



Law Enforcement

January 1993

Digest

HONOR ROLL

394th Session, Basic Low Enforcement Academy - September 1 through November 20, 1992

President: Deputy William F. Cottrell - Grays Harbor Sheriff's Department
Best Overall: Deputy Timothy D. Lour - Grays Harbor Sheriff's Department
Best Academic: Deputy Timothy D. Lour - Grays Harbor Sheriff's Department
Best Firearms: Officer Curtis T. Gerry - Seattle Police Department

395th Session, Basic Low Enforcement Academy/Spokane - September 14 through December 4, 1992

Best Overall: Officer G. Paul Lebsock - Gonzaga University Police Department
Best Academic: Officer G. Paul Lebsock - Gonzaga University Police Department
Best Firearms: Officer Terry G. Preuninger - Spokane Police Department
Best Mock Scenes: Officer William K. Peters - Pomeroy Police Department

Corrections Officer Academy - Class 174 - October 1 2 thru November 6, 1992

Highest Overall: Officer Kirk A. Worthington - Spokane County Jail
Highest Written: Officer Michael L. Rozelle - Airway Heights Corrections Center
Highest Practical Test: Officer Michael L. Rozelle - Airway Heights Corrections Center
Highest in Mock Scenes: Officer Sidney F. Harty - Spokane County Jail
Highest Defensive Tactics: Officer Dusty C. Kent - Airway Heights Corrections Center

Corrections Officer Academy - Class 175 - October 26 thru November 20, 1992

Highest Overall: Officer Douglas C. Faddis - Skagit County Jail
Highest Written: Officer Janet Miller - Twin Rivers Corrections Center
Highest Practical Test: Officer Julie R. Dunkin - McNeil Island Corrections Center
Officer Odell C. Hacker - Washington Corrections Center
Highest in Mock Scenes: Officer James R. Langford - Stevens County Jail
Officer Robert A. Haverman - Twin Rivers Connections Center
Officer Marilyn Schram-Waller - Clallam County Corrections Center
Highest Defensive Tactics: Officer Douglas C Faddis - Skagit County Jail

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VI. CORRECTION NOTICE

BLOODBORNE PATHOGENS' PROTECTION UPDATE

By P.B. Nicholls, Seattle Police Department

[LED EDITOR'S INTRODUCTORY NOTE The author of the following article on workplace safety requirements with regard to exposure to bloodborne pathogens is Officer P. B. Nicholls, Seattle Police Department. Officer Nicholls has been with S.P.D. for 23 years and has been an Instructor in the Basic Law Enforcement Training (BLET) Academy of the Criminal Justice Training Commission for the past four years. He has many years of experience as an Emergency Medical Technician and as an Instructor in first aid and related matters. His previous article on the same subject appeared in the October 1991 **LED**.

It is encouraging to hear how many agencies are coming into compliance with Federal and State law regarding bloodborne pathogens. When I wrote for the LED a year ago [See Oct. '91 LED at 07], few if any agencies were even in the early stages of writing Exposure Control programs. Now, thanks to the efforts of many, law enforcement agencies throughout Washington are putting together good programs which will pass muster with state safety and health officials, or the agencies already have such programs in place. More importantly, officers in these agencies have a safer place to work.

There remain a few agencies, however, whose command staff haven't yet heard, or continue in their failure to acknowledge their obligation under the law to protect the safety and health of officers in relation to bloodborne pathogens. I prefer to believe that rather than this being a crisis of ethos, it is more a dilemma of knowing how and where to start.

If your agency does not yet have a program for dealing with bloodborne diseases, disposal of infectious waste, hepatitis B shots for officers, post-exposure follow-up, record keeping, etc., then this article is **MUST READING** for the chief or sheriff who must answer the question -why not? Officers have a right - guaranteed by Federal law and enforced by the State Department of Labor and Industries (WISHA) - to a safe work place. If an abatement program hasn't been initiated, then perhaps the following might be helpful.

A "WISHA Compliance Calendar" lists the dates by which every employer must have implemented each of these pieces:

Effective Date of the Standard	5/26/92
Exposure Control Plan	6/26/92
Information and Training of Employee	
Hazard Communication	7/27/92
Recordkeeping	7/27/92
Engineering/Work Practice	8/27/92
Personnel Protective Equipment	8/27/92
Hepatitis B Vaccination and Post-	
Exposure follow-up	8/27/92
Labels and Signs	8/27/92
Housekeeping	8/27/92
Other Provisions	8/27/92

What follows next is an information and training outline provided by Washington Department of Labor and industries (WISHA). As you read, you can check off whether or not your agency provides these in a timely fashion.

- (i) The employer will ensure that all employees/volunteers with occupational exposure participate in a training program which must be provided at no cost to the employee and during working hours.
- (ii) Training will be provided as follows:
 - (A) At the time of initial assignment to tasks where occupational exposure may take place;
 - (B) Within 90 days after the effective date of the standard; and
 - (C) At least annually thereafter.
- (iii) For employees/volunteers who have received training on bloodborne pathogens in the year preceding the effective date of the standard, only training with respect to the provisions of the standard which were not included need be provided.

- (iv) Annual training for all employees/volunteers will be provided within one year of their previous training.
- (v) The employer will provide additional training when changes such as modification of tasks or procedures or institution of new tasks or procedures affect the employee's/volunteer's occupational exposure. The additional training may be limited to addressing the new exposures created.
- (vi) Material appropriate in content and vocabulary to educational level, literacy, and language of employees/volunteers will be used.
- (vii) The training program will contain at a minimum the following elements:
 - (A) An accessible copy of the regulatory text of this standard and an explanation of its contents;
 - (B) A general explanation of the epidemiology and symptoms of bloodborne diseases;
 - (C) An explanation of the modes of transmission of bloodborne pathogens;
 - (D) An explanation of the employer's exposure control plan and the means by which the employee/volunteer can obtain a copy of the written plan;
 - (E) An explanation of the appropriate methods for recognizing tasks and other activities that may involve exposure to blood and other potentially infectious materials;
 - (F) An explanation of the use and limitations of methods that will prevent or reduce exposure including appropriate engineering controls, work practices, and personal protective equipment;
 - (G) Information on the types, proper use, location, removal, handling, decontamination and disposal of personal protective equipment;
 - (H) An explanation of the basis for selection of personal protective equipment;
 - (1) Information on the hepatitis B vaccine, including information on its efficacy, safety, method of administration, the benefits of being vaccinated, and that the vaccine and vaccination will be offered free of charge;
 - (J) Information on the appropriate actions to take and persons to contact in an emergency involving blood or other potentially infectious materials;
 - (K) An explanation of the procedure to follow if an exposure incident occurs, including the method of reporting the incident and the medical follow-up that will be made available;
 - (L) Information on the post-exposure evaluation and follow-up that the employer is required to provide for the employee/volunteer following an exposure incident;
 - (M) An explanation of the signs and labels and/or color coding required by the exposure control plan, the standard and WRD;
 - (N) An opportunity for interactive questions and answers with the person, conducting the training session.
- (viii) The person conducting the training will be knowledgeable in the subject matter covered by the elements contained in the training program as it relates to the workplace that the training will address.

Next, you will find the outline of an Exposure Control Plan. As you can see, this is an extensive plan, the subject contents of which require a significant effort to compile.

EXPOSURE CONTROL PLAN CONTENT

- I. INTENT OF EXPOSURE CONTROL PLAN
- II. APPLICATIONS OF EXPOSURE CONTROL PLAN
- III. DEFINITIONS
- IV. CONTENT OF EXPOSURE CONTROL PLAN
- V. ENSURANCE OF EXPOSURE CONTROL PLAN

V1. IMPLEMENTATION OF EXPOSURE CONTROL PLAN

- A. Assessment
- B. Application
- C. Criteria for Exposure

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- A. Methods of Compliance
 - 1. General
 - 2. Engineering and Workplace Practice Controls
 - 3. Personal Protective Equipment
 - 4. Housekeeping
- B. Hepatitis B Vaccination and Post-Exposure Follow-Up
 - 1. General
 - 2. Hepatitis B Vaccination
 - 3. Post-exposure Evaluation and Follow-up
 - 4. Information Provided to the Healthcare Professional
 - 5. Healthcare Professional's Written Opinion
 - 6. Medical Recordkeeping
 - 7. Occupational Recordkeeping
- C. Communication of Hazards to Employees/Volunteers
- D. Information and Training
- E. Record Keeping
 - 1. Medical Records
 - 2. Training Records
 - 3. Availability
 - 4. Transfer of Records
 - 5. OSHA 200 Reporting (Column B)

For those of you who are tasked with development, fear not ... help is out there. More likely than not, some person within your county EMS office has been designated the Exposure Control specialist. This person has been working with the local fire and police agencies and may have compiled a number of model programs along with a significant library of resource documents. That individual may also have developed a rapport with the local office of Labor and Industries. (Attached is a list of their Service Locations). At those offices you will find Industrial Hygiene consultants who can advise and assist you as you build your program.

It should be noted that the Department of Labor and Industries investigates employee complaints regarding unsafe working conditions. It might serve a negative motivational need to point out to the mayor and/or city council that fines of \$5000 to \$70,000 are being levied (per violation) when an agency is not in compliance with any of the aforementioned program components.

Finally, if you are still overwhelmed and need advice on how to proceed, call me at (206) 764-4301 at the Criminal Justice Training Center. As I stated earlier in the article, many departments are in compliance. Perhaps I can direct you to those persons who may be able to offer guidance and support. All officers have the right to a safe work place.

DEPARTMENT OF LABOR AND INDUSTRIES SERVICE LOCATIONS

Aberdeen 415 W Wishkah, Suite 1B PO Box 66	Bellingham 2500 Elm St Suite F 98225-2732	Bremerton 4841 Auto Center Way, Suite 201
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98520-0013 (206) 533 9300	(206) 676 2083	98312 4379 (206) 478 4921
Colville 298 S Main Suite 203 99114 2408 (509) 684 7417	Ephrata 21 C St SW 98823 1895 (509) 754 4608	Everett 8625 Evergreen Way Suite 250 98208 2620 (206) 290 1300
Kelso 711 Vine St. 98626 2621 (206) 577 2200	Kennewick 500 N Morain St Suite 1110A 99336 2607 (509) 735 0100	Mount Vernon 1220 Memorial Hwy 98273 3262 (206) 428 1350
Okanogan 1234 2 nd Ave S PO Box 632 98840 0632 (509) 826 7345	Olympia PO Box 44640 98504 4640 (206) 753 6501	Port Angeles 1026 E First St Suite 1 98362 4020 (206) 457 2572
Seattle 300 W Harrison St 98119 6302 (206) 281 5400	Spokane E 3901 Main Ave 99220 4033 (509) 456 2930	Tacoma 1305 Tacoma Ave S Suite 305 98402 1988
Vancouver 10401 NE Fourth Plain Road #201 98662 6302 (206) 696 6311	Walla Walla 1815 Portland Ave Suite 2 99362 2246 (509) 527 4437	Wenatchee 123 Ohme Gardens Road Suite 203 98801 9634 (509) 663 9713
Yakima 1716 S 16 th Ave 98902 5789 (509) 454 3700		

LED EDITOR'S NOTE: "REPORTED FACTS" VS. "ACTUAL FACTS"

Your **LED** Editor recently received a letter from an officer who had been Involved in State v. Richardson, a case reported in the August, 1992 **LED** at page 15. While recognizing that the **LED** merely excerpts whatever the appellate courts report, the officer was critical of the court's (and hence the **LED**'s) inaccurate description of the facts.

The officer sent along a bundle of documents showing that there was no evidence that he ever ordered the subject of the contact to "empty his pockets," as was reported by the Court in Richardson. It appears that any pocket emptying in the contact occurred entirely by voluntary (hence lawful) consent, a fact which the appellate court did not report in holding the contact to be an unlawful Terry stop.

Unfortunately, this kind of distortion of the facts can happen, and there is nothing that can be done about it once the case becomes final, as here. Our appellate courts generally do a fair and reasonable job of review, but once in a while appellate courts in this state and elsewhere will describe "facts" for which there is little or no evidentiary support in the record. We won't speculate on why this might occur, other than to note that appellate courts infrequently develop an irrepressible desire to articulate rules in certain law enforcement areas even though neither the facts nor the law support the rule they wish to and do articulate.

Please let us know whenever you are aware of a significant disparity between the "reported facts" and the "actual facts" of a case reported in the LED. We cannot do much good, but we promise to: (a) commiserate, and (b) pass on your reports anecdotally in our future contacts with the various participants in the legal system.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) MARITAL PRIVILEGE - NO SPOUSAL INCOMPETENCY TO TESTIFY AGAINST OTHER SPOUSE UNDER RCW 5.60.0600) WHERE ANY INTERSPOUSAL CRIME CHARGED – In State v. Thornton, 119 Wn.2d 578 (1992), the State Supreme Court unanimously overrules a precedent from 1910 in ruling that the marital privilege rule which prevents one spouse from testifying against the other during the term of the marriage (also known as the "spousal incompetency" rule) is not limited to "crimes of violence". The Supreme Court rules in Thornton that modern public policy considerations dictate a broader exception to the incompetency rule, and therefore, the Court holds that the exception applies where one spouse is charged with any crime against the other.

The Court in Thornton expressly declared that the issue before it did not involve the second type of marital privilege under RCW 5.60.0600) - confidential marital communications. However, because the same interspousal crimes exception applies to the confidential communications privilege as the status privilege, we see no reason why the Supreme Court would not make the same ruling with respect to both variations of the marital privilege.

Result: King County Superior Court ruling reversed; case remanded for trial on residential burglary charge.

(2) REAL PROPERTY FORFEITURE PROVISION OF CONTROLLED SUBSTANCES ACT UPHELD AGAINST CONSTITUTIONAL ATTACK - In Tellevik et. al. v. Real Property Known As 31641 West Rutherford Street, Carnation, etc. et. al. 120 Wn.2d 68 (1992) and Tellevik et. al. v. 9209 218th N.E., Redmond, etc. et. al., 120 Wn.2d 68 (1992) (two separate cases consolidated for purposes of appeal), the State Supreme Court rejects by a 6-2 vote a constitutional due process challenge to the real property forfeiture provisions of the 1989 amendments to the Uniform Controlled Substances Act, RCW 69.50.505. The argument had centered on whether something more than an ex parte judicial proceeding is required under the constitution prior to institution of forfeiture against real property. The majority held that an ex parte proceeding is adequate.

The Supreme Court also rejects a statutory interpretation argument by the parties challenging forfeiture. They had argued that the wording of the real property forfeiture provision does not authorize forfeiture where law enforcement action causes the property owner to cease the illegal conduct before the government's seizure of the property actually occurs. The Supreme Court rules that past illegal acts will justify present seizure and forfeiture; the illegal conduct need not be ongoing at the moment of seizure.

Result: King County Superior Court orders dismissing forfeiture complaints of the State reversed; cases remanded for forfeiture trials. Status: At **LED** deadline a request for discretionary review was pending in the U.S. Supreme Court.

(3) OVERNIGHT GUEST MAY HAVE HAD AUTHORITY TO ADMIT POLICE TO RESIDENCE - In State v. Ryland (Supreme Court No. 59, 466-0) Department II of the Washington Supreme Court reverses a decision of the Court of Appeals reported at 65 Wn. App. 806 (Div. 1, 1992) Oct:92:10.

The Court of Appeals had ruled by a 2-1 vote in Ryland that a man who had spent the night on the living room sofa as a guest of the resident of the house had no authority to admit police into the living room when they came knocking in the early morning hours. The Court of Appeals' majority held therefore that a probable cause arrest of the resident-host in the living room violated the Pallon rule's restriction on warrantless entry to arrest. The dissenting judge had argued that the overnight guest may have had apparent authority to consent to the entry of the police into the living room. She urged that the case be remanded to the trial court for a hearing to determine whether it was reasonable for the police to assume that Ryland had authority to consent to their entry into the house.

The Supreme Court issues a per curiam opinion in which the Court agrees with the dissenting Court of Appeals' judge in Ryland. Accordingly, the case is remanded to the King County Superior Court for a hearing on the "apparent authority" issue.

WASHINGTON STATE COURT OF APPEALS

COURT ALMOST GETS IT RIGHT ON MIRANDA TRIGGER ISSUE; NETHER FOCUS NOR MERE TEMPORARY RESTRICTION ON FREEDOM TRIGGERS WARNINGS NEED

State v. Walton (Jeffrey), 67 Wn. App. 127 (Div. 1, 1992)

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

On November 3, 1990, at approximately 11:30 p.m., Bellingham Police Officer Leslie Gitts received a report that a juvenile party was in progress at a 2-story apartment complex in Bellingham. When he arrived at the scene, Officer Gitts entered the complex and contacted Walton on the second story landing.

Upon making contact with Walton, Officer Gitts detected an odor of alcohol on his breath. Officer Gitts immediately requested Walton's identification, which indicated that he was 17 years old. Officer Gitts then asked Walton "if he had anything to drink." Walton responded that he had consumed "half a beer" at the juvenile party. Officer Gitts cited Walton for minor in possession and/or consumption of liquor, RCW 66.44.270.

At Walton's juvenile court hearing, Officer Gitts testified that he did not advise Walton of his Miranda rights. He also testified that Walton was not under arrest at the time he asked him whether he had been drinking. Officer Gitts stated that although he was 'pretty sure' Walton had violated RCW 66.44.270 when he posed the question, he was still investigating. He also testified that he probably would have arrested Walton had he attempted to leave. Officer Gitts did not observe any alcohol in Walton's possession, nor did he observe Walton consume any alcohol.

At the conclusion of the State's case, defense counsel made an oral motion to suppress Walton's statement and to dismiss the charge for insufficient evidence. The trial court denied Walton's motion to suppress, reasoning under Berkemer v. McCarty, 468 U.S. 420 (1984) and its progeny that he was not entitled to Miranda warnings. The trial court also concluded that the State had presented sufficient evidence to establish that Walton had consumed alcohol based on his admission and the odor of alcohol on his breath and found Walton guilty as charged.

ISSUES AND RULINGS: (1) Was Walton in custody for Miranda purposes because Officer Gitts had probable cause to arrest him or because Walton was not free to leave or because the officer had an uncommunicated subjective intent to arrest Walton? (ANSWER No) (2) Was there sufficient evidence to support Walton's MIP conviction? (ANSWER Yes) Result: Whatcom County Superior Court juvenile conviction for minor in possession and/or consumption of liquor affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Miranda Custody

A person subjected to custodial interrogation by a state agent is entitled to the benefit of the procedural protections enunciated in Miranda. "Custody for Miranda purposes is established ' . . . as soon as a Suspect's freedom of action is curtailed to a "degree associated with formal arrest."'" "[T]he only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his [or her] situation."

The fact that a suspect is not "free to leave" during the course of a Terry stop does not make the stop comparable to a formal arrest for purposes of Miranda. The reason is that, unlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less "police dominated", and does not easily lend itself to a deceptive interrogation tactics.

Walton argues that he was in custody because Officer Gitts had probable cause to arrest him and thus was authorized to restrict his freedom of action if he had attempted to leave. This argument is without merit. Officer Gitts' question W83 posed in the course of a typical Terry stop. Although Officer Gitts acknowledged that he would have arrested Walton had he attempted to leave, there is no evidence that Officer Gitts communicated this to Walton. This uncommunicated plan could not lead Walton, as a reasonable person, to believe that he was under arrest and in custody. See Berkemer, 468 U.S. at 442 ("A policeman's

unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"); Hensler, 109 Wn.2d at 362-63 (unarticulated belief that suspects were probably in possession of contraband could not lead to reasonable perception by suspects that they were under arrest and in custody.)

Moreover, the fact that Officer Gitts' question to Walton was designed to elicit an incriminating response did not require that Walton be apprised of his Miranda rights. A police officer may ask a detainee "a moderate number of questions to . . . try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. Berkemer, 468 U.S. at 439. An additional safeguard is found in the prohibition against a police officer attempting to elicit an incriminating response through illegitimate, i.e., deceptive, means. See Berkemer, 468 U.S. at 438 & n.27; Hensler, 109 Wn.2d at 362-63.

Thus, because Officer Gitts acted in a noncoercive, routine investigatory manner, Walton's inculpatory statement was not a product of custodial interrogation. Furthermore, there is no evidence that Officer Gitts' question was deceptive. Therefore, no Miranda warnings were required, and the trial court did not err in denying Walton's motion to suppress the statement.

(2) Sufficiency of MIP Evidence

Walton contends next that there was insufficient evidence to sustain his conviction. However, the evidence that Walton violated RCW 66.44.270 consisted of his age, his admission that he had consumed beer at the juvenile party, and Officer Gitts' corroborating testimony that he detected the odor of alcohol on Walton's breath. This constituted sufficient evidence to sustain Walton's conviction under RCW 66.44.270.

LED EDITOR'S COMMENT: The Court of Appeals almost got it right on the Miranda issue. The Court is right that "focus" or "probable cause to arrest" by an investigating officer does not trigger the Miranda warnings requirement. Walton is also correct that even if the officer has an uncommunicated subjective intent to arrest at the outset of a stop, the restriction on freedom involved in a Terry stop is not "custody" for Miranda purposes. See our prior notes on this issue in the May, July and September '92 LED's.

However, the Walton Court is not right in suggesting that deceptive questioning during a Terry stop will trigger Miranda. The Court of Appeals' cite to a U.S. Supreme Court opinion (Berkemer takes the language in that opinion out of context - the U.S. Supreme Court in the Berkemer footnote was simply explaining why it does not require Miranda warnings during a Terry stop; the Court was not stating an alternative trigger to Miranda. And the Court of Appeals' cite in Walton to a Washington Supreme Court opinion (Hensler overlooks the fact that the deception trigger articulated in Hensler was totally rejected in the reductio ad absurdum of the alternative deception trigger in State v. Short, 113 Wn-2d 35 (1989) Oct. '89 LED:13 (holding that an undercover narcotics officer was not required to administer Miranda warnings during the course of an undercover investigation.)

We know of no cases elsewhere suggesting that the fact of deception during a Terry stop questioning triggers Miranda. To date, the Washington Courts have not deviated from

Federal Miranda interpretations in construing our state constitution. Therefore, there is no deceptive purpose trigger to Miranda, in our opinion.

It should be noted, however, that in our view: (1) deceptive questioning should not be heavily relied on as a Terry stop questioning technique, and (2) inquisitorial questioning, whether deceptive or not, can transform a close case from non-custody to custody status for Miranda purposes. Finally, It should also be noted that while Walton should clear up some misunderstanding on clear non-arrest situations (such as the Walton factual situation), the issue of whether restriction on a detainee's freedom to leave has moved along the continuum from (a) Terry stop to (b) functional equivalent of custodial arrest does not lend itself to easy definition. A court may find that by your actions you made an arrest even if you didn't intend to. Accordingly, when in doubt as to whether your detention is a functional arrest, Mirandize before questioning.

We'll revisit this subject next month as we are hearing (at LED deadline) a rumor that the powerful King County DWI defense bar has convinced District Court judges in King County that roadside field sobriety testing prior to arrest triggers Miranda. If the rumors are true, the judges are misreading the law. See Heineman v. Whitman County, 105 Wn.2d 796 (1986) July '86:06 and Berkner v. McCarty. We also hear that some judges require Miranda in NVOL stops. This is generally wrong too, particularly in light of the Walton decision.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DESTRUCTION OF COMMUNITY PROPERTY MAY RESULT IN MALICIOUS MISCHIEF CONVICTION - In State v. Webb, 64 Wn. App. 480 (Div. 1, 1992) the Court of Appeals holds that defendant was lawfully convicted of malicious mischief for breaking into the apartment occupied by his wife from whom he was formally separated. The Court has alternative rationales for its ruling: (1) that under the special facts of this case, the wife had a superior property interest to her husband under the formal separation even though the vandalized personal property was still legally community property, and (2) even if such a superior property interest did not exist, malicious mischief is a crime different in nature from the crime of theft, and hence while, one may not be able to commit theft of community property where there is no superior property interest in either spouse, one may be guilty of malicious mischief in such a circumstance. The court's analysis on these two alternative rationales is in part as follows:

[W]ebb and Metcalf formally separated in early 1989. In February 1989, Webb moved out of the couple's apartment and gave his key to Metcalf. Metcalf and Webb divided their possessions and, at the end of April 1989, Metcalf Removed Webb's possessions from the apartment. Thus, at the time of the incident in May 1989, it is apparent that Metcalf had the superior, if not sole, interest in the personal property in her possession. Thus,... because Webb's ownership interest in the damaged property was inferior to Metcalf's, his conviction for malicious mischief was not barred.

Furthermore, unlike theft, malicious mischief encompasses the damaging, if not the destruction, of property, and therefore, possession can never be redeemed. Hence, sound policy reasons exist to treat the term "property of another" in the malicious mischief context differently than in the theft context. Thus, we conclude that the term "property of another" as used in RCW 9A.48.0800(a) includes property co-owned by the defendant. [The Court cites a California decision as

well as a legal treatise to support the view that a spouse can commit malicious mischief against community property. **LED** Ed.]

Result: Snohomish County Superior Court convictions for second degree burglary and second degree malicious mischief affirmed.

(2) GLORIA SMITH RULE AGAINST BOOKING SEARCHES OF PERSONS ARRESTED ON BAIL WARRANTS GIVEN “HOLDING CELL EXCEPTION”; FAILURE TO OBTAIN WRITTEN SUPERVISOR AUTHORIZATION FOR STRIP SEARCH PER RCW 10.79 DOES NOT REQUIRE EXCLUSION IF VERBAL AUTHORIZATION GIVEN - In State v. Harris 66 Wn. App. 636 (Div. I, 1992), the Court of Appeals creates what appears to be a significant exception to the rule of the Gloria Smith case [56 Wn. App. 145 (1989) **March '90 LED:12, Feb. '92 LED:18**]. Gloria Smith held unlawful a booking search conducted where officers do not allow a person arrested under a warrant with a bail provision a reasonable opportunity (upon request) to post bail. In Harris, the Court of Appeals rules that if the correctional facility must necessarily place the arrestee in a holding cell while bail is being arranged, this is an exigent circumstance which justifies a search of the person and his personal effects prior to placing him in the holding cell. The Harris opinion is authored by the same judge who wrote Gloria Smith and a good argument can now be made that there is a "holding cell" exception to the Gloria Smith rule.

On the other hand, because the arrestee in Harris was a known gang member and the officers testified regarding their past experiences with gang members secreting razor blades in the private areas of their bodies, defense attorneys will no doubt argue that the case must be narrowly read. Officers should be prepared to testify regarding the fact (assuming it is so) that non-gang members also sometimes secrete contraband on their bodies.

The Court of Appeals also holds that violation of the requirement in RCW 10.79.140(2) that authorization to conduct a strip search be in writing does not require exclusion of evidence discovered in the strip search. As long as the government can prove that authorization in some form was obtained, the failure to get it in writing will not require suppression of the evidence.

Result: Affirmance of King County Juvenile Court adjudication of guilt for Mzee Baraka Harris for possession of a controlled substance with intent to deliver.

(3) REPORT BY INFORMANT THAT “FRIEND” HAD MADE ONE PURCHASE OF DRUGS AT RESIDENCE DID NOT ESTABLISH PC TO SEARCH RESIDENCE - In State v. Bittner, 66 Wn. App. 534 (Div. 1, 1992), the Court of Appeals holds that a search warrant affidavit that recited that an informant told a police officer of a single purchase of a controlled substance by an unidentified friend at a suspect residence within the past week did not establish probable cause to search. The Court declares that some further corroboration was required, such as the informant's observation of controlled substances in the residence or facts establishing the friend's reliability.

Result: Island County Superior Court conviction for violation of the Uniform Controlled Substances Act reversed.

LED EDITOR'S NOTE: While resolving only the “basis of information” prong of the probable cause issue, the Court of Appeals also briefly notes its criticism of the search warrant affiant's description of his informant as a mere "concerned citizen". In fact, according to the Court, the evidence produced in pro-trial proceedings established that the informant had previously contacted the police department because he was being investigated for a

crime. The Court declares that the affidavit should have included this fact so that the magistrate could make a better assessment of the credibility of the informant.

(4) LANDLORD'S CONSENT TO POLICE ENTRY TO HOUSE INVALID AS LEASE NOT EXPIRED - In State v. Birdsong, 66 Wn. App. 534 (Div. 1, 1992), the Court of Appeals holds that a landlord's consent to entry of a rented premises was invalid because the lease had not expired and the tenancy had not been abandoned.

The landlord had called police to inform them that the tenant had abandoned the premises, and that the landlord had discovered the remains of a marijuana grow on the premises. Shortly after police arrived, and before they and the landlord entered the house, the tenant also arrived.

Without discussing the matter with the tenant, the police and the landlord went inside to look at the marijuana grow. Apparently, the landlord did not inform the officers that the lease had not yet expired, and the police did not inquire as to the expiration date of the lease.

Under these facts, the Court of Appeals holds: (1) that the landlord had no authority to consent to entry of the still-rented premises, and (2) the officers could not rely on the "apparent authority" of the landlord, as the tenant was at the scene at the time of the search, such that questions regarding the tenancy could have been addressed to the tenant and the landlord prior to entry.

Result: King County Superior Court conviction for manufacturing a controlled substance reversed and case dismissed.

LED EDITOR'S COMMENT: This result underscores the need to get a search warrant in circumstances such as this. Even if a lease has expired, the tenancy generally will be deemed to continue on a month-to-month basis; unless abandonment of the premises is clearly evident, a search warrant or consent of a tenant is needed.

(5) INTOXICATED SUSPECT'S DEMAND THAT POLICE COME INSIDE WHILE HE REFUSED TO STEP OUTSIDE CONSTITUTED CONSENT TO ENTRY - In State v. Cyrus, 66 Wn. App. 502 (Div. I, 1992), the Court of Appeals holds that under the following facts (as described by the Court), police officers had consent to enter an assault suspect's house to arrest him:

Upon arriving at Cyrus's home, the police approached the front door and knocked. Cyrus opened the door almost immediately. The police informed Cyrus why they were there and asked him to come out to talk. Cyrus was angry and belligerent and refused to come out, instead demanding that the police come in. This happened at least three times in response to both officers. The officers testified that they did not want to enter the house at that time because the interior lights were off and Cyrus's right hand and arm were hidden behind the door. They preferred to have him out on the front porch for officer safety.

After the initial exchanges between Cyrus and the police, Mrs. Cyrus, the defendant's mother, came to the door and stood between Cyrus and the police. Mrs. Cyrus was informed of the reason for the police presence. She also became angry. When it became clear Cyrus was not going to come out, Officer Chang walked around Mrs. Cyrus, into the house, and grabbed Cyrus's left arm preparing to arrest and cuff him.

Cyrus immediately jerked his arm away and began flailing. At this point Cyrus moved back from the door. Officer Divine began moving to help Officer Chang and saw Cyrus's right hand for the first time and saw that he was armed with a revolver. Officer Divine called out a warning that Cyrus was armed. Cyrus pointed the gun at Officer Divine. The two officers and Cyrus began fighting, Officer Chang attempting to control Cyrus and Officer Divine attempting to disarm him. Both officers admitted striking Cyrus to subdue him. Cyrus was ultimately subdued, cuffed and arrested.

On these facts the Court of Appeals rejects defendant's arguments that his "consent" to entry: (a) was a mere submission to police authority or (b) was vitiated by his intoxication.

Result: King County Superior Court convictions for first degree assault and attempted second degree murder affirmed.

(6) NO FIFTH AMENDMENT VIOLATION WHERE POLICE DECLARE TO INTERROGATION SUSPECT THAT THEY WILL TALK TO PROSECUTOR, BUT THEY MAKE NO OTHER PROMISES - In State v. Putnam, 65 Wn. App. 606 (Div. 11, 1992), the Court of Appeals declares that no Fifth Amendment violation occurred where police officers conducting a custodial interrogation: (a) told the suspect that they would talk to the prosecutor about any cooperation by the suspect, but (b) they did not promise him reduced charges or other special consideration by the prosecutor. Result: Thurston County Superior Court convictions for aggravated first degree murder, first degree felony murder, and second degree burglary affirmed.

LED EDITOR'S COMMENT: If officers tell a suspect during interrogation that they will talk to the prosecutor about his cooperation, they should expressly tell the suspect that they cannot promise him any special consideration by the prosecutor. Unauthorized promise of leniency in this setting will make any admissions of guilt "involuntary".

(7) STATE WINS ON MIRANDA "INTERROGATION" ISSUE WHERE QUESTION OF "CURRENT ADDRESS" ASKED IN BOOKING PROCESS - In State v. Walton (Bobby Gene), 64 Wn. App. 410 (Div. 111, 1992), the Court of Appeals rejects defendant's challenge to a "current address" question which a booking officer asked him following his arrest as a suspected drug dealer.

Defendant had been arrested as an occupant of a house searched under a search warrant. At the jail, when asked for his address by the booking officer, defendant gave the address of the house where he had been arrested. The next day he repeated this information to a DOC pre-trial investigator. Defendant subsequently challenged the admissibility of these statements on grounds that he had not been given prior Miranda warnings.

LED EDITOR'S COMMENT

The Court's holding to the contrary notwithstanding - safety first. When in doubt, officers will and should frisk. But officers must try to explain in incident reports why the frisk was done and be prepared to explain it again in the suppression hearing. Here, the Court of Appeals did not seem to be aware that such brazen door-to-door activity is a burglary M.O.

(10) WASHINGTON MUTUAL AID PEACE OFFICER POWERS ACT - COUNTY NOT LIABLE IN ASSIST ACTION BECAUSE ITS OFFICERS WERE SUBJECT TO "DIRECTION AND CONTROL" BY CITY POLICE COMMAND STAFF - In Sheimo v. Bengston, 64 Wn. App. 545

(Div. III 1992), the Court of Appeals affirms a trial court's decision that Stevens County may not be held liable for any of the act or omission of county officers who assisted city officers during a hostage-holding-incident in Colville. The incident resulted in the death of a passer-by when the hostage-holder shot from the house.

The Court holds that where the Stevens County officers assisting the City of Colville officers were clearly subject to the direction and control of the city personnel in charge of the scene, the provisions of RCW 10.93.040 of the Washington Mutual Aid Peace Officer Power Act mandate that the county officers and their agency not be held liable for the assisting officers' acts or omissions.

The City of Colville argued on appeal that in order for liability to shift under chapter 10.93 there must be a written agreement between agencies participating in a joint operation. This argument finds no support in the language of the Act or in the public policy considerations which caused the Legislature to adopt the MAPOPA, the Court of Appeals holds.

Result: Affirmance of Stevens County Superior Court judgment declaring Stevens County to be exempt from liability under the facts of this case.

(11) DEFENDANT'S "PRETEXT" THEORY REJECTED; CUSTODIAL ARREST FOLLOWING TRAFFIC INFRACTION STOP UPHELD - In State v. Johnson (Anthony) 65 Wn. App. 716 (Div. 11, 1992) the Court of Appeals: (1) rejects defendant's claim that when an officer stopped him for making a turn without signaling it was a pretext stop, to investigate him for illegal drug activity (DEFENDANT WAS ABLE TO SHOW THAT HE WAS UNDER SURVEILLANCE AS A POSSIBLE DRUG DEALER AT THE TIME THAT A PATROL CAR PULLED HIM OVER FOR HIS UNSIGNALLED TURN, BUT HE COULD NOT OVERCOME THE TRIAL COURT'S FINDING THAT THE REASON FOR THE STOP WAS THE TRAFFIC INFRACTION, NOT A DRUG INVESTIGATION), and (2) upholds the trial court's decision that the patrol officer made a lawful custodial arrest of Johnson following the traffic stop based on a determination that Johnson would not honor a signed promise to appear (JOHNSON HAD NO DRIVER'S LICENSE OR ID, THE VEHICLE REGISTRATION WAS IN SOMEONE ELSE'S NAME, AND JOHNSON GAVE A FALSE NAME TO THE OFFICER AT THE OUTSET OF THE STOP).

Accordingly, the Court of Appeals rules that Johnson was lawfully subjected to a custodial arrest and that the search of the passenger area of his vehicle incident to that arrest was lawful. Cocaine found in a jacket in the backseat of the vehicle driven by Johnson was therefore admissible in evidence.

Result: Pierce County Superior Court conviction for possession of a controlled substance with intent to deliver affirmed.

(12) COURT FINDS PROBABLE CAUSE FOR VEHICULAR HOMICIDE ARREST IN BOOZE AND ADMISSIONS AND CIRCUMSTANCES OF ACCIDENT. - In State v. Dunivin, 65 Wn. App. 501 (Div. 11, 1992), the Court Of Appeals holds that the following facts (as described by the Court) provided probable cause for the arrest of defendant and hence justified a forcible blood test under the implied consent statute, RCW 46.20-308:

On May 9, 1989, Dunivin drove his car onto the path of an oncoming motorcycle. The motorcycle rider died. Dunivin fled the scene, but Officers Rehaume and Fundingsland soon found him hiding; in a yard nearby. He had been drinking, and he told Rehaume that he fled the scene because 'he was scared about being

drunk. While investigating the scene, Trooper O'Neill observed a still-foaming bottle of beer and a bottle of whiskey in the car.

Officer Rehaume and Trooper Batt took Dunivin to a local hospital. A test administered at the State's direction showed a blood alcohol level of .19 percent.

Dunivin was charged with vehicular homicide while under the influence of alcohol. The blood test results were admitted at trial.- and the jury returned a verdict of guilty.

Result: Cowlitz County Superior Court conviction for vehicular homicide, affirmed.

LED EDITOR'S COMMENT: There is case law to support the assertion that just the smell of alcohol on a driver's breath plus a vehicular death under suspicious circumstances provides probable cause to arrest for vehicular homicide. See State v Steinbrunn, 54 Wn. App. 506 (1989). Ideally, the officer seeking to establish PC in this context will have more. In light of Dunivin's admissions, the facts in Dunivan clearly went beyond the facts of Steinbrunn and therefore provided probable cause for an arrest.

(13) IMPLIED CONSENT WARNINGS PER RCW 46.20.380(2) SUPPORT REVOCATION OF DRIVERS' LICENSES; DRIVERS' REFUSAL OF TESTING PRECLUDES ISSUANCE OF OCCUPATIONAL DRIVER'S LICENSES - In the consolidated cases of Burnett v. DOL and Gasaway v. DOL 66 Wn. App. 253 (Div. 11, 1992), the Court of Appeals rejects the arguments of two drivers whose drivers' license were revoked for their refusal of alcohol breath testing after they had been arrested for driving while intoxicated.

The first set of arguments rejected by the Court of Appeals were: (a) that the implied consent warnings should specify the time period of the revocation for refusal, and (b) that implied consent warnings should expressly advise the arrestee that a refusal will result in denial of an occupational driver's license during the term of the revocation. The Court holds that the basic warnings set forth in RCW 46.20.308(2) - i.e., the standard warnings currently used by WSP and other Washington agencies - support license revocation.

The second argument - that revocation does not preclude issuance of an occupational driver's license - was even more creative than the first. This argument involved a theory that an implied consent revocation is in effect a criminal conviction, and that this somehow entitles the revoked person (under the "deferred prosecution" statutes) to an occupational driver's license at the time of revocation. The Court rejects this theory, along with another creative theory that denial of an occupational driver's license in this context is an unconstitutional denial of equal protection of the laws.

Result: Clark County Superior Court rulings affirmed; DOL license revocations and denials of occupational drivers' licenses affirmed.

(14) "LET'S FIGHT" EVIDENCE INSUFFICIENT TO SUPPORT HARASSMENT CONVICTION - In State v. Austin, 65 Wn. App. 759 (Div. 1, 1992), the Court of Appeals holds that evidence that defendant flashed a knife from a car window and Yelled at a person 'come on boy, let's fight" was insufficient evidence of a 'threat" to support defendant's conviction for (criminal) harassment under RCW 9A.46.020. Result: King County Juvenile Court harassment adjudication reversed; reckless endangerment adjudication reversed on grounds not addressed here, and case remanded for juvenile court to make additional findings on the reckless endangerment charges.

(15) FINGERPRINTS ON INNER SIDE OF GLASS FROM WINDOW WHICH WAS BROKEN IN FORCED ENTRY CONSTITUTES EVIDENCE OF "ENTRY" UNDER BURGLARY STATUTE – In State v. Berglund, 65 Wn. App. 648 (Div. 1, 1992), the Court of Appeals rejects defendant's argument that there was insufficient evidence of illegal entry in his trial for burglary. The Court holds that the evidence supported the giving of an instruction allowing the jury to infer defendant's intent to commit a crime in the premises. Police testimony that pieces of glass from a window broken in a forced entry supported the conviction because the testimony showed that defendant's fingerprints were on the inner side of the glass, and that he had therefore "entered" the premises. Result: King County Superior Court conviction for second degree burglary affirmed.

CORRECTION NOTICE

In the November LED at 15, we erred in the "Issue and Ruling" portion of our entry on the Clayton Donald Smith case by putting a "No" answer where we should have had a "Yes" answer. The text should have read as follows:

ISSUE AND RULING: Was the search of the fanny pack a search incident to arrest"? (ANSWER: Yes.) Result: Yakima County Superior Court conviction for possession of cocaine affirmed; Court of Appeals ruling reversed.

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.