

July, 1993

HONOR ROLL

401st Session, Basic Law Enforcement Academy - Spokane - February 24 through May 13, 1993

Best Academic: Officer Kevin A. Shearer - Spokane Police Department
Best Firearms: Deputy Kevin R. Ellingsburg - Klickitat County Sheriff's Department
Best Physical: Officer Erick T. Nelson - Ephrata Police Department

402nd Session, Basic Law Enforcement Academy - March 2 through May 20, 1993

President: Officer Marlene K. Goodman - Des Moines Police Department
Best Overall: Officer Ronn S. Mayer - Ruston Police Department
Best Academic: Officer Ronn S. Mayer - Ruston Police Department
Best Firearms: Officer Cameron A. Lefler - King County Police Department
Best Night Mock Scene: Officer Michael Bernklau - King County Police Department

Corrections Officer Academy - Class 182 - May 3 through 28, 1993

Highest Overall: Officer Scott C. Tollackson - Kittitas County Corrections
Highest Academic: Officer Stephanie A. Hansen - King County Adult Detention
Highest Practical Test: Officer John P. Halsted - Kitsap County Jail/Work Release
Highest in Mock Scenes: Officer Kathy J. Perez - Washington State Reformatory
Highest Defensive Tactics: Officer Randall T. Parsons - Bellevue Police Department
Officer Scott C. Tollackson - Kittitas County Corrections

Corrections Officer Academy - Class 183 - May 3 through 28, 1993

Highest Overall: Officer Jerald R. Grieder - Washington Corrections Center for Women
Highest Academic: Officer Mary K. Lowe - Airway Heights Corrections Center
Highest Practical Test: Officer Matt W. Johnson - Washington State Penitentiary
Officer Nick L. Johnson - Washington Corrections Center
Officer Clarence A. Woods II - Coyote Ridge Corrections Center
Highest in Mock Scenes: Officer Marc A. Malloque - Washington State Reformatory
Highest Defensive Tactics: Officer Jonathon M. Slothower - Renton City Jail
Officer Scott C. Tollackson - Kittitas County Corrections

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1993 WASHINGTON LEGISLATIVE ENACTMENTS - PART I

LED EDITOR'S INTRODUCTORY NOTE: Over the next several months, we will present information on 1993 Washington legislative enactments of general interest to law enforcement. This month's entry is simply a listing of chapter number, bill number, subject area and effective date of each of the enactments to be covered in the coming months.

<u>Chapter/Bill Number</u>	<u>Subject Area</u>	<u>Effective Date</u>
26/HB 1217	destroying seized liquor	7/25/93
68/HB 1064	corporal punishment in schools	unclear
82/HB 1484	wildlife violator compact	7/25/93
83/HB 1544	uniform criminal penalties for ordinances	7/01/94
102/SB 5426	overweight permits for trucks	7/25/93
103/SB 5427	maximum gross weight tire factors	7/25/93
106/SB 5148	handicap parking	7/25/93
121/SB 5442	tow trucks	7/25/93
127/HB 1569	malicious harassment	7/25/93
128/HB 1338	criminal interference with access to health care	4/26/93
153/HB 1111	vehicles and pedestrian crosswalks	7/25/93
175/HB 1893	motor vehicle buyers' agents	7/25/93
180/HB 1864	fire accelerant detection dogs	7/25/93
187/SB 5520	controlled substances miscellany	7/25/93
189/HB 1156	municipal incorporation, annexation -- sheriff's office employees	7/25/93
203/SB 5145	bungee jumping	7/25/93
209/SB 5107	10.31.100 -- PC arrest for weapons on school property	7/25/93
214/SB 5541	limitations periods for sex crime prosecutions	7/25/93
237/HB 1115	access to child abuse reports	7/25/93
239/HB 1128	fees for BAC tests	7/01/93
243/HB 1259	firearms forfeiture	5/07/93
244/HB 1318	boating safety	7/25/93
246/HB 1344	vehicle axles	7/25/93
260/HB 1870	bail bond agents	7/01/93
274/SB 5879	child passenger restraints in MV's	7/25/93
283/SB 5056	seaweed harvesting regulation	7/25/93
285/HB 1033	city, county jail industries	7/25/93
288/HB 1069	forfeiture of property used in felony	7/25/93

292/HB 1086	littering penalties	7/25/93
293/HB 1116	explosives (c.70.74 RCW)	7/25/93
294/HB 1157	emancipation of minors	1/01/94
301/HB 1271	vehicle length limits	7/25/93
314/HB 1507	junk vehicles	7/25/93
324/HB 1849	automated teller machine safety	5/12/93
328/SB 5245	BAC, blood alcohol test evidence	7/25/93
338/HB 1922	work ethic boot camp	7/01/93
347/SB 5307	weapons in K-12 schools	7/25/93
348/SB 5330	holding property post-auction	7/25/93
350/SB 5360	victims' rights re: violent crimes, sex crimes	7/25/93
355/SB 5452	charging incarceration costs to prisoners	7/25/93
384/HB 1713	tinted MV windows	7/25/93
396/HB 1059	weapons in court facilities	7/25/93
397/HB 1067	collective bargaining for some local jail personnel	7/25/93
398/HB 1081	collective bargaining for additional "uniformed personnel"	Various
401/HB 1107	transit vehicles' right-of-way	7/25/93
402/HB 1110	sexually aggressive youth	7/25/93
403/HB 1129	commercial vehicle inspection	7/25/93
442/SB 5975	reimbursement of extradition costs	7/01/93
452/HB 1444	identification required for DOL ID cards	7/25/93
457/HB 1689	impersonating an officer	7/25/93
477/SB 5577	sex offenses by medical, drug treatment providers	7/25/93
479/SB 5625	no death penalty for mentally retarded	7/25/93
484/SB 5704	unlawful factoring of credit card transactions	7/25/93
487/SB 5815	forfeiture: UCSA, DWI, physical control	7/25/93
501/HB 1741	miscellaneous traffic law changes	7/25/93
507/HB 2071	minors' access to tobacco products	7/25/93
509/SB 5186	"luring" as crime	7/25/93
513/HB 1183	intoxicated minors appearing in public	7/25/93
514/SB 5075	"hazing" as a misdemeanor	7/25/93
21 ex. sess./SB 5521	criminal justice funding	7/01/93

DOL REMINDER REGARDING CITATIONS

Elaine Hagseth, Administrator, Law and Justice Liaison Program, Department of Licensing (DOL) Driver Services, has written with some DOL concerns. She says:

1. Statewide, many officers are citing RCW 46.30.040 for failure to provide proof of motor vehicle insurance as a traffic infraction. The RCW which should be cited is 46.30.020. RCW 46.30.040 is for providing false evidence of insurance which is a misdemeanor. I have a large stack of citations where the RCW does not match the English description and we

can't do anything with them; the entire stack will be returned to the courts.

2. When officers issue a citation for DWLS/R, the degree (1st, 2nd or 3rd) must be shown. When it is not shown, the courts guess as to what to convict and sentence on and DOL does not know what to suspend or revoke on.

Dispatch has the appropriate degree on the driving record on the ACCESS Network. Law enforcement officers should be sure and ask for it from the dispatcher.

Those with questions may call Elaine Hagseth at (206) 753-2323, SCAN 234-2323.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) CO-CONSPIRATORS HAVE NO AUTOMATIC STANDING TO CHALLENGE SEARCHES OF FELLOW CO-CONSPIRATORS -- In U.S. v. Padilla, 53 CrL 2109 (1993), in a brief unanimous opinion, the U.S. Supreme Court rules that there is no such thing as "co-conspirator standing" under the Fourth Amendment.

Prior case law establishes that the only persons with standing to challenge a search are those whose rights were directly violated by the search itself, not those concerned only with the introduction of damaging evidence obtained in illegal searches of others. Here, co-conspirators in a drug-dealing enterprise before the Court in this case arguably exercised joint control and supervision, by virtue of their position in the conspiracy, over a vehicle driven by a narcotics "mule". The Court rules, however, that this fact alone did not give the co-conspirators automatic standing to challenge the search of the vehicle (the search was based on the mule's consent).

Result: Ninth Circuit Court of Appeals suppression ruling reversed; case remanded to the lower courts for a determination whether any privacy rights of the co-conspirators were directly violated by the law enforcement search.

(2) DURATION OF "INITIATION OF CONTACT" BAR UNDER FIFTH AMENDMENT REMAINS UNRESOLVED -- In U.S. v. Green, 53 CrL 2001 (1993) the U.S. Supreme Court has dismissed the appeal because the defendant has died. The Green case would have helped resolve an important issue under the Fifth Amendment "initiation of contact" rule. For a discussion of the "initiation of contact" rule, see the LED article in the April '93 LED at 2-10 and see also the charts appended to the May '93 LED. The Green case is discussed in the April LED article at pages 6-7 and at 9.

At issue in Green was the scope of the restriction announced in Edwards v. Arizona, 451 U.S. 477 (1981), and broadened in Arizona v. Roberson, 486 U.S. 675 (1988) Sept. '88 LED:01 and Minnick v. Mississippi, 498 U.S. 146 (1990) Fed. '91 LED:01. Under Edwards, an in-custody defendant who asserts his right to counsel under Miranda v. Arizona may not be subjected to further police-initiated interrogation in counsel's absence. Roberson expanded this bright-line rule to cover questioning about all other crimes, and Minnick made clear that an intervening consultation with counsel does not lift the Edwards bar.

Green involved the Roberson and Minnick facts plus the following: Defendant had since pleaded guilty to the original crime by the time the police approached him for further questioning, and five months had passed between his initial assertion of his right to counsel and the second interrogation. However, he had not yet been sentenced. Ruling against the prosecution, the District of Columbia Court of Appeals had held that these facts did not allow police to initiate contact under the Edwards line of cases, 592 A2d 985 (1991). At oral argument in the U.S. Supreme Court, opposing counsel differed greatly on whether the bright-line rule against contact should continue to apply in this post-guilty plea, pre-sentencing situation. However, the case has now been dismissed because of the defendant's death.

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

(1) ROUTINE THROUGH-THE-CLOTHES BODY SEARCHES OF FEMALE INMATES BY MALE CORRECTIONAL OFFICERS RULED IMPERMISSIBLY "CRUEL AND UNUSUAL" -- In Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) an en banc (full) panel of the Ninth Circuit Court of Appeals reverses a decision of a three-judge Ninth Circuit panel last year. A majority of the full panel rules that a policy at the Washington Corrections Center For Women (at Purdy) allowing male guards to conduct routine body searches (through-the-clothing, pat-down technique) of fully clothed female inmates violates the 8th Amendment's prohibition against cruel and unusual punishment.

The majority distinguishes routine cross-gender pat-down searches when conducted on male inmates by female correctional officers. The majority is persuaded by evidence in the trial court record of this case that all women, and particularly women who have been sexually abused in the past (many Purdy prisoners claim a history of sex abuse victimization and the Court accepts it as true) suffer significant emotional or psychic pain from cross-gender, through-the-clothes patting of intimate areas of the body. In past cases brought by male prisoners in the reverse situation, there was no evidence of similar emotional pain by the male inmates, the majority declares. The majority goes on to hold that prison necessity does not outweigh the privacy consideration, and therefore the majority concludes that the cross-gender body-search policy for routine searches must be permanently enjoined.

Result: District Court ruling enjoining the Purdy cross-gender search policy affirmed. Status: decision final; the Governor's Office decided not to appeal to the United States Supreme Court.

(2) FEDERAL PROSECUTOR'S MEETING WITH CHARGED DEFENDANT RULED VIOLATIVE OF ETHICS RULE BUT NOT A REASON TO DISMISS CASE ABSENT PREJUDICE TO DEFENDANT -- In U.S. v. Lopez, 52 CrL 1545 (1993) a panel of the United States Ninth Circuit Court of Appeals takes a very restrictive view regarding when a prosecutor is allowed to have any contact with a charged defendant known to be represented by counsel. The majority rules that the Assistant U.S. Attorney violated ethical standards by discussing a possible plea bargain with the defendant in the absence of counsel, even though defendant was the person who initiated the conversation.

The Ninth Circuit panel's view of the ethical restrictions on prosecutors generally would make it impossible for a prosecutor to lawfully communicate with a represented defendant about the

charged matter without the presence or consent of counsel, regardless of who initiates the contact (see the LED article on initiation-of-contact for law enforcement officers in the April 1993 LED at 2-10). This restriction would also extend to situations where the prosecutor is involved in a police officer's contact with a defendant on a charged matter. The restriction would not extend to the police, however. Hence, in situations where the police make such contacts without prosecutor involvement, there will be no vicarious ethical violation, and, if the initiation-of-contact rules are adhered to, any statements obtained by police will be admissible.

The Ninth Circuit panel goes on to hold that the ethical violation here by the prosecutor did not merit dismissal of the charge as was ordered by the trial court. Defendant was not prejudiced by the violation -- an attempt at plea bargaining in the absence of his lawyer -- because nothing came of the bargaining and defendant subsequently obtained very competent alternative counsel to defend him. Result: case remanded to federal district court for trial.

WASHINGTON STATE SUPREME COURT

FOUNDED SUSPICION STANDARD FOR FRISK DURING TERRY STOP-AND-FRISK REQUIRES OBJECTIVE PROOF ONLY THAT PAT-DOWN WAS NOT ARBITRARY OR HARASSING

State v. Collins, 121 Wn.2d 168 (1993)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

During the early morning of July 10, 1989, Officer Kaffer and his partner were patrolling the Capitol Hill area of Seattle in a marked patrol car. At approximately 4 a.m., on East Pike Street, the officers stopped a 1969 green Pontiac after observing that the vehicle's brake lights failed to come on when the vehicle was stopped at a red traffic light. The driver of the vehicle was defendant Michael F. Collins, a 6-foot-3-inch-tall white male.

As soon as the vehicle was stopped, Officer Kaffer approached the driver's side of the vehicle. When he reached the driver's window, he immediately recognized defendant from an arrest on a felony warrant made approximately 2 months earlier. Although Officer Kaffer could not recall the exact date of the arrest or the exact nature of the warrant, he did recall the circumstances of his prior contact with defendant.

The prior contact occurred when defendant was stopped for riding a bicycle at night without a light. Following the stop, Officer Kaffer ran a routine check on defendant's identification, and was informed of an outstanding felony warrant for defendant. Defendant was then placed under arrest, and the officers agreed to defendant's request that his bike be placed in the bed of his truck three blocks away. When the officers carried out this request, they noticed "a large amount of either .38 or .357" ammunition, a holster, and a set of handcuffs in the passenger compartment of the truck. Defendant told the officers that they would not find a gun in the truck, and the officers did not find a gun when they searched the truck's

passenger compartment with defendant's permission.

Upon recognizing defendant and recalling these facts, Officer Kaffer ordered defendant out of the vehicle and conducted a brief, pat-down frisk of defendant's outer clothing to search for weapons. During the frisk, Officer Kaffer discovered a hard object in defendant's left rear pocket. Believing that the hard object could be a weapon, Officer Kaffer reached into the pocket and retrieved a knife with a 3-inch blade. As Officer Kaffer pulled out the knife, a plastic bag containing a powdery substance fell out of the pocket. Suspecting that the bag contained a controlled substance, Officer Kaffer placed defendant under arrest for a violation of the UCSA. The contents of the bag tested positive for methamphetamine.

Defendant was charged with possession of methamphetamine, a controlled substance. Defendant, alleging that the frisk for weapons was in violation of his rights under the fourth amendment to the United States Constitution, moved to suppress the controlled substance found during that frisk. The trial court denied the motion to suppress and entered a judgment of guilty upon defendant's "stipulation to facts sufficient to enter a guilty finding."

ISSUE AND RULING: Was a frisk justified under the totality of the circumstances? (ANSWER: Yes, rules a unanimous Court) Result: King County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS:

The Supreme Court sets the stage for its analysis of the facts by describing as follows the legal standard for conducting a frisk for weapons:

The exception relied on by the State is the one recognized in Terry v. Ohio, 392 U.S. 1 (1968), for what the court there referred to as a "stop and frisk".

In Terry, the United States Supreme Court rejected the argument that the Fourth Amendment is inapplicable to a seizure of a person short of a custodial arrest and to an accompanying brief frisk of an individual's outer clothing to search for weapons. However, the Court explained that such police action is subject only to the Fourth Amendment's requirement that searches and seizures not be unreasonable

The Court explained that the lesser Fourth Amendment burden imposed in the protective frisk context is justified by the strong government interest in police officer safety. . . .

The Fourth Amendment will be satisfied where the following requirements are met: (1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose. In this case, only the existence of a reasonable safety concern that would justify the protective frisk is at issue.

A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently dangerous." .

. . This court recently phrased the principle thusly:

[C]ourts are reluctant to substitute their judgment for that of police officers in the field. *"A founded suspicion is all that is necessary, from which the court can determine that the [frisk] was not arbitrary or harassing."*

[Some text, citations omitted; emphasis added]

The Court then turns to the facts of this case. In four pages of analysis, the Court rules that the frisk was lawful under the totality of the circumstances. In this case, the totality of the circumstances is made up of three critical fact elements, no one of which is found by the Court to be sufficient to justify a frisk by itself, but which in combination are found to be sufficient.

First, the fact that the stop was made in the hours of darkness is declared by the Court to be relevant, as follows:

The darkness made it more difficult for Officer Kaffer to get a clear view into the car defendant was driving. Thus, it would have been more difficult for Officer Kaffer to observe defendant's movements. In addition, the darkness made it more difficult for Officer Kaffer to view the surrounding area and to ascertain whether other persons, who could come to defendant's aid, or interfere with the activity, were in the area. Furthermore, an individual who has been stopped may be more willing to commit violence against a police officer at a time when few people are likely to be present to witness it.

Second, the Court declares that the fact of the officer's knowledge of the prior felony arrest helped support the frisk even though the officer could not recall the nature of the felony for which the earlier arrest had been made. The Court explains:

In answering this question, we reject the notion that an officer must have an accurate memory catalog of the exact nature of all previous felony arrests when making an instantaneous decision in the streets. Instead, we hold it is sufficient that Officer Kaffer accurately recalled an arrest for a crime serious enough to be a felony. It is not necessary that an officer take time to sort out the elements of each felony in circumstances where a quick decision is called for to preserve the safety of the officer and others.

The third circumstance helping to justify the frisk was the officer's remembrance of the presence of the ammunition and holster on the occasion of the earlier arrest. This remembrance, when combined with the state of darkness and the officer's knowledge that the person had recently been arrested for a felony, provided justification for the frisk, the Court holds, because "such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others."

LED EDITOR'S COMMENT:

Stop-and-frisk cases often have limited precedential value because they are decided on a case-by-case basis on the totality of the circumstances. However, the language in the Collins opinion which we have emphasized in italics at the top of page 9, and which our Court quoted from its earlier decision in State v. Belieu, is very significant. When the

Court says "[A] founded suspicion is all that is necessary, from which the court can determine that the [frisk] was not arbitrary or harassing" the Court is in effect stating that, while the standard for lawfulness of a frisk cannot be quantified or stated in absolute, considerable deference should be given the officer's articulation of his or her reasons for frisking. So long as there is objective evidence that the frisk was done for reasons that are neither arbitrary nor harassing, the frisk should be upheld. REMINDER: As always, officers must remember that their written reports of incidents are critical in the later review of their actions in those incidents. The reward for a thorough report may be a result like that obtained in this case.

USE OF "LINE TRAP" FOR SOURCE OF PHONE CALLS NOT COVERED BY CHAPTER 9.73 PRIVACY LAW; COMPUTER HACKER SEARCH WARRANT FAILS PARTICULARITY TEST

State v. Riley, 121 Wn.2d 22 (1993)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

Northwest Telco Corporation ("Telco") is a company that provides long distance telephone service. Telco's customers dial a publicly available general access number, then enter an individualized 6-digit access code and the long distance number they wish to call. A computer at Telco's central location then places the call and charges it to the account corresponding to the entered 6-digit code.

On January 9, 1990, Cal Edwards, Director of Engineering at Telco, observed that Telco's general access number was being dialed at regular intervals of approximately 40 seconds. After each dialing, a different 6-digit number was entered, followed by a certain long distance number. Edwards observed similar activity on January 10, between 10 p.m. and 6 a.m. From his past experience, Edwards recognized this activity as characteristic of that of a "computer hacker" attempting to obtain the individualized 6-digit access codes of Telco's customers. Edwards surmised that the hacker was using a computer and modem to dial Telco's general access number, a randomly selected 6-digit number, and a long distance number. Then, by recording which 6-digit numbers enabled the long distance call to be put through successfully, the hacker was able to obtain the valid individual access codes of Telco's customers. The hacker could then use those codes fraudulently to make long distance calls that would be charged improperly to Telco's paying customers.

On January 11, Edwards contacted Toni Ames, a U.S. West security investigator, and requested her assistance in exposing the hacker. In response, Ames established a line trap, which is a device that traces telephone calls to their source. By 3 p.m., Ames had traced the repeated dialing to the home of Joseph Riley in Silverdale, Washington. The dialing continued until 6 a.m. on January 12.

Ames contacted the Kitsap County Prosecutor's Office on January 12, 1990, and was directed to [an investigator]. [The investigator] filed an affidavit for a search warrant after interviewing both Ames and Edwards. The affidavit stated that hackers program computers to conduct the repeated dialing of random numbers and, after discovering valid codes, often transfer them to notebooks, ledgers, or lists. Because the telephone company's system that processes long distance calls

is a computer "switch", the crime listed in the affidavit was computer trespass. That day, [the investigator] obtained a search warrant authorizing the seizure of

any fruits, instrumentalities and/or evidence of a crime, to-wit:
notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.

The warrant did not state the crime of computer trespass, or any other crime.

On January 16, [the investigator] arrived at Riley's house with the search warrant. Prior to executing the search, [the investigator] informed Riley of his rights, although Riley was not arrested. [The investigator] then questioned Riley about the occupancy of the house to ascertain which occupant was responsible for the hacking. According to [the investigator], "[Riley] stated that his children did not have access to the modem and that he was the one that used the compute and modem." Riley then admitted having attempted to obtain Telco customer access codes. Riley told [the investigator] that he had tried to obtain the access codes for 3 days in the past week, but that he was not certain of the specific dates. This was consistent with the telephone company's observation of hacking activity on January 9, 10 and 11. Riley is also reported to have said that had he been successful in discovering valid access codes, he might have used the codes to make personal long distance telephone calls.

Evidence discovered during the subsequent search included four stolen access codes, a computer program that conducted the rapid repeated dialing and entry of random 6-digit numbers, handwritten notes detailing Riley's hacking activity, and a how-to-hack manual.

Riley was later charged with and convicted of two counts of computer trespass against Telco, one count of computer trespass against another long distance telephone company, ITT Metromedia, and four counts of possession of a stolen access device. The conditions of Riley's sentence included that he not associate with hackers, communicate with computer bulletin board services, or possess a computer.

ISSUES AND RULING: (1) Was the warrant sufficiently particular in its description of things to be seized? (ANSWER: No); (2) Did the phone company's use of a line trap violate the Privacy Act, chapter 9.73 RCW? (ANSWER: No) Result: reversal of Kitsap County Superior Court convictions of possession of stolen property (four counts) and one count of computer trespass; affirmance of convictions of two other counts of computer trespass.

ANALYSIS:

(1) Particularity of Description

On the Fourth Amendment particularity issue, the Court declares:

The Fourth Amendment mandates that warrants describe with particularity the

things to be seized. When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable. In such cases, the search must be circumscribed by reference to the crime under investigation; otherwise, the warrant will fail for lack of particularity. . . .

In the present case, the warrant used to search Riley's home permitted the seizure of broad categories of material and was not limited by reference to any specific criminal activity. We therefore hold that the warrant was overbroad and invalid.

The State contends that the warrant is valid because the executing officer . . . had personal knowledge of the crime being investigated. It is true that the executing officer's personal knowledge of the place to be searched may "cure" minor, technical defects in the warrant's place description. For example, the officer's knowledge of the place to be searched will excuse the transposition of address numbers. However, where the inadequacy arises not in the warrant's description of the place to be searched but rather in the things to be seized, the officer's personal knowledge of the crime may not cure the defect. This is so because the purpose of a warrant is not only to limit the executing officer's discretion, but to inform the person subject to the search what items the officer may seize.

For the same reason, the State's assertion that the search was not executed overbroadly is irrelevant. Because the person whose home is searched has the right to know what items may be seized, an overbroad warrant is invalid whether or not the executing officer abused his discretion.

The State also contends that the warrant's overbreadth is cured because the affidavit limited the search to evidence of the particular crime of computer trespass. However, an affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with "suitable words of reference". If the affidavit is not attached to the warrant and expressly incorporated therein, it may not cure generalities in the warrant even if some of the executing officers have copies of the affidavit. . . .

The affidavit for the Riley warrant was not attached to the search warrant or incorporated in the warrant by reference. Therefore, although the affidavit mentioned "computer trespass" as the crime under investigation, it cannot validate the overbroad warrant.

[Some citations omitted]

(2) Chapter 9.73

On the question of whether the phone trap was a violation of the Privacy Act, the Court's primary focus is on whether the trap was the recording of a "private communication". The court declares in this regard:

RCW 9.73.030(1)(a) provides in part that
it shall be unlawful for any . . . corporation . . . to intercept, or record any:
(a) Private communication transmitted by telephone . . . between two or

more individuals . . . by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication[.]

Because RCW 9.73 does not define "private communication", courts must give the term its ordinary and usual meaning. The ordinary meaning of "communication" is "the act . . . of imparting or transmitting" or "facts or information communication".

Here, the "line trap" traced the hacking activity to, and discovered nothing more than, Riley's telephone number. A telephone number, unless it is itself communicated, does not constitute a "communication". Therefore, discovering Riley's telephone number via a tracer does not implicate RCW 9.73.030(1)(a).

Riley urges that State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)[**Aug. '86 LED:04**] dictates a contrary determination. We disagree. In Gunwall, this court held that a pen register records a "private communication" under RCW 9.73. A pen register is a device that "identif[ies] all local and long distance numbers dialed, whether the call is completed or not." Although a pen register does not intercept spoken words, it does record an exchange of information -- the dialing from one telephone number to another. A pen register is thus "comparable in impact to electronic eavesdropping devices in that it . . . may affect other persons and can involve multiple invasions of privacy". In contrast, all that is learned from a tracer is the telephone number of one party, the party dialing. A pen register may therefore be reasonably viewed as recording a "private communication", whereas a tracer may not.

[Some citations omitted]

The Court also holds in the alternative that the phone trap was permissible under the special "common carrier" exception at RCW 9.73.070 exempting certain activities of phone companies and other common carriers.

LED EDITOR'S NOTES: Other rulings in Riley include the following: (1) the Court holds that computer trespass was a proper charge under the facts of this case, rejecting defendant's argument that RCW 9.26A.110, which deals with telephone fraud, was the only appropriate statute to cover his style of computer hacking activity; the court also points out in this part of its analysis that its interpretation does not criminalize the mere act of repeated dealing of a busy telephone number "because a computer trespass conviction requires a concomitant intent to commit another crime . . ."; (2) the Court also rejects defendant's challenge to three of the conditions of his sentence, finding to be reasonable the trial court's prohibitions on: (a) owning a computer; (b) associating with other hackers; and (c) communicating with computer bulletin boards. On the other hand, the Supreme Court passes on the chance to decide if Washington courts should recognize a good faith exception to the exclusionary rule, noting that the issue was not raised in the trial court proceedings.

LED EDITOR'S COMMENT: The error in the drafting of the Riley search warrant was a simple oversight. The warrant no doubt would have satisfied the State Supreme Court if it

had simply specified additionally that the items being sought related to the "crimes of computer trespass (chapter 9A.52 RCW) and/or telephone fraud (chapter 9.26A RCW)."

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **DNA TYPING EVIDENCE ADMISSIBLE IF VALID PROBABILITY STATISTICS SHOW THE MATCH IS NOT COINCIDENTAL** -- In State v. Cauthron, 120 Wn.2d 879 (1993) the State Supreme Court, in a 6-2 decision, rules that DNA typing is generally accepted in the scientific community, and therefore evidence of DNA typing generally can meet the "Fyre test" for admissibility of scientific evidence. However, the Court rules that in Cauthron's trial the State failed to present sufficient evidence of the DNA population database on which the expert based his "match" opinion (i.e., his opinion that the DNA was defendant's). Without more evidence on the underlying database, only could conclude that the match was coincidental, the Court appears to say. Accordingly, the case is remanded to the trial court to take additional evidence on the expert's population database.

Result: Snohomish County Superior Court convictions (seven counts) of first degree rape reversed and case remanded to trial court. Apparently, if the trial court determines that the database testimony is sufficient to support the expert's "match" conclusion, then the convictions will be reinstated without a new trial. If not, then presumably a new trial will be necessary.

LED EDITOR'S NOTE: We realize that we haven't provided much in this LED entry in the way of explanation of the DNA typing method or the controversy over its use. The majority's lengthy opinion provides a good technical explanation; for another good readable explanation see the article in the June 1990 FBI Law Enforcement Bulletin beginning at page 26.

(2) **"BATTERED CHILD SYNDROME" MEETS SCIENTIFIC EVIDENCE STANDARD; SYNDROME EVIDENCE MAY BE ADMITTED TO HELP PROVE SELF-DEFENSE** -- In State v. Janes, 121 Wn.2d 220 (1993) the State Supreme Court rules that in Mr. Jane's appeal of his murder and assault convictions expert testimony regarding the "battered child syndrome" (like expert testimony on the "battered woman syndrome") has sufficient support in the scientific community to be admitted in support of a criminal defendant's self-defense theory.

Addressing the question whether the trial court erred in not submitting Janes' self-defense theory to the jury, the Court explains:

[T]estimony that a defendant suffers from the battered child syndrome, standing alone, does not ensure that the defendant's belief in imminent harm was reasonable. "That the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury." In short, the existence of the battered child syndrome does not eliminate the defendant's need to provide some evidence that his or her belief in imminent danger was reasonable at the time of the homicide.

The concept of imminence was well defined by the Court of Appeals in [State v. Walker, 40 Wn. App. 658 (1985)]:

The evidence must establish a confrontation or conflict, not instigated or provoked by the defendant, which would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe that there was *imminent danger* of great bodily harm about to be inflicted.

Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out. Especially in abusive relationships, patterns of behavior become apparent which can signal the next abusive episode.

It is also important to distinguish "imminent harm" from "immediate harm". These two words have divergent meanings:

imminent . . . ready to take place : near at hand : . . . hanging threateningly over one's head : menacingly near . . .

immediate . . . occurring, acting, or accomplished without loss of time : made or done at once . . .

The statute only requires that the harm faced by the defendant be imminent. RCW 9A.16.050. That the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of the defendant's perception of imminent harm. Even an otherwise innocuous comment which occurred days before the homicide could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode.

Applying these concepts to the case before us, we conclude that the trial court's consideration of the motion for a self-defense instruction was incomplete. The trial court denied the requested instruction because it believed that the comments of Walter the night prior to, and the warning of Andrew's mother the morning of, the homicide were not sufficiently aggressive and were too far removed from the homicide to justify a self-defense instruction. However, there is nothing in the record before us which indicates that the trial court considered the defense evidence in light of Andrew's subjective knowledge and perceptions. In the defendant's offer of proof, there was considerable evidence as to the interaction between long-term abuse, self-defense and the battered child syndrome. Also, the trial court may have given undue consideration to the length of time between the alleged threat and the homicide; the justifiable homicide statute requires imminence, not immediacy.

Thus, we are unable to determine if this evidence was properly considered and evaluated by the trial court in denying the proposed instruction. We therefore remand this case to the trial court. On remand, the trial court is to reconsider its ruling denying the self-defense instruction in light of the principles discussed in this opinion. If the trial court determines that some evidence existed to justify a self-defense instruction, then it should order a new trial. Otherwise, Andrew's

conviction stands, subject to a continuation of the normal appeals process.

[Some citations omitted]

Result: Snohomish County Superior Court conviction for second degree murder reversed; case remanded for trial court's reconsideration of whether a self-defense instruction should have been given; if so, Janes must be retried for murder. Two convictions of second degree assault, one for shooting at responding police officers and the other for shooting at a bystander are not affected by the self-defense issue and will stand regardless of what happens on the murder charge.

(3) STATUTE MANDATING HIV TESTING OF ALL CONVICTED OF SEXUAL OFFENSES APPLIES TO BOTH JUVENILE AND ADULT SEXUAL OFFENDERS AND IS CONSTITUTIONALLY VALID -- In In Re A, B, C, D, E, 121 Wn.2d 80 (1993) the State Supreme Court holds that RCW 70.24.340(1)(a), which mandates AIDS testing of all convicted sexual offenders, applies to both juveniles and adults adjudged to have committed sexual offenses under chapter 9A.44 RCW.

A 5-2 majority of the Court also holds that the statute meets Fourth Amendment requirements, as well as state and federal constitutional privacy restrictions, even though the statute mandates testing without any requirement that the State produce evidence indicating a likelihood of an exchange of bodily fluids during the particular sexual offense in a given case. Justice Utter is joined in a partial dissent by Justice Johnson on the constitutional issues. They fail to convince the majority that the State should not be allowed to obtain HIV testing following a sex offense conviction or adjudication unless the State can show that it is probable that there was an exchange of bodily fluids during the crime.

Result: Whatcom County Superior Court (juvenile court) orders directing five defendants to submit to HIV blood tests affirmed.

(4) LAW TO PROTECT ID OF CHILD SEXUAL ASSAULT VICTIMS VIOLATES STATE CONSTITUTIONAL MANDATE FOR OPEN ACCESS TO COURTS -- In Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993) the State Supreme Court unanimously invalidates section 9, chapter 188, Laws of 1992, a statute which would have required courts to ensure that information identifying child victims of sexual assault is not disclosed to the public or press during the course of judicial proceedings or in any court records. The Court holds that section 9 is unconstitutional because it violates the public's right of open access to judicial proceedings, as guaranteed under article 1, section 10 of the Washington State Constitution. The Court does declare that under some circumstances it is permissible to close court proceedings or court documents to protect child victims of sexual assault from further harm and to protect their rights to privacy. However, such closure must follow guidelines established under past cases interpreting Washington Constitutional article 1, section 10; because the 1992 legislation does not permit trial courts to conform to those guidelines, it is unconstitutional, the Court holds.

Result: affirmance of King County Superior Court order permanently enjoining enforcement of section 9 of chapter 188, Laws of 1992.

WASHINGTON STATE COURT OF APPEALS

CITIZEN-POLICE CONVERSATION DURING ARREST OF CITIZEN IN HIS FRONT DRIVEWAY HELD NOT "PRIVATE" UNDER COMMUNICATIONS PRIVACY LAW (CH. 9.73 RCW); HENCE CITIZEN'S TAPING OF CONVERSATION WITH POLICE NOT PROSCRIBED BY LAW

State v. Flora, 68 Wn. App. 802 (Div. I, 1992)

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

Flora is an African-American residing in [a Skagit County city]. Flora contends that on one occasion one of his neighbors called his daughters "nigger bitches" while the girls were playing in their front yard. The older of the two girls threw mud on the neighbor's car in retaliation. The police were summoned to arrest the girls for malicious mischief. When they arrived the girls became upset and Flora sent the younger one into the house, at which point he was arrested for obstruction of justice.. He maintains that he was handled roughly and called "nigger" during his arrest. His daughter was also arrested. The charges against Flora and his daughter were ultimately dismissed, but his neighbor obtained a restraining order against Flora and his family.

On September 20, 1989, Flora stood in the middle of the street in front of his neighbor's house and took pictures of a friend, Norma Sherrin, driving his car in front of his house. The neighbor, concluding that he was photographing her house and possibly violating the protective order as well, called the police.

The police officers who arrived . . . were the same ones involved in Flora's 1988 arrest. They informed Flora that his neighbor was complaining that he had approached her home and photographed it in violation of the protective order. Flora explained that he had been standing in the road in front of his neighbor's house, at a distance of over 20 feet as required in the order. He also told them he was taking pictures of his car in order to establish the distance of the car to his house for use in a different court matter. He offered to show the photographs to the police officers, but they refused. Instead, they arrested him for violating the restraining order. Flora was never convicted of that offense.

During his conversation with the officers, Flora and Sherrin entered the house to retrieve the protective order in order to show the officers that the limit was 20 feet rather than 25 feet. They not only brought out the order but a pile of other papers as well. Hidden among them was a small tape recorder. Flora maintains that he wanted to record the conversation because he feared the deputies would assault him and use racial slurs as they had done in the past. He explains that he felt particularly apprehensive because the officers refused to look at the pictures he had taken, pictures which, he thought, would prove he had not been photographing his neighbor's house.

When Flora and Sherrin came out of the house the officers proceeded with the arrest. The stack of papers was placed on the hood of the police car. After Flora was placed in the car, Sherrin picked up the papers and one of the officers saw the tape recorder. Sherrin was arrested and the tape recorder confiscated.

At trial, Flora testified that although the police officers made no verbal threats, their manner made him feel threatened.

Sherrin testified that she had driven Flora's car down the road while Flora photographed it, after which they left for a short time, and that they found the police officers waiting for them when they returned to Flora's house. She also testified that during her own arrest she was twisted and lifted off the ground.

The State charged Flora with recording his arrest, a private conversation, in violation of RCW 9.73.030. The matter was tried before a jury in district court. At the close of testimony, defense counsel made a motion to dismiss for failure to prove a prima facie case, arguing that the conversation did not qualify as private, and that there could be no cause of action of these facts. The court denied the motion and the jury proceeded to convict Flora. Flora made an unsuccessful appeal to the superior court.

ISSUE AND RULING: Was the conversation between Flora and the police during his arrest in his front driveway a "private" conversation covered by chapter 9.73 RCW? (**ANSWER:** No) **Result:** Skagit County Superior Court order affirming a district court conviction under chapter 9.73 RCW reversed. **Status:** at **LED** deadline a petition for review filed by the prosecutor was pending in the State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9.73.030, the statute under which Flora was convicted, provides in pertinent part:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

. . .

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, . . . may be recorded with the consent of one party to the conversation.

The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.

Determining whether a given matter is private requires a fact-specific inquiry. . . .

Although the term "private" is not explicitly defined in the statute, Washington courts have on several occasions construed the term to mean:

secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly; not open or in public.

. . . That definition is consistent with the Legislature's purpose in enacting the privacy act, to protect individuals from the dissemination of illegally obtained information. Our Supreme Court has explained that the statute

expresses a legislative intent to safeguard the *private conversations* of citizens from dissemination in any way. The statute reflects a desire to *protect individuals from the disclosure of any secret illegally uncovered by law enforcement.*

[Italics by Court]

The City advances no persuasive basis for its contention that the conversation between the officers and Flora should be considered private. We note in particular that in none of the cases it cites as controlling were public officers asserting a privacy interest in statements uttered in the course of performing their official and public duties. Rather, the question in those cases was whether the *personal* privacy of an individual was improperly invaded. The State now urges us to distort the rationale of those cases to support the proposition that police officers possess a personal privacy interest in statements they make as public officers effectuating an arrest.

Our research into other legal sources, in which a literature on the notion of privacy may be said to exist, has produced no cases which support the State's position. In Fourth Amendment analysis, and tort theory, for example, the question whether a matter is private occasions a threshold inquiry into whether the matter at issue ought properly be entitled to protection at all:

It is clear, however, that there must be something in the nature of prying or intrusion, . . . *It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private.*

The conversation at issue fails this threshold inquiry; the arrest was not entitled to be private. Moreover, the police officers in this case could not reasonably have considered their words private. **[COURT'S FOOTNOTE: *We note, incidentally, that the police officers testified at trial that they did not consider the conversation private.*** Because the exchange was not private, its recording could not violate RCW 9.73.030 which applies to private conversations only. We decline the State's invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity. The trial court erred in denying Flora's motion to dismiss. Flora's conviction is reversed and the case dismissed.

[Case citations omitted]

LED EDITOR'S COMMENT:

Many times during the past 15 years we have stated our personal view in conversations with Washington officers that, unless they have gotten written court or supervisor authorization under the terms of chapter 9.73, they should not secretly record conversations during their contacts with persons in open, public areas, such as the roadside. We have stated this view because we have had the belief that the Washington courts would find that many of these conversations are "private", even though they occur in a public place. We therefore have opined that if such conversations are to be recorded, the officers should first advise, on the tape, that the conversation is being recorded. (See RCW 9.73.030 which presumes consent where such an announcement is made, but see also RCW 9.73.090(1)(b) which requires a more detailed announcement if any taping is to be made of questioning which follows an arrest.) Our caution has consistently brought a response from out-of-state officers who had re-located to Washington. They have advised that such tape recordings, permitted under the laws of the state of their former employment, had proven particularly useful in the disciplinary context for defending themselves against false complaints brought against them by citizens, and had also proven useful occasionally in criminal prosecutions where officers had been assaulted during the contact.

The Flora opinion gives us pause in regard to this cautionary view, but we are sticking to it. We recognize that it can be argued that if the conversation with Flora during the arrest in his driveway was not "private" for purposes of prosecution of Flora for making a secret recording, such a conversation also should not be "private" in the otherwise identical circumstances where police make the secret recording. Thus, while the language of the Flora opinion is couched in the perspective of the defendant, it seems illogical to conclude that the same conversation is "not private" for purposes of the defendant's tape recorder but is "private" for purposes of a law enforcement recorder. We are told that, with approval of legal counsel, a few Washington law enforcement agencies have begun using audio-video equipment to record DWI stops; the Flora decision will help to support the taping of what should be deemed to be non-private conversations on the street.

Nonetheless, we have not changed our view. We still feel that if the officer wishes to make a tape recording of a conversation during a street contact, the officer should do so only after announcing on the tape that the conversation is being recorded. Also, if the person objects to the taping, the recorder should be shut off, we believe. As always, we urge consultation with local prosecutors and legal advisors.

Remember also RCW 9.73.090(1)(b), mentioned above. If a suspect is subjected to a custodial arrest (as opposed to a mere detention for questioning or for purposes of writing a citation), then the officer must comply with the special requirements of section 090 for obtaining a recorded, post-arrest statement. Subsection (1)(b) of RCW 9.73.090 provides:

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the

recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording; . . .

Finally, we remember being advised by former California officers their belief that under California law a patrol car conversation is never private, and therefore officers could record the conversation between two suspects left alone in the back seat of a patrol car. We're told that this can be a very fruitful endeavor, particularly with juvenile suspects trying to get their story straight. However, there is no way to read Flora or chapter 9.73 to permit such recording. It is one thing to say that a citizen's conversation with a uniformed officer on a public street is not "private." We think it is quite another thing to say that a one-on-one, citizen-citizen conversation, even if it takes place in the back of a patrol car, is "not private."

NEXT MONTH

In the August 1993 LED, we begin our excerpts and notes on 1993 Washington legislative enactments of interest; we will also digest recent court decisions, including State v. Thomas, ___ Wn.2d ___ (1993), where the State Supreme Court has affirmed a Court of Appeals decision [65 Wn. App. 347 (Div. I, 1992), Oct. '92 LED:16] holding that the execution period for search warrants for controlled substances is the same as that for search warrants for other crimes, i.e., 10 days, and that the provision of chapter 69.50 RCW requiring return of service within 3 days of execution of a warrant does not establish a special 3-day rule for execution of such warrants.

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