WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

JANUARY 2011

Law enforcement officers: Thank you for your service, protection and sacrifice.

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WASHINGTON STATE COURT OF APPEALS

LED INTRODUCTORY EDITORIAL COMMENTS REGARDING THE BARNES AND LOUTHAN DECISIONS IMMEDIATELY BELOW: All informed Washington law enforcements officers are aware that the status of Washington constitutional case law is a confusing mess on the issue of when officers may conduct a vehicle search incident to arrest. In the November 2010 LED at page 3, we noted that on October 5, 2010, the Washington Supreme Court granted discretionary review in two cases where the Court of Appeals upheld car searches incident to arrest by applying the search-for-evidence-of-the-crime rationale of Arizona v. Gant, 129 S.Ct. 1710 (2009) June 09 LED:13. The Court of Appeals decisions that will be reviewed by the Washington Supreme Court are State v. Snapp, 153 Wn. App. 485 (Div. II, 2009) Jan 10 LED:06, and State v. Wright, 155 Wn. App. 537 (Div. I, 2010) June 10 LED:12. We noted in the November 2010 LED that one Senior Appellate Deputy Prosecuting Attorney had described the issue that is now before the Washington Supreme Court in Snapp and Wright along the following lines:

> **In State v. Patton, 167 Wn.2d 379 (2009) Dec 09 LED:17; State v. Valdez, 167 Wn.2d 761 (2009) Feb 10 LED:11; and State v. Afana, 169 Wn.2d 169 (2010) Aug 10 LED:09, the Washington Supreme Court held car searches incident to arrest to be not justified; in each of those cases, the officers conducting the car search did not have a reasonable belief that evidence of the crime of arrest would be found in the car. Does dicta (i.e., language not necessary to decide the cases on their particular facts) in those decisions overrule the longstanding Washington rule allowing law enforcement officers to search the passenger compartment of a vehicle, incident to the arrest of an occupant, for evidence of the crime for the suspect was arrested (assuming there is a reasonable belief that such evidence is in the vehicle passenger area)?**

We also added in the November 2010 LED that these grants of review give us guarded hope that the Washington Supreme Court will ultimately rule that article I, section 7 of the Washington constitution authorizes vehicle passenger area searches incident to arrest when it is reasonable to believe that the vehicle contains evidence of the crime of arrest.

Also digested in the November 2010 LED was the Division Two Court of Appeals decision in State v. Chesley, ___ Wn. App. ___, 239 P.3d 1168 (Div. II, 2010) Nov 10 LED:14, where a 2-1 majority (Judges Armstrong and Bridgewater in the majority, with Judge Quinn-Brintnall in dissent) ruled that, under the post-Gant Washington Supreme Court decisions, the Washington constitution is more restrictive than is the Fourth Amendment under Gant. The Chesley majority held that the Washington constitution does not permit a vehicle search incident to arrest once an arrestee has been secured, even where the search would be lawful under Gant's Fourth Amendment authorization to conduct such a search if there is reason to believe the vehicle contain evidence of the crime of arrest.

Digested below in this month's LED are two new Division Two Court of Appeals decisions addressing vehicle searches incident to arrest. In the Barnes case, Judges Quinn-Brintnall and Hunt uphold a vehicle search, disagreeing with Judge Van Deren's dissent in competing interpretations of the post-Gant Washington Supreme Court decisions. In the Louthan case, Judges Quinn-Brintnall and Hunt again uphold a vehicle search, disagreeing with Judge Bridgewater's dissent in similar competing interpretations of the Washington Supreme Court post-Gant decisions.

In addition to discussing the analysis of the post-Gant Washington Supreme Court cases regarding search incident to arrest, the opinions in these cases also address the concept of "open view" (as opposed to "plain view" - - see the description of the distinction between the basic concepts of "open view" and "plain view" in the Barnes majority opinion) not addressed in those Washington Supreme Court decisions. The Barnes majority opinion appears to hold both that: (1) open view provides a basis to distinguish the Washington Supreme Court decisions under search-incident-to-arrest analysis; and (2) open view provides an independent basis for entering and searching a car without a warrant. Unlike the Barnes majority opinion, the Louthan majority opinion does not indicate that open view provides a basis to distinguish the post-Gant Washington Supreme Court decisions, but it does hold that open view provides an independent basis for entering and searching a car without a warrant.

Whatever the Washington Supreme Court does with the search incident issue in Snapp and Wright and other cases, we caution officers against relying on the "open view" analysis in the majority opinions below in Barnes and Louthan. To the extent that the analysis suggests that open view, taken alone, of evidence or contraband justifies warrantless entry of a vehicle to search it or to seize the item openly viewed, we have strong doubts about that. Neither the majority opinions nor the dissenting opinions in Barnes and Louthan mention the Court of Appeals decision in State v. Lemus, 103 Wn. App. 94 (Div. III, 2000) Feb 01 LED:02. Lemus held that, absent actual exigent circumstances, open view does not justify entry of a vehicle to search it or to seize the evidence or contraband openly viewed. We think that Lemus reached the conclusion that the Washington Supreme Court will reach on open view as a purported independent basis for entering or searching a vehicle without true exigent circumstances.

As always, we suggest that officers and agencies consult their legal advisors and local prosecutors for legal advice on the current status of the law.

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2-1 MAJORITY CONCLUDES IN THE ALTERNATIVE THAT SEARCH-INCIDENT EXCEPTION AND "OPEN VIEW" JUSTIFIED ENTRY OF CAR TO SEIZE GUN CASE FOLLOWING ARREST OF DRIVER FOR FELONY HARASSMENT; DISSENTER ARGUES THAT NEITHER SEARCH-INCIDENT EXCEPTION NOR "OPEN VIEW" SUPPORT VEHICLE ENTRY OR SEARCH IN ABSENCE OF TRUE EXIGENT CIRCUMSTANCES

State v. Barnes, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 4613976 (Div. II, 2010)

Facts: (Excerpted from Court of Appeals majority opinion)

> On November 13, 2008, at approximately 12:30 pm, Barnes entered a Washington Mutual Bank in Washougal, Washington. Apparently unable to receive the assistance with his account from a bank employee that he sought, Barnes became upset and said, "I am sick of everyone wanting to take my

money"; "I am sick of having a bank account"; and "I feel like going and getting a gun and shooting everyone." Barnes left the bank branch soon after.

The bank employee first notified the branch assistant manager about Barnes's threat to get a gun and shoot everyone. Then the employee notified both the police department and the bank's internal security specialist. [A law enforcement officer of the] Washougal Police received the bank employee's call and noted Barnes's statements. [The officer] knew Barnes from previous calls involving assaultive behavior.

Two hours later, at approximately 2:30 pm, [the officer] saw Barnes come out of an auto parts store and get into his car, which was parked in a public parking lot about one-half mile from the bank. [The officer] approached Barnes and ordered him to step out of his car. [The officer] then placed Barnes under arrest for felony harassment of the bank employee and put him in the back seat of her patrol vehicle. [The officer] read Barnes his Miranda rights while he was sitting in the patrol car's back seat.

Leaving Barnes in the patrol vehicle, [the officer] and another Washougal police officer returned to Barnes's car. Through the car's passenger-side window the two officers saw a gun box and a helmet on the front side passenger seat. [The arresting officer] opened the unlocked passenger-side car door, retrieved the gun box, opened it, and found a Taurus 9 mm handgun inside. Inside the car, the officers also saw a handful of bullets in the front console cup holder, a can of black spray paint, a Bill Clinton face mask, and a t-shirt that read "dead or alive."

Procedural Background (Excerpted from Court of Appeals majority opinion)

On November 17, 2008, the State charged Barnes with one count of felony harassment for the death threats made to the bank employee and one count of second degree unlawful possession of a firearm. On January 30, 2009, the State filed an amended information, adding one count of second degree attempted assault. The same day, Barnes filed a motion to suppress his statements and all evidence seized during the November 13, 2008 search as evidence seized pursuant to an illegal stop or arrest based on lack of probable cause. On February 18, 2009, the State filed a second amended information adding a firearm enhancement to the second degree attempted assault charge. On May 11, 2009, Barnes filed a motion to suppress the evidence seized during the search of his vehicle as evidence seized in violation of Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**.

On June 29, 2009, the trial court held CrR 3.5 and 3.6 hearings on Barnes's suppression motions. During the CrR 3.5 hearing, [the arresting officer] testified that she read Barnes his Miranda rights and that he indicated he understood those rights. [The arresting officer] also testified that Barnes was "excitable" but that he spoke freely and made statements "trying to minimize the statement that he made [at the bank]."

During the CrR 3.6 hearing, Barnes called two witnesses: the bank employee and Barnes. First, the bank employee testified about the events of November 13, 2008, as outlined above. The bank employee also testified that there had been past incidents at the bank involving Barnes but that the November 13 incident

> was the first time involving the police. Second, Barnes testified that [the arresting officer] read him his Miranda rights, that he understood them, and that he had made his statements voluntarily. Barnes further testified that he placed the gun case on the passenger seat of his car prior to being arrested.
>
> Following the hearings, the trial court made an oral ruling denying Barnes's motions to dismiss and to suppress based on lack of probable cause. On July 16, 2009, the trial court issued its findings of fact and conclusions of law. The trial court's factual findings included that (1) the officers had probable cause to believe Barnes may have committed felony harassment, (2) [an officer] arrested Barnes and physically placed him in the patrol vehicle, and (3) the officers believed they had a right to search Barnes's car because he was under arrest even though he was not in the car. On the issue of whether evidence seized during the officers' warrantless search was admissible under article I, section 7 of the Washington Constitution, the trial court found that (1) the gun case was in open view, (2) there was no evidence of an obstruction to the officers' ability to get a warrant, and (3) there were no exigent circumstances justifying the warrantless search and seizure of the gun case. The trial court concluded, "The State has not carried its burden that the [gun case] was not unreasonably seized and it is therefore suppressed, mere mobility is not a sufficient showing."
>
> On July 23, the State filed a motion for reconsideration of the CrR 3.6 findings of fact and conclusions of law. . . . During the July 24 hearing on the State's motion, the trial court stated that current Washington law required exigent circumstances to search a vehicle incident to arrest and denied the motion. . . .

ISSUES AND RULINGS: Where officers were investigating Barnes's threat to bank staff to get his gun and shoot people, were aware of his past assaultive behavior, arrested him out of his car parked in a store parking lot, secured him in a patrol car, and then saw from outside the car a "gun case" on the front passenger seat of the car, was the ensuing warrantless search of Barnes's car a lawful search incident to arrest or otherwise lawful because the gun case was in "open view"? (ANSWER: Yes, rules a 2-1 majority, with Judges Quinn-Brintnall and Hunt in the majority and Judge Van Deren in dissent)

Result: Reversal of Clark County Superior Court order suppressing evidence; case remanded for trial of Tyler S. Barnes for felony harassment.

ANALYSIS: (Excerpted from Court of Appeals majority opinion by Judge Quinn-Brintnall)

> Barnes contends that the trial court properly suppressed the evidence under either [the Fourth Amendment as interpreted in] Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13** or under article I, section 7 of the Washington Constitution as interpreted in State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**. Specifically, Barnes first contends that it was not reasonable for the officers to believe that the car contained evidence of the offense of arrest, felony harassment. See Gant. Because the gun case evidence was in open view and is relevant to the "true threat" requirement of the felony harassment charge, we disagree.
>
> . . . .

Next, Barnes argues that, under Patton, a defendant must pose a safety risk or the vehicle must contain evidence of the crime of arrest that could be concealed or destroyed in order to justify a warrantless vehicle search. But Barnes's reliance on Patton is misplaced. [Court's footnote: *Barnes does not rely on [State v. Valdez, 167 Wn.2d 761 (2009)* ***Feb 10 LED:11]*** *which states that a search warrant must be obtained prior to a search incident to an arrest if (1) the search can be delayed or obtained without jeopardizing officer safety or risking the concealment or destruction of evidence, and (2) the warrantless search does not fall under another applicable exception. In Valdez, our Supreme Court held that officers exceeded the scope of the vehicle search incident to arrest warrant exception when they searched the dashboard of the defendant's vehicle after securing him in the back of a patrol vehicle. In reaching its decision, our Supreme Court noted, "[T]he State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle." In contrast to Valdez, here officers saw evidence of the crime of arrest in open view.*]

In Patton, our Supreme Court concluded that the justifications to search a car incident to arrest did not apply because (1) Patton was not a driver or recent occupant of the car, (2) Patton was secured in a patrol car at the time of the search, and (3) there was no evidence of the crime of arrest or contraband in the car. In addition, the Patton court specifically noted that the State did not argue that there was probable cause to search the car. Thus, the court concluded that because there was simply no nexus between the arrestee, the crime of arrest, and the vehicle, the search of the vehicle in Patton violated article I, section 7 of the Washington Constitution.

Here, Barnes was arrested for felony harassment based on his threat to return with a gun and shoot everyone in the bank. He was placed in the back seat of [the officer's] patrol vehicle. Unlike in Patton, the vehicle searched belonged to Barnes, he was preparing to drive away at the time of his arrest, and the State established probable cause to believe that Barnes's vehicle contained relevant evidence. On this point, the trial court agreed:

> I find that . . . given the call that [the arresting officer] had and the circumstances under which she observed [the gun case] in terms of proximity in time, that she had probable cause to believe that it might be evidence of a crime to have this gun case if there was a gun inside since Mr. Barnes was within some proximity to the bank and fairly close in time to when he made threats to shoot people within the bank. So there was probable cause to believe that the gun case was evidence of the crime.

Moreover, unlike in Patton, the evidence (gun case) was in open view.

Evidence discovered in "open view," as opposed to "plain view," is not the product of a "search" within the meaning of the Fourth Amendment. In the "plain view" situation, the view takes place after an intrusion into activities or areas as to which there is a reasonable expectation of privacy. The officer has already intruded and, if his intrusion is justified, the objects of obvious evidentiary value in plain view, sighted inadvertently, may be seized lawfully and will be admissible.

In contrast, in the "open view" situation, "the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public." The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place.

Barnes's vehicle was parked in a public parking lot and the officers observed the unlocked gun case while standing in a public place outside the unlocked passenger-side door of his vehicle. Thus, substantial evidence supports the trial court's finding that the gun case was in open view. Despite this ruling, the trial court, citing State v. Ozuna, 80 Wn. App. 684 (Div. III, 1996) **Sept 96 LED:18**, suppressed the gun case evidence, stating that the State did not show exigent circumstances necessitating a warrantless automobile search.

In Ozuna, an officer investigating a report of "vehicular prowling" observed an illegally parked vehicle. A check of the car's registration revealed that it belonged to an individual known to the officer as having a criminal record. After learning the owner's identity, the officer went to the unlocked, unoccupied vehicle and removed several items later determined to be stolen. The Ozuna court agreed with the trial court's determination that there was no probable cause to believe the car contained evidence of a crime and affirmed the trial court's suppression order. The Ozuna court further stated, "Even if we had found probable cause here, the warrantless search was unlawful because no exigencies existed." Ozuna is distinguishable from the present case. The evidence seized in Ozuna was not in "open view"; the officer removed items from the car based solely on his knowledge of the vehicle owner's criminal history and did not know them to be evidence of a crime until further investigation after seizing the items revealed them to be stolen.

Here, substantial evidence supports the trial court's finding that the gun case was in open view but the trial court's conclusion of law that Ozuna applied requiring exigent circumstances is in error. Once seen in open view, the gun case was immediately recognized as relevant evidence with respect to felony harassment and the "true threat" requirement to RCW 9A.46.020(1)(a)(i). Accordingly, the police officers lawfully seized and preserved it and the trial court erred in ordering suppression of relevant evidence that Barnes had in open view at the time of his arrest for felony harassment.

DISSENTING OPINION BY JUDGE VAN DEREN

I respectfully dissent and would affirm the trial court's ruling suppressing the evidence seized from Barnes' vehicle because the officers were required to obtain a search warrant before seizing the gun box from Barnes' vehicle under State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**.

The majority correctly cites Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, which allows a vehicle search to be performed when evidence relating to the crime of arrest is reasonably contained within the vehicle. Here, [the officer] arrested Barnes for felony harassment for threatening the bank employees that he would return with a firearm and shoot them. [The officer]

removed Barnes from the vehicle and placed him in her patrol vehicle. Returning to Barnes' vehicle, [the officer] saw a gun box in open view on the front seat of Barnes' vehicle.

In Valdez, our Supreme Court appears to provide greater privacy protections to Washington citizens than does Gant. Valdez provides that a vehicle search without a warrant incident to the arrest and removal of the vehicle's occupants may occur only to avoid destruction of evidence and for officer safety. Neither concern was implicated after Barnes' arrest and removal from his vehicle.

And neither Gant nor Valdez mention the open view exception to the necessity to obtain a search warrant when a driver is arrested and removed from a stopped vehicle. Thus, whether the open view exception applies to vehicle searches after Gant and Valdez is unclear. Furthermore, because the gun itself was not in open view in Barnes' vehicle, I disagree that the gun box alone would trigger the open view exception to the search warrant requirement.

Thus, I would affirm the trial court's ruling suppressing the evidence seized from Barnes' vehicle.

LED EDITORIAL COMMENT: The Court of Appeals did not address the question of why the officers concluded that the box that they saw on the car's front seat was a "gun case." Officers should be prepared to explain why they reached such a conclusion from their observations. See, for instance, the Ninth Circuit Court of Appeals decision in U.S. v. Gust, 405 F.3d 797 (9th Cir. 2005) Sept 05 LED:15.

2-1 MAJORITY CONCLUDES IN THE ALTERNATIVE THAT SEARCH-INCIDENT EXCEPTION AND "OPEN VIEW" JUSTIFIED ENTRY OF CAR TO SEIZE DRUG PARAPHERNALIA AFTER ARREST OF APPARENTLY INTOXICATED DRIVER; DISSENTER ARGUES THAT NEITHER SEARCH-INCIDENT EXCEPTION NOR "OPEN VIEW" SUPPORTS VEHICLE ENTRY OR SEARCH IN ABSENCE OF ACTUAL EXIGENT CIRCUMSTANCES; COURT APPEARS TO BE IN AGREEMENT THAT ARREST WAS SUPPORTED BY PROBABLE CAUSE

State v. Louthan, ___ Wn. App. ___, ___P.3d ___, 2010 WL 4852275 (Div. II, 2010)

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

Due to high flooding and water over roadways in December 2007, the Washington State Department of Transportation closed a portion of Highway 107 in Grays Harbor County, setting up barricades, cones, and road blocks. While monitoring the closure, [a law enforcement officer] stopped a vehicle that had entered the closed segment of the highway. When [the officer] contacted the driver of the vehicle, later identified as Louthan, [the officer] suspected that he was under the influence of a controlled substance. [The officer] did not detect the odor of alcohol on Louthan's breath, but he noticed that Louthan's pupils did not expand or contract when he shined a light on them. And when [the officer] asked for Louthan's proof of insurance, he gave the officer a copy of his 2006 tax return, insisting that it was his proof of insurance.

While standing outside the car, [the officer] saw what he believed to be drug paraphernalia behind Louthan's seat. The item was made out of an orange juice

container with a tube secured by electrical tape protruding through the side of it. Based on his training and experience, [the officer] recognized this as drug paraphernalia used to ingest drugs. [The officer] instructed Louthan to exit the vehicle, arrested him, and read him Miranda warnings.

[The officer] then searched Louthan's vehicle. [The officer] saw a black tar residue on the orange juice container that he recovered from behind Louthan's seat. The search also resulted in the seizure of the following items: three bindles containing a white powdery substance, a blade with black tar residue on it, two glass pipes, and a digital scale. [The officer] conducted field tests on the substances; the white powdery substance contained methamphetamine and the black tar substance contained an opiate. [A] forensic scientist with the Washington State Patrol Crime Lab, later confirmed [the officer's] field test results and identified the opiate in the black tar residue as heroin.

The State charged Louthan with unlawful possession of methamphetamine. Louthan moved to suppress the evidence obtained during the search incident to his arrest, contending that his arrest was unlawful. Specifically, Louthan asserted that the municipal code on which [the officer] based his arrest, Montesano Municipal Code 8.22.040 (unlawful possession of drug paraphernalia), conflicted with RCW 69.50.412(1), rendering the municipal code unconstitutional and his arrest invalid. The trial court denied Louthan's motion to suppress, reasoning that [the officer] had probable cause to arrest him under RCW 69.50.412 (unlawful use of drug paraphernalia) and, thus, the evidence was seized during a search incident to a lawful arrest. At a bench trial on stipulated facts, the trial court found Louthan guilty of unlawful possession of methamphetamine; it sentenced him to 60 days confinement with 30 of those days converted into 240 hours of community restitution.

Louthan appealed his conviction on the grounds that his arrest was unlawful and that the trial court erred when it refused to suppress the evidence seized incident to his arrest. On December 4, 2009, we ordered the parties to submit supplemental briefing addressing [Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**, and State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24**].

ISSUES AND RULINGS: Where an officer: stopped Louthan's car on a portion of highway closed due to flooding in the area; observed that Louthan's pupils were unresponsive to a light the officer shined on them; received a bizarre response from Louthan to the officer's request for proof of insurance; and saw, from outside the car, what the officer recognized to be drug paraphernalia behind the driver's seat:

1) Did the officer have probable cause to arrest Louthan? (ANSWER: Yes, under the objective standard for probable cause);

2) Immediately after arresting Louthan and securing him in a patrol car, did the officer have authority under article I, section of the Washington constitution to search the car, either because the drug paraphernalia was in "open view" or because the search-incident-to-arrest exception to the search warrant requirement justified the search or a combination of both rationales? (ANSWER: Yes, rules a 2-1 majority, with Judges Quinn Brintnall and Hunt in the majority and Judge Bridgewater in dissent).

Result: Affirmance of Grays Harbor County Superior Court conviction of Darrin Lee Louthan of possession of methamphetamine.

ANALYSIS BY MAJORITY IN OPINION AUTHORED BY JUDGE QUINN-BRINTNALL:

1. Validity of Louthan's Arrest

The Louthan majority opinion rejects Louthan's challenge to the validity of his arrest as follows:

> Louthan first contends that [the officer] unlawfully arrested him for possessing drug paraphernalia, asserting that, although the Montesano local ordinance criminalized this conduct, the Uniform Controlled Substances Act, ch. 69.50 RCW, as adopted in Washington, does not permit an arrest for mere possession of drug paraphernalia. Louthan specifically contends that his arrest was unlawful because the local ordinance criminalizing mere possession of drug paraphernalia conflicts with State law and is, thus, unconstitutional and cannot form the basis for a valid arrest. But Louthan overlooks the fact that police had probable cause to arrest him for driving while under the influence of a controlled substance, in violation of former RCW 46.61.502. Accordingly, his arrest was lawful and we need not reach his statutory constitutional claims. See, e.g., State v. Huff, 64 Wn. App. 641 (Div. II, 1994) **April 98 LED:09** (arrest supported by probable cause not made unlawful by officer's reliance on offense different from one for which probable cause exists) [**LED EDITORIAL NOTE: Huff is good law on the point it is cited for here, but note that in State v. Grande, 164 Wn.2d 135 (2008) Sept 08 LED:07, the Washington Supreme Court apparently limited to singly occupied cars the ruling in Huff that there was probable cause to arrest based on the smell of marijuana coming from a car.**]; see also State v. Stebbins, 47 Wn. App. 482 (1987) (where police arrested suspect for armed robbery, for which there was no probable cause, arrest held lawful because probable cause existed to arrest for crime of burglary).
>
> Absent an exception to the warrant requirement, we presume that a warrantless search is unconstitutional under the Fourth Amendment to the United States Constitution and article I, section 7 of our state constitution. One exception to the warrant requirement allows for a warrantless search incident to a lawful arrest. In order for the search incident to lawful arrest warrant exception to apply, the arrest preceding the search must be lawful . . . .
>
> A lawful custodial arrest requires the officer to have probable cause to believe that a person committed *a* crime. Probable cause "boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed *a* crime." . . . . Probable cause is not knowledge of evidence sufficient to establish guilt beyond a reasonable doubt but, rather, is "reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty." We determine whether an arresting officer's belief was reasonable after considering all the facts within the officer's knowledge at the time of the arrest as well as the officer's special expertise and experience.
>
> An arrest not supported by probable cause is not made lawful by an officer's subjective belief that the suspect has committed a crime. And conversely, "an arrest supported by probable cause is not made unlawful by an officer's

> subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exist[ed at the time of the arrest]." Huff. "'The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law . . . to always be able to immediately state with particularity the exact grounds on which he is exercising his authority. Huff. Louthan asserts that probable cause cannot be supported by an offense different from the offense that an officer relied on when making his arrest. But it is well established in both state and federal law that the relevant inquiry in a probable cause determination is whether an officer had objectively sufficient probable cause to arrest for *an* offense; the officer's subjective intent to arrest for a particular offense is immaterial.
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> Next, Louthan argues that the trial court erred by finding that [the officer] had probable cause to arrest him for the misdemeanor offense of unlawful use of drug paraphernalia because the State did not present any evidence that the offense was committed in the officer's presence as former RCW 10.31.100 (2006) required. But even if Louthan were correct, [the officer] had probable cause to arrest him for driving while under the influence of a controlled substance contrary to former RCW 46.61.502. We can affirm a trial court's probable cause determination, a question of law, on any correct ground appearing in the record.
>
> Here, the stipulated facts show that [the officer] stopped Louthan for failure to obey traffic control devices. After [the officer] stopped him, Louthan exhibited behaviors indicating that he was under the influence of a controlled substance; his pupils were constricted, his speech was slurred, and when asked for proof of insurance he produced a tax return insisting that it was his proof of insurance. Additionally, while standing outside Louthan's car conducting the traffic stop, [the officer] could see a device used to ingest drugs behind Louthan's seat.
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> Based on the evidence outlined above, [the officer] had probable cause to arrest Louthan for driving while under the influence of a controlled substance and [to seize] evidence of that crime he found in open view.

2. "Open view" justification for seizing the evidence

The Louthan majority opinion first rules on the car-search-related issues that Louthan waived the right to challenge any car search by not raising the issue while his case was in Superior Court. Next the Louthan majority opinion concludes under the following analysis that, in any event, the seizure of evidence from the car was justified by the "open view" rule:

> In addition, we note that here the officer did not seize the orange juice container bong pursuant to an illegal search. Evidence discovered in "open view" is not the product of a "search" within the meaning of the Fourth Amendment. Under the "open view" doctrine, there is no search because a government agent's "'observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public.'" Accordingly, the object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked due to a lawful police stop.

> While standing outside Louthan's vehicle after having lawfully stopped Louthan for driving on a closed road, [the officer] saw an orange juice container bong sitting on the back seat of Louthan's car. In accordance with the open view doctrine, [the officer] lawfully seized the drug-ingesting device he saw in open view, and the trial court did not err by declining to exclude the evidence at trial.
>
> The dissent argues that in addition to the bong being in open view, that exigent circumstances were required for [the officer] to seize the evidence. First, we reiterate that because the bong was in open view there was no illegal search and Louthan's privacy rights were not violated by [the officer's] seizing of the bong. Second, because the bong seized is contraband, Louthan had no property right to possess it. RCW 69.50.505(1) ("The following are subject to seizure and forfeiture and no property right exists in them: (f) All drug paraphernalia.").
>
> More importantly, assuming without deciding that exigent circumstances are required to seize evidence found in open view, here exigent circumstances existed. Exigent circumstances exist when "obtaining a warrant is not practical because the delay inherent in securing a warrant would . . . permit the destruction of evidence." State v. Tibbles, 169 Wn.2d 364 (2010) **Sept 10 LED:09**. Louthan's car was located near a road-blocked part of a highway. [The officer] was monitoring the closed road and surrounding area because of ongoing public safety concerns related to the flooding and high water. In the face of natural disasters, such as possible flash floods, lahars, or tsunamis, exigent circumstances exist such that an officer does not need to spend precious time and utilize scarce emergency resources to get judicial approval to seize contraband, whether it is a bag of marijuana, a bong, or a dead body, in open view that might otherwise be lost or destroyed.

3. Search-incident analysis under Gant's evidence-of-crime-of-arrest standard

The pertinent part of the majority opinion's analysis of the search incident issue is as follows:

> [T]he search was proper under Gant and our decision in State v. Snapp, 153 Wn. App. 485 (Div. II, 2009) **Jan 10 LED:06**, because [the officer] searched the car for evidence related to the crime for which Louthan was arrested. Following Gant, in Snapp, we held that evidence seized during a search of the suspect's vehicle while the suspect was handcuffed and placed in the back of a patrol car, was admissible at trial. We held that the seized evidence was admissible because, under Gant, officers may conduct a warrantless search incident to arrest if there is probable cause to believe that the vehicle contains evidence of the offense of arrest. Here, while standing in a place they had a lawful right to be, police saw that Louthan's vehicle contained evidence related to his driving while under the influence of a controlled substance. Accordingly, notwithstanding Louthan's failure to preserve the issue and, assuming Gant applies, the search of Louthan's vehicle for evidence of the crime incident to Louthan's lawful arrest did not violate Gant.
>
> Citing [State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**] and State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**], Louthan asserts that under article I, section 7 of our state constitution, police may not search a vehicle incident to arrest for evidence related to the offense of arrest unless the evidence was within reaching distance of the suspect at the time of the search. But the

Patton court did not address a situation where the suspect was the driver or recent occupant of the vehicle. See, e.g., Snapp (holding that search of driver's vehicle, after police detained him in the back of a patrol vehicle, was lawful under Gant because police searched for evidence of the crime of arrest). Instead, the Patton court addressed

> whether it would stretch the search incident to arrest exception beyond its justifications to apply it where the arrestee is not a driver or recent occupant of the vehicle, the basis for arrest is not related to the use of the vehicle, and the arrestee is physically detained and secured away from the vehicle before the search.

Our Supreme Court held that the search of Patton's vehicle was unlawful under article I, section 7 of our state constitution, reasoning,

> Patton was not a driver or recent occupant of the vehicle searched. There is no indication in the record that Patton even had keys to the vehicle. No connection existed between Patton, the reason for his arrest warrant, and the vehicle. Rather, Patton's warrant was for failure to appear in court for a past offense unrelated to the eventual drug charge that arose from the car search. Thus, there was no basis to believe evidence relating to Patton's arrest would have been found in the car.

In contrast to Patton, Louthan was the driver of the vehicle searched, there was probable cause to arrest him for a driving offense relating to drug intoxication, and an implement for ingesting drugs could be seen plainly by the arresting officer from his lawful vantage point outside Louthan's vehicle. Patton does not apply.

Our Supreme Court's decision in Valdez also does not apply to the facts present in Louthan's appeal. In Valdez, our Supreme Court held that officers exceeded the scope of the vehicle search incident to arrest warrant exception when they searched the defendant's vehicle after securing him in the back of a patrol vehicle. In reaching its decision, our Supreme Court noted, "[T]he State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle." Valdez. In contrast to Valdez, here officers reasonably believed that evidence of driving while under the influence of a controlled substance was in Louthan's vehicle.

Additionally, as noted in Chief Justice Alexander's concurring opinion, the officers in Valdez "searched an area of the automobile that was not within the passenger compartment and thereby violated article I, section 7 of the Washington Constitution." (Alexander, C.J., concurring). Thus, the Valdez court's statement that "after an arrestee is secured and removed from the automobile, he or she poses no risk of . . . concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception," is dicta ("dicta" is language in an opinion that was not necessary to the decision in the case).

Our Supreme Court's statement, suggesting that warrantless searches for evidence of the crime of arrest are invalid under our state constitution if the

> suspect is out of reaching distance of the evidence, was not necessary to resolving the issues presented in Valdez because (1) there was no reason for police to believe that evidence of the crime of arrest could be found in the vehicle search, and (2) police searched an area of the car that was not within the passenger compartment. Although Valdez suggests that, in a future case, our Supreme Court would hold such a search invalid under our state constitution, the issue was not before it in Valdez. In Valdez, our Supreme Court did not have before it a case presenting the legality of a search for evidence of the crime of arrest. Accordingly, our Supreme Court's statement is merely advisory. Moreover, we note that, like Valdez, our Supreme Court's recent opinion in State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09**, addressed a situation where the arresting officer "had no reason to believe that the vehicle in which [the defendant] was a passenger contained evidence of the crime for which [the defendant] was being arrested."

[Some citations and footnotes omitted]

DISSENTING OPINION BY JUDGE BRIDGEWATER

Judge Bridgewater agrees with the majority judges' view that the arrest was lawful, but he appears to disagree with all of the other salient conclusions in the majority opinion. Judge Bridgewater opines as follows on the "search incident" and "open view" issues in the case:

> Applying Washington's search incident to arrest rule here, nothing in the record indicates that the officer searched Louthan's car to protect himself or to prevent destruction or concealment of evidence. Louthan was in custody at the time of the search and, therefore, could not threaten officer safety or conceal or destroy evidence. I would hold that the search incident to Louthan's arrest was unlawful because it was not necessary at the time of the search to preserve officer safety or prevent concealment or destruction of evidence of the crime of the arrest. [Citing Valdez; Patton; Afana; and State v. Chesley, __ Wn. App. ___, 239 P.3d 1160 (Div. II, 2010) **Nov 10 LED:14**].
>
> I further note that the "open view" doctrine that the majority alternatively relies on to uphold the search under Gant was neither briefed nor argued by either party; regardless, the bong in open view does not support the majority's opinion. Although I agree that [the officer] seeing the bong did not constitute an unlawful search under the open view doctrine, I disagree that, absent exigencies, the open view doctrine permitted [the officer] to seize it without a warrant. To justify a warrantless seizure, the police must have probable cause to believe that the vehicle contains evidence of a crime and must be faced with "'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence'" that made it impracticable to obtain a warrant. Exigent circumstances are those that truly involve an emergency, i.e., an immediate major crisis, that requires swift action to prevent the destruction of evidence or protect officer safety. State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) **July 09 LED:20**.
>
> Here, [the officer] had no reason to conclude that the bong was any kind of emergent or exigent circumstance to support a warrantless seizure. The record contains no evidence that the road on which Louthan parked his car was flooding at the time [the officer] seized the bong. Instead, [the officer's] police report suggests that he made the stop after Louthan exited the area that was closed

due to flooding. Also, in analogous circumstances, the emergency has been intimately tied to the area invaded for the search, whether the emergency is based on a community caretaking notion, in which an officer enters the protected area to ascertain if people are within it, or whether the emergency is based on protecting the public from a danger posed by nearby materials that might explode. Here, there is nothing that presents a danger to the public, the officer, or destruction of evidence.

If, as the majority suggests, the flooding presented an immediate emergency, there needs to be some evidence that a crisis was imminent. Without such evidence that the flooding was an immediate crisis, there is no evidence that the alleged flooding jeopardized evidence or made it unsafe for [the officer] to obtain a warrant. Nor is there evidence that circumstances made it impracticable for [the officer] to obtain a telephonic warrant. Therefore, I disagree with the majority's conclusion that the flooding constitutes an exigency. See, e.g., State v. Tibbles, 169 Wn.2d 364 (2010) **Sept 10 LED:09** (no exigent circumstance where State failed to show that suspect was fleeing, that evidence would likely be destroyed, or that obtaining a warrant was otherwise impracticable).

Viewing the bong in open view was not a search and might have supported probable cause for a warrant to search Louthan's car, or perhaps supported impounding the car and conducting an inventory search, but these avenues were not pursued. Thus, I would reverse Louthan's conviction.

POLICE CONTACT WITH DRUG SUSPECT WAS LAWFUL SOCIAL CONTACT, AND OFFICER'S REQUEST TO TAKE HIS HANDS FROM HIS POCKETS DID NOT MAKE CONTACT A SEIZURE; SHOWUP ID WAS NOT TOO SUGGESTIVE; CRAWFORD SIXTH AMENDMENT CONFRONTATION RULE DOES NOT APPLY TO SUPRRESSION HEARINGS

State v. Fortun-Cebada, ___ Wn. App. ___, ___P.3d ___, 2010 WL 4193029 (Div. I, 2010)

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

On January 2, 2008, Seattle Police Officers [A], [B], and [C] were on bicycle patrol in a high narcotic area in the International District. The officers each had at least nine years of experience in street level drug transactions.

The Seattle Police Department had received a number of citizen complaints of drug dealing at a fast food restaurant located at 507 South Jackson Street. The police had also observed a marked increase in drug users at that location, and Officer [A] had recently arrested several people near the minimart for using crack cocaine.

At around 11:45 a.m., the officers stopped at a red light near the restaurant at the corner of 5th Avenue South and South Jackson Street. As [the three officers] waited for the light to change, approximately eight people came out of the restaurant and walked westbound. Officer [A] immediately recognized the person in the middle of the group as Jorge Fortun-Cebada, a known drug dealer. Fortun-Cebada was wearing a blue rain jacket. Officer [A] recognized the other individuals in the group as crack cocaine users.

When Fortun-Cebada separated from the group a man, later identified as Wilbert Walker, immediately approached him. After Walker talked to Fortun-Cebada, they turned around and started walking together eastbound. Fortun-Cebada reached into his

left pants pocket, pulled out his left hand, and cupped it next to his waist. Walker then looked into Fortun-Cebada's cupped hand. The officers watched as Fortun-Cebada and Walker made a hand-to-hand exchange, hugged, and then separated. The officers were not able to see what was exchanged. As Fortun-Cebada walked away he put his closed left hand in his left pant pocket and then pulled his open hand out of his pocket. The officers watched as Walker walked away and put his left hand into the front pocket of his sweatshirt.

Officer [A] rode his bike across the street to talk to Fortun-Cebada. Meanwhile, [Officers B and C] rode in different directions around the block to find Walker.

After a brief conversation with Fortun-Cebada, Officer [A] asked, "[d]o you mind if I check your left pant pocket?" Fortun-Cebada responded "[n]o, you can't check me and if you don't have a reason to stop me then you can't touch me. I'm leaving." Officer [A] told Fortun-Cebada "[y]ou're free to go." Fortun-Cebada then walked away toward the intersection.

[Officers B and C] located Walker a couple of blocks away at the corner of 6th Avenue South and South King Street. Walker had both hands in the front pocket of his sweatshirt. Officer [B] asked him "if [he] could talk to him for a minute, and [Walker] said yeah, and he stopped walking." Officer [B] told Walker to take his hands out of his sweatshirt pocket. Officer [C] was located off to the side. As Walker removed his left hand, Officer [C] saw a cream-colored rock in his pocket that looked like rock cocaine. The officers placed Walker in custody.

Walker waived his Miranda rights, identified himself as Wilbert Walker, and admitted that the cream-colored rock was cocaine. Walker told Officer [B] that he bought the crack cocaine for $20 "from some guy that he did not know on the sidewalk." Officer [B] asked Walker if he would recognize the seller if he saw him again. Walker said that he would.

Officer [B] notified Officer [A] that Walker was in custody and could identify the man who sold him the cocaine. Officer [A] then approached Fortun-Cebada, told him that he was no longer free to leave, and read Fortun-Cebada his Miranda rights.

Shortly thereafter, Walker identified Fortun-Cebada as the person who sold him the crack cocaine. In response to Officer [A's] question, "do you recognize this guy from anywhere . . . ." Walker said "Yeah, that is the guy that who I gave 20 bucks to and he gave me . . . crack cocaine."

The officers placed Fortun-Cebada under arrest. In a search incident to arrest, the police seized a rolled up $20 bill, a rolled up $5 bill, and a piece of tissue from his left pant pocket that contained three pieces of crack cocaine.

Later, at the precinct, Walker signed a written statement that states, in pertinent part:

> I drove down to Chinatown by 5th and Jackson because I wanted to buy $20 worth of crack cocaine. About a year ago I went down there with a friend because she wanted to buy some crack. I saw a black guy going in and out of a little restaurant there and I asked him if he knew where to get "something" at. By "something," I meant crack cocaine. He pointed at a guy on the sidewalk and I walked over to that guy. I told him, "can I get a twenty?" He said, "come on," and we walked together for about 5 steps.

> I gave him $20 and he gave me a piece of what I thought was crack. He then gave me a hug like he knew me and he went his way and I went mine.

Walker also stated that "[t]he police asked me to look at a guy to see if he was the guy that sold me the crack. They drove me to 5th and Jackson and I saw they had the guy handcuffed that sold me the crack. He was wearing a blue jacket."

The State charged Fortun-Cebada with one count of possession with intent to deliver cocaine in violation of RCW 69.50.401(1), (2)(a).

The defense filed a CrR 3.6 motion to suppress the cocaine seized from Fortun-Cebada, arguing the police did not have probable cause to arrest because Walker was not a reliable informant and the information he provided the police did not justify the detention of Fortun-Cebada.

[Officers A, B, and C] were the only witnesses to testify at the CrR 3.6 hearing. Officer [B] testified about contacting Walker and Walker's identification of Fortun-Cebada as the man who sold him the cocaine. During the cross-examination of Officer [B], the defense introduced Walker's written statement into evidence.

During oral argument on the motion to suppress, defense counsel argued that the contact with Walker was an unlawful Terry stop. But when the court questioned whether Fortun-Cebada had standing to challenge the police contact with Walker, defense counsel conceded that Fortun-Cebada did not have standing. Following the hearing, the defense filed a supplemental memorandum arguing that Officer [A] was not justified in stopping Fortun-Cebada because Walker was not a reliable informant.

The court denied Fortun-Cebada's motion to suppress the cocaine. The court concluded that the initial police contact with Fortun-Cebada was a permissible social contact, and that the officers' observations of the exchange with Walker, and shortly thereafter, finding the suspected rock cocaine on Walker, provided reasonable suspicion to detain Fortun-Cebada. The court concluded there was probable cause to arrest Fortun-Cebada, and also rejected the defense argument that Walker was an unreliable informant.

. . . .

Before trial, the defense moved to exclude any testimony as to Walker's out-of-court hearsay statements. The State agreed that any statement identifying Fortun-Cebada as the seller was inadmissible hearsay.

. . . .

[Officers A, B, and C] testified at trial. Walker did not testify. At the conclusion of the State's case, the defense moved to dismiss the charge of possession of cocaine with intent to deliver. The court granted the motion to dismiss. The court ruled the evidence was insufficient to prove beyond a reasonable doubt that Fortun-Cebada had the intent to deliver the crack cocaine to Walker. The court granted the State's motion to amend the information to charge Fortun-Cebada with one count of possession of cocaine in violation of RCW 69.50.4013.

Fortun-Cebada testified, and denied possessing any cocaine. Fortun-Cebada said that he did not talk to or shake hands with anyone that day and the police arrested the wrong person. Fortun-Cebada told the jury that the police put the cocaine in his pocket as part of a cover-up.

The jury convicted Fortun-Cebada of possession of cocaine. The court imposed a standard range sentence.

[Some footnotes omitted]

ISSUES AND RULINGS: (1) Did Officer B's directive to Walker during the social contact to take his hands out of his sweatshirt pocket change the social contact into a Terry seizure? (ANSWER: No);

(2) Was the showup ID procedure in which Walker identified Fortun-Cebada as the crack cocaine seller impermissibly suggestive in violation of constitutional due process protections? (ANSWER: No);

(3) Does the Sixth Amendment right to confrontation that restricts admissibility of hearsay evidence in criminal trials per Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** apply in pre-trial suppression hearings? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of Jorge Fortun-Cebada of unlawful possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Police Social Contact with Walker

Fortun-Cebada asserts that the contact with Walker was an unlawful Terry stop, and the evidence seized is inadmissible under the derivative exclusionary rule. The State argues that Fortun-Cebada does not have standing to challenge the legality of the police contact with Walker. The State also argues that in any event, the contact was not an unlawful detention but rather a permissible social contact. Assuming, without deciding, that Fortun-Cebada has standing to challenge the police contact with Walker, the undisputed record supports the conclusion that the police contact with Walker was a lawful social contact.

. . . .

Fortun-Cebada argues that a seizure occurred when the police told Walker to take his hands out of his sweatshirt pocket.

. . . .

A seizure occurs where a reasonable person would have believed that he was not free to leave or free to otherwise decline an officer's request.

In State v. Nettles, 70 Wn. App. 706 (Div. I, 1993) **Nov 93 LED:09**, this court found that given the permissive nature of the officer's request to speak with the defendant Nettles, a seizure did not occur. In Nettles, after Nettles and two other men saw the police officer in her patrol car, they started quickly walking away.

The officer pulled over, got out of the patrol car, and called out to Nettles and the two other men: "Gentlemen, I'd like to speak with you, could you come to my car?" Nettles stopped and turned around. The two other men kept walking. The officer told Nettles to remove his hands from his pockets and come toward the patrol car. As Nettles took his hands out of his pockets, he threw a plastic baggie under the patrol car. The officer ordered Nettles to place his hands on the patrol car and seized the baggie containing suspected cocaine.

On appeal, we affirmed the trial court's denial of Nettle's motion to suppress. We held that a seizure does not occur "when a police officer merely asks an individual whether he or she will answer questions or when the officer makes some further request that falls short of immobilizing the individual." We concluded that it was not unreasonable to direct Nettles to make his hands visible, and that telling him to do so did not convert the encounter into a seizure. The court also cited to decisions in other out-of-state courts that reached the same conclusion.

Here, as in Nettles, Officer [B] asked Walker if he could speak to him before telling him to take his hands out of his sweatshirt pocket. There is no dispute that Walker was under no obligation to talk to Officer [B] and could have walked away. As in Nettles, we conclude the direction to remove his hands from his sweatshirt pocket did not convert a permissible social contact into a seizure. Because Fortun-Cebada cannot show that a motion to suppress the evidence seized from Walker would have been granted, Fortun-Cebada cannot establish ineffective assistance of counsel.

2) Show-Up Identification

By itself, the presence of a suspect in handcuffs is not enough to show the show-up procedure was unduly suggestive. The court must review the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. State v. Maupin, 63 Wn. App. 887 (Div. III, 1992) **Sept 92 LED:20**. To determine whether the identification was reliable, the court must consider the factors set out [by the U.S. Supreme Court] in Manson v. Brathwaite, 432 U.S. 98 (1977):

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Here, an analysis of the Brathwaite factors shows there was not a substantial likelihood of irreparable misidentification. Walker had ample opportunity to observe Fortun-Cebada when they were together. The undisputed testimony of Officers [B] and [C] establishes Fortun-Cebada and Walker had a brief conversation, walked down the street together, made hand-to-hand contact, and hugged before separating. Walker identified Fortun-Cebada within minutes of the encounter, and the record does not suggest any uncertainty about the identification. Further, the time between Walker's encounter with Fortun-Cebada and his identification of Fortun-Cebada as the person who sold him cocaine was very short.

We conclude that because the show-up identification did not create a substantial likelihood of misidentification, Fortun-Cebada cannot establish ineffective assistance of counsel.

3) Admission of Out-of-Court Hearsay at Suppression Hearing

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him". Fortun-Cebada relies on Crawford v. Washington to argue that admission of Walker's out-of-court hearsay statements at the pretrial suppression hearing violated his constitutional right to confrontation.

In Crawford, the [United States] Supreme Court established a rule barring admission of testimonial hearsay at trial absent the witness's unavailability and a prior opportunity to cross examine. . . .

But nothing in Crawford suggests that the Supreme Court intended to change its prior decisions allowing the admission of hearsay at pretrial proceedings, such as a suppression hearing. . . .

The overwhelming majority of state courts that have addressed the question of whether Crawford applies to a preliminary hearing such as a motion to suppress, have also held that the right of confrontation is not implicated.

We hold there is no right to confrontation at a pretrial CrR 3.6 evidentiary hearing on a motion to suppress under the Sixth Amendment and Crawford. Accordingly, Fortun-Cebada's attorney did not provide ineffective assistance of counsel by failing to object to the admission of Walker's out-of-court hearsay statements at the CrR 3.6 suppression hearing.

[Court's subheadings revised; footnotes and some citations omitted]

LED EDITORIAL NOTES:

1. Social contact issue. We agree with the analysis by the Court of Appeals in Fortun-Cebada. While court decisions in cases raising the social-contact-versus-seizure question are highly fact-dependent, we note that a different ruling might have been made if the officer had asked Walker to allow the officer to search his pocket for a weapon, rather than merely directing him to take his hands out of his pockets. See State v. Harrington, 167 Wn.2d 656 (2009) Feb 10 LED:17.

2. Show-up identification issue. For some discussion of show-up identifications and other ID procedure issues, see the article on identification procedures on the Criminal Justice Training Commission's Internet LED page.

ARRESTEE WHO HAD INITIALLY INVOKED HIS RIGHT TO AN ATTORNEY UNDER CRIMINAL RULE 3.1 HELD TO HAVE WAIVED THAT RIGHT WHERE HE INITIATED A CONVERSATION WITH OFFICERS AND MADE VOLUNTEERED STATEMENTS

State v. Mullins, ___ Wn. App. ___, 241 P.3d 456 (Div. II, 2010)

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

> Detective [A] met Mullins at the Centralia Police Department, advised him of his Miranda rights, and told him he was not under arrest and was free to leave at any time. Mullins agreed to answer questions. After about 45 minutes of questioning, Mullins invoked his rights and said he wanted a lawyer. The detectives terminated the interview and allowed Mullins to leave.
>
> On Monday afternoon, while driving to Aberdeen with a friend, Mullins learned of the discovery of Amy's body. Aware that he was a suspect, he decided to turn himself in. He presented himself at the Grays Harbor County jail in Montesano at approximately 3:40 p.m. An officer from Thurston County arrived, took Mullins into custody, read him his rights, and drove him to the Thurston County jail.
>
> . . . .
>
> After he arrived at the Thurston County jail, Mullins was turned over to Thurston County detectives [B] and [C] at about 5:30 p.m. They were assigned to execute a search warrant that authorized taking photographs of Mullins as well as removing trace evidence such as hair, fingernail clippings, and saliva samples. They would be assisted in this process by the deputy coroner. Initially, [the two detectives] escorted Mullins into a room nicknamed the "BAC" room because it was the room used for breathalyzer tests of blood alcohol content. [Detective B] advised Mullins of his rights. According to unchallenged findings entered after the suppression hearing, Mullins "said something to the effect that he would talk to the detectives after he was appointed an attorney."
>
> The detectives explained to Mullins how they were going to go about collecting evidence. As photographs of Mullins were taken, he was asked if he knew why he was "here" and he responded, "Because my wife's dead." The deputy coroner arrived and continued with evidence collection in a nearby holding cell. When this process was completed, [Detective B] returned to the BAC room to complete the prebooking form while Mullins was allowed to wait in a "waiting area" where he had access to telephones.
>
> One of the questions on the prebooking form was whether orders of protection were required for relatives. [Detective B] asked [Detective C] whether Mullins had children who would need such orders. Mullins overheard this question. He walked into the BAC room and approached [Detective B]. He asked about his children and then "transitioned into talking about his own childhood. He talked about being locked in a refrigerator by his brother." He then began "talking about a dream that was troubling him."
>
> The detectives interrupted Mullins and reminded him that he had invoked his rights and could simply wait in the adjoining room rather than talking to them. Mullins said, "I know I requested an attorney but I want to talk about the dream I had." The detectives repeated their admonitions. Mullins said he "understood his rights" but had something he wanted to get "off his chest." For the next 20 minutes, while the detectives listened, he narrated a dream which he described as "almost like he was outside his body," giving a version of Amy's violent death that matched details of the murder and crime scene. The detectives asked him if he wished to make a recorded statement repeating what he had just said.

Mullins declined.

The detectives completed the prebooking form and turned Mullins over to jail officers, who booked him. This was about one and three quarter hours after Mullins arrived at the jail. At no time did the detectives attempt to place Mullins in communication with a lawyer. The record reflects that a lawyer visited Mullins in the jail about 9 a.m. the next day.

Mullins moved to suppress the detectives' testimony about the statements he made in the booking area of the Thurston County jail. His motion was denied. At trial, their testimony was vital to the State's case. Mullins testified and denied making the statements. He suggested that the detectives made up the "dream" narrative to frame him.

Mullins moved for suppression on two separate grounds. The first was that the detectives improperly questioned him after he had invoked his right to counsel. Under Miranda principles, once a suspect has asserted his right to counsel, custodial interrogation must cease - - unless the suspect initiates further communication. Miranda v. Arizona, 384 U.S. 436 (1966); State v. Birnel, 89 Wn. App. 459 (Div. III, 1998) **Apr 98 LED:11**. The trial court found that Mullins understood his Miranda rights, that the detectives did not interrogate him or engage in conduct designed to elicit an incriminating response, and that it was Mullins who initiated the communication in which he made the incriminating statements.

Accordingly, the court concluded the statements were voluntary:

> 3. The defendant also invoked his rights when he made the response to the effect "I will talk to you after I have an attorney appointed." No interrogation occurred thereafter, as was appropriate. Interrogation must stop (as it did here) unless the defendant himself initiates further communications or exchanges or conversations with the police. This is what the defendant did, in spite of being reminded (by [Detective B) that he had previously invoked. By insisting that he "get something off his chest" the defendant initiated the communication, and his ensuing statements were voluntarily made.

The second ground for the motion to suppress, and the only ground argued by Mullins on appeal, was that the detectives violated Mullins' right to counsel under CrR 3.1. In Washington, the right to a lawyer as provided by court rule accrues "as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." CrR 3.1(b)(1). "When a person is taken into custody that person shall immediately be advised of the right to a lawyer." CrR 3.1(c)(1). If the person in custody desires a lawyer, he is to be promptly offered the means of getting in touch with a lawyer:

At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer. CrR 3.1(c)(2). The court concluded that Mullins waived his rights under CrR 3.1 when he insisted on

getting the story of Amy's death "off his chest" before the detectives completed their prebooking paperwork:

> 4. The purposes of CrR 3.1 are different from the reasons for Miranda warnings. Miranda's purpose is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants. The Court Rule (CrR 3.1) is designed to give a defendant a meaningful opportunity to contact an attorney.
>
> 5. Here, Detectives [B and C] were engaged in executing a warrant and the pre-booking process. Moreover, the court utilizes a Miranda type analysis to determine whether a defendant waives his rights under CrR 3.1.
>
> 6. In this instance, the defendant did waive his CrR 3.1 rights. The detectives were executing a court order and otherwise engaged in the booking process. Defendant was in the waiting area and, upon overhearing [Detective B's] question to [Detective C], the defendant initiated the contact with the detectives. He insisted on engaging the detectives to "get something off his chest." His statements were voluntary and his conduct constituted a waiver of his rights under CrR 3.1.
>
> [Mullins was convicted of first degree murder.]

ISSUE AND RULING: Murder-suspect-arrestee Mullins responded to Miranda warnings by saying he would talk to detectives after an attorney was appointed for him. At that point, the detectives stopped their interrogation effort, but they did not ask Mullins if he wanted to talk to an attorney right away. Instead, they executed a search warrant for the taking of physical evidence from Mullins's person. Shortly after that process was complete, Mullins began, without being questioned, making volunteered statements about a "dream" in which he committed the murder. The detectives quickly reminded Mullins that he had invoked his rights, and they repeated the Miranda warnings. Mullins insisted that he needed to "get something off his chest." He then gave a detailed account of the "dream."

Did defendant voluntarily waive his attorney-contact right under CrR 3.1? (ANSWER: Yes)

Result: Affirmance of Thurston County Superior Court conviction Steven Henry Mullins for first degree murder.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mullins agrees a suspect may waive his rights under CrR 3.1 by voluntarily initiating communication with the police. But he contends that his rights under CrR 3.1 had already been violated when he made his lengthy statement describing Amy's death. At the suppression hearing, Mullins established that Thurston County has a roster of assigned defense counsel who are on call 24 hours a day and the detectives were aware of this. He contends that as soon as he invoked his right to counsel, the rule obligated the detectives to advise him on how to contact the on-call defender.

In determining that the detectives did not have to interrupt their prebooking procedures to offer Mullins help with contacting an attorney, the trial court relied on State v. Wade, 44 Wn. App. 154 (1986). In Wade, police identified the defendant as a suspect shortly after a robbery. They arrested him and advised him of his Miranda rights. The defendant declined to talk and requested an attorney. He was taken to the police station. There, an officer asked him if he would consent to a search of his car. The defendant said no and stated he should probably talk to an attorney. While he was waiting in the booking area, he made a confession that led to his conviction:

> Officer Jensen, who knew Mr. Wade, went to the booking area where Mr. Wade was being processed. Officer Jensen told Mr. Wade where to find him if he wanted to talk. Later Officer Jensen was asked to take Mr. Wade's photo. Officer Jensen testified at that time Mr. Wade said to him: "When you get time, come up and see me. Referring to up in the jail. And I said well, I've got a few minutes now if you want to talk we can talk now. And Willie said okay." Officer Jensen then read Mr. Wade his rights. Mr. Wade signed a waiver form and then admitted the armed robbery of Pump and Pak. He also consented to a search of his vehicle. Mr. Wade refused to make a statement on tape and at that point was given a list of public defenders. At trial he denied his involvement in the robbery and the contents of the statement he made to Officer Jensen.

Wade, 44 Wn. App. at 157.

Wade argued that his request for an attorney was not scrupulously honored pursuant to CrR 3.1(c)(2), and consequently his statement to Officer Jensen should not have been admitted. The court disagreed, first concluding that Wade waived his Miranda rights when he initiated conversation with Officer Jensen. The court then addressed Wade's argument that the police were obliged to put him in contact with an attorney immediately upon his invocation of the right to counsel. The court concluded that although the rule states a person in custody must be given the opportunity to call a lawyer at "the earliest opportunity," police may complete the process of booking a suspect into jail before they provide access to a telephone and the number for a public defender:

> The robbery occurred between 5:45 and 5:50 p.m. on December 3, 1984. Less than 10 minutes later, at 5:57 p.m., Mr. Wade was first read his rights and then transported to the police station. At the station, he again requested an attorney. As the booking process was being completed, Mr. Wade initiated the conversation with Officer Jensen. At 6:45 p.m., less than an hour after he was initially stopped as a suspect, he was again advised of his rights and signed a waiver. In our view, Mr. Wade waived his right to counsel before the police had an opportunity to provide him with access to the phone and a list of attorneys who could possibly defend him. Thus, we find no error.

Wade, 44 Wn. App. at 159.

Ignoring Wade, Mullins relies on State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) **March 98 LED:12**. Deputies from Lewis County arrested Kirkpatrick, a murder suspect, in Port Angeles. After being advised of his Miranda rights, Kirkpatrick agreed to talk. During 90 minutes of questioning, he first denied involvement in the crime and then admitted being in the parking lot when the store clerk was killed inside. "After giving this statement, Kirkpatrick asked if he could leave. [The lead detective] told him he could not. Kirkpatrick then demanded a lawyer. [The detective] stopped questioning Kirkpatrick, but made no effort to contact a lawyer for Kirkpatrick." Without giving Kirkpatrick the opportunity to telephone an attorney, the deputies drove him to Lewis County. During the four hour drive, Kirkpatrick initiated conversation with them, described the crime, and confessed to being the shooter. His statements were admitted at trial, and he was convicted of first degree murder.

On appeal, Kirkpatrick argued his counsel was ineffective for not raising a CrR 3.1 violation at his suppression hearing. The court agreed, distinguishing Wade and holding that the "earliest opportunity" to provide access to a lawyer was immediately after Kirkpatrick requested one:

> Here, the police first contacted Kirkpatrick more than three hours before he confessed, and Kirkpatrick first asked for an attorney several hours before confessing. Moreover, Kirkpatrick's request came during normal working hours and at a police station, where presumably procedures exist for contacting defense counsel. Thus, the record demonstrates that the "earliest opportunity" to put Kirkpatrick in touch with an attorney was immediately after his request. As recognized in Wade, a valid waiver must have occurred before this "earliest opportunity." See Wade (suggesting that waiver would not have been valid if the police had opportunity to provide access to telephone and did not do so). To hold otherwise would allow the State to benefit by its own failure to perform its duty under CrR 3.1(c)(2). In short, unlike in Wade, the State has not shown reasonable efforts to contact an attorney, why such efforts could not have been made, or a valid waiver by Kirkpatrick before the "earliest opportunity" arose.

Kirkpatrick, 89 Wn. App. at 415-16. Nevertheless, the court affirmed the conviction, concluding that even if the defendant had been put in touch with an attorney and had followed advice to remain silent, evidence of his guilt apart from his confession was so strong that there was no reasonable probability of a different verdict at trial.

Mullins also cites State v. Jaquez, 105 Wn. App. 699 (Div. II, 2001) **Aug 01 LED:18**. Jaquez was convicted of robbery. He demanded an attorney when arrested, and argued on appeal that the police did not respond quickly enough to his request. Following Kirkpatrick, the court found a violation of CrR 3.1 because "the officers did not act at the earliest opportunity to allow Jaquez to contact an attorney. Rather, it appears that they made Jaquez wait at least 45 minutes while other officers drove [the robbery victim] to Jaquez's location for an attempted showup identification." The court found the error harmless, however, because Jaquez did not show how the outcome would have differed had he been

able to contact counsel in advance of the showup. The conviction was reversed on other grounds.

While Kirkpatrick and Jaquez may appear to be at variance with Wade as to when the "earliest opportunity" arises for police to put a person in custody in touch with a lawyer, Kirkpatrick distinguishes Wade rather than disagreeing with it. As the trial court perceived, the cases can be reconciled on the basis that the rule does not necessarily compel police to postpone routine prebooking procedures or the execution of a search warrant when an arrestee expresses the desire to consult an attorney. In Kirkpatrick, the police were in the midst of interrogation when the defendant demanded an attorney. They stopped questioning him, but instead of giving him the opportunity or means to contact an attorney, they took him on a four hour drive to Lewis County. In Wade, on the other hand, when the defendant asked for an attorney, the police were in the midst of completing routine booking, much like the procedures Mullins was undergoing when he invoked his right to counsel. As the trial court found here, Mullins - - unlike the defendant in Kirkpatrick - - was not "restrained in close custody." Rather, while the detectives filled out forms, Mullins was permitted to remain in a waiting area where he had access to telephones.

We do not mean to suggest that "the earliest opportunity" for police to facilitate a telephone call is always after prebooking procedures; this would not be true, for example, in the circumstances of an arrest for driving while intoxicated. And there may be other situations in which the booking process should be interrupted, for example, if it is unduly protracted. We merely conclude that under these circumstances, Wade is the applicable precedent. Despite the reminders from the detectives that he had requested an attorney and could wait quietly in the adjoining room, Mullins began to talk and thus waived his rights under CrR 3.1.

[Some citations omitted]

LED EDITORIAL NOTE: The Court of Appeals noted in discussion not included in this LED that Mullins did not argue in the Court of Appeals that his Miranda rights were violated under Miranda initiation-of-contact rules. For an article on that subject, see the article, *Initiation Of Contact Rules Under The Fifth Amendment*, on the CJTC LED Internet page; that article also contains a discussion of the Kirkpatrick decision discussed in Mullins. We believe that Mullins's rights under Miranda were not violated in this case.

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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 own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. 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/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "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 LED 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].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. 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 Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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