreed to join the officers in the hospital conference room where the questioning occurred. The trial court further found that Mr. Adams was free to leave.

Although Mr. Adams claimed that he requested to use the bathroom and was not permitted to leave to do so, this contradicted the testimony of both police officers who were questioning Mr. Adams. The trial court found the statements of the police officers to be more credible. The court also found that portions of Mr.

Adams's testimony did not make sense. This court shows great deference to the credibility determinations of the trial court.

2) No coercion of statements

A confession must be voluntary to be admissible at trial. The test for the voluntariness of a confession is whether it appears under the totality of the circumstances that the confession was coerced. The central inquiry is whether the defendant's will was overborne. In making this determination, courts look to such factors as the mental state of the defendant, the conduct of the police (with a particular focus on whether any threats or promises were made by the officers), the duration of the interrogation, the defendant's prior experience with police, and the defendant's mental abilities.

In cases of successive confessions, the voluntary nature of a confession given prior to Miranda warnings is the touchstone of whether a confession after receiving a Miranda warning is admissible. A subsequent confession need not be suppressed unless it was the product of actual coercion or improper tactics by the police.

This court reviews the trial court's findings of fact related to the suppression hearing for substantial evidence. The trial court found that all of Mr. Adams's statements were voluntary. To support this finding, the trial court noted that the police made no promise or threat in order to obtain Mr. Adams's statements, and that Mr. Adams volunteered much of the information with no prompting by police. Based on the testimony presented, the trial court concluded that Mr. Adams's will was not overborne and that all of his statements were voluntary. The record supports the trial court's findings of fact, and these findings form a sufficient basis to conclude that Mr. Adams's statements to police were voluntary.

[Some citations omitted]

OFFICERS ACTED LAWFULLY IN ATTEMPT TO CONTACT ARREST WARRANT SUBJECT BY DAYLIGHT APPROACH TO HOME ON RURAL PROPERTY DESPITE “NO TRESPASSING” SIGN (AREA WAS “IMPLIEDLY OPEN” TO PUBLIC AND OFFICERS WERE ON “LEGITIMATE POLICE BUSINESS”); ALSO, PROBABLE CAUSE FOR SEARCH WARRANT FOR METH OPERATION HELD SUFFICIENT AND NOT STALE; BUT METH MANUFACTURING SENTENCING ENHANCEMENTS FOR “ARMED” AND FOR MANUFACTURING IN PRESENCE OF MINOR REVERSED

State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007)

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

On March 31, 2001, Thurston County [Deputy A] ran a records check for a vehicle located on Ague's property. The report stated that the registered owner, John Steven Hamm, had an outstanding felony warrant for escape. [Deputy A] contacted [Deputy B], asking him for assistance in locating Hamm.

When [Deputy B] arrived, the deputies drove to Ague's residence, a single-wide mobile home, through an open cattle gate and down an unobstructed driveway

approximately 50 to 75 feet before parking approximately 150 feet from the residence. [Deputy A] saw a sign in a tree that said "something to the effect of keep out or no trespassing or no hunting," but [Deputy B] and a corrections officer on a ride-along with [Deputy A] did not see the sign. The deputies entered the property during daylight hours while in full uniform.

The deputies walked to the front door, and [Deputy A] knocked on the door for about a minute to a minute and one-half before hearing a noise from behind the residence. The deputies followed the noise through an open yard to the back of the residence.

While in the backyard, the deputies noticed a strong smell of propane. They saw three new propane tanks with the valves turned open and believed that someone was purging them of their contents.

Also in the backyard, the deputies saw a man, whose height and weight was consistent with Hamm's, welding a vehicle's bumper. The deputies asked the man if Hamm was present. The man initially responded he did not know but then said he would contact the residence's occupants to find out.

The man walked to the back porch, began knocking on the door, and said, "Come open up; it's Steve." Once the back door opened, the man "quickly tried to bolt inside the residence." The deputies grabbed the man and handcuffed him before he could get inside.

The deputies asked the man to identify himself, but he gave evasive responses. It started to rain, so the deputies moved him to a patrol car. Ague's daughter, S.A., yelled to the deputies that she lived at the residence and wanted them to leave.

[Deputy A] continued questioning the man, asking him if he had any weapons. After the man said no, [Deputy A] performed a pat-down search. [Deputy A] felt what appeared to be a "large knife" inside the man's jacket. To access the knife from the man's pocket, [Deputy A] had to pull out a pill bottle, which contained 150-200 pseudoephedrine pills prescribed for a female name. The deputies also found the man's identification card, which indicated that he was not Hamm, and a records search of the name on the card did not reveal any outstanding warrants. After the deputies determined the man was not Hamm, they released him and returned the pill bottle.

The next day, [Deputy B] heard from an anonymous source that Steven Layton was bragging that he had fooled police. [Deputy B] obtained a booking photo of Layton and realized that Layton was the man he had questioned at Ague's residence. He also discovered that Layton had not appeared for sentencing on previous convictions of unlawful possession of methamphetamine with intent to deliver, first degree unlawful possession of a firearm, and attempted unlawful manufacturing of methamphetamine.

On April 2, [Deputy B] telephoned a judge to obtain a warrant to search Ague's property for items associated with methamphetamine manufacture. For support, he informed the judge: (1) about his encounter with Layton; (2) about Layton's criminal background; (3) about the pseudoephedrine pills Casebolt found; (4) about the heavy scent of propane in Ague's backyard; (5) that methamphetamine

manufacturers may purge propane bottles in order to store anhydrous ammonia; (6) that anhydrous ammonia and pseudoephedrine pills are both primary precursors for manufacturing methamphetamine; and (7) about other suspects he believed lived at the residence based on an anonymous informant's tip. The judge authorized the warrant.

The deputies served the search warrant in the early morning of April 3. When they arrived, Ague opened the door wearing only underwear and appearing surprised, as if he had just awakened. The deputies found three other adults and one minor, S.A., in the house.

There were several outbuildings, travel trailers, and vehicles on the property. The deputies kicked in the door of a detached shed approximately 100 feet from the residence and, once inside, found items associated with a methamphetamine lab, including anhydrous ammonia and several containers with substances that tested positive for methamphetamine.

The shed also contained a washing machine full of wet clothing, a dryer, a freezer, a shower, a desk, a police scanner, and a monitor for a surveillance system. The residence and shed shared a grass yard that someone had recently mowed. The deputies taped off a hazardous area around the shed, which they described as the "hot zone." The residence was outside the hot zone.

The deputies did not find any evidence of a methamphetamine lab inside the house, but they did find a "large" dial-operated gun safe in a bedroom. A locksmith opened the safe, which contained six shotguns, two rifles, four handguns, ammunition, batteries, baggies containing a white substance, a scale, and a box of syringes. All of the firearms were unloaded.

The State charged Ague with one count of unlawful manufacture of methamphetamine with special allegations that he did so while armed with a deadly weapon and while a minor was present in or on the manufacturing premises.

Before trial, Ague moved to suppress evidence seized during the search, challenging the deputies' entry onto the property, the search warrant affidavit, and the probable cause for the warrant. The trial court found that the deputies had legitimate business on the property and only entered areas impliedly open to the public. The trial court excised portions of the search warrant affidavit dealing with the home's residents other than Layton because there was an insufficient showing of the informant's reliability. After excising these portions, the trial court found that the remainder of the affidavit was sufficient to establish probable cause for the search warrant and denied the motion to suppress.

The jury found Ague guilty of manufacturing methamphetamine and found he was armed with a deadly weapon during the commission of the offense and that a minor was in or on the premises of manufacture.

ISSUES AND RULINGS: 1) Even if there was a "no trespassing" sign on the rural property, were the officers engaged in "legitimate police business," and were they in areas "impliedly open" to the public such that they were acting lawfully in their daylight approach to the rural home to try to talk to an arrest warrant suspect? (**ANSWER:** Yes, and therefore the officers' actions did not violate Fourth Amendment search and seizure protections);

2) Did the search warrant affidavit establish probable cause to search the property for a methamphetamine manufacturing operation where the affidavit provided information about the felony arrest warrant, pseudoephedrine pills, evasive response by the suspect to the deputies, and the suspect's likely propane-purging activity? (ANSWER: Yes, probable cause was established);

3) Was the PC information in the search warrant affidavit stale? (ANSWER: No);

4) Is the sentence enhancement for being "armed" in the commission of meth manufacturing supported by the evidence? (ANSWER: No);

5) Is the sentence enhancement for a minor being in or on the premises of the meth manufacturing supported by the evidence? (ANSWER: No)

Result: Affirmance of Thurston County Superior Court conviction of Daniel Norman Ague-Masters for manufacturing methamphetamine; reversal of sentencing enhancements for committing this crime in the presence of a minor and for committing crime while armed with a deadly weapon; case remanded for resentencing.

ANALYSIS: (Excepted from Court of Appeals opinion)

1) Expectation of privacy on rural property

Although residents maintain an expectation of privacy in the curtilage, or area contiguous with a home, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house," so long as they do so as would a "reasonably respectful citizen." Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment.

Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry. An access route is impliedly open to the public, absent a clear indication that the owner does not expect uninvited visitors. See State v. Ross, 141 Wn.2d 304 (2000) **Sept 2000 LED:02**. "No trespassing" signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. Entry during daylight hours is more consistent with that of a reasonably respectful citizen. See Ross.

Before we can determine if the areas of the curtilage were impliedly open, we must address Ague's argument that the deputies were not on legitimate police business when they entered his property. Ross. Entering property to speak with occupants as part of an investigation of a possible crime is legitimate police business. Ross. Here, the deputies saw a car on the property associated with a person who had an outstanding arrest warrant, and they entered the property to ask the occupants about the person. Substantial evidence supports the trial court's finding that the deputies were engaged in legitimate police business.

Ague next argues that the deputies exceeded the scope of implied invitation by driving past a "No trespassing" sign and walking to the backyard. Here, the deputies entered the property during daylight hours and drove through an open, unlocked gate, proceeding down an unobstructed driveway. Although [Deputy A]

saw what could have been a “No trespassing” sign, two other officers did not see it. One deputy knocked on the front door but no one answered and, after hearing a noise, the deputies followed the noise through an open yard to where they found Layton.

Substantial evidence also supports finding that a reasonable, respectful citizen would believe that he could drive through the open gate and down the driveway to the area where the deputies stopped, despite the possible presence of the sign in the tree. Additionally, a reasonable, respectful citizen seeking to contact an occupant would believe he could follow the deputies' same unobstructed path to the backyard. The deputies did not exceed the scope of implied invitation while on Ague's property.

2) Probable cause to search for meth manufacturing

An affidavit establishes probable cause if it sets forth sufficient facts to lead a reasonable person to conclude there is a probability that criminal activity has taken place and that evidence of the criminal activity can be found at the place to be searched. “In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstance set forth in the affidavit and drawing commonsense inferences.”

Here, the affidavit without the information the trial court excised provided that Layton, who had an existing felony warrant, possessed a pill container with 150-200 pseudoephedrine pills prescribed for a female. Layton responded evasively and furtively to the deputies' questions. Three propane tanks were on the back porch of the residence, and the strong smell of propane led the deputies to believe someone was purging them. The affidavit also included an officer's statement that drug manufacturers use purged propane tanks to store anhydrous ammonia and that that pseudoephedrine and anhydrous ammonia are primary precursors for methamphetamine manufacture.

The facts alleged in the affidavit, absent the excised portions, sufficiently support a conclusion that criminal activity was taking place and that evidence of criminal activity was on the property. Accordingly, the redacted affidavit established probable cause to issue the search warrant.

3) Non-stale probable cause information

Ague also argues that the information in the affidavit was stale because there was no indication Layton would still be at the property at the time of the search, three days after the deputies' initial contact with him.

In evaluating whether the facts underlying a search warrant are stale, we look at the totality of the circumstances. “The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity.”

The information in the affidavit was not stale. Only two days elapsed from the time the deputies first encountered Layton on the property and when they served the warrant. The deputies found pseudoephedrine pills on Layton and what appeared to be purging propane tanks in the yard, which suggested that any manufacturing could be in its early stages. It was reasonable to assume that the methamphetamine manufacturing process would be ongoing when the deputies

served the warrant. The trial court did not err in denying Ague's motion to suppress.

4) Not armed with a deadly weapon

“A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes,” and there is a connection or nexus between the defendant, the weapon, and the crime.

[W]hen determining the nexus between the weapon and the crime, we must examine “ ‘the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).’ ”

Here, the deputies detained and handcuffed Ague outside his front door. There was a methamphetamine lab in a detached shed 100 feet from the house but no evidence of a lab in the house. The deputies did not find any firearms in the shed but found 12 unloaded firearms and drug paraphernalia locked in a safe in the house. The deputies had already arrested Ague when they found the unloaded firearms in the safe. There was no evidence Ague attempted to use or had used one of the firearms for offensive or defensive purposes.

The State argues that the firearms were easily accessible because had Ague chosen to use them, he could have opened the safe, loaded one of them, and used it. But Washington courts have found that a defendant is not “armed” even though he, presumably, could have obtained a weapon by taking a few steps.

The State also compares this case with [a prior Court of Appeals decision] arguing that the fact finder could reasonably infer that the firearms were part of a defense system for the methamphetamine lab. But although there was a surveillance system monitor in the shed, there were no firearms in the shed. Unlike [the prior case], there was no evidence of a firearm that someone had recently used or other loaded firearms that had been present in the manufacturing lab. Rather, the firearms were located in a safe in the house 100 feet away from the methamphetamine lab.

The evidence is insufficient to show that the firearms in the safe were easily accessible and readily available, and Ague's constructive possession of the firearms is not enough to show he was “armed” for purposes of former RCW 9.94A.125. Accordingly, we vacate his deadly weapon enhancement.

5) No minor in or on manufacturing premises

Here, police found S.A. in the house, but the methamphetamine lab was in a detached shed approximately 100 feet away. There was no evidence of methamphetamine manufacturing anywhere else on the property outside the shed. No evidence linked S.A. to the clothing in the shed or suggested that she used the shed or area around the shed. And importantly, the residence was outside the hot zone police taped off around the shed.

Considering the evidence in the light most favorable to the State and all reasonable inferences from it, the evidence was insufficient to find that S.A. was present in or on the premises of manufacture for purposes of former RCW

9.94.128. We vacate Ague's sentence enhancements for manufacturing methamphetamine while a minor was in or on the manufacturing premises.

[Some citations omitted]

LED EDITORIAL NOTE REGARDING "ARMED" SENTENCING ENHANCEMENT: In recent decisions, the Washington Supreme Court addressed the sentencing enhancement for committing a crime while "armed." Those decisions will not be digested in the **LED** except in this note. The cases were, as all such cases must be, decided on the totality of the circumstances. In **State v. Easterlin**, 159 Wn.2d 203 (2007), the Supreme Court ruled that where a handgun was in the arrestee's lap just moments before he was arrested out of his car, and a loaded magazine had been on the car seat beside him, the evidence was sufficient to establish that he was "armed" during his commission of the crime of possession of cocaine. In **State v. O'Neal**, 159 Wn.2d 500 (2007), the Supreme Court ruled that evidence that a methamphetamine manufacturer's home contained a loaded "AR-15" leaning against closet wall, and one of the accomplice family members testified that a pistol in the house was "there if I needed it," another accomplice living in the house was "armed" in the commission of the meth manufacturing crime. And in **State v. Eckenrode**, 159 Wn.2d 488 (2007), the Supreme Court ruled that, where a marijuana grower had called 911 only minutes earlier regarding a possible intruder and told the dispatcher that he (the grower) had a loaded gun in his hand and was prepared to shoot any intruder, the discovery by responding police officers of a loaded rifle, an unloaded Ruger pistol, and a police scanner in the grow house was evidence that the defendant was "armed" in the commission of the crime of marijuana growing.

EVIDENCE HELD SUFFICIENT TO SUPPORT JURY VERDICT THAT VALUE OF STOLEN RINGS WAS OVER \$1500

State v. Hermann, ___ Wn. App. ___, 158 P.3d 96 (Div. III, 2007)

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

[At defendant's trial for stealing rings from his stepmother Joann], a certified diamond grader appraised the eight recovered rings at slightly over \$900, based on the value of the gold and diamonds. The appraiser did not take into account the value of any colored stones. Joann also submitted sales receipts for many of the rings, including some of the rings that were not recovered. The receipts for the rings placed their purchase price at over \$4,000.

The State proffered an original jury instruction stating that evidence of retail price may be sufficient to establish value. Hermann objected, arguing that the instruction was not included in the pattern jury instructions and improperly commented on the evidence. The trial court gave the instruction, finding that it was accurate and well founded in case law.

The jury convicted Hermann on all three charges.

ISSUES AND RULINGS: 1) Was there sufficient evidence to support the jury's verdict that the value of the rings that defendant stole had a total value of greater than the threshold amount for first degree theft, \$1500? (**ANSWER:** Yes); 2) Where defendant pawned and did not sell the stolen goods, is there sufficient evidence that defendant committed the crime of trafficking in stolen property? (**ANSWER:** Yes); 3) Did the trial court make a prejudicial comment on the

evidence by instructing the jury that “evidence of a retail price may be sufficient to establish value?” (ANSWER: Yes)

Result: Affirmance of Mason County Superior Court conviction of Nathan W. Hermann for trafficking in stolen property; reversal of first degree theft conviction and remand for retrial on that charge.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Sufficient evidence of value

Hermann contends that the sales receipts for the rings did not prove that the value of the rings exceeded \$1,500 because the purchases were too remote, having occurred over a 20 year period.

To prove first degree theft, the State must present evidence that the defendant stole property exceeding \$1,500 in value. RCW 9A.56.030(1)(a). “Value” refers to the market value of the property at the time and in the general area of the crime. RCW 9A.56.010(18)(a). Market value is an objective standard and consists of the price a well-informed buyer would pay to a well-informed seller.

In determining the value of an item, evidence of price paid is entitled to great weight. The jury can consider changes in the property's condition that would affect its market value. Value need not be proven by direct evidence as the jury may draw reasonable inferences from the evidence.

Here, the evidence was sufficient to place the value of the stolen rings in excess of \$1,500. Joann's receipts showed that she paid at least three times that amount when she purchased the rings. One of the unrecovered rings came with a lifetime guarantee for its full value of \$1,110.34. The recovered rings were worth at least \$915 because of the value of the gold and diamonds, without considering the value of the colored stones. Considering only the wholesale value of the gold and diamonds in the recovered rings, together with the guaranteed value of the unrecovered ring, the State presented sufficient evidence from which the jury could reasonably infer that the value of the stolen jewelry exceeded \$1,500.

Moreover, Hermann misplaces reliance on State v. Morley, 119 Wn. App. 939 (Div. III, 2004) **Aug 04 LED:18**. In Morley, Division Three held that evidence of retail value was insufficient to prove market value under the facts of that case. But that case involved a used generator, which was purchased at less than retail price and depreciated in value. Here, Joann purchased the rings at retail prices and they retained their wholesale value as gold and gemstones. Under these facts, Morley does not apply.

Because the State presented sufficient evidence for the jury to conclude that the value of the stolen rings exceeded \$1,500, Hermann's first argument fails.

2) Sufficient evidence of trafficking

A defendant “who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first

degree.” RCW 9A.82.050(1). “Traffic” is defined as “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person.” RCW 9A.82.010(19).

Contrary to Hermann's contention, sale or transfer of ownership is not the exclusive means of committing trafficking in stolen property. Evidence that a defendant knowingly pawns stolen goods is sufficient to support a charge of trafficking in stolen property. See generally State v. Michielli, 132 Wn.2d 229 (1997) **Oct 97 LED:11**.

3) Instruction to jury regarding “value”

A jury instruction can constitute a comment on the evidence if it reveals the court's attitude toward the merits of the case, or the court's evaluation of a disputed issue. Judicial commentary on the evidence is prohibited in order to prevent the court's opinion from influencing the jury.

...

Here, the trial court instructed the jury in instruction 21: “Evidence of a retail price may be sufficient to establish value.”

In our view, [the case law does not support] giving instruction 21. By instructing the jury that evidence of retail price could be sufficient to establish the value of the stolen jewelry, the trial court improperly directed the jury to give greater weight to that evidence than the evidence of wholesale value. “Because the jury is the sole judge of the weight of the testimony, a trial court violates this prohibition when it instructs the jury as to the weight that should be given certain evidence.” Instruction 21 improperly invaded the province of the jury by effectively directing it to calculate the jewelry's value based on the purchase price, to the exclusion of other competent evidence of value.

Moreover, the State has not shown the error was harmless. Because the evidence that the jewelry was worth at least \$1,500 was not overwhelming, it is likely that instruction 21 influenced the jury's verdict. The conviction of first degree theft must be reversed and the matter remanded for further proceedings.

[Some citations omitted]

DRUNK BOATER’S OFFER TO GIVE HIS SINKING BOAT TO ONLOOKERS IN EXCHANGE FOR A RIDE AND FOR THEIR SILENCE AS TO HIS CRIME HELD NOT BRIBERY

State v. Henjum, 136 Wn. App. 807 (Div. III, 2007)

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

Occupants of a houseboat complained to authorities of the National Park Service about a couple of drunks driving a jet boat on Lake Roosevelt. Richard Henjum owned and was driving the boat. He ran the jet boat aground. The couple argued. The woman jumped overboard. The boat was sinking.

Mr. Henjum tried to cut a deal with the occupants of the houseboat. He would give them his boat if they would take he and his friend to the marina and not call the authorities. The authorities arrived. They found a highly intoxicated Mr. Henjum. He had difficulty walking and speaking. His eyes were bloodshot. Mr. Henjum said he owned the boat.

The police took the couple to the marina and cited Mr. Henjum for boating under the influence. The State later charged Mr. Henjum with the operation of a vessel under the influence of intoxicating liquor and/or drugs and bribery. Mr. Henjum moved to dismiss the bribery charge because it was not supported by the facts (Knapstad motion). The judge agreed and dismissed the charge. The State appeals that ruling.

ISSUE AND RULING: Does Mr. Henjum's drunken offer of his sinking boat in exchange for a ride and silence satisfy the bribery statute's requirement that the offer be made to induce a person "to refrain from reporting information relevant to a criminal investigation? (**ANSWER:** No)

Result: Affirmance of Ferry County Superior Court dismissal of bribery charge.

ANALYSIS: (Excerpted from Court of Appeals opinion)

We view the evidence and the reasonable inferences from that evidence in the light most favorable to the State when passing on a Knapstad motion.

To make out a case of bribery, the State must show that the accused (1) conferred or offered to confer a benefit on a person about to be called in any official proceeding, or (2) on a person who may have information relevant to a criminal investigation. RCW 9A.72.090(1). The State must also show an intent to influence testimony, or to induce someone not to testify, or "[i]nduce that person to refrain from reporting information relevant to a criminal investigation." RCW 9A.72.090(1)(d).

Here, there was no pending proceeding or investigation. Indeed, Mr. Henjum was trying to do what he could to forestall an investigation and any proceeding. Mr. Henjum did not then offer or confer any benefit upon a person about to be called in an official proceeding. RCW 9A.72.090(1). And Mr. Henjum could not have offered or conferred a benefit upon a person who may have information relevant to "a criminal investigation."

The trial judge's comments are also insightful. The offer of a " 'damaged and half submerged' boat by a highly intoxicated individual" would not be an advantage or a gain as required by the statute for the finding of bribery. We agree. The requirement of some intent is not satisfied by a highly intoxicated man offering a sinking boat to bystanders when neither a criminal investigation nor an official proceeding had begun. No investigation was pending. No testimony was called for.

We affirm the trial judge's dismissal of this bribery charge.

LED EDITORIAL COMMENT: Certainly the Henjum case did not involve the most egregious behavior ever committed, but we think that some of the analysis by the Court of Appeals misinterprets the phrase "information relevant to a criminal investigation." There need not be a pending investigation for the phrase to apply. The phrase is found not only in the bribery statute at issue in this case but also in the witness intimidation and witness

tampering statutes. In **State v. James**, 88 Wn. App. 812 (Div. II, 1997) March 98 LED:15, the Court of Appeals declared that this phrase in the intimidating a witness statute, RCW 9A.72.110, makes criminal a person's threats made "to induce a person not to report a crime and, necessarily, threats made before an investigation is commenced." Officers may wish consult their legal advisors and prosecutors on this question.

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>]

