Law Enforcement Digest

NOVEMBER 2010

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

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HONOR ROLL

667th Basic Law Enforcement Academy – May 25, 2010 through October 5, 2010

President:	Mark E. Grow – Yakima Police Department
Best Overall:	Geoffrey R. Albright – Stillaguamish Tribal Police Department
Best Academic:	Clayton T. Slominski – Kirkland Police Department
Best Firearms:	Geoffrey R. Albright – Stillaguamish Tribal Police Department
Patrol Partner Awards:	Michael G. Seifert – Mercer Island Police Department
Tac Officer:	Officer Mike O'Neill – Olympia Police Department

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NOVEMBER 2010 LED TABLE OF CONTENTS

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WASHINGTON SUPREME COURT GRANTS REVIEW IN TWO CASES WHERE THE COURT OF APPEALS UPHELD CAR SEARCHES INCIDENT TO ARREST

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 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**. One Senior Appellate Deputy Prosecuting Attorney has described the issue that is now before the Washington Supreme Court 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)?

LED EDITORIAL COMMENT: 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. As always, we suggest that officers and agencies consult their legal advisors and local prosecutors for legal advice on the current state of the law.

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LAW ENFORCEMENT ARTICLES ON (1) MIRANDA INITIATION OF CONTACT AND (2) IDENTIFICATION PROCEDURES HAVE BEEN UPDATED ON CJTC LED PAGE

The following two articles on the CJTC internet LED page were recently updated: (1) *Initiation of Contact Rules Under The Fifth Amendment* (including a one-page bullets summary and a one-page flow chart); and (2) *Lineups, Showups And Photographic Spreads: Legal And Practical Aspects Regarding Identification Procedures and Testimony*.

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

(1) CIVIL RIGHTS ACT CIVIL LIABILITY: FIRE DEPARTMENT ADMINISTRATORS AND CONTRACT ATTORNEY VIOLATED FIREFIGHTER'S FOURTH AMENDMENT RIGHTS WHEN, DURING IA INVESTIGATION, THEY ORDERED HIM TO RETRIEVE SOME OBJECTS FROM HIS HOME ON PAIN OF BEING DISCIPLINED FOR INSUBORDINATION – In Delia v. City of Rialto, ___ F.3d ___, 2010 WL 3504502 (9th Cir. 2010) (decision filed September 9, 2010), in a Civil Rights Act action for damages, a three-judge Ninth Circuit panel addresses circumstances where City of Rialto (California) fire department administrators and a City contract attorney asked a firefighter (Nicholas Delia) to voluntarily retrieve some objects from his home in relation to an internal affairs investigation. When Delia

refused to do so voluntarily, they then ordered him, in writing and on pain of disciplinary action for insubordination for disobeying an order, to retrieve the items from his home. He complied, but he later sued the City of Rialto for violating his Fourth Amendment rights. The Ninth Circuit panel concludes that the order given to Delia was the equivalent of the administrators unlawfully entering Delia's home without a search warrant and without any justification for warrantless entry. The administrators' conduct violated the Fourth Amendment, the panel concludes.

The Delia panel, however, grants qualified immunity to the fire department administrators. On this point, the Court concludes that, at the time they gave the order, the administrators could not have reasonably anticipated that their order was a Fourth Amendment violation. But the panel denies qualified immunity to the City of Rialto's contract attorney on the rationale that qualified immunity does not apply to private attorneys even though they can be held liable for a Fourth Amendment violation in this context.

Finally, the Delia panel concludes that the order given by the administrators to Delia was not given under any official policy or custom. And none of the administrators involved in the decision to give Delia the order to retrieve objects from his home qualified – within the meaning of the term in Civil Rights Act case law – a "policy-maker" for the City of Rialto. Therefore, no liability attaches to the City under a "municipal liability" rationale tied to agency custom or policy.

Result: Reversal in part and affirmance in part of U.S. District Court (Central District of California) summary judgment ruling against Delia; case remanded for fact-finding to address possible civil liability of the City's contract attorney.

(2) **BROOKS AND MATTOS TASER-USE CIVIL RIGHTS ACT CASES TO BE REHEARD** – The Ninth Circuit has withdrawn the three-judge panel decisions in (1) Malaika Brooks v. City of Seattle (Ninth Circuit # 08-35526) and (2) Troy Mattos v. Darren Agarano (Ninth Circuit # 08-15567). The Ninth Circuit has reset each case for rehearing before a larger Ninth Circuit panel.

The three-judge panel's decision in Brooks was reported in the June 2010 **LED** beginning at page 10. The panel ruled 2-1 that police use of the taser was reasonable. The three-judge panel's decision in Mattos was reported in the March 2010 **LED** beginning at page 5. That panel was unanimous in ruling that police use of the taser was reasonable.

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WASHINGTON STATE SUPREME COURT

TWO-MINUTE VISIT AT 3:20 A.M. TO SUSPECTED "DRUG HOUSE" DOES NOT ADD UP TO REASONABLE SUSPICION FOR TERRY STOP OF THE VISITOR WHERE SOLE APPARENT BASIS FOR POLICE LABELING AS "DRUG HOUSE" WAS NEIGHBORS' REPORTS OF RECENT PATTERN OF HEAVY "SHORT STAY TRAFFIC" TO HOUSE

State v. Doughty, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3705223 (2010)

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

> At 3:20 a.m. on August 14, 2007, [a law enforcement officer] observed Doughty park his car, approach a house, return to his car less than two minutes later, and drive away. The officer did not see any of Doughty's actions at the house, or even if Doughty interacted with anybody there. Neighbors had previously "made numerous complaints of large quantities of short stay traffic" at the house, prompting police to identify it as a "drug house." Nothing in the record indicates that police based this suspicion on anything other than neighbor complaints, such as actual evidence of drugs, controlled buys, reports of known drug users or dealers frequenting the house, and so forth.
>
> After the two-minute visit, [the officer] stopped Doughty "for the suspicion of drug activity." [The officer] ran Doughty's license through a license check and learned he was driving with a suspended license. [The officer] arrested Doughty

for the license offense, then searched Doughty's car incident to arrest [**LED EDITORIAL NOTE: Apparently, Doughty never challenged the authority of the officer, assuming for argument's sake that the stop and arrest were lawful, to conduct a vehicle search incident to arrest.**] [The officer] discovered a glass pipe that field-tested positive for methamphetamine. [The officer] re-arrested Doughty for possession of a controlled substance and transported him to jail. During booking, officers found a plastic baggie, which contained a crystal substance, in Doughty's shoe. The substance also field-tested positive for methamphetamine.

At trial Doughty moved to suppress evidence obtained as a result of an unlawful investigative detention. The trial court denied the motion. Following a bench trial on stipulated facts, the trial court found Doughty guilty of possession of a controlled substance (methamphetamine). The court sentenced him to 18 months' incarceration. Doughty appealed, and the Court of Appeals affirmed the conviction in a split decision. State v. Doughty, 148 Wn. App. 585 (Div. III, 2009) **April 09 LED:14**.

ISSUE AND RULING: Under Terry v. Ohio, 392 U.S. 1 (1968) and State and federal court decisions interpreting Terry and the Fourth Amendment and the Washington constitution's article 1, section 7, law enforcement officers must have reasonable suspicion to justify a warrantless seizure (a Terry stop) of a person. In this case, does the two-minute visit at 3:20 a.m. to a house that several neighbors' recent reports of heavy pattern of "short stay traffic" consistent with a drug house add up to reasonable suspicion to stop the 3:20 a.m. visitor to investigate whether he was involved in illegal drug activity? (ANSWER: No, rules a 6-3 majority in an opinion authored by Justice Richard Sanders)

Result: Reversal of Court of Appeals decision that affirmed the Spokane Superior Court conviction of Walter Moses Doughty for possession of methamphetamine.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct. State v. Garvin, 166 Wn.2d 242 (2009) **July 09 LED:18**. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

A Terry stop must be reasonable. When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. The State must show by clear and convincing evidence that the Terry stop was justified. Garvin, 166 Wn.2d at 250. [**LED EDITORIAL NOTE: See our commentary regarding Justice Fairhurst's sharp, well-supported attack on this apparently erroneous sentence in the Doughty majority opinion about the standard of proof.**]

A person's presence in a high-crime area at a "late hour" does not, by itself, give rise to a reasonable suspicion to detain that person. Similarly, a person's "mere proximity to others independently suspected of criminal activity does not justify the stop." A traffic stop is a seizure for purposes of constitutional analysis.

The State argues [that the officer] had valid grounds for a Terry stop. It cites facts to support the seizure, including (1) law enforcement's identification of the house as a drug house, (2) complaints from neighbors, (3) Doughty visited the house at 3:20 a.m., and (4) his visit lasted less than two minutes. These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7.

Police may not seize a person who visits a location – even a suspected drug house – merely because the person was there at 3:20 a.m. for only two minutes. The Terry-stop threshold was created to stop police from this very brand of interference with people's everyday lives. The Supreme Court embraced the

Terry rule to stop police from acting on mere hunches. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Terry. On these facts, [the officer] acted on a hunch alone.

The State relies on [State v. Kennedy, 107 Wn.2d 1 (1986)], to support its argument that investigative seizures may rest on grounds amounting to "less than probable cause." The State suggests articulable suspicion arises when "there is a substantial possibility that criminal activity has occurred or is about to occur." The officer's suspicion must nevertheless be well-founded (i.e., based on specific and articulable facts that the individual has committed a crime) and reasonable. See Kennedy.

Moreover Kennedy is distinguishable. We held the investigative seizure in Kennedy did not violate the defendant's rights. However, we emphasized that police formed a reasonable and articulable suspicion to seize the defendant based on detailed information provided by a reliable informant. The informant told police that Kennedy "regularly purchased marijuana [at a suspected drug house], that Kennedy only went [there] to buy drugs, and that Kennedy usually drove either a [green truck or maroon car]." The officer observed Kennedy leave the location in the maroon car described by the informant. As the officer signaled Kennedy to pull over, he saw Kennedy make a furtive movement to place something (later discovered to be marijuana) under his seat. These grounds justified the investigative seizure and the officer's vehicle search for a weapon.

In contrast, here [the officer] relied only on his own incomplete observations. There was no informant's tip (which was the element we found most persuasive in Kennedy), and no furtive movement. [The officer] merely saw Doughty approach and leave a suspected drug house at 3:20 a.m. [The officer] had no

idea what, if anything, Doughty did at the house. The totality of these circumstances does not warrant intrusion into Doughty's private affairs.

The Court of Appeals below relied upon State v. Richardson, 64 Wn. App. 693 (Div. III, 1992) **Aug 92 LED:15**, to affirm the trial court's denial of Doughty's motion to suppress. But Richardson finds an investigative seizure improper on arguably less substantial facts than those present here. A police officer observed Richardson walking at 2:50 a.m. with a person whom police suspected of dealing drugs. The officer stopped both men. The court held the investigative detention to be unlawful. "At the time of the seizure, [the officer] knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of 'running drugs'." In Richardson, then, consorting with a suspected drug dealer late at night in a high-crime area did not justify a Terry stop.

The facts of Doughty's case are similar, but even less damning. Here, police never saw any of Doughty's interactions at the house. He may not have even interacted with anybody there. As far as [the officer] knew, maybe Doughty knocked and nobody answered. Maybe Doughty even had the wrong house. The two-minute length of time Doughty spent at the house – albeit a suspected drug house – and the time of day do not justify the police's intrusion into his private affairs.

A more apt analogy rests with State v. Gleason, 70 Wn. App. 13 (Div. III, 1993) Oct 93 LED:15. Based on the totality of the circumstances, the Gleason court held it improper to seize a person merely for exiting an apartment complex that had a history of drug sales. The court reasoned that "this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he

was not carrying any unusual objects." That statement describes the events in Doughty's chronology almost exactly.

JUSTICE CHAMBERS' CONCURRING OPINION:

Justice Tom Chambers concurs with the analysis and result of the Doughty majority opinion, but he adds that "had the record contained more specific facts indicating why this house was designated a 'drug house' our analysis might be different."

JUSTICE FAIRHURST'S DISSENT:

Justice Mary Fairhurst writes a dissenting opinion joined by Justice James Johnson and Chief Justice Barbara Madsen. The dissent argues that there were enough in the facts to meet the relatively low legal standard for reasonable suspicion.

Justice Fairhurst's dissent also contains a footnote that sharply attacks as "absurd" the following sentence in the majority opinion addressing a standard of review issue:

> The State must show by clear and convincing evidence that the Terry stop was justified. Garvin, 166 Wn.2d at 250.

Justice Fairhurst's dissent attacks the standard of review sentence as follows:

> The majority asserts that every exception to the warrant requirement must be established by clear and convincing evidence. In the context of a Terry stop, this requirement offers only confusion. Saying the State needs to establish reasonable suspicion by clear and convincing evidence is as absurd as saying the State must show guilt beyond a reasonable doubt by a preponderance. This error is recent and arose in dictum in State v. Garvin, 166 Wn.2d 242 (2009) **July 09 LED:19 [LED EDITORIAL NOTE: "Dictum" is language in an opinion that it not needed to support the result reached in the case. Justice Richard**

Sanders is the author of both the Doughty majority opinion and the Garvin opinion]. For the proposition that all exceptions to the warrant requirement need be shown by clear and convincing evidence, Garvin cites to State v. Smith, 115 Wn.2d 775 (1990). Garvin, 166 Wn.2d at 250. However, Smith did not recognize a clear and convincing burden for all warrant exceptions; instead, only the voluntariness of consent had to be shown by clear and convincing evidence. 115 Wn.2d at 789. I have found no case other than Garvin where we have recognized a clear and convincing burden for a warrant exception outside of consent. In short, the dictum in Garvin was an unwarranted extension that injects confusion into our Fourth Amendment and article I, section 7 jurisprudence. This court should not only refuse to follow it but should explicitly repudiate it.

LED EDITORIAL COMMENTS: We agree with the result of the Doughty majority opinion, and we also agree with Justice Chambers' concurrence. We think that the facts of Doughty do not add up to reasonable (i.e., objective) suspicion under either the federal or Washington constitutional standards. But the facts could have added up to reasonable suspicion that the house visited was a "drug house" if that conclusion were based on objective evidence less speculative than mere neighbors' reports of heavy, short-stay traffic to the house. Police observation of or even neighbors' reports of multiple visits by known (to police) drug users or drug dealers would probably be sufficient corroboration to support a stop of a two-minute, 3 a.m. visitor to the house.

On a point that is no doubt more of interest to prosecutors than officers, we also agree with the standard-of-review discussion in Justice Fairhurst's dissent. Justice Fairhurst's discussion of the standard of review in her dissent sparked us to do some further research on the standard-of-review question regarding proof of exceptions to the warrant requirement. First, as Justice Fairhurst points out in her Doughty dissent, there appears to be no court decision suggesting that there is a general proposition, as does the Doughty majority opinion and the Garvin opinion

(both authored by Justice Richard Sanders), that exceptions to the search warrant requirement must be proved by clear and convincing evidence, as opposed to a mere preponderance.

Second, while the Washington courts have on numerous occasions over the past 35 years asserted that voluntariness of consent, as a special area of concern, must be proved by clear and convincing evidence, our research tells us that this question is ripe for a fresh look by the Washington appellate courts. It appears that the "clear and convincing" language first appeared in the Washington Supreme Court decision in State v. Shoemaker, 85 Wn.2d 207 (1975), a decision that focused on special concerns about determining voluntariness of consent by a person who is under arrest at the point when police make the request for consent. The Shoemaker Court cited some then-extant Fourth Amendment case law in other jurisdictions addressing review of consent issues in the context of a request for consent from a person under arrest. The Shoemaker Court ultimately determined the consent to be voluntary under the clear and convincing evidence standard of review.

Washington appellate court decisions since Shoemaker have routinely referenced such a "clear and convincing" standard for proof of voluntariness of consent. The references appear to have become boilerplate, rather than conclusions based on updated research. It appears to us that the boilerplate needs fresh scrutiny. We think that the majority view nationally, even in the liberal Ninth Circuit of the U.S. Court of Appeals, is that voluntariness of consent under the Fourth Amendment, like all other exceptions to the search warrant requirement, is determined and reviewed under a simple preponderance standard. For a collection of some of the relevant case law relating to the standard for appellate court review of voluntariness of consent, see 6 Wayne R. LaFave, Search and Seizure, section 11.2, n 148 (4th ed. 2004) (LaFave); see also U.S. v. Hurtado, 899 F.2d 371 (5th Cir. 1990); U.S. v. O'Looney, 544 F.2d 385 (9th Cir. 1976). For case law on the factors for determining voluntariness of consent, see LaFave, section 8.2; State v. Flowers, 57 Wn. App. 636 (Div. I, 1990) (valid consent by person under arrest) and State v. Garcia, 140 Wn. App. 609 (Div. III 2007) Nov 07 LED:17

(**invalid consent by person under arrest**). **Note that the question of voluntariness of consent is closely scrutinized on the totality of the circumstances, but that it is possible, as was held in Flowers, for a person under arrest to give a voluntary consent.**

INTIMIDATION OF A PUBLIC SERVANT, RCW 9A.76.180: EVIDENCE ON INTENT-TO-INFLUENCE-OFFICAL ACTION ELEMENT HELD INSUFFICIENT TO SUPPORT CHARGE

State v. Montano, ___ Wn.2d ___, ___P.3d ___, 2010 WL 3584467 (2010)

Facts:

Law enforcement officers justfiably tased Juan Jose Montano twice while trying to arrest him for assault on another person and for his aggressive resistance to arrest. The Supreme Court majority opinion describes as follows what happened next after one of the officers handcuffed Montano and began escorting Montano to a patrol car:

> When Montano stopped struggling, [the officer] handcuffed him and led him to the patrol car. Montano again became angry, pulled away from Smith, and told the officer, "I know when you get off work, and I will be waiting for you." As they walked toward the car, Montano continued to verbally abuse [the officer], saying, "I'll kick your ass," "I know you are afraid, I can see it in your eyes," and calling the officer "punk ass."
>
> While [the officer] drove Montano to the Grant County jail, Montano continued his commentary, noting that "you need to retire. I see your gray hair." Montano repeated that the officer was scared and that he could see it in [the officer's] eyes.

Proceedings: (Excerpted from Court of Appeals opinion)

> The State charged Montano with intimidating a public servant, fourth degree assault, and resisting arrest. Montano moved to dismiss the intimidation charge [for lack of sufficient evidence to support the charge]. The trial court granted the motion and dismissed the charge, concluding that the State provided insufficient evidence to satisfy the elements of intimidation. The State then moved to dismiss the remaining charges, without prejudice, in order to avoid speedy trial or double jeopardy issues and to avoid multiple trials.

ISSUE AND RULING: To establish the crime of intimidating a public servant under RCW 9A.76.180, the State must present evidence, aside from threats alone, of an attempt to influence the public servant's official action. Is there such evidence of intent to influence action in this case? (ANSWER: No, rules a 6-3 majority)

Result: Defendant Juan Jose Montano prevails; reversal of Court of Appeals decision (see **Feb 09 LED:18**) that had reversed the Grant County Superior Court's dismissal of the charge of intimidating a public servant.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> A person commits the crime of intimidating a public servant if, "by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180. In order to survive a motion to dismiss, the State must provide some evidence both that the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action. The parties and the trial court in the present case agreed that Montano's statements to [the officer] constituted threats. Their disagreement centers on whether sufficient evidence existed that Montano intended his threats to influence an official action by [the officer].
>
> We have never considered any aspect of this intimidation statute, and only limited case law exists from the Court of Appeals. However, one decision from

the Court of Appeals, Division Two, deals directly with the issue before us: State v. Burke, 132 Wn. App. 415 (Div. II, 2006) **May 06 LED:20**. In Burke, the defendant was convicted of intimidating a public servant after he yelled profanities and "fighting threats" at a police officer during a house party, as well as "belly bumping" the officer and swinging his fists. The police officer had observed several, apparently underage people drinking beer in front of the house, and he followed them through the house onto the back porch, where he was accosted by the defendant. On appeal, the court reasoned that the evidence did not support a jury's inference that the defendant intended to influence the police officer's official actions. Though the defendant's actions demonstrated his anger at the situation and at the officer, those actions – by themselves – did not evidence an attempt to influence an action by the officer. The court reversed the conviction, holding that "[e]vidence of anger alone is insufficient to establish intent to influence [a public servant's] behavior."

This rule from Burke is consistent with statements in another case addressing the public servant intimidation statute, State v. Stephenson, 89 Wn. App. 794 (1998) (holding that the intimidation statute is not unconstitutionally overbroad). In that case, the court observed that the "attempt to influence" element of the crime cannot be satisfied by threats alone. Thus, the two courts agreed; to convict a person of intimidating a public servant, there must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances. We agree with this rule.

This rule is simply a part of the general requirement that the State must prove every element of a crime beyond a reasonable doubt. Evidence is insufficient to prove an element if no reasonable jury could have found the element to be met. And in Burke, where the defendant's actions showed only that he was angry, the court held that no reasonable jury could have inferred that the defendant was attempting to influence the police officer; some evidence must independently support the "attempt to influence" element of the crime.

The rules of Burke and Stephenson are logically sound, and they guide the disposition of the case before us. Montano argues that the Court of Appeals incorrectly distinguished Burke from his case. Montano is correct that there is no meaningful distinction between the facts of Burke and those before us here.

In its opinion, the Court of Appeals in Montano distinguished the present case from Burke by pointing out that here, the police officer was taking official action (transporting Montano to jail) at the time Montano made the threats, whereas in Burke, the officer had "abandoned his pursuit . . . and was simply trying to leave the scene." This distinction raises two concerns: first, from the facts portrayed by the Burke court, the Montano court's conclusion that the officer had abandoned his pursuit appears to be unsupported. But even if the pursuit was abandoned, that fact does not lead inescapably to the conclusion that the officer was engaged in no official action. No court has addressed what constitutes "official action" for the purpose of this statute, and there is no need to consider it here.

Second, and more importantly, the statute contains no requirement that the public servant be presently engaged in an official action in order for the defendant to attempt to influence such action. In fact, such an interpretation would eliminate many reasonable applications of this statute. For example, if a person called a police station and threatened to kill any officer who tried to arrest him, the intimidation statute logically applies, even though the official action (arrest) will occur in the future.

Under the Montano court's reasoning, however, the intimidation statute would apply only if the officer was in the act of arresting the person when the threat was made. Such an interpretation unreasonably limits the application of the public servant intimidation statute, and we reject it. The Court of Appeals' attempt to distinguish Montano's case from Burke is unpersuasive.

> The Burke court's reasoning applies to the facts of Montano's case. Before his arrest, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two tasings, Montano grew increasingly enraged and violent. After being subdued physically, he resorted to lashing out verbally, hurling threats and insults at the officers. As in Burke, this behavior amply demonstrates Montano's anger at the situation and at the police officers. However, there is simply no evidence to suggest that Montano engaged in this behavior, or made his threats, for the purpose of influencing the police officers' actions. Instead, the evidence shows a man who was angry at being detained and who expressed that anger toward the police officers. In the absence of some evidence suggesting an attempt to influence, the State has failed to make a prima facie showing that Montano attempted to influence either officer's official action.

[Footnote, some citations omitted]

DISSENT: Justice James Johnson authors a dissent joined by Justice Debra Stephens and Chief Justice Barbara Madsen. The dissent argues that the facts of the case were sufficient to allow a jury to make a decision under RCW 9A.76.180.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **CLAIMANTS IN RCW 69.50.505 DRUG FORFEITURE CASES MAY RECOVER ATTORNEY FEES EVEN IF ONLY FRACTIONALLY SUCCESSFUL IN CHALLENGES** – In Guillen v. Contreras, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3504827 (2010), the Washington Supreme Court interprets RCW 69.50.505 and rules for the family of a dead, suspected drug dealer. The family appealed from a Yakima County Superior Court attorney fees ruling in a drug forfeiture case

under RCW 69.50.505. The Superior Court ruled that, because the family failed to win on the largest dollar forfeiture issue in the case ($57,990 in cash), the family was not entitled to recover attorney fees related to the family's recovery of (1) $9,342 in cash, and (2) a car worth between $5,000 and $10,000. Division Three of the Court of Appeals affirmed the Superior Court.

The Supreme Court majority opinion reverses the Court of Appeals and Superior Court, awarding attorney fees to the family for attorney work in recovering the $9,342 and the car, even though the family lost its challenge to seizure and forfeiture of the additional $57,990 in cash. The Supreme Court remands the case to superior court for a determination of the extent of attorney fees attributable to the family's challenges to the $9,342 cash forfeiture and the car forfeiture, directing the superior court to offset attorney work attributable to the unsuccessful challenge related to the $57,990 in cash.

The concluding paragraph of the majority opinion summarizes the ruling as follows:

> We conclude that the attorney fee provision in RCW 69.50.505(6) was intended to protect people whose property was wrongfully seized. We hold that a claimant may recover reasonable attorney fees for any property the government has wrongfully seized under RCW 69.50.505. However, the legislature did not, as we read the statute, intend for claimants to recover fees and costs incurred solely for unsuccessful claims. Generally, the amount of a fee award will be left to the discretion of the trial court. We remand to the trial court to determine, consistent with this opinion, the amount of attorney fees reasonably incurred by the respondents in recovering the vehicle and the $9,342.

Eight members of the Court join in the majority opinion. Justice Richard Sanders dissents, but not to side with the government. Rather, Justice Sanders' dissent argues that full attorney fees should be awarded to the family with no offset for their unsuccessful challenges.

Result: Reversal of Court of Appeals decision (see **Jan 09 LED:22**) that affirmed a Yakima County Superior Court order denying attorney fees to family members of the dead suspected drug dealer, Jesus Jaime Torres, Sr.

(2) **CHILD WITNESSES, JUST LIKE ADULT WITNESSES, ARE PRESUMED TO BE COMPETENT, AND THE BURDEN IS ON THE PARTY CHALLENGING THE WITNESS TO REBUT THAT PRESUMPTION** – In State v. Webb, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3705185 (2010), the Washington Supreme Court unanimously rules that child witnesses, just like adult witnesses, are presumed to be competent. The burden is always on the party challenging a child or adult witness to prove incompetence.

In this criminal case, the alleged victim of a rape was a developmentally delayed 14-year-old boy who testified that another 14-year-old boy had raped him. The trial court had placed the burden on the defendant to show that the victim was not competent.

On defendant's appeal from his conviction, the Court of Appeals ruled that the trial court should have placed the burden of proving competency of a child witness on the State. The Court of Appeals ruled, however, that the trial court's error was harmless because the evidence established the competency of the victim. The Supreme Court disagrees with the placement of burden by the Court of Appeals. Instead, the Supreme Court concludes that the trial court got it right.

Result: Affirmance of result of Division One Court of Appeals decision that affirmed the Island County Superior Court third degree rape conviction of Samuel J. Webb.

LED EDITORIAL NOTE: We reported on the Court of Appeals decision in Webb in the August 2009 LED beginning at page 22. Our focus in our Webb entry in the August 2009 LED was on a Miranda custody issue in the case. When the Supreme Court granted review on the witness-competency issue, the Supreme Court denied the defendant's request that the Court review the Miranda custody issue.

(3) ACQUITTAL IN CRIMINAL PROSECUTION UNDER BEYOND-A-REASONABLE-DOUBT PROOF STANDARD DID NOT PRECLUDE PROBATION REVOCATION THAT WAS BASED ON SAME CONDUCT BUT WAS DETERMINED UNDER A LOWER PROOF STANDARD – In City of Aberdeen v. Regan, ___ Wn.2d ___, ___ P.3d ___ , 2010 WL 3785299 (2010), the Washington Supreme Court rules that (1) acquittal of a criminal charge did not preclude revocation of a defendant's probation for an alleged violation that was based on the same conduct, and (2) that the burden of proof in the probation hearing was not the criminal law's "beyond a reasonable doubt" standard.

The Aberdeen Municipal Court found Regan guilty of fourth degree assault, with a sentence that included a period of probation. As one of the conditions of his probation, Regan agreed to commit "no criminal violations of the law." The City subsequently charged Regan with having committed new crimes of fourth degree assault and criminal trespass. As a result of these new charges, the City petitioned the Municipal Court for a probation revocation hearing, which the court continued until after trial. At trial, a jury acquitted him of both criminal trespass and fourth degree assault.

At the probation revocation hearing, the Municipal Court revoked five days of Regan's suspended sentence. The judge ruled that although the jury found Regan not guilty using a beyond a reasonable doubt standard, the evidence supported a criminal trespass violation. Regan appealed to Superior Court. The Superior Court agreed with the City "that an acquittal in a criminal proceeding does not preclude revocation of a suspended sentence." But the Superior Court reversed the Municipal Court, reasoning that Regan's probation conditions prohibited "'criminal violations of the law'" and, therefore, any violation must be proved beyond a reasonable doubt. The prosecutor appealed and the Court of Appeals reversed and reinstated the Municipal Court's revocation order. **April 09 LED:17.**

The Supreme Court majority notes that in Standlee v. Smith the Supreme Court reaffirmed the validity of the trial court's parole revocation even after the defendant's acquittal of underlying felony charges. 83 Wn.2d 405 (1974). As the Standlee Court explained, even when probation revocation hearings and criminal trials are premised on the same alleged violation, the two carry

distinct burdens of proof, thereby precluding application of the litigation-preclusion doctrines of collateral estoppel and res judicata.

The Supreme Court also rejects defendant's arguments that (1) the probation order's reference to future "violations" meant future convictions, and (2) that the Superior Court must apply a beyond-a-reasonable-doubt standard (as opposed to a "reasonably satisfied" standard – which is essentially a preponderance standard) to revoke his probation based on his alleged commission of a crime.

The majority opinion is authored by Justice Mary Fairhurst. Justice Gerry Alexander writes a concurring opinion (joined by Justices James Johnson and Tom Chambers) in which he complains that he is constrained by the precedent of Standlee v. Smith, but in which he invites a future "direct attack" on Standlee v. Smith. Justice Richard Sanders writes a lone dissent, arguing that a beyond-a-reasonable-doubt standard must be applied because of the probation order's language, "criminal violations of law," as opposed to possible alternative phrasing such as "violations of criminal law," that would require that proof be only under a preponderance standard.

Result: Reinstatement of Aberdeen Municipal Court order revoking the probation of Francis James Regan; affirmance of Division Two Court of Appeals decision that reversed the decision of the Grays Harbor County Superior Court that reversed the probation revocation order of the Aberdeen Municipal Court.

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WASHINGTON STATE COURT OF APPEALS

SEIZURE AND ARREST OF PERSON UPHELD, BUT SEARCH-INCIDENT OF HIS CAR DETERMINED TO VIOLATE WASHINGTON CONSTITUTION'S ARTICLE I, SECTION 7, EVEN THOUGH SEARCH WOULD HAVE BEEN UPHELD UNDER FOURTH AMENDMENT

State v. Chesley, __ Wn. App. __, __P.3d __, 2010 WL 3860482 (Div. II, 2010)

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

> [A law enforcement officer] was on a routine patrol when dispatch notified him that a bait car alarm had been activated. He was approximately a quarter-mile away from it, which was in a nearby parking lot, and he responded to the scene in less than one minute.
>
> When [the officer] arrived at the scene, he did not see any cars entering or exiting the lot. A few cars were in the lot, including the bait car and another car parked in an adjacent stall. [The officer] saw a person, later identified as Chesley, standing between the bait car and the other car. As he drove closer, Chesley quickly jumped into the adjacent car's driver seat.
>
> When backup arrived, [the officer] and the other officers ordered Chesley to exit the car and handcuffed him as he complied. The officers also saw two other passengers in the car, ordered them to exit, and took them into custody.
>
> After the car occupants were in custody, [the first responding officer] saw that the bait car's passenger door lock had been punched through. Two hours before this incident, [the officer] had responded to the same bait car, and the lock was intact. He looked through the driver side window of Chesley's car and saw several tools spread throughout the floorboard, including hammers, picks, screwdrivers, and electrical items. At that point, believing the items were burglary tools, [the officer] formally arrested Chesley.
>
> Officers then searched Chesley's car. During the search, they found several items that had been reported stolen. Based on the contents found in the car, they obtained a telephonic search warrant to search its trunk. In the trunk, they discovered a stolen gun and some other items.

> The State charged Chesley with first degree possession of stolen property and possession of a stolen firearm. Chesley moved to suppress the evidence officers obtained by searching his car, arguing that they did not have probable cause to arrest him. The trial court denied his motion and found him guilty in a stipulated facts bench trial.

[Footnote omitted]

ISSUES AND RULINGS: 1) Based on the timing of events and the observations by the initially responding officer, together with Chesley's appearance, conduct and presence near the bait car, did the officers have reasonable suspicion that justified the initial temporary seizure of Chesley? (ANSWER: Yes);

2) Was the arrest of Chesley supported by probable cause? (ANSWER: Yes, when the officer saw the punched lock on the bait car and the burglary tools in Chesley's car, these facts, together with the facts that supported the initial temporary seizure of Chesley, added up to probable cause to arrest him);

3) Was the arrest of Chesley for the gross misdemeanor of car prowling lawful even though Chesley did not commit the crime in the officer's presence? (ANSWER: Yes, RCW 10.31.100(1) provides an exception to the misdemeanor-presence requirement for crimes against property);

4) Was the warrantless search of Chesley's car lawful as a search incident to arrest under article I, section 7 of the Washington constitution? (ANSWER: No, rules a 2-1 majority, once Chesley and the other vehicle occupants had been secured, there was no need to search his car to prevent Chesley from destroying or concealing evidence or from obtaining a weapon).

NOTE: C.C. Bridgewater is the author of the majority opinion. Judge David Armstrong signs on. Judge Christine Quinn-Brintnall dissents on the search incident issue.

Result: Reversal of Thurston County Superior Court convictions of Joseph James Chesley for first degree possession of stolen property and possession of a stolen firearm.

ANALYSIS:

1) Reasonable suspicion for seizure of person

Under both the federal and Washington constitutions, reasonable suspicion is a standard that is lower than probable cause. Reasonable suspicion is an objective standard for justifying a temporary police seizure of the person to investigate possible criminal activity. An officer must have reasonable and articulable suspicion that the person has committed or is committing a crime. The Chesley Court explains as follows that this standard was met at the point when Chesley was initially temporarily seized:

> Here, [the first officer] responded to the bait car's silent alarm and saw Chesley between it and another car parked in an adjacent stall. When he drove closer, Chesley quickly hopped into the adjacent car. [The officer] had responded in less than one minute and did not see any cars enter or exit the parking lot. [B]ased on Chesley's appearance, conduct, and presence in the vicinity, [the officer] had a reasonable and articulable suspicion that Chesley had activated the bait car's alarm. [The officer] properly detained Chesley to investigate what triggered the alarm.

2) Probable cause for arrest

Probable cause to arrest is a higher standard than reasonable suspicion to temporarily seize a person, requiring reasonable grounds to believe that the person has committed a crime. The Chesley Court explains as follows that this standard was met at the point when Chesley was arrested:

> While Chesley was detained, [the first responding officer] saw that the bait car's passenger door lock had been punched through. Only two hours before, [the officer] had responded to the same bait car and the lock was intact. He also saw several tools, in open view, spread throughout the floorboard of Chesley's car. Based on his training and experience, he knew these items were burglary tools. Once [the officer] saw the punched door lock and the burglary tools, he had probable cause to arrest Chesley for a car prowl.

3) Misdemeanor presence exception for crime against property

The Court of Appeals analyzes the misdemeanor presence issue as follows:

> Although car prowling is a gross misdemeanor, which usually requires an officer to witness the crime, an officer may arrest a person for a gross misdemeanor not committed in the officer's presence if the officer has probable cause to believe that the person "has committed or is committing a . . . gross misdemeanor . . . involving physical harm or threats of harm to . . . property or the unlawful taking of property." RCW 10.31.100(1). Car prowling involves a crime against property in a car. RCW 9A.52.100. [The officer] could therefore arrest Chesley for a car prowl without witnessing the crime because he had probable cause to believe that Chesley has committed or was committing a crime against property.

4) Car search incident to arrest

The Chesley Court focuses on and discusses three Washington Supreme Court search-incident decisions: 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 Chesley Court concludes based on those decisions that article I, section 7 of the Washington constitution provides that – after officers have made a custodial arrest of a motor vehicle occupant and have secured the arrestee – the officers generally may not search any part of the vehicle without a search warrant under a search-incident rationale even if the officers have reason to believe that

the vehicle's passenger area contains evidence of the crime of arrest. The Court explains that under this view, the car search in the Chesley case was not lawful:

> At the time of the search, Chesley and the other occupants were in custody. Nor did the officers have reason to believe that the arrestee, Chesley, posed a safety risk because . . . he was in custody at the time of the search. We hold the search incident to Chesley'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 arrest.

Finally, the Court concludes, because the search warrant for the trunk search was based primarily on the evidence that was seized in the warrantless search of the passenger area, the evidence seized under the warrant must be excluded as fruit of the poisonous tree.

The Chesley Court does not discuss the Fourth Amendment standard for search incident to arrest. In Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, the U.S. Supreme Court announced a new, more-restrictive rule for searching the passenger area of a vehicle incident to arrest of an occupant. Under Gant and the Fourth Amendment, officers may invoke their "search incident" authority to search the passenger area of a vehicle following arrest of a vehicle occupant if, and only if, the officers have reason to believe that there is evidence of the crime in the passenger area.

The Chesley Court also does not discuss the Division One Court of Appeals decision in State v. Wright, 155 Wn. App. 537 (Div. I, 2010) **June 10 LED:12**, or the Division Two Court of Appeals decision in State v. Snapp, 153 Wn. App. 485 (Div. II, 2009) **Jan 10 LED:06**. In both Wright and Snapp, the Court of Appeals held that the Gant standard applies to searches by Washington officers. In each case, the Court of Appeals upheld a car search incident to arrest – after the arrestee has been secured – based on the fact that the searching officers had reason to believe the car passenger area contained evidence of the crime. Those holdings conflict with the holding by the Chesley Court. The Court of Appeals decision in Snapp was issued before the Washington Supreme Court decided Patton, Valdez or Afana. The Court of Appeals in Wright

expressly considered Patton and Valdez. The Wright Court concluded that Patton and Valdez were not in conflict with Gant's authorization for search incident to arrest where officers have reason to believe that the vehicle's passenger area contains evidence of the crime of arrest.

LED EDITORIAL NOTE: See our note on page 3 of this LED regarding the Washington Supreme Court's grant of review of the Court of Appeals decisions in 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 expect that the prosecutor in Chesley will seek review in the Washington Supreme Court.

DELIBERATE 2-STEP INTERROGATION METHOD WITHOUT CURATIVE WARNING AT STEP 2 HELD TO VIOLATE THE MIRANDA RULE OF MISSOURI V. SEIBERT

State v. Hickman, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3555882 (Div. II, 2010)

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

> On November 3, 2008, the State charged Hickman with failure to register as a sex offender contrary to former RCW 9A.44.130 (2006). A jury trial began on March 12, 2009. Before trial, the trial court held a CrR 3.5 hearing to determine the admissibility of statements Hickman made to [a detective].
>
> At the CrR 3.5 hearing, [the detective] testified that on October 16, 2008, he tried to locate Hickman at his registered address, 701 North Tower in Centralia, Washington. [The detective] stated that when he discovered that the 701 North Tower address did not exist, he attempted to locate Hickman at 701 South Tower. [The detective] further testified that when he spoke with residents at 701 South Tower, they told him that Hickman had moved out in July 2008. [The detective] stated that he asked the residents to have Hickman contact him.

Hickman called [the detective] later that same day. [The detective] told Hickman that he needed to come to the Lewis County Sheriff's office to properly register. After Hickman arrived, [the detective] told him that they would have a two-part interview consisting of an administrative interview to register him followed by an advisement of his Miranda rights and a criminal investigation for his suspected failure to register. [The detective] then questioned Hickman about his current address and had him sign a new registration form.

After Hickman registered his new address, [the detective] stopped the interview, explained that they were now going to shift into the criminal investigation, and advised him of his Miranda rights. [The detective] asked Hickman where he had been living and at what times he had lived at different places. Hickman told [the detective] that he had been living on South Tower Avenue until July 1, 2008, at which point he became transient until October 10, 2008, when he began living at his then current address. [The detective] then asked Hickman if he would be willing to make a taped statement, which Hickman agreed to do; [the detective] read Hickman his Miranda rights a second time and Hickman indicated that he understood his rights and was willing to talk to the detective.

The trial court suppressed Hickman's pre-Miranda statements, finding that [the detective] had subjected Hickman to custodial interrogation at the time he made the statements. The trial court also suppressed Hickman's post-Miranda statement regarding his new address. But the trial court did not suppress Hickman's remaining post-Miranda statements, finding that the second part of the interview was sufficiently separate from the first part of the interview because of [the detective's] explanation that it was for a criminal investigation.

. . . .

[At trial the detective] testified that he and Hickman had discussed the discrepancy on Hickman's registration form regarding the 701 North Tower

address and that Hickman had told him that he moved from the 701 South Tower address on July 1, 2008. [The detective] further testified that Hickman did not register a new address until October 16, 2008. The jury found Hickman guilty of failing to register as a sex offender . . . .

[Footnote omitted]

ISSUE AND RULING: Where the defendant was required by law as a sex offender to answer the detective's questions, and where the detective's giving of a Miranda warning in Step 2 of the custodial interrogation process did not include cleansing advice that the statements defendant had given during Step 1 of the process could not be used against him, did the two-step interrogation process violate Miranda and Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**, and therefore were all of the defendant's statements in the entire interrogation process inadmissible? (ANSWER: Yes, the detective's 2-step questioning method violated the Miranda rule of Missouri v. Seibert)

Result: Reversal of Lewis County Superior Court conviction of Tony Curtis Hickman for failing to register as a sex offender.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In [Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**], interrogating officers deliberately questioned a suspect without providing Miranda warnings until the suspect confessed, at which point officers advised the suspect of her Miranda rights, acquired a waiver from her, and then resumed interrogation while referring to the suspect's earlier pre-Miranda admissions to elicit a post-Miranda confession. The United States Supreme Court, in a plurality opinion, found that this interrogation technique rendered Miranda warnings ineffective and held that the post-Miranda statements were inadmissible, observing that "[t]he object of question-first [interrogation practice] is to render Miranda warnings ineffective by

waiting for a particularly opportune time to give [the warnings], after the suspect has already confessed." Justice Kennedy's concurring opinion in Seibert states,

> I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning.
>
> . . . .
>
> If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver. For example, a substantial break in time and circumstances between the prewarning statement and the Miranda warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.

Several lower federal and state courts assume without analysis that Justice Kennedy's concurring opinion represents the narrowest holding in Seibert.

Generally, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court

may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" . . . .

[W]e hold that the controlling constitutional rule of Seibert is that which has been articulated in United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006) **April 06 LED:02:**

> [A] trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning – in light of the objective facts and circumstances – did not effectively apprise the suspect of his rights. Although the [Seibert] plurality would consider all two-stage interrogations eligible for a Seibert inquiry, Justice Kennedy's opinion narrowed the Seibert exception to those cases involving deliberate use of the two-step procedure to weaken Miranda's protections. . . . This narrower test-that excludes confessions made after a deliberate, objectively ineffective mid-stream warning-represents Seibert's holding. In situations where the two-step strategy was not deliberately employed, [Oregon v. Elstad, 470 U.S. 298 (1985)] continues to govern the admissibility of postwarning statements. (Footnotes omitted.)

Although the Williams court held that Seibert requires a trial court to determine whether an interrogator deliberately employed a two-step interrogation technique to undermine Miranda, it did not require trial courts to look to the subjective intent of the interrogator. Instead, the Williams court determined that the Seibert test requires trial courts

> [to] consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to

> undermine the Miranda warning. Such objective evidence would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.

Williams, 435 F.3d at 1158-59 (footnotes and citations omitted).

Under Seibert, as interpreted in Williams, the deliberate interrogation technique employed here failed to apprise Hickman of knowledge essential to his ability to understand the nature of his Fifth Amendment right to remain silent. Accordingly, the trial court erred when it refused to suppress Hickman's post-Miranda statements.

Here, [the detective] informed Hickman that he would conduct the interview in two parts, but he did not inform Hickman that the information given in the first part of the interview could not be used against him at a subsequent criminal proceeding for violating his reporting conditions. Then, during the non-Miranda part of the interview, [the detective] elicited statements from Hickman that indicated he had been in violation of reporting requirements. Because failing to register as a sex offender, former RCW 9A.44.130, is a status offense, Hickman's pre-Miranda statement informing [the detective] of his current address, coupled with the date of the move, amounted to a confession that he had been in violation of his reporting requirements. Thus, [the detective's] two-part interview placed Hickman in the impossible position of choosing between confessing to a past registration violation or committing a new violation by refusing to participate in [the detective's] "administrative" interview.

Under these unique facts and circumstances, [the detective's] mid-stream Miranda warnings, without a significant break in time or place and without informing Hickman that his pre-Miranda statements could not be used against him in a subsequent criminal prosecution, did not inform Hickman of his Fifth Amendment

right to silence sufficiently to enable him to knowingly determine whether to exercise that right. Accordingly, the trial court erred by admitting Hickman's post-Miranda statements.

[Footnote, some citations omitted]

LED EDITORIAL COMMENTS: The Court of Appeals decision in this case assumes that Hickman was in "custody" for Miranda purposes throughout the questioning. The best practice is for law enforcement not to use a two-step interrogation process in any such custodial interrogations.

But where a two-step interrogation practice does occur, courts (as the Hickman Court notes) look, on a case-by-case basis in these deliberate-two-step-questioning cases, at the following: (1) completeness and detail of the pre-warning custodial interrogation; (2) any overlapping content of pre- and post-warning custodial interrogations; (3) the timing (particularly whether there was a significant time gap) and the other circumstances of both custodial interrogations; (4) the continuity of police personnel in the two sessions; (5) the extent to which the interrogator's questions treated the second round of custodial interrogation as continuous with the first; and (6) whether any curative measures were taken, such as advising the suspect to the effect that none of the statements made in the first round of questioning will be admissible. We think that the most important element is the sixth element, i.e., whether the interrogator(s) gave a curative warning prior to Step 2 regarding inadmissibility of the un-Mirandized Step 1 questioning.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) CRIMINAL MISTREATMENT: UNDER FACTS OF CASE, JURY SHOULD HAVE BEEN INSTRUCTED ON DEFENSE THEORY THAT CARE CANNOT BE FORCED ON PERSON –

In State v. Koch, 157 Wn. App. 20 (Div. II, 2010), the Court of Appeals rules 2-1 that the jury in a criminal mistreatment prosecution should have been given a care-cannot-be-forced instruction that defendant proposed.

Defendant had attempted to be the live-in care provider for his 86-year-old, cantankerous, mentally deteriorating father. His father was generally refusing care, and he was filthy malnourished, dehydrated, covered with sores. Several years earlier, the son had been convicted of assault for slapping his father while trying to force care on him. So the son was reluctant to force care on his father. Ultimately, the father was brought to a hospital in desperate medical condition and died soon after from congestive heart failure that resulted from efforts to rehydrate him.

Defendant was charged with first degree manslaughter and first degree criminal mistreatment. The trial court rejected defendant's "assault defense" instruction reading as follows:

> It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

The analysis in the majority opinion of the Court of Appeals includes the following:

> Koch's requested "assault defense" instruction would have informed the jury that (1) Lloyd had a right to be free from bodily invasion from his son, even though he (Lloyd) was no longer strong enough to protest; and (2) Koch did not have to disregard his father's wishes by forcing on him unwanted care. The trial court instructed the jury to follow the law as it instructed them. Therefore, absent Koch's request instruction or some functional equivalent, the lay jury could neither know nor consider that unwanted contact can constitute assault, thus, essentially rendering legally irrelevant Koch's evidence that he was honoring his father's wish to die at home where his wife had passed, without unwelcome intrusion from others.

. . . .

> [N]othing in the record suggests that this proudly stubborn 86-year-old patriarch ever retreated from his persistent express command that he be allowed to die at home, where his wife had passed, regardless of how eccentric he may have appeared to the outside world and regardless of the ready availability of medical care in a hospital, which might have extended his life for a time. Because Lloyd had previously pressed charges against him, Koch was more wary of invading his father's personal space and disobeying his orders than even his siblings, whom [the father] had also rebuffed when they, too, had offered care. With the requested "assault defense" instruction, the jury could have found that Koch acted reasonably under his particular circumstances.

Judge Hunt authors the majority opinion and is joined by Judge Houghton. Judge Quinn-Brintnall dissents. She agrees that, in light of the circumstances of this case, defendant was entitled to a special instruction, but she argues that the instruction offered by defendant was incomplete and misleading.

Result: Reversal of Clallam County Superior Court convictions of James Perry Koch for second-degree manslaughter and first-degree criminal mistreatment; remanded for retrial.

(2) **EXPERT WITNESS WAS LAWFULLY ALLOWED TO GIVE HIS OPINION THAT CONCLUDED THE EVIDENCE WAS CONSISTENT WITH A DOGFIGHTING OPERATION** – In State v. Nelson, 152 Wn. App. 755 (Div. III, 2009), the Court of Appeals rules that a trial court did not abuse its discretion by allowing an expert witness to testify that the evidence in the case was consistent with an illegal dogfighting operation.

The theory of the defendants in the case was that the evidence showed training and use of dogs exclusively in relation to lawful weight-pulling contests. The Court of Appeals holds that it was appropriate for the trial court to allow the State to counter this theory with expert opinion

that the circumstantial evidence showed that defendants were engaging in illegal dogfighting exhibitions.

The Court of Appeals describes as follows the expert testimony in the case, along with some of the other evidence:

> Ms. Montano then searched Spokane County records and found that there was no licensed kennel at the east Utah Street address. But two dogs at the address were licensed, one each to Alfredo Renteria and Peter Nelson. Mr. Renteria had licensed numerous pit bulls at the east Utah Street address since 2001.
>
> Police applied for and were granted a warrant to search the property. Members of the Spokane County Animal Control, the Washington State Gambling Commission, and the Spokane County Sherriff's Office SWAT team executed the search warrant. Mr. Nelson was present during the search. They found:
>
> From a mudroom/utility room in the house:
>
> - Veterinary medical supplies including Betadine surgical scrub, and antiseptic sudsing skin cleanser, blood-stop powder, mineral and vitamin supplements, 500 mg amoxicillin capsules, dexamethasone sodium phosphate injection for horses, SWAT Original fly repellant ointment for wounds and sores, Pet-Otic ear cleaner for dogs and cats, oil skin treatment, and aloe vera and jojoba skin salves for dogs.
> - A veterinary kit containing supplies such as syringes, surgical blades, ointments, scissors and various veterinary drugs.
> - A basket muzzle, three harnesses, three collars, a pull toy, and training tools.
> - A metal dog kennel or cage. Officers found seven or eight kennels during the search, some inside and some outside.

From the southeast bedroom of the house:

- A receipt from a purchase by Mr. Nelson at a store called "Dogtown Company."
- A t-shirt imprinted with a photo of Mr. Nelson and a dog and the name "Capone."
- A knife-shaped chew toy.
- A handwritten IOU note from someone named Terry Naffziger to Mr. Nelson for $1,200.
- Periodicals about pit bulls.
- Photo album with photos of dogs.

The cases were tried together. The veterinarian testified about the physical condition of the dogs seized from the property. A dog named "Callie" was excessively thin and had numerous old scars on both forelimbs, on her right rear leg, and on top of her head. A dog named "Zeeda" had two recently torn ears, old wounds on both forelimbs and the right hip, and calluses on both forelimbs. A dog named "Chewy" had a torn left ear and an impression around its torso that indicated it likely had a belt attached to him one or two days before. A dog named "Rita" had sutures on its chest and calluses on its tail and hocks. A dog named "Fatty" had calluses on its wrist areas, the left rear heel, and collar rub to the skin on the throat. A dog named "Gorda" displayed a broken upper right canine tooth, collar abrasions on its throat, and calluses on its front carpuses (wrists) and rear heels.

The veterinarian testified that fights that arose spontaneously between or among the dogs could have caused all of the injuries except Callie's leg wounds. Callie's leg wounds were so numerous that they more likely resulted from human involvement. He also agreed that all of the veterinary supplies that were found in the mudroom could be used for horses. And he said that "lactated ringers"

were used to rehydrate an animal suffering from dehydration or to flush out an animal's system in a veterinary surgical setting.

An officer photographed tattoos on Mr. Nelson's arms, legs, and back, at least some of which depict dogs. The tattoo on Mr. Nelson's back depicts two pit bulls fighting each other.

The State called Eric Sakach as an expert. He is the West Coast Regional Director for the Humane Society of the United States. Mr. Sakach explained that he began his 32-year career with the Humane Society as an investigator who eventually specialized in investigating and infiltrating animal fighting rings. Over the years he had looked into hundreds of potential dogfighting cases and had attended approximately one dozen dogfights for purposes of investigation or surveillance. Mr. Sakach was conversant with and testified about the history of dogfighting and the present business of dogfighting exhibitions. He had previously testified as an expert on dogfighting in 50 to 75 trials. He explained the significance of the information discovered and the items found at the east Utah Street property. For example, he said that the notations in one of the found in the shed off the garage appeared to be a "keep," a diet and exercise plan for specific dogs to "build cardiovascular fitness in the animal while reducing its weight to its optimum fighting weight." In a different section of the same notebook, Mr. Sakach identified a "Colby's Test," a plan for assessing a dog's strength and endurance for fighting and habituating a dog to fight. He knew and explained the significance of Mr. Nelson's tattoo depicting two dogs fighting. He knew that many people involved with dogfighting exhibitions had tattoos of animals fighting. He also noted that law enforcement officers in jails often catalog inmates' tattoos because finding "somebody with a tattoo depicting fighting cocks or fighting dogs . . . is a lead for detectives." Mr. Sakach then gave his expert opinion on the significance of all of this:

> Based on the totality of the evidence, in my view, in my opinion, this was a dogfighting operation and the dogs that were on that property or a portion of the dogs that were on that property were being kept were possessed with the intent that they be engaged in a dogfighting exhibition. That was their purpose.

Mr. Sakach based this on the manner in which the dogs were kept, the injuries to the dogs, and the presence of various items, which, although legal in their own right, were all consistent with a dogfighting operation when viewed together. He testified that medical supplies such as dexamethasone, lactated ringers, and suture kits were "designed to patch a dog up . . . in response to a fight." And the "underground publications" about pit bull fighting were "things [that] any normal person would be miles away from."

Result: Affirmance of Spokane County Superior Court convictions of Peter S. Nelson and Alfredo Lee Renteria for engaging in animal fighting and for operating an unlicensed private kennel.

(3) **RUSTY FIREARM WAS PROVED TO BE "OPERATIONAL" FOR PURPOSES OF PROSECUTION UNDER RCW 9.41.040 FOR UNLAWFULLY POSSESSING A FIREARM** – In State v. Raleigh, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3490230 (Div. II, 2010), the Court of Appeals rejects defendant's argument that a rusty handgun did not qualify as a "firearm" under RCW 9.41.010(1) for purposes of prosecuting defendant for unlawful possession of a firearm in the first degree under RCW 9.41.040.

Under Washington case law, a firearm that can be rendered operational with reasonable effort and within a reasonable time period is a "firearm" within the meaning of the statute. State v. Padilla, 95 Wn. App. 531 (Div. I, 1999) **Jan 00 LED:18**. Another case on establishing a gun to be "operational" is State v. Faust, 93 Wn. App. 373 (Div. II, 1998) **March 99 LED:16**.

When the handgun was found in a shoebox in defendant Raleigh's possession, the gun was pitted and rusty. The Court of Appeals rules, however, that the testimony of a law enforcement

officer who was a firearms expert was sufficient to establish that the rusty handgun was "operational" at the time that police found the defendant in possession of the gun. The Raleigh Court describes as follows the officer-expert's testimony:

> [The officer] stated that the gun found was an Egyptian Helwan Brigadier 9mm pistol. He examined the gun for overall functionality. He removed the magazine and found that it was a replacement magazine, bright and shiny. He concluded that the magazine, safety, and slide worked and that the gun would load ammunition into the chamber.
>
> When [the officer] examined the firing pin, it appeared stuck forward. [The officer] conducted a test to see if the gun would fire. He placed an 8mm pencil in the bore of the gun and pulled the trigger. If the pencil moved, the gun could fire. [The officer] did not state the test's result, but he successfully re-performed the test for the jury.
>
> On the morning of his testimony, the prosecutor had asked [the officer] to verify if the gun would work. [The officer] removed the slide, looked at the firing pin, and noticed that the firing pin was inside the channel. He used a drop of penetrating oil, a hammer, and a punch and loosened the firing pin so it would work. [The officer] stated that these steps did not require specialized training, a person could use tools found in a toolbox. He stated that he did have to take the gun apart to repair the firing pin, but the gun did not need a new firing pin. In addition, [the officer] found a schematic of the firearm online through a simple Google search. [The officer] concluded that the gun was operable based on its state when he examined the gun on the morning of his testimony.

Result: Affirmance of Mason County Superior Court conviction of Steven Albert Raleigh, aka Joseph Francis Law, for first degree unlawful possession of a firearm.

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NEXT MONTH

The December 2010 LED will include the 2010 LED Subject Matter Index, along with entries on new cases of interest to Washington law enforcement.

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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 site for U.S. Supreme Court opinions is the Court's site 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]