

August 1995

HONOR ROLL

431st Session, Basic Law Enforcement Academy - April 4 through June 23, 1995

President: Officer Aaron S. Reynolds - Seattle Police Department
Best Overall: Officer Aaron S. Reynolds - Seattle Police Department
Best Academic: Officer Aaron S. Reynolds - Seattle Police Department
Best Firearms: Deputy Marshall S. Henderson - Clark County Sheriff's Department

Corrections Officer Academy - Class 214 - June 5 through 30, 1995

Highest Overall: Officer Mark J. Lee - Snohomish County Corrections
Highest Academic: Officer Mark J. Lee - Snohomish County Corrections
Highest Practical Test: Officer Lawrence Milford Clemons - McNeil Island Correctional Center
Officer Martha P. Garrido - King County Div of Corrections
Officer Mark J. Lee - Snohomish County Corrections
Officer Larry E. Hensley - Washington State Penitentiary
Officer Tara Lynn Simmelink - Yakima County Corr/Deten Center
Officer Keith McCoy - Washington C. C. for Women
Highest in Mock Scenes: Officer Diane L. Klontz - McNeil Island Correctional Center
Officer Cynthia L. Nale - Special Offender Center
Highest Defensive Tactics: Officer Timothy D. Gray - Clallam Bay Corrections Center

Corrections Officer Academy - Class 215 - June 5 through 30, 1995

Highest Overall: Officer Ronald R. Voeller - Spokane County Jail
Highest Academic: Officer Ronald R. Voeller - Spokane County Jail
Officer Loren Allen Erdman - Stevens County Jail
Highest Practical Test: Officer Ronald R. Voeller - Spokane County Jail
Officer Loren Allen Erdman - Stevens County Jail
Officer Gary Hilliard, Jr. - Washington State Penitentiary
Officer Chad M. Kilburg - Washington State Penitentiary
Officer John J. Moses - McNeil Island Correctional Center
Highest in Mock Scenes: Officer Ronald R. Voeller - Spokane County Jail
Highest Defensive Tactics: Officer Catrina M. Cunningham - Grays Harbor County Jail

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1995 WASHINGTON LEGISLATIVE ENACTMENTS -- PART III

DV MANDATORY ARREST-- FOLLOWUP TO PART II

1. Teenagers in dating relationships

Interpretation question: An interpretation question has been raised regarding interpretation of the 1995 amendments to the

mandatory arrest provisions of RCW 10.31.100(2). A "plain language" argument can be made that the July '95 LED entry (at pages 13-15) on chapter 246--overhauling the the domestic violence legislation-- overstates the rule of mandatory arrest where persons 16 or 17 years of age are involved in one of the assault situations addressed in RCW 10.31.100(2)(b). In that LED entry, we asserted that:

If a person 16 years of age or older commits against a person 16 years of age or older one of the types of assault that otherwise triggers mandatory arrest under RCW 10.31.100(2)(b), and the two persons are in a "dating relationship" , then, even if they do not and have not ever resided together, arrest is mandatory under RCW 10.31.100.

The above quoted assertion would appear to be correct only if the term "respondent" in RCW 10.99.020(1) --a subsection incorporated by reference in the 1995 amendments to RCW 10.31.100-- is read as "perpetrator of the assault". A contrary reading of the term "respondent" is that the term applies only to a person who is the subject of an existing court order issued under chapters 10.14, 10.99, 26.09, 26.10, 26.26, 26.44, or 26.50 RCW. Under the latter view, the only two non-family member, dating relationship situations where arrest of a 16- or 17-year-old is mandatory under the 1995 amendments to 10.31.100(2)(b) are as follows (in each situation, all three elements must be present in order for arrest to be mandatory)--

SITUATION 1: (a) a person 16 years of age or older has committed one of the described types of assault against a person 16 years of age or older in the past four hours, and (b) the two persons have or have had a "dating relationship", and (c) the two persons are presently residing together or have resided together in the past;

SITUATION 2: (a) a person 16 years of age or older has committed one of the described types of assault against a person 16 years or older in the past four hours, and (b) the persons have or have had a "dating relationship", and (c) the victim has obtained a domestic violence protection order against the perpetrator under chapters 10.14, 10.99, 26.09, 26.26, 26.44, or 26.50 RCW and the order is still in effect (of course, an assault in the latter situation, if the perpetrator knows of the court order, would also constitute a protection order violation for which arrest is mandatory (with the exception of a chapter 10.14 RCW violation) without regard to the four-hour rule-- see subsection (a) of subsection (2), RCW 10.31.100).

We will keep LED readers posted as to any developments on this controversy. Meanwhile, as with all issues addressed in the LED, officers and their agencies must consult their prosecutors, city attorneys, and/or legal advisors for legal advice on the best reading of this important legislation. Law enforcement personnel and/or their legal counsel may wish also to contact the Northwest Women's Law Center (206) 682-9552 or Mary Pontarolo of the Washington State Coalition Against Domestic Violence (360) 352-4029 for information regarding the legislative history of chapter 246 in relation to mandatory arrest.

2. Family member assaults--parent-child, child-parent.

At page 14 of the July '95 LED, we stated that "parent-child, child-parent assaults where the child is 16 or older will be DV for purposes of mandatory arrest and mandatory [DV] reports." The quoted statement is correct, but it does not go far enough. To be more accurate and inclusive in describing mandatory arrest in this context, we should have said that arrest is mandatory in the following parent-child, child-parent situations (NOTE: Arrest apparently is also mandatory if any person 16 or older assaults etc. any person 18 or older with whom he or she resides or has resided.):

SITUATION 1: (CHILD ASSAULTS PARENT) A person 16 years of age or older has committed one of the described types of assault within the past four hours against a parent, stepparent, or grandparent (whether the relationship is legal or biological);

SITUATION 2: (PARENT ASSAULTS CHILD) A parent, step-parent, or grandparent (whether the relationship is legal or biological) 16 years of age or older has committed one of the described types of assault against his or her child, regardless of the age of the child. **NOTE, HOWEVER:** RCW 9A.16.100 allows a parent to use reasonable and moderate force in restraining or correcting a child. While ordinarily law enforcement officers need not try to resolve issues regarding possible defenses to criminal charges in making a PC to arrest determination under RCW 10.31.100(2), law enforcement agencies will probably want to factor in the provisions of this chapter 9A.16 defense when deciding whether

to arrest parents under the 1995 revisions to RCW 10.31.100. Again, we urge consultation with prosecutors, city attorneys, and/or legal advisors.

LED EDITOR'S INTRODUCTORY NOTE TO PART III: This is the third and final part (in small print to conserve space) of a digest of 1995 State legislative enactments of interest to Washington law enforcement officers and/or their agencies. We have tried throughout our updates where significant to note any current RCW sections affected by the legislation. Where new sections are created by legislation, the State Code Reviser must assign an appropriate section number. That process should be completed by the Code Reviser by early fall of 1995.

Beware: As always with this publication, any opinions, express or implied, are the personal views of the LED Editor alone. A formal Attorney General Opinion (AGO) may be obtained only by means of a formal written request to Attorney General Christine Gregoire by one of the following -- a legislator, an elected prosecutor, or one of certain state government officials.

CJTC Computer Bulletin Board: We have put into the WSCJTC Computer Bulletin Board under a separate file -- "Leg95" -- all 1995 legislation which we believe is of significant interest to law enforcement agencies and their officers. Instructions on use of the Bulletin Board can be found at page 50 of the WSCJTC's 1994-1995 Training Catalog (reprinted as an appendix to the January 1995 LED). Readers with technical questions about the Bulletin Board may contact Ian Wallace at (360) 439-3740, ext. 218.

Correction Notice: The July '95 LED entry on SSB 5326 amending the sex offender registration statutes gives an erroneous chapter number, "268", rather than the correct chapter number, "248". This error was repeated in "Leg95," the CJTC Computer Bulletin Board legislative entry. The actual "chapter 268" also amended the sex offender registration statutes and is included in this month's LED at 8.

RESERVE LAW ENFORCEMENT OFFICERS' RETIREMENT

CHAPTER 11 (SHB 1453)

Effective Date: July 23, 1995

Amends chapter 41.24 to allow municipal corporations to elect to provide retirement benefits for law enforcement reserve officers.

POLE TRAILERS

CHAPTER 26 (SSB 5222)

Effective Date: June 1, 1995

Amends RCW 46.44.030 definitions re "pole trailers".

"NO EVIDENCE" REPORT TO JOB APPLICANT AFTER WSP RECORDS CHECK

CHAPTER 29 (SB 5330)

Effective Date: July 23, 1995

Amends RCW 43.43.838 to require that businesses or organizations which make criminal records checks with the WSP ID section as to certain "applicants" provide "a copy of the identification declaring the showing of no evidence to the applicant" in the event such information is received.

CRIME VICTIMS' COMPENSATION ACT AND COLLECTING RESTITUTION

CHAPTER 33 (SSB 5400)

Effective Date: July 23, 1995

Amends provisions of chapters 7.68, 9.94A, and 9.95 RCW relating to restitution and the pursuit by the Department of Labor and Industries of recovery from criminals responsible for crime victims' compensation payments.

NO "HIGH-RISK OFFENDERS" IN JUVENILE BOOT CAMPS

CHAPTER 40 (SSB 5234)

Effective Date: July 23, 1995

Amends the provisions of RCW 13.40.320 relating to juvenile offender basic training camp to provide that a juvenile offender assessed as "a high risk offender" may not participate in the program.

SELF-DEFENSE REIMBURSEMENT UNDER RCW 9A.16.110

CHAPTER 44 (SSB 5278)

Effective Date: July 23, 1995

Amends RCW 9A.16.110 to, among other things, provide that the reimbursement of legal costs allowed in certain self-defense situations may be limited or denied altogether "if the trier of fact ..determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant.."

ALCOHOL SERVER PERMITS AND TRAINING

CHAPTER 51 (SSB 5463)

Effective Date: July 23, 1995

Adds new sections to chapter 66.20 RCW to require training of alcohol servers regarding the effects of alcohol and the liability ramifications of serving alcohol. Effective July 1, 1996, all servers of alcohol in licensed establishments will be required to have valid alcohol server permits.

HUNTING LICENSES

CHAPTER 59 (SB 5625)

Effective Date: July 23, 1995

Adds a new section to RCW 77.32 providing:

Hunters who have a valid hunting license, and a valid migratory waterfowl stamp that may be used after December 31 of the year of issuance, are not required to purchase a new hunting license in order to use the migratory waterfowl stamp during the period in which a waterfowl hunting season exists in the month of January in the year following the issuance of the migratory waterfowl stamp and hunting license.

JUVY "SERIOUS VIOLENT OFFENSES" IN ADULT SENTENCING

CHAPTER 101 (SHB 1062)

Effective Date: July 23, 1995

Amends RCW 9.94A.030 and 9.94A.360 to provide that juvenile adjudications for "serious violent offenses" shall be used as criminal history for purposes of adult sentencing.

TREATMENT-ORIENTED SENTENCING FOR DRUG OFFENDERS

CHAPTER 108 (SHB 1549)

Effective Date: April 19, 1995

Amends various sentencing laws in chapter 9.94A to require more treatment-oriented sentences for some offenders convicted of drug crimes.

PRIVATE SCHOOL BUSES

CHAPTER 141 (SHB 1246)

Effective Date: July 23, 1995

Amends RCW 46.04.521 to except private school buses from the definition of "school buses" for purposes of the traffic code; amends RCW 46.37.193 to address the required markings for private school buses. Adds a section to chapter 46.37 RCW to clarify the standards which must be met by private school buses.

VEHICLE LOAD LIMITS

CHAPTER 171 (SHB 1192)

Effective Date: July 23, 1995

Amends RCW 46.44.041 and 46.44.0941 with housekeeping and technical changes regarding vehicle load limits.

POLICE ACCESS TO DEPOSIT ACCOUNT INFO RE DISHONORED CHECKS

CHAPTER 186 (EHB 1603)

Effective Date: July 23, 1995

Sections 1 through 3 add new sections to chapter 30.22 RCW to allow banks to provide information to law enforcement officers investigating possible fraudulent NSF checks. Section 1 creates definitions of "customer", "financial institution", and "law enforcement officer". Section 2 provides as follows regarding law enforcement officer requests for deposit account information when they are investigating crimes relating to dishonored checks:

(1) If a financial institution discloses information in good faith concerning its customer or customers in accordance with this section, it shall not be liable to its customers or others for such disclosure or its consequences. Good faith will be presumed if the financial institution follows the procedures set forth in this section.

(2) A request for financial records made by a law enforcement officer shall be submitted to the financial institution in writing stating that the officer is conducting a criminal investigation of actual or attempted withdrawals from an account at the institution and that the officer reasonably believes a statutory notice of dishonor has been given pursuant to RCW 62A.3-515, fifteen days have elapsed, and the item remains unpaid. The request shall include the name and number of the account and be accompanied by a copy of:

(a) The front and back of at least one unpaid check or draft drawn on the account that has been presented for payment no fewer than two times or has been drawn on a closed account; and

(b) A statement of the dates or time period relevant to the investigation.

(3) To the extent permitted by federal law, under subsection (2) of this section a financial institution shall within a reasonable time disclose to a requesting law enforcement officer so much of the following information as has been requested concerning the account upon which the dishonored check or draft was drawn, to the extent the records can be located:

(a) The date the account was opened; the details and amount of the opening deposit to the account; and if closed, the reason the account was closed, the date the account was closed, and balance at date of closing;

(b) A copy of the statements of the account for the relevant period including dates under investigation and the preceding and following thirty days and the closing statement, if the account was closed;

(c) A copy of the front and back of the signature card; and

(d) If the account was closed by the financial institution, the name of the person notified of its closing and a copy of the notice of the account's closing and whether such notice was returned undelivered.

(4) Financial institutions may charge requesting parties a reasonable fee for the actual costs of providing services under this chapter. These fees may not exceed rates charged to federal agencies for similar requests. In the event an investigation results in conviction, the court may order the defendant to pay costs incurred by law enforcement under... (this act).

Section 3 adds a new section to chapter 9.38 RCW which provides that records obtained pursuant to the act shall be admitted in evidence when accompanied by a certificate substantially in a form set out in the act.

Section 4 adds a new section to chapter 9.38 RCW reading as follows:

- (1) It is a gross misdemeanor for a deposit account applicant to knowingly make any false statement to a financial institution regarding:
 - (a) The applicant's identity;
 - (b) Past convictions for crimes involving fraud or deception; or
 - (c) Outstanding judgments on checks or drafts issued by the applicant.
- (2) Each violation of subsection (1) of this section after the third violation is a class C felony punishable as provided in chapter 9A.20 RCW.

INMATE COST RECOVERY

CHAPTER 221 (SB 5523)

Effective Date: July 23, 1995

Amends RCW 10.01.160(2) to add the following language:

..Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed fifty dollars per day of incarceration. Payment of other court-ordered financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs..

Repeals RCW 10.64.130 which also dealt with inmate cost recovery.

RESTITUTION

CHAPTER 231 (SHB 1047)

Effective Date: July 23,1995

Makes changes in the restitution laws relating to (1) the time within which the sentencing court may determine restitution amounts and (2) the time within which a person may execute civilly on a restitution order; also makes the changes addressed in subsection (1) above qualifiedly retroactive.

LAW ENFORCEMENT "PEER SUPPORT GROUP COUNSELOR" PRIVILEGE

CHAPTER 240 (HB 1425)

Effective Date: July 23, 1995

Amends RCW 5.60.060 creating a new subsection (6) to establish a qualified evidentiary privilege for law enforcement "peer support group counselor(s)" as defined under the act.

OFFICE OF CRIME VICTIM ADVOCACY

CHAPTER 241 (HB 1858)

Effective Date: July 23, 1995

Adds a new section to chapter 43.280 RCW establishing a state "office of crime victims advocacy."

ENHANCED 911

CHAPTER 243 (SB 5089)

Effective Date: July 23, 1995

Amends sections and adds sections in various titles of RCW addressing enhanced 911; among other things, it prohibits local jurisdictions from "mandating automatic number identification or automatic location identification for a private telecommunications system or for a provider of private shared telecommunications services."

BACKGROUND CHECKS OF DEVELOPMENTALLY DISABLED PERSONS' HIREES

CHAPTER 250 (SSB 5421)

Effective Date: July 23, 1995

Amends RCW 43.43.830 and 832 to allow "developmentally disabled individuals" and "vulnerable adults" (as defined under section 830) to do background checks on persons they hire.

SALVAGED VEHICLES

CHAPTER 256 (ESSB 5685)

Effective Date: July 23, 1995

Amends various provisions of Title 46 RCW relating to salvaged vehicles, both in regard to licensing and criminal enforcement. Among the changes are the following. Amends chapter 46.12 RCW by adding a section reading as follows:

It is a class C felony for a person to sell or convey a vehicle certificate of ownership except in conjunction with the sale or transfer of the vehicle for which the certificate was originally issued.

Also amends RCW 46.80.020 to read as follows:

It is unlawful for a person to engage in the business of wrecking vehicles without having first applied for and received a license. A person or firm engaged in the unlawful activity is guilty of a gross misdemeanor. A second or subsequent offense is a class C felony.

Adds a new section to chapter 46.12 which requires, effective January 1, 1997, the marking of vehicles less than four years old if such vehicles are rebuilt after being totaled; it will be a class C felony to remove the prescribed marking from such a vehicle.

SEX OFFENDER REGISTRATION

CHAPTER 268 (HB 1088)

Effective Date: July 23, 1995

Amends RCW 9A.44.130 and .140 to exclude from the definition of "sex offense" (and hence excluding from the mandatory registration requirement) certain misdemeanor and gross misdemeanor crimes (but see chapter 195, Laws of 1995, making "communication with minor for immoral purposes" a crime for which registration is required), but providing further that an attempt, solicitation or conspiracy in relation to a crime which would be a "sex offense" (as defined at RCW 9.94A.030) if completed will be a "sex offense" even if it is classified as only a gross misdemeanor under chapter 9A.28's "step-ladder" classification system.

COMMERCIAL VEHICLE SAFETY-- WSP AND UTC

CHAPTER 272 (ESHB 1209)

Effective Date: January 1, 1996

Transfers responsibility pertaining to safety inspections of certain categories of commercial vehicles from the Utilities and Transportation Commission to WSP.

INTEREST ARBITRATION FOR LAW ENFORCEMENT

CHAPTER 273 (ESHB 1730)

Effective Date: July 1, 1995

Amends several provisions in chapter 41.56 RCW relating to which "uniformed" law enforcement personnel employed by cities, towns, counties, and other governmental agencies may participate in mandatory arbitration. Also requires a comprehensive legislative study of law enforcement mandatory arbitration, with a report due to be completed by December 15, 1996.

CRIME VICTIMS' RIGHTS IN RE PROSECUTORS

CHAPTER 288 (SHB 1610)

Effective Date: July 23, 1995

Amends various provisions of chapter 9.94A RCW relating to prosecutors' duties to communicate with crime victims.

INTEREST ON COURT FINES

CHAPTER 291 (SHB 1680)

Effective Date: July 23, 1995

Amends various provisions in Titles 3, 10, 35, and 36 RCW: (1) to allow for accrual and collection of interest on "penalties, fines, bail forfeitures, fees, and costs" in civil and criminal matters; and (b) to provide for distribution of such interest to certain designated state and local accounts.

CLERKS' FEES

CHAPTER 292 (SHB 1692)

Effective Date: July 23, 1995

Adds new sections to chapter 36.18 RCW and amends various provisions in Titles 5, 10, 11, 12, 13, 34, 36, 40, 49, 65, 70, and 90, clarifying the law and making technical changes in the law relating to clerk's fees.

CHILD CARE LICENSING

CHAPTER 302 (SHB 1906)

Effective Date: July 23, 1995

Amends various provisions in chapter 74.15 RCW, the statute addressing the regulation and licensing of agencies that care for children, expectant mothers, and the developmentally disabled. Expands authority of DSHS and requires specialized training of administrative law judges who work in this subject area. Amends RCW 74.15.030 to require fingerprinting and criminal records checks on child care personnel in certain circumstances.

MASSAGE PRACTITIONERS AND PROSTITUTION

CHAPTER 353 (SHB 1387)

Effective Date: July 23, 1995

Amends RCW 18.108.085 to provide that the Department of Health will automatically revoke the "massage practitioner" license of any practitioner convicted of one of the prostitution crimes at RCW 9A.88.030, .070, .080, or .090. Sets up a grant program in the Department of Community, Trade, and Economic Development (DCD) for prostitution prevention and intervention. Adds sections to chapters 9.68A RCW (re: sexual exploitation of children, including patronizing juvenile prostitutes) and 9A.88 (re: prostitution generally) to provide for fees to be assessed, in addition to any other penalties provided by law, for violations of certain RCW sections in those two chapters; the fees will be used to help fund the DCD grant program for prostitution prevention and intervention.

COMMERCIAL TOW TRUCK SAFETY

CHAPTER 360 (ESHB 1820)

Effective Date: July 23, 1995

Adds a new section to chapter 46.37 RCW defining "safety chains" and providing further as follows:

A tow truck towing a vehicle and a vehicle towing a trailer must use safety chains. Failure to comply with this section is a class 1 civil infraction punishable under RCW 7.80.120.

Adds a new section to chapter 46.55 RCW providing as follows:

A vehicle engaging in the business of recovery of disabled vehicles for monetary compensation, from or on a public road or highway must either be operated by a registered tow truck operator, or someone who at a minimum has insurance in a like manner and amount as prescribed in RCW 46.55.030(3), and have had their tow trucks inspected in a like manner as prescribed by RCW 46.55.040(1). The department shall adopt rules to enforce this section. Failure to comply with this section is a class 1 civil infraction punishable under RCW 7.80.120.

Amends the tow truck chapter with technical changes in RCW 46.55.063, 46.55.090, 45.55.100, 46.55.110, 46.55.120. Also amends RCW 46.20.435 to require that before an officer will release a vehicle impounded under that section the registered owner of an impounded vehicle must establish that penalties, fines, and forfeitures have been satisfied.

FIRE PROTECTION BY WSP

CHAPTER 369 (ESSB 5093)

Effective Date: July 1, 1995

Amends a variety of statutes to transfer to the WSP the powers, duties, and functions in relation to fire protection from the Department of Community Development and Department of Community, Trade, and Economic Development.

WELFARE FRAUD, SUSPENSION OF BENEFITS

CHAPTER 379 (SB 5652)

Effective Date: July 23, 1995

Amends RCW 74.08.290 to require suspension of welfare benefits for periods of time specified in the statute for persons convicted of welfare fraud under RCW 74.08.331.

PERSISTENT PRISON MISBEHAVIOR

CHAPTER 385 (SSB 5905)

Effective Date: July 23, 1995

Adds new section and amends section in chapter 9.94 RCW to make it a class C felony for an inmate in "state correctional institution" to commit a "serious infraction" after losing all potentially earned early release time and credit, unless the infraction constitutes a class A or B felony. (The quoted terms are defined in the statute.)

EMERGENCY MANAGEMENT FROM DCD TO STATE MILITARY

CHAPTER 391 (SHB 1017)

Effective Date: July 1, 1995

Amends various RCW sections and adds new sections transferring state emergency management administration from the Department of Community Development to the State Military Department.

FARM VEHICLE COMMERCIAL LICENSE EXCEPTION

CHAPTER 393 (SHB 1270)

Effective Date: July 23, 1995

Amends RCW 46.25.050 to include in the "farmer" exception from the commercial driver's license requirement the transportation of "Christmas trees and wood products harvested from private tree farms and transported by vehicles weighing no more than forty thousand pounds licensed gross vehicle weight . . ."

BOND FOR JUVENILES

CHAPTER 395 (SHB 1853)

Effective Date: July 23, 1995

Amends various sections of Title 13 RCW and adds sections to that title to give the juvenile court discretion to require the posting of bond or other collateral by the charged juvenile.

FORENSIC INVESTIGATIONS

CHAPTER 398 (SSB 5977)

Effective Date: July 23, 1995

Amends various RCW provisions charging/expanding the "death investigations council" into the "forensic investigations council" and addresses certain aspects of budgeting for and funding of the WSP crime laboratory.

DEPENDENT CHILDREN LIVING WITH NON-PARENTS

CHAPTER 401 (ESSB 5244)

Effective Date: July 23, 1995

Adds two new sections to chapter 74.12 RCW providing that where a non-parent relative of a child applies for welfare benefits on behalf of the child, DSHS will make a reasonable effort to notify the child's parents.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

VEHICULAR HOMICIDE BASED ON DRIVER'S DUI STATUS DOESN'T REQUIRE PROOF THAT INTOXICATION CAUSED VICTIM'S DEATH; ONLY OPERATOR-CAUSE NEED BE PROVEN

State v. Rivas, 126 Wn2d 443 (1995)

The State Supreme Court rules unanimously that where the crime of vehicular homicide is based on the driver's being under the influence of alcohol, a causal connection between a criminal defendant's intoxication and the death of the victim is not an element of the crime.

Accordingly, the Court holds that the operator of a motor vehicle is liable for vehicular homicide if the driver was intoxicated at the time of the accident, and the driver's operation of the vehicle was a "proximate cause" of the death in question. The Court explains in some detail the limits of "proximate cause."

Result: Whatcom County Superior Court conviction for vehicular homicide affirmed.

WASHINGTON STATE COURT OF APPEALS

TRUCK'S ACCESSIBLE LIVING AREA IS SUBJECT TO SEARCH INCIDENT TO ARREST

State v. Johnson, 77 Wn. App. 441 (Div. II, 1995)

Facts: After releasing Johnson following a traffic stop, a WSP trooper learned of an outstanding arrest warrant. The trooper stopped Johnson's Peterbilt truck again, arrested him, handcuffed him, and placed him in the patrol car. The Court of Appeals describes what happened next:

Trooper Berends then entered the truck cab and searched the interior, including a sleeping compartment located behind the driver's seat. In the sleeping area he found a simulated leather pouch which contained several items which appeared to be drug-related contraband, including two bags of whitish powder and a film canister containing marijuana. According to the trooper, he was looking for papers relating to ownership of the truck, such as insurance, registration documents or log books, and for weapons.

Proceedings: (Excerpted from Court of Appeals opinion)

Mr. Johnson was charged by amended information with possession of methamphetamine. He moved to suppress the evidence found in the sleeping compartment. His motion was denied, and he was found guilty.

ISSUE AND RULING: Was the search of the living area of the truck cab a lawful search incident to arrest under State v. Stroud and New York v. Belton? (ANSWER: Yes) Result: Yakima County Superior Court conviction for possession of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

"[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." New

York v. Belton, 453 U.S. 454 (1981). The justification for this exception is the arresting officer's need to prevent the arrestee from destroying evidence or obtaining a weapon. Chimel v. California, 395 U.S. 752 (1969). The scope of the search incident to arrest is accordingly limited to the area within the arrestee's "immediate control" from which he could gain possession of a weapon or destroy evidence.

In the context of vehicles, the [U.S. Supreme Court] found the principle announced in Chimel difficult to apply. The Court recognized that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item[m].'" In order to provide more workable guidance, Belton announced a rule applicable to searches incident to the arrest of automobile occupants: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." The issue in the present case is whether the Belton rule applies exclusively to automobiles or more broadly to other vehicles such as the truck in question, and if the latter, then does the term "passenger compartment" extend to a sleeping compartment which may be reached from the passenger compartment?

The term "automobile" used in the Belton rule has been construed to apply to other types of vehicles including trucks; pickup trucks; and dump trucks. It applies to the tractor-trailer truck here.

For the purpose of applying the rule in Belton, the term "passenger compartment" has been held to include the trunk area of a hatchback automobile, and the rear section of a mid-sized station wagon. [The cases from other jurisdictions cited by the Court] adopt the rule proposed by Professor LaFave that the passenger compartment should be construed "as including all spaces reachable without exiting the vehicle . . ." 3 Wayne R. La Fave, Search and Seizure, § 7.1(c), at 16 (2d ed. 1987).

The testimony showed the sleeping area was directly behind the driver's seat and reachable through an opening without exiting the cab. Under the rule proposed by Professor LaFave, the passenger compartment would include the sleeping area. The search of a container found within the sleeping area of the passenger compartment of Mr. Johnson's truck did not violate Fourth Amendment protection.

Mr. Johnson contends the search violates [Washington] Const. art. 1, § 7. . . .

Washington's constitution allows officers to search the passenger compartment of a vehicle for weapons or destructible evidence during the arrest process including the time the suspect is handcuffed and placed in a patrol car. State v. Stroud, 106 Wn.2d 144 (1986)[**Aug. '86 LED:01**]. . . . Stroud departs from the federal rule stated in Belton and prohibits the warrantless search of locked containers located in a passenger compartment. The rationale for this departure from the federal standard is that use of a lock demonstrates the individual's expectation of privacy and the presence of a lock minimizes the danger of an arrestee gaining access to the contents of the container.

The issues in the present case are whether an individual has a heightened expectation of privacy in a sleeping area adjacent to, and readily accessible from, the passenger compartment; whether a rule which excludes such an area from the permissible search of the passenger

compartment adequately addresses the needs of law enforcement officers; and whether creating an exception for sleeping areas will reintroduce the "subtle nuances and hairline distinctions" which the rule announced in Stroud was intended to avoid. . . .

Because it is similar to a home, Washington's citizens may well have an expectation of privacy in the sleeping area of a vehicle for which our constitution provides heightened protection. Nevertheless, when the home is located in a vehicle, in such a way as to make it readily accessible from the passenger compartment, the safety of law enforcement officers and the need for a bright-line rule militate against prohibiting officers from searching a sleeping area which is readily accessible from the passenger compartment.

Although Stroud prohibits the search of locked areas or containers, neither the sleeping area nor the leather-like pouch was locked. The court properly denied the motion to suppress the evidence found in the pouch.

[Some citations omitted]

NO PRIVACY FOR RURAL HOMEOWNER BASED ON NEIGHBORS' "NO TRESPASSING" SIGNS; MORE THAN SIGNS GENERALLY NEEDED TO CREATE PRIVACY PROTECTION

State v. Gave, 77 Wn. App. 333 (Div. II, 1995)

Based on a tip, undercover WSP detectives decided to knock on Gave's door to try to detect the smell of his basement marijuana grow operation. On their drive to Gave's residence, the detectives had proceeded along a rural road with several "no trespassing" signs posted on utility poles. The poles were located on Gave's neighbors' property.

The detectives then drove into Gave's ungated driveway and parked. The residence could be seen from the public access road. The detectives walked up to his front door and knocked on the door.

When Gave opened the door, the detectives claimed to be repossessioners looking for a car. When he could not help them find the fictitious car, they thanked him and left. They had been able to detect a strong smell of marijuana when the door was open.

A search warrant was then obtained based in large part on the detectives' detection of marijuana smell during their contact with Gave. On execution of the warrant, an elaborate marijuana grow operation was found in the basement, and Gave was charged with manufacturing a controlled substance. After he lost a suppression hearing challenging the pre-warrant visit to his home, Gave stipulated to certain facts and was convicted.

ISSUE AND RULING: Does the greater protection against government intrusions afforded by the Washington constitution (article 1, section 7) protect Gave against police access to his front door under the facts of this case? (ANSWER: No, he does not have a reasonable expectation of privacy protecting him from such a contact). Result: Thurston County Superior Court conviction for manufacturing a controlled substance affirmed.

ANALYSIS: In part, the Court of Appeals analysis of the privacy issue is as follows:

Under the "open view doctrine" of both Const. art. 1, § 7 and the Fourth Amendment, police with legitimate business may enter areas of the curtilage of a residence that are impliedly open, and "[i]n so doing they are free to keep their eyes open." Areas of curtilage impliedly open to the public include a driveway, walkway, or access route leading to the residence or

to the porch of the residence. If police are able to detect something by utilizing one of their senses while lawfully present on areas of impliedly open curtilage that detection does not constitute a "search" under either Const. art. 1, § 7 or the Fourth Amendment. In short, as our Supreme Court recently stated,

If a law enforcement officer or agent does not go beyond the area of the residence that is impliedly open to the public, such as the driveway, the walkway, or an access route leading to the residence, no privacy interest is invaded. Whether the intrusion into an area has substantially and unreasonably exceeded the scope of an implied invitation depends on the facts and circumstances of the particular case.

. . . . Since the officers had a right to be in the place where they were when they developed probable cause, namely an impliedly open area, the trial court was justified in not suppressing the evidence.

This conclusion is not altered by the no trespassing signs. We held in State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) **Jan. '95 LED:19**] that "No Trespassing" signs were not dispositive on the issue of privacy. We held that it was merely one factor to be considered in conjunction with other manifestations of privacy. The "No Trespassing" signs were not those of Gave. He in no way adopted them as his own, and permission was granted by the owner, the City of Olympia, to traverse Allison Springs Lane. The signs were not intended to have any effect upon the property of Gave, and therefore he has no right to rely upon them. He did not erect gates or fences, did not post other signs on his residence, and did not interpose objection to the police presence at his doorstep. Gave's residence differed in no respect from any other residence and the case is analyzed using settled law.

This case is more like State v. Hornback, 73 Wn. App. 738 (1994) **[Oct. '94 LED:17]** than Johnson. The detectives, albeit using a ruse, did not use the secretive methods utilized by the agents in Johnson to investigate the tip, as they parked in Gave's driveway, directly approached the house without departing from the accessway, and personally contacted Gave. Thus, the detectives never left the areas of curtilage impliedly open to the public. The detectives were on legitimate police business. The fact that officers are investigating a crime they believe is occurring on the property does not invalidate the evidence seen as long as the defendant does not have a reasonable expectation of privacy in the access route used. Moreover, unlike Johnson, the detectives here conducted their investigation at mid-morning rather than in the middle of the night.

Thus, even if Gave had adopted the signs as embodying his subjective intent to close his property, the signs would not have been dispositive as to the privacy issue. The signs alone in this case are insufficient because no other manifestation of privacy was present. The detectives were therefore properly present in an impliedly open access area, and their observations were valid under the open view doctrine.

[Some citations omitted]

PROBABLE CAUSE LACKING; ANTICIPATORY WARRANT QUESTION DISCUSSED

State v. Gonzalez, 77 Wn. App. 479 (Div. III, 1995)

Facts and Proceedings:

Yakima City Police used an informant (Mr. Ancira) initially to buy one ounce of cocaine from a middleperson (Ms. Velasco) at her apartment. Upon the informant's arrival at the middleperson's apartment on the day of the one-ounce purchase, the middleperson left the apartment, went to her source, and returned with the cocaine.

On that day and for the next few days, the informant was negotiating a much bigger sale-- two kilos of cocaine--but the deal was not closed during these negotiations, and no statements were made by the middleperson suggesting that she presently had possession of any quantity of cocaine.

While negotiations were ongoing, a few days after the one-ounce sale, a Yakima City detective applied for (1) a search warrant for the middleperson's apartment, and (2) an electronic intercept order under RCW 9.73.090. To establish probable cause, the two applications for court authorizations (to search and to electronically intercept and record) apparently described the earlier transaction and the ongoing negotiations. [LED Editor's Note: We say "apparently" because the Court of Appeals opinion does not set out the affidavits or even describe in any sort of helpful detail their contents.]

The Court of Appeals opinion suggests that there were at least two defects in the detective's affidavits: (1) the search warrant affidavit and the electronic intercept authorization affidavit (both of which were required to make the same basic probable cause showing) apparently were written with the incorrect assumption that some details covered by one did not need to be covered in the other and did not incorporate each other by reference; and (2) the search warrant affidavit contained a statement from the detective to the effect that the informant "had seen cocaine in the apartment in the past 72 hours", which, though true, was somewhat misleading in that the cocaine had been procured at a location outside the apartment and brought back inside for the one-ounce sale; thus, there was actually no evidence that any cocaine remained after the sale was made.

Soon after obtaining the court authorizations, the police sent the informant back to try to close the deal with the middleperson. The informant was wired and police had a search warrant. The informant went in alone and struck a deal with the middleperson. Shortly after the deal was struck, Mr. Gonzalez and Mr. Valente arrived at the apartment with a supply of cocaine. Police moved in, seizing the cocaine, and making arrests.

In a pretrial suppression motion, Gonzalez moved on several bases to suppress the cocaine. Among his bases were: (1) no probable cause for the search warrant, (2) unlawful "anticipatory search warrant", and (3) intentional or reckless misrepresentations in the affidavits. The trial court denied the motion and found Gonzalez guilty of delivery of a controlled substance.

ISSUES AND RULINGS: (1) Are anticipatory search warrants permitted under Washington law? (ANSWER: Yes, but this was not an anticipatory warrant); (2) Was there any intentional or reckless misrepresentation by the affiant detective? (ANSWER: The Court seems to say "probably not" but does not really answer the question, and we will not address it in the LED); (3) Was there probable cause to search the middleperson's apartment? (ANSWER: No); (4) Did Gonzalez have standing to challenge the electronic intercept order? (ANSWER: Yes--we will not address this unremarkable ruling in the LED); (5) Did Gonzalez have standing to challenge the search warrant's validity? (ANSWER: Yes--we will not address this issue in this month's LED; see our discussion of the standing question in the June '95 LED at 17-18). Result: Yakima County Superior Court conviction for delivery of a controlled substance reversed.

ANALYSIS : (Excerpted from Court of Appeals opinion-- only PC and "anticipatory warrant" analysis excerpted)

Mr. Gonzalez urges the warrant is an illegal conditional warrant. Washington apparently has yet to reach the question, but the general rule is that conditional, or anticipatory, warrants are not per se objectionable. United States v. Garcia, 882 F.2d 699 (2d Cir., 1989), Grant v.

United States, 493 U.S. 943 (1989); People v. Sousa, 22 Cal. Rptr. 2d 264 (1993). An anticipatory warrant is "conditioned upon future events which, if fulfilled, would create probable cause[.]" Garcia, at 700. "[W]hen an anticipatory warrant is used, the magistrate should protect against its premature execution by listing in the warrant conditions governing the execution which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." Garcia, at 703-04. Although these facts present a classic example of when a conditional warrant might be appropriate, we need not reach the question because the subject warrant is not conditional. It is absolute on its face and gave police the right to immediately enter Ms. Velasco's apartment without the occurrence of a future event. As a practical matter, the police would not have done so prior to completion of the 2-kilo buy because they knew there was no cocaine on the premises at the time the warrant issued.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **BURGLARY -- FENCED AREA FOR PARK'S DONKEY HELD TO BE "BUILDING"** -- In State v. Gans, 76 Wn. App. 445 (Div. I, 1994) the Court of Appeals for Division One affirms a trial court ruling that a fenced area unlawfully entered by defendants in the case was a "building" within the meaning of the second degree burglary statute.

The Court of Appeals describes the facts pertinent to the "building" issue as follows:

On the morning of April 16, 1992, caretakers at Kelsey Creek Farm Park in Bellevue discovered that the park's donkey, Pasado, had been beaten and killed the previous night. . . .

At the hearing, the State established that at the time of the crime, Pasado was housed in a corral inside the park. The corral consisted of a large fenced-in area and small shed. The shed was 10 feet by 20 feet. The exterior wall contained a door for access to the shed. This door was kept padlocked to prevent access by individuals other than park staff. The interior wall contained a 4-foot wide opening to allow Pasado to enter and exit the shed.

The fence surrounding the remainder of the corral was approximately 4 feet high. It was constructed with four 2-inch by 6-inch boards bolted to posts sunk into the ground. There was an 18-inch gap between the boards. The only other authorized access to the corral (besides through the shed) was through a padlocked gate in the fence near the shed.

The Kelsey Creek Farm recreation coordinator testified that the purpose of the fence and locked gates was to keep out unauthorized persons, including the many visitors to the park. She also testified that the fence served the purpose of keeping Pasado in the corral. The City of Bellevue recreation coordinator testified that the purpose of the fence was to keep animals in and people out, as the City was concerned about liability.

Relying in part on the prior Court of Appeals decision in State v. Flieger, 45 Wn. App. 667 (Div. III, 1986) **March '87 LED:11**, defendants argued that the Court of Appeals should reverse the trial court ruling and determine that the fenced area was not a "building." Their first sub-argument on this issue was that the donkey they killed was not "goods." The Court of Appeals explains as follows the context of the "goods" issue:

A person is guilty of second degree burglary if "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030.

"Building", in addition to its ordinary meaning, includes any dwelling, *fenced area*, vehicle, railway car, cargo container, or any other structure used for loading of persons or for carrying on business therein, or *for the use, sale or deposit of goods* . . .

[COURT'S EMPHASIS] RCW 9A.04.110(5). In the instant case, the determination as to whether Pasado's corral was a "building" turns on whether Pasado was "goods" that had been deposited within the fenced area. . . .

[Citations omitted]

Then, quoting from a dictionary, the Court concludes that the donkey was "goods" within the ordinary, broad meaning of that term:

"Goods" is defined as "tangible movable personal property having intrinsic value". . . . Having intrinsic value and being movable personal property, Pasado meets the definition of "goods". Accordingly, his corral was a "building", i.e., the corral was fenced in and was used for the deposit of "goods". [Citations omitted]

The Court of Appeals then goes on to explain why it rejects defendants' argument, on a variety of bases, why "goods" should be given a narrow, commercially-related definition. After this discussion, the Court concludes on the "goods" question:

Under the plain meaning of the term "goods" Pasado was goods deposited or used within a fenced area. Resort to the U.C.C. or to various tenets of statutory construction to restrict the definition of goods does not alter this plain meaning.

Next, the Court of Appeals turns to the defendants' other argument as to why the fenced area should not be given "building" status. This argument goes to the primary purpose for the fence. The Court explains why defendants' argument fails:

Our Supreme Court has added an additional qualification before a fence can be deemed a building for purposes of the burglary statute. In order to be a building a fence must have as its main purpose the protection of the property inside the fenced-in area:

Were [a] fence a mere boundary fence or one erected for the *sole* purpose of aesthetic beautification, it would not constitute a "structure" . . . where [a] fence is of such a nature that it is erected mainly for the purpose of protecting property within its confines and is, in fact, an integral part of a closed compound, its function becomes analogous to that of a "building" and the fence itself constitutes a "structure" subject to being burglarized.

State v. Roadhs, 71 Wn.2d 705 (1967). Thus, a fence's main purpose establishes as a matter of law whether that fence can be considered a "building" for purposes of charging burglary.

The primary purpose of a fence is a question of fact. In State v. Brenner, 53 Wn. App. 367 (1989)[Nov. '89 LED:16], Brenner's co-defendant climbed an 8-foot fence and absconded with a

transmission, which the two then tried to load into Brenner's car. The court concluded that, although the junkyard owner was statutorily required to surround the junkyard with a fence or wall (for aesthetic reasons), the record contained substantial evidence that the owner constructed the fence specifically to combat theft. Thus, the fence's purpose was to protect the auto yard, making the fence a "building".

In the instant case, both trial courts concluded that the primary purpose of this fence was to protect Pasado by keeping him confined within a defined area. There was substantial evidence at B.W.'s hearing and the trial of Lombardi and Gans to support the trial courts' determinations. That there may have been other purposes for the fence does not undermine either trial court's determination. . . .

Appellants rely upon State v. Flieger, 45 Wn. App. 667 (1986)[**March '87 LED:11**]. In Flieger, the defendant was charged with burglary for entering a backyard which was surrounded by a 6-foot fence. The homeowner told police that the gates and fence were closed to protect property stored in the backyard, including items in a shed. . . . Despite this evidence, and noting that the fence could be opened from the exterior by reaching over and unlatching an unlocked gate, the court stated that this was a typical backyard fence, as might be found at any private residence. As such, the court concluded that it did not amount to a "building", as its "main purpose" was not to protect property or "goods" inside.

To the extent that Flieger stands for the proposition that a fence erected as a boundary or for beautification cannot be considered a "building" under the Roadhs main purpose test, we agree with the holding. However, to the extent that Flieger holds that an appellate court should decide the factual question of the primary purpose for a fence in each case, looking only at how tall or easily penetrated the fence may be, we decline to adopt its reasoning. We think a sounder approach is to allow the trier of fact to determine the primary purpose for a fence.

[Some citations omitted]

Result: Affirmance of the King County Superior Court convictions of two adults (and the adjudication of one juvenile) for second degree burglary and for cruelty to animals.

(2) CHILD MOLESTING STATUTE'S 'INTIMATE PARTS,' 'PURPOSE OF SEXUAL GRATIFICATION' ELEMENTS ADDRESSED IN TOUCH-THROUGH-CLOTHING CASE -- In State v. Veliz, 76 Wn. App. 775 (Div. III, 1995) the Court of Appeals rejects defendant's challenge to the trial court's jury instructions in this prosecution for first degree child molesting. The jury instruction issue will not be addressed in detail in the LED, but we will note several points made in the decision.

First, the Court of Appeals indicates that, based on State v. Powell, 62 Wn. App. 914 (Div. III, 1991) **Feb. '92 LED:09**, the "sexual contact" element of the child molesting statute (see RCW 9A.44.083-089) has the following general proof requirements:

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing, . . . the courts have required some additional evidence of sexual gratification.

The Court then goes on to hold that there was ample "additional evidence of sexual gratification" in Mr. Veliz'

touching of a child's "intimate parts" (see next paragraph) through the child's clothing for a period of 20 to 30 seconds.

Second, the Court of Appeals explains as follows regarding the term "intimate parts" in the "sexual contact" definition at RCW 9A.44.010(2):

"Intimate parts" has a broader connotation than sexual parts and includes "parts of the body in close proximity to the primary erogenous areas . . ." including hips, buttocks, and lower abdomen. Here, A.F. testified that Veliz touched her over her clothing on her "private spot in the front." [Citations omitted]

The Court goes on to find the evidence to be sufficient to satisfy the "intimate parts" element of the statute.

Third, the Court of Appeals criticizes language in State v. Powell (cited above), regarding a purported need for non-innocent explanations for would-be "molesting" conduct:

At one point in Powell, the court indicated that the evidence was insufficient because it was "susceptible of innocent explanation". We question whether this is the proper test for evaluating challenges to the sufficiency of the evidence. If this were the test, child molestation convictions could be subject to dismissal or reversal simply because a jury *could* believe a nonsexual explanation for the behavior. In our view, the correct test is that recited by the Powell court at the beginning of its opinion: whether, as a matter of law, there is sufficient evidence from which a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. [Citation omitted]

Result: Whatcom County Superior Court conviction for first degree child molesting affirmed.

(3) UNLAWFUL FIREARM POSSESSION: CORPUS DELICTI RULE IS SIMILAR TO THAT FOR DUI; STATE REQUIRED TO AND DID PRODUCE SOME EVIDENCE THAT DEFENDANT WAS THE GUN'S POSSESSOR -- In State v. Wright, 76 Wn. App. 811 (Div. I, 1995) the Court of Appeals imports into a firearms possession prosecution (chapter 9A.11 RCW) the special corpus delicti rule applied in DUI prosecutions. Thus, the Court of Appeals applies the rule of Bremerton v. Corbett, 106 Wn.2d 569 (1986) **Nov. '86 LED:03** in requiring proof that the defendant (a felon barred from possession of a firearm) was the person who unlawfully possessed a firearm before allowing into evidence proof that defendant confessed/admitted to possession of the firearm. The Court of Appeals goes on to hold that there was sufficient independent evidence of possession of the firearm by defendant in this case in the evidence that defendant initially lied to the officer about seeing a suspicious vehicle in the area (thus reflecting defendant's guilty knowledge regarding the gun).

Result: King County Superior Court conviction for possession of a pistol by person previously convicted under UCSA affirmed.

(4) STATUTE OF LIMITATIONS ON CONTINUING "COMMON SCHEME" CRIME BEGINS TO RUN ONLY UPON COMPLETION OF CRIME -- In State v. Reid, 74 Wn. App. 281 (Div. III, 1994) the Court of Appeals rejects defendant's argument that the statute of limitations had run on her alleged crime of theft.

Defendant was a young woman. The State charged that defendant had befriended an elderly widow and then had begun an alleged scheme of bilking the widow out of money over a period of several years. Throughout the alleged scheme, according to the State, defendant pretended to borrow the money, but she did not intend to repay it.

In her prosecution for first degree theft, defendant argued that under RCW 9A.04.080(1)(g) the limitations period for theft is three years, and the State could not prosecute her for any "loans" which occurred more than three years before she was charged. The Court of Appeals holds, however, that all of her "loans" were part of a continuing "common scheme or plan" to bilk the widow out of her money. Therefore, the statute of limitations would not begin to run on any of the acts until the last check was written. The trial jury had found that each of defendant's acts were part of a common scheme or plan, and accordingly the statute of limitations did not begin to run on her acts, the Court of Appeals holds, until she took her last "loan."

Result: Asotin County Superior Court conviction for first degree theft reversed on grounds not discussed in this LED entry; case remanded for retrial.

(5) NO CONSTITUTIONAL ERROR IN EXCLUDING PUBLIC FROM CrR 3.5 HEARING -- In State v. Boneclub, 76 Wn. App. 872 (Div. I, 1995) the Court of Appeals rejects defendant's claim that his rights were violated when the trial court closed a CrR 3.5 suppression hearing to temporarily protect the identity of an undercover narcotics agent. The Court of Appeals notes that in determining whether the exclusion of the public from a pretrial hearing to protect the identity of an undercover police officer violates a criminal defendant's right to a public trial under Const. art. 1, § 22 (amend. 10), the trial court must balance the State's interest in protecting the officer's identity against the defendant's and the public's interest in allowing spectators to be present. The balance tipped in the State's favor in Boneclub's prosecution, the Court of Appeals holds. Result: Whatcom County Superior Court convictions for possession of a controlled substance (two counts) and distribution of a controlled substance (four counts) affirmed.

(6) PRIEST-PENITENT PRIVILEGE OF RCW 5.60.060(3) GETS NARROWING CONSTRUCTION -- In State v. Buss, 76 Wn. App. 780 (Div. I, 1995) the Court of Appeals rejects defendant's argument that statements she made to a non-ordained "family minister" at her Catholic church were privileged under the priest-penitent privilege of RCW 5.60.060(3).

Noting that statutory privileges are to be narrowly construed, the Court of Appeals rules that: (1) a non-ordained church counselor does not qualify as a "member of the clergy" for purposes of RCW 5.60.060(3); (2) the priest-penitent privilege applies only to confessions made in accordance with formal church doctrine and procedures; and (3) the statement of a member of the Catholic Church is not protected by the priest-penitent privilege if it was not made during the Catholic sacrament of confession.

Result: King County Superior Court conviction for first degree rape of a child affirmed.

(7) LEAVING RESIDENCE WITHOUT PERMISSION WHILE SERVING HOME DETENTION SENTENCE IS ESCAPE -- In State v. Parker, 76 Wn. App. 747 (Div. III, 1995) the Court of Appeals for Division III rules that under RCW 9A.76.010, 9A.76.110, and 9.94A.030(8) and (40), a criminal defendant who is sentenced to home detention following a felony conviction commits the crime of first degree escape by leaving the residence without permission, even if he continues to wear his electronic monitoring device after he leaves the residence.

Result: Benton County Superior Court conviction for first degree escape affirmed.

(8) VICTIM OF ASSAULT LEGALLY CAN'T BE "PARTICIPANT" UNDER FELONY-MURDER RULE -- In State v. Goodrich, 72 Wn. App. 71 (Div. I, 1993) the Court of Appeals follows the rule set forth in earlier Washington cases, State v. Brigham, 52 Wn. App. 208 (Div. I, 1988) **Nov. '88 LED:08** and State v. Langford, 67 Wn. App. 572 (Div. III, 1992). The Court of Appeals holds that, for purposes of RCW 9A.32.050(1)(b), which exempts from the definition of second degree felony murder the killing of a "participant" in the crime, the victim of an assault is not, as a matter of law, a "participant" in the assault underlying the murder charge. Even if the incident is at some point a mutual assault situation, the person killed is not deemed to be a participant in the

assault.

In Goodrich, the defendant got into an argument with Steven Steel, pulled a pistol on Steel, and shot him dead. She was charged with, among other things, felony-murder in the second degree, based on the fact that Steel was killed during the course of her second-degree assault on him. The Court of Appeals rules that, under the rule articulated in Brigham and Langford, defendant could not legally argue that Steel was a "participant" in the crime which led to his death. Accordingly, the trial court properly did not allow Goodrich to argue to the jury that she was not guilty based on her theory that Steel was a "participant" in the crime.

Result: King County Superior Court conviction for second degree felony murder affirmed.

NEXT MONTH

The September '95 LED will include, among other things, entries addressing recent U.S. Supreme Court decisions in Wilson v. Arkansas, 57 CrL 2122 (1995) (incorporating the common law "knock and announce" rule in the Fourth Amendment) and U.S. v. Lopez, 131 L. Ed.2d 626 (1995) (invalidating a federal law banning guns near school campuses based on federal constitutional commerce clause limits on federal congressional law-making power).

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.

PC TO ARREST, SEARCH MV FOR RAPE EVIDENCE ESTABLISHED; ALLEGATION OF DELIBERATE OR RECKLESS OMISSION FROM WARRANT AFFIDAVIT NOT PROVEN
State v. Herzog, 73 Wn. App. 34 (Div. II, 1994).....

JUVENILE OFFENSE ADJUDICATION AS "FELONY WITH SEXUAL MOTIVATION" DOESN'T REQUIRE THAT JUVENILE REGISTER AS SEX OFFENDER
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REVOCAION OF DEFERRED PROSECUTION ON DUI NO. 1 MANDATORY AUTOMATICALLY UPON CONVICTION OF DUI NO. 2, EVEN IF APPEAL HAS BEEN FILED ON DUI NO. 2
State v.Kuhn, 74 Wn. App. 787 (Div. II, 1994).....

PC TO ARREST, SEARCH MV FOR RAPE EVIDENCE ESTABLISHED; ALLEGATION OF DELIBERATE OR RECKLESS OMISSION FROM WARRANT AFFIDAVIT NOT PROVEN
State v. Herzog, 73 Wn. App. 34 (Div. II, 1994)

Facts:

On six separate occasions during a two-month period in the Spring of 1989, individual female victims were abducted and raped by a man operating in the Vancouver (Wash)-Portland area. Each of the victims similarly described her abductor, his pickup truck, and his MO. **LED EDITOR'S NOTE: To save space, we have omitted their respective descriptions, but the reader should note that each element of the police investigation described below corroborated the victims' reports.**

Police investigators suspected that each of the women had been raped by the same man. They provided an artist's sketch of the suspect to local newspapers. After the sketch was published, the ex-stepson of Gary Kenneth Herzog contacted the police. What happened after that is described by the Court of Appeals as follows:

[The stepson] said he had seen an artist's sketch of the attacker in the newspaper and believed it "could be [Herzog]". He qualified his statement by saying the sketch was not a "good depiction" of Herzog. His description of Herzog matched that given by the six women, including the fact that Herzog sported a "double-hearted tattoo." He also said that Herzog drove a "1970 or early 1970's Chevrolet four-wheel-drive pickup truck, yellow in color". He said he had been sexually molested by Herzog in the past.

The police obtained a photo of Herzog, which showed a person "distinct[ly] similar" to the description the six women had given. They confirmed through licensing records that Herzog owned a "four-wheel-drive Chevrolet", and through arrest records that Herzog previously had been charged with a sex crime in King County. His ex-stepson was the alleged victim, and the charge had ultimately been dismissed.

After ascertaining that Herzog worked at the Freightliner Corporation in Portland, the police went there to conduct further investigation. In Freightliner's parking lot, they saw a "four-wheel-drive Chevrolet pickup truck with a canopy that met the general description of what

we were looking for" They also saw a chain hanging from the truck's rearview mirror. They made these observations from the street, which was separated from the parking lot by 6 to 30 feet of landscaping.

The police sought permission from Freightliner's security department before entering Freightliner's parking lot. After permission was granted, several officers walked past the truck and looked through its windows. Although they did not enter the truck, or "even put [a] face against the window", they were able to see various items, including an automatic transmission, sheepskin seat covers, pillows, cupholders, towels, a covered spare tire, a broken light under the roof of the canopy, and writing under the roof of the canopy.

The police then met Herzog in Freightliner's offices. Observing that he resembled each victim's description of her attacker, they arrested him. After he was under arrest, they further observed a double-heart tattoo on his left shoulder and a scar on his stomach.

Later that day, the police obtained Oregon search warrants for Herzog's truck, for the room in which he was living, and for samples of his blood, saliva and hair. When they searched the truck, they seized the items they had seen while the truck was parked at Freightliner. When they searched the room, they seized a pair of brown cowboy boots, a pair of white tennis shoes, and a polo-type shirt with blue and white stripes. They did not find a handgun.

Lineups were held within a short time. Each of the six women identified Herzog as her attacker.

As the investigation continued, the police contacted the King County Prosecutor's office to find out why the charge involving the ex-stepson had been dismissed. The reason, they were told, was that the ex-stepson had recanted his allegations.

Proceedings: (Excerpted from Court of Appeals opinion)

Later in 1989, Herzog was tried in Oregon for the attacks on [four of the victims]. He was convicted on 17 counts of kidnapping, rape, sodomy, and sexual abuse. He was sentenced to 435 years in prison, and the sentence was affirmed on appeal.

Also in 1989, Washington charged Herzog with the first degree kidnapping of S (count 1), the first degree rape of S (count 2), the attempted first degree kidnapping of B (count 3), and the second degree assault of B (count 4). Before trial, he moved to suppress the evidence seized pursuant to the Oregon search warrants. The trial court denied the motion.

. . . .

The State introduced various items of tangible evidence seized as a result of the Oregon search warrants. That evidence tended to corroborate the victims' testimony, and to connect Herzog with the attacks.

Herzog called several witnesses and testified on his own behalf. He denied perpetrating any of the incidents.

The jury convicted on all counts.

ISSUES AND RULINGS: (1) Did the police conduct an illegal search when they looked at Herzog's truck in the parking lot at Freightliner? (ANSWER: No, they merely observed things which were in open view -- no "search" occurred); (2) Did the affidavit for the Oregon search warrants establish probable cause to search Herzog's truck and room? (ANSWER: Yes); (3) Did Herzog establish that the police made intentional or reckless omissions in the affidavit supporting the Oregon search warrants? (ANSWER: No) Result: Clark County Superior Court convictions for first degree kidnapping, first degree rape, attempted first degree kidnapping and second degree assault affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Observing the Truck Not "Search"

The Fourth Amendment applies when government agents conduct a "search". Government agents conduct a "search" when they infringe upon a person's constitutionally protected expectation of privacy. Conversely, government agents do not conduct a "search" when they make observations from a place where they have the right to be. . . .

Here, the officers stood on the public street and looked at the truck. Then, with Freightliner's permission, they walked through the parking lot and looked into the truck. These activities did not involve anything other than observing, from lawful vantage points, things in open view. There was no search, and the Fourth Amendment did not apply.

(2) PC To Arrest

Even when made in a public place, an arrest must be supported by probable cause. "Probable cause exists 'where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been . . . committed.'" "The question of probable cause should not be viewed in a hypertechnical manner."

The police had probable cause to arrest when they took Herzog into custody at Freightliner. Several of the women had said their attacker had a distinctive tattoo on his arm, and Herzog's ex-stepson had said Herzog wore that kind of tattoo. The women had described the attacker's person, and the police had observed that Herzog fit the description. The women had described the vehicle of their attacker in great detail -- a light colored (tan or yellow) Ranger-type pickup, with a canopy that had a stripe on each side, automatic transmission, 4-wheel-drive shifter, fuzzy seat covers, cupholders, towels, pillows, gold chain hanging from the rearview mirror, writing on the underside of the roof of the canopy, broken light under the canopy -- and the police had confirmed those details by their own lawful observations. The police had also confirmed through state records that the truck was owned by Herzog. Viewed in combination, these facts and circumstances were such that a person of reasonable caution would have believed that Herzog had committed the crimes in question.

(3) Omissions in the Affidavit

An omission or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth. "Allegations of negligence or innocent mistake are insufficient." The defendant bears the burden of establishing the necessary facts.

Herzog says the police recklessly omitted to include in the search warrant affidavit the fact that his ex-stepson had recanted his sexual abuse charge against Herzog. However, the police included in the affidavit the fact that the charge had been dismissed, and they did not discover that the dismissal was due to the ex-stepson's recantation until *after* the search warrants had been issued. Nothing indicates that the failure to discover the recantation was intentional or reckless; indeed, nothing indicates that it was even negligent, in view of the rapidity with which events were unfolding at the time. We hold that the failure to state that the ex-stepson had recanted does not affect the legality of the search warrants.

Herzog also says the police recklessly omitted to state in the affidavit that before they went to Freightliner, the ex-stepson had qualified his identification of Herzog by saying the artist's sketch "could be" him but was not a "good depiction". According to testimony given later at trial, the ex-stepson actually told the police that the depiction was "similar . . . it could be him". Moreover, even if the ex-stepson's qualifying words had been included in the affidavit, nothing would have changed, for with or without such words, the affidavit contained a wealth of information demonstrating probable cause. There was no material omission from the affidavit.

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals also discusses at length the question of whether evidence relating to one of the uncharged rapes could be admitted. The general rule is that evidence of uncharged crimes is not admissible because of its prejudicial effect. However, the Court holds that because of the many similarities in the MO's of each of the rapes and of the victims' descriptions of their attacker, the evidence relating to the uncharged rape tended to show the identity of the rapist and was therefore admissible.

(5) **JUVENILE OFFENSE ADJUDICATION AS "FELONY WITH SEXUAL MOTIVATION" DOESN'T REQUIRE THAT JUVENILE REGISTER AS SEX OFFENDER** -- In State v. S.M.H., 76 Wn. App. 550 (Div. I, 1995) the Court of Appeals rules that, due to an apparent legislative oversight in drafting the sex offender registration statute, a "felony with sexual motivation" by a juvenile (RCW 13.40.135) does not constitute a "sex offense" under RCW 9.94A.030(31). Therefore, a juvenile convicted of a "felony with sexual motivation" (as opposed to a juvenile convicted of a "sex offense") is not required to register as a sex offender under 9A.44.130. Result: King County Superior Court order to juvenile to register as a sex offender stricken.

9) **NO "CAT OUT OF THE BAG" RULE UNDER MIRANDA** -- In State v. Baruso, 72 Wn. App. 603 (Div. I, 1993) the Court of Appeals declares that the fact that a suspect made a voluntary statement during police questioning which was in technical violation of the Miranda rule, but did not involve physical or mental coercion, does not necessarily taint later voluntary statements after proper Miranda warnings were given. The Court holds that under such circumstances, there is no requirement that the post-Miranda statements be removed in time and place from the statements made in violation of the Miranda rule.

The ruling in Baruso agrees with the ruling in State v. Allenby, 68 Wn. App. 657 (Div. I, 1992) **Oct. '93 LED:18**. Both Baruso and Allenby hold that the State Supreme Court's decision in State v. Lavaris, 99 Wn.2d 851 (1983) **Aug. '83 LED:10** was overruled by the U.S. Supreme Court decision in Oregon v. Elstad, 470 U.S. 298 (1985) **June '85 LED:10**.

Result: King County Superior Court conviction for two counts of aggravated first degree murder affirmed.

LED EDITOR'S COMMENT:

In light of the recent rulings in Allenby and Baruso, we feel fairly confident in reversing a position we stated after Lavaris was decided. At that time (see Aug. '83 LED at 11) we stated our view that whenever a custodial suspect is questioned without being given adequate Miranda warnings, then any followup questioning must be preceded by a cat-out-of-the-bag warning to the effect that: "any statements just made cannot be used against you . . ." Baruso and Allenby are clear authority that our suggestion in 1983 as to the need for a special warning was rendered incorrect by the 1985 decision of the U.S. Supreme court in Elsstad (cited above). A special warning is not required in the described situation, so long as the initial questioning occurred under circumstances which were non-coercive and involved only the technical Miranda violation. On the other hand, if the initial questioning occurred under coercive circumstances (e.g., a threat or actual physical assault on the suspect or improper promises) resulting in an involuntary statement, then a special warning -- plus a time-out period -- will no doubt be required in order for any subsequent interrogation response to be admissible.

(11) **REVOCAION OF DEFERRED PROSECUTION ON DUI NO. 1 MANDATORY ON CONVICTION OF DUI NO. 2 EVEN IF APPEAL HAS BEEN FILED ON DUI NO. 2** -- In State v.Kuhn, 74 Wn. App. 787 (Div. II, 1994) the Court of Appeals holds that under RCW 10.05.100 revocation of a defendant's deferred prosecution by a court of limited jurisdiction is to occur as soon as the defendant is subsequently convicted of a similar offense. Thus, revocation is automatic when an adjudication of guilt by a jury or trial court is entered for the subsequent offense, without regard to whether the defendant seeks appellate review of the subsequent conviction. Accordingly, John Kuhn's deferred prosecution on an earlier DUI was properly revoked based on a conviction for a second DUI offense, even though he had immediately appealed that subsequent conviction. Result: Kitsap County Superior Court order revoking deferred prosecution affirmed. (The Superior Court order had reversed an earlier District Court order denying revocation of the deferred prosecution).