

November, 1993

HONOR ROLL

406th Session, Basic Law Enforcement Academy - June 30 through September 21, 1993

*President: Officer Ronald Horch - Vancouver Police Department
Best Overall: Officer Beth C. Rahman - Bellevue Police Department
Best Academic: Officer Beth C. Rahman - Bellevue Police Department
Best Firearms: Officer Richard P. Myers - Everett Police Department*

Corrections Officer Academy - Class 186 - September 13 through October 8, 1993

*Highest Overall: Officer Jeffery H. Daugherty - Grays Harbor County Jail
Highest Academic: Officer Marjorie L. Mc Guire - Cowlitz County Corrections Department
Highest Practical Test: Officer Anna C. Keim - Airway Heights Corrections Center
Highest in Mock Scenes: Officer Cheryl Graham - Yakima County Jail
Highest Defensive Tactics: Officer Jose Porras - Benton County Corrections*

Corrections Officer Academy - Class 187 - September 13 through October 8, 1993

*Highest Overall: Officer Denise D. Hackett - Yakima County Jail
Highest Academic: Officer Denise D. Hackett - Yakima County Jail
Highest Practical Test: Officer Judy M. Higdon - Clark County Jail
Highest in Mock Scenes: Officer Edward K. Cler - Washington State Reformatory
Officer Marcia L. Crocker - Airway Heights Corrections Center
Officer Charles L. Helmer - Washington State Reformatory
Officer Barbara G. Larson - Jefferson County Clearwater Jail
Officer David M. Millet - Kittitas County Corrections
Officer Sandra K. Palomarez - Franklin County Corrections
Highest Defensive Tactics: Officer Antonio P. Quiming - McNeil Island Corrections Center*

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WASHINGTON STATE SUPREME COURT

SIXTH AMENDMENT CONFRONTATION CLAUSE -- NON-TESTIFYING CO-DEFENDANT'S HEARSAY STATEMENTS TO GIRLFRIEND MEET RELIABILITY TEST, BUT ADMISSIONS TO DETECTIVE DURING CUSTODIAL INTERROGATION BY DETECTIVE DO NOT

State v. Rice, 120 Wn.2d 549 (1993)

Facts and Proceedings: In this case defendant claimed on appeal that his double murder convictions should be set aside because hearsay statements by his non-testifying co-defendant were considered by the jury. The Court summarizes the facts and trial court proceedings in this case as follows:

On the evening of January 7, 1988, 82-year-old Mike Nickoloff and his 74-year-old

wife, Dorothy Nickoloff, were stabbed to death in their home. Mr. Nickoloff was stabbed so many times in the chest and face that the police initially thought he was killed by a shotgun. Mrs. Nickoloff had been stabbed twice in the chest and numerous times in the back.

The investigation soon led to two 17-year-old boys -- Herbert "Chief" Rice, Jr., and Russell McNeil. McNeil was arrested on the evening of January 26, 1988, and confessed early the next morning. That same morning the police arrested Rice, and he also confessed within a few hours.

The confessions of McNeil and Rice agree on most of the following details. McNeil and Rice were driving around on the evening of January 7, 1988. Rice said he knew of a house they could rob. Only McNeil's confession states they showed their knives to each other on the way to the Nickoloff home. Rice and McNeil went to the door, and Mrs. Nickoloff answered and let them inside. Rice used the Nickoloff's phone to call his girl friend, and McNeil used the bathroom. Then McNeil went into the kitchen where Mrs. Nickoloff was eating dinner. Rice went into the living room where Mr. Nickoloff was watching television. McNeil stabbed Mrs. Nickoloff repeatedly in the back, but stated that he did not stab her in the chest. Rice stabbed Mr. Nickoloff several times, but noticed that he was still breathing so he "let him have it again" and screamed "you'd better die." Rice and McNeil do not agree on who started the stabbings, but they occurred virtually simultaneously. They stole two television sets, which they sold later that evening.

Both McNeil and Rice were charged with one count of aggravated first degree murder and one count of accomplice to aggravated first degree murder. In the alternative, they were each charged with two counts of felony murder. The prosecutor sought the death penalty against both defendants.

On August 25, 1989, McNeil pleaded guilty to two counts of aggravated first degree murder, and the prosecutor recommended two life sentences for him, to be served consecutively, without the possibility of parole. **[Prior to Rice's trial, McNeil exercised his Fifth Amendment right against self-incrimination, thus making him legally unavailable to testify in Rice's trial. LED Ed.]**

On November 6, 1989, voir dire began for Rice's trial. It was not disputed that Rice stabbed Mr. Nickoloff, therefore, Rice went to trial on December 5, 1989, solely to determine premeditation and aggravation. The jury found Rice guilty of one count of aggravated first degree murder for Mr. Nickoloff, and one count of accomplice to aggravated first degree murder for Mrs. Nickoloff. The jury was unable to reach a conclusion on the death penalty, so Rice was sentenced to two life sentences without parole.

Turning to the trial court's admission of two hearsay statements by Rice's co-defendant, the Supreme Court describes the statements as follows:

One of the statements admitted at trial which Rice objects to is part of a letter from McNeil to his former girl friend, Melanie Siqueido. The letter was written after McNeil had been in prison 2 months. The portion of the letter admitted by the trial

court was presented by stipulation rather than live testimony of Miss Siqueido:

It has been stipulated that if Melonie [sic] Siqueido was called as a witness, that she would testify as follows: That on or about April 12th, 1988, Russ McNeil wrote a letter to her, and that she is his former girlfriend. And that in the letter he wrote that Mr. Rice said to him while in the car prior to arriving at the Nickoloff home, quote, I know where we can get some money. It would be easy, stab them, end quote. Mr. McNeil wrote that Mr. Rice asked if Mr. McNeil had a knife and Mr. McNeil wrote that Mr. Rice, quotation marks, or, quote, pulled his out, closed [sic] quote.

The beginning and end of the letter are relevant for evaluating reliability, even though they were not admitted. At the beginning of the letter, McNeil states:

Melanie, because I love u [sic] I'm going to be "*completely*" honest with you and tell you everything that I can remember that happened that night. After you read this I have no idea how you will feel towards me. I haven't told my *lawyers or anyone* yet . . .[.]

In closing, McNeil wrote:

I think it would be better if you got rid of this o.k.

The other statement at issue is from an interview of McNeil by a detective soon after his arrest. Detective Rod Shaw interviewed McNeil during the initial investigation of the Nickoloff murders on January 27, 1988, almost 3 weeks after the murders. At first, McNeil denied even going into the Nickoloffs' home, claiming only Rice went in. Then he admitted his participation, and told Shaw that Rice had said: "Maybe we should go out and stab someone and get some money." Shaw wrote this statement in quotation marks near the top of his notes. Shaw then proceeded to tape record an interview with McNeil.

ISSUE AND RULING: Did admission of one or both of the statements of the non-testifying McNeil violate: (a) the hearsay rule under the Rules of Evidence (ER's), or (b) the confrontation clause of the Sixth Amendment? (**ANSWER:** the statements were admissible under the ER's, but only the statement to the girlfriend was admissible under the Sixth Amendment confrontation clause.) **Result:** Yakima County Superior Court convictions for aggravated first degree murder (two counts) affirmed.

ANALYSIS:

Of the two legal issues relating to admissibility of the statements, the Court first disposes of the basic hearsay objections under the Rules of Evidence (ER) by ruling the two statements admissible under ER 804(b)(3). The second question addressed by the Court is the more difficult one, whether admission of one or both of the statements violated Rice's Sixth Amendment right to confront witnesses against him. The test here is whether the statements were reliable enough to come in, even though, as hearsay, they are not (a) under oath, (b) subject to cross examination or (c) subject to observation of the declarant's demeanor. **LED EDITOR'S COMMENT: Because very different interests are involved, the test for hearsay "reliability" under the Sixth**

Amendment confrontation clause is much more stringent than the test for hearsay "reliability" in determining probable cause under the Fourth Amendment.] The test for "reliability" under the Sixth Amendment confrontation clause considers nine factors, described by the Court as follows:

(1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of past fact; (7) whether cross examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement.

Applying these nine factors to the letter, the Court finds the letter to the girlfriend to be reliable, and hence admissible. On the other hand, the custodial statements to the detective are ruled to be insufficiently reliable under the nine-factor test to be admissible. The Court's analysis on the two statements is as follows:

The first factor is whether the declarant had an apparent motive to lie. McNeil's letter to his girl friend appears to have been an outpouring of his emotions with little hope that it would benefit himself. At the beginning, he states that he is going to be "*completely*" honest with her because he loves her. At the end of the letter, McNeil even tells her to get rid of the letter. This factor supports admissibility.

However, McNeil had an obvious motive to lie to Detective Shaw. He was being interrogated. He had just tried to tell the officers he was not responsible, and not involved in the killings. He had a motive to shift blame onto Rice. Statements made in police custody by a coconspirator are almost presumptively unreliable. In approving the admission of a coconspirator statement in [a prior case], this court wrote: "These were not statements made in police custody, nor were they statements made after police suspicions had been aroused." . . . The circumstances under which McNeil made his statement suggest unreliability.

The second factor is whether the general character of the declarant suggests trustworthiness. Our concern is with general trustworthiness, not propensity toward virtue. Trustworthiness is present in the letter to McNeil's girl friend. During cross examination, Rice's attorney asked Miss Siqueido if McNeil had ever lied to her. She replied "No". This favors admissibility of the letter.

McNeil's trustworthiness is more questionable during the interview with Detective Shaw. He began by lying to Detective Shaw about his involvement, attempting to shift blame onto Rice. This suggests a lack of trustworthiness.

The third factor, whether more than one person heard the statements, is largely irrelevant. In [a prior case] we stated that where a statement was taped, this factor was irrelevant. The same reasoning should apply to a letter or a statement memorialized in notes. However, it is worth noting that McNeil's candor might

actually have been greater in his letter if he assumed only his girl friend would read it.

The fourth factor is whether statements were made spontaneously. The letter was spontaneous, which suggests it is reliable. The statement to Detective Shaw was made in response to questions during interrogation, and therefore was not spontaneous and not reliable.

The fifth factor requires us to examine the timing of the statements and the relationship between the declarant and the witness. The timing of the letter does not favor admissibility. It was written on April 12, 1988, more than 3 months after the murders. But the close relationship between codefendant McNeil and his girl friend does suggest reliability.

The statement to Detective Shaw was made a few weeks after the murders, so it may be slightly more reliable than the letter in that respect. However, there was no close relationship between McNeil and Shaw, which suggests it is unreliable.

The sixth factor is whether the statements contained express assertions of past fact. Both contain assertions of past fact, namely what happened the night of the murders. Therefore, they did not carry on their face a warning against giving them undue weight. Therefore, this factor weighs against admitting both statements.

The seventh factor, whether cross examination could not help to show the declarant's lack of knowledge, favors the admissibility of both statements. McNeil was present, and knew what was occurring. The eighth factor, whether the possibility of the declarant's recollection is remote, also favors admissibility of the statements. Both statements were made soon after the murder -- the letter about 3 months afterward, the statement to Shaw only 2 or 3 weeks afterward. As the court in [a previous case] indicated, the ninth factor, whether the circumstances surrounding the statements give no reason to suppose the declarant misrepresented the defendant's involvement, is somewhat redundant.

Applying these factors to the letter, it appears reliable. It was a spontaneous outpouring by McNeil to his girl friend. McNeil did not have a significant motive to lie to her. The statement to Detective Shaw is another matter. McNeil's statement was not spontaneous. He had every reason to distort the truth to shift blame onto Rice, and clearly did so at the beginning of the interview. He also had no close relationship to Detective Shaw. Therefore, at least under the factors we listed in [prior cases], admission of the statement to Detective Shaw appears to violate Rice's right to confrontation.

[Citations and footnote omitted]

Finally, the Court looks at the issue of whether the trial court's admission of the co-defendant's in-custody hearsay statement to the detective was "harmless error." Because the inadmissible statement to the detective was substantially similar to the admissible statement to the girlfriend, the trial court's admission of the statement did not affect the outcome of the trial, and hence was harmless error, the Court rules.

TRIBAL OFFICER HAD AUTHORITY TO: (A) STOP SPEEDING DRIVER TO DETERMINE IF TRIBAL MEMBER AND (B) DETAIN HIM FOR WSP AS SUSPECTED NON-INDIAN DWI

State v. Schmuck, 121 Wn.2d 373 (1993)

Facts and Proceedings: Schmuck was stopped by a Suquamish Tribal Police Officer on a road running through the Suquamish reservation. The tribal officer's radar showed Schmuck driving 36 m.p.h. in a 25 m.p.h. zone. Determining during the stop that Schmuck was a non-Indian and was probably DWI, the tribal officer called WSP and detained Schmuck for approximately 20 minutes until a WSP trooper arrived.

The trooper ultimately determined that Schmuck was a DWI and arrested him (breath tests averaged .17). Schmuck was convicted of DWI in Kitsap County District Court.

ISSUES AND RULINGS: (1) Does a tribal peace officer have inherent authority to stop a speeding driver to determine whether the driver is a tribal member subject to the jurisdiction of the tribal traffic courts? (ANSWER: Yes); (2) After determining that the traffic law violator is a non-Indian but also determining that he is a probable DWI, does a tribal peace officer have authority to detain the suspect for a reasonable period of time while waiting for state or local law enforcement officers to come to the scene and investigate? (ANSWER: Yes) Result: Kitsap County District Court DWI conviction affirmed.

ANALYSIS: (Excerpted from Supreme Court opinion)

(1) Authority to Stop Traffic Law Violator

After engaging in considerable discussion of the law relating to qualified tribal sovereignty (which gives tribal traffic courts jurisdiction over tribal members only, it appears), the Supreme Court finally concludes under the following analysis that a tribal peace officer does have authority to make an initial stop of a possible traffic violator whose status as a tribal member is unknown (even though the tribal courts would not have any jurisdiction to try such a person):

Fundamental to enforcing any traffic code is the authority by tribal officers to stop vehicles violating that code on roads within a reservation. In this case, Officer Bailey was exercising the Tribe's authority to enforce its traffic code when he observed the speeding pickup truck and pursued it through the streets of the Reservation. When he first saw the truck, he had no means of ascertaining whether the driver was an Indian. Only by stopping the vehicle could he determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless. It would also run contrary to the "well-established federal 'policy of furthering Indian self-government.'"

We hold Suquamish Tribal Officer Bailey had the requisite authority to stop Schmuck to investigate a possible violation of the Suquamish traffic code and to determine if Schmuck was an Indian, subject to the code's jurisdiction.

(2) Authority To Detain For WSP Or Local Police Investigation

Again after engaging in considerable discussion of the law in the subject area, the Court concludes on the issue of "authority to detain" for state or local police:

We conclude an Indian tribal officer has inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution. We hold Tribal Officer Bailey, as a police officer employed by the Suquamish Indian Tribe, had authority to stop and detain Schmuck, who was allegedly driving while intoxicated on the Reservation, until he could be turned over to the Washington State Patrol for charging and prosecution.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

ALL INFORMATION, INCLUDING VISUAL OBSERVATIONS, OBTAINED BY AN OFFICER WEARING AN UNAUTHORIZED LISTENING DEVICE IS INADMISSIBLE; 1989 AMENDMENTS TO CHAPTER 9.73 RCW DID NOT CHANGE ITS BASIC ALL-INCLUSIVE EXCLUSIONARY RULE -- In State v. Salinas, 121 Wn.2d 689 (1993) the State Supreme Court reviews the issue of whether the unauthorized use of a listening device in connection with an undercover narcotics investigation will generally render inadmissible not only the officer's testimony about any conversations picked up by the device, but also will render inadmissible the officer's testimony regarding any visual observations made while the officer or another was wearing the device.

The Supreme Court describes as follows the pertinent facts relating to the law enforcement agency's tactical decision to have the officer wear the unauthorized listening device:

The officers were concerned about [the undercover officer's] safety because of [the confidential informant's] report that [a drug seller] carried a gun and had shot one of his runners. This concern was heightened by the fact that a large amount of money was involved. Therefore the officers determined that [the undercover officer] should wear some sort of electronic device to signal for help if the situation became dangerous. The officers considered having [the undercover officer] wear an "agent alert" device, which is designed to send out a radio signal to advise other law enforcement personnel if the officer wearing the device is in trouble. The only agent alert device the officers had available to them at this time was not working, however, and so [the lead detective] instructed [the undercover officer] to wear a "body wire", which instead of only a radio signal can **[and did, apparently . . . LED Ed.]** transmit whole conversations. No authorization was obtained prior to the use of this body wire.

The officer's visual observations enabled the narcotics team to obtain a search warrant for Salinas's apartment. The warrant was executed and cocaine was seized. Salinas was convicted of possession of cocaine with intent to deliver.

On review the Court of Appeals reversed, suppressing the evidence. 67 Wn. App. 232 (1992) Feb. '93 LED:14. The State Supreme Court granted the State's petition for review but has now

affirmed the Court of Appeals' suppression decision.

The Supreme Court's analysis is in two parts. First, the Court notes that in State v. Fiermestad, 114 Wn.2d 828 (1990) the Court interpreted the pre-1989 version of chapter 9.73, and held that the Privacy Act's statutory exclusionary rule at RCW 9.73.050 renders inadmissible all information, including visual observations, obtained by an officer wearing an unauthorized hidden listening device.

Second, the Court responds to the State's argument in Salinas that 1989 amendments to chapter 9.73 RCW creating RCW 9.73.210(5) and RCW 9.73.230(8) allow the admission of evidence obtained without the aid of illegal interception or recording. The Court rules that the special exclusionary provisions of RCW 9.73.210 (which allows narcotics officers and their informants to wear a body wire for personal safety reasons based on reasonable suspicion if there is prior authorization by an officer above the rank of first-line-supervisor) and RCW 9.73.230 (which allows narcotics officers and their informants to wear a body wire for evidence-gathering purposes based on probable cause if there is above-first-line-supervisor-authorization) are restricted in application to those sections.

The Court declares that the exclusionary provisions of those sections apply only where an agency is using RCW 9.73.210 (officer safety body wire authorized by appropriate supervisor) or RCW 9.73.230 (evidence-gathering body wire authorized by appropriate supervisor), and something goes awry in that particular process. The Court thus rules that the special exclusion provisions of RCW 9.73.210 and .230 do not create a general exception to the exclusionary rule of RCW 9.73.050, which was not amended by the 1989 amendments to the Privacy Act. Here, the police team did not attempt to use either RCW 9.73.210 or .230, and hence the general exclusionary provision of RCW 9.73.050 applies.

Result: affirmance of Court of Appeals' ruling that reversed Salinas' King County Superior Court conviction for cocaine possession with intent to deliver.

WASHINGTON STATE COURT OF APPEALS

NO SEIZURE IN REQUEST TO TALK, ORDER TO REMOVE HANDS FROM POCKETS

State v. Nettles, 70 Wn. App. 706 (Div. I, 1993)

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

On June 14, 1991, on her way to investigate reported narcotics activity at Rainier Avenue South and South Ferdinand Street, Seattle Police Officer Susan Wong passed Nettles and two other men at the corner of Rainier Avenue South and South Hudson Street. When the three saw Wong's car, they looked at each other and hurriedly began walking away. Nettles and one of the two others began walking south.

Wong found the intersection of Rainier and Ferdinand clear of people and narcotics activity and turned south again on Rainier. Wong testified that when she

passed Nettles and his companion a second time, they quickened their pace and repeatedly turned to stare at her car. Wong pulled over and parked on Hudson Street, exited her car, and called out to the two, "Gentlemen, I'd like to speak with you, could you come to my car?" Nettles turned around; the other man continued walking. Wong told Nettles to remove his hands from his pockets and come toward her car. She testified that as Nettles withdrew one hand from his pocket, he threw a plastic bag under her car which she suspected contained a controlled substance. The court found that Nettles "dropped" the baggie. Wong then ordered Nettles to place his hands on her patrol car and seized the baggie of suspected cocaine. Nettles was subsequently arrested and charged with unlawful possession of a controlled substance. Nettles agreed to a stipulated trial and moved to suppress the cocaine seized prior to his arrest. The trial court denied the motion and found Nettles guilty of the charge, imposing a standard range sentence of 2 months' confinement and 12 months' community supervision.

ISSUE AND RULING: Was Nettles "seized" for Fourth Amendment purposes before he tossed the baggie of cocaine? (ANSWER: No, rules a 2-1 majority) Result: King County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

Police may generally retrieve voluntarily abandoned property without violating Fourth Amendment rights. Property is not voluntarily abandoned where the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment. Property abandoned prior to a seizure is not the product of any illegal police conduct.

...

Not every encounter between an officer and an individual amounts to a seizure. In Washington, a police officer has not seized an individual merely by approaching him in a public place and asking him questions, as long as the individual need not answer and may simply walk away. . . . However, once the officer restrains the individual's freedom to walk away, he has seized that person. . . .

We now turn to an analysis of the facts of this case. Officer Wong did not approach Nettles and his companion with either siren or patrol lights. When exiting her car she did not draw her gun. She addressed Nettles and his companion in a normal voice when requesting to speak with them. Until Nettles voluntarily discarded a plastic baggie of cocaine, Wong made no attempt to stop Nettles' companion, who continued to walk away after she asked to speak with both men. This alone is a forceful indication that neither individual was required to or felt compelled by the circumstances to stop. Officer Wong made no attempt to immobilize Nettles -- she did not request and retain his identification and she did not direct him to place his person in any particular location or position, such as hands on the patrol car, that would have implied a loss of freedom to a reasonable person. There is nothing to indicate that he could not have declined to speak to her or approach her car.

...

Moreover, in the interest of promoting public safety, the encounter between Nettles and Officer Wong should not be characterized as a seizure. As a part of their "community caretaking" function, police officers must be able to approach citizens and permissively inquire as to whether they will answer questions. In furtherance of this function, it is not unreasonable to permit a police officer in the course of an otherwise permissive encounter to ask an individual to make his hands visible, particularly under the circumstances of this case. Such a request, by itself, does not immobilize an individual who has voluntarily agreed to speak with a police officer, does not produce property which an officer's possession of would immobilize the individual, and does not produce any incriminating evidence. Thus, the trial court properly concluded that the encounter between Officer Wong and Nettles never rose to the level of a seizure.

Therefore, because Nettles' own actions resulted in the abandonment of the evidence prior to any seizure of his person, it was lawfully retrieved by Officer Wong and properly admitted against him.

[Footnotes, citations omitted]

LED EDITOR'S COMMENT:

In a footnote, the majority in Nettles comments briefly on the Gleason "seizure" case digested in last month's LED at 15, appearing to suggest that Gleason might have been erroneously decided. However, the majority then goes on to state that the two cases are distinguishable factually because the overall atmosphere at the scene in Gleason was more coercive than in Nettles.

Although we continue to question the decision in Gleason as we noted last month, we would expand on what we believe to be Division I's basis for distinguishing Nettles from Gleason. It is one thing to assertively demand that a person lawfully contacted on the street take his hands from his pockets. This is a very minor intrusion done for officer protection purposes. In fact, it has been held that in the special non-seizure circumstance where the person contacted: (1) doesn't comply with such a request, and (2) poses a danger to the officer, a frisk is lawful. See State v. Hall, 60 Wn. App. 645 (Div. I, 1991) July '91 LED:11. On the other hand, it is a slightly greater intrusion and not an officer-safety step (though not necessarily a "seizure" in every case) to order the production of identification from a person contacted. As to each request, the best approach is to make the act voluntary if the officer wishes to keep things at a non-seizure level -- "Would you please take your hands from pockets?" "Would you show me some ID?" -- but, if both requests are stated as demands, the ID demand is more likely to be deemed a "seizure" than the show-me-your-hands demand.

TRACE AMOUNT OF COKE IN BAGGIES DOES NOT SUPPORT CHARGE OF POSSESSION WITH INTENT TO DELIVER WITHOUT OTHER EVIDENCE OF DELIVERY INTENTIONS

State v. Robbins, 68 Wn. App. 873 (Div. II, 1993)

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

On March 15, 1990, at approximately 9 p.m., police officers executed a search warrant at Robbins's residence in Longview. They did not find any immediately identifiable controlled substances. However, they found three small plastic baggies and a spoon, as well as sales ledgers, cutting agents and paraphernalia tending to show that Robbins was a dealer in cocaine.

Later, the state toxicologist used infrared spectrography to find trace amounts of cocaine in the three baggies. Those amounts were not visible to the naked eye. The toxicologist also found trace amounts of cocaine on the spoon. Neither the cocaine in the baggies nor the cocaine on the spoon was in sufficient quantity to effect a sale.

The State charged Robbins with possession of cocaine with intent to deliver, and the matter went to trial. The jury was instructed on both possession with intent to deliver and the lesser included offense of simple possession. It found Robbins guilty of possession with intent to deliver.

After trial, Robbins moved to arrest judgment on grounds of insufficient evidence. The trial court ruled the evidence was insufficient to support a conviction for possession with intent to deliver, but sufficient to support a conviction for the lesser included offense of simple possession. The trial court entered judgment on the lesser offense and sentenced Robbins to 2 months in the county jail.

[Footnote omitted]

ISSUE AND RULING: Was the evidence sufficient to support the conviction for possession of a controlled substance with intent to deliver? (**ANSWER:** No) **Result:** Affirmance of Cowlitz County Superior Court order which (i) set aside a guilty verdict for possession of drugs with intent to deliver, and (ii) entered a conviction of the lesser charge of simple possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Evidence is not sufficient to support a conviction for possession with intent to deliver unless a rational trier could find that the defendant possessed the same cocaine he intended to deliver. RCW 69.50.401(a) states that "it is unlawful for any person to . . . possess with intent to . . . deliver, a controlled substance", and the plain meaning of this language is that possession and intent to deliver refer to the same quantity of controlled substance. Moreover, this meaning was confirmed in United States v. Latham, 874 F.2d 852, 860-63 (1st Cir. 1989), which involved a federal statute virtually identical to RCW 69.50.401(a). There, the trial judge instructed that the defendant "need not have the intent to distribute the specific cocaine which he possesses in order to be guilty of this offense." (*Italics omitted.*) Holding this instruction to be erroneous, the Court of Appeals [*in Latham*] held:

This instruction amounted to telling the jury that it could find Latham guilty of possession with intent to distribute cocaine even if the defendant did not intend to distribute the cocaine he in fact possessed, but if he had the intent to distribute some unspecified amount of cocaine, that he did not currently

possess, at some unspecified time in the future. Such an interpretation of the statute is erroneous. The crucial words of the statute are "possess with intent to distribute a controlled substance." The common sense meaning of this language is that possession and intent to distribute refer to the same controlled substance. The instruction changes the statute to make it read: "possess a controlled substance *and* have a general intent to distribute at some time (the same or a different) controlled substance." This interpretation distorts the clear meaning of the statute.

In this case, Robbins possessed trace amounts of cocaine that were invisible to the naked eye, unusable and without value. There is no reasonable inference that he intended to deliver such amounts to someone else, and even when viewed most favorably to the State, the evidence was not such that a rational trier could have so found beyond a reasonable doubt.

The State argues that there was an "overwhelming amount of evidence that the defendant was buying and selling drugs." Assuming that to be true, such evidence warrants only an inference that the defendant intended to deliver cocaine not yet possessed, and such an inference will not support a conviction for possession with intent to deliver.

The State argues that Robbins did not discard the three baggies because he intended to put new amounts of cocaine into them, then deliver the baggies and their contents -- including the trace amounts present in the baggies on March 15, 1990 -- to other persons. This argument fails because there is absolutely nothing to indicate that Robbins intended to use the three baggies to deliver cocaine in the future.

[Footnotes, some citations omitted]

PAWNBROKER'S MULTIPLE FEES ADD UP TO EXCESSIVE INTEREST UNDER 19.60 RCW

Wenatchee v. Johnston, 68 Wn. App. 697 (Div. III, 1993)

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

A Wenatchee city undercover detective contacted Mr. Johnston, owner of Ray's Pay-n-Save Auto Parts & Pawnbroker, on April 2 and 6, 1990. He told Mr. Johnston he wanted to pawn handguns. On April 2, the detective gave Mr. Johnston a handgun in exchange for \$100. He redeemed the handgun 9 days later for \$136.70, an additional 36.7 percent charge. On April 6, the detective gave Mr. Johnston a second handgun in exchange for \$75. He redeemed this handgun 3 days later for \$102.50, an additional 36.7 percent charge.

Mr. Johnston was tried in the Chelan County District Court on June 5, 1990. At trial he testified that this charge included insurance, inspection, setup, handling, appraisal, storage, bookkeeping, and interest. Mr. Johnston never specified how the payment was allocated between interest and other fees. The court found Mr. Johnston guilty on two counts of charging excessive interest and one count of failing to record information, in violation of former RCW 19.60.010 *et seq.* Mr.

Johnston appealed to the Chelan County Superior Court, which affirmed all three counts.

ISSUE AND RULING: Were Mr. Johnston's interest and loan charges excessive under chapter 19.60 RCW? (ANSWER: Yes) Result: Chelan County Superior Court affirmance of District Court convictions under pawnbroker law affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Former RCW 19.60.060 read, in pertinent part:

All pawnbrokers are authorized to charge and receive interest and other fees at the following rates for money loaned on the security of personal property actually received in pledge:

(1) The interest shall not exceed:

...

(c) For an amount loaned from \$40.00 to \$75.99 -- interest at the rate of \$2.00 per month;

(d) For an amount loaned from \$76.00 to \$100.99 -- interest at the rate of \$2.50 per month;

...

(2) The fee for the preparation of documents, pledges, or reports required under the laws of the United States of America, the state of Washington, or the counties, cities, towns, or other political subdivisions thereof, shall not exceed:

...

(i) For the amount loaned from \$70.00 to \$79.99 -- the sum of \$9.00;

...

(l) For the amount loaned from \$1001.00 to \$124.99 -- the sum of \$12.00;

...

The language of the statute is sufficiently plain that other rules of construction are not needed. Although Mr. Johnston seeks to obscure that plainness by arguing that the fees mentioned in former RCW 19.60.060(2) are only "document preparation fees" or "record fees", his argument ignores the plain language in its opening clause: "All pawnbrokers are authorized to charge and receive interest and other fees at the following rates". Former RCW 19.60.060 clearly authorizes interest and document preparation fees at specified amounts.

Since the statute grants pawnbrokers authorization to charge interest and document preparation fees, other fees not designated in the statute are not authorized. "[W]here a statute designates a list of things whereupon the statute operates, the inference arises that the Legislature intended to omit other things not listed". This inference is heightened by the Legislature's deliberate act, in 1984, of removing statutory authorization to charge other fees for maintenance, insurance, inspection, setup, and the like.

Moreover, the plain language of former RCW 19.60.060(2) authorizes fees for the

"preparation of . . . pledges" as well as documents and reports. Services relating to preparation of pledges include insurance, inspection, setup, handling, appraisal, storage, and bookkeeping. Therefore, such charges are authorized so long as the total fee for preparation of documents, pledges, and reports does not exceed the limits prescribed by former RCW 19.60.060(2).

Here, the statutory limit for interest and other fees was \$14.50 on the loan of \$100, and \$11 on the loan of \$75, a monthly rate of approximately 14.5 percent. Mr. Johnston exceeded that limit by charging 36.7 percent. Former RCW 19.60.060 authorizes pawnbrokers to charge only the fees set forth in the statute; the evidence supports the trial court's finding that Mr. Johnston was guilty of charging unauthorized fees.

LED EDITOR'S COMMENT:

While this case involved RCW 19.60.060 as it read prior to its amendment by chapter 323, Laws of 1991, the 1991 amendment would not affect the principle established in this case. That is, while the amounts allowed for interest and other fees were modified in the 1991 amendments, the basic structure of the statute was not changed. Therefore, under the current statute, as under the former statute, the statutorily prescribed amounts may not be exceeded through a business practice such as that followed by Mr. Johnston in this case.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) INFORMANT'S UNDISCLOSED PENDING CHARGES DON'T NEGATE PROBABLE CAUSE; 9.73 REQUIREMENTS MET; SEARCH OF VEHICLE INCIDENT TO ARREST NEARBY LAWFUL -- In State v. Lopez, 70 Wn. App. 259 (Div. III, 1993) the Court of Appeals rejects all three of defendant's challenges to his controlled substances conviction.

(1) PC ISSUE

First, the Court of Appeals responds to defendant's argument that, in the government's application for a court order under RCW 9.73.090 to tape record a conversation with defendant, the government should have advised the Superior Court of the fact that the government's identified drug-world informant gave the PC information to the police following his arrest and the filing of drug charges. The Court responds as follows:

However, reference in the affidavit to Mr. Cantu's pending charge would, if anything, likely tend to further support a finding of reliability and veracity. The fact that an informant provides information following arrest has been recognized as an indicia of his credibility. In [two previous decisions] promises by the State of leniency in exchange for the information were made and the information included specific statements against penal interest. In this case, as in those cases, motivation to be truthful with the police is enhanced by the existence of a pending charge. . . .

We conclude that the application affidavit was sufficient to support a conclusion

that Mr. Cantu was reliable and credible.

LED EDITOR'S COMMENT ON PC ISSUE: Nonetheless, we recommend that applicants for search warrants and 9.73 court orders always include information about an informant's criminal record, as well as pending charges.

(2) 9.73'S REQUIRED SHOWING OF INADEQUACY OF ALTERNATIVE METHODS

Second, the Court of Appeals rejects defendant's argument that the government had failed to make a showing under RCW 9.73.130 that an electronic intercept/recording order was necessary due to the inadequacy of other investigative means. Relying on prior Court of Appeals decisions in State v. Knight, 54 Wn. App. 143 (1989) and State v. Cisneros, 63 Wn. App. 724 (1992) May '92 LED:13 the Court of Appeals rules that the following statement in the intercept application satisfied the statutory requirement of showing the inadequacy of other investigative methods:

Based on the previous transactions the deal will take place in the garage at the Cantu residence. Due to the geographic setting officers will be unable to locate themselves in such a manner as to be unable [sic] to monitor any conversations without electronic devices.

...

(f) Successful prosecution of this type of case requires proof of knowledge contained in a verbal exchange. Other normal investigative methods to obtain evidence of the conversations, such as stationing an officer close enough to overhear the conversation appears unlikely to succeed due to the location being of necessity to be agreed to by the drug buyer and subject to changes. It is anticipated that Gregorio Cantu's credibility would be a primary issue in subsequent proceedings. Possession of this verbal exchange (between Gregorio Cantu and Domincio [sic] Lopez), in the form of a recording can resolve any issue as to exactly what was said, by whom, and in what context things were said. Thus a "swearing contest" between Gregorio Cantu and Domincio [sic] Lopez could be avoided in subsequent court proceeding, and Gregorio Cantu will have his credibility enhanced.

Possession of the record of an actual conversation may also negate any defense of entrapment. Finally the intercept will help protect the safety of the participants.

(3) VEHICLE SEARCH INCIDENT TO ARREST

Third, the Court of Appeals holds that a police search of Mr. Lopez' vehicle was lawful as a search incident to arrest under the following factual circumstances. Mr. Lopez had driven in his pickup truck to Mr. Cantu's house and had parked the pickup on the street. He had a discussion with Mr. Cantu in Cantu's garage, and then Cantu went into his house. The pertinent ensuing circumstances on the search-incident-to-arrest issue are described by the Court of Appeals as follows:

While Mr. Cantu was in the house obtaining the marijuana, surveillance officers observed Mr. Lopez return to his pickup, get in, do something in the vehicle below

the dashboard level for a few moments, and then return to the garage.

When Mr. Cantu returned to the garage with the marijuana, listening surveillance officers noted that "things became heated". At that point the officer in charge of the operation, Detective Sergeant Edwin Radder, became concerned about Mr. Cantu's safety and directed the other officers to enter the garage and arrest Mr. Lopez.

While other officers were arresting and securing Mr. Lopez 50 to 60 feet from the pickup, Sergeant Radder looked into the pickup to determine that no other persons were in the cab or canopy and then opened both doors of the cab and leaned in both sides far enough to see under the seat "to see if there was something that would discern to me what it was that Mr. Lopez had done in the cab of that vehicle".

After determining that no persons were in the pickup, Sergeant Radder leaned through the open doors to check under the seat and found a brown paper bag on the center hump pushed partially back under the seat. He looked into the bag and could see that it contained a large bundle of money. He did not remove the paper bag or anything else from the pickup, which was driven by an officer to city facilities where it could be secured. Sunnyside police then obtained a search warrant for the pickup based upon an affidavit which recited Mr. Lopez' arrival in the pickup at the Cantu residence, his examination and negotiation of the marijuana, and Sergeant Radder's observation of the paper bag on the floorboard containing a quantity of money.

In a search of the pickup, a marijuana cigarette, a triple beam scale containing marijuana residue, and the paper bag containing \$4,800 in cash were seized.

The Court holds that this vehicle search was a lawful search incident to arrest under State v. Stroud, 106 Wn.2d 144 (1986) Aug. '86 LED:01. Stroud is the State Supreme Court decision which established a "bright line" rule allowing police to search the passenger area of a vehicle and any unlocked containers or compartments of that area as an incident of a custodial arrest of an occupant of a vehicle. Stroud allows this search regardless of whether the driver and/or passengers have already been secured by police, so long as the search is reasonably contemporaneous with the arrest and occurs while the arrestee is still at the scene.

Responding to defendant's argument that the facts of his case (the distance of the arrestee from the vehicle at the moment of arrest) distinguished his case factually from Stroud, the Court of Appeals disagrees under the following analysis:

[I]f a comparison of the circumstances in Stroud with those in this case was necessary, we fail to perceive any distinctions of significance. In both cases, the defendants were outside the vehicle when the police contacted and arrested them and were secured prior to the search of the vehicle. The exigencies in Stroud were no greater than those present in this case. Although the court in Stroud observed that the officers would also have been entitled to enter the car to retrieve a gun under the "plain view" exception, the search of the car was clearly approved as an automobile search incident to arrest.

Result: Yakima County Superior Court conviction of Nemecio Lopez for attempted possession of a controlled substance with intent to deliver affirmed.

LED EDITOR'S COMMENT RE LIMITS ON STROUD/LOPEZ/FORE: Lopez pushes at the limits of the rule on vehicle searches incident to arrest in terms of the requirement that the arrestee have a close connection to the vehicle. The limits of the law are not very clear in this area, but if we had to state a black-letter rule based on the Lopez, Stroud and another case with facts similar to those in Lopez, State v. Fore, 56 Wn. App. 329 (Div. I, 1990) March '90 LED:05, we would state it as follows:

A VEHICLE UNOCCUPIED AT THE MOMENT OF ARREST MAY BE SEARCHED INCIDENT TO A CUSTODIAL ARREST ONLY IF THE ARRESTEE IS NEAR THE VEHICLE AT THE MOMENT OF ARREST AND THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ARRESTEE HAS BEEN INSIDE THE VEHICLE WITHIN THE PAST FEW MINUTES.

(2) **EVIDENCE SUFFICIENT TO SUPPORT CONVICTION FOR HARMING A POLICE DOG** -- In State v. Kisor, 68 Wn. App. 610 (Div. II, 1993) the Court of Appeals rejects defendant's argument that the State had not produced sufficient evidence to convict him of harming a police dog.

A police officer on foot had chased defendant, a car theft suspect, into the woods. A K-9 unit had then responded. The police dog, "off leash", had gone ahead into the woods after Kisor. A single shot was heard, and later the dog was found dead. Kisor's statement after his arrest had been that he had seen a "blur" coming after him in the woods and he shot it, only then realizing it was a dog. The Court of Appeals' analysis of whether there was sufficient evidence that Kisor knew he was shooting a police dog is as follows:

In reviewing the sufficiency of the evidence to support a guilty verdict in a criminal case, the appellate court views the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The crime of harming a police dog is defined in RCW 9A.76.200 as follows:

Harming a police dog. (1) A person is guilty of harming a police dog if he maliciously injures, disables, shoots, or kills by any means *any dog that the person knows or has reason to know to be a police dog* as defined in RCW 4.24.410, whether or not the dog is actually engaged in police work at the time of the injury.

(Court's emphasis.) In order to sustain a conviction for the offense, the State had to prove that Kisor knew or had reason to know that Lucky was a police dog. Kisor asserts that a reasonable trier of fact could not have found that he possessed such knowledge.

Because the evidence showed that Kisor was attempting to escape into a wooded area, the jury could have reasonably inferred that Kisor knew or would know that a police tracking dog would be the most effective means to track him. Furthermore, Lucky was equipped with a harness, reflectors, bell, and badge which greatly

increased his visibility and identified him as a police dog. There was evidence, also, that Lucky was trained not to take defensive measures as he pursued and confronted a suspect. That evidence would suggest that Lucky came directly at Kisor, thus exposing his identification as a police dog. Additionally, an expert witness testified that he believed the fact that Lucky was found with a stick in his mouth indicates that Kisor lured the dog with the stick and then fired into his chest.

This suggests that Kisor was aware that Lucky was tracking him. When all of this evidence is viewed in the light most favorable to the State, we can say that it was sufficient to permit the jury to infer that Kisor knew or should have known that Lucky was a police dog.

Result: Clark County Superior Court convictions for harming a police dog affirmed. Kisor was also convicted of theft and burglary, but those convictions were not appealed. Kisor also appealed a restitution order for \$17,380 for the cost of replacing the police dog; the Court of Appeals agrees with him that the evidence before the Court wasn't sufficient to support the dollar amount of the order, and the Court remands the case for a new restitution proceeding to determine the cost of replacing and training a new police dog.

EVIDENCE OF : (1) HIT-RUN, CAR-BICYCLE ACCIDENT, (2) ALCOHOL USE, AND (3) ERRATIC DRIVING MAY JUSTIFY FORCIBLE ENTRY OF HOME TO ARREST

LED EDITOR'S INTRODUCTORY NOTE: The following summary is a collaboration-in-writing between the deputy prosecuting attorney on the case and your LED Editor. The decision described in the summary is that of a district court, not an appellate court, so the decision sets no precedent and cannot be cited as legal authority. Even though the decision does not set a precedent, it is instructive on the law. We agree with the trial court's "exigent circumstances" ruling in the case, as this case has facts closely analogous to those in State v. Komoto, 40 Wn. App. 200 (Div. I, 1985) Aug. '85 LED:18, where, as here, exigent circumstances were found to justify forcible entry of a private premises to make an arrest of a suspected hit-and-run, DWI. However, a much closer question would be posed if there were no injury-hit-run accident, i.e., if there were only: (1) probable cause as to a DWI in the past few minutes, plus (2) knowledge that the driver appeared to be passed out inside her apartment. See Seattle v. Altshuler, 53 Wn. App. 317 (Div. I, 1989) April '89 LED:17, May '89 LED:19; See also Altshuler v. Seattle, 63 Wn. App. 389 (Div. I, 1991). Compare State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept. '91 LED:18.

State v. Ms M

FACTS

This was a prosecution for Driving While Intoxicated and Hit & Run - Attended. The Defendant moved to suppress all of the state's evidence for (i) lack of probable cause to arrest, (ii) warrantless arrest of defendant (which was made inside of her home), and (iii) "governmental misconduct."

At about 9:30 p.m., Trooper Kaleta drove up on a small crowd of people gathered around a bicyclist who was lying on the ground. The rider had been hit by a car only moments before. This occurred in the University District in Seattle. Trooper

Kaleta learned from two eyewitnesses that a late model red Nissan Pulsar had been weaving down the block and had struck the bicyclist. The witnesses had followed the vehicle for several blocks and observed it crossing the center line and narrowly missing several parked cars. They described the driver as a female with shoulder length brown hair. They said that the Nissan had fled the accident scene with a flat right front tire. They also said that there was minor body damage to the right front of the car. They also had the license plate of the Nissan.

After the aid car had arrived, Trooper Kaleta proceeded to the address of the registered owner of the Nissan, where he met two other troopers (Odegard and Penry). The troopers had found the Nissan parked directly in front of the address (a small apartment house). It had a flat right front tire and damage to the right front. The troopers went to the apartment of the registered owner, a Ms. M (actual name deleted). They saw a white female with shoulder length brown hair lying face down on the living room floor only a few feet from the doorway. The telephone was off the hook and lying beside her. The troopers knocked on the door loudly and yelled Ms. M's name. They were loud enough to wake up many of the neighbors, yet Ms. M, only a few feet away, remained completely motionless. As the troopers looked at Ms. M through the front window, it became apparent that Ms. M was not going to wake up. The troopers called the apartment manager.

When the manager arrived, the troopers entered the apartment without a warrant and determined that Ms. M had simply passed out. She was subsequently arrested for DWI and Hit & Run - Attended. (The injuries to the bicyclist were not severe). After the arrest, additional evidence of both offenses was obtained, including statements and a very high blood alcohol level.

RULING ON SUPPRESSION MOTIONS

The Seattle District Court denied the Defendant's motions, finding that the trooper had probable cause to arrest and sufficient exigent circumstances to make an arrest in the defendant's home without a warrant. The Court also found that there had been no "misconduct" by the investigating troopers.

DISPOSITION OF CHARGES

The Court granted the Defendant's motion for deferred prosecution.

LEGAL ANALYSIS

Standing outside the apartment, looking in the window, the troopers had probable cause to believe the person inside had committed Hit & Run - Attended. Eyewitnesses to the accident had noted the vehicle's make, model, color, flat tire and license number. The witnesses described the driver as a white female with shoulder length dark hair. Radio informed the troopers that the vehicle belonged to the Defendant and that she lived at the address where the vehicle was found. At that point, it was considerably more likely than not that the unconscious person in the apartment was the owner and driver of the vehicle. They also had probable cause to believe she was intoxicated.

A similar set of facts was presented in State v. Komoto [40 Wn. App. 200 (Div. I, 1985) Aug., '85 LED:18]. In Komoto, a vehicle struck a pedestrian (who later died) and left the scene without stopping. Witnesses saw the accident and obtained a description of the vehicle but not the driver. The owner of the vehicle had been stopped the day before and was intoxicated at that time. The vehicle was found at the home of the owner. Lights and television were on in the home, but no one responded to knocking. Troopers entered the home without a warrant, arrested the owner of the vehicle, and obtained evidence of intoxication. The Court upheld the search, arrest and conviction for Felony Hit & Run, RCW 46.52.020.

Absent consent, officers must have probable cause and exigent circumstances to make a warrantless entry or search of a residence. The troopers in this case had greater probable cause than did the troopers in Komoto to believe an arrest of the Defendant would produce necessary evidence. The need for evidence of intoxication is an exigency which may justify a warrantless arrest in a residence. In State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept. '91 LED:18, the Defendant was arrested for DWI at the door of her house. The officer had observed erratic driving and had pursued the driver to the door of her home. The Court analyzed the subsequent investigation and arrest as a warrantless arrest in the home. The Court in Griffith found that, coupled with other exigencies (hot pursuit and fleeing suspect), the exigency of the destruction of the alcohol evidence allowed a warrantless residential arrest.

The exigencies of the criminal investigation in this case justified the warrantless entry and arrest. The offenses being investigated by the troopers were serious. Ms. M's defense counsel tried to make much out of the fact that the crime charged in Komoto was a felony, while the crime charged in Ms. M's case was a gross misdemeanor. The response to this argument is in the alternative: (1) that there was discretion here to charge a felony, and (2) that what is important is that the circumstances known to the troopers on the scene indicated a serious crime, regardless of the ultimate charge filed.

In addition, critical evidence, namely the Defendant's blood alcohol, was evaporating. The accident witnesses said they had seen the vehicle swerving back and forth across the roadway, narrowly missing parked cars, prior to the collision with the bicycle. This information alone gave the troopers probable cause to believe that the driver was intoxicated, and that the blood alcohol evidence was evaporating. Together with the evidence of the hit-run accident, the evidence of probable intoxication justified the forcible entry to arrest, the trial court held.

NEXT MONTH

The December LED will include, among other entries, our annual subject matter index, as well as an entry on the decision in State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) (Holding that the monitoring of phone numbers received on a pager lawfully seized from a drug-dealer was not violative of any constitutional or statutory privacy protection provisions.)

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