

July, 1992

HONOR ROLL

387th Session, Basic Law Enforcement Academy - Spokane, February 27 through May 14, 1992

- Best Overall: Officer Jason M. Hartman - Spokane Police Department*
- Best Academic: Officer Jason M. Hartman - Spokane Police Department*
- Best Firearms: Officer David L. Hansen - Kennewick Police Department*
- Best Physical: Officer Jason M. Hartman - Spokane Police Department*

388th Session, Basic Law Enforcement Academy, March 4 through May 21, 1992

- President: Officer Craig A. Moran - Dayton Police Department*
- Best Overall: Officer John D. Kruse - Wenatchee Police Department*
- Best Academic: Officer John D. Kruse - Wenatchee Police Department*
- Best Firearms: Officer Steven C. Ward - Seattle Police Department*
- Best Mock Scenes: Officer Frederick J. Gendreau - Algona Police Department*

Corrections Officer Academy - Class 168 - April 20 through May 15, 1992

- Highest Overall: Officer Kelvin Red - Washington Corrections Center for Women*
- Highest Written: Officer Robert Crouch - Snohomish County Corrections*
- Highest Practical Test: Officer Kelvin Red - Washington Corrections Center for Women*
- Highest in Mock Scenes: Officer Marina Tanner - Tacoma Pre-Release*
- Highest Defensive Tactics: Officer Curtis Filleau - Pierce County Corrections*

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1992 WASHINGTON LEGISLATION - PART II
(See June 1992 LED for PART I)

Introductory Note: This completes our review of 1992 Washington legislation of interest, unless we are apprised of an overlooked item or we feel the need to revisit an item previously digested.

ABORTION RIGHTS

CHAPTER 1 (Initiative 120)

Effective Date: December 24, 1991

Adds new sections to chapter 9.02 RCW and repeals existing sections of chapter 9.02 to broaden and clarify the "right to choose or refuse to have an abortion"; also clarifies certain other rights relating to "personal reproductive decisions."

BIOMEDICAL WASTE

CHAPTER 14 (SHB 2391)

Effective Date: June 11, 1992 (various others)

Adds a new chapter to Title 70 RCW; defines "biomedical waste;" declares that this definition of biomedical waste is the sole state definition (preempting all local definitions); but leaves all control of biomedical waste management at the local level.

PRIVATE VEHICLE IMPOUNDS

CHAPTER 18 (HB 2746)

Effective Date: June 11, 1992

Provides an exception to the restrictions on private impound in RCW 46.55.035 with a new section in chapter 46.55 which provides:

A registered tow truck operator may receive compensation from a private property owner or agent for a private impound of an unauthorized vehicle that has an approximate fair market value equal only to the approximate value of the scrap in it. The private property owner or an agent must authorize the impound under RCW 46.55.080. The registered tow truck operator shall process the vehicle in accordance with this chapter and shall deduct any compensation received from the private property owner or agent from the amount of the lien on the vehicle in accordance with this chapter.

FAILURE TO APPEAR, COMPLY

CHAPTER 32 (SB 6140)

Effective Date: June 11, 1992

Section 1 deletes the crime of "failure to comply" from RCW 46.64.020, and section 2 reinserts this crime (elements unchanged) as a new section to be added to chapter 46.64 RCW. At LED deadline the Code Reviser had not yet assigned a new RCW number.

UNAUTHORIZED MAILINGS

CHAPTER 43 (SB 6427)

Effective Date: June 11, 1992

Section 1 amends RCW 19.56.020, revising it to read as follows:

If unsolicited goods or services are provided to a person, the person has a right to accept the goods or services as a gift only, and is not bound to return the goods or services. Goods or services are not considered to have been solicited unless the recipient specifically requested, in an affirmative manner, the receipt of the goods or services according to the terms under which they are being offered. Goods or services are not considered to have been requested if a person fails to respond to an invitation to purchase the goods or services and the goods or services are provided notwithstanding. If the unsolicited goods or services are either addressed to or intended for the recipient, the recipient may use them or dispose of them in any manner without any obligation to the provider, and in any action for goods or services sold and delivered, or in any action for the return of the goods, it is a complete defense that the goods or services were provided voluntarily and that the defendant did not affirmatively order or request the goods or services, either orally or in writing.

Section 2 adds a new section to chapter 19.56 RCW reading as follows:

Violation of RCW 19.56.020 is a matter affecting the public interest for the purpose of applying chapter 19.86 RCW. Failure to comply with this chapter is not reasonable in relation to the development and preservation of business. A violation of RCW 19.56.020 constitutes an unfair or deceptive act or practice in trade or commerce for the purposes of applying chapter 19.86 RCW. **[LED Ed. Note: chapter 19.86 is the Consumer Protection Act.]**

TAILLIGHTS ON OLD VEHICLES

CHAPTER 46 (SB 5425)

Effective Date: June 11, 1992

Amends RCW 46.37.100 to provide an exception to the taillight requirement revising subsection (3) to provide as follows (shown in bill-draft form):

All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop lamp or other signal device, which may be red, amber, or yellow, and except that on any vehicle forty or more years old, the taillight may also contain a blue or purple insert or not more than one inch in diameter, and except that the light illuminating the license plate shall be white and the light emitted by a back-up lamp shall be white or amber.

MUNICIPAL CRIMINAL JUSTICE ASSISTANCE ACCOUNT

CHAPTER 55 (HB 2655)

Effective Date: March 26, 1992

Amends RCW 82.14.320 to make modifications to the crime-rate based distribution formula under the Municipal Criminal Justice Assistance Account.

PENALTIES (COUNSELING) FOR ALCOHOL-RELATED TRAFFIC OFFENSES

CHAPTER 64 (SB 6295)

Effective Date: June 11, 1992

Adds a new section to chapter 46.61 RCW providing as follows:

In addition to penalties that may be imposed under RCW 46.61.515, the court may require a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 or who enters a deferred prosecution program under RCW 10.05.020 based on a violation of RCW 46.61.502 or 46.61.504, to attend an educational program focusing on the emotional, physical, and financial suffering of victims who were injured by persons convicted of driving while under the influence of intoxicants.

ESCAPE FROM COMMUNITY PLACEMENT OR SUPERVISION

CHAPTER 75 (HB 2490)

Effective Date: June 11, 1992

Amends RCW 72.09.310 in the following manner (shown in bill-draft form):

An inmate in community custody who willfully ~~((fails to comply with any one or more of the controls placed on the inmate's movements by the department of corrections))~~ discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

Also amends sentencing provisions of various sections of chapter 9.94A which incorporate, make reference to, or relate to RCW 72.09.310.

ELECTRONIC MONITORING

CHAPTER 86 (SB 6103)

Effective Date: June 11, 1992

Amends the criminal sentencing provisions of RCW 9.95.210 to authorize the sentencing court to require that probationers pay the costs of electronic monitoring where they are financially able. Amends domestic violence laws in chapters 10.99 and 26.50 RCW to define "electronic monitoring", to allow courts to require monitoring as part of no-contact orders under those chapters, and to authorize recoupment of costs where the monitored person is financially able.

NATURAL DEATH ACT

CHAPTER 98 (HB 1481)

Effective Date: June 11, 1992

Makes a number of changes in Washington's Natural Death Act, first adopted in 1979. Section 10 of the 1992 Act amends RCW 70.122.100 as follows (shown in bill-draft form):

Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing or physician-assisted suicide, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

Section 11 adds a new section to chapter 70.22.100, reading as follows:

This chapter shall not be construed as providing the exclusive means by which individuals may make decisions regarding their health treatment, including but not limited to, the withholding or withdrawal of life-sustaining treatment, nor limiting the means provided by case law more expansive than this act.

Section 14 adds a new section to chapter 43.70 RCW, reading as follows:

The [state] department of health shall adopt guidelines and protocols for how emergency medical personnel shall respond when summoned to the site of an injury or illness for the treatment of a person who has signed a written directive or durable power of attorney requesting that he or she not receive futile emergency medical treatment.

WARRANT SERVERS/OFFICERS

CHAPTER 99 (HB 1732)

Effective Date: June 11, 1992

Amends RCW 35.20.270 to change the title of "warrant servers" to "warrant officers" and to take such personnel from municipal courts and to place them within city police departments. Such warrant officers now are vested under this section with the special authority to make arrests authorized by warrants and other arrests as are authorized by ordinance.

CRIMINAL HISTORY CHECK ON CARE PROVIDERS FOR VULNERABLE ADULTS

CHAPTER 104 (HB 2055)

Effective Date: June 11, 1992

Amends RCW 43.43.842 to authorize the Department of Social and Health Services and the Department of Health to adopt regulations expanding the requirements for criminal history background checks on employees of entities licensed to provide care and treatment to "vulnerable adults" (as defined at RCW 74.34.020(8)).

EMPLOYEE BENEFITS WHILE ON MILITARY ACTIVE DUTY

CHAPTER 119 (SB 5092)

Effective Date: March 31, 1992

Amends RCW 41.26.520, 41.32.810, and 41.40.710 relating to the rights of public employees who leave public employment for active military service and then return to the public employer. The 1992 amendments apply retroactively, allowing public retirement system credit for military service which began on or after January 1, 1990. This has been referred to as a Desert Storm Amendment.

PENSION CREDIT FOR LEOFF OFFICERS WHO QUALIFIED UNDER PRIOR SYSTEM

CHAPTER 157 (HB 2985)

Effective Date: June 11, 1992; April 1, 1992

Allows LEOFF retirement credit for law enforcement officers and fire fighters who qualified under certain specified prior pension systems but who either previously withdrew contributions or did not make contributions. In any case, payments to make up for the missing contributions will be required in order to obtain the additional LEOFF credit.

CRIMINAL RECORD CHECKS ON SCHOOL EMPLOYEES

CHAPTER 159 (HB 2518)

Effective Date: June 11, 1992

Among other things, this act adds a new section to chapter RCW 28A.400 reading as follows:

School districts, educational service districts, and their contractors hiring employees who will have regularly scheduled unsupervised access to children shall require a record check through the Washington state patrol criminal identification system under RCW 43.43.834, 10.97.030, and 10.97.050 and through the federal bureau of investigation before hiring an employee. The record check shall include a fingerprint check using a complete Washington state criminal identification fingerprint card. The requesting entity shall provide a copy of the record report to the applicant. When necessary, applicants may be employed on a conditional

basis pending completion of the investigation. If the applicant has had a record check within the previous two years, the district or contractor may waive the requirement. The district, pursuant to chapter 41.59 or 41.56 RCW, or contractor hiring the employee shall determine who shall pay costs associated with the record check.

Expands the power of the State Superintendent of Public Instruction under teacher certification laws to ensure that teachers committing certain crimes against children lose their certificates to teach.

COMPACTS UNDER INDIAN GAMING ACT

CHAPTER 172 (SB 6004)

Effective Date: April 1, 1992

Amends RCW 43.06.010 to clarify that the Governor has authority to execute compacts with Indian tribes under the federal Indian Gaming Regulatory Act. Adds new section to chapter 9.46 RCW governing the process by which the Gambling Commission shall negotiate compacts for Class III gaming on federal Indian land.

DEFENSES TO CRIMES INVOLVING SEXUAL EXPLOITATION OF CHILDREN

CHAPTER 178 (SB 6261)

Effective Date: June 11, 1992

Amends 9.68A.110 to provide as follows (bracketed, bold inserts are LED Ed's):

(1) In a prosecution under RCW 9.68A.040, **[sexual exploitation of a minor]**, it is not a defense that the defendant was involved in activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses. Law enforcement and prosecution agencies shall not employ minors to aid in the investigation of a violation of RCW 9.68A.090 **[communication with a minor for immoral purposes]** or 9.68A.100 **[patronizing a juvenile prostitute]**. This chapter does not apply to lawful conduct between spouses.

(2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.080 **[these sections address conduct relating to depictions of minors engaged in sexually explicit conduct]**, it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter: PROVIDED, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that the person depicted was a minor.

(3) In a prosecution under RCW 9.68A.040 **[sexual exploitation of a minor]** or 9.68A.090 **[communication with a minor for immoral purposes]**, it is not a defense that the defendant did not know the alleged victim's age: PROVIDED, that it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona

vide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

(4) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070 **[these sections address conduct relating to depictions of minors engaged in sexually explicit conduct]**, it shall be an affirmative defense that the defendant was a law enforcement officer in the process of conducting in official investigation or a sex-related crime against a minor, or that the defendant was providing individual case treatment as a recognized medical facility or a psychiatrist or psychologist licensed under Title 18 RCW.

(5) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070, the state is not required to establish the identity of the alleged victim.

[Bracketed language supplied by LED Editor]

CONFIDENTIALITY OF VICTIM ID IN CHILD SEXUAL ABUSE CASES

CHAPTER 188 (HB 2348)

Effective Date: June 11, 1992

Section 1 of this Act sets out the purpose of the Act. Section 2 amends RCW 7.69 provides a definition of "identifying information" as follows:

. . . the child's name, address, location, and photograph, and in cases in which the child is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

Section 6 adds a new section to the Public Disclosure Act, chapter 42.17 RCW, providing as follows:

Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means that child victim's name, address, location, photograph, and in cases in which the child victim is a relative or step child of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

Section 7 amends the records privacy provisions of the Juvenile Act at RCW 13.50.050 by adding a subsection reading:

(25) Information identifying child victims under age eighteen who are victims of sexual assaults by juvenile offenders is confidential and not subject to release to the press or public without the permission of the child victim or the child's legal guardian. Identifying information includes the child victim's name, addresses, location, photographs, and in cases in which the child victim is a relative of the alleged perpetrator, identification of the relationship between the child and the

alleged perpetrator. Information identifying a child victim of sexual assault may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault.

Section 8 adds a new section to the Criminal Records Privacy Act, chapter 10.97 RCW, reading as follows:

Information identifying child victims under age eighteen who are victims of sexual assaults is confidential and not subject to release to the press or public without the permission of the child victim or the child's legal guardian. Identifying information includes the child victim's name, addresses, location, photographs, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. Information identifying the child victim of sexual assault may be released to law enforcement, prosecutor, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault. Prior to release of any criminal history record information, the releasing agency shall delete any information identifying a child victim of sexual assault from the information except as provided in this section.

Section 9 adds a new section to chapter 10.52 RCW regarding witnesses in criminal cases:

Child victims of sexual assault who are under the age of eighteen, have a right not to have disclosed to the public or press at any court proceeding involved in the prosecution of the sexual assault, the child victim's name, address, location, photographs, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. The court shall ensure that information identifying the child victim is not disclosed to the press or the public and that in the event of any improper disclosure the court shall make all necessary orders to restrict further dissemination of identifying information improperly obtained. Court proceedings include but are not limited to pretrial hearings, trial, sentencing, and appellate proceedings. The court shall also order that any portion of any court records, transcripts, or recordings of court proceedings that contain information identifying the child victim shall be sealed and not open to public inspection unless those identifying portions are deleted from the documents or tape.

The confidentiality provisions of this act relating to court proceedings have been challenged in an action filed recently in King County Superior Court. The action challenges the constitutionality of the law under Federal and State constitutional provisions protecting the rights of free speech and of the press.

DEFICIENCY CLAIMS AGAINST OWNERS OF IMPOUNDED VEHICLES

CHAPTER 200 (HB 2844)

Effective Date: June 11, 1992

Amends RCW 46.55.140 to provide that the limitation of the section on towing and deficiency claims by two truck operators against registered vehicle owners "does not apply to an impound directed by a law enforcement officer."

COUNSELING FOR FAMILIES OF HOMICIDE VICTIMS

CHAPTER 203 (SB 6174)

Effective Date: June 11, 1992

Adds a new subsection to RCW 7.68.070 to allow crime victims benefits as follows:

(17) In addition to other benefits provided under this chapter, immediate family members of a homicide victim may receive appropriate counseling to assist in dealing with the immediate, near-term consequences of the related effects of the homicide. Fees for counseling shall be determined by the department in accordance with RCW 51.04.030, subject to the limitations of RCW 7.68.080. Payment of counseling benefits under this section may not be provided to the perpetrator of the homicide. The benefits under this subsection may be provided only with respect to homicides committed on or after July 1, 1992.

OMNIBUS LEGISLATION FROM JUVENILE ISSUES TASK FORCE

CHAPTER 205 (HB 2466)

Effective Date: June 11, 1992

Makes numerous amendments to the juvenile laws, most of which we will not cover in the LED, perhaps because we do not fully appreciate the significance of the changes.

Also amends RCW 4.24.190, the statute which allows property owners to sue parents for acts of vandalism by their children under age 18. The limits on damages in such a civil action have been raised. The victim can now ask the vandal's parents for up to \$5000 in damages, rather than the former limit of \$3000.

Amends firearms act sections 9.41.010 and 9.41.040 to clarify that juvenile offender adjudications which are equivalent to disqualifying adult convictions specified in those sections are also disqualifiers. Thus, a juvenile "adjudicated" to have committed a juvenile offense which would be a "crime of violence" if committed by an adult will be ineligible (1) to possess a firearm or (b) to be issued a concealed weapons permit.

MONEY LAUNDERING

CHAPTER 210 (SB 5318)

Effective Date: June 11, 1992

Sections 1 through 4 create a new "money laundering" chapter in Title 9A RCW.

Section 1 contains seven definitions for terms under the new chapter. Section 2 creates the Class B felony of money laundering, and establishes special proof requirements where the money laundering prosecution is against an attorney or a financial institution; civil penalties are also specified in this section.

Section 3 establishes civil forfeiture authorization for money laundering proceeds. Section 4 establishes a broad immunity to civil suit for law enforcement officers and other public officers acting under this new chapter.

PRACTICE OF LAW BY DEPUTY SHERIFFS

CHAPTER 225 (HB 2368)

Effective Date: June 11, 1992

Amends RCW 2.48.200 and 36.28.110 to allow deputy sheriffs to practice law.

WEIGHTS AND MEASURES

CHAPTER 237 (SB 6483)

Effective Date: July 1, 1992

Comprehensive amendatory act overhauls the provisions of chapter 19.94 RCW relating to weights and measures, including the civil penalty provisions at RCW 19.94.510. Also directs state OFM to form a task force to review the state weights and measures program.

WASHINGTON STATE COURT OF APPEALS

PARAMEDIC'S SEARCH LAWFUL; STATEMENT TO RESPONDING OFFICER VOLUNTEERED

State v. McWatters, 63 Wn. App. 911 (Div. III, 1992)

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

On July 23, 1989, David Almond, a student paramedic with the Spokane Fire Department, was one of those called to the scene of an accident involving a car and motorcycle. When he arrived on the scene, he saw an injured man, later identified as Mr. McWatters, conscious, lying face down on the street. To assess the extent of the injuries, Mr. Almond, in accordance with paramedic procedures, cut off Mr. McWatters' pants and shirt. After Mr. Almond and several of the department's emergency medical technicians rolled him over on his back, the rest of Mr. McWatters' clothing was removed. A red pouch containing a large amount of money was found on Mr. McWatters' stomach. Mr. Almond gave the pouch to a nearby police officer, along with other items found in Mr. McWatters' pants, including a folding knife, notebook and clear plastic container. The officer recognized the brown substance in the plastic container as heroin. Mr. McWatters was taken to the hospital by ambulance.

The officer went to the hospital to issue Mr. McWatters a citation for the accident. When the officer entered the hospital room, Mr. McWatters asked him about his money. The officer told him his money and drugs were placed on the property books for evidence, to which Mr. McWatters replied, "not all of the money was drug

money." He was subsequently charged with possession of a controlled substance.

Mr. McWatters moved to suppress the heroin and his statement to the officer at the hospital. When the motion was heard, Mr. Almond testified that in accordance with his training, he looks for valuables at an accident scene. Because there was nothing left of Mr. McWatters' clothing and to protect himself from accusations of theft, he gave Mr. McWatters' personal effects to the police officers for safekeeping. He also testified he did not recognize the substance in the plastic container as contraband. The officers testified they did not suggest or request Mr. Almond search Mr. McWatters' pants. One of the officers stated when Mr. Almond handed him the knife, notebook and plastic container, he said, "I have something here you might be interested in".

The court denied the motion to suppress on the basis Mr. Almond was not acting on behalf of the police when he took the items in question, or alternatively, the medical necessity exception applied, and his statement to the officer in the hospital was not the result of interrogation. Mr. McWatters was convicted, resulting in this appeal.

ISSUES AND RULINGS: (1) Do search and seizure laws apply to the conduct of a paramedic in emergency circumstances such as these? (ANSWER: No); (2) Was the paramedic acting as an agent of the police when he went through McWatters' pants? (ANSWER: No); (3) Should McWatters' statement to the officer be suppressed because it was uttered in the absence of Miranda warnings after the officer developed probable cause to arrest him? (ANSWER: No, because there was no custody, nor was there interrogation by the officer). Result: Spokane County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Paramedic Search

Mr. McWatters' reliance on Michigan v. Tyler, 436 U.S. 499 (1978) and State v. Bell, 108 Wn.2d 193 (1987) to support his claim search and seizure rules apply to paramedics is misplaced. Those courts held search and seizure protections apply to firemen unless the discovery of contraband falls within one of the exceptions to the warrant requirements. No authority has been cited which would support extending search and seizure protections in the circumstances present here and we decline to do so.

(2) Agent of Police

Nor does the record support Mr. McWatters' contention Mr. Almond was acting as an agent of the police. His argument that the police knew of and acquiesced in the search is not supported by the record. Here, the search was neither encouraged nor instigated by the police. The impetus for the search was based on Mr. Almond's training as a paramedic to protect valuables belonging to an injured person at an accident scene. Mr. Almond's statement to the police, "I have something here you might be interested in", is insufficient to find he was acting on behalf of the police. While a person may believe turning over evidence may be helpful to the police, such unilateral conduct does not convert that person into an

agent. There was no error. [COURT OF APPEALS' FOOTNOTE: Since we find no police involvement, it is unnecessary to discuss the medical necessity exception raised by Mr. McWatters' counsel.]

(3) Miranda

Second, Mr. McWatters contends the court erred in refusing to suppress his statement made to the police officer while he was in the hospital. He argues because the officer had probable cause to arrest him before the statement was made, he should have been advised of his Miranda rights. We disagree.

To trigger the protections afforded by Miranda v. Arizona, 384 U.S. 436 (1966), a suspect must be (1) taken into custody or otherwise deprived of his freedom of action in a significant way and (2) subjected to custodial interrogation. **A suspect's freedom of action is curtailed when the circumstances resemble formal arrest.** State v. Harris, 106 Wn.2d 784 (1986), cert. denied, 480 U.S. 940 (1987). First, in determining if the suspect is in custody or otherwise deprived of his freedom of action in a significant way, the sole inquiry "has become whether the suspect reasonably supposed his freedom of action was curtailed". State v. Short, 113 Wn.2d 35 (1989). Second, interrogation involves express questioning, words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an incriminating statement that is not in response to an officer's question is freely admissible.

Here, Mr. McWatters was not in custody nor could he have reasonably supposed his freedom of action was curtailed; the officer's reason for going to the hospital was to issue a citation to him for the traffic offense; and the officer did not undertake to interrogate him about the suspected possession offense. Instead, Mr. McWatters' statement "not all of the money was drug money" was spontaneous. **Whether the officer had probable cause to arrest Mr. McWatters for possession is not a circumstance to be considered in determining if Mr. McWatters was in custody.**

[Some citations omitted; Emphasis added by LED Ed.]

LED EDITOR'S NOTE: See LED Editor's comments at page 20, 21 of this LED on the triggering of the Miranda warnings requirement. McWatters is supportive of our point there in declaring: (a) that probable cause is irrelevant and (b) that the custody test turns on whether the circumstances "resemble formal arrest." See emphasized language from Court's opinion above.

MOTEL MANAGER'S OBSERVATION OF BINDLES, SMELL OF DIESEL FUEL KEY TO PC

State v. Garcia, 63 Wn. App. 868 (Div. III, 1992)

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

Police Officer John Mays attested that on July 18, 1990, he contacted Teri Sullivan, the manager of the Sunland Motor Inn in Moses Lake. She stated Mr. Garcia was the tenant in room 20 and he had told her he did not want his room

cleaned. When the owner of the inn informed Mrs. Sullivan that all rooms were to be checked on a daily basis, she entered room 20.

Mrs. Sullivan related to Officer Mays the room smelled like diesel fuel. She also observed a brown paper bag filled with folded papers in a drawer in the room. Officer Mays demonstrated a paper bundle fold for Mrs. Sullivan. He stopped halfway through the fold, and Mrs. Sullivan told him the papers she had seen were folded more. After the officer completed the fold, Mrs. Sullivan stated the papers she had seen were folded completely and were glossy.

Officer Mays further attested:

Based on the affiant's past experience in executing search warrants and schools attended by the affiant it is known that, cocaine is not only made using diesel fuel, but that cocaine is quite often transported in fuel tanks that contain diesel fuel. Cocaine made with diesel and or transported in diesel fuel retains some of the odor of diesel fuel. Cocaine is packaged in paper bundle folds using glossy type paper. The glossy type paper is used to keep the cocaine from adhering to the paper. Also from past experience the affiant has knowledge that motel rooms are quite often used for the distribution of controlled substances. The affiant has knowledge that persons dealing from motel rooms want no persons inside the room to change linen or do other things that can draw suspicion to themselves.

Mrs. Sullivan told Officer Mays Mr. Garcia received numerous telephone calls at all hours and the same people were going to his room on a daily basis. She gave the police a list of license numbers of vehicles used by persons going to room 20. One of these license numbers was that of a vehicle registered to Jose Garcia. Tip sheets indicated the vehicle was involved in drug trafficking in Moses Lake.

Based upon Officer Mays' affidavit, a warrant was issued to search room 20 of the Moses Lake Sunland Motor Inn. The warrant was executed, and cocaine was seized from that location. Subsequently, Mr. Garcia was charged with possession of cocaine. He moved to suppress. The court heard argument of counsel, and ruled:

I think if I was going to rank the order of the importance of the information in the search warrant, it would seem to be the existence of the bindles was most probative to the magistrate and to this court. The numerous telephone calls, the existence of the diesel fuel type smell were . . . not innocuous type details but were in fact specific evidence of the existence of contraband. That, coupled with the remainder of the details which in and of themselves are innocuous, I think was sufficient for this magistrate to issue out a search warrant. Although I will be the first to say that is a very close question.

[Garcia was convicted of possession of a controlled substance.]

ISSUE AND RULING: Did the search warrant affidavit establish probable cause under the two-pronged Aguilar-Spinelli test? (**ANSWER:** Yes) **Result:** Grant County Superior Court conviction for possession of controlled substances affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In reviewing the validity of warrants based upon hearsay information, the constitutional criteria for determining probable cause is measured by the 2-prong Aguilar-Spinelli test. Under that test, the reliability of an informant is established by showing

underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; [basis of knowledge prong] and . . . underlying circumstances from which the officer concluded that the informant was credible or his information reliable [veracity prong].

Mr. Garcia complains that the basis of knowledge prong was not met in this case. He points out Mrs. Sullivan did not recognize the diesel smell or the folded glossy packets as evidence of drug activity. It was necessary for Officer Mays to interpret the information she supplied in order to reach the conclusion that cocaine probably could be found in Mr. Garcia's motel room. However, the court in State v. Berlin, 46 Wn. App. 587 (1987) held it is sufficient if the affidavit shows the observer provided enough firsthand facts to an individual who possesses the necessary skill, training or experience to link the information given to criminal activity. There, the detective interviewed three citizens and was convinced by what they described the defendant was growing marijuana in his shed. The court held:

Certainly, the better practice would be for the affidavits to recite how an informant is qualified to identify the observed plants as marijuana. Again, mindful of the deference given to magistrates who issue warrants and that doubts must be resolved in favor of the warrant's validity, it was not error to find that the basis of knowledge prong of Aguilar-Spinelli was satisfied.

Here, Officer Mays attested that based upon his experience he knows cocaine is made using diesel fuel, is often transported in diesel fuel tanks, and retains some of the odor of diesel fuel. Also based upon his experience, he knows that cocaine is often packaged in glossy paper folded in a certain way. He demonstrated the fold for Mrs. Sullivan, and she identified it as the same as she had seen in Mr. Garcia's room. Because Mrs. Sullivan provided facts from which Officer Mays could link the information given to criminal activity, the affidavit satisfies the basis of knowledge prong.

Mr. Garcia's next contention is that Mrs. Sullivan's observations, even when coupled with Officer Mays' explanation, do not establish probable cause to believe cocaine would be found in his room. She did not see any cocaine, she only saw bindles and smelled diesel fuel.

Professor LaFave states:

Mere suspicion that the objects in question are connected with criminal activity will not suffice. . . .

This is not to suggest, however, that the information linking the things to be

seized with criminal activity must always be of the direct sort or that reasonable inferences cannot be drawn from the surrounding circumstances.

(Footnotes omitted.) 2 W. LaFave, Search and Seizure § 3.7(d), at 102 (1987).

In State v. Courcy, 48 Wn. App. 326 (1987), the defendant contended a Yakima police officer did not have probable cause to seize a folded paper bindle which he saw when the defendant removed his driver's license from a clear plastic identification holder. The court stated the issue at page 328 as "whether the officers had probable cause to believe the item viewed was contraband . . .". In answering "yes", the court reasoned at page 329:

Although Officer Cruz testified he had no formal police training related to drug identification, he had "on the job" training and observed bindles such as this during street arrests; in his experience, the bindle always contained drugs. In 3 years with the Yakima Police Department, he had personally made four or five cocaine arrests and in almost every case, cocaine was packaged in paper bindles like the one seen in the defendant's transparent plastic identification holder. . . . Finally, Officer Cruz testified that when Mr. Courcy realized the officer had spotted the bindle, he pulled it back to his chest. This circumstance, coupled with the knowledge of a bindle's customary use, gave Officer Cruz probable cause to seize it.

In State v. Lair, 95 Wn.2d 706 (1981), a police officer seized a folded piece of paper while executing a warrant authorizing a search for marijuana. He opened it and found a fine white powder inside which laboratory tests established to be phencyclidine. The defendant argued at page 716 that the seizure did not satisfy the requirement of the plain view doctrine that it be immediately apparent to the police that they have evidence before them. The court disagreed:

Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them. . . . The trial court concluded that under all the circumstances, particularly the presence of other drugs on the same shelf and the officer's testimony as to prior experience with drugs in flat packages, the police could have reasonably believed they had evidence before them. Our review of the record convinces us that the trial court was correct on this point.

We could not find any case in which the odor of diesel fuel was listed as an indicator of the presence of cocaine. Defense counsel argued "I've never seen or heard of the use of diesel fuel in cocaine process . . .", but did not supply the court with any expert testimony to rebut the assertions made by Officer Mays in the affidavit. Only "[i]f a defendant establishes by a preponderance of the evidence that statements made by an agent of the State in an affidavit in support of a search warrant were false or made with reckless disregard of the truth, and if the remaining material in the affidavit is insufficient to establish probable cause . . ." is the search warrant voided and the fruits of the search excluded.

Applying the above authority, we hold the warrant was supported by probable

cause. Officer Mays recognized Mrs. Sullivan's description of the folded glossy papers as bindles, a distinctive form of packaging commonly used in the sale of cocaine. The information about the bindles did not stand alone, but was viewed in conjunction with the other circumstances which included the odor of diesel fuel and the numerous phone calls received by Mr. Garcia during all hours. While the details may be innocuous when viewed singly, together they give rise to probable cause to believe cocaine was present in the room.

Finally, Mr. Garcia argues the State did not show the reliability of the tip sheet which listed a vehicle licensed under number UX9001 as used in cocaine trafficking in the Moses Lake area. However, the trial court did not rely solely upon the tip sheet information in upholding issuance of the warrant. Even without the tip sheet, the affidavit contained sufficient facts to justify issuance of the warrant.

Accordingly, we hold the court did not err when it refused to suppress the evidence of cocaine seized upon execution of the warrant.

[Footnote, some citations omitted]

PRIVACY PROTECTIONS VIOLATED IN SEARCH FOR MARIJUANA PATCH

State v. Ferro, 64 Wn. App. 181 (Div. III, 1992)

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

On August 29, 1989, Stevens County sheriff's deputies were engaged in aerial surveillance of a rural area of the county, using an Air National Guard helicopter. The surveillance was part of the County's marijuana eradication program. While the helicopter was flying approximately 500 feet above the ground, one of the deputies saw marijuana growing in a wooded area. He advised sheriff's deputies on the ground and they, with further guidance from the helicopter, proceeded to a house near the location of the marijuana. At some point after the initial observation, the helicopter approached within 300 feet of the ground.

Deputies arrived at the house in a truck. Deputy Mugaas got out of the truck and spoke with Kathy Ferro. Two other deputies drove on across the property some distance, then walked past a garden area and into the woods where they came upon marijuana plants. They seized the growing plants and placed them in their truck.

ISSUE AND RULING: Did the officers violate Ferro's constitutionally protected expectation of privacy? (ANSWER: Yes) Result: Stevens County Superior Court conviction for manufacturing a controlled substance reversed. Status: decision final as State's petition for review was denied by the State Supreme Court on May 5, 1992.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Ms. Ferro contends the aerial surveillance from 300 to 500 feet above her property was an unconstitutional intrusion into her privacy. It is unnecessary for us to reach this issue.

Ms. Ferro further contends the subsequent entry onto and across the curtilage of her home, for the purpose of seizing contraband from the open fields beyond, was an unconstitutional violation of her constitutionally protected expectation of privacy.

Under the "open view doctrine" an officer's observation of evidence from a lawful vantage point is not, standing alone, a search subject to constitutional restrictions. Such an observation may provide the basis for a search warrant. Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining more closely, or seizing, the evidence which has been observed.

It is important to recognize, however, that this doctrine - the "open view" doctrine - applies to visual intrusions only, not to physical intrusions such as entries onto premises. Although a person may have no reasonable expectation of privacy protecting against police observation of objects in a window of his home, he does have a reasonable expectation of privacy protecting against police entry into his home.

State v. Bell, 108 Wn.2d 193 (1987).

Police may enter areas of the curtilage impliedly open to the public, such as a driveway or walkway leading to a residence, or the porch of the residence itself. Substantial departure from the area open to the public intrudes on a constitutionally protected area in which citizens have a reasonable expectation of privacy.

Here, the deputies entered Ms. Ferro's driveway where they encountered her, and one of them got out of the truck and spoke to her. Two deputies drove on past the house to a garden, got out of the truck and continued walking across her property, through a brushy area to where the plants were growing. The court found the officers had trespassed; they had departed from the area of the curtilage impliedly open to the public.

The court also found the officers could have applied for a telephonic search warrant, but failed to do so. No consent to search was obtained until after the warrantless entry. The intrusion into the constitutionally protected area of the curtilage, for the purpose of seizing evidence from the unprotected area beyond, requires suppression of that evidence.

[Citations omitted]

EVIDENCE SUPPORTS CUSTODIAL INTERFERENCE CONVICTION -- DEFENDANT'S USE OF CHILD AS "BAIT" TO FORCE MARITAL RECONCILIATION SHOWS INTENT TO DENY ACCESS

State v. Lund, 63 Wn. App. 553 (Div. I, 1991)

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

In July 1987, appellant Gary Lund and his wife Tracie had a son, Damadora Prasada Lund. On September 24, 1988, the Lunds separated and in November

1988, Tracie Lund filed a petition for dissolution of their marriage. Disputes arose over the care and custody of Damadora. On December 13, 1988, a temporary parenting plan was entered prohibiting either parent from removing Damadora from Washington without approval of the court or the other parent. The order also directed that Damadora reside with his mother, except for specified weekends and holidays to be spent with Gary Lund.

On January 1, 1989, Gary Lund picked up Damadora for a visitation which was to end at 6:30 p.m. that evening. Lund failed to return Damadora as scheduled and he failed to contact Tracie Lund with regard to the whereabouts of father and son. On January 16, 1989, Lund contacted Tracie Lund through his brother, Michael Lund, and said that he would meet her in Los Angeles. Lund testified that the purpose of the meeting was to reconcile their marriage.

On January 27, 1989, the State filed an information charging Lund with custodial interference in the first degree. Lund was arrested in Laguna Beach, California, and was extradited to Washington for trial. . . . After a bench trial, the trial judge found Lund guilty of custodial interference in the first degree.

ISSUE AND RULING: Was there sufficient evidence to support Lund's conviction for first degree custodial interference? (ANSWER: No) Result: King County Superior Court conviction for first degree custodial interference affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Lund next contends that his conviction must be reversed because the trial court failed to find specifically that Lund intended to deny Tracie Lund access to Damadora. Intent to deny access to the child by a person having a lawful right to physical custody is an element of the crime of custodial interference. [COURT'S FOOTNOTE: RCW 9A.40.060, defining the crime of custodial interference in the first degree, provides in pertinent part:

9A.40.060. Custodial interference in the first degree. (1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:
(a) Intends to hold the child or incompetent person permanently or for a protracted period; or
". . . ."
(c) Causes the child or incompetent person to be removed from the state of usual residence; or
". . . ."]

Lund argues that to intend to hold a child as "bait" to obtain a perceived advantage of marital reconciliation is inconsistent with intent to deny access. We disagree. Lund himself testified that one of his purposes for taking Damadora was to "rectify the marriage". Lund's admission that one of his motives for taking Damadora was

to entice Tracie Lund to California is tantamount to an admission of intent to deny access, at least until Tracie Lund complied with his wishes. Children, however, are not chattels and they cannot lawfully be used in such a manner. To intend to deny access to a child until the lawful custodian gives in to the demands of the holder is still an intent to deny access. We hold that it is not a defense to the intent to deny access element of the crime that a child is only being held as "bait" until the lawful physical custodian submits to the demands of the holder of the child.

[Some citations omitted]

ANTICIPATORY SEARCH WARRANTS REVISITED

In the December 1991 LED at page 13 we noted the July 1991 FBI Law Enforcement Bulletin article addressing "Anticipatory Search Warrants". At that time, we requested information from Washington officers regarding any experiences with such warrants. Two submissions were made (thank you), thus indicating that at least occasionally prosecutors and judges in Washington have approved the use of such warrants under appropriate circumstances.

A more recent article on this subject is "Anticipatory Search Warrants: Future Probable Cause," 28 Criminal Law Bulletin 59 (1992) by U.S. Magistrate Judge, Richard A. Powers III. Judge Powers discusses Federal case law, which he argues strongly supports use of this enforcement tool under anticipated exigent circumstances. He concludes his article by discussing one of the circumstances where he believes an anticipatory warrant is appropriate:

Uses of the Anticipatory Warrant

Generally, the anticipatory warrant is sought in searches of crack houses in the inner city. Certain gangs utilize two or more crack houses in a neighborhood where the supply is quickly distributed within several hours after delivery. Then the gang moves the operation to another location for an equally speedy distribution. The anticipatory warrant is uniquely adaptable to the urgency of the situation.

It is possible to prevent abuse of the anticipatory warrant by restricting its use to those critical instances of transient criminal activity scheduled to occur within several hours of issuance. Any longer time period can be provided for by telephone warrants supported by surveillance and informant activity. Consequently, no agent will have a packet of speed warrants at the ready for indiscriminate use.

In any event, the heightened concern of defense counsel over possible abuse of the search warrant rule can be alleviated by the federal courts' power to review de novo the probable cause finding by the magistrate judge and, if necessary, suppress any evidence obtained where no expedited emergency existed. Like all innovations to the rules, only time will determine its facility and whether it comports with existing constitutional principles.

One possible argument by defense counsel is that there is a difference between federal court issuance of anticipatory warrants and state court issuance of anticipatory warrants because federal legislation is more clear in allowing such warrants. However, your LED Editor believes that

current Washington Court Rules are similar to existing Federal legislation and are broad enough to encompass anticipatory search warrants.

MIRANDA

WE REPEAT -- FUNCTIONAL EQUIVALENT OF ARREST SOLE TRIGGER TO MIRANDA

In the May 1992 LED at 2-3 we asserted our view that the Miranda warnings-and-waiver requirement does not apply to mere Terry seizures or to "focus" situations. We cited what we believe to be controlling federal and state court cases for our view that only that custody which is the "functional equivalent of an arrest" (or "resembles formal arrest" -- see McWatters case above at 11-13) triggers the Miranda requirement prior to interrogation.

We revisit the subject this month because we have been advised of a particular Miranda twist not expressly addressed last month. Apparently, some juvenile court and district court judges have taken the view that police-juvenile contacts are inherently coercive. These judges perceive a great power-disparity in the youth-authority-figure contact, and hence hold that, regardless of the inapplicability of Miranda to a similar adult non-arrest-Terry- stop questioning and non-arrest-"focus" situation, Miranda waivers are necessary in investigatory stops where juveniles are being questioned.

We know of absolutely no published case law applicable to interpreting the pertinent State or Federal constitutional provisions or the pertinent state statutes and court rules to support such an approach to juvenile Miranda rights. Indeed, in Berkemer v. McCarty, 468 U.S. 420, 422 (1984) at footnote 35, in explaining why the custody test must be objective, not subjective, the U.S. Supreme Court quoted with approval the following language from a New York State court decision:

. . . (an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question").

Our research reveals no case law to the contrary. The custody test in Washington is an objective one -- would a reasonable person have believed that he or she was in custody which is the functional equivalent of formal arrest. It does not matter what the detainee's subjective perceptions were. It does not matter what was in the officer's mind. The age, intellect, experience etc. of the detainee -- while very relevant where custody has been established in evaluating the validity of a Miranda waiver under the totality of circumstances test -- is irrelevant on the custody question, we believe. We would gladly entertain argument to the contrary.

One closing note of caution. While we do not believe that street contacts with juveniles call for a double standard for giving Miranda under the custody test, we do have some concern regarding Miranda-less stationhouse interviews with juveniles who have been "invited" in and have been told that they are free to leave at any time. While existing case law would lead to the conclusion that such an approach to Miranda-less questioning can qualify as non-custodial where adult suspects are involved, there is significant risk (in our opinion) that such quasi-custodial questioning of juveniles will produce a precedent-setting case injecting a subjective component into the custody test for the first time, or, even worse, will produce a "bright line" rule limiting the questioning of juveniles in all settings. Accordingly, we would suggest caution in using the stationhouse-invite-

free-to-leave technique with juvenile suspects. We would advise warnings in this setting for juveniles.

Finally, note also that juveniles under age 12 are statutorily incapable of waiving their rights absent the participation of a parent or guardian. See RCW 13.40.140(9) and (10). This does not preclude, however, non-custodial questioning of such persons by officers in the field, e.g., "who threw that rock at my patrol car?".

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.

