



Law Enforcement

OCTOBER 2008

Digest

630th Basic Law Enforcement Academy – April 28, 2008 through September 3, 2008

President: Martin R. Shane – Clallam County Sheriff's Office
Best Overall: Brandon J. Koe – Pullman Police Department
Best Academic: Brandon J. Koe – Pullman Police Department
Best Firearms: Michael J. Clark – Benton County Sheriff's Office
Tac Officer: Randy Huserik – Seattle Police Department

631st Basic Law Enforcement Academy – May 5, 2008 through September 10, 2008

President: Michael Sargent – Arlington Police Department
Best Overall: Matthew T. Barker – Snohomish County Sheriff's Office
Best Academic: Matthew T. Barker – Snohomish County Sheriff's Office
Best Firearms: Peter C. Teske – Snohomish County Sheriff's Office
Tac Officer: Sergeant Bryan Keller – Bothell Police Department

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NINTH CIRCUIT, U.S. COURT OF APPEALS

SECTION 1983 CIVIL RIGHTS CASE JURY UPHELD ON ITS REASONABLENESS FINDING WHERE OFFICERS WAITED 5 TO 8 SECONDS, AFTER KNOCKING AND ANNOUNCING, BEFORE BEGINNING THEIR EFFORTS TO FORCE HOME’S STEEL SECURITY DOOR TO EXECUTE NARCOTICS SEARCH WARRANT

Howell v. Polk, 532 F.3d 1025 (9th Cir. 2008) (decision filed July 16, 2008)

Facts and Proceedings below: (Excerpted from Ninth Circuit opinion)

Around 6:30 in the morning, a team of police officers arrived at the Howell residence to execute a search warrant [for narcotics]. The officers were required to knock and announce their presence before they could use force to enter the home. Wilson v. Arkansas, 514 U.S. 927 (1995) **Sept 95 LED:03**. At trial, witnesses testified that at least one officer knocked on the door and yelled “police, search warrant.” The police testified that, because the front door was a steel-reinforced “security door” that would take some time to breach, they began to force the door open when they didn’t hear a response after five to eight seconds of knocking and yelling. It took the police twenty to thirty seconds to open the door. At least one officer continued to yell “police” while the others were forcing entry.

ISSUE AND RULING: Are the Howells entitled to summary judgment on grounds that, as a matter of law, the officers were unreasonable in waiting only five to eight seconds before starting to force the front steel security door to execute a narcotics search warrant? (**ANSWER:** No)

Result: Affirmance of U.S. District Court (Arizona) judgment against the Howells based on the jury's verdict for the government.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

The district court instructed the jury to determine whether execution of the search warrant was reasonable given the totality of the circumstances. The jury found that it was. On appeal, the Howells argue that the jury should have been instructed to find only the number of seconds that elapsed between the first knock and the police starting to break down the door, and whether that amount of time was reasonable as a matter of law.

Determining whether the officers' entry into the house was reasonable required balancing complex considerations: The Howells argued that it wasn't, because the police waited only five to eight seconds before starting to break down the door. According to the Howells, few area residents would be awake-and thus able to dispose of evidence, flee or arm themselves-at 6:30 in the morning. The police countered that they had no choice but to start the process quickly because they knew that the steel security door would take a while to breach, and if they had waited any longer, the Howells would have had time to arm themselves *[Court's footnote: [Concern for safety] turned out to be well-founded. As the police were forcing the door open, Robert Howell retrieved a revolver from his bedroom, loaded it and fired one shot at the intruders. Upon realizing that the men at his door were police, he dropped his gun and surrendered.]* or dispose of evidence. The police further argued that the large picture window in the front of the house would have given a resident a vantage point from which to shoot at officers, that the small size of the house would have allowed the occupants to quickly hide evidence and that the drugs for which police were looking could have been flushed down the toilet in seconds. See United States v. Banks, 540 U.S. 31 (2003) **Jan 04 LED:02** ("the opportunity to get rid of [narcotics]" is a factor in how long officers must wait).

The Howells argue that, because the case requires balancing competing interests in privacy and law enforcement, only the district judge may determine whether the conduct was reasonable. But we frequently entrust juries with the task of determining the reasonableness of police conduct. For example, in excessive force lawsuits, the jury is usually charged with deciding whether the force used by police in effecting an arrest was reasonable. As in this case, determining whether an officer used excessive force requires the jury to balance the state's interest in law enforcement against the plaintiff's interest in personal security. If a jury is capable of weighing the reasonableness of a use of force, then it is also capable of weighing the reasonableness of an entry into a building. In other section 1983 lawsuits, the jury decides whether the police had probable cause to search. If the jury can weigh probable cause, a tricky and legalistic doctrine if ever there was one, then it can also decide whether a warrant was lawfully executed. The district court didn't err in submitting the issue of reasonableness to the jury.

The Howells also appeal the district court's denial of their motion for summary judgment. They argue that the court erred in not holding that the search was unreasonable as a matter of law. While there are some entries that are

unreasonable as a matter of law, (finding, under the totality of circumstances, that five seconds was unreasonable), this one was not among them. Plaintiffs lived in a small house, with a large picture window and a difficult-to-breach security door. In these circumstances, a jury *might* have found the search unreasonable, but was not required to do so. The district court didn't err in denying plaintiffs summary judgment on their claim of unlawful entry.

[Some citations, one footnote omitted]

IN-HOME QUESTIONING, WITH CHILD PORN SUSPECT SURROUNDED BY OFFICERS IN A STORAGE ROOM, HELD “CUSTODIAL” UNDER TOTALITY OF CIRCUMSTANCES PER MIRANDA RULE DESPITE FACTS THAT THE INTERROGATING OFFICER TOLD THE SUSPECT THAT THE SUSPECT: 1) WOULD NOT BE ARRESTED THAT DAY, 2) DID NOT HAVE TO ANSWER ANY QUESTIONS, AND 3) WAS FREE TO LEAVE AT ANY TIME

U.S. v. Craighead, __ F.3d __ , 2008 WL 3863709 (9th Cir. 2008) (decision filed August 21, 2008)

Facts: (Excerpted from 9th Circuit opinion)

[A child pornography] search warrant for Craighead's residence on [an] Air Force base was executed at approximately 8:40 A.M. on July 27, 2004. Eight law enforcement officers, representing three different agencies, went to Craighead's residence: five FBI agents, a detective from the Pima County Sheriff's Department, and two members from the OSI. All of these law enforcement officers were armed; some of them unholstered their firearms in Craighead's presence during the search. All of the FBI agents were wearing flak jackets or “raid vests.” Two non-agents accompanied the law enforcement officers: an FBI evidence control clerk, and Air Force Sergeant Mike Ramsey, who the government later represented was present for Craighead's “emotional support” [though Craighead was not so informed and saw the Sergeant's presence there as being in a supervisory role].

At the hearing on Craighead's motion to suppress, SA Andrews testified that while other officers executed the search warrant, she introduced herself to Craighead as Robin Andrews from the FBI. She also introduced Jeff Englander, the detective from Pima County. She told Craighead that the two of them would like to talk with him about the search warrant. She told him that he was not under arrest, that any statement he might make would be voluntary, and that he would not be arrested that day regardless of what information he provided. SA Andrews also testified that she told Craighead that he was free to leave [and the U.S. District so found].

SA Andrews and Detective Englander then directed Craighead to a storage room at the back of his house, “where [they] could have a private conversation.” SA Andrews did not handcuff Craighead at any point while escorting him to the storage room nor during the interview that followed. As SA Andrews described the storage room, it was cluttered with boxes. She could not recall whether Craighead sat on a box, or whether he sat on a chair grabbed from the kitchen. SA Andrews squatted on the ground, taking notes. Detective Englander stood leaning against the wall near the exit, with his back to the door. Detective Englander wore a flak jacket and a sidearm. SA Andrews testified that they shut

the door “for privacy.” Although Sergeant Ramsey had ostensibly been brought along to provide emotional support for Craighead, he was not permitted to accompany Craighead into the storage room. SA Andrews testified that this was because he was “non-law enforcement” and therefore would “never” be permitted to be present during an FBI interview.

The interview lasted approximately twenty to thirty minutes. SA Andrews testified that it was her practice to tell interviewees that they are “free to leave” at the beginning of each interview, even if she has already told them this when escorting them to the interview location. However, she could not recall whether she actually repeated this statement to Craighead after they entered the back storage room and she closed the door. During the interview, SA Andrews did not make any threats or promises to induce Craighead to speak. She did not use any force. She did not read Craighead the Miranda warnings.

Craighead testified that he felt that he was not free to leave because he “would have either had to have moved [Detective Englander] or asked him to move.” He also testified that the “prevailing mood of the morning” left him with the impression that he was not free to leave. He knew there were members of three different law enforcement agencies present in his home: the FBI, the Pima County Sheriff’s Department, and the Air Force OSI. He believed that even if SA Andrews permitted him to leave, members of the other two law enforcement agencies would not. He was concerned that the agencies had not coordinated and so members of the other agencies might not know that SA Andrews had authorized him to leave. Similarly, he was unsure if he needed permission from all three agencies to leave, or if the Air Force investigators believed that he needed such permission.

Craighead also testified that he was unaware during the interview that Sergeant Ramsey had been invited to provide emotional support. Rather, as Craighead explained, Sergeant Ramsey was his “first sergeant,” a superior with authority over him. Craighead assumed Sergeant Ramsey was required to be there by Air Force regulation. It was not until after everyone had left his house that he had a moment to speak with Sergeant Ramsey and discover the reason for Sergeant Ramsey’s presence.

During the interview, Craighead admitted that he downloaded child pornography using LimeWire, that he stored child pornography on his computer, and that he had saved some to a disk. Craighead was not arrested at the end of the interview. He was never arrested at any time prior to his conviction; he appeared in court by summons only.

The search resulted in the seizure of the hard drive and loose storage media (compact discs and 3.5-inch floppy diskettes) from Craighead’s computer. The FBI computer forensics expert located [extensive child pornography].

Proceedings below:

Craighead was charged in U.S. District Court in Arizona with violating federal child pornography law. He moved to suppress the statements he gave to officers on grounds that he should have received Miranda warnings before questioning. The District Court denied his motion, and he was convicted and sentenced to 78 months imprisonment.

ISSUE AND RULING: Under the totality of the circumstances of the questioning, including the facts: 1) that questioning took place in a small, closed, back room with the door closed; 2) that Craighead was surrounded by armed law enforcement officers; and 3) that his Air Force Sergeant was excluded from the room, was Craighead in “custody” for Miranda purposes despite the fact that the interrogating officer told him that he would not be arrested that day, that he did not have answer any questions, and that he was free to leave at any time? (**ANSWER:** Yes)

Result: Reversal of U.S. District Court (Arizona) conviction of Ernest Craighead for violating federal child pornography.

ANALYSIS:

Under the U.S. Supreme Court’s Miranda decision, an interrogation must be preceded by Miranda warnings if the circumstances are custodial. The courts apply a totality-of-the-circumstances test to determine custody, which means that anticipating how the courts will rule on the custody question is not easy to predict. The custody determination turns on such factors as: (1) the location of the questioning (e.g., street corner questioning is less likely to be held custodial than police station interrogation room questioning); (2) the duration of the questioning (questioning during a brief Terry investigatory detention is ordinarily not deemed to be Miranda custody, while extended interrogation-room questioning is more likely to be deemed custodial); (3) the words used by the police (including communication of the officers’ perceived probable cause facts, their communication regarding the length of time that the interrogation might be expected to last, and any express communication that the suspect need not answer questions or is free to leave at any time); (4) the intensity, tone, and manner of questioning; (5) the use of restraints or a show of force prior to or at the time of the questioning; and (6) the release or incarceration of the suspect at the end of the questioning.

The Craighead Court notes that often an interrogation by law enforcement officers in the suspect’s own home is held to be non-custodial because there is less police domination than in police station questioning. But even for in-home questioning, the determination is one that depends on all of the circumstances of the particular case. The Court explains in lengthy, detailed, fact-based analysis that an in-home interrogation may become police-dominated depending upon (1) the number of law enforcement personnel, the number of agencies represented, and whether they were armed and at some point guns were unholstered; (2) whether the suspect was at any point restrained, either by physical force, by threats or by positioning of officers; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made. Ultimately, the Craighead Court concludes that the questioning here occurred in an atmosphere that was so police-dominated that it was custodial.

LED EDITORIAL COMMENT: The test for custody is so multi-factored and fact-based that many prosecutors and police legal advisors will tell officers that the better course of action, whenever in doubt as to Miranda applicability, is to Mirandize. This is yet another case that illustrates the point.

But we have said in the past that there will be cases where experienced officers, in their best judgment regarding the particular case and particular suspect, will reasonably decide that their best chance of obtaining a statement is to conduct purely voluntary, non-Mirandized questioning of a suspect. In those cases, we have suggested in the past, officers will generally want to do the following - - (1) they must procure the suspect’s presence in the room voluntarily; (2) they should make clear before any questioning that

the suspect is free not to answer any questions, is not under arrest, and is free to leave at any time; and (3) they should be prepared to release the suspect once the questioning is completed. All of these things were done in the Craighead case. We now add to that suggestion that officers also evaluate the setting in which the questioning is conducted so that the setting seems as non-coercive as practicable. If the questioning in the Craighead case had occurred at a kitchen table or living room sofa or on the porch, we guess that the outcome would have been different.

NO PRIVACY RIGHT IN COMPUTER FILE-SHARING SYSTEM ACCESSIBLE TO OTHERS ON PEER-TO-PEER NETWORK

U.S. v. Ganoë, ___ F.3d ___, 2008 WL 3546375 (9th Cir. 2008) (decision filed August 15, 2008)

Facts: (Excerpted from 9th Circuit opinion)

On January 5, 2004, Immigration and Customs Enforcement Special Agent Ken Rochford was using LimeWire to locate people using file-sharing programs to trade child pornography. LimeWire is a file-sharing program that can be downloaded from the internet free of charge; it allows users to search for and share with one another various types of files, including movies and pictures, on the computers of other persons with LimeWire. Once a user downloads the program onto his computer, the user can click on an icon that connects his computer to others on the network. Users can input search terms and receive a list of responsive files available on other computers connected to the network.

Upon observing a file entitled "Baby J Compilation," Rochford downloaded and viewed the movie, confirming that it depicted an adult having sexual intercourse with a very young girl. (The computer forensics expert testified that "BabyJ" is a common term in the world of child pornography, referring to "a specific victim of child exploitation" depicted in a series of pictures and movies.) Rochford used LimeWire's "Browse Host" feature to view all of the files being shared by a particular "Host," thereby discovering four additional file titles that suggested similar content. Rochford downloaded and viewed these files, observing that they too contained footage of children engaged in sexually explicit conduct. Rochford determined that the downloads originated from a computer with a particular IP address, and that the IP address was assigned to Tyrone Ganoë, located at a specified residence in Norwalk, CA.

Agents obtained a search warrant for that address, which was executed on March 9, 2004. Tyrone Ganoë arrived at the residence while the agents were engaged in the search. He spoke with Agent Margaret Condon, who advised him that he was not under arrest but that she would like to ask him a few questions. Ganoë agreed, confirming that he lived at the house with his mother Josephine and his sister Yvette. Condon asked Ganoë if he knew why the agents were there, and he said that he did; he explained that he had been using LimeWire to download music and had inadvertently downloaded child pornography. He stated that the "bad stuff" could be found in the "z" folder on the iMac. Upon examination, the "z" folder was found to contain 72 image and movie files suspected to be child pornography.

The day after the search of Ganoë's residence, Agent Condon called Ganoë on his cell phone to inform him that he could retrieve some of the items taken during the search. Ganoë volunteered that he was seeking counseling for his

“problem.” Agent Condon asked him what he meant, and he stated that he was referring to his habit of viewing child pornography.

Proceedings below:

Ganoe was charged in U.S. District Court in California with several counts under federal child pornography laws. The District Court rejected his motion to suppress the evidence taken from his computer under the search warrant. The District Court concluded that Ganoe “knew or should have known that the [filesharing] [software that he had loaded into his computer] might allow others to access his computer.”

Ganoe was convicted and sentenced to 96 months.

ISSUE AND RULING: Did Ganoe have a privacy right in a file-sharing computer system that he had loaded into his computer and that he knew others could freely access through their computers? (ANSWER: No)

Result: Affirmance of U.S. District Court (California) conviction and sentence of Tyrone Alan Ganoe.

ANALYSIS: (Excerpted from 9th Circuit opinion)

Ganoe asserts that when Agent Rochford used LimeWire to access the child pornography files on his computer, Rochford conducted a warrantless search that was illegal under the Fourth Amendment. The district court denied Ganoe's motion to suppress evidence obtained from Rochford's search on the grounds that having installed file sharing software on his computer, Ganoe “knew or should have known that the software might allow others to access his computer” and thus lacked a reasonable expectation of privacy in the files stored on his computer. We agree and affirm the denial of the motion to suppress.

Although as a general matter an individual has an objectively reasonable expectation of privacy in his personal computer, . . . we fail to see how this expectation can survive Ganoe's decision to install and use file-sharing software, thereby opening his computer to anyone else with the same freely available program. The crux of Ganoe's argument is that he simply did not know that others would be able to access files stored on his own computer. But he knew he had file-sharing software on his computer; indeed, he admitted that he used it—he says to get music. Moreover, he was explicitly warned before completing the installation that the folder into which files are downloaded would be shared with other users in the peer-to-peer network. Ganoe thus opened up his download folder to the world, including Agent Rochford. To argue that Ganoe lacked the technical savvy or good sense to configure LimeWire to prevent access to his pornography files is like saying that he did not know enough to close his drapes. Having failed to demonstrate an expectation of privacy that society is prepared to accept as reasonable, Ganoe cannot invoke the protections of the Fourth Amendment.

[Citations omitted]

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

(1) BECAUSE ARREST PROCESS BEGAN WHEN ARRESTEE WAS TWO HOUSES AWAY FROM THE CAR THAT HE HAD JUST PARKED, THE CAR COULD NOT BE LAWFULLY SEARCHED INCIDENT TO HIS ARREST – In U.S. v. Caseres, 533 F.3d 1064 (9th Cir. 2008) (decision filed July 21, 2008), the Ninth Circuit holds that an arrestee’s car was not subject to search incident to arrest because he was two houses away from his car when the arrest process began.

An LAPD officer decided to investigate whether tinting of the windows of Caseres’ car was lawful. Caseres had parked his car and had walked two houses away from the car to arrive in front of his own house. At that point, the officer contacted Caseres and asked to talk to him. Caseres threatened the officer, and the officer told him he was under arrest and attempted to take control of him. Caseres broke free and was taken into custody a few blocks away.

The Ninth Circuit holds that for purposes of the search incident rule for car searches, Caseres was not near enough to his car to support searching it as incident to arrest. The Court says this is so regardless of whether one uses as the location of the arrest: 1) the place of the initiation of the arrest process, or 2) the place of final successful apprehension of Caseres.

Result: Reversal of U.S. District Court (California) conviction of Joseph Caseres for violation of Federal law prohibiting convicted felons from possessing firearms ammunition.

LED EDITORIAL NOTE: A similar exclusionary ruling on somewhat similar facts was made by the Washington Court of Appeals, Division Two, in State v. Rathbun, 123 Wn. App. 372 (Div. II, 2004) Jan 05 LED:08.

(2) SATIRICAL MESSAGE – “I AM A . . . SUICIDE BOMBER TERRORIST” PAINTED ON HIS VAN BY MILD-MANNERED, ANTI-GOVERNMENT “NUT” WAS PROTECTED AS “FREE SPEECH” UNDER THE FIRST AMENDMENT – In Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008) (decision filed June 27, 2008), the Ninth Circuit rules that, taking into account the full context of the investigation of messages painted on a 1970 white VW van, officers did not have justification, in light of constitutional freedom of speech protection, to arrest and jail the suspect, to impound his van, or to make him paint over the van’s messages.

The Fogel Court describes the van’s decoration as follows:

The words “I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!” were painted in block letters on the back of the van above the rear window. On the rear window was painted “PULL ME OVER! PLEASE, I DARE YA[.]” Below the window in slightly smaller letters was the text “ALLAH PRAISE THE PATRIOT ACT ... FUCKING *JIHAD* ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!” A small American flag was attached to the van below the lettering. The rest of the van was decorated with slogans and paintings that had no political or threatening character.

A citizen complained about the van. Law enforcement officers from a Utah town investigated. They concluded on contacting him that Fogel was a mild-mannered anti-government enthusiast, who some others in the community called an “anti-government nut.” Fogel consented to a search of the van, which the officers did, but in doing so they did not treat the van as if it actually contained a bomb. The search yielding nothing. Nonetheless, solely because of the messages on the van, the officers arrested him, took him to jail, and impounded his van, and made him paint over the messages before allowing him to retrieve the van from impound. The prosecutor declined to file charges, and Fogel sued.

The Fogel Court concludes that under either an objective (reasonable person) or a subjective (focused on Mr. Fogel) analysis, freedom of speech protects the messages on the van because no true threat was being made:

Applying the objective standard, we hold that “a reasonable person would [not] foresee that the statement [on the van] would be interpreted by those to whom [Fogel] communicates the statement as a serious expression of intent to harm or assault.” A reasonable person would expect that an observer of Fogel's van would see an old Volkswagen van covered with artwork, an American flag, and an obviously satiric or hyperbolic political message. The First Amendment and USA PATRIOT Act references are overtly political speech, and reasonable observers would be hard-pressed to believe that an actual suicide bomber would so boldly announce his presence and intentions. The remainder of the van displayed innocuous images and phrases, including some with spiritual meaning, created through the artistic endeavors of Fogel and his friends.

When we take into account the entire context of Fogel's statements on the van, it is hard to see how any reasonable observer would have believed the statements were serious expressions of an intent to cause harm.

Applying the subjective standard, we hold that Fogel did not intend his statements to threaten serious harm to anyone. In his deposition, he explained that his goal was:

to express disagreement . . . with the Patriot Act, and I wanted to display the need to express yourself and use your rights, especially when something like the Patriot Act is working to directly take those rights away and let people know that you still want those rights by exercising them. I wanted to express frustration . . . and I figured this was a safe, healthy way to do that.

Fogel also explained how he envisioned others would interpret the van:

It seemed to me impossible to construe . . . that someone was actually an Islamic extremist with any reason or desire to do harm to anyone. It seemed pretty plain to me that it's a joke and it's ironic and it's backwards, and that's just to get people to think about how backwards some of our government's reasoning is.

There is virtually no evidence that Fogel subjectively intended the speech as a true threat of serious harm. The officers noted that Fogel was “mildmannered” and did not have a threatening presence. None of the officers interpreted Fogel's words or actions as threatening. Even Fogel's purported statement in the parking lot that he intended to scare people-to scare them into thinking, or to scare them in the same way the United States government is scaring Iraqi citizens-is consistent with Fogel's contention that he intended his message to be satirical. Fogel's goal of shocking or “scaring” observers of the van into reflecting on political events is exactly the kind of “unpleasantly sharp attack[] on government and public officials” the First Amendment welcomes and protects.

[Citations omitted]

The Fogel Court goes on to conclude that the police officers were entitled to qualified immunity, however, because the law was not clearly established on the freedom of speech issue at the time they made the arrest. The Court also concludes that the police agency is not liable because no agency policy or policy-maker was involved in this case.

Result: Affirmance of U.S. District Court (Utah) dismissal order; the officers and agency are not liable for civil rights violation.

LED EDITORIAL COMMENT: The officers and agency escaped civil liability in this case, but the next time a case with similar facts comes to the courts, there may be liability. That is because the granting of qualified immunity is often a “but-don’t-do-it-again ruling.” The Ninth Circuit probably will now consider the law to be “clearly established” if a similar fact pattern comes before it.

(3) EXTENDING DETENTION OF ANTI-ABORTION PROTESTORS WHILE WAITING FOR A SUPERVISOR TO HELP OFFICERS INTERPRET THE LAW WAS NOT REASONABLE – In Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff’s Department, 533 F.3d 780 (9th Cir. 2008) (decision filed July 2, 2008), the Ninth Circuit rules, among a number of other things, that law enforcement officers who are having difficulty deciding whether conduct constitutes a crime are not justified in extending a Terry detention of a suspect for 30 minutes while they wait for a supervisor to come to the scene to help them figure out the law (as opposed to such brief delay to figure out the facts).

This was not the main issue in this civil rights lawsuit under 42 U.S.C., section 1983. The decision addresses several questions revolving around whether, under California statutes and under the federal constitution’s First and Fourth Amendments, the California officers lawfully detained anti-abortion protesters, lawfully searched their vehicles, and lawfully ordered them out of the area near a middle school. The decision focuses on interpretation of California statutes, particularly a statute about conduct on K-12 school property. But officers in all jurisdictions should keep in mind one lesson of this case. In light of First Amendment free speech protection, a crime is not generally presented by the mere fact that the images and words of anti-abortion protesters are highly offensive to parts of an audience. This includes even the troubling circumstances here involving communications to middle school children arriving at school.

Result: Reversal of U.S. District Court (California) order of summary judgment for law enforcement defendants; case remanded for trial.

(4) SAN FRANCISCO JAIL POLICY OF STRIP SEARCHING WITHOUT REASONABLE SUSPICION ALL PRE-TRIAL DETAINEES WHO ARE TO BE PLACED IN GENERAL POPULATION HELD TO VIOLATE FOURTH AMENDMENT – In Bull v. City and County of San Francisco, ___ F.3d ___, 2008 WL 3876757 (9th Cir. 2008) (decision filed August 22, 2008), the 9th Circuit rules, 2-1, in a class action civil suit that a jail’s blanket policy of strip searching all pre-trial detainees slated for placement in the general population violates the Fourth Amendment of the U.S. Constitution. The majority opinion also concludes that reasonable jail administrators would have known of this restrictions, requires individualized suspicion to justify strip searching of pre-trial detainees arrested for minor offenses. Therefore, the majority denies qualified immunity to the sheriff in charge of the jail.

Ninth Circuit Judge Richard Tallman, dissents, arguing: 1) that the jail officials provided compelling evidence regarding over 1000 incidents of smuggling of contraband into the general

jail population over a 3-year period; and 2) that the Ninth Circuit decision in this case and in others is out of step with U.S. Supreme Court precedents.

Result: Affirmance of U.S. District Court (California) decision denying qualified immunity to the sheriff in charge of the San Francisco city and county jail system.

LED EDITORIAL COMMENT: Jails in Washington that comply with Washington’s statutes on strip-searching and body-cavity searching – see RCW 10.79.060 – 10.79.160 – would appear to be legally safe under this ruling.

(5) SIX-PACK OF PHOTOS USED FOR IDENTIFICATION HELD TO BE SUFFICIENTLY QUESTIONABLE TO HELP SUPPORT CIVIL LITIGANT’S CLAIM THAT HE WAS ARRESTED WITHOUT PROBABLE CAUSE – In Torres v. City of Los Angeles, __ F.3d __ , 2008 WL 3905411 (9th Cir. 2008) (decision filed August 26, 2008), the Ninth Circuit reverses in part a U.S. District Court ruling that dismissed a section 1983 (federal civil rights) lawsuit against the Los Angeles Police Department and several detectives on grounds that an arrest for murder was not supported by probable cause.

A number of fact-based questions are addressed in the Court’s analysis, and the **LED** will address only one, the question of whether the identification procedure used by detectives was so questionable that its deficiencies supported in part in part the civil rights plaintiff’s theory that he was arrested without probable cause.

The Ninth Circuit describes the identification procedures, followed immediately by arrest, as follows:

Detective Hickman used the most recent photo of Torres she had received from Pomerantz to assemble a photographic identification array of six individuals called a “six-pack.” Detective Hickman used a computer database to find photos of five other individuals to place in the six-pack, which she did by searching for photos based on age and physical characteristics also applicable to Torres. However, while Detective Hickman first searched for photos of persons who were not only young male Hispanics but also “heavy,” that search did not yield a sufficiently large selection to fill the six-pack with faces that Detective Hickman considered to be similar to that of Torres. Accordingly, Detective Hickman expanded her search to include non-heavy persons, which did yield a sufficiently large selection. Plaintiffs’ police procedures expert testified at trial that the resulting six-pack was unduly suggestive because aside from Torres’ photo only one other photo was of a visibly “chubby” person, thus significantly increasing the odds that Hernandez would “identify” Torres in the lineup.

Detectives Roberts, Park and Rains then proceeded to the residence of Hernandez. Detectives Roberts and Park went inside to show Hernandez the six-pack; Detective Rains waited outside in his car. Detective Roberts told Hernandez that he “had possibly identified the 15- to 16-year old chubby boy” and then read her a standard “photographic show-up admonition.”

After Detective Roberts handed Hernandez the six-pack, Hernandez stared at it according to Hernandez for between five and ten minutes-whereupon Detective Roberts asked her at whom she was staring. Hernandez then indicated that she was staring at photo # 6, the photo of Torres. However, there was conflicting

testimony as to whether Hernandez also stated that the person in photo # 6 was the third male passenger in the car, or, on the contrary, whether she stated that she did not know whether it was him or not. It is undisputed, however, that the detectives then asked Hernandez to write down what she thought, whereupon Hernandez circled the photo of Torres with a pen and wrote on the six-pack, "I circle the person in # 6 because he looks more likely [sic] to the other guy in the car." Detective Roberts acknowledged at trial that, based solely on what Hernandez wrote on the six-pack, he did not have probable cause to arrest Torres.

When Detectives Roberts and Park rejoined Detective Rains outside Hernandez's home, Detective Roberts told Rains that Hernandez had identified Torres as the third male passenger—a statement which Hernandez testified at trial was false—and said they were going to arrest Torres. Detective Rains was not shown Hernandez's written statement on the six-pack. Detectives Roberts, Park and Rains then went to Torres' home. When Torres came outside and the detectives approached him, Torres did not try to flee. The detectives engaged in no conversation with Torres but simply arrested him in his mother's presence. Detective Park acknowledged at trial that at the time of Torres' arrest there was no physical evidence linking Torres to the shooting.

[Footnote omitted]

The Ninth Circuit's analysis in relevant part of the probable cause issue is as follows:

We conclude that, based on the information in the detectives' possession at the time of the arrest, a reasonable jury could have found that the detectives lacked probable cause to believe that Torres had been the third male passenger in the car and had acted in concert with the shooter with conscious disregard for human life.

First, Hernandez's general description of the third male passenger is not sufficient to create probable cause. " 'Under the law of this Circuit, mere resemblance to a general description is not enough to establish probable cause.' " For example, in United States v. Ricardo D., we held that the fact that the defendant matched descriptions of the crime suspect as a "young, thin man, not too tall" and a "young, Mexican male" were insufficient to create probable cause. Here, Hernandez's description of the third male passenger was slightly more detailed than the description in Ricardo D. but, at the same time, did not match Torres insofar as Hernandez described the third male passenger as having some hair. Moreover, the fact that Hernandez did not mention a chain or cross around the passenger's neck casts further doubt on whether Torres matched Hernandez's general description. Accordingly, Hernandez's description alone was clearly insufficient to create probable cause as a matter of law.

Second, a reasonable jury could have found that Hernandez's "identification" of Torres in the six-pack did not create probable cause because the six-pack was suggestive and the "identification" was not sufficiently reliable.

The Supreme Court has cautioned that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." Here, only one other photo in

the six-pack besides the photo of Torres was of a visibly overweight individual and thus of a person who fit Hernandez's general description. In addition, Detective Roberts told Hernandez, before handing her the six-pack, that the detectives had "possibly identified the 15 to 16 year-old chubby boy." According to Plaintiffs' expert, that statement was "absolutely forbidden" and "contaminate[d] the identification," presumably because it informed Hernandez that the detectives' suspect was among the photos in the six-pack and thus could have pressured her to make an identification. Based on these facts, a reasonable jury could have found the six-pack to be impermissibly suggestive.

Although a suggestive photo array "may still serve as a basis for probable cause if sufficient indicia of reliability are present," here a reasonable jury could have found that no sufficient indicia of reliability were present. "Indicia of reliability include: 1) the opportunity to view the criminal at the time of the crime; 2) the degree of attention paid to the criminal; 3) the accuracy of the prior descriptions of the criminal; 4) the level of certainty demonstrated at the time of the confrontation; and 5) [] the length of time between the crime and the confrontation." While Hernandez spent several hours in the car with the third male passenger, she had never seen him before and did not pay attention to him. In addition, as previously discussed, Hernandez gave only a general description of the third male passenger, which did not match Torres in two important respects (head of hair and no mention of prominent cross). Further, Hernandez was not shown the six-pack until six weeks after the shooting. When she was handed the six-pack, she stared at it in silence for between five and ten minutes and then, when asked at whom she was staring, made only a *comparative* identification: she stated that Torres looked more like the third male passenger than the other persons depicted in the six-pack (only one of whom was visibly overweight), but that she was not sure whether or not it actually was him. Thus, a reasonable jury could have concluded that Hernandez's identification lacked sufficient indicia of reliability and thus did not provide the detectives with probable cause. Although Detective Rains had been told that Hernandez had positively identified Torres, we nevertheless conclude that the reliability of the identification was sufficiently questionable for other reasons to allow a reasonable jury to conclude that Rains, too, lacked probable cause.

[Some citations omitted]

Result: Reversal in part of U.S. District Court (California) dismissal order and remand to District Court for trial.

(6) COURT UPHOLDS MULTI-MILLION DOLLAR VERDICT FOR LAPD OFFICERS IN THEIR CIVIL RIGHTS LAWSUITS AGAINST AGENCY FOR ARRESTING THE OFFICERS WITHOUT PROBABLE CAUSE – In Harper v. City of Los Angeles, 533 F.3d 1010 (9th Cir. 2008) (decision filed July 14, 2008), the Ninth Circuit of the U.S. Court of Appeals rules that there is sufficient evidence to support a civil jury's multi-million dollar verdict in a section 1983 lawsuit finding that three officers of the Los Angeles Police Department were arrested by the LAPD without probable cause.

The trial record in this case probably would have supported a jury verdict either way on the probable cause question, and the **LED** will not provide a summary or excerpts of the facts or the Ninth Circuit's lengthy, highly-fact-based, legal analysis. But we believe that some in Washington law enforcement have heard of this case and other litigation that arose out of the

“Rampart Scandal” in the LAPD. Access to Ninth Circuit opinions, as we explain in the “Internet Access” information at the end of each **LED** is at [<http://www.ca9.uscourts.gov/>] Central to the case was the argument of the three officer-plaintiffs 1) that an accusing officer, who himself was suspected of numerous violations of law, was not credible; and 2) that his claims had not been properly investigated at the point when the three officer-plaintiffs were arrested on grounds of filing a false police report.

(7) BECAUSE PROBATION OFFICERS INVESTIGATING SUSPECTED VIOLATION HAD PROBABLE CAUSE TO BELIEVE THAT PROBATIONER LIVED AT A RESIDENCE, IT WAS LAWFUL FOR THE OFFICERS TO FORCE ENTRY WITHOUT A SEARCH WARRANT - - In U.S. v. Mayer, 530 F.3d 1099 (9th Cir. 2008) (decision filed June 30, 2008), the Ninth Circuit explains in a criminal case appeal that, while the less demanding standard of reasonable suspicion of a probation or parole violation justifies warrantless forcible entry of the residence of a probationer or parolee to arrest him or her, officers must meet the higher standard of probable cause in their assessment of whether the residence to be entered is that of the probationer or parolee. The Mayer Court holds that the latter probable cause standard was met in this case.

The Court concludes that officers had probable cause to believe that the probationer lived at the residence they searched based on the combination of the following facts: (1) he had previously resided at that address; (2) one of his neighbors called police to report that he was living at the residence and was likely selling drugs from the residence; (3) on the day of the search an officer received an anonymous phone call informing her that defendant could be found at the residence; and (4) moments before entry, a man who lived directly across the street told one of the officers that defendant lived there alone.

Result: Affirmance of U.S. District Court (Oregon) conviction for being a felon in possession of a firearm and ammunition.

LED EDITORIAL NOTE AND COMMENT: In State v. Winterstein, 104 Wn. App. 676 (Div. II, 2007), Division Two of the Washington Court of Appeals ruled, among other things, that the standard for determining where a probationer or parolee resides in the lesser standard of reasonable suspicion. Winterstein has not been previously digested in the **LED. The case is on review in the Washington Supreme Court, and we would not be surprised to see the Washington Supreme Court make a different ruling on this point. We think that the safer approach for officers is to assume that the standard is probable cause.**

(8) CIVIL RIGHTS LAWSUIT WILL GO FORWARD ON PLAINTIFFS’ ALLEGATIONS THAT OFFICERS LOOKING FOR A PAROLE VIOLATOR UNLAWFULLY FORCED A WARRANTLESS ENTRY OF THEIR HOME WITHOUT PROBABLE CAUSE TO BELIEVE THAT THE PAROLEE LIVED THERE - - In Cuevas v. De Roco, 531 F.3d 726 (9th Cir. 2008) (decision filed June 27, 2008), the Ninth Circuit rules in a section 1983 federal civil rights case that the lead deputy sheriff on a team of deputies and parole officers looking for a suspected parole violator would be liable for a Fourth Amendment violation, assuming for purposes of summary judgment review that the allegations of the residents of a home were truthful. Accordingly, the case is remanded to the U.S. District Court for jury trial on the issue of whether officers had probable cause to believe the suspected parole violator lived at the residence that officers entered without a search warrant. The jury will also consider the question of whether, in conducting a protective sweep of the premises, the lead officer opened a dresser drawer (which would exceed the scope of such a sweep). Finally, the Cuevas Court denies qualified immunity to the lead officer, concluding that, on the date of the entry, a reasonable officer would have known of the legal standard for warrantless entry in this context.

Result: Reversal of U.S. District Court (California) granting summary judgment on certain aspects of the case; case remanded for trial.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) STALKING STATUTE ITSELF INCLUDES ACTING THROUGH OTHER PERSONS, SO STALKING CONVICTION STANDS EVEN THOUGH JURY WAS NOT INSTRUCTED ON ACCOMPLICE LIABILITY – In State v. Becklin, 163 Wn.2d 519 (2008), a 6-3 majority of the Washington Supreme Court reads RCW 9A.46.110(1)(a) and RCW 10.14.020(2) together to uphold a trial court jury instruction that allowed for a conviction for stalking committed through actions of persons other than the defendant. The Supreme Court majority holds that the referenced statutory provisions on stalking are broad enough to include acting through third parties, and therefore it did not matter that the trial court failed to instruct the jury on accomplice liability under RCW 9A.08.020.

Result: Reversal of Court of Appeals decision that reversed (by a 2-1 vote) Ferry County Superior Court conviction of Andre Paul Becklin for felony stalking.

LED EDITORIAL NOTE: This decision should have no effect on actions of law enforcement officers. And, despite the favorable ruling, we expect that careful prosecutors will ask for accomplice liability jury instructions in this situation.

(2) COURT REJECTS 1) CLAIM OF CONSTITUTIONAL RIGHT TO JURY TRIAL IN JUVENILE COURT, AND 2) CONSTITUTIONAL CHALLENGE TO LEGISLATURE’S USE OF COMMON LAW DEFINITION OF ASSAULT – In State v. Chavez, 163 Wn.2d 262 (2008), the Washington Supreme Court: 1) rules, 6-3, that there is no constitutional right to a jury trial in a juvenile court trial, regardless of the seriousness of the charge; and 2) rejects, 9-0, the defendant’s constitutional challenge (based on constitutional separation of powers considerations) to the Legislature’s failure to provide an express definition of “assault” (which instead is defined by common law as having three alternative variations).

Result: Affirmance of Court of Appeals decision that affirmed the Clallam County Superior Court juvenile adjudication finding that Azel L. Chavez committed attempted first degree murder (three counts), second degree unlawful possession of a firearm, second degree robbery while armed with a firearm, and second degree taking a motor vehicle without permission while armed with a firearm.

LED EDITORIAL NOTE: On the jury-right issue the Supreme Court opinions of the majority and the dissent (Justices Madsen, Sanders, and Chambers) discuss several previous Washington Supreme Court and Washington Court of Appeals decisions rejecting constitution-based arguments for a jury trial right in juvenile adjudication.

(3) PRISONER HELD NOT TO HAVE CONSTITUTIONAL RIGHT TO STARVE HIMSELF – In McNabb v. DOC, 163 Wn.2d 393 (2008), a majority of the Washington Supreme Court rules, under interpretation of both the Washington and federal constitutions, that the government’s interests that led to force-feeding a DOC inmate outweighed the inmate’s right to refuse artificial means of nutrition and hydration. A factor in the majority’s analysis is that

prisoner McNabb is not “in an advanced state of a terminal or incurable illness” or “suffering severe permanent mental or physical deterioration.”

Justice Sanders authors a dissent, joined by no other justice, in which he argues that the Washington constitution provides a greater right to starve oneself to death than does the federal constitution.

Result: Affirmance of Court of Appeals decision that affirmed a Spokane County Superior Court order upholding DOC’s decision to force-feed Charles R. McNabb.

WASHINGTON STATE COURT OF APPEALS

EVIDENCE IS SUFFICIENT TO SUPPORT SEX OFFENDER’S CONVICTION FOR FAILURE TO REGISTER ON 1) CHANGE-OF-RESIDENCE AND 2) KNOWLEDGE ELEMENTS OF CRIME

State v. Shoemaker-Castillo, 144 Wn. App. 584 (Div. III, 2008)

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

Jose Shoemaker Castillo is a convicted sex offender. He is therefore required to register his home address with the sheriff's department in the county where he lives. RCW 9A.44.130(1)(a). And he is required to notify the sheriff's department of any change in address within 72 hours of moving. RCW 9A.44.130(5)(a).

Mr. Castillo reported his address on August 8, 2006, as 610 East Arlington Avenue, Apartment 152, Yakima, Washington. The apartment belonged to his sister, Ashley Castillo. She lived there with her children, her sister, and her sister's children. [Prior to August 8, 2006, Mr. Castillo had complied with registration requirements.]

Police went to the apartment two weeks later to serve an arrest warrant on Mr. Castillo. Ms. Castillo told the officers that Mr. Castillo did not live at the apartment and that he was not welcome there. She allowed the officers to search the apartment for Mr. Castillo. The officers searched the apartment but did not find Mr. Castillo.

They also did not see any male clothing or accessories or any other indication that a male lived in the apartment. They did find Mr. Castillo's father. He said that he had not seen Mr. Castillo at the apartment for a couple of weeks.

The State charged Mr. Castillo with failure to register as a sex offender. A jury found him guilty as charged. And the trial court sentenced him to 49 months of confinement, followed by a term of community custody.

ISSUE AND RULING: Where Mr. Castillo reported that he had changed his address and was living with his sister, but considerable evidence indicated that he was not, and where he had previously complied with the reporting requirements, was there sufficient evidence of defendant’s violation of the sex offender registration statute, RCW 9A.44.130, specifically the elements of change of residence and knowledge? (ANSWER: Yes)

Result: Affirmance of Yakima County Superior Court conviction of Jose Shoemaker-Castillo for failure to register as a sex offender.

ANALYSIS:

The Court of Appeals explains that the State was required to show that Mr. Castillo: (1) changed his residence on or after August 8, 2006, (2) knowingly failed to provide written notice of the change of his address to the Yakima County sheriff's department within 72 hours of moving, and (3) had previously been convicted of a sex offense that required registration. RCW 9A.44.130(1)(a), (5)(a), (11)(a). Mr. Castillo previously had been convicted of a sex offense that required registration.

On the element of change of residence, there was evidence that Mr. Castillo had moved out of his sister's home and had no belongings there, and that his father stated he no longer lived there. The Court of Appeals held that a jury could reasonably infer from this evidence that Mr. Castillo changed his residence.

On the element of knowing failure to provide notice, the Court of Appeals holds that a jury could have reasonably inferred that Mr. Castillo knowingly failed to register because he had registered several times before, and he did not properly register his new address with the sheriff's department after August 8, 2006.

EVIDENCE OF PREMEDITATION SUFFICIENT TO SUPPORT ATTEMPTED MURDER CONVICTIONS RELATED TO SHOOT-OUT WITH LAW ENFORCEMENT OFFICERS WHERE EVIDENCE SHOWED (1) MOTIVE TO AVOID ARREST, (2) PROCUREMENT OF GUN, (3) SHOOTING TO KILL, AND (4) STEALTH DURING SHOOTOUT

State v. Barajas, 143 Wn. App. 24 (Div. III, 2007)

Facts and Proceedings below:

During a routine road patrol, Deputy Dale Wagner pulled over Florentino Barajas because he recognized him as driving without a valid driver's license. Deputy Wagner attempted to arrest Barajas, but Barajas attempted to punch Deputy Wagner and fled in his vehicle. Deputy Wagner followed Barajas' vehicle and requested assistance from other officers. Barajas drove into a driveway next to a house. Deputy Wagner pulled into the driveway behind Barajas' truck. Barajas got out of the truck and ran into the residence. Barajas got his gun and loaded it.

Deputy Wagner waited outside the home until two backup officers arrived. While on the telephone with one of the backup officers who was en route, Deputy Wagner saw Barajas run from behind the house and dive into a row of trees. The three officers formulated a plan to bring Barajas into custody. The officers were concerned that Barajas had a weapon. In light of this concern, the officers decided that Deputy Wagner and Deputy Lane would approach Barajas' position with guns drawn, while Officer Dobson would stay behind at the house for containment purposes.

Barajas partially concealed himself in a shallow ditch near the tree line. He had piled tumbleweeds around himself in an attempt to hide. Barajas had his back turned when Deputy Wagner spotted him. Deputy Wagner ordered Barajas in both English and Spanish to show his hands. Coming from the opposite direction, Deputy Lane also saw Barajas partially hidden in the weeds. He also ordered Barajas to put his hands up. Barajas sat up in the ditch and raised

his hands. He appeared to be upset. Deputy Wagner ordered Barajas to roll out of the ditch, but Barajas refused to comply. Instead, Barajas pulled out a gun and aimed it at Deputy Lane.

Deputy Lane felt apprehensive and started to retreat. Barajas shot Deputy Lane in the chest and leg. Although Deputy Lane was wearing a bullet-proof vest, he sustained injuries to his chest in addition to the gunshot wound to his left thigh. Deputy Lane and Deputy Wagner opened fire on Barajas. Barajas dropped back into the ditch while Deputy Wagner retreated toward the tree line. Deputy Wagner fell to the ground during his retreat. When Deputy Wagner turned around, he saw Barajas five or six feet away, aiming a gun at him. Deputy Wagner heard gunshots and opened fire on Barajas again.

Once Deputy Wagner returned fire, Barajas turned and ran toward a nearby equipment yard. Deputy Wagner ran to where Deputy Lane had been shot and assisted him back to the police vehicles to call for help. Police set up a containment area to catch Barajas, and he was eventually detained and questioned by police. During the recorded interrogation, Barajas admitted to shooting at Deputy Lane three times, but Barajas stated that he shot at the officer only because the officer shot at him first. Barajas also claimed that Deputy Wagner seemed very angry and had thrown Barajas up against his truck during the initial stop. Barajas was shot in the hand and the cheek during the gunfight.

Barajas was charged with two counts of attempted first degree murder and one count of first degree unlawful possession of a firearm. Barajas took the stand in his own defense. He testified that when he saw the officer place his hand on his weapon that decided to get in his truck and attempt to get away. He denied attempting to hit Deputy Wagner during this encounter.

Barajas then stated that he decided to drive home so he could get his gun in order to defend himself. He testified that he attempted to hide in the ditch because he was scared and did not know what to do. According to Barajas, Deputy Lane shot him first, and it was only then that Barajas made a move for the gun that he had retrieved from his house. Barajas stated that he thought the police officers wanted to kill him.

Barajas was convicted of two counts of attempted first degree murder and one count of first degree unlawful possession of a firearm.

ISSUE AND RULING: There was evidence of (1) the motive to avoid arrest, (2) the procurement of a gun, (3) shooting with intent to kill, and (4) stealth during the shootout. Was this evidence, considered together, sufficient proof to support the premeditation element of the crime of attempted first degree murder? (ANSWER: Yes)

Result: Affirmance of Adams County Superior Court convictions of Florentino Silva Barajas for two counts of attempted first degree murder and one count of unlawful possession of a firearm.

ANALYSIS: (Excepted from Court of Appeals opinion)

Premeditation is “the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.”

Premeditation may be proved by circumstantial evidence if substantial evidence supports the jury's finding and inferences from the facts are reasonable. While the mere opportunity to deliberate is not sufficient to support a finding of premeditation, a wide range of facts can support the inference of premeditation.

Taken together, the evidence showed that Barajas went into his house to retrieve a gun, loaded it, attempted to hide himself from the officers, fired multiple shots, and admitted to aiming his gun at Deputy Lane's body while firing. This was sufficient evidence to support the jury's finding of premeditation.

[Some citations omitted]

THE STATE LACKS CRIMINAL JURISDICTION OVER TRIBAL MEMBER IF THE ALLEGED NON-TRAFFIC CRIMINAL VIOLATION IS UNRELATED TO AN EXCEPTION TO RCW 37.12.010(1)-(8)

State v. Pink, 144 Wn. App. 945 (Div. II, 2008)

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

On December 10, 2006, Grays Harbor County sheriff deputies stopped a vehicle bearing Quinault Tribe license plates traveling on Washington State Highway Route (SR) 109, just south of the Moclips highway. That portion of SR 109 lies within the geographical borders of the Quinault Indian Reservation. . . .

Pink, an enrolled member of the Quinault Tribe, was a passenger in a vehicle that had been stopped for having defective equipment: a defective muffler and cracked windshield. During the stop, deputies asked Pink to identify himself and used the information to run a warrants check. After discovering an outstanding warrant, the deputies arrested Pink. The search incident to his arrest revealed a .270 caliber rifle cartridge in Pink's pocket and a .270 caliber rifle in the vehicle. Pink acknowledged that the rifle belonged to him and stated that he was a tribal member with hunting rights. The deputies did not contact the Quinault Tribe's law enforcement agency to request assistance or seek the Quinault Tribe's approval to exercise general criminal jurisdiction over Pink.

Based on these events, the State charged Pink with second degree unlawful possession of a firearm. Pink, a convicted felon, is prohibited from knowingly possessing or owning firearms. Pink moved for dismissal of the charges, arguing a lack of State criminal jurisdiction. . . .

The trial court granted the motion. . . .

In its brief, the Quinault Tribe asserts that by charging Pink with unlawfully possessing the firearm on tribal land, the State intruded on its criminal jurisdiction and ignored its sovereignty and authority to govern its own people and property.

ISSUE AND RULING: Does the State of Washington have jurisdiction to prosecute an enrolled tribal member for a criminal non-traffic violation of Washington State law committed while the tribal member was a passenger in a vehicle being driven on SR 109 within the Quinault Indian Reservation? (ANSWER: No)

Result: Affirmance of Grays Harbor County Superior Court dismissal of charge of unlawful possession of a firearm against William Peter Pink, a/k/a William Peter Pink Bailey.

ANALYSIS BY MAJORITY: (Excerpted from opinion)

The State argues that, because the crime was committed while Pink was on SR 109, it had jurisdiction to prosecute him for it even though he is an enrolled member of the Quinault Tribe. We disagree.

...

Here, the parties do not dispute the locus of the alleged criminal acts; instead, they disagree on whether the State possesses general criminal jurisdiction over the lands attached to SR 109 to which the Quinault Tribe granted the State an easement.

A. Public Law 280 and RCW 37.12.010

The [Washington] legislature did not assert general jurisdiction but set forth eight categories of cases over which it would assert jurisdiction [over the Tribes]. These excepted categories include: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles on the public streets, alleys, roads, and highways. RCW 37.12.010(1)-(8).

B. Tribal Lands and Right-of-Way Easements

Generally, the State's criminal jurisdiction extends across the geographical boundary of the reservation. RCW 37.12.010. Except for the eight categories noted above, however, the State has no jurisdiction over enrolled tribal members for matters occurring on their "tribal lands or allotted lands." RCW 37.12.010.

...

[I]n this case, the Quinault Tribe did not sell the State the land that runs under SR 109. Instead, it granted the State an easement to "build and maintain SR109 over this portion of the Quinault Reservation." The State does not present any evidence showing that the Quinault Tribe ceded any interest in this land to the State beyond granting the highway easement. Nevertheless, the State asserts that our Supreme Court's holding in Somday v. Rhay, 67 Wn.2d 180 (1965), supports its argument that the easement grants it jurisdiction to prosecute all crimes committed on SR 109. We disagree with this argument because, in Somday, the tribe granted the State a fee simple patent, not a right-of-way easement. 67 Wn.2d at 180.

...

Here, unlike the Colville Tribe's grant of a fee interest in Somday, the Quinault Tribe only granted the State a right-of-way easement. Thus, here, the Quinault Tribe retained its ownership interest in its land... We hold that the Quinault Tribe

did not transfer ownership of the land to the State over which the State built and maintains SR 109.

In this case, the State asserts that, because it has "sole responsibility for the highway's construction, maintenance, and repair," the Quinault Tribe, "[i]n essence, . . . has relinquished all control over the public highway to the State." This circumstance, it argues, makes the land equivalent non-Indian fee land. Again, we disagree.

...

In this case, nothing in the statute or the easement suggests any intention that the State assume or the Quinault Tribe grant criminal jurisdiction over tribal members on the highway. RCW 37.12.010. Moreover, the State has not shown that the Quinault Tribe relinquished its interest in the land. Accordingly, the State's public roads within the reservation, including SR 109, remain part of the Quinault Reservation and, absent the exceptions set out in RCW 37.12.010(1)-(8), the Quinault Tribe continues to have jurisdiction to prosecute crimes committed on this land by tribal members.

...

[H]ere, Pink's alleged firearms violation did not concern the operation of a vehicle . . . RCW 37.12.010 specifically provides for the State's assumption of jurisdiction over tribal members on reservations for matters involving the "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." RCW 37.12.010(8). But here, Pink was not operating a motor vehicle. He was a passenger in a motor vehicle when the deputies arrested him. Thus, the exception of RCW 37.12.010(8), which gives the State jurisdiction over crimes concerning the operation of motor vehicles, does not apply.

We hold that, because he did not commit any traffic violations involving the operation of a motor vehicle, the State lacked the jurisdiction necessary to prosecute Pink, an enrolled tribal member, for allegedly unlawfully possessing a firearm in violation of RCW 9.41.040 on SR 109 within the Quinault Tribe lands.

Accordingly, we affirm the trial court's order dismissing the charges.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DIVISION ONE AGAIN REJECTS ARGUMENT THAT CONSTITUTIONAL DUE PROCESS PROTECTIONS REQUIRE ELECTRONIC RECORDING OF ALL INTERROGATIONS – In State v. Turner, __ Wn. App. __, 187 P.3d 835 (Div. I, 2008), Division One of the Court of Appeals rejects a criminal defendant's argument that due process protections of the Washington constitution are more restrictive on police interrogations and require tape recording all interrogations. The Court notes that it reached the same conclusion in State v. Spurgeon, 63 Wn. App. 503 (Div. I, 1991) **Sept 92 LED:18**, and nothing has changed.

Result: Affirmance of King County Superior Court convictions of Kenith Earl Turner for rape of a child in the first degree (one count) and child molestation in the first degree (two counts).

Status: Defendant Turner has petitioned for discretionary Washington State Supreme Court review; action likely will not be taken on the petition until spring of 2009.

LED EDITORIAL NOTE: The Turner Court discusses research articles on the problem of false confessions, and the Court also notes that the Supreme Courts of three states – Alaska (based on Alaska constitution), Wisconsin (based “supervisory power” of the Court) and Minnesota (based on “supervisory power” of the Court) – require electronic recording of police interrogations when feasible.

(2) “PUBLIC DUTY DOCTRINE” PRECLUDES NEGLIGENCE-BASED LAWSUIT FOR ARREST ON WARRANT THAT HAD BEEN QUASHED – In Vergeson v. Kitsap County, ___ Wn. App. ___, 186 P.3d 1140 (Div. II, 2008), the Court of Appeals applies the public duty doctrine to affirm the trial court’s dismissal of a lawsuit against Kitsap County based on a county employee’s allegedly negligent failure to remove a quashed warrant from the warrant databases.

To prove negligence, a civil plaintiff must show that the civil defendant had a duty, breached that duty, and caused injury in the breach. In a negligence lawsuit against the government, the plaintiff also must generally – under the public duty doctrine – show that the government had a duty to the plaintiff individually and not just to the public in general. There are four “exceptions” to the rule that the government’s duty is a public one, not one owed to individuals. The four, sometimes overlapping, exceptions are: 1) legislative intent to protect a particular category of persons; 2) failure to enforce a statute despite government’s knowledge of a violation of a statute that is intended to protect a certain category of persons; 3) circumstance under which government undertakes rescue or undertakes a duty to warn or aid a person in danger, who then relies on the government; and 4) special relationship circumstance under which government employee gives assurances upon which plaintiff justifiably relies.

After detailed analysis of each exception, the Vergeson Court concludes that no exception applies.

Result: Affirmance of Pierce County Superior Court decision dismissing negligence lawsuit by Magdalena Qutorio Vergeson, formally known as Magdalena Qutorio Cuddie.

(3) EVIDENCE IN FIRST DEGREE PREMEDITATED MURDER CASE SUPPORTS CONVICTION, INCLUDING PREMEDITATION ELEMENT – In State v. Sherrill, ___ Wn. App. ___, 186 P.3d 1157 (Div. III, 2008), the Court of Appeals rules, 2-1, that the following constituted sufficient evidence of premeditation to support a jury verdict of premeditated first degree murder: 1) the defendant had a long history of beating his domestic partner, Teressa Hilton; 2) blood spatter from the victim was present in several distinct locations inside and outside of the couple’s motor home residence; 3) the victim sustained at least 42 separate blunt force injuries in the fatal attack that took place over several hours; and 4) the victim had defensive wounds.

Under case law, “premeditation” is the deliberate formation of and reflection upon the intent to take a person’s life. Evidence of motive, stealth, or bringing or procurement of a weapon are particularly relevant factors in establishing premeditation. But even though none of these factors were present in this case, the above-described combination of evidence was sufficient to prove premeditation, the Sherrill majority (Judges Kulik and Stephens) holds.

Judge Schultheis dissents, arguing that the evidence was insufficient to support a finding of premeditation.

Result: Affirmance of Yakima County Superior Court conviction of Kenith Wayne Sherrill for first degree murder.

(4) JUDGE’S ORDER TO DEPUTY SHERIFF TO ESCORT PRISONER FROM COURTROOM TO JAIL DID NOT GIVE THE DEPUTY “JUDICIAL IMMUNITY” FROM A CIVIL SUIT FOR NEGLIGENCE WHEN THE PRISONER ESCAPED EN ROUTE AND CAUSED INJURY TO A COURTHOUSE SECURITY GUARD - - In Lallas v. Skagit County, 144 Wn. App. 114 (Div. I, 2008), the Court of Appeals rules that neither a deputy sheriff nor the sheriff is entitled to judicial immunity from a negligence lawsuit. The lawsuit arose from circumstances where the deputy was carrying out a judge’s order to escort a convict from the courthouse to the jail. The convict escaped from the deputy’s control and injured a security guard.

Judicial immunity is generally narrow and limited to protecting judges so that they will not be deterred from carrying out their decision-making duties. The Lallas Court holds that judicial immunity does not extend to law enforcement personnel whose job it is to provide courtroom security.

Result: Reversal of Snohomish County Superior Court summary judgment order; remand of case for trial.

(5) DVPA PROSECUTION – EVIDENCE HELD SUFFICIENT TO PROVE THAT DEFENDANT KNEW WHERE PROTECTED PERSON RESIDED – In State v. Vant, ___ Wn. App. ___, 186 P.3d 1149 (Div. II, 2008), the Court of Appeals rules that sufficient evidence supports the jury’s conviction of defendant Vant for violating a protection order. The Vant Court rejects defendant’s argument that the evidence does not support that he knew that the residence he visited was the residence of the person protected under the protection order. In salient part, the description of the evidence by Court of Appeals and the Court’s analysis of that evidence are as follows:

At trial, Vant testified that he “assumed” Carter lived with her mother but that he was told that Carter would not be home, so he went over to “get some laundry” and “[take] a bath.” Vant further testified, with respect to the sexual offender registration, that Detective Kolb explained the registration rules to him but that his “comprehension is not that good.”

...

Carter testified as well, noting that she only lived “[o]ff and on” with her mother during August 2006. She testified that she was not at her mother’s house on August 29, when Vant was seen on the porch, but that she was there the next day when police came to take her statement. Carter testified that she received mail at her mother’s house and that she kept personal belongings and property there as well.

...

In his appeal, Vant argues that the dictionary definition of “residence” does not align with Carter’s testimony, regarding her living habits, when he visited his sister’s house on August 29, 2007. Per Vant, Webster’s Dictionary, “residence” means:

the act . . . of abiding or dwelling in a place for some time: an act of making one's home in a place . . . ; the place where one actually lives or has his home distinguished from his technical domicile; . . . a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit. . . .

Under this definition, any reasonable jury could easily find, beyond a reasonable doubt that Carter, in fact, “resided” at her mother's house. She testified that though she did not live there all the time, she did live there off and on, kept personal belongings there, and received mail there. Carter may not have lived there full time, but her testimony indicates that her mother's house was at least a “temporary . . . dwelling” to which she intended to return. Further, the jury heard that Carter returned to her mother's house the day after Vant's visit, as the police took her statement. Vant relies heavily on the idea that Carter did not reside at her mother's but, rather, that it was more of a “technical domicile.”

Regardless, Vant's own testimony demonstrated to the jury that he “assumed” Carter lived there and that he was attempting to visit when she would not be home. Even under the residence definition Vant presented, any reasonable trier of fact could have found Vant guilty of “knowingly coming within one mile of the residence of Raven Carter,” this violating the protection order.

Result: Affirmance of Thurston County Superior Court convictions of Russell Raymond Vant for a protection order violation and a sex offender registration violation; remand for a new sentencing hearing (on questions not addressed in this LED entry).

(6) “CRIMINAL LIBEL” STATUTE RULED UNCONSTITUTIONAL BASED ON FREE SPEECH PROTECTIONS OF FIRST AMENDMENT – In Parmelee v. O’Neel, __ Wn. App. __ , 186 P.3d 1094 (Div. II, 2008), the Court of Appeals agrees with a DOC prison inmate that he could not be “infracted” based on a violation of the “criminal libel” statute in chapter 9.58 RCW because the statute is vague and overbroad on its face in violation of Fourteenth Amendment and First Amendment protections of the U.S. Constitution’s due process and free speech protections.

Result: Reversal of Clallam County Superior Court order granting summary judgment to DOC; case remanded for trial on DOC inmate Allen Parmelee’s civil action for damages against DOC for allegedly violating his First Amendment and Fourteenth Amendment rights, and for allegedly retaliating against him for exercising his First Amendment free speech rights.

NEXT MONTH

The November 2008 LED will include entries on two recent decisions:

1. The September 11, 2008 unanimous decision of the Washington Supreme Court reversing the decision of Division Three of the Court of Appeals in State v. Xiong, and holding that the testimony of the law enforcement officers in the case did not provide enough objective officer safety factors to support their frisk of a suspect who they had in handcuffs at the time of the frisk (the Court of Appeals decision was reported in the May 2007 LED at pages 20-23); and

2. The September 2, 2008 decision of Division One of the Court of Appeals in State v. Adams upholding a search of a vehicle incident to a lawful arrest where the arrestee 1) had responded to an officer's lawful act of turning on her emergency lights by getting out of his car and yelling at her while standing in the swing of the door, 2) then ignored her commands to get back in his car, and 3) finally locked the door before backup arrived to aid her in arresting him. The Adams Court discusses the following prior decisions, among others, some of which also involved vehicles that were locked by the suspect in apparent response to the presence of law enforcement: State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June 02 LED:21 (denying suppression in locked vehicle case); State v. Fore, 56 Wn. App. 339 (Div. I, 1989) (denying suppression in case where vehicle was not locked); State v. Quinlivan, 142 Wn. App. 960 (Div. III, 2008) March 08 LED:02 (suppressing evidence in locked vehicle case); State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June 97 LED:02 (suppressing evidence in locked vehicle case); State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) Jan 05 LED:08 (suppressing evidence in search incident case where vehicle not locked); Thornton v. U.S., 124 S.Ct. 2127 (2004) July 04 LED:02 (denying suppression in case where vehicle not locked).

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, 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. 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 are 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 2007, is at [<http://www.leg.wa.gov/legislation/>]. Information about bills filed since 1991 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 internet 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://www.atg.wa.gov/>].

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 Criminal Justice Training Commission's Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]
