

**October, 1994**

***HONOR ROLL***

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**"PIG THEORY" OF FORFEITURE EXPLAINED**

**LED EDITOR'S INTRODUCTORY NOTE:** The following article explaining the double jeopardy/excessive fines limitation on forfeiture is authored by Pat Sainsbury, Chief Deputy Prosecutor of the King County Prosecuting Attorney's Office. See also the LED entry on State v. Clark which immediately follows Pat's article. Comments or questions by LED readers regarding Pat's article or the Clark case may be directed to your LED Editor (206) 464-6039 or to the persons indicated in the final paragraph of Mr. Sainsbury's article.

**DOUBLE JEOPARDY**

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. .

. ." Fifth Amendment.

"No person shall . . . be twice put in jeopardy for the same offense." Art. I, Sec. 9, Wash. Const.

### EXCESSIVE FINES

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Eighth Amendment.

"Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Art. I, Sec. 14, Wash. Const.

### CASES

Mr. Halper submitted 65 false Medicare claims of \$9 each (total loss \$585) and received a two-year prison sentence and a \$5,000 fine. Then the government filed and won a civil suit for double damages and costs of investigation and prosecution, plus an automatic civil penalty of \$130,000 (\$2,000 per false claim). Held: even though it is called a "civil penalty," it is in fact punishment (unless it's "remedial") and violates the double jeopardy clause. U.S. v. Halper, 490 U.S. 435 (1989).

Mr. Austin sold minor amounts of cocaine (2 grams) involving his body shop and mobile home. The feds forfeited the body shop and mobile home. Held: Although it is an "in rem civil forfeiture proceeding," the federal drug forfeiture statute is in fact punishment, and a disproportionate forfeiture violates the Excessive Fines clause. Austin v. U.S., 509 U.S. \_\_\_, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993).

The Washington drug forfeiture statute is in fact punishment for purposes of Double Jeopardy analysis. State v. Clark, 124 Wn.2d 90 (1994). (Note: The Court has been asked by both sides to reconsider the case.)

### PIG THEORY

Halper and Austin illustrate the pig theory: If you make a pig of yourself in a forfeiture, the courts will make sausage of you.

### PROBLEMS

"I've been found guilty in the criminal case. You can't forfeit my \_\_\_\_ (house, Mercedes, etc). It would violate Double Jeopardy." Coming soon to your jurisdiction.

"You've already forfeited my \_\_\_\_ (house, Mercedes, etc.) You can't charge me with a crime." Coming soon to your jurisdiction.

"I only bought/sold two \$20 rocks. You can't forfeit my Lexus. It would violate Excessive Fines." Coming soon to your jurisdiction.

### WHAT SHALL WE DO?

It's abundantly clear from these three cases (and other cases decided by federal courts) that the

courts are going to examine forfeitures to see if they're "fair", i.e. proportional in light of the underlying conduct and the property's role in that conduct. It's not clear whether they'll use excessive fines analysis or double jeopardy analysis, but that's for lawyers and judges to worry about. What police and forfeiture prosecutors should be worrying about are the facts of the cases the courts examine. We need to be sure the forfeitures are proportionate to both the conduct and the role of the property being forfeited. If we do, the courts should act reasonably, rather than overreact.

This issue will arise mainly in the forfeiture of vehicles and real estate used to facilitate drug sales or purchases. Forfeiting proceeds of drug dealing or property intended to be used to purchase drugs obviously is proportionate to both the conduct involved and the role of the property. State v. Clark on p. 101 hints our Supreme Court will agree that forfeiture of proceeds will always be permissible.

### SAFE HARBORS

The law is just starting to develop in the trial and lower appellate courts. There should be several "safe harbors":

1. Forfeiture of contraband or proceeds.
2. Maybe (no cases) a forfeiture of instrumentalities which totals less than the maximum fine, or perhaps less than a reasonable fine, and there was no criminal fine.
3. Forfeiture of instrumentalities which is roughly equal to the government's reasonable costs. Cases cited in Halper, Austin footnote 14, Clark pp. 103-104.
4. Forfeiture of instrumentalities whose value is "proportionate" to the case/crime, considering several factors: gravity of offense, harshness of punishment, role of the property in the offense (integral vs. incidental, number of times used, length of time used, proportion used). Cases discussed in Clark, p.106.

### CONCLUSION

Nothing is settled. The safest practice is a global settlement (where the criminal case and forfeiture are settled in one agreement). Be sure the settlement contains an explicit waiver of Double Jeopardy and Excessive Fines claims. The next best is to prosecute first, then litigate the forfeiture. Try to intertwine the civil and criminal proceedings (for example, use the same affidavit for criminal search or charges, and for forfeiture seizure, file the cases simultaneously), so that it is clear that the forfeiture case isn't brought later because you're disappointed with the outcome of the criminal case. This is to take advantage of cases which say that's a single case for purposes of double jeopardy. Don't proceed with the forfeiture first unless you are sure it's roughly equal to your costs and proportionate to the conduct you can prove. Remember the Pig Theory!! Pick good facts for the first cases. Don't get into a situation where the courts overreact to bad facts and make bad law that hurts all of us.

HELP

Marilyn Brenneman, Barbara Mack, and I are following these issues and are happy to talk with you or your attorneys. Call us at (206) 296-9010 or SCAN 667-9010. We are compiling a list of people familiar with the cases and issues, so that we can refer you or your attorney to someone in your area.

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

**(1) FORFEITURE OF REAL, PERSONAL PROPERTY HELD NOT EXCESSIVE PENALTY IN DRUG CASE** -- In State v. Clark, 124 Wn.2d 90 (1994) the State Supreme Court answers some constitutional questions regarding the appropriate combination of criminal punishment and civil forfeiture for criminal activity; the Court leaves some other constitutional questions unanswered.

Based on evidence found in a search under a warrant, Robert Leroy Clark was convicted in Clallam County Superior Court with UCSA crimes for growing marijuana, as was his wife, Linda Lee Clark, in a second criminal prosecution; both defendants were fined and sentenced to jail time. In a separate civil action, the county forfeited the Clarks' house and motorhome for the property's direct involvement in the marijuana-growing operation (rather than as proceeds). On appeal, the Clarks challenged the forfeiture of their property on grounds, among others: that it violated double jeopardy provisions of the federal and state constitutions; that it violated the "excessive fines" prohibition of the Federal constitution; and that it violated their "homestead" rights under state law.

In a unanimous opinion, the State Supreme Court: (1) declines review of the state constitutional double jeopardy issue because it was not properly raised by the Clarks; (2) declares that civil forfeiture under RCW 69.50.505 of real and personal property for its direct involvement in illegal drug activity is a form of punishment subject to federal double jeopardy scrutiny; but that the Clark's failed to show in this case that the civil forfeiture "penalty" was for the "same offense" as their criminal penalties, so their federal double jeopardy challenge must fail (the Court also leaves room for a future ruling that forfeiture of "proceeds" of drug activity is not punishment subject to double jeopardy analysis, but the Court does not decide this issue); (3) rules under the "excessive fines" clause of Federal Constitution's Eighth Amendment that because the cost of prosecuting the Clarks was roughly equal to the value of the equity in the property forfeited, the punishment of forfeiture was not "excessive" (the Court notes without much discussion that other factors may enter into the excessive-ness analysis in appropriate cases); and (4) rejects the Clarks' "homestead" claim under state law because it was not timely raised by the Clarks.

Result: Clallam County Superior Court civil forfeiture order affirmed, as is Court of Appeals order which earlier affirmed the trial court order.

**LED EDITOR'S NOTE:** The Supreme Court also very briefly addresses and rejects an argument by the Clarks that their Fourth Amendment rights were violated by an affiant law enforcement officer's allegedly deliberate or reckless omission of information from the original search warrant affidavit. The Clarks failed to support their claim that any omissions were deliberate or reckless, or, in any event, that any such omissions were prejudicial to the Clarks. More detailed analysis of this question is found in the earlier

**Court of Appeals decision at 68 Wn. App. 592 (the Court of Appeals decision will not be digested in the LED).**

**(2) "PLAIN FEEL" CASE IS REMANDED TO TRIAL COURT FOR FINDINGS ON "IMMEDIATE RECOGNITION" ISSUE** -- In State v. Hudson, 124 Wn.2d 107 (1994) a unanimous State Supreme Court reverses a Court of Appeals suppression ruling on the "plain feel" issue in the same case [see 69 Wn. App. 270 (Div. I, 1993) Sept. '93 LED:17] and remands the case to the trial court for further hearings and findings.

Defendant Hudson had been lawfully frisked by law enforcement officers who suspected that Hudson had just been involved in a drug transaction. The facts surrounding the "plain feel" issue are described in part by the State Supreme Court as follows:

[Hudson] approached the detectives and asked what was going on. Both of his hands were in the large front pockets of his heavy leather jacket. As Hudson approached, [Detective] Gaddy displayed his badge, explained to Hudson that he was executing a search warrant of the premises, and told Hudson to remove his hands from his pockets. Hudson appeared dumb-founded and kept his hands in his pockets. The detectives were concerned that Hudson might have a weapon in one of his pockets. Both detectives approached Hudson on either side and held him by the arms. They told him again to take his hands out of his jacket and explained to him that they needed to make sure he had no weapons. When Hudson failed to cooperate, the detectives forcibly removed his hands and placed them on the top of his head. The detectives then patted down the outside of his jacket. [Detective] Turney-Loos "felt a quite substantial bulge, hard something" in the right jacket pocket which made him "believe even more so that there was likely some kind of a weapon, something in his pocket". Suspecting a weapon, Turney-Loos reached into the pocket to determine whether Hudson was armed. Turney-Loos felt the item he had suspected was a weapon and instantly recognized it as a pager. He also felt paperwork and a baggie containing a "ragged edge chunk" of a substance. Turney-Loos later testified that he "knew immediately from feeling it that [the substance in the baggie] was likely one large chunk of a hard substance, which was likely cocaine". Turney-Loos then informed Gaddy of this discovery, removed the baggie and pager from Hudson's pocket, and confirmed his suspicions.

The trial court had suppressed the evidence seized in the frisk (and the fruits thereof which resulted from a more thorough search following Hudson's arrest) on grounds that the sense of touch is simply not reliable enough to justify seizure of evidence under the "plain view" doctrine of the Fourth Amendment. The Court of Appeals had affirmed. See Sept. '93 LED:17.

Now, the State Supreme Court has reversed this ruling, holding that, under the Fourth Amendment, the sense of touch can, under some circumstances, justify a "plain view" or "plain feel" seizure of evidence or contraband. The controlling Fourth Amendment case on "plain feel" is Minnesota v. Dickerson, 124 L. Ed.2d 334 (1993) Sept. '93 LED:15, where the U.S. Supreme Court held that an officer making a lawful frisk of a suspect may seize evidence or contraband if the officer immediately recognizes the nature of the item by sense of touch. "Immediate recognition" under Dickerson means that the officer recognizes the nature of the item with no further manipulation of the object following the instant that the officer determines the object is not

a weapon. In Hudson, the State Supreme Court declares that the trial court's findings are unclear on the "immediate recognition" question, and the Court therefore remands the case to the trial court for further factual determinations.

Result: Reversal of King County Superior Court suppression ruling (and of Court of Appeals affirmance of suppression); case remanded for further suppression proceedings.

**LED EDITOR'S NOTE**: The Supreme Court refuses to consider defendant's "independent grounds" argument under article 1, section 7 of the Washington Constitution, because the argument was raised too late in the proceedings.

**(3) GANG MOTIVATION FOR DRIVE-BY SHOOTING CAN ENHANCE SENTENCE; SENTENCE ENHANCEMENT DOESN'T VIOLATE RIGHT TO "FREEDOM OF ASSOCIATION"**  
-- In State v. Johnson, 124 Wn.2d 57 (1994) the State Supreme Court rejects defendant's argument that his First Amendment right to "freedom of association" was violated when the trial court enhanced his sentence based on the aggravating circumstance that his gang membership was a motivating factor for committing the crime. While gang membership alone is not a valid basis for an enhanced sentence, gang membership which motivates the crime may be used to enhance a sentence. In Antwon Lanell Johnson's case, the Court holds, there was ample evidence presented by Seattle police officers that Johnson committed a drive-by shooting as turf protection for the "Black Gangster Disciples" against the "Crips", and Johnson's sentence could be enhanced for that reason. Result: Affirmance of King County Superior Court convictions of first degree assault and second degree assault and concurrent sentences of 170 months (for the first degree assault) and 50 months (for the second degree assault); enhancement of sentences based on gang motivation and impact of the crime on the community (the shooting was near a grade school) upheld.

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**WASHINGTON STATE COURT OF APPEALS**

**CORROBORATION BY POLICE REMEDIES FAILURE OF CONFIDENTIAL INFORMANT TO FULLY SATISFY AGUILAR-SPINELLI TWO-PRONGED TEST FOR PROBABLE CAUSE**

State v. Kennedy, 72 Wn. App. 244 (Div. II, 1993)

**Facts and Proceedings**:

The primary issue in this Court of Appeals case centered on whether a warrant issued by a county district court judge was supported by probable cause to search for controlled substances. The affidavit which supported the application for the search warrant is described by the Court of Appeals as follows:

1. On August 21, 1989, the detectives received information from a confidential informant (CI #326) that George P. Cormier "was a large drug dealer who lived in Gig Harbor, but is working around the Mason County area." The informant stated that Cormier "cooks drugs", is "dangerous" and the informant was "afraid" of him.

2. On October 7, Tracy Wolle, manager of the Alderbrook Inn in Union, telephoned Detective Pfitzer and advised him that an individual named George Cormier had checked into the Inn on October 5 "giving false information along with other suspicious circumstances that led employees . . . to believe there was a drug lab in a rented room." On the registration slip, Cormier gave a

Gig Harbor address and identified his vehicle as a Pinto with license number KZ 189. While registering, Cormier showed the desk receptionist an envelope stuffed full of money and bragged about it containing five thousand dollars. The room was rented for four nights at \$105.00 per night, paying with hundred dollar bills from the envelope of money.

3. On October 6, two "room service maids, Linda K. Clemenson and Melinda L. Schoene, went to the cottage rented by Cormier to service the room. They noticed all the curtains and shades drawn closed on the windows: and "smelled a strong chemical smell at the cottage . . . When the maids knocked on the door a subject cracked the door just enough to talk to them. The subject told them that he wanted no service and needed nothing."

4. The next day, October 7,

the maids, Schoene and Clemenson, called the cottage occupied by Cormier to inquire about servicing the room. They called repeatedly but received no answer, so they went to the cottage to service it. When they arrived at the cottage they noticed someone look out the windows as they pulled in. Again all the shades were drawn closed. They knocked and a different person, a white female cracked the door open just far enough to talk. The female subject told them they wanted no room service. Schoene again smelled the chemical smell while standing in front of the door which was just cracked open. Schoene said that when she knocked on the door, she heard rustling from inside and heard what she said sounded like utensils falling and hitting the floor. Schoene and Clemenson said both persons they contacted at the cottage appeared stoned on drugs to them, and acted very strange.

5. Later, the same day, October 7, Detective Pfitzer "went to the cottage disguised as an employee and knocked on the door. A white male unlike the male described by the maids opened the door by cracking it slightly. Again the shades were drawn closed." Pfitzer told the subject

I had a repair order and he told me they wanted no service in the room. While at the cottage I observed three vehicles parked out front including a brown Ford Granada Washington license KYV 189, which is the vehicle mentioned in several contacts with CI #326 as being involved in [Cormier's] drug dealings. This was also the vehicle Cormier was in when registering, note it is not a Pinto but a Granada, and the actual license is KYV 189, not KZ 189 as Cormier used when registering.

6. On October 8, "Cormier brought a bunch of linen to the Inn's office and asked for clean linen in exchange. Employees smelled the soiled linen and called

Detectives to say that the linen smelled of the chemical odor."

7. On October 9, "the subject believed to be Cormier rented the room for one more night. In doing so he again showed a large amount of cash from an envelope.

8. Later, on October 9

at about 11100 hrs., CI #326 called Detectives to give information about Cormier. This was the fifth or sixth call to Detectives about Cormier since August of 1989. CI #326 called to advise that Cormier had recently moved from his residence in Gig Harbor, that he was still active in cooking drugs.

9. The affidavit then states that based on the detectives' training and experience certain listed items are characteristic of traffickers in controlled substances. One of those items was the necessity to "maintain on hand large amounts of U.S. currency in order to maintain and finance their ongoing narcotics business."

[Footnote omitted]

Based on the above-described affidavit, a district court judge issued a warrant to search the cottage for controlled substances. The Court of Appeals describes what occurred thereafter as follows:

When the warrant was executed, methamphetamines and a number of items typical of a methamphetamine lab were found. Those present in the cottage, Kennedy, Gookin and Jody Sweet, were arrested. Later Joan Hilgar arrived at the cottage in the Ford Granada and was arrested. A few minutes later, Cormier arrived and was arrested.

They were all charged with manufacturing and/or possessing methamphetamines with intent to deliver. Before trial, Cormier and Sweet pleaded guilty; Kennedy and Gookin proceeded to trial. They moved to suppress the evidence obtained during the search on the ground the search warrant had been issued without probable cause and was therefore invalid. This motion was denied.

At trial, both Cormier and Sweet testified that all of them were involved in the manufacture and sale of methamphetamines and had set up a lab in the cottage. The existence of a drug laboratory was confirmed by the testimony of a chemist. Kennedy and Gookin were convicted and this appeal followed.

**ISSUE AND RULING:** Was the corroborative information sufficient to establish PC to search for controlled substances despite the CI deficiencies under Aguilar-Spinelli's two-pronged test? (**ANSWER:** Yes, rules a 2-1 majority). **Result:** Mason County Superior Court controlled substances convictions affirmed.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

Kennedy and Gookin contend that as to the confidential informant the affidavit supporting the issuance of the search warrant fails to satisfy the basis of

knowledge and reliability prongs of Aguilar-Spinelli. [Court's footnote: Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).] The State concedes this to be true, but takes the position that independent investigation corroborated the tip to such an extent that the missing elements of the Aguilar-Spinelli test were satisfied, citing State v. Jackson, 102 Wn.2d 432 (1984)[Nov. '84 LED:06]. We agree.

In Jackson, the court stated, at page 438:

if the informant's tip fails under either or both of the two prongs of Aguilar-Spinelli, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the Aguilar-Spinelli test. The independent police investigations should point to suspicious activity, ["*probative indications of criminal activity along the lines suggested by the informant*" . . . Merely verifying "innocuous details", commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong. . . .

Here, Cormier registered at the Alderbook Inn, a resort complex on Hood Canal in Mason County. His registration showed a Gig Harbor address. At the time of registration, he displayed an envelope stuffed full of money and bragged it contained \$5,000. He paid four nights' lodging at \$105 per night in \$100 bills from the envelope. Experienced officers stated a characteristic of drug dealers is to carry large amounts of cash. Although Cormier registered otherwise, he drove a Ford Granada, license KYV 189, as reported by the informant. At all times, the shades on the cottage window were drawn closed and the maids were refused entrance to clean and make up the cottage. On consecutive days when the maids knocked on the cottage door, a male on the first day and a female on the second day opened the door only a crack to refuse service. One day the maids heard rustling and what appeared to be utensils falling on the floor. On each occasion the maids smelled a strong chemical odor and the person who answered the door "appeared to be stoned on drugs." On the third day, Cormier delivered linen to the office in exchange for clean linen. The soiled linen smelled of the same chemical odor. Throughout Cormier's occupancy of the cottage, his Granada and other cars were parked at the cottage.

Kennedy and Gookin argue these are innocuous facts and are as consistent with legal activity as they are with criminal activity. As the court in Jackson noted, "independent police investigations should point to suspicious activity, "*probative indications of criminal activity along the lines suggested by the informant.*" (Italics omitted.) Under different circumstances, mere registration while driving a Granada, license KYV 189, and the refusal of maid service at the cottage, without more, would be innocuous facts insufficient to corroborate the informant's tip. However, here such facts are coupled with other suspicious activities: the presence of several cars outside the cottage; different people answering the maid's knock at the door to refuse service; the presence of a strong chemical odor emanating from the cottage and from the linen delivered to the office; and the maid's observation that those who answered the door appeared "stoned" on drugs. These activities were shrouded in secrecy by the constantly drawn shades. Not only are these

suspicious activities, particularly at a resort where there are outdoor recreational activities, they are probative indications of criminal activity along the lines suggested by the informant.

Drawing common sense inferences from the stated facts, giving deference to the magistrate's determination of probable cause, and resolving all doubts in favor of the warrant's validity, we conclude the affidavit established probable cause to issue the search warrant and the trial judge who reached the same conclusion in denying the motion to suppress should be affirmed.

[Some citations omitted]

### **POSSESSION ALONE, EVEN OF LARGE AMOUNT OF DRUGS, GENERALLY DOES NOT SUPPORT CONVICTION FOR DRUG POSSESSION WITH "INTENT TO DELIVER"**

State v. Hutchins, 73 Wn. App. 211 (Div. III, 1994)

#### Facts:

A Walla Walla County deputy sheriff searched a vehicle incident to an arrest of the driver, Hutchins. The deputy found a bag which later laboratory tests proved to contain 393 grams (14 ounces) of marijuana.

#### Proceedings:

At his trial on charges of possession with intent to deliver, Hutchins objected on relevance grounds to the deputy sheriff's testimony that the amount of marijuana was more than usual for personal use and indicated intent to deliver. Hutchins had made no admissions after his arrest regarding intent to deliver, and there was no other evidence supporting the charge that he intended to deliver his near-pound of marijuana. The trial court allowed the deputy's testimony, and Hutchins was convicted of possession with intent to deliver.

ISSUES AND RULINGS: (1) Was the deputy's testimony that the quantity of marijuana possessed indicated an intent to deliver relevant? (ANSWER: No); (2) Was the evidence sufficient to convict Hutchins of "possession with intent" without the deputy's expert opinion? (ANSWER: No) Result: Walla Walla County Superior Court conviction for possession with intent to deliver reversed; case remanded for retrial on a simple possession charge.

ANALYSIS: (Excerpted from Court of Appeals opinion)

#### (1) RELEVANCE

Evidence of the profit to be gained from the sale of marijuana may be relevant to the issue of distribution. When, however, testimony of a profit motive is presented with no evidence other than bare possession of a quantity of marijuana, its admission is little more than an attempt to bootstrap a simple possession charge into the more serious offense of possession with intent to distribute. [The officer's] testimony assumed the very fact the State had the burden of proving -- that Mr. Hutchins intended to sell the marijuana in his possession. His testimony adds no direct or circumstantial evidence of Mr. Hutchins' intent. There is no evidence Mr.

Hutchins intended to sell the marijuana, only evidence he possessed a quantity of marijuana and would be well paid if he did sell it. Evidence of packaging and the profits to be made in distributing is not relevant under these circumstances.

## (2) SUFFICIENCY OF EVIDENCE

Bare possession of marijuana is not sufficient to support a conviction for possession with intent to deliver. "Washington case law forbids the inference of an intent to deliver based on "bare possession of a controlled substance, absent other facts and circumstances[.]" State v. Brown, 68 Wn. App. 480 (1993) [**May '93 LED:11**] (conviction for possession of cocaine with intent to deliver reversed and remanded for resentencing on lesser charge of possession when evidence showed at most constructive possession of seven bindles of cocaine); State v. Cobelli, 56 Wn. App. 921 (1989) [**June '90 LED:17**] (possession of baggies of marijuana containing 1.4 grams insufficient to establish even a prima facie case of intent to deliver); State v. Kovac, 50 Wn. App. 117 (1987)[**Jan. '88 LED:16**] (possession of seven baggies of marijuana insufficient to establish intent to deliver). . . .

In those decisions in which an intent to deliver has been inferred from possession of a large quantity of a controlled substance, some additional factor has been present. . . .

In State v. Brown [**May '93 LED:11**], the defendant had no weapon, no substantial sum of money, no scales or drug paraphernalia. The cocaine was not separately packaged and officers had not observed any actions suggesting delivery. The court rejected the State's argument there was sufficient evidence to support an inference of intent to deliver based on the officer's testimony that 20 rocks of cocaine exceeded the amount commonly possessed for personal use, noting:

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.

Recognizing the different legislative treatments for simple possession of a controlled substance and possession of a controlled substance with intent to deliver, the court stated:

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.

An officer's opinion of the quantity of a controlled substance normal for personal use is insufficient to establish, beyond a reasonable doubt, that a defendant possessed the controlled substance with an intent to deliver. . . .

. . .

There was no packaging material in the car, no scales or other drug paraphernalia, and the marijuana was not separately packaged. moreover, the bag of marijuana was apparently not ready for immediate use because it was still moist.

[Some citations omitted; LED citations inserted.]

**LED EDITOR'S CROSS REFERENCE NOTE:** Compare the result in Hutchins with that in Hagler, the next case.

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

(1) **INTENT TO DELIVER "PROVEN BY JUVENILE'S POSSESSION OF 24 COCAINE ROCKS AND \$342 IN CASH** -- In State v. Hagler, 74 Wn. App. 232 (Div. I, 1994) the Court of Appeals rejects a 16-year old's argument that the fact that he was found in possession of 24 rocks of cocaine (2.8 grams) and \$342.00 was not sufficient evidence to prove that he intended to deliver the cocaine. The Court seems to suggest that it would rule differently if the defendant were an adult, but that it is much more unusual for a juvenile to be carrying \$342.00 for no criminal purpose. In the absence of a reasonable explanation, the cash was corroborating evidence of his intent to deliver the drugs. Result: King County Juvenile Court convictions for possession and possession with intent to deliver a controlled substance affirmed.

(2) **1,000 FEET PROVISION OF UCSA'S "SCHOOL GROUND" SENTENCE ENHANCEMENT MEANS "WITHIN A 1,000 FOOT RADIUS"** -- In State v. Wimbs, 74 Wn. App. 511 (Div. III, 1994) the Court of Appeals rules that for purposes of the 24-month punishment enhancement given to persons convicted of committing certain controlled substances crimes within 1,000 feet of the perimeter of a school ground under RCW 69.50.435(a) and RCW 9.94A.310(5), "within 1,000 feet" means "within a 1,000 foot radius". The Court also follows the holding of the State Supreme Court in State v. McGee, 122 Wn.2d 783 (1993) March '94 LED:03 in rejecting defendant's argument that, in order to enhance his sentence under RCW 69.50.435(a), the State must prove that he intended to deliver a controlled substance to a person within 1000 feet of a school ground. If, while within 1000 feet of a school ground, he possessed a controlled substance with intent to deliver it anywhere, then he is subject to the sentence enhancement provision, the Court declares.

Result: Yakima County Superior Court UCSA conviction and sentence enhancement affirmed.

(3) **SEIZURE OF "SLIPPERY MATERIAL" FROM FRISK SUBJECT'S POCKET FAILS "PLAIN FEEL" TEST** -- In State v. Tzintzun-Jimenez, 72 Wn. App. 852 (Div. II, 1994) the Court of Appeals agrees with defendant-appellant that cocaine was unlawfully taken from his pocket during an otherwise lawful frisk.

During a street contact with a suspect, an officer became reasonably concerned for his safety and began a lawful frisk of the suspect. In patting one of the suspect's pockets, the officer hooked a finger in the pocket as the suspect started to pull away. At that point, the officer felt a "slippery material" in the pocket. The officer then took the slippery material out of the pocket -- it was a plastic baggie of cocaine. After losing a suppression motion, defendant was convicted of possession of cocaine.

The Court of Appeals notes that the "plain feel" issue before it is controlled by the U.S. Supreme Court decision in Minnesota v. Dickerson, 124 L. Ed.2d 334 (1993) Sept. '93 LED:15. In Dickerson the Supreme Court held that, under a "plain view" or "plain feel" theory, a police officer conducting a lawful frisk may seize an item of evidence or contraband identified as such by the sense of touch during the frisk. However, the Court held further in Dickerson that if the officer initially detects by sense of touch that an item is not a weapon, and then, by further probing, subsequently determines the evidentiary or contraband nature of the item, then the officer has gone beyond the scope of a lawful frisk. In the latter event, the item may not be seized, Dickerson holds.

Applying the Dickerson test to the case before it, the Court of Appeals in Tzintzum-Jimenez explains that its suppression decision is based on the trial court findings (or to be more precise, the lack thereof) on the critical factual question of the officer's ability to immediately recognize as illegal drugs the item touched in the patdown:

To satisfy the immediate recognition prong, the State must show that, when [the officer] felt the slippery substance inside the defendant's pocket, [the officer] had probable cause to believe he was touching a baggie of cocaine. Probable cause requires that the facts available to the officer "warrant a man of reasonable caution in the belief, . . . that certain items may be contraband . . ." Here, the only finding on this issue is the finding that [the officer] "could feel a slippery material in the pocket". There is no finding that [the officer] knew by training or experience that a slippery material was likely to be cocaine. The absence of such a finding is fatal.

[Citations, officer's name deleted.]

Result: Cowlitz County Superior Court conviction for possession of a controlled substance reversed.

**(4) DRIVER'S RECONSIDERATION OF HIS REFUSAL OF BLOOD ALCOHOL TEST TIMELY UNDER JUDGE-MADE TOTALITY-OF-THE-CIRCUMSTANCES TEST** -- In DOL v. Lax, 74 Wn. App. 7 (Div. II, 1994) the Court of Appeals rules, 2-1, that a driver who had initially refused a blood alcohol test could, under the factual circumstances of this case, reverse his refusal of the test for purposes of the implied consent law at RCW 46.20.308. The majority judges establish a test under which four conditions must be present before a DUI arrestee who has initially refused an alcohol test will be allowed to change his or her mind and withdraw the refusal.

The Court of Appeals describes the facts which occurred following WSP Trooper Przygocki's lawful arrest of Ralph Lax for DUI:

Przygocki then placed Lax in his patrol car and proceeded to the Jefferson County corrections facility. En route, Lax began to complain that he was having chest pains, so Przygocki took him to the Jefferson General Hospital. At the hospital, Lax was taken to the emergency room, where hospital personnel attached monitoring equipment to his chest and also administered an EKG test. After receiving permission from the attending hospital personnel, Przygocki read Lax his implied consent warnings in accordance with RCW 46.20.308(2) and asked him if he would submit to a blood test. Lax "refused to allow the blood sample to be drawn at that time".

Prygocki remained at the hospital in order to determine if Lax would be released. Subsequently, a nurse approached Lax and asked to draw blood from him. Lax refused. Shortly after Lax told the nurse that he would not give her a blood sample, Lax "asked the [t]rooper if he still wanted a blood sample". The trooper responded that because Lax had refused his initial request, he was making no further request. Lax then "volunteered to give blood and a sample was drawn by hospital personnel approximately 12 minutes after the initial refusal". The blood sample was placed in a "sample vial" supplied by the hospital to store and preserve blood samples for subsequent blood alcohol testing.

[Footnotes omitted]

What happened procedurally after that point is described by the Court of Appeals as follows:

The hospital provided the vial with Lax's blood to Przygocki for evidentiary purposes, and it was used in evidence by the State at Lax's trial in Jefferson County District Court on the charge of driving while under the influence of intoxicating liquor.

Przygocki completed and signed a report in which he indicated Lax had refused to submit to a blood test. The report was sent to the Department of Licensing. Upon receipt of the report, the Department revoked Lax's driver's license pursuant to RCW 46.20.334. Following trial, the Superior Court sustained the Department's decision to revoke Lax's driving privilege.

The majority opinion for the Court of Appeals holds that when a driver refuses to provide a breath or blood sample when requested for purposes of RCW 46.20.308, the implied consent statute, but later reconsiders and unequivocally assents to the taking of a sample, the test should be given, and even if it is not, no revocation should occur, if each of the following conditions are present: (1) the amount of time elapsed is brief enough to ensure the reliability of the test results; (2) the suspect has been in police custody or observation throughout this period; (3) the arresting officer is still in the driver's presence, and the delay in assenting to the test neither prevents the officer from performing other duties nor inconveniences the officer; and (4) the testing equipment or facility is still available and convenient. Under such circumstances, the assent is timely, the State is not prejudiced by the delay, and the results obtained from the test are reliable, the majority declares.

The majority judges of Division II concede that their ruling for a flexible refusal standard is inconsistent with the unanimous decision of the Division I Court of Appeals in Mairs v. DOL, 70 Wn. App. 541 (Div. I, 1993) Feb. '94 LED:18; the Mairs Court opted for a "bright line" one-chance-to-refuse standard. **[NOTE: The February '94 LED entry on Mairs did not address the one-chance-to-refuse issue.]**

Addressing the public policy considerations behind its "refusal" ruling, the two judges in the majority assert that permitting a driver to make a timely reconsideration of an initial refusal to provide a breath or blood sample when requested for purposes of RCW 46.20.308, serves the evidence-gathering purpose of the statute more effectively than allowing the driver only one

opportunity to assent or refuse. Permitting reconsideration also furthers fundamental fairness by allowing a more just determination of whether the driver actually refused the test, the majority judges assert.

**DISSENT:** Judge Seinfeld dissents from Judge Alexander's majority opinion. She argues for a "bright line" rule barring reconsideration of a breath or blood test refusal, asserting that such a test is more consistent with the statutory language and public policy. In regards to public policy, she asserts:

[T]he majority's decision is inconsistent with good public policy. It permits an arrested driver to unequivocally refuse, then change his or her mind, and have the court relabel the initial refusal as a nonlegal refusal. In so doing, it provides the arrested driver an opportunity to manipulate and negotiate - first refusing, then consenting. Our new "flexible approach" also places an unnecessary additional burden on law enforcement. Upon receipt of a refusal, the officer cannot automatically move to his or her next official duty. Instead, the officer, faced with an ambivalent driver, will need to decide whether the driver's initial refusal was a legal refusal or merely a factual refusal. The officer will have to weigh and balance the driver's possible multiple changes of mind to determine if they occurred within a "reasonable time" or satisfied the other factors established by the majority. The officer then may be further detained by the necessity of rewriting his or her report. Meanwhile, the officer will be unavailable to deal with other, perhaps more urgent needs.

**Result:** Jefferson County Superior Court order affirming DOL's suspension of Lax's license reversed.

**Status of case:** DOL's petition for review by the State Supreme Court is pending in that Court; the Court's decision to "grant" or "deny" further review is expected in late fall.

**(5) VIDEOTAPING OF DWI STOP WITHOUT RECORDING SOUND NOT PROHIBITED BY CHAPTER 9.73 RCW** -- In Haymond v. DOL, 73 Wn. App. 758 (Div. I, 1994) the Court of Appeals rejects defendant's claim that his privacy rights were violated under the electronic recording statute, chapter 9.73 RCW.

A City of Bellevue police officer had attempted to make a video and sound recording of a DWI stop of Haymond, but the sound function of the machine was not operating, and, therefore, only a video recording was obtained. In a superior court trial on DOL's revocation of Haymond's license under the implied consent law, the trial court judge ruled: (a) that the officer-driver contact on the street was a "private" conversation, (b) that the video tape was not admissible because no sound recording was made of the officer advising the suspect of the presence of the tape machine, but (c) the officer should be allowed to testify because any violation of chapter 9.73 was an unintentional act of a uniformed officer. On appeal the Court of Appeals declares that it will not address the "private conversation" issue or other 9.73 issues addressed by the trial court, because the case can be resolved on another basis. The Court of Appeals explains why chapter 9.73 does not apply to the facts of this case:

We hold, following State v. Raymer, 61 Wn. App. 516 (1991) **Nov. '91 LED:12** that the privacy act does not apply to the operation of a video camera without an

audible sound recording. In Raymer, an officer supplied undercover informants with a micro video camera to record drug transactions. The camera, concealed in a radio cassette deck at the informants' residence, did not record sound.

The informants used this camera to record Raymer in the act of measuring out baggies of marijuana. In one transaction, the camera videotaped Raymer laying out three bags of marijuana in exchange for money. Raymer contended that the trial court should have excluded the videotape because the camera with an attached television monitor was an electronic device under RCW 9.73.030(1)(b), requiring consent to record private conversations by such devices. This court affirmed the trial court's admission of the silent videotape, stating "[p]olice officers have long availed themselves of photographic and visual surveillance techniques. The soundless recording of conduct is not prohibited by the statute."

"The soundless recording of conduct" aptly describes the video recording made by Officer Hayward. That he intended to produce an audio recording as well does not affect the result. The malfunctioning of the equipment did more than deprive DOL of proof as to consent; it removed the case altogether from the reach of the privacy act. A party to a conversation cannot record the conversation using an electronic device that does not work.

Result: King County Superior Court revocation of Haymond's driver's license affirmed.

(6) **"NO TRESPASSING" SIGN DOES NOT MAKE UNOBSTRUCTED RESIDENTIAL DRIVEWAY "PRIVATE"** -- In State v. Hornback, 73 Wn. App. 738 (Div. I, 1994) the Court of Appeals rejects defendant's claim that his property was unlawfully searched. City of Everett police officers went to Hornback's property during daylight hours on November 9, 1989 seeking to corroborate an informant's report that Hornback had a grow operation (police had also learned of Hornback's consistently high electrical usage without seasonal variation). At the entrance to the driveway to Hornback's home was a "No Trespassing" sign. Hornback's house was in a semi-residential area; his home could be partially seen from neighboring properties, and neighboring homes could be partially seen from Hornback's property. The Court describes the officers' actions on Hornback's property on November 9, 1989:

When the officers arrived at Hornback's property, they did not encounter any closed gates or other obstructions blocking the driveway. The officers drove up to the parking area and stopped; they went no closer to Hornback's house. They did not deviate from the driveway while on the property. Hornback came out of the house and approached the officers' car. He and one of the officers spoke for 2 or 3 minutes about the whereabouts of an address for which the officers pretended they were looking. After the conversation, the officers left. Hornback never asked the officers to leave the property.

The officers noted that Hornback appeared to be under the influence of a controlled substance and that he smelled heavily of marijuana smoke. They noted that his eyes were glassy and he had difficulty maintaining a consistent train of thought. The officers also observed that the basement windows of his house were boarded over. This information was included in the affidavit in support of the search warrant application.

A search warrant was obtained and evidence of a marijuana grow operation was seized from Hornback's home.

After a suppression hearing, the trial court held: (1) that the police entry into the driveway did not violate Hornback's privacy rights, and (2) that the affidavit established probable cause to search Hornback's home for evidence of a grow operation. Citing and discussing a number of precedents (including State v. Ridgway, 57 Wn. App. 915 (Div. II, 1990) Sept. '90 **LED:04**, which the Court distinguishes on its facts) the Court of Appeals agrees with the trial court's decision that the driveway of Hornback's property was impliedly open to the public and therefore that he had no reasonable expectation of privacy in that area. With respect to defendant's claim of a privacy right based on his "No Trespassing" sign, the Court of Appeals states in a footnote:

The trial court relied on State v. Vonhof, 51 Wn. App. 33 (1988) [**Oct. '88 LED:18**] for the proposition that the presence of a "No Trespassing" sign was not dispositive of the issue. The Vonhof court, citing Oliver v. United States, 466 U.S. 170 1735 (1984) [**July '84 LED:01**] stated that "the presence of . . . 'No Trespassing' signs does not increase the constitutional level of privacy interests". We agree with the trial court that the presence of a "No Trespassing" sign is not dispositive of this issue. A "No Trespassing" sign alone does not withdraw permission to enter access routes to a house or other portions of the curtilage impliedly open to the public.

[Some citations omitted]

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

**(7) OFFICER LAWFULLY LOOKED INTO PARTIALLY OPEN GARBAGE CAN LOCATED IN HOME'S PARKING AREA OPEN TO THE PUBLIC** -- In State v. Graffius, 74 Wn. App. 23 (Div. I, 1994) the Court of Appeals rejects defendant's claim that his privacy rights were violated where a police officer looked into his partially open garbage can. An officer was lawfully in a parking area near the garage of a private residence in an area open to the public when the officer looked down on a garbage can whose lid was ajar. Through a 6-8 inch opening in the lid, the officer could see a fist-sized bud of marijuana on top of other garbage about two-thirds of the way down in the can.

The trial court had held that the officer violated defendant's rights because his look into the can was intentional. Writing an opinion that seems more complicated than it needs to be, the Court of Appeals eventually reaches what we believe to be the right result -- the trial court was wrong; defendant had no right to be free of an alert officer's intentional look into a partially open garbage can sitting in a public area. While a closed garbage can would be protected, the Court notes correctly (see State v. Boland, 115 Wn.2d 571 (1990) [**Jan. '91 LED:02**], the reasonable expectation of privacy protected in Boland derives from the can-owner's placing of a lid squarely on the opaque can to preclude viewing of its contents until pickup. Such was not the case here.

**Result:** Snohomish County Superior Court suppression ruling reversed; case remanded for further proceedings (likely a trial based on evidence found under a search warrant which had been issued following discovery of the contents of the garbage can).

**(8) CHAIN-LINK-FENCED YARD IS WITHIN HOME'S PROTECTED "CURTILAGE" BUT OFFICERS' UNLAWFUL ENTRY DOESN'T JUSTIFY RESIDENT'S ASSAULT OF OFFICERS --**

In State v. Mierz, 72 Wn. App. 783 (Div. I, 1994) the Court of Appeals holds that defendant Mierz' trial attorney was constitutionally ineffective in failing to move to suppress evidence in his case, but that trial counsel's failing did not affect the outcome of the case, and therefore that Mierz' assault convictions can stand.

Wildlife agents went to Mierz' home to seize two wild coyote pups he was keeping inside a chain-link-fenced area in the yard next to his home. After trying unsuccessfully to get Mierz to voluntarily surrender the coyotes, the agents climbed over the six-foot chain-link fence to try to seize the coyote pups, having been previously advised (erroneously) by a district court judge and a deputy prosecutor that the pups could be seized from the yard without a search warrant if they were in "plain view."

After the agents had entered the fenced area, Mierz sicked his dogs on the agents, and he also physically attacked one of the agents himself. Mierz was ultimately arrested and charged with two counts of assault and one count of unlawful possession of wildlife.

Mierz was convicted on all counts after a trial on stipulated facts. Apparently, his trial lawyer did not move to suppress evidence or otherwise challenge the lawfulness of the officers' entry of Mierz' yard. Subsequent to his trial, Mierz obtained another lawyer; and through that lawyer, he challenged his conviction.

On the issues concerning the lawfulness of entry of Mierz' back yard, the Court of Appeals holds that the fenced yard, even though open to view from outside the property, was within the "curtilage" of the home and therefore entitled to the same privacy protection from forced entry as the interior of the home. The Court explains that, at common law, "curtilage" is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life. Only (1) consent, (2) exigent circumstance or a (3) warrant -- none of which were present -- would justify entry into the curtilage. Nor did the fact that Mierz was then committing a misdemeanor in the presence of the officers (i.e., possessing the coyote pups) justify forced entry into his home or his curtilage to arrest him, the Court holds.

The Court then turns to the exclusionary rule issue, holding that Mierz was not prejudiced by his attorney's failure to move to suppress evidence. That is because assaults on officers are generally deemed to be independent of any police illegality ("attenuated" from it) and hence not subject to the exclusionary rule. The Court explains:

The public policy in Washington, as reflected by statute and case law, evinces a heightened concern for the safety of law enforcement officers. This policy mandates admission of evidence of assaults against officers while they are performing their official duties and requires the citizen whose rights have been violated to seek redress through a civil action. We find the agents' violation of Mierz' constitutional rights extremely offensive. However, we cannot rule that suppression of assault evidence is a proper remedy for a constitutional violation preceding the assault. Such a holding would require suppression in future cases where the injury to the officer is far more serious, thus further endangering the officers charged with performing difficult and dangerous tasks as part of their official duties. The logical implication of such a holding would be suppression even

where an officer is murdered.

Mierz has not argued that exclusion of assault evidence is always an appropriate remedy. Rather, he has suggested that exclusion is appropriate where, as here, the injury to the officers is relatively minor. We can find no logical or principled basis for distinguishing these types of cases according to the degree or seriousness of the injury to the officer. Accordingly, we hold that, despite the officers' unconstitutional activity, evidence of assaults against an officer fall outside the exclusionary rule. Had a motion to suppress been brought, the assault evidence would not have been properly suppressed. . . . [M]ierz was not prejudiced by his counsel's deficient representation and, thus, was not denied effective assistance of counsel.

[Footnotes, citations omitted]

Result: King County Superior Court convictions for two counts of third degree assault and one count of unlawful possession of wildlife affirmed.

**LED EDITOR'S NOTE:**

**On the exclusionary rule issue, the Court of Appeals at footnote 10 criticizes the ruling in State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93 LED:13. In Apodaca, Division III of the Court of Appeals excluded evidence of an assault on police officers who had unlawfully entered a suspect's home to arrest him. The Apodaca exclusionary ruling was contrary to a line of cases holding that exclusion is inappropriate in this circumstance because the legal system wishes to discourage physical resistance to even unlawful arrests. Footnote 10 in Mierz confirms that mere unlawful entry by police or a mere unlawful arrest by police does not by itself justify any level of assault by a citizen who objects to the unlawful action. If the citizen assaults police in these circumstances, he or she can be prosecuted under RCW 9A.36.031(1)(g), and the exclusionary rule will not be applied to exclude the evidence concerning the circumstances of the assault. See also our additional note at page 22 following the Ross and Crider case entries immediately below.**

**(9) MERE UNLAWFUL ARREST WHICH THREATENS ONLY LOSS OF FREEDOM DOES NOT JUSTIFY ASSAULT ON OFFICER -- In State v. Crider, 72 Wn. App. 815 (Div. III, 1994) the Court of Appeals rejects defendant's argument that his assault of a police officer was justified because the officer was in the process of making an unlawful arrest at the time. The Court explains that it need not decide whether the arrest was unlawful:**

*"A citizen has the right to resist an unlawful arrest so long as that resistance is reasonable in light of all the circumstances." "The use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable."*

Here, the trial court found (1) Mr. Crider struck [the officer] when the officer grabbed his shoulder, and (2) at that point, Mr. Crider did not have reason to fear any injury to himself. These findings are supported by [the officer's] statement in his police report which was allowed into evidence by stipulation.

[Citations omitted; officer's name deleted]

Result: Spokane County Superior Court conviction for third degree assault against a police officer affirmed.

(10) **NO RIGHT TO USE FORCE TO RESIST LAWFUL ARREST WHICH INVOLVES REASONABLE FORCE** -- In State v. Ross, 71 Wn. App. 837 (Div. I, 1993) the Court of Appeals rejects Michael Ross's challenge to his conviction for third degree assault. Michael Ross argued unsuccessfully that the jury should not have been instructed that a person may use force to resist a lawful arrest only if he is "actually about to be seriously injured." The Court of Appeals describes the facts and trial court proceedings as follows:

Michael Ross (Michael) was driving his car while wearing a set of headphones. Michael's identical twin brother, Mark, sat in the front passenger seat. Officers Graham and Norton, seeing Michael with the headphones, stopped Michael's car. Officer Graham explained why he had stopped him and asked Michael for his license and proof of insurance. Michael replied he did not have either with him and carried no identification.

Officer Graham asked Michael to stop out of the car. During the questioning, Michael behaved strangely, clenching his fists and putting his hands in his pockets. Norton searched Michael's person and found a Washington State identification card for "Michael Ross". The testimony indicates Michael either denied knowing he had the card or did not respond.

Officer Graham, perceiving a threat from Michael's behavior and demeanor, had Michael lean against the police car with his legs spread. As the level of physical interaction between Officer Graham and Michael increased, Mark got out of the car and grabbed Officer Norton. All four men got into a wrestling match.

Subsequently, both brothers broke free and Michael locked himself in his car. The officers, having called in backup, tried to get Michael out of the car by breaking its windows. Seeing Michael reach beneath the seat and pull out a hatchet, both officers drew their revolvers. Eventually Michael unlocked the door and was forcefully pulled out of the car and arrested.

The State charged the brothers with assaulting an officer while he was performing his official duties under RCW 9A.36.031(1)(g). At trial neither Officer Graham nor Officer Norton could identify Michael as the driver. The jury acquitted Mark but found Michael guilty of one count of third degree assault. Michael received a sentence of 12 days based on an offender score of 0.

Result: holding that the King County Superior Court jury was properly instructed that defendant had no right to use force to resist a lawful arrest unless he was actually about to be seriously injured by the arresting officers, the Court of Appeals affirms Ross's conviction for third degree assault.

**LED EDITOR'S NOTE**: While Ross involved a lawful arrest, the preceding LED entries on Mriez and Crider support the proposition that even if an arrest is unlawful (e.g., because PC to arrest is lacking or because an unconstitutional entry precedes the arrest), a citizen

has no right to use force to resist that unlawful arrest unless the officers' actions present a risk of serious harm; a mere risk of loss of freedom will not justify use of force by the citizen to resist an unlawful arrest.

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### **NEW MIRANDA CARDS**

The Revised Miranda cards with the juvenile warning language change noted in our August '94 LED at 21-22 are now available from the Criminal Justice Training Commission. Order forms for English Miranda and Spanish Miranda are included in this month's CJTC monthly training update sent to agency chief executives and training officers.

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### **NEXT MONTH**

The November LED will digest, among other recent court decisions, the decision in the consolidated action of State v. Wittenbarger, State v. South Dt. Ct. et. al., and State v. Matthews; in that decision, announced September 8, 1994, the State Supreme Court rejects several DUI defendants' constitutional and statutory challenges to the results of BAC Verifier DataMaster tests; the defendants had argued, among other things, that their rights were violated by the government's failure to keep certain repair and maintenance records on the BAC devices.

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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 express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.

