

March, 1993

**HONOR ROLL**

*397th Session, Basic Law Enforcement Academy - November 3, 1992 through January 29, 1993*

*President: Deputy Joseph L. Lusignan, Jr. - Benton County Sheriff's Department*  
*Best Overall: Officer Randolph Kyburz - Seattle Police Department*  
*Best Academic: Officer Randolph Kyburz - Seattle Police Department*  
*Best Firearms: Officer Irving Ramirez - Neah Bay Police Department*  
*Best Mock Scenes: Officer Thomas Longtine - Buckley Police Department*

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*Corrections Officer Academy - Class 177 - January 4 through 29, 1993*

*Highest Overall: Officer Kay Y. Walker - Skagit County Jail*  
*Highest Written: Officer Richard L. Hogg - McNeil Island Corrections Center*  
*Highest Practical Test: Officer Kay Y. Walker - Skagit County Jail*  
*Highest in Mock Scenes: Officer Thomas L. Dickerson - Kitsap Island Jail/Work Release*  
*Officer Robert G. Haberman - Washington Corrections Center*  
*Officer Paula B. Koughn - Kittitas County Corrections*  
*Highest Defensive Tactics: Officer Eric V. Harris - McNeil Island Corrections Center*

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*Corrections Officer Academy - Class 178 - January 4 through 29, 1993*

*Highest Overall: Officer Jim J. Flynn - Washington Corrections Center*  
*Highest Written: Officer Brian K. Swalandar - Pierce County Jail*  
*Highest Practical Test: Officer Jim J. Flynn - Washington Corrections Center*  
*Highest in Mock Scenes: Officer Thomas A. L'Heureux - McNeil Island Corrections Center*  
*Highest Defensive Tactics: Officer Chad V. Proctor - Twin Rivers Corrections Center*

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**MARCH LED TABLE OF CONTENTS**

**MIRANDA NOTE -- NO SPECIAL FIELD SOBRIETY TEST WARNINGS REQUIREMENT ..... 2**

**WASHINGTON STATE SUPREME COURT ..... 3**

PSYCHOLOGIST'S POST-CONVICTION INTERVIEW AT PRISON NOT SUBJECT TO  
MIRANDA  
State v. Post, 118 Wn.2d 596 (1992) ..... 3

**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT ..... 6**

DELAYED REPORT OF RAPE BY ALZHEIMER'S SUFFERER NOT EXCITED UTTERANCE  
State v. Chapin, 118 Wn.2d 681 (1992) ..... 6

**WASHINGTON STATE COURT OF APPEALS ..... 9**

OFFICER'S CONTACT, DRUG INQUIRY, CONSENT REQUEST ADD UP TO "SEIZURE" <u>State v. Soto-Garcia</u> , 68 Wn. App. 20 (Div. II, 1992) .....	9
<b>BRIEF NOTES FROM WASHINGTON STATE COURT OF APPEALS</b> .....	12
LEOFF I OFFICER IS DISABILITY RETIRED, CAN'T PERFORM STRENUOUS ACTIVITIES <u>Morrison v. Retirement Systems</u> , 67 Wn. App. 419 (Div. I, 1992) .....	12
LISTENING IN AT TIPPED PHONE RECEIVER NOT BARRED BY CH. 9.73 RCW <u>State v. Corliss</u> , 67 Wn. App. 708 (Div. I, 1992) .....	12
CONSENT TO ENTER HOME NOT VALID WHERE GIVEN AFTER OFFICERS STATE THEY'LL "GO GET A WARRANT IF CONSENT DENIED," AND PC FOR SEARCH WARRANT ABSENT <u>State v. Apodaca</u> , 67 Wn. App. 736 (Div. III, 1992) .....	13
MENTAL DISORDER STATUTE JUSTIFIES EMERGENCY DETENTION, LIMITED SEARCH OF HANDBAG; THEN PROBABLE CAUSE ARREST JUSTIFIES SEARCH OF SMALL POUCH INSIDE HANDBAG AS A SEARCH INCIDENT TO ARREST (ALL CONTAINERS SUBJECT TO SEARCH) <u>State v. Lowrimore</u> , 67 Wn. App. 949 (Div. I, 1992) .....	15
PRETEXT, PLAIN VIEW RULINGS FOR STATE; NO PRETEXT IF SEARCH OBJECTIVELY JUSTIFIED, PLAIN VIEW RULE DOES NOT REQUIRE "INADVERTENCE" <u>State v. Goodin</u> , 67 Wn. App. 623 (Div. II, 1992) .....	17
IMPEACHING DEFENDANT WITH UNLAWFULLY SEIZED EVIDENCE PERMITTED UNDER BOTH FEDERAL AND STATE CONSTITUTIONS; EXCLUSIONARY RULE A SHIELD, NOT A SWORD <u>State v. Greve</u> , 67 Wn. App. 166 (Div. I, 1992) .....	18
BANK LOSES SECURITY INTEREST IF BANK IGNORES VEHICLE FORFEITURE NOTICE <u>Key Bank of Puget Sound v. City of Everett</u> , 67 Wn. App. 914 (Div. I, 1992) .....	19
LIPS MAY BE AN "INTIMATE PART" UNDER INDECENT LIBERTIES STATUTE <u>State v. R.P.</u> , 67 Wn. App. 663 (Div. I, 1992) .....	19

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## **MIRANDA NOTE**

### **MIRANDA NOTE -- NO SPECIAL FIELD SOBRIETY TEST WARNINGS REQUIREMENT**

At the close of our "Miranda Note" in last month's LED (at 3), we promised to return this month to a reported recent bizarre ruling by a district court judge. The ruling was apparently to the effect that, regardless of Miranda applicability under the custody/arrest rule, officers must warn persons prior to field sobriety testing: (a) that they have a right to refuse to perform such tests and (b) that their refusal of the tests may not be used against them. While it is true that one has a right to refuse to perform such tests and that one's refusal is not admissible evidence, there is no such

warnings requirement.

Being charitable, we believe the erring district court judge may have made his error based on a misreading of the case of Seattle v. Personeous, 63 Wn. App. 461 (Div. I, 1991). In Personeous, in discussion not pertinent to resolution of the case, the Court of Appeals noted correctly that one has a right to refuse field sobriety tests. However, neither Personeous nor any other case that we have seen anywhere even suggests that special field sobriety test warnings are required.

What the erring district court judge apparently failed to realize was that the warnings required under Miranda constitute the exception to the Fifth Amendment rule. The general rule is that there can be no Fifth Amendment protection against self-incrimination unless the person himself or herself invokes the protection. See State v. Post, 118 Wn.2d 596, 605 (1992). The Miranda warnings requirement is thus the exception to the rule. The singular law enforcement exception to the Fifth Amendment rule was established in the bombshell 1966 U.S. Supreme Court decision in Miranda v. Arizona, and no similar or related exceptions related to law enforcement-citizen contacts have been created by case law since.

A second warnings requirement (not linked to the Fifth Amendment) is established by Washington Court Rule and mandates a warning about the right to counsel after a person is formally arrested.

A third warnings requirement -- the implied consent warnings requirement -- (also not linked to the Fifth Amendment) has been expressly established by statute. There are no other such warnings requirements, and the district court judge was way out of line in trying to establish a new rule.

Two examples of situations where no warnings are required help illustrate that the district court judge was off the mark in his ruling which appeared to be mistakenly grounded in the Fifth Amendment: (i) consent to search may be obtained under Fourth Amendment doctrine without advising a person of his or her right to refuse consent (although such a warning helps show voluntariness of the consent) see Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and (ii) countless cases recognize that under the Fifth Amendment officers may lawfully contact people on the street and talk to them in a noncoercive way without warning them that they are not legally required to cooperate or may first consult counsel.

In our view there is no more case law support for the district court judge's ruling than there is for a rule that would require that all police cars have posted warning signs (and/or that all officers make periodic loudspeaker warnings) that citizens need not cooperate with them unless the officers have at least reasonable suspicion to believe the citizens have broken the law. We hope this sounds absurd and unreal and does not instead inspire another district court judge to try to create yet another warnings rule.

We assume that prosecutors and officers are not tolerating such silliness as the district court ruling discussed above and that appropriate appeals will be taken. We ask officers to let us know if this special field-sobriety-test ruling is a continuing problem.

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**WASHINGTON STATE SUPREME COURT**

**PSYCHOLOGIST'S POST-CONVICTION INTERVIEW AT PRISON NOT SUBJECT TO**

## MIRANDA

State v. Post, 118 Wn.2d 596 (1992)

Facts and Proceedings: (Excerpted from Washington Supreme Court opinion)

On October 10, 1988, Charles Post was convicted of first degree rape and burglary. The trial court imposed an exceptional sentence of 180 months (15 years) and listed four reasons as justification: (1) deliberate cruelty, (2) violation of the victim's zone of privacy, (3) future dangerousness, and (4) protection of the public.

The convictions arose from events that occurred on February 20, 1988. On that morning, shortly before 8 a.m., 15-year-old M awoke and was confronted in her bedroom at her parents' home by Charles Post. Post tried to choke M and then raped her. When he left the residence, he took a camera and camera bag that belonged Tom's sister. Post was on parole for two prior first degree rape convictions when he committed the 1988 rape and burglary. Post did not testify at his trial.

The sentencing hearing was held on November 9, 1988. Post filed a notice to dispute material facts. The State presented testimony from Dr. Brett Trowbridge, a psychologist, . . . [and] a copy of a report that Dr. Trowbridge prepared after interviewing Post in September 1980. Post objected . . . Post's objection against Dr. Trowbridge's testimony was based on the Fifth Amendment privilege against self-incrimination and the psychologist-patient privilege. . . .

Dr. Trowbridge gave the court his current opinion that Post was "predatory" and had a high likelihood of reoffending if released into the community. He did not believe Post's chances for successful treatment were good. Trowbridge's opinion was based on the 1980 interview and Post's conduct since 1980. Post's refusal to admit his guilt in committing the most recent offense was a factor in Trowbridge's opinion because "[p]eople who deny their pattern of sexual deviancy are almost impossible to treat".

Dr. Trowbridge was a consultant to DOC in 1980. He interviewed Post in September 1980 after Post's parole officer referred Post to Trowbridge. Post had been transferred to work release in August 1980 and his parole officer was concerned about his progress. The purpose of this interview was to evaluate Post and give a recommendation to DOC work release personnel as to Post's potential dangerousness; what Post's problems might be; how quickly he could leave work release; and his suitability for work release. Trowbridge conducted no psychological tests on Post. The interview was limited to the subject of Post's prior crimes.

Dr. Trowbridge concluded in the 1980 report that Post was potentially dangerous, recommending "close scrutiny and monitoring", noting that Post had not appreciably changed after 6 years in prison. In his report, Trowbridge concluded that Post was manipulative and showed little insight into his sexual deviancy. Post denied any sexual motivation in the rapes he committed in 1974 and contended

that the rapes were motivated by money.

During the interview Dr. Trowbridge told Post that the report would not be confidential. He routinely told individuals that his reports became part of their permanent Department of Corrections file. In testimony at the sentencing hearing, Trowbridge acknowledged that he did not anticipate that his report would be used 8 years later in a sentencing hearing and did not warn Post about such a possibility. Trowbridge also acknowledged that Post was "required" to submit to his evaluation in the sense that it was widely known that if individuals did not cooperate during the interview process, it was a factor considered against them: "There were people who refused to see me and were sent back to the institutions . . ." He did not advise Post of his Miranda rights before conducting the 1980 interview.

[Some text, one footnote omitted]

ISSUE AND RULING: Was Post in custody during the 1980 interview such that Miranda warnings should have been given him by Dr. Trowbridge? (ANSWER: No, he was not in custody for Miranda purposes) Result: King Court Superior Court conviction and exceptional sentence for first degree rape and first degree burglary affirmed.

ANALYSIS: (Excerpted from Supreme Court opinion)

The Miranda [warnings requirement] applies when the interview or examination is (1) custodial (2) interrogation (3) by a state agent. In most cases, "custodial" refers to whether the defendant's freedom of movement was restricted at the time of questioning. . . .

The Court of Appeals assumed that a person serving a prison sentence is automatically in custody for Miranda purposes. We do not agree. **"Custody" for Miranda purposes is narrowly circumscribed and requires "'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest" . . .**

The record does not indicate that Post was in "custody" in the sense meant by Miranda when the 1980 interview took place. The record does not indicate the location of the 1980 interview, but it does show that Post had work release status beginning sometime in August 1980. A person on work release is in the custody of the DOC in the sense that one is not truly free to come and go as one desires until his or her sentence expires. However, the restrictions on a convicted felon's freedom of movement while on work release do not equal the restraints on freedom of movement that accompany formal arrest.

The traditional "custody" analysis of Miranda is not appropriate when the interview or questioning may have occurred in a prison setting or the person being questioned is serving a criminal sentence. All convicted felons serving their sentence are in "custody" because their freedom of movement is "restricted" until they have served their sentence. When the person being interviewed is serving a prison sentence, it is appropriate to analogize to the cases applying Miranda to

questioning of prisoners in prison. These cases [citations omitted by LED Editor] note that traditional Miranda "custody" analysis leads to the anomalous result of requiring Miranda warnings anytime a prison official desires to speak with an inmate. Instead, these cases consider the circumstances and setting of the interview to see if the inmate was subjected to more than the usual restraint to depart. In particular, they look for some act which places further limitations on the prisoner's already limited freedom of movement.

Applying this test, we note that Post does not suggest that he was physically restrained from leaving the interview area or bound during the interview. See [U.S. v. Conley, 779 F.2d 970 (4th Cir. 1985)] (questioning of handcuffed inmate awaiting medical treatment after being involved in a prison fight did not require Miranda warnings). He was on work release and the psychological pressure to stay and answer questions in order to preserve that status suggests some degree of psychological "restraint" motivated him to attend or prevented him from breaking off the interview.

A defendant's assertion of psychological compulsion alone is not enough to support a finding that the defendant was in custody for Miranda purposes. The defendant must show some objective facts indicating his or her freedom of movement was restricted. In the context of determining custody in nonprison settings, we have said that the inquiry into freedom of movement is an objective one; the psychological state of the person being questioned is irrelevant to determining if his freedom of movement was restricted. Under this analysis, we find that Post was not in "custody" for Miranda-purposes.

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

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## **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

**DELAYED REPORT OF RAPE BY CONVALESCENT CENTER'S ALZHEIMER'S SUFFERER NOT EXCITED UTTERANCE** -- In State v. Chapin, 118 Wn.2d 681 (1992) the State Supreme Court looks at the issue of whether an alleged victim's out-of-court statement was properly admitted under the excited utterance exception to the hearsay rule provided at ER 803(a)(2). The alleged victim in the case was a 69 year-old nursing home patient with advanced Alzheimer's disease who blurted out -- "raped me" -- thus accusing a male aide at the home of raping him the day before. During a 24-hour period after the alleged rape and before the report was made, the patient had seen the alleged perpetrator several times without saying anything about the alleged rape.

Justice Guy's opinion for the Court explains that there are two ways in which a person's out-of-court accusation of his alleged assailant could qualify as an excited utterance under Evidence Rule (ER) 803(a)(2): (A) as an utterance triggered by the startling event of the assault itself, or (B) as an utterance triggered by the startling event of seeing the alleged perpetrator some time after the alleged assault. The Court rules that alleged victim's report qualified under neither rationale under the facts of this case.

Three elements are necessary for a hearsay statement to qualify as an admissible excited utterance under ER 803(a)(2): (i) a startling event or condition, (ii) a statement made while still under the stress of excitement caused by the event or condition, and (iii) relationship of the statement to the event or condition.

As to the first element of proof, the Court explains that the test for whether an event is startling is a subjective one -- it depends on the declarant's subjective reaction to the event. Moreover, the startling event need not be the "principal act" underlying the prosecution -- where the victim of a crime sees the perpetrator or a picture of the perpetrator a period of time after the principal act, an utterance immediately upon seeing the perpetrator may be deemed to be "excited" if it meets the other elements of the test. The Court suggests that the victim's statement here might have met the requirements of this element of the test because he uttered the statement upon seeing Chapin, the alleged assailant.

As to the second element of proof, the Court points out that the requirement that the declarant still be under the stress of excitement from the event at the time of the statement is ordinarily the most significant element of the test in any given case. It is this element of the test which disqualified the statement here, according to the Court. We will set out the Court's analysis of this subissue below after noting the third element of the test.

As to the third requirement -- relationship of the statement to the event -- the Court points out that this is a flexible element such that "any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event" meets this requirement. Here, the victim's statement, "raped me," clearly was related to the startling event of seeing his alleged rapist.

The Court's analysis of the critical second element, the continued stress/excitement element, is as follows:

The trial court found that the alleged rape occurred "within a day or so" of Hillison's statement. Because of this time lapse, Hillison was unlikely to have still been in an excited state caused by the alleged rape itself when he made the statement. Moreover, earlier in the day, before Hillison made his statement, he had been calm and had engaged in his usual activities. This increases the danger of fabrication. Consequently, the requirement of an excited state caused by the startling event is not met if the alleged rape itself is offered as the startling event.

Alternatively, the startling event that prompted Hillison's statement might be argued to have been his seeing Chapin. The present situation may thus appear like that in United States v. Napier, where unexpectedly seeing his assailant's picture in a newspaper startled the victim into spontaneously exclaiming. Here, however, seeing Chapin was a normal part of Hillison's life at the Center, and Hillison had seen Chapin at least three times earlier that day. On each occasion Hillison expressed violent anger. When Chapin again appeared and Hillison made the statement, Hillison's initial response was again one of anger. Anger might accompany the sort of nervous excitement ER 803(a)(2) requires, but anger alone does not ensure reliability; the excited utterance exception should not be confused with some sort of "angry utterance" exception. Moreover, Hillison's statement was made after Maeford [a nursing home worker] calmed him down and in response to her question as to why he was angry with Chapin. The fact that a statement is made in response to a question will not by itself require the statement be excluded,

but it is a factor that raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.

Other factors raise similar doubts. In particular, Hillison's mental deterioration was severe. He was frequently confused and disoriented. For example, on one occasion prior to his admission to the nursing home, he tried to boil water using only a serving bowl. Upon his admission to the hospital in December 1986, from where he was later discharged to the Center, he could not identify the hospital or city he was in, could not state the date, did not know his wife's name or the names of his children, could not name objects such as a watch, bedspread, or paper, and generally responded incoherently to questions. Most importantly, Hillison's medical records describe him as engaging in "obvious confabulation" in response to questions addressed to him by the examining physician. In addition, the records state that Hillison had developed "paranoid behavior". He thought people were hiding things from him and the family was against him. Because of this paranoid behavior, the family had removed all potential weapons from the home.

The medical records also describe Hillison as being hostile and belligerent. Testimony during trial indicated that Hillison was hostile toward male attendants in particular because they were the ones who sometimes forced him to stop walking and to sit in his wheelchair. On one occasion Hillison struck a male attendant in the stomach hard enough to make him double over with pain. This combative behavior was occurring prior to the incident involving Chapin and prior to the time Chapin began working at the Center.

In sum, Hillison was confused, prone to confabulation, subject to persecutory delusions, hostile to those who tried to direct his behavior, and hostile in particular to male attendants. Hillison made the statement, "Raped me", after calming down from being angry, not from being excited, and in response to a question from his wife. In addition, Hillison's anger was elicited not by any startling event, but by seeing Chapin, which was a normal part of Hillison's life at the Center and which had occurred at least twice previously that day. These factors leave us persuaded that Hillison's statement was not a spontaneous and reliable utterance made while he was under the stress of excitement caused by the occurrence of a startling event. Accordingly, we hold the trial court erred in admitting Hillison's statement under the excited utterance exception of ER 803(a)(2).

[Some citations, one footnote, omitted]

The Court concludes by explaining that it finds the remaining evidence in the case inadequate to support the conviction.

Result: Pacific County Superior Court conviction for second degree rape reversed.

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## **WASHINGTON STATE COURT OF APPEALS**

### **OFFICER'S CONTACT, DRUG INQUIRY, CONSENT REQUEST ADD UP TO "SEIZURE"**

State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992)

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

On April 25, 1990, at approximately 11 p.m., [a] Kelso police officer came into contact with Marcelo Soto-Garcia in an area of Kelso the police officer referred to as "little Tijuana." [The officer] searched Soto-Garcia, found cocaine on his person and, consequently, placed Soto-Garcia under arrest. Soto-Garcia was eventually charged with possession of cocaine.

Soto-Garcia moved to suppress the evidence found on his person. After a hearing on his motion, the trial court made the following findings of fact:

1. That on April 25, 1990, [a] Kelso Police Officer was on routine patrol in the 400 block of Pine Street in Kelso, an area known for cocaine trafficking.
2. That at approximately 11:30 p.m. [the officer] observed Marcelo Soto-Garcia walking out of an alley. When Soto-Garcia observed [the officer], he quickly looked the other way.
3. That [the officer] pulled his car to the side of the road and Soto-Garcia voluntarily walked over to [the officer]. [The officer] did not turn on his overhead lights or order Soto-Garcia to come to him.
4. That [the officer] asked Soto-Garcia where he was coming from and where he was going to. Soto-Garcia answered these questions appropriately.
5. That [the officer] asked Soto-Garcia what his name was and Soto-Garcia voluntarily produced a driver's license. [The officer] ran an identification check on Soto-Garcia in Soto-Garcia's presence without walking away from Soto-Garcia.
6. That [the officer] then asked Soto-Garcia if he had any cocaine on his person. Soto-Garcia responded that he did not.
7. That [the officer] then asked Soto-Garcia if he could search him. Soto-Garcia responded, "Sure, go ahead."
8. That [the officer] then reached into Soto-Garcia's shirt pocket and found cocaine.

From these findings of fact, the trial court concluded:

1. That there was no seizure of the person within the meaning of the

Fourth Amendment when [the officer] approached Soto-Garcia and began to speak with him.

2. That the State has shown that Soto-Garcia freely and voluntarily gave consent to search his person, however, the request to search transformed the consensual conversation into a seizure of Soto-Garcia. Officer Tate did not have reasonable, articulable suspicion to detain Soto-Garcia pursuant to Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 St. Ct. 1968 (1968).

In his oral opinion, the trial court elaborated somewhat on its conclusions of law when it said:

I don't think there's anything wrong stopping a person and chatting . . . . But when you start asking them, 'Have you been buying drugs?' and 'Can I search you'" we're getting into the Terry situation . . . . this is a Terry stop situation, not a Terry stop.

The trial court suppressed the evidence seized from Soto-Garcia and dismissed the State's case.

ISSUES AND RULINGS: (1) Was defendant unlawfully seized without reasonable suspicion? (ANSWER: Yes); (2) Was the consent-to-search which followed the unlawful seizure of defendant tainted by the seizure? (ANSWER: Yes) Result: Cowlitz County Superior Court suppression order affirmed; dismissal of charges affirmed as well.

ANALYSIS:

(1) Seizure

On the issue of whether defendant was "seized" when the officer asked if he had drugs and requested consent to search him, the Court of Appeals declares:

"A person is 'seized' within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, his freedom of movement is restrained." . . . . Recently, in Florida v. Bostick, 59 U.S.L.W. 4708 (1991), the United States Supreme Court recited the test for determining if a seizure has occurred. It said:

We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.

Not every encounter between a policeman and a citizen amounts to a seizure. There is, for example, "nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." . . .

The fact that a police officer is in uniform and armed, without more, does not convert an encounter into a seizure requiring some level of objective justification. A police officer has not seized an individual merely by approaching him in a public place and asking him questions, if a reasonable person would have felt free to leave. . . .

Applying these concepts to the facts of this case, we hold that the trial court correctly concluded that Soto-Garcia was seized at the time the police officer asked him if he had cocaine on his person and if he could search him. Considering all of the circumstances surrounding the encounter between [the officer] and Soto-Garcia, the evidence was sufficient for the trial court to conclude that a reasonable person would not have felt free to decline the police officer's requests that he provide information regarding his activities and submit to a search. The atmosphere created by [the officer's] progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter.

The trial court's findings, as well as the record, reveal that Soto-Garcia had done nothing before being confronted by [the officer] which would suggest that he had committed any criminal act. Soto-Garcia was merely walking on the streets of Kelso in the late evening, albeit in an area apparently known for cocaine trafficking, when [the officer] observed him. For reasons known only to the officer, [he] confronted Soto-Garcia and began questioning him. After Soto-Garcia answered [the officer's] questions "appropriately," [the officer] decided to run an "identification check." While Soto-Garcia apparently produced his identification voluntarily in response to [the officer] asking him his name, there is no evidence that suggests that he consented to the identification check. Although the check revealed no outstanding warrants for Soto-Garcia, [the officer] apparently remained curious, and he asked Soto-Garcia if he had any cocaine on his person. We agree with the trial judge that at this point, Soto-Garcia was seized.

As noted above, the State has not suggested that it had any basis for seizing Soto-Garcia. This is certainly understandable because there simply was no basis for an arrest, or a so-called Terry stop. . . . The fact that Soto-Garcia looked away when [the officer] approached him certainly did not provide probable cause for an arrest. Neither can it be said that this conduct provided a well founded suspicion of wrongdoing.

[Some text, citations omitted]

## (2) Taint

After noting that in certain circumstances evidence discovered under a consent to search which follows an unlawful Terry stop may be admissible, the Court of Appeals holds that here the unlawful seizure tainted the consent. The Court indicates that two factors were significant on the taint-suppression question: (1) the contact was initiated even though defendant had not been engaged in any significant suspicious activity, and (2) consent was requested without first advising Soto-Garcia of his right to refuse consent to search. The Court's ruling suggests that, in the Division II panel's view, while a mere contact may be initiated in the absence of observation of suspicious activity, and while a consent to search for drugs may be obtained in some

circumstances without advising a person of his or her right to refuse consent, the combination of these two circumstances will generally require suppression of the results of the search.

**LED EDITOR'S COMMENT:**

We think the Court of Appeals has misconstrued Fourth Amendment doctrine here, and that these facts fall short of a "seizure" as defined by the U.S. Supreme Court under the Fourth Amendment in the Bostick case. See Sept. '91 LED:06. The officer was admittedly quite inquisitive, but in our view he did not step over the line from "mere contact" to "seizure". Nonetheless, to be safe, an officer requesting consent in this context would be well-advised to first warn the person that he or she has the right to refuse consent. Such a warning is a good idea whenever asking for consent, but ordinarily it is not mandatory as a pre-requisite to getting a voluntary consent. However, in the context of a super-inquisitive contact, as here, such a warning may be needed to satisfy reviewing courts that no "seizure" occurred and/or that the consent was an untainted voluntary one.

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**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

(1) **LEOFF I OFFICER IS DISABILITY RETIRED BECAUSE HE CAN'T PERFORM STRENUOUS PHYSICAL ACTIVITIES** -- In Morrison v. Retirement Systems, 67 Wn. App. 419 (Div. I, 1992) the Court of Appeals rules that even though a permanently disabled detective assigned in part to an IA unit of a police agency spent 80+% of his work activities in a desk job, the fact that 10 to 20% of his assigned activities were too physically strenuous for him in light of his disabilities meant that he was entitled to a disability retirement under the LEOFF I retirement system. Result: King County Superior Court order directing the disability retirement status be granted affirmed. **LED EDITOR'S NOTE**: This ruling applies only to LEOFF I personnel. Different statutes apply to LEOFF II officers.

(2) **LISTENING IN AT TIPPED PHONE RECEIVER NOT BARRED BY STATUTORY, CONSTITUTIONAL PRIVACY PROTECTIONS** -- In State v. Corliss, 67 Wn. App. 708 (Div. I, 1992) the Court of Appeals rules that the investigative technique described below (by the Court of Appeals) did not violate statutory or constitutional privacy restrictions:

In May of 1990, Tom Gibler, an informant, and Det. Watkins of the South Snohomish County Narcotics Task Force, arranged a marijuana sale with Corliss in which Det. Watkins was to pose as a supplier. In preparation, Watkins and another officer, Det. Conner, monitored phone conversations between Gibler and Corliss by standing next to Gibler as he spoke to Corliss while tipping the phone in their direction. The officers heard Corliss say he was interested in purchasing at least 2 lbs of marijuana. Gibler agreed to sell the marijuana, and set up a meeting. At the meeting, Corliss entered Watkins' undercover car and gave Watkins \$6,300 for the marijuana. Corliss stated that he was interested in at least three additional pounds and that he had "lots of customers waiting" and could "sell all you can get."

The Court of Appeals notes that prior Washington cases have held that listening at an extension phone does not violate statutory (chapter 9.73 RCW) or constitutional (article 1, section 7)

restrictions. The Court then concludes that, if listening at an extension phone does not violate statutory or constitutional privacy restrictions, then the lesser intrusion of listening at a phone receiver voluntarily tipped in a law enforcement officer's direction is not violative of the privacy provisions either.

Result: affirmance of Snohomish County Superior Court conviction for attempted possession of a controlled substance with intent to manufacture or deliver.

**(3) CONSENT TO ENTER HOME NOT VALID WHERE GIVEN AFTER OFFICERS STATE THEY'LL "GO GET A SEARCH WARRANT IF CONSENT TO ENTER IS DENIED" AND PC FOR A WARRANT ABSENT --** In State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) the Court of Appeals holds that where police threatened to "go get a warrant" while asking for consent to enter a private home, but the officers lacked probable cause to support a warrant, the resident's consent to search was invalid.

Police were investigating a possible hit-and-run (unattended) traffic incident with a report of possible alcohol involvement when they knocked at the Apodaca's front door looking for their suspect, Mr. Apodaca. The Court of Appeals declares that the police had already learned from a witness that Mr. Apodaca had apparently intentionally pushed a neighbor's car out of Mr. Apodaca's driveway with the bumper of his car, and that afterwards Mr. Apodaca had given his name and address to the owner of the other vehicle.

Mrs. Apodaca answered the door and, according to the Court of Appeals, she resisted giving consent to enter until the officers told her that they would "go get a search warrant" if she refused consent. She then consented to entry.

Mr. Apodaca was found in bed. He was argumentative on awakening and then, after saying "Well, I've had enough of this; I'll take care of this right now," he lunged for a dresser drawer which was subsequently found to contain a loaded handgun. He did not otherwise assault the officers.

Mr. Apodaca was convicted in superior court of attempted second degree assault. On appeal, however, the Court of Appeals reverses the conviction, holding that Mrs. Apodaca's consent was coerced. Because this made the entry unlawful, the gun and Mr. Apodaca's statements should have been suppressed. Without this evidence, he could not be retried for attempted assault, and the case was therefore dismissed.

The Court of Appeal's ruling apparently is not that consent is invalid whenever police threaten to "get" a warrant (although this may in fact turn out to be the rule -- see LED EDITOR'S COMMENT below.) Rather, the Court of Appeals' ruling seems to be that a threat to "get" a warrant will negate consent only if police do not actually have probable cause to get a warrant when they make the threat. Thus, the Court declares:

In this case, the officers were authorized under RCW 10.31.100(3)(a) to arrest Mr. Apodaca, without a warrant, if he violated RCW 46.52.010, which provides in part:

The operator of any vehicle which collides with any other vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address

of the operator and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice, giving the name and address of the operator and of the owner of the vehicle striking such other vehicle.

The offense does not have to be committed in the officer's presence.

[The officers] were told following their arrival at the scene that Mr. Apodaca had notified the owner of the vehicle about the incident. Mr. Apodaca complied with the statute and, therefore, the officers' threat to obtain a warrant to search the residence and arrest Mr. Apodaca was coercive. Mrs. Apodaca's reluctant consent, in response to the officers' threat to obtain a warrant, was not freely and voluntarily given.

[Citations, footnote omitted]

Result: Yakima County Superior Court conviction for attempted second degree assault reversed.

### **LED EDITOR'S COMMENTS:**

#### **1. Consent To Search Issue**

The Court of Appeals appears to have followed the line of cases which Professor LaFave describes in his Search and Seizure treatise (2nd ed. 1987) as follows:

Although not all of the cases can be explained on this basis, it may generally be said that a threat to obtain a search warrant is likely to be held to invalidate a subsequent consent if there were not then grounds upon which a warrant could issue, and likely not to affect the validity of the consent if the police then had probable cause upon which a warrant could issue. As to the latter situation, it has been expressly held that if "in fact there were grounds for the issuance of a search warrant," then "the well founded advice of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion." This proposition rests upon the conclusion that the "threat" in such circumstances does not involve any deceit or trickery, but instead accurately informs the individual of his precise legal situation. But this means that under the better view the police act at their peril in threatening to obtain a search warrant; it is not enough that their threat was made in the good faith expectation that a warrant would issue, there must in fact be probable cause.

#### **3 LaFave, Search and Seizure, Section 8.2(c).**

In the Apodaca case the Court considered the issue of whether there was PC to believe Apodaca had violated the hit-and-run statute. If PC to search for and arrest Apodaca for some other crime could have been established (maybe DWI -- there was mention of alcohol in the factual description -- or maybe malicious mischief), then presumably the officers could have gotten lawful consent after telling Mrs. Apodaca that they could "get a warrant." Nonetheless, as we've indicated in past LED's, we think that its much safer if officers say that they'll "seek a warrant" when asking for consent to search. Our State

Supreme Court has not spoken definitively on this issue and could easily take the restrictive view that saying you'll "get a warrant" inappropriately suggests that there is a rubber-stamp in the magistrate's office.

## 2. Exclusionary Rule Anomaly

Generally, if a person assaults an officer who has unlawfully arrested him or her, the person can be prosecuted for assault even though the arrest is unlawful. Whether the arrest is unlawful due to lack of PC, or due to violation of the Payton rule which limits entry to arrest, or due to some other reason, one generally has no right to resist an unlawful arrest except in defense against unlawful life-threatening force -- see State v. Holeman, 103 Wn.2d 426 (1985) April '85 LED:11. Hence, here, if Mr. Apodaca had punched the officers, he could have been prosecuted, notwithstanding the unlawfulness of the entry. See Holeman. Testimony about his physical actions would not be subject to suppression. However, the Apodaca case is somewhat anomalous in that the only evidence against him was the gun he was lunging for and his contemporaneous statement. This evidence was excluded as the fruit of the unlawful entry, and there was therefore no evidence to support the prosecution.

(4) **MENTAL DISORDER STATUTE JUSTIFIES EMERGENCY DETENTION AND LIMITED SEARCH OF LARGE HANDBAG; PC ARREST JUSTIFIES SEARCH OF SMALL POUCH INSIDE LARGER BAG AS A SEARCH INCIDENT TO ARREST** -- In State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) the Court of Appeals rules that: (1) a mother's report that her teenage juvenile daughter: (a) had knives and illegal drugs and (b) had threatened in the past to kill herself, plus (2) a responding law enforcement officer's observation of bizarre and emotional behavior by the juvenile justified both a detention of the juvenile under the mental health statute (chapter 71.05 RCW) and an emergency search of the juvenile's bag for weapons and drugs.

The Court of Appeals rules further that when the officer found several items (marijuana pipes, scales, and other paraphernalia) of drug paraphernalia loose in the bag, this fact, plus the fact of the juvenile's bizarre behavior (consistent with a recent use of drugs) gave the officer probable cause to arrest her for the possession of drug paraphernalia on the theory that the paraphernalia had been used to ingest controlled substances. See RCW 69.50.412(1). Because probable cause to arrest Lowrimore existed at that point, a small zip-up pouch inside the bag could be searched as an incident of arrest. In response to several arguments regarding applicability of the search-incident-to-arrest rule to the search of the small pouch, the Court declares:

As an incident to arrest, Olson had authority to search Lowrimore. Former distinctions and uncertainties as to the scope of a search incident to arrest of various containers such as purses, brief cases and back packs once they were in the officer's control, have been eliminated by State v. Smith, 119 Wn.2d 675 (1992), in which the court stated the rule as follows:

An object is, therefore, within the control of an arrestee for the purposes of a search incident to an arrest as long as the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest.

No exigent circumstances are required for such search, nor is the subjective intent of the officer controlling. If, as a matter of fact, there were grounds justifying the

search, the evidence need not be suppressed because the officer was unclear or even acted on an incorrect basis. Under the circumstances, it is also immaterial whether the search took place immediately before the arrest or immediately following the arrest.

Accordingly, the search of the pouch was justified as incident to the arrest of Lowrimore for possession of drug paraphernalia in what, at that point, became a criminal investigation.

Result: King County Superior Court (juvenile court) conviction/ adjudication of felony possession of methamphetamine affirmed.

### **LED EDITOR'S COMMENTS:**

#### **(1) Container Search Incident to Arrest**

The above-quoted language from Lowrimore confirms our comment on State v. Smith (Clayton Donald) 119 Wn.2d 675 (1992) in the December '92 LED at 17, where we expressed our opinion that the strange rule articulated in State v. Gammon, 61 Wn. App. 858 (Div. I, 1991) Oct. '91 LED:09 was effectively overruled in Smith. Gammon had attempted to establish for containers a search-incident-to-arrest rule that would distinguish between objects carried inside one's clothing at the time of arrest (such as wallets and compacts) [SEARCHABLE] and objects carried (or within reach) outside one's clothing at the moment of arrest [NOT SEARCHABLE].

As we pointed out in our comments when the Gammon entry appeared in the October '91 LED, the Gammon "rule" had no support in Fourth Amendment doctrine or in State Supreme Court decisions. Smith made this abundantly clear, and Lowrimore confirms that under Smith there is no such distinction among containers under the search incident rule.

All containers in the possession or within the reach of the arrestee at the moment of arrest are subject to search incident to the arrest.

#### **(2) PC Arrest For Drug Paraphernalia Possession**

The state statute at RCW 69.50.412 does not make possession of drug paraphernalia with intent to use a crime. One must either have used the drug paraphernalia or intend to deliver the drug paraphernalia, or there is no crime under the state statute. (This is different from some city or county ordinances which make mere possession with intent to use a crime. See discussion at April '91 LED:19.) What the Court of Appeals must be saying with regard to arrest on probable cause in Lowrimore is that Ms. Lowrimore's bizarre behavior gave the officer probable cause to believe she had recently used the drug paraphernalia, and that this fact gave him probable cause for a paraphernalia use arrest under state law. An arrest based solely on the mere possession of apparently unused (e.g., brand new pipe with no residue, no admissions, no bizarre behavior) drug paraphernalia would not be lawful unless a local ordinance proscribed such mere possession.

**(5) PRETEXT, PLAIN VIEW, EXIGENT CIRCUMSTANCES ISSUES RESOLVED IN FAVOR OF STATE; NO "INADVERTENCE" REQUIREMENT FOR PLAIN VIEW SEIZURE --** In State v.

Goodin, 67 Wn. App. 623 (Div. II, 1992) the Court of Appeals resolves three search and seizure issues in favor of the prosecution. The facts and procedures bearing on the search-and-seizure issues are described by the Court of Appeals as follows:

On March 9, 1990, Detective Friberg of the Clark-Skamania Narcotics Task Force obtained a warrant to search Goodin's residence to look for Patrice Fair, a cooccupant of the residence. Friberg had previously obtained an arrest warrant for Fair. Undersheriff Robert Songer supervised the execution of the search warrant, and after Friberg served the search warrant on Goodin, Detective Christensen, whose purpose was to see that there were no people in the residence who could threaten the officers, went into the bedroom and saw controlled substances on the floor in plain view, which he seized.

In reviewing the validity of the seizure, the trial court found that: Friberg wanted to search the residence for drugs but lacked probable cause; Friberg had searched prior residences of Goodin and found drugs; Friberg knew that Goodin had recent convictions for possession of controlled substances; Friberg knew that Patrice Fair had a prior conviction for possessing a controlled substance; and Friberg knew that Goodin had a reputation among law enforcement officers as a drug dealer. The trial court found that it was the officers' "subjective state of mind that they probable would find drugs inside of the residence. However, the officers did not have probable cause to believe that they would find drugs in the residence on March 9, 1990." It also found that "[t]he officers conferred among themselves prior to execution of the warrant about the possibility of finding drugs."

On March 11, 1990, the police returned to Goodin's residence to arrest him on a probation violation warrant. After Goodin answered the door, Undersheriff Songer asked him to step out. Songer then arrested him. While doing so, Songer looked into the apartment and saw a juvenile female in the doorway of the bathroom. She bolted into the bathroom and closed the door. Songer heard the sound of the toilet flushing. Believing that she was flushing evidence, Songer went into the bathroom, pushed her aside, and retrieved contraband out of the toilet. In reviewing the validity of this seizure, the trial court refused to suppress the evidence, finding that Songer had probable cause to believe the woman possessed controlled substances and that exigent circumstances existed to justify the warrantless entry.

Goodin was convicted on two counts of possessing a controlled substance with intent to deliver.

On appeal Goodin made three arguments. First, he argued that the first entry of his residence under a search warrant (to search for and arrest Ms. Fair) was a pretext to cover the officers' subjective intent to search for drugs. The Court of Appeals holds that the subjective intent of law enforcement officers is irrelevant under the state and federal constitutions where a search is objectively justified, as here. Because the underlying search warrant objectively authorized the first entry and search of Goodin's residence, it was lawful regardless of any other motives of the officers.

The second challenge by Goodin was under what he believed to be the "inadvertence prong" of the plain view doctrine. Goodin argued that the seizure of the drugs on the first search of his residence was not justified by "plain view" because the officers expected to find drugs and hence the drugs were not "inadvertently" discovered. The Court of Appeals holds that neither the state

nor the federal constitution requires inadvertence of discovery for a plain view seizure. See Horton v. California, 496 U.S. 128 (1990) Aug. '90 LED:02. So long as the officer is lawfully in a place and has probable cause to believe that an item in that place is evidence or contraband, as here, the plain view doctrine authorizes seizure of the item.

Finally, Goodin argued that the officer did not have exigent circumstances to justify warrantless entry of Goodin's residence on the second visit to his residence. However, the Court of Appeals holds that it was reasonable for the officer to conclude from -- (1) what he knew from past contacts at the residence and (2) what he currently was observing -- that the juvenile was trying to destroy contraband. That justified entry and search under the exigent circumstances exception to the warrant requirement, the Court holds.

Result: Clark County Superior Court convictions (two counts) for possessing a controlled substance with intent to deliver affirmed.

**(6) IMPEACHING DEFENDANT WITH UNLAWFULLY SEIZED EVIDENCE PERMITTED UNDER BOTH FEDERAL AND STATE CONSTITUTIONS** -- In State v. Greve, 67 Wn. App. 166 (Div. I, 1992) the Court of Appeals rules that neither the State Constitution (article 1, section 7) nor the Federal Constitution (Fourth Amendment) prohibits the admission of unlawfully seized evidence to impeach a defendant's testimony. While the Exclusionary Rule of each constitution requires suppression of such unlawfully seized evidence in the State's case-in-chief, neither precludes the use of such evidence to combat possible perjury by a defendant.

Result: Snohomish County Superior Court conviction for third degree rape affirmed.

**LED EDITOR'S NOTE AND COMMENT:** The unlawful behavior in this case was an **unconsented, warrantless police entry to arrest which violated the Payton rule.** The Court of Appeals' judges declare in a footnote that they "deplore the increasing frequency of cases coming to this Court involving warrantless arrests of suspects in their homes where there is a complete absence of exigent circumstances . . ."

We don't know how many cases have come to the Court on the Payton issue and we ourselves deplore (well, maybe "strongly disagree with" is more accurate) the Court's obviously erroneous rulings on this entry-to-arrest issue in two recent cases. See LED entries on State v. Solberg (Nov. '92:10) and State v. Ryland (Oct. '92:10, Jan. '93:09) (Note that Ryland has been reversed per our note in the January '93 LED at 09, and that the State Supreme Court has accepted review in Solberg.) Nonetheless, a word of warning. Be aware of the Payton rule which precludes forcible entry of a person's residence to arrest on probable cause without one of the following: (a) consent, (b) exigency, (c) emergency, (d) an arrest warrant (plus reason to believe the intended arrestee is presently home), or (e) a search warrant. In some cases, officers can get a search warrant more readily than an arrest warrant; hence, where officers have probable cause to make an arrest and wish to take the conservative approach while we await a Supreme Court reversal in Solberg, they may want to get a telephonic search warrant (authorizing entry to arrest) before going to a person's residence to make an arrest without an arrest warrant.

**(7) SECURED PARTY LOSES SECURITY INTEREST IF PARTY IGNORES VEHICLE FORFEITURE NOTICE UNDER RCW 69.50.505** -- In Key Bank of Puget Sound v. City of Everett, 67 Wn. App. 914 (Div. I, 1992) the Court of Appeals holds that a secured party (Key Bank) which

has been notified of a vehicle forfeiture action is required to file a claim under RCW 69.50.505(d) in order to preserve its security interest in the vehicle.

The City of Everett had notified Key Bank of a vehicle seizure, but the bank had failed to file a claim. After the statutory time for filing a claim had expired, Key Bank advised the City of Everett that it believed that as a secured party it was not required to file a claim. Key Bank offered a hypertechnical reading of the statute, but the Court of Appeals disagrees, basing its ruling in part on common sense reasoning that the notice requirement of the statute, as it expressly applies to secured parties, wouldn't make much sense if it didn't accomplish anything in terms of foreclosing late claims by secured parties.

Result: Snohomish County Superior Court summary judgment for Key Bank reversed; judgment granted to the City of Everett.

**(8) LIPS AN "INTIMATE PART" IN SOME CIRCUMSTANCES UNDER INDECENT LIBERTIES STATUTE --** In State v. R.P., 67 Wn. App. 663 (Div. I, 1992) the Court of Appeals holds that where a male juvenile forcibly held down a female juvenile for an extended period of time and gave her a "hickey" on her neck, the perpetrator could be convicted of indecent liberties. The issue in the case was whether the perpetrator's lips were an "intimate part" for purposes of the indecent liberties statute. The Court's analysis on the "intimate parts" question is as follows:

The "determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts." In re Adams, 24 Wn. App. 517 (1979) [Jan. '80 LED:03]. That determination is not, however, left solely to the unfettered discretion of the trier of fact. In re Adams, *supra*, the court interpreted the term "intimate parts" to have a broader connotation than the word "sexual" and to include parts of the anatomy "in close proximity to the primary erogenous areas".

The term "intimate parts" is not specifically defined in the criminal code. Under RCW 9A.44.010(2), the area touched must be "the sexual or other intimate parts of a person" to constitute sexual contact. Given this sequence, the phrase "intimate parts" must refer to parts of the human body commonly associated with sexual intimacy.

Here, it is undisputed that R.P. kissed C.C. on the neck. Stated another way, C.C.'s neck was forced to come into direct physical contact with R.P.'s lips. The lips are a part of the human anatomy which are often associated with acts of sexual intimacy. Given the extremes of individual and cultural standards regarding the common social custom of kissing, lips can be an intimate part of the body under RCW 9A.44.010(2). Since sexual contact in this case is measured in terms of what is "intimate", the offensiveness of the contact may ultimately depend upon not only the area of the body touched but also the duration of the contact. The kiss in this case lasted long enough to leave a bruise on C.C.'s neck. The trial court concluded that R.P. had sexual contact with C.C. by engaging in this type of conduct. While there may be many occasions in which the act of kissing a person on the neck would not constitute the offense of indecent liberties, the trial court here did not err in finding R.P. guilty of indecent liberties.

[Some citations omitted]

Result: Island County Superior Court conviction/adjudication of juvenile for indecent liberties affirmed.

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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.

