

January, 1992

HONOR ROLL

380th Session, Basic Law Enforcement Academy, September 4 through November 21, 1991

President: Officer Donald J. Nesel - King County Police Department
Best Overall: Officer Steven K. Strand - Seattle Police Department
Best Academic: Officer Steven K. Strand - Seattle Police Department
Best Firearms: Officer Dennis W. James - Western Washington University Police Department

381st Session, Spokane Basic Law Enforcement Academy, September 17 through December 6, 1991

Best Overall: Deputy Charles E. Court - Klickitat County Sheriff's Department
Best Academic: Deputy Charles E. Court - Klickitat County Sheriff's Department
Best Physical: Deputy Charles E. Court - Klickitat County Sheriff's Department
Best Firearm: Officer Mark Burrows - Chewelah Police Department

Corrections Officer Academy - Class 163 - October 21 through November 15, 1991

Highest Overall: Officer Bruce D. Hoffman, Geiger Corrections Center
Highest Academic: Officer Leda R. Torgramson, Washington Corrections Center
Highest Practical Test: Officer Bruce D. Hoffman, Geiger Corrections Center
Officer Theodore J. Larson, King County Jail
Highest in Mock Scenes: Officer Bruce D. Hoffman, Geiger Corrections Center
Highest Defensive Tactics: Officer Gregory Randall, Special Offenders Center

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WASHINGTON STATE SUPREME COURT

ONE DOLLAR BILL IS "WRITTEN INSTRUMENT" AND ALTERING THE BILL IS "FORGERY"

State v. Scoby, 117 Wn.2d 55 (1991)

Fact and Proceedings: (Excerpted from Supreme Court opinion)

On November 28, 1987, Scoby purchased \$2 worth of gasoline at the Airway Deli Mart in Moses Lake. To pay for the gas, he used a \$20 bill, the corners of which had been cut or torn off. Scoby then asked the cashier for two \$10 bills in exchange for what appeared to be another \$20 bill. The cashier made the exchange. As Scoby was leaving, the cashier realized that the bill was actually a \$10 bill with the corners of a \$20 bill pasted onto it. The cashier then wrote down Scoby's license number and called the police.

Scoby was apprehended and charged with forgery committed by altering a written instrument or putting off as true an altered written instrument. At trial, he denied altering the \$1 bill and testified that he was unaware it had been altered. He also moved to dismiss the charges, arguing that a \$1 bill is not a "written instrument" for purposes of the forgery statute. The court denied the motions, and the jury found Scoby guilty as charged. The Court of Appeals affirmed. State v. Scoby, 57 Wn. App. 809 (1990) [Oct. '90 LED:10]

ISSUE AND RULING: Is a \$1 bill a "written instrument" under the forgery statute such that passing an altered \$1 bill constitutes forgery? (ANSWER:Yes) Result: Grant County Superior Court conviction for forgery affirmed.

ANALYSIS: (Excerpted from Appeals Court opinion)

The crime of forgery is defined in RCW 9A.60.020, which provides in pertinent part:

- (1) A person is guilty of forgery if, with intent to injure or defraud;
 - (a) He falsely makes, completes, or alters a written instrument or;
 - (b) He possesses, utters, disposes of, or puts off as true a written instrument which he knows to be forged.

The term "written instrument" is defined as follows:

"Written instrument" means: (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, as defined in RCW 9A.56.010(3), token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification[.]

RCW 9A.60.010(1). Thus, forgery requires the falsification of a paper, document, or *other instrument*. The statute does not define the term "instrument", however. RCW 9A.04.060 states that the common law governing the commission of crimes supplements Washington penal statutes. Therefore, we look to the common law definition of the term "instrument" for guidance as to whether a \$1 bill qualifies as an instrument for purposes of the statute.

As the Court of Appeals explained, under the common law "an instrument is something which, if genuine, may have legal effect or be the foundation of legal liability." . . . A \$1 bill is a Federal Reserve Note, and as such it is an obligation of

the United States that must be redeemed on demand. Because it has legal efficacy, a \$1 bill qualifies as an "instrument" under the common law definition, as the Court of Appeals correctly concluded. Consequently, a \$1 bill is a written instrument for purposes of the statutory definition of forgery in RCW 9A.60.020.

...
Scoby argues that the legislative history of RCW 9A.60.010 and .020 requires a different result. He points out that the Legislature enacted RCW 9A.60.010(1) and .020 in 1975 to supplant former RCW 9.44.010 and .020. . . .

The principal weakness in Scoby's argument is the premise that, in changing the forgery statute, the Legislature did not intend any change in the law regarding whether money is a written instrument for purposes of defining forgery. The previous forgery statute prohibited the forgery of "any writing or instrument" in a separate clause from that in which it prohibited the forgery of a wide variety of other items, including: (1) a request for the payment of money or property; (2) the identification of any person; (3) a public record; (4) an entry in a public or private account; (5) a court judgment, order, or pleading; (6) an official report of a public officer; (7) the draft of a bill presented to the Legislature; (8) the seal of any public officer; and (9) coins or money. Laws of 1909, ch. 249, § 331, p. 990 (former RCW 9.44.020). This use of different clauses to prohibit the forgery of "any writing or instrument" and the forgery of other items indicates that under the previous statute the meaning of "writing or instrument" did not include those other items. Under the present forgery statute, on the other hand, the list of items susceptible to forgery is gone; instead, what is prohibited is simply the forgery of a "written instrument". We hold this use of the expression "written instrument" was meant to encompass the full range of items in the previous statute, including currency. Thus, the Legislature's decision to supplant former RCW 9.44.010 and .020 with current RCW 9A.60.010 and .020 reflects the Legislature's intention that those other items, including money, be treated as written instruments for purposes of forgery.

Scoby also contends that his conduct falls outside the statutory definition of forgery because it constituted a mere false representation of fact, which alone is not forgery. He asserts that if he committed any crime on November 28, 1987, it was theft by deception. Scoby relies on State v. Mark, 94 Wn.2d 520 (1980) and State v. Marshall, 25 Wn. App. 240 (1980), which both involved abuse of an otherwise authorized practice among pharmacists. Under that practice, pharmacists would obtain reimbursement for medication provided to Medicaid recipients by signing and submitting claim forms representing that medication had been prescribed by a physician and delivered to a patient. In these cases, however, the pharmacists submitted claim forms for medication neither prescribed nor delivered. Thus, the forms were exactly what they purported to be - claim forms containing a genuine pharmacist's signature - but the forms misrepresented the facts. Both cases held that there was no forgery. In Marshall, the court explained that mere misrepresentation of facts by an item otherwise genuine in its execution does not constitute forgery.

Scoby's reliance upon Mark and Marshall is misplaced. The claim forms at issue in those cases were genuine and unaltered, and the pharmacists' signature were genuine. The forms and the signature on them were thus exactly what they

purported to be. Here, on the contrary, the bill Scoby handed the cashier in exchange for two \$10 bills was not a genuine \$20 bill; it was a \$1 bill altered to appear to be a \$20 bill. Therefore, Mark and Marshall are factually distinguishable from the present case. As for Scoby's argument that his conduct, if criminal, was theft by deception rather than forgery, the prosecution had the discretion to decide which crime to charge.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) ARMY SERGEANT'S INVENTORY SEARCH OF ABSENT SOLDIER'S LOCKER WAS LAWFUL UNDER FOURTH AMENDMENT AND DID NOT IMPLICATE STATE CONSTITUTION -- In the case of In re Personal Restraint of Teddington, 116 Wn.2d 761 (1991) the State Supreme Court holds: (1) that where an Army sergeant conducted an inventory search of an absent soldier's locker and personal effects (for purposes of ensuring the health, welfare, morale, fitness and readiness of the Army unit), the inventory was lawful under the Fourth Amendment of the U.S. Constitution; (2) that where evidence pertinent to a pending murder investigation was lawfully obtained in the military inventory search by the Federal officer, that evidence could be lawfully introduced into evidence in State of Washington criminal proceedings, even if the same search by a Washington law enforcement officer would have violated the Washington Constitution, so long as the federal officer was not acting under the direction or control of a Washington officer when the evidence was seized; and (3) that State of Washington officers did not violate the privacy rights of the Army soldier in accepting the evidence independently seized by Army officials without first obtaining a search warrant authorizing the state officers accept the evidence.

Result: personal restraint petition of defendant denied; King County Superior Court first degree murder conviction affirmed.

(2) "INITIATIVE 62" REQUIRES THAT STATE PAY TACOMA'S COSTS IN IMPLEMENTING DOMESTIC VIOLENCE PREVENTION ACT -- In Tacoma v. State, 117 Wn.2d 348 (1991) the State Supreme Court rules that the Domestic Violence Prevention Act of 1984 (DVPA) mandated that the City of Tacoma implement a "new program" and an "increased level of services" within the meaning of RCW 43.135.060(1) (this statute was originally adopted as Initiative 62, passed by vote of the people in the 1979 general election). Therefore, the City of Tacoma is entitled under "Initiative 62" to reimbursement for its costs in implementing the DVPA. Result: Pierce County Superior Court judgment for the City of Tacoma affirmed.

(3) TUKWILA'S ADULT ENTERTAINMENT ZONING ORDINANCE INVALIDATED, PEEP SHOW LICENSING ORDINANCE UPHELD -- In World Wide Video v. Tukwila, 117 Wn.2d 382 (1991) the Washington State Supreme Court rules that only one of the City of Tukwila's ordinances regulating "adult entertainment" in the city is valid. Tukwila's zoning ordinance restricting a variety of types of adult entertainment business to a particular area of the city is held to be invalid (apparently because it tries to force too many types of adult businesses into a particular zone of the city). On the other hand, the court holds that the city's peep show licensing ordinance is valid. Seven justices join in these holdings, while two justices (Dore and Durham) would have upheld both ordinances. Result: King County Superior Court rulings on both ordinances affirmed.

WASHINGTON STATE COURT OF APPEALS

WARRANTLESS SEARCH OF VEHICLE PERMITTED INCIDENT TO ARREST OF PASSENGER

State v. Cass, 62 Wn. App. 793 (Div. II, 1991)

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

Cass's automobile caught the attention of police conducting surveillance of a drug distribution point. A police sergeant followed the car and soon recognized one of the three occupants as Chad Jendry, a passenger. After confirming the existence of three warrants for Jendry's arrest, the officer stopped the vehicle.

Without contacting Cass, the officer went to the passenger side of the car, spoke to Jendry, requested that Jendry exit from the car, handcuffed him, searched him, and recovered a syringe and \$150 from his pants pocket. The officer then placed him in the patrol car.

A backup officer arrived and asked Cass to produce a driver's license and vehicle registration. Three to five minutes later, the first officer returned and conducted a warrantless search of the passenger compartment. He discovered methamphetamine and then arrested Cass.

At the suppression hearing, the trial court upheld the validity of the search.

ISSUE AND RULING: May the passenger area of a vehicle be searched without a warrant following an arrest of a passenger of the vehicle? (ANSWER: Yes, rules a 2-1 majority) Result: Cowlitz County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

Cass contends that the search of her car was improper because it was not a search incident to her arrest. . . . A police officer can search the passenger compartment of a vehicle for weapons or destructible evidence during the arrest process; this includes the time immediately subsequent to arresting, handcuffing, and placing the suspect in a patrol car. State v. Stroud, 106 Wn.2d 144 (1986). [Aug. '86 LED:01]

Cass contends that the Stroud holding does not apply under the facts of this case. In Stroud, after the driver and passenger of an automobile were validly arrested and placed in a patrol car, a warrantless search of the passenger compartment produced incriminating evidence. The Stroud court recognized the need to balance an individual's privacy interest against the dangers to law enforcement officers presented during the arrest of a person in an automobile. Noting that article 1, section 7 of the Washington Constitution provides a more protective standard than that provided by the fourth amendment to the United States Constitution, the court set forth a bright line rule: "During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible

evidence."

In Stroud, the arrest of the driver validated the subsequent warrantless search of the automobile. Here, only one of the three occupants, a passenger in the backseat, was subject to arrest. Cass argues that under these circumstances a warrantless search is not justified. Hence, the question: When the driver of the car is not the one arrested, does the balance tilt in favor of individual privacy?

The State argues that Stroud did not limit the bright line rule to cases in which the driver was arrested. Stroud states that the police can search an automobile when they arrest the "suspect". This is consistent with cases interpreting the fourth amendment to the United States Constitution. In New York v. Belton, 453 U.S. 454 (1981), the Court held that the area of the immediate control of the arrestee includes the entire passenger compartment of the vehicle. While Belton suggested that the custodial arrest justified the infringement of any privacy right the arrestee may have, the rights of a nonarrestee do not override this police authority. [Citing cases from other jurisdictions.]

As yet, no Washington court has applied the rationale of Stroud to a situation where a passenger but not the driver of a car is arrested. . . .

Because Jendry was in handcuffs in the back of a police car, one might assume that there was no immediate threat to the officer's safety or any possibility of escape. However, these two factors did not sway the Stroud court and, hence, we refuse to look to the specific facts and circumstances of this case. The Stroud court sought to eliminate any such case-by-case analysis because of the difficult burden it places on police officers "who must make a decision to search with little more than a moment's reflection." Consequently, the trial court correctly interpreted the Stroud decision in its refusal to suppress the evidence before it.

[Some citations omitted]

DISSENT:

In dissent, Judge Alexander argues the libertarian view that Stroud does not support a warrantless search of a vehicle incident to arrest of anyone other than the driver of the vehicle. He cites no cases to support his view and he characterizes the search as "nothing more than a fishing expedition."

OPEN CONTAINER LAW APPLIES TO CONTAINER IN CAR PARKED IN PUBLIC PLACE

State v. Vriezema, 62 Wn. App. 437 (Div. I, 1991)

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

Vriezema's motion to suppress was heard on May 9, 1990. The sole witness at the hearing was Officer Radke. He testified that during a routine patrol on April 7, 1989, at 2:42 a.m., he observed Vriezema's car parked just off the roadway near the entrance to a park. Vriezema's car was parked in an area posted "no

parking", which had a history of complaints about alcohol related offenses, loud parties, fights, and loitering. Officer Radke testified that the police had been instructed to issue parking citations to cars parked in that area because it was an illegal parking location on park property.

Officer Radke got out of his patrol car and approached Vriezema's car on foot. He requested Vriezema to roll down his window and asked him why he was sitting there. As he did, Officer Radke observed an open bottle of beer on the floor directly in front of the passenger's side. Officer Radke recognized Vriezema from an arrest he had made the previous month. Officer Radke testified that he had reason to believe that Vriezema would not appear in court if he issued him a citation for the open container violation because when he had arrested Vriezema in the past he discovered that Vriezema had an outstanding warrant and two failures to appear on his traffic record. **[LED EDITOR'S NOTE: In a footnote the Court of Appeals notes that the record did not show that there was in fact a warrant outstanding on the night in question.]** Officer Radke further testified that he was concerned that Vriezema would attempt to flee or assault him with his vehicle. Therefore, rather than issuing Vriezema a citation, Officer Radke asked Vriezema to step out of the car so that he could place him under arrest for opening or consuming liquor in public.

As Vriezema stepped out of the car, Officer Radke felt a leather belt in the area of Vriezema's right arm and saw several needles on the seat where Vriezema had been seated. officer Radke testified that belts were commonly used by intravenous drug users.

Officer Radke then arrested Vriezema and placed him in the patrol car. He went back to Vriezema's car to seize the items he had observed and to search the "wingspan and console area for other weapons or contraband." Officer Radke found beer in the bottle on the floor and a small glass vial containing a white powder substance in the center console near the stick shift.

Based upon Officer Radke's testimony the trial court denied Vriezema's motion to suppress and he was convicted as charged after stipulating to the police reports.

[Emphasis added; footnote omitted; bracketed bold type Editor's note added]

ISSUE AND RULING: Was Officer Radke's entry of the vehicle to seize the beer bottle and drug paraphernalia lawful? (**ANSWER:** Yes) **Result:** King County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Vriezema contends that neither the fact that he was parked in an area about which the police had received numerous complaints, nor the fact that he had an open container of beer in his car, was enough to justify a seizure. Vriezema, relying on Hamilton v. Collier [an Ohio decision], contends that a privately owned automobile does not fall within the statutory definition of a "public place", and therefore Officer Radke had no reason to suspect that he had consumed liquor or opened a package containing liquor in a public place. RCW 66.44.100. Thus, Officer Radke did not have probable cause to believe that a crime had been

committed.

The State contends that the drug paraphernalia and cocaine were legally seized because Officer Radke had a right to be where he was when he saw the contraband in open view. We agree.

"[A] person has a diminished expectation of privacy in the *visible* contents of an automobile parked in a public place." "What a person knowingly exposes to the public, . . . is not a subject of Fourth Amendment protection."

The purpose of the open container statute is to prohibit the consumption of alcohol in a public place. Here, Vriezema was parked in a public place. Although the open container of beer was in his car it was clearly "visible" and knowingly exposed to the public. Under these circumstances it cannot be said that Vriezema had an expectation of privacy in the visible contents of his car or that he did not have an open container of liquor in a public place.

Thus, having concluded that Vriezema did violate the open container statute, it was reasonable for Officer Radke to ask Vriezema to step out of his car.

An officer's underlying intent or motivation is irrelevant to the judicial inquiry into the lawfulness of the officer's conduct. Whether a constitutional violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting the officer at the time and not on the officer's actual state of mind at the time the challenged action was taken.

In the instant case, Officer Radke testified that he asked Vriezema to step out of the car because he was concerned that Vriezema would flee or assault him with his vehicle. In addition, Officer Radke had reasonable grounds to believe that Vriezema would not respond to a citation. "When a driver is stopped for a traffic violation, an arrest may be made if . . . the officer has reasonable grounds to believe the driver will not respond to a citation." We see no reason why this rationale could not be applied to an arrest for any misdemeanor.

Given the facts and circumstances confronting Officer Radke in the instant case it is reasonable to conclude that he acted lawfully. Thus, he did not violate the Fourth Amendment by entering Vriezema's automobile to seize the drug paraphernalia which was in open view.

[Some citations, one footnote omitted]

LED EDITOR'S COMMENT: We agree with the result, but we had a difficult time determining the exact rationale for the Court's decision. One thing is clear -- the case supports the view that the open container law applies to open containers in vehicles which are located in public places. (Note, however, that if a motor vehicle is on a highway, the traffic infraction statute, RCW 46.61.519, would appear to exclusively apply. Note also that the traffic statute is more broadly written than RCW 66.44.100.) Beyond that, the precedential value of this case is not clear because of the fact that Officer Radke had some special knowledge of the flakiness of his suspect, and the Court did not write clearly to say how it would rule if this special knowledge were factored out of the case.

Presumably, however, even if Officer Radke had believed that Vriezema would respond to a citation, Officer Radke would have had authority to ask Vriezema to step out of his vehicle so that the officer could enter the vehicle to investigate the apparent open container law violation. The drug paraphernalia then would have been discovered in plain view, anyway. Thus, even if a custodial arrest decision had not been made in regards to the original open container law violations, the same result would have been obtained. In other words, we think that while violation of the open container law may not be a crime for which custodial arrest is permitted per se, officers are permitted to make an investigation of suspicious circumstance by entry into the vehicle.

Of course, here, the suspect's prior FTA's probably would have provided sufficient justification to arrest for the open container offense in any event. A known history of FTA's will probably justify a custodial arrest in situations where the officer would otherwise be required to cite and release.

NO "PROCURING AGENT DEFENSE" UNDER UNIFORM CONTROLLED SUBSTANCES ACT

State v. Grace, 61 Wn. App. 787 (Div. I, 1991)

Facts and Proceedings: (Excerpted from Appeals Court opinion)

Officers Senteney and Jandoc both testified that on July 7, 1989, they were working on a narcotics detail in a high crime area of Seattle. The object of the operation was to make a buy of narcotics. First contact was made with appellant Grace when the officers pulled their unmarked car near the sidewalk where Grace was walking with a companion and asked if Grace or her companion knew where they could obtain \$20 worth of narcotics. Grace got into the backseat of the officers' vehicle and said that she knew where they could buy \$20 worth of cocaine. The officers followed Grace's direction to 20th Avenue South and South Jackson where they saw two females walking along the street. Grace told the officers to stop at that point. Grace testified that one of the women, later identified as the codefendant in this case, Yvette Bailey, approached the vehicle. Grace told Bailey that the man wanted "a twenty". Grace stated she then got out of the car. Grace asserts that the exchange of money and drugs occurred directly between the male officer and Bailey. According to the officers, however, Grace got out of the car and made contact with Bailey. Both officers testified that they saw Grace hand Bailey the \$20 which the officers had given her, and that they saw Bailey remove something from her blouse and hand it to Grace. The officers assert that Grace returned to the vehicle and that she handed several crumbs of a rock-like substance to them. The substance was identified at trial as cocaine.

Following the close of testimony in the case, counsel for Grace offered a proposed instruction that: "One who merely aids a purchaser in effecting a purchase of dangerous drugs is not, on that account, criminally responsible." After consideration the court proposed a modified form of the instruction which stated that:

The Defendant Rochelle Grace is not guilty of the crime charged if she

was acting only as an accomplice in the purchase of a controlled substance; however, if she was acting as an accomplice to both the purchaser and the seller of controlled substances, then she is an accomplice in the crime charged.

The trial court relied on State v. Walker, 82 Wn.2d 851 (1973) as authority for this proposed instruction. Counsel for the State objected to the proposed instruction on the basis that the Uniform Controlled Substances Act, RCW 69.50, had been adopted since Walker and that the action now proscribed was "delivery" rather than "sale", . . . The trial court found that while only the seller could be liable for the act of a sale, both the seller and purchaser could be liable for the act of a delivery and declined to give the requested instruction.

ISSUE AND RULING: Does the "procuring agent defense" apply under the UCSA?
(ANSWER: No) Result: King County Superior Court conviction for delivery of cocaine affirmed.

ANALYSIS: (Excerpted from Appeals Court opinion)

Grace relies on the "procuring agent defense" to contend that the trial court was required to instruct the jury that it could not find her guilty if it found she had acted solely as an agent for the police officers in their purchase of the cocaine from Bailey. That defense provides that "one who merely aids a purchaser in effecting a purchase of dangerous drugs is not on that account criminally responsible under [the Uniform Narcotic Drug Act]."

In State v. Matson, 22 Wn. App. 114 (1978), however, this court specifically stated that the procuring agent defense is no longer a defense under Washington law because the Uniform Narcotic Drug Act has been repealed and replaced with the Uniform Controlled Substances Act, RCW 69.50, effective May 21, 1971. The court reasoned that . . . the procuring agent defense was based upon the fact that, under the old narcotics act, the act of selling was specifically prohibited while the act of purchasing was not mentioned. Therefore, an agent of the buyer could not be prosecuted under the old act.

The Uniform Controlled Substances Act, however, prohibits "any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401. Deliver is defined in RCW 69.50.101(f): "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." The court in Matson therefore concluded that:

[T]he new statute makes no distinction between the selling and the purchasing of drugs and eliminates the distinction between whether a buyer or seller acts as a principal or agent so long as an illegal transfer of a controlled substance occurs.

[Some citations omitted]

LED EDITOR'S NOTE: Another panel of Division I of the Court of Appeals recently also concluded that there is no "procuring agent defense" under Washington's version of the Uniform Controlled Substances Act. See State v. Ramirez, 62 Wn. App. 301 (Div. I, 1991).

VEHICLE LAWFULLY FORFEITED TO CITY EVEN THOUGH TASK FORCE SEIZURE OCCURRED OUTSIDE CITY LIMITS -- OFFICERS OF SEIZING AGENCY HAD CONSENT LETTER FROM SHERIFF GIVING THEM EXTRATERRITORIAL POWERS

Lynnwood v. \$128 Cash, 61 Wn. App. 505 (Div. I, 1991)

Facts and Proceedings: During the course of a narcotics investigation, officers of the South Snohomish County Narcotics Task Force (Task Force) seized a Blazer vehicle, two handguns, \$800 in cash, and other items. The Snohomish County Sheriff had sent all city agencies on the Task Force a letter consenting "to the full exercise of peace officer powers" with Snohomish County, by any and all properly certificated officers of [the cities on the Task Force].

Under the terms of a written Task Force agreement, the Lynnwood Police Department was then the "designated agency." As such, Lynnwood P.D. was responsible for supervising the Task Force unit and for processing any forfeitable property seized.

Accordingly, the City of Lynnwood instituted forfeiture proceedings against the items seized. Paul and Pamela Heeter challenged the forfeiture, arguing in a summary judgment motion that the City of Lynnwood lacked authority to forfeit the vehicle because the vehicle was seized outside of the territorial jurisdiction of Lynnwood.

The trial court denied the Heeters' motion for summary judgment, and ultimately entered an order forfeiting the Blazer but not the cash and guns to the City of Lynnwood.

ISSUE AND RULING: Did the City of Lynnwood P.D. lack authority to seek forfeiture of the vehicle because the seizure occurred outside the incorporated area of the city? (ANSWER: No, because the sheriff had consented to the exercise of authority in the unincorporated areas of the county.) Result: Snohomish County Superior Court forfeiture order affirmed.

ANALYSIS: (Excerpted from Appeals Court opinion)

Under the forfeiture provisions of the UCSA, "[t]he law enforcement agency under whose authority the seizure was made" is required to serve notice to the owner of the property seized within 15 days of the seizure. RCW 69.40.404(c). The Heeters assert that the Lynnwood Police Department is not the "agency under whose authority" the Blazer was seized within the meaning of the statute.

We disagree and draw support for our decision from an analysis of both the Washington Mutual Aid Peace Officers Powers Act of 1985 (WMAPOPA), RCW 10.93, and the UCSA. Under the WMAPOPA, a distinction is drawn between "an agency with primary territorial jurisdiction" and a "primary commissioning agency." RCW 10.93.020 provides in relevant part:

. . . .

(7) "Agency with primary territorial jurisdiction" means a . . . sheriff's department which has responsibility with regard to police activity in the unincorporated areas within the county boundaries . . .

(8) "Primary commissioning agency" means (a) the employing agency in

the case of a general authority Washington peace officer . . .

Here, the Snohomish County Sheriff is the agency with primary territorial jurisdiction with regard to all Task Force activities conducted in the unincorporated areas of Snohomish County. The Lynnwood, Edmonds, and Mountlake Terrace police departments are all primary commissioning agencies because each employs officers on the Task Force. **[COURT'S FOOTNOTE: The Task Force officers are general authority Washington peace officer[s] as that phrase is used in RCW 10.93.020(8) because they are employed by divisions of municipal corporations which have as their primary function the detection and apprehension of persons violating the criminal laws. See RCW 10.93.020(1), (3).]**

The WMAPOPA provides that a general authority Washington peace officer "may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state" under certain circumstances. RCW 10.93.070. These include:

(1) Upon the prior written consent of the sheriff . . . in whose primary territorial jurisdiction the exercise of the powers occurs;

Pursuant to subsection (1), here the Snohomish County Sheriff submitted a letter consenting "to the full exercise of peace officer powers, within Snohomish County, by any and all properly certificated or exempted officers of the City of Lynnwood". Although the Heeters don't dispute this fact, they claim that any Lynnwood police officer exercising peace officer powers pursuant to such consent is doing so on behalf of the Snohomish County Sheriff.

There is nothing in RCW 10.93.070(1) nor any other provision in the WMAPOPA which supports the Heeters' position. Subsection (1) does not condition the Sheriff's consent upon the relinquishment of jurisdiction authority by the primary commissioning agency. In fact, absent a specific contractual delegation of authority to another agency, "[a]ll persons exercising peace officer powers under this chapter are subject to supervisory control of and limitations imposed by the primary commissioning agency". RCW 10.93.050. There is no evidence here that the primary commissioning agency, the Lynnwood Police Department, delegated supervisory control of its officers to the Snohomish County Sheriff. The affidavit of Lynnwood Police Chief Larry Kalsbeek indicates that he approved the search of the Heeters' residence as the designated Department Supervisor for the Task Force. Thus, under the WMAPOPA the authority for the Task Force's seizure of the Blazer lay with the Lynnwood Police Department.

Because the Blazer was properly seized by a Lynnwood police officer, the Lynnwood Police Department was the "seizing agency" under RCW 69.50.505. The provisions of the UCSA specifically authorize the "seizing agency" to conduct forfeiture proceedings. Under the statute, the law enforcement agency under whose authority the seizure was made shall serve a notice of the forfeiture upon the property owner. RCW 69.50.505(c). In addition, the forfeiture "hearing shall be before the chief law enforcement officer of the seizing agency [or his designee]". RCW 69.50.505(e). Based upon the language in these provisions of the UCSA and our analysis of the WMAPOPA, we conclude that the City had the authority to bring a forfeiture action against the Blazer.

The Heeters next point out that an officer's RCW 10.93 powers are limited to the enforcement of the traffic and criminal laws of the State. RCW 10.93.070. Thus, they assert that the terms of the WMAPOPA do not apply in this case because a forfeiture proceeding under the UCSA is civil in nature.

This argument is unpersuasive. Although forfeiture proceedings are not criminal prosecutions, they are still quasi criminal since their purpose is to penalize individuals who are illegally involved with controlled substances. Furthermore, all police officers are authorized to enforce the traffic and criminal laws of this State. If the Heeters' position were taken to its logical extreme, no municipality could bring a forfeiture proceeding under the UCSA. Thus, we conclude the seizure and forfeiture provisions of the UCSA are "criminal laws" for purposes of RCW 10.93.070.

In conclusion, we hold as a matter of law that the City of Lynnwood had the authority to institute a forfeiture action against the Heeters' Blazer. Even though the seizure occurred outside the Lynnwood city limits, Task Force officers were acting under the lawful authority of the Lynnwood Police Department.

[Some citations omitted]

EVIDENCE SEEN BY OFFICER FILMING CRIME SCENE PER WARRANT IN PLAIN VIEW

State v. Wright, 61 Wn. App. 819 (Div. I, 1991)

Facts:

During an investigation of a sexual assault complaint involving a red and white vibrator, Burlington police officers obtained a search warrant to search for and seize the described vibrator and to "photograph crime scene." The facts pertinent to execution of this search warrant are described by the Appeals Court as follows:

[Sergeant Hanson] entered Wright's bedroom and saw the vibrator on the bed, where he was told he would find it. As Sergeant Hanson approached the bed and the vibrator, he saw a clear glass jar in the doorway of the closet. In the jar was a brownish-green vegetable matter which he believed to be marijuana. He proceeded to photograph the vibrator on the bed and the jar of marijuana in the closet doorway. He took additional pictures of the scene from different angles in the room. While taking pictures from a corner of the room, Sergeant Hanson looked down into an open "doctor's-type bag" and saw another case inside the bag. The second case was closed but from its size and shape the officer thought it was a handgun case. He picked up the closed smaller case and opened it to find a gun. [COURT'S FOOTNOTE: Earlier that evening Sergeant Hanson received information that Wright had been convicted of second degree assault. Not knowing if Wright's possession of guns was a violation of the terms of his sentence, the officer returned the gun to its case and placed it back in the doctor-type bag.]

The Court of Appeals describes a second search under a warrant following the above-described

search:

After determining that under Wright's prior sentence and probation he was not to possess firearms, and after talking to K. about her father's guns, Detective Heenan obtained and executed a second search warrant based on the fact that Sergeant Hanson had seen the gun during the first search. Detective Heenan searched the entire bedroom and found no guns. **[COURT'S FOOTNOTE: In the time between the initial search and the second search, friends of Wright entered the house and removed his guns.]** However, he did find additional marijuana in the so-called doctor's bag and in the dresser. The additional marijuana, combined with that found in the jar, added up to a weight of just over 40 grams.

[Footnotes omitted]

Proceedings: (Excerpted from Appeals Court opinion)

Wright was charged with the offenses of second degree rape and unlawful possession of a short firearm. After the acquittal on the rape charge, an additional information was filed adding the charge of unlawful possession of a controlled substance. Trial commenced on these remaining charges and the jury returned a verdict of guilty on each count.

ISSUE AND RULING: Did the officer violate defendant's privacy rights as he moved about his bedroom to photograph the crime scene during the execution of the first search warrant? (ANSWER: No) Result: affirmance of Skagit County Superior Court convictions for unlawful possession of a short firearm and of a controlled substance.

ANALYSIS:

The Court of Appeals begins its lengthy analysis by discussing general privacy rights, including the seminal case of Katz v. U.S., 389 U.S. 347 (1967). Katz declares that the Fourth Amendment provides protection from government intrusion only to the extent that the person enjoys a reasonable expectation of privacy in the area searched. The Court of Appeals finds no violation of Wright's reasonable expectation of privacy under the facts of this case, declaring:

In the case before us, Wright argues there was an extended general search after the seizure of the vibrator and the discovery of the jar of marijuana. Wright is not challenging the right of officers to photograph a crime scene where there is a reasonable nexus to the crime or to the "thing" specified in the warrant, but is contending that in this case, the taking of the additional photographs in his bedroom, after the initial discovery of the vibrator and the jar of marijuana, exceeded the permissible scope of the search, and violated his expectation of privacy. We do not agree.

After considering the holding in Katz and its progeny we conclude that the discovery of the handgun during the first search was no more than a de minimis invasion of Wright's general right of privacy while the officer was photographing, and not the result of an extension of the original search at all. This is especially true in light of the fact that the officer was appropriately in this room of the house pursuant to the warrant. The officer had a right to photograph what he saw

without transcending privacy interests not already subsumed in the intrusion allowed by the warrant. There is nothing in the record to indicate that when the officer went around the bed to shoot a photo of the scene from a different angle he had any purpose in mind other than to accurately reflect what he found when he entered the room. "[W]hen a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment."

[Footnotes omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) USING POTENTIAL CO-DEFENDANT AS INTERPRETER UNLAWFUL UNDER MIRANDA -- In State v. Cervantes, 62 Wn. App. 695 (Div. III, 1991) the Court of Appeals reviews a case where, following the execution of a search warrant for controlled substances, a law enforcement officer had used a housemate and potential co-defendant of a drug possession suspect as a foreign language interpreter. The Court of Appeals declares that no emergency existed, and that a neutral interpreter could have been obtained within a reasonable period of time. The Court of Appeals rules that the use of the housemate and potential co-defendant to give Miranda advisements, obtain a Miranda waiver, and translate questions and answers during a custodial interrogation of the other drug possession defendant, was fundamentally unfair and violated the suspect's right of due process. Result: Yakima County Superior Court conviction for possession of controlled substances reversed. Status: Petition for review pending in State Supreme Court.

(2) "GO F . . . YOURSELF" IS MIRANDA REFUSAL AND SUBSEQUENT QUESTIONING IS UNLAWFUL; HARMLESS ERROR RULE APPLIES, HOWEVER -- In State v. Reuben, 62 Wn. App. 620 (Div. III, 1991) the Court of Appeals holds that where a law enforcement officer administered Miranda warnings at the hospital to a vehicular homicide suspect, the suspect effectively asserted his right to silence and thus "refused" to waive his rights when he turned his head from the officer and said "Go f . . . yourself." (This is an exact quote from the Court of Appeals opinion). Accordingly, otherwise voluntary but Miranda-less statements subsequently made by the suspect when a detective approached the suspect shortly after the suspect refused to make a statement were inadmissible. The Court of Appeals analyzes the Miranda issue as follows:

Nevertheless, the State failed to prove Mr. Reuben waived his rights. By his expletive to the trooper and turning his head away, Mr. Reuben asserted his right to remain silent. [The trooper] properly ceased interrogation as required by Miranda. While there is no per se proscription on further questioning by the police, resumption of interrogation after a very short respite, about the same incident and without new warnings, violates the Miranda guidelines. Mr. Reuben's statement to [the detective] in the emergency room without new warnings should have been suppressed.

[Citations omitted]

The Court of Appeals goes on, however, to hold that the admission of the confession taken in violation of Miranda was "harmless error", analyzing this issue as follows:

The Washington Supreme Court has adopted the "overwhelming untainted evidence" standard in harmless error analysis; therefore, we look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilt.

Here, the untainted evidence upon which the trial court relied consisted of proof of Mr. Reuben's ownership of the vehicle and the stipulated reports of two Wapato police officers. Officer Quantrille described what he observed at the scene of the accident: "The subject that appeared to be the driver, Oleson Reuben, was laying across the front seat with his head toward the passenger side of the vehicle"; Officer Rosenow also described what he observed; "An Indian male, who I later learned was Oleson Reuben, was lying in the front seat with Redhorn on top of him. Mr. Reuben's lower body was under the steering column". Given the nature and credibility of the properly admitted evidence, we find the erroneous admission of Mr. Reuben's statement harmless beyond a reasonable doubt.

Result: Yakima County Superior Court conviction for vehicular homicide affirmed.

LED EDITOR'S COMMENT: Implicit in the court's analysis of the Miranda issue is that the detective's initiation of contact with the suspect after his refusal might have been held lawful if new Miranda warnings had been given at the outset of the re-contact. Re-contact after the assertion of the right to counsel (e.g., "I want a lawyer") is flatly prohibited, while re-contact after the assertion of the "right to silence" (e.g., "go F . . . yourself") is looked at on a case-by-case basis on the totality of the circumstances. As long as the officers: (a) do not appear to be badgering the suspect and (b) give new Miranda warnings at the outset of the re-contact, the re-contact in the "right to silence" situation will apparently not violate the "initiation of contact" rule.

For other cases on the "initiation of contact" rules, see article in September '88 LED regarding "initiation of contact" restrictions under the 5th and 6th Amendments; and see Minnick v. Mississippi, 59 LW 4037 (1990) Feb. '91 LED:01 (consult with attorney does not lift bar to re-contact after suspect asserts right to counsel in custodial interrogation); and McNeil v. Wisconsin, 59 LW 4636 (1991) Sept. '91:10 (defendant's assertion of 6th Amendment right at arraignment on CRIME A does not bar contact on uncharged CRIME B unless Miranda has been invoked in a custodial interrogation).

"PRETEXT ARREST" ARTICLE REVISITED

In last month's LED at 13-14, we briefly discussed the "pretext arrest" issue and asserted our agreement with a recent federal court decision which had rejected a restrictive "pretext arrest" standard which would have turned on the frequency of enforcement of certain types of laws by an agency (e.g., sheriff's deputies enforcing certain traffic laws) or subunit thereof (e.g., narcotics officers enforcing traffic laws). We did not mean to suggest in that article that specialty officers like narcotics officers should bird-dog vehicles, trying to observe very minor traffic law violations to justify a warrantless stop, hoping that it will lead to discovery of a drug violation. Such a regular practice would probably lead to the restrictive standard we criticized in the piece.

What we did intend in our discussion of this issue was to counsel law enforcement officers and their respective prosecutors against accepting without argument a broadly restrictive standard in any given case. Carried to its extreme, the "frequency of enforcement" pretext standard would preclude any officer who does not routinely (whatever that means) make traffic stops -- e.g., police chief of a medium or larger department, a D.A.R.E. officer, a crime prevention officer, etc. -- from responding to a clear violation in his or her presence of any traffic law (or other law) which a given trial judge might perceive to be a law of minor importance. We think that some sort of concession as to "pretext" from the arresting officer is needed to prove a pretext arrest under current case law.

In closing, we would concede that the law in this area is far from settled where warrantless stops are involved. See State v. Michaels, 60 Wn.2d 638 (1962) (Michaels is a 6-3 decision of questionable precedential value which talks of "pretext" arrest but provides little guidance as to what evidence will establish a "pretext arrest"). As we stated last week, it is our view that the law is clearer where warrant-based arrests are involved. Seizures on outstanding arrest warrants cannot be deemed to be pretextual. See State v. Davis, 35 Wn. App. 724 (1983) Jan. '84 LED:06.

MANDATORY VEHICLE LIABILITY INSURANCE LAW REVISITED

In the October '91 and November '91 LED's, we presented some information regarding 1991 amendments to the mandatory vehicle liability insurance law at chapter 46.30 RCW. We were recently asked about the "proof of insurance" requirement of that statute. No change in the proof requirement was made in the 1991 amendments. Accordingly, the following regulation adopted by the Department of Licensing in 1989 remains valid:

WAC 308-106-020 ID Card Content Requirement

Whenever an insurance company issues or renews a motor vehicle liability insurance policy, the company shall provide the policy holder with an identification card that is to include, at a minimum:

- (a) The name of the insurance company;
- (b) The policy number;
- (c) The effective date of the policy;
- (d) The expiration date of the policy; and
- (e) A description of the year, make and/or model of the insured vehicle(s) and/or the name of the insured driver. If there are five or more vehicles under common ownership, the word "fleet" may be used in place of the vehicle description. The insurance company may issue a supplemental listing of vehicles covered.

If an insurance company issues an identification card containing information in addition to that identified above, the above information shall be printed in such a way so as to be readily discernible. To the extent practical, the insurance identification card shall be printed in a manner so as to discourage tampering.

Note the use of the phrase "and/or" in subsection (e) of this regulation. This term is interpreted as "or." This means that the card is sufficient if it describes either an insured driver or an insured vehicle. It is also significant that DOL did not specify the configuration or style that the insurance ID card was to take. If the required information is present on any document in a driver's possession, the proof requirement under the statute has been met. The following additional

1989 DOL regulation governing self-insurance situations also remains valid:

WAC 308-106-020 Self-Insurance ID Card Requirement

A person or organization providing proof of compliance through self-insurance, as provided in RCW 46.29.630, certificate of deposit, as provided in RCW 46.29.550, or bond, shall provide an identification card to all covered drivers. The card shall contain the following information:

- (a) For persons or organizations who are self-insured;
 - (i) The self-insurance number issued by the department of licensing;
 - (ii) The effective date of the certificate of self-insurance; and
 - (iii) A description of the year, make and/or model of the vehicles covered by the certificate of self-insurance and/or the name of the driver covered by the certificate of self-insurance. The word "fleet" may be used in place of the vehicle description. The person or organization may issue a supplemental listing of vehicles covered;
- (b) For persons or organizations who are covered by a certificate of deposit:
 - (i) The certificate number issued by the state treasurer; and
 - (ii) The name of the driver covered by the certificate of deposit;
- (c) For persons or organizations covered by a liability bond:
 - (i) The name of the company issuing the bond;
 - (ii) The bond number; and
 - (iii) The name of the driver covered by the bond.

**RAYMER RULING ON SINGLE PARTY
CONSENT VIDEOTAPE SURVEILLANCE REVISITED**

In the November 1991 LED at 12, we digested State v. Raymer, 61 Wn. App. 516 (Div. III, 1991). In Raymer the Washington Court of Appeals held that the Privacy Act, chapter 9.73, does not restrict the videotaping by police of undercover transactions. Accordingly, Raymer upheld the warrantless use of video equipment (without recording sound) to record a drug deal between an agent of the police (who had previously consented to the videotaping) and a suspected drug dealer.

We wish to emphasize that Raymer involved a single-party consent situation, and that Raymer did not involve sound recording. A no-consent placement of video equipment (even without sound recording capacity) may violate the Federal law which prohibits law enforcement use of wiretapping and electronic surveillance without consent of at least one party to a transaction. Recently, the Ninth Circuit Court of Appeals held in U.S. v. Koyomejian, 50 CrL 1117 (9th Cir. 1991) that the Federal wiretap law does prohibit the use of video surveillance equipment (without sound recording) in a no-consent situation. Other federal courts have held to the contrary, ruling that the Federal wiretap law does not govern video recording, without sound recording, under any circumstances.

We believe that warrantless single-party consent videotaping (without sound recording) is lawful under Raymer. However, in light of the Ninth Circuit's decision in Koyomejian, because there is always a risk that inadvertent no-consent videotaping may occur during any given investigative effort, officers considering the use of video equipment should take steps to avoid the occurrence of no-consent videotaping.

As always, we urge law enforcement officers to consult their prosecutors and/or legal advisors on these and any other issues.

STATUS OF COURT OF APPEALS DECISIONS IN STATE SUPREME COURT

Further review has been granted by the State Supreme Court on the following Court of Appeals decisions previously reported in the LED: State v. (Clayton Donald) Smith, 61 Wn. App. 482 (Div. III, 1991) Sept. '91 LED:16 (post-arrest search of fanny pack which came off during arrest held not a search "incident to arrest"); State v. Zakei, 61 Wn. App. 805 (Div. II, 1991) Nov. '91 LED:13 ("automatic standing" rule for crimes of possession articulated in lead opinion in State v. Simpson held to be not binding on the Court of Appeals); State v. Coria, 62 Wn. App. 44 (Div. III, 1991) Nov. '91 LED:19 (statutory penalty enhancement for delivery of controlled substances near a school bus route held invalid).

NOTICE REGARDING AMERICANS WITH DISABILITIES ACT

The employment provisions of the Americans With Disabilities Act take effect for all agencies on January 26, 1992, not July 26, 1992, as previously reported by some commentators. For current information, see Jody Litchford's article in the December 1991 Police Chief (IACP monthly publication) at 11-12.

Numerous questions remain under the Act and the implementing EEOC regulations. One of the most significant areas of dispute involves the question of whether psychological screening of candidates may be done prior to a conditional offer of employment. The IACP Psychological Services Section has reached the conclusion that most current psychological screening methods do not constitute "medical examinations," and that such methods therefore may be used to screen law enforcement officer applicants prior to a conditional offer of employment. See article by Catherine L. Flanagan, Ph.D. (and chair of the IACP Psychological Services Section) in the December 1991 Police Chief at 14-16.

Along with many other issues, the issues concerning applicability of the ADA to psychological screening are still being debated by legal analysts, including the Legal Advisors Section of the WASPC. We will keep LED readers posted on developments. Meanwhile, each agency will have to make its own decision on these and other questions under the ADA through consultation with the agency's own legal counsel.

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.

