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**HONOR ROLL**

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## **CRIMINAL VIOLATIONS OF PRIVATE SECURITY GUARD AND PRIVATE DETECTIVE LICENSING LAWS - PART I**

### **A. Introduction**

In 1991 the Washington State Legislature adopted a statewide scheme to license and regulate private security guards and private detectives. The statutes, codified at chapters 18.170 and 18.165 RCW, create two categories of security guard (armed and unarmed) as well as two categories of private detective (armed and unarmed), and require appropriate licensing. The State laws preempt (invalidate) any local licensing ordinances.

Licensing and disciplinary action is the responsibility of the Washington State Department of Licensing (DOL). Injunctive relief for non-compliance with the law may be sought by DOL, the Attorney General, prosecuting attorneys, as well as private citizens (in other words, anyone).

There are also criminal sanctions under the statutes. Such criminal sanctions may be enforced by State or local law enforcement officers, regardless of whether disciplinary action is taken by DOL

or injunctive relief is sought by anyone. The purpose of this article is solely to address the criminal provisions of the law. Because of LED space limitations, we have divided our article into 2 parts to be presented in the May and June 1993 LED's.

Part I in this month's LED consists of this introduction plus the exact wording of some key definitions and significant substantive crimes. Part II in next month's LED will analyze the essential elements of the crimes, discuss enforcement questions under the laws and set out sample copies of the various kinds of licenses issued by DOL.

## **B. Criminal Provisions Of "Private Security Guard" Law [Chapter 18.170 RCW]**

**DEFINITIONS:** RCW 18.170.010 provides the following definitions, among others:

(14) "Private security company" means a person or entity licensed under this chapter and engaged in the business of providing the services of private security guards on a contractual basis.

(15) "Private security guard" means an individual who is licensed under this chapter and principally employed as or typically referred to as one of the following:

- (a) Security officer or guard;
- (b) Patrol or merchant patrol service officer or guard;
- (c) Armed escort or bodyguard;
- (d) Armored vehicle guard;
- (e) Burglar alarm response runner; or
- (f) Crowd control officer or guard.

**EXEMPTIONS:** RCW 18.170.020 provides the following exemptions from the licensing requirement of chapter 18.170 RCW:

The requirements of this chapter do not apply to:

- (1) A person who is employed exclusively or regularly by one employer and performs the functions of a private security guard solely in connection with the affairs of that employer, if the employer is not a private security company;
- (2) A sworn peace officer while engaged in the performance of the officer's official duties; or
- (3) A sworn peace officer while employed by any person to engage in off-duty employment as a private security guard, but only if the employment is approved by the chief law enforcement officer of the jurisdiction where the employment takes place and the sworn peace officer does not employ, contract with, or broker for profit other persons to assist him or her in performing the duties related to his or her private employer.

Subsection (1) exempts security guards employed by employers with security guards performing security work exclusively for that employer, for example, Boeing guards. Note also that railroad police are also exempt from the licensing law by virtue of this section.

**OUT-OF-STATE SECURITY GUARDS:** There are also limited exemptions for private security

guards from other states who are currently licensed in those states and are temporarily operating in this state: See RCW 18.170.120, 18.170.150.

BASIC CRIMINAL VIOLATIONS PROVISION: RCW 18.170.160 establishes the following gross misdemeanor crimes:

(1) After June 30, 1992, any person who *performs the functions and duties of a private security guard* in this state without being licensed in accordance with this chapter, *or any person presenting or attempting to use as his or her own the license of another, or any person who gives false or forged evidence of any kind to the director in obtaining a license, or any person who falsely impersonates any other licensee, or any person who attempts to use an expired or revoked license, or any person who violates any of the provisions of this chapter* is guilty of a gross misdemeanor.

(2) After January 1, 1992, a person is guilty of a gross misdemeanor if he or she *owns or operates a private security company* in this state without first obtaining a private security company license.

(3) After June 30, 1992, *the owner or qualifying agent of a private security company* is guilty of a gross misdemeanor if he or she *employs an unlicensed person to perform the duties of a private security guard* without issuing the employee a valid temporary registration card if the employee does not have in his or her possession a permanent private security guard license issued by the department. This subsection does not preclude a private security company from requiring applicants to attend preassignment training classes or from paying wages for attending the required preassignment training classes.

(4) After June 30, 1992, a person is guilty of a gross misdemeanor if he or she *performs the functions and duties of an armed private security guard* in this state unless the person holds a valid armed private security guard license issued by the department.

(5) After June 30, 1992, it is a gross misdemeanor for a *private security company to hire, contract with, or otherwise engage the services of an unlicensed armed private security guard* knowing that he or she does not have a valid armed private security guard license issued by the director.

(6) It is a gross misdemeanor for a person to possess or use any vehicle or equipment displaying the word "police" or "law enforcement officer" or having any sign, shield, marking, accessory, or insignia that indicates that the equipment or vehicle belongs to a public law enforcement agency.

(7) It is the duty of all officers of the state and political subdivisions thereof to enforce the provisions of this chapter. The attorney general shall act as legal adviser of the director, and render such legal assistance as may be necessary in carrying out the provisions of this chapter. [Emphasis added]

In addition, RCW 18.170.250(3) provides:

(3) Unlicensed practice of a profession or operating a business for which a license is required by this chapter, unless otherwise exempted by law, constitutes a gross misdemeanor. All fees, fines, forfeitures, and penalties collected or assessed by a court because of a violation of this section shall be remitted to the department.

**C. Criminal Provisions Of "Private Detective" Law [Chapter 18.165 RCW]**

Chapter 18.65 RCW governing the licensing of private detectives closely parallels the provisions of the security guard licensing chapter excerpted above. Thus, the basic criminal violations provisions of the "private security guard" statute, RCW 18.170.160, set forth above, are in essence the same as the basic criminal violations provisions of the "private detectives" chapter (set out at 7 below), except that where the former statute uses the terms "private security guard," "private security company," "armed private security guard" (see the italicized language above), the latter statute uses the terms "private detective," "private detective agency" and "armed private detective."

**DEFINITIONS:** RCW 18.165.010 provides the following definitions, among others:

(11) "Private detective" means a person who is licensed under this chapter and is employed by a private detective agency for the purpose of investigation, escort or body guard services, or property loss prevention activities.

(12) "Private detective agency" means a person or entity licensed under this chapter and engaged in the business of detecting, discovering, or revealing one or more of the following:

- (a) Crime, criminals, or related information;
- (b) The identity, habits, conduct, business, occupations, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person or thing;
- (c) The location, disposition, or recovery of lost or stolen property;
- (d) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or to property;
- (e) Evidence to be used before a court, board, officer, or investigative committee;
- (f) Detecting the presence of electronic eavesdropping devices; or
- (g) The truth or falsity of a statement or representation.

**EXEMPTIONS:** RCW 18.165.020 provides the following exemptions from the licensing requirement of chapter 18.165 RCW:

The requirements of this chapter do not apply to:

- (1) A person who is employed exclusively or regularly by one employer and performs investigations solely in connection with the affairs of that employer, if the employer is not a private detective agency;
- (2) An officer or employee of the United States or of this state or a political subdivision thereof, while engaged in the performance of the officer's official

duties;

(3) A person engaged exclusively in the business of obtaining and furnishing information about the financial rating of persons;

(4) An attorney at law while performing the attorney's duties as an attorney;

(5) A licensed collection agency or its employee, while acting within the scope of that person's employment and making an investigation incidental to the business of the agency;

(6) Insurers, agents, and insurance brokers licensed by the state, while performing duties in connection with insurance transacted by them;

(7) A bank subject to the jurisdiction of the Washington state banking commission or the comptroller of currency of the United States, or a savings and loan association subject to the jurisdiction of this state or the federal home loan bank board;

(8) A licensed insurance adjuster performing the adjuster's duties within the scope of the adjuster's license;

(9) A secured creditor engaged in the repossession of the creditor's collateral, or a lessor engaged in the repossession of leased property in which it claims an interest;

(10) A person who is a forensic scientist, accident reconstructionist, or other person who performs similar functions and does not hold himself or herself out to be an investigator in any other capacity; or

(11) A person solely engaged in the business of securing information about persons or property from public records.

See our note above at 4 regarding RCW 18.170.020, the exemptions of the security guard law. Similarly, by virtue of the exemption in subsection (1) of RCW 18.165.020, railroad police and investigators employed as investigators by and for a single employer, e.g., Boeing, are not subject to the private detective licensing law.

OUT-OF-STATE PRIVATE DETECTIVES: There are also limited exemptions for private detectives from other states who are currently licensed in those states and are temporarily operating in this state. See RCW 18.165.120, 18.165.140.

BASIC CRIMINAL VIOLATIONS PROVISION: RCW 18.165.150 establishes the following gross misdemeanor crimes:

(1) After June 30, 1992, any person who *performs the functions and duties of a private detective* in this state without being licensed in accordance with this chapter, *or any person presenting or attempting to use as his or her own the license of another, or any person who gives false or forged evidence of any kind to the director in obtaining a license, or any person who falsely impersonates any other licensee, or any person who attempts to use an expired or revoked license, or any person who violates any of the provisions of this chapter is guilty of a gross misdemeanor.*

(2) After January 1, 1992, a person is guilty of a gross misdemeanor if he or she *owns or operates a private detective agency* in this state without first obtaining a private security company license.

(3) After June 30, 1992, the owner or qualifying agent of a *private detective*

agency is guilty of a gross misdemeanor if he or she *employs any person to perform the duties of a private detective* without the employee having in his or her possession a permanent private detective license issued by the department. This shall not preclude a private detective agency from requiring applicants to attend preassignment training classes or from paying wages for attending the required preassignment training classes.

(4) After June 30, 1992, a person is guilty of a gross misdemeanor if he or she *performs the functions and duties of an armed private detective* in this state unless the person holds a valid armed private detective license issued by the department.

(5) After June 30, 1992, it is a gross misdemeanor for a *private detective agency to hire, contract with, or otherwise engage the services of an unlicensed armed private detective knowing* that the private detective does not have a valid armed private detective license issued by the director.

(6) It is a gross misdemeanor for a person to possess or use any vehicle or equipment displaying the word "police" or "law enforcement officer" or having any sign, shield, marking, accessory, or insignia that indicates that the equipment or vehicle belongs to a public law enforcement agency.

(7) It is the duty of all officers of the state and political subdivisions thereof to enforce the provisions of this chapter. The attorney general shall act as legal adviser of the director, and render such legal assistance as may be necessary in carrying out the provisions of this chapter. [Emphasis added]

In addition, RCW 18.165.240(3) provides:

(3) Unlicensed practice of a profession or operating a business for which a license is required by this chapter, unless otherwise exempted by law, constitutes a gross misdemeanor. All fees, fines, forfeitures, and penalties collected or assessed by a court because of a violation of this section shall be remitted to the department.

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

(1) **"COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES" (RCW 9.68A.090) GETS BROAD READING; CONFLICTING COURT OF APPEALS RULINGS RESOLVED IN PRO-STATE DECISION** -- In State v. McNallie, 120 Wn.2d 925 (1993) the State Supreme Court declares that "[a]n invitation or inducement [to a minor] to engage in behavior constituting indecent liberties with or without consideration" satisfies the elements of the crime of communication with a minor for communication with a minor for immoral purposes (RCW 9.68A.090).

McNallie had talked to some 10- and 11-year-old children about getting a "hand job." There was conflict in the testimony about whether he had offered them money or had asked them to do the "hand job" for him. Relying on the prior State Court of Appeals decision in State v. Danforth, 56 Wn. App. 133 (1989) (not previously reported in the LED), McNallie had argued that in his prosecution for communication with a minor for immoral purposes the jury should be instructed

that this crime does not occur unless the person asking the minor to engage in the "immoral" conduct (defined by the court as "sexual misconduct") either: (a) offers a fee for the conduct or (b) otherwise requests conduct which would constitute child prostitution or child pornography under chapter 9.68A RCW if carried out. In a unanimous decision, the Supreme Court rejects McNallie's argument and overrules Danforth.

Reviewing the language of the statute, as well as the statute's history and purpose, the Court concludes that by moving the statute from chapter 9A.88 RCW to chapter 9.68A RCW, the Legislature did not intend to limit application of the statute to child sexual exploitation circumstances. Instead, the Court concludes legislative intent is broader. That intent is to protect children from invitations or inducements to engage in "sexual conduct," regardless of whether a fee or other element of the child sexual exploitation chapter is involved.

Result: Whatcom County Superior Court convictions for communicating with a minor for immoral purposes (two counts) affirmed.

### **LED EDITOR'S NOTES:**

#### **1. What age children are protected from what kind of request?**

RCW 9.68A.011(4) defines "minor" as "any person under eighteen years of age." Does this mean that any person, regardless of that person's age, who requests "sexual contact" or "sexual intercourse" (see definitions at RCW 9A.44.010) from a person under age 18 is guilty of communicating with a minor for immoral purposes? We think not, although the McNallie opinion does not expressly reject such a view.

We think that in order to violate RCW 9.68A.090, the communication must request sexual conduct which would violate Washington law, if performed. Thus, it is our view that the perpetrator-victim-age-difference requirements of the various child-protection crimes of chapter 9A.44 RCW -- "rape of a child," "child molestation," and "sexual misconduct with a minor" -- would have to be proven in a prosecution under RCW 9.68A.090. For example, a person 21 years of age asking a person 15 years of age to engage in sexual intercourse would be guilty of a violation of RCW 9.68A.090. On the other hand, in our view, a person 18 years of age asking the 15-year-old for sexual intercourse (assume no fee is offered and hence the "patronizing a juvenile prostitute" law, which has no age-difference element, would not apply) would not violate RCW 9.68A.090. That is because in our second hypothetical there would not be a 48-month age gap, which gap is a necessary element under the third degree rape of a child statute (RCW 9A.44.079). As always, we encourage officers to consult their prosecutors with questions regarding the breadth of coverage of this law.

#### **2. Does statute cover "take your clothes off" request uttered in a private area?**

While the ruling in McNallie provides a broader reading than was argued by defendant in this case, the Court's reading would probably not extend to a request in private by an adult to an under-aged person to "take your clothes off." (This was the fact pattern in a recent Court of Appeals case.) That is because such a request would not involve sexual contact or sexual intercourse. However, an argument could be made that such a request violates the "sexual exploitation of a minor" provision at RCW 9.68A.040. And changing the facts in our hypothetical, asking the child to disrobe and touch himself or herself sexually,

would clearly be covered as a request for "sexual contact."

**3. When does "mistake of age" provide a defense to a "communication" charge?**

In the July 1992 LED at 7-8, we noted that RCW 9.68A.110(3) had been amended so that one must request ID if one is to claim "mistake of age" in a prosecution for communication with a minor for immoral purposes. Under the revised statute, it

. . . is not a defense that the defendant did not know the alleged victim's age: PROVIDED, that it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

(2) **SPOUSAL PRIVILEGE APPLIES TO IN-COURT TESTIMONY ONLY** -- In State v. Burden, 120 Wn.2d 371 (1992) a unanimous State Supreme Court holds that the admission of a third person's testimony as to extrajudicial statements made by a defendant's spouse does not violate the spousal testimonial privilege of RCW 5.60.060(1). Only a spouse's in-court testimony is protected by the testimonial privilege, the Court holds.

In Burden the defendant, a scam artist, wanted to exclude his wife's incriminating statements to third parties (her pastor, her brother, police officers and store cashiers, among others). He argued that if her extra-judicial statements came in, then he would be forced to waive the privilege in order to refute the testimony.

The State Supreme Court apparently was not persuaded that this was a bad thing. Noting, among other things, (1) that the marital privilege does not prevent use of one spouse's out-of-court statements to establish probable cause to arrest the other or to search the property of the other, and (2) that the privilege has come under some fire in recent years because it thwarts the truth-seeking process with less than compelling justification, the Court rules that the only application of the privilege is to limit in-court testimony of the other spouse.

Result: Kitsap County Superior Court exclusion ruling reversed, case remanded for trial.

(3) **OFFICER SERVICE RECORDS AND PERSONNEL FILES NOT SUBJECT TO DISCOVERY BY CRIMINAL DEFENDANT ABSENT SPECIAL SHOWING OF BASIS FOR REQUEST** -- In State v. Blackwell, 120 Wn.2d 822 (1993) the State Supreme Court addresses a trial court dismissal of third degree assault and trespass charges based on the trial court's mistaken belief that the State had violated criminal discovery rules. The third degree assault charges were based on two juvenile defendants' assaults of law enforcement officers who had responded to a disturbance. A criminal defense lawyer had asserted in preliminary court proceedings that one of the arresting officers "was the most racist man she had ever met," and she therefore wanted to inspect both arresting officers' service and personnel records. She provided no factual basis for her claim that the officer was racist, and she provided no other support for her request to inspect the records.

Nonetheless, the trial court judge ordered the records produced. The county prosecutor objected

to the order, explaining that, among other things, the city employing the officers had control of the records, and the records would have to be obtained from the city by subpoena. The defense attorney did not seek a subpoena; eventually, the trial court dismissed the charges because the prosecutor had not produced the records.

The Supreme Court rules that the trial court's order was improper for each of the following reasons: (1) the defense provided a totally insufficient factual basis (none) to show there was a reasonable likelihood that the evidence sought would help the defense; (2) the deputy prosecutor was justified in explaining to the trial court that he had no control over the records of the city officers, and hence that a subpoena to the city was necessary to obtain these records; and (3) there was no misconduct by the prosecution which would justify the extraordinary remedy of dismissal of charges.

Result: case remanded to Pierce County Superior Court for prosecution of the juveniles, Hyson Blackwell and Lateira Sabb, for third degree assault (two counts apiece) and for criminal trespass in the first degree.

(4) **"WORK PRODUCT," PERFORMANCE EVALUATIONS GET PROTECTION UNDER PUBLIC DISCLOSURE ACT** -- In Dawson v. Daly, 120 Wn.2d 782 (1993) the Washington State Supreme Court addresses a number of questions under Washington's Public Disclosure Act (ch. 42.17 RCW). Included among those questions was the status under the disclosure law of the following records: (1) internal memoranda developed for impeachment purposes by a deputy prosecuting attorney and another prosecutor employee regarding Lawrence Daly, who is a former law enforcement officer and a frequent defense expert witness in child sex abuse prosecutions; and (2) the deputy prosecuting attorney's personnel file. The Court's ruling indicates that most, if not all, of the records in dispute in this case are protected from the disclosure request which had been made on behalf of Mr. Daly. However, further review will be necessary at the trial court level.

On the question of the status of the internal impeachment files developed by the deputy prosecutor and an associate, the Supreme Court finds applicable the public disclosure exemption at RCW 42.17.310(1)(j) which exempts from public disclosure some records that are relevant to a "controversy" to which an agency is a party. The Court declares that this exemption is a "work product" exemption which applies broadly, applying not only to work product developed for presently existing legal actions (criminal or civil) but also to work product developed for completed and reasonably anticipated litigation. If the impeachment files developed in this case were developed in reasonable anticipation of future impeachment of Lawrence Daly or were developed for impeachment in a past case, the records are not subject to disclosure, the Supreme Court indicates. That issue is reserved for further consideration by the trial court on remand in light of the Supreme Court's analysis of "work product" exemption.

On the question of the status of the personnel files of the deputy prosecutor, more specifically performance evaluations in those files, the Court rules that the performance evaluations are exempt from public disclosure. The exemption cited by the Court is RCW 42.17.310(1)(b), which exempts information about a person that would be highly offensive to a reasonable person and which is not of legitimate concern to the public. The Court leaves open the possibility that in a future case involving performance evaluations which address specific instances of misconduct (presumably, those where charges have been sustained and for which disciplinary action has been taken) the Court might require disclosure.

Result: case remanded to Snohomish County Superior Court for further review of the Daly impeachment files consistent with the legal analysis of the Supreme Court.

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## **WASHINGTON STATE COURT OF APPEALS**

### **POSSESSION OF 20 ROCKS OF CRACK NOT EVIDENCE OF "INTENT TO DELIVER"**

State v. Brown, 68 Wn. App. 480 (Div. I, 1993)

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

Juveniles Frank Brown and Thomas Lee were standing on the sidewalk in the 1400 block of 21st Avenue, alternately drinking from a bottle of beer at 9:45 p.m. on October 19, 1989. Brown lived around the corner. Officers Donald Bolton and Miles were patrolling the neighborhood, which the officers characterized as a high narcotics area. The officers drove toward Brown and Lee, intending to cite them for a liquor violation. As they got out of their marked car and asked the boys to approach them, Lee dropped the bottle, and he and Brown ran between houses near where they had been standing. Officer Bolton pursued Brown for 50 to 60 feet, at which point Brown slowed down and then stopped. As Brown did so, he dropped a baggie containing white objects on the ground near his feet. Bolton recovered the baggie containing what he suspected was crack cocaine, and arrested Brown.

Brown was initially charged by information in the Juvenile Department of King County Superior Court with possession of cocaine (count 1) and alcohol possession/consumption by a minor (count 2). After plea bargaining failed, the State amended the charges. The second amended information charged Brown with possession of cocaine with intent to deliver (count 1) and obstructing a public servant (count 2).

Officer Bolton testified about his extensive experience in narcotics enforcement, although he was not specifically certified as an expert. He testified that the street value of the crack found on Brown was worth about \$400, and that most users only carry one to two pieces, at most four pieces, of crack for personal use. Officer Hawkes testified that the approximately 20 rocks of crack Brown carried was "definitely in excess of the amount commonly possessed for personal use only." Hawkes concluded, "this is an exceedingly large amount to be possessed for personal use only. And this is definitely possessed with the intent to deliver." Steve Benarian, a forensic scientist with the Washington State Crime Laboratory, weighed and tested the contents of the baggie and determined the substance contained cocaine and weighed 5.1 grams. Brown appeals from the conviction of both counts.

[Footnotes omitted]

ISSUE AND RULING: Was there sufficient evidence to support the "intent to deliver" element of the drug charge? (ANSWER: No) Result: King County Juvenile Court adjudication reversed, and defendant found guilty of simple possession of a controlled substance; case remanded for resentencing.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Washington case law forbids the inference of an intent to deliver based on "bare possession of a controlled substance, absent other facts and circumstances[.]" . . .

Washington cases where intent to deliver was inferred from the possession of a quantity of narcotics all involved at least one additional factor. For example, in State v. Llamas-Villa, 67 Wn. App. 448 (1992), possession of cocaine, heroin, and \$3,200, combined with an officer's observations of deals, supported the inference of intent. State v. Mejia, 111 Wn.2d 892 (1989) held that 1 1/2 pounds of cocaine combined with an informant's tip and a controlled buy supported an inference of intent to deliver. In State v. Lane, 56 Wn. App. 286 (1989), 1 ounce of cocaine, together with large amounts of cash and scales supported an intent to deliver, where the court specifically noted that cocaine is commonly sold by the one-eighty ounce. State v. Simpson, 22 Wn. App. 572 (1979), held possession of cocaine, uncut heroin, lactose for cutting, and balloons for packaging supported an inference of intent to deliver. In Harris [14 Wn. App. 414 (1975)] possession of five 1-pound bags of marijuana and scales evidenced intent to deliver.

The federal cases are in accord with Washington law.

This is a naked possession case. Brown had no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery, the rocks of cocaine were not separately packaged nor were separate packages in his possession, the officers observed no actions suggesting sales or delivery or even any conversations which could be interpreted as constituting solicitation. Although in a "high narcotics area", Brown was just around the corner from his home. Recognizing that the facts would not support a conviction of possession with intent to deliver under the Washington cases, the State primarily relies on Officer Hawkes's opinion that the 20 rocks of crack in Brown's possession were "definitely in excess of the amount commonly possessed for personal use" to support the inference of intent to deliver.

The State's position would mean that any person possessing a controlled substance in an amount greater than some experienced law enforcement officer believes is "usual" or "customary" for personal use is subject to conviction for possession with intent to deliver. This is inconsistent with the significant difference between the standard ranges for simple possession and for possession with intent. In Brown's case, the difference is an offender score of C and a standard sentence of 8 to 12 weeks versus an offender score of B+ and a standard sentence of 103 to 109 weeks. This approximately tenfold difference strongly indicates that the Legislature views these crimes very differently indeed. The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial

evidence as to the possessor's intent above and beyond the possession itself.

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession. Based on the facts before us, we hold that the officer's opinion as to what a person would carry for normal use is insufficient to justify a finding beyond a reasonable doubt that Brown possessed the cocaine in question with intent to deliver.

[Footnotes, some citations omitted]

**CHARGE OF ATTEMPT TO OBTAIN CONTROLLED SUBSTANCE BASED ON USE OF FALSE NAME DOES NOT REQUIRE PROOF THAT DOCTOR ACTUALLY RELIED ON FALSE NAME**

State v. Donald, 68 Wn. App. 543 (Div. III, 1993)

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

On September 12, 1990, between 1 and 2 a.m., Mr. Donald came to the emergency room of Cascade Medical Center in Leavenworth. He identified himself as Duke Adams. He was seen by Dr. Stephen Huffman. Dr. Huffman recognized Mr. Donald as a person he had treated once before in the emergency room. He also knew from medical records that Mr. Donald had been to the emergency room on a third occasion. Each time he used a different name and obtained narcotics.

According to Dr. Huffman, Mr. Donald told him he was going to the East Coast for cancer therapy and needed pain medication to enable him to travel. Dr. Huffman testified he was unable to confirm Mr. Donald's claim regarding cancer, either by examination or by calls to other treatment facilities. He first suggested treatment of the symptoms by use of nonnarcotic anti-inflammatories and then by "lesser abuse-potential narcotic medications . . .". Mr. Donald objected to both suggestions and told him he wanted Percocet. At that point, Dr. Huffman asked a nurse to call the sheriff.

Mr. Donald testified he was on his way to Wellpinit from Tacoma when he stopped at the medical center. He said his left testicle was removed 2 years earlier due to seminoma cancer. A fake testicle was inserted, but it "rejected and it came out . . ." and the stitching was causing problems. According to Mr. Donald, Dr. Huffman did not examine his groin area.

Mr. Donald said he did not use his real name because he owed the medical center money for earlier treatments. He denied asking for Percocet and said that because he was on medication to stop him from taking opiates, Percocet would not have done him "any good".

By amended information, Mr. Donald was charged with attempting to obtain a controlled substance either by use of a false name (Duke Adams) or by fraud, deceit, misrepresentation or subterfuge, in violation of RCW 69.50.403(a)(3).

The jury found Mr. Donald guilty. He was sentenced to 60 days in jail, 30 days to

be served by credit for a drug treatment program.

ISSUE AND RULING: Was there sufficient evidence to support the conviction under RCW 69.50.403(a)(3)? (ANSWER: Yes) Result: Chelan County Superior Court conviction for attempting to obtain a controlled substance through fraud or use of a false name affirmed.

Controlling Statute: RCW 69.50.403(a)(3) makes it unlawful for any person knowingly or intentionally:

To obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance, (i) by fraud, deceit, misrepresentation, or subterfuge; or (ii) by forgery or alteration of a prescription or any written order; or (iii) by the concealment of material fact; or (iv) by the use of a false name or the giving of a false address.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Donald was charged with attempting to obtain a controlled substance either by (a) use of a false name or (b) by fraud, deceit, misrepresentation or subterfuge. RCW 69.50.403(a)(3). The jury was instructed regarding both means of committing the offense and as instructed it only had to be unanimous as to one.

If one of the alternative methods upon which a charge is based fails, the verdict must be set aside unless the court can determine whether it was based on remaining grounds for which sufficient evidence was presented. Since a special verdict form was not used here, there must be sufficient evidence to support both alternative means of committing the offense, if the conviction is to stand.

Mr. Donald's use of a false name is undisputed. What is disputed is his purpose in using the false name and whether use of the false name, together with other evidence, was sufficient to establish fraud, deceit, or misrepresentations for purposes of obtaining narcotics. According to Mr. Donald, the State failed to show reliance by the physician on the false name and failed to prove the element of guilty knowledge or intent to defraud.

A. Reliance. State v. Lee, 62 Wn.2d 228 (1963) rejected defendant's contention that reliance upon a false name and/or address by a doctor or pharmacist was an element of former RCW 69.33.380(1)(d) . . . [In Lee, the Court declared]

The legislative purpose, in enacting the Uniform Narcotic Drug Act, was to curb illegal traffic in narcotic drugs, and to regulate and control their sale and distribution. The section here in question, when read in conjunction with the recording provisions of the act, is directed at a particular aspect of this general purpose, namely, to prevent a person with a seemingly legitimate complaint from obtaining an oversupply of narcotic drugs by using a different name and address[.]

We agree with the State's contention that even if Mr. Donald's complaint was legitimate, the purpose of the statute is to prevent the very acts he committed, and reliance by the doctor or pharmacist need not be shown.

B. Intent To Deceive. The use of a false name can be used to infer guilty knowledge, although it does not compel such inference. Here, the jury's inference of guilty knowledge or intent was permissible when the admitted use of the false name is considered along with the testimony of Dr. Huffman. That evidence, when viewed in a light most favorable to the State, supports a guilty verdict as to both alternative means of committing the offense.

[Footnote, some citations omitted]

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

(1) **"GROOMING PROCESS" TESTIMONY BY EXPERT GENERALLY INADMISSIBLE IN STATE'S CASE-IN-CHIEF IN MOLESTING PROSECUTIONS** -- In State v. Braham, 67 Wn. App. 930 (Div. I, 1992) the Court of Appeals rules that it was prejudicial error for the trial court to allow the State's expert witness to testify in a child molestation prosecution about the "grooming process" by which child molesters establish relationships with their victims.

Holding that in this case the "grooming process" testimony unfairly implied defendant's guilt based on a profile, the Court establishes a rule that generally such testimony will not be admissible in the State's case-in-chief. That is because the testimony improperly implies that defendant engaged in grooming behavior and is therefore guilty. The Court's opinion leaves room for such testimony to come in for some purposes, including: (a) impeaching defendant or (b) explaining a victim's behavior in some circumstances.

Result: King County Superior Court conviction for first degree child molestation reversed; case remanded for re-trial.

(2) **WYOMING DEPUTY'S MIRANDA WARNINGS SATISFY FEDERAL CONSTITUTION; OUT-OF-STATE OFFICER'S ACTIONS NEED NOT SATISFY WASHINGTON CONSTITUTION** -- In State v. Koopman, 68 Wn. App. 514 (Div. III, 1992) the Court of Appeals holds, among other things, that the Miranda warnings given by a Wyoming sheriff's deputy to a Washington woman seized in Wyoming did not violate the Federal Constitution's Fifth Amendment. The Court's analysis is as follows:

Ms. Koopman contends the advisement of rights, as required by Miranda, was defective because she was not told she had the right to have counsel present before and during interrogation. Nor was she told of her right to break off questioning at any time. No particular language is required to advise a suspect of the right to have counsel before and during interrogation. . . . The challenged advice, contained in written forms used by the Wyoming sheriff's deputy, expressly stated in part:

You have the right to talk to a lawyer and *have him present with you while you are being questioned*. If you cannot afford to hire a lawyer, one will be appointed to represent you *before any questioning*, if you wish one.

[Court's emphasis.] The record establishes Ms. Koopman was sufficiently advised of her right to have counsel present before and during questioning.

She cites no authority for her claim she was entitled to be advised of her right to break off questioning at any time. United States v. Johnson, 467 F.2d 630 (2d Cir. 1972) held no such advice was required. The Wyoming warnings were sufficient to apprise Ms. Koopman of her rights under Miranda.

[Some citations omitted]

**LED EDITOR'S COMMENT:**

Despite the Court's ruling in Koopman, we believe that the warnings given by the Wyoming deputy sheriff leave something to be desired. The warnings on the Criminal Justice Training Commission (CJTC) cards more adequately explain one's rights, and these warnings, or other warnings along the lines of the CJTC cards, should be used by Washington officers. However, this case should help where a trial court judge decides to take a close look at the longstanding warnings on the CJTC card. The CJTC warnings are superior to the Wyoming deputy's warnings, so any such challenges along the lines of those raised in this case should fail.

On another note, the Court of Appeals rules in this case that, where a defendant in a Washington prosecution claims misconduct by police of another state, it is the law of the state where the alleged misconduct occurred, not Washington law, which controls the determination of the legality of the conduct. Hence, where, as here, the police of another state act on their own to arrest and/or interrogate a Washington person in their state, it is only the law of the other state (as well as, of course, the Federal Constitution) that will determine the legality of that conduct in the Washington prosecution. Thus, the Court indicates that if there were a higher standard under the Washington State Constitution, that standard would not be applied to the Wyoming officer's actions. This discussion in Koopman is clearly "dicta" (language unnecessary to the decision) in that our Washington Supreme Court has ruled (in contrast to its rulings on search and seizure law) that the same Miranda and other interrogations law rules apply under the Washington and U.S. Constitutions. See State v. Earls, 116 Wn.2d 364 (1991) May '91 LED:02.

(3) **HOUSE'S ATTACHED GARAGE IS PART OF "DWELLING" FOR PURPOSES OF BURGLARY STATUTE** -- In State v. Murbach, 68 Wn. App. 509 (Div. III, 1993) the Washington State Court of Appeals holds that the unlawful entry into a garage which is attached to a single-family residence constitutes entry into a "dwelling" for purposes of the burglary statutes. The Court holds that "dwelling," as defined at RCW 9A.04.110(7) and used in the burglary statutes (chapter 9A.52), includes a dwelling's attached garage. That is because such a garage is "a 'portion' of a building used as lodging" as those words are used in the statutory definition of "dwelling." Result: Stevens County Superior Court conviction for residential burglary affirmed.

(4) **AIRPORT LUGGAGE X-RAY OPERATOR LOSES CLAIM TO SEIZED DRUG MONEY** -- In Farrare v. City of Pasco, 68 Wn. App. 459 (Div. III, 1992) the Court of Appeals rejects the appeal of an airport luggage x-ray operator who discovered currency (\$36,900) in a passenger's luggage. The x-ray operator had sought to claim the currency after the passenger was unable to prove ownership during a controlled substance statute forfeiture proceeding held by the city. The city had taken custody of the currency, at the time of its discovery, in response to a request for assistance from the Port of Pasco.

The Court of Appeals holds that Ms. Farrare did not timely make her claim. Among other things, the Court of Appeals also: (1) implies that Ms. Ferrare had no right to the cash because her employment contract with the Port of Pasco did not contemplate such a right, and (2) declares that the City of Pasco had jurisdiction to seize and forfeit drug money seized on Port of Pasco, rather than City of Pasco, property, because, under RCW 10.93.070 (the Washington Mutual Aid Peace Officer Powers Act) the City of Pasco officers had law enforcement authority over the cash by virtue of a specific request for assistance on the case by Port of Pasco officials.

Result: Franklin County Superior Court ruling for City of Pasco affirmed.

**(5) BURGLAR'S CLAIM/THREAT THAT HE WAS SEARCHING HIS POCKETS FOR HIS KNIFE DID NOT MAKE HIM "ARMED" FOR PURPOSES OF BURGLARY ONE STATUTE --** In State v. Chariello, 66 Wn. App. 241 (Div. III, 1992) the Court of Appeals holds that there was insufficient evidence that an accused burglar was armed with a deadly weapon during the course of a burglary. There was, however, also evidence that the victim was physically assaulted during the burglary through means other than a deadly weapon, so defendant's conviction of burglary in the first degree is upheld.

The deadly weapon evidence consisted solely of the burglary-assault victim's testimony that one of the burglars claimed to be searching his pockets for a knife during the course of the burglary-assault. The victim testified that to his knowledge the perpetrator never found the knife. Under these facts, there was no basis for a first degree burglary charge grounded in a deadly weapon element. However, the alternative element of an assault during the course of the burglary was met, the Court holds, and therefore, the first degree burglary conviction stands.

Result: Grant County Superior Court conviction for first degree burglary affirmed on the ground that the assault element of the crime was met.

**(6) DEFENDANT CHARGED WITH ATTEMPTED RAPE NOT ENTITLED TO ASSERT DEFENSE OF VOLUNTARY INTOXICATION BECAUSE HE FAILED TO SHOW HOW INTOXICANTS AFFECTED HIS MENTAL STATE --** In State v. Gallegos, 65 Wn. App. 230 (Div. I, 1992) the Court of Appeals holds that in an attempted rape prosecution the defendant was not entitled to an instruction on voluntary intoxication even though there was substantial lay witness testimony that he was quite intoxicated on the evening of the attack. The Court of Appeals' analysis in part is as follows:

[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. . . .

Here, the mental state required to convict one of attempted second degree assault [**sic -- Court's apparent intended reference is "rape"**] is intent to engage in sexual intercourse with another by forcible compulsion. See RCW 9A.28.020; RCW 9A.44.050(1)(a). Although Karns and Locke testified that Gallegos had been drinking, and that the drinking made him lose his balance, spill things, and knock things over, there was no evidence presented that the drinking impaired Gallegos's ability to acquire the intent to engage in sexual intercourse with T.G. by forcible compulsion. Gallegos neither testified, nor offered, expert testimony or other

evidence indicating that this drinking prevented him from acquiring the requisite intent or that he lacked awareness of his actions at the time of the incident in question. We therefore conclude that Gallegos was not entitled to the proposed voluntary intoxication instruction.

Result: King County Superior Court attempted second degree rape conviction affirmed.

**(7) VOLUNTARY INTOXICATION DEFENSE APPLIES TO ALL DRUGS, NOT JUST ALCOHOL**

-- In State v. Hackett, 64 Wn. App. 780 (Div. I, 1992) the Court of Appeals reverses the first degree assault conviction of Kenneth Hackett, who shot a King County police officer during a traffic stop. (Fortunately, the shot had hit the officer's police radio and he was not badly injured.)

At trial Hackett had sought a jury instruction on voluntary intoxication to negate the mental state of "intent to inflict great bodily harm" (RCW 9A.36.011). However, the trial court rejected his proposed instruction on grounds that the voluntary intoxication defense (RCW 9A.16.080) applies only to alcohol intoxication, not to intoxication from other drugs.

The Court of Appeals reverses, declaring: (1) that the intoxication defense applies to drug-induced intoxication as well as alcohol-induced intoxication, and (2) that there was substantial evidence to support Hackett's claim that he was "blacked out" from a heavy dose of cocaine and valium when he shot the officer. The Court holds that the other instructions given the jury, including a diminished capacity instruction, were not sufficient to allow Hackett to argue his theory of the case.

Result: King County Superior Court first degree assault conviction reversed and case remanded for retrial; a conviction for possession of cocaine arising out of the same incident was not challenged by defendant and is affirmed.

**(8) INOPERATIVE FIREARM IS NOT A "DEADLY WEAPON" FOR PURPOSES OF ASSAULT**

**TWO LAW** -- In State v. Carlson, 65 Wn. App. 153 (Div. I, 1992) the Court of Appeals holds that an assault with an object apparently, but not actually, capable of producing bodily harm (in this case, an inoperative BB gun) does not constitute second degree assault under RCW 9A.36.021(1)(c). The statute prohibits assault with a "deadly weapon", not assault with "what appears to be" a deadly weapon. Result: Snohomish County Superior Court (juvenile court) adjudication of guilty of second degree assault reversed; case remanded for entry of a judgment of guilty of fourth degree assault and for resentencing.

**NOTE: FLOWCHART TO INITIATION OF CONTACT ARTICLE**

Appended to this month's LED are separate flowcharts for (a) the Fifth Amendment "Initiation of Contact" Rule and (b) the Sixth Amendment "Initiation of Contact" Rule as addressed in the April 1993 LED article at pages 2-10.

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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

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