

August 1996

HONOR ROLL

446th Session, Basic Law Enforcement Academy - April 2 through June 21, 1996

President: Officer Eric J. Thomas - Bellevue Police Department
Best Overall: Officer David P. Baldwin - Sultan Police Department
Best Academic: Officer David P. Baldwin - Sultan Police Department
Best Firearms: Deputy Montgomery P. Minion, Jr. - Pierce County Sheriff's Department

Corrections Officer Academy - Class 233 - June 3 through 28, 1996

Highest Overall: Officer Robert Bennett Irish - Geiger Corrections Center
Highest Academic: Officer Michael G. Haynes - Auburn City Jail
Officer Thomas P. Ifft - Olympic Correctional Center
Highest Practical Test: Officer Robert Bennett Irish - Geiger Corrections Center
Highest in Mock Scenes: Officer William A. Cassel - Washington State Reformatory
Highest Defensive Tactics: Officer Robert Bennett Irish - Geiger Corrections Center

Corrections Officer Academy - Class 234 - June 3 through 28, 1996

Highest Overall: Officer Robert K. Moore - Cowlitz County Jail
Highest Academic: Officer Cindy K. Marlowe - Washington State Penitentiary
Highest Practical Test: Officer Russell A. Martin - Pierce County Corrections Bureau
Officer Tonya Jo Ramos - Pierce County Corrections Bureau
Highest in Mock Scenes: Officer Robert K. Moore - Cowlitz County Jail
Highest Defensive Tactics: Officer Robert M. Wetmore - Asotin County Jail

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1996 WASHINGTON LEGISLATIVE ENACTMENTS-- PART THREE

LED EDITOR'S INTRODUCTORY NOTE: This is the third and final part of our update of 1996 Washington State legislative enactments. Parts one and two appeared in the June and July LED's respectively. Part three includes brief entries on several enactments not covered in parts one and two, plus additional information on several enactments previously addressed, and, finally, an index for all three parts. *[Note that we plan to include in the September 1996 LED some further "Questions and Answers" relating to the amended firearms laws in addition to those set forth below at pages 5 and 6.]* As always, we remind our readers that any views that we express regarding the correct interpretation of legislation are solely our own and do not necessarily reflect the views of the Attorney General's Office or the Criminal Justice Training Commission.

A. **ENACTMENTS NOT COVERED IN PARTS ONE AND TWO**

HORSE MICROCHIPS

CHAPTER 105 (SSB 6694)

Effective Date: June 6, 1996

Adds a new section to chapter 16.57 RCW making a person guilty of a gross misdemeanor, if, with intent to defraud a subsequent purchaser, he or she removes "a microchip implanted in a horse" or removes "a microchip from one horse and implants or causes it to be implanted in another horse..." The Department of Agriculture has authority to investigate under certain specified suspicious circumstances.

ACCIDENT REPORT PROCESSING

CHAPTER 183 (SHB 1964)

Effective Date: July 1, 1996

Amends RCW 46.52.030 to authorize a change in the processing of the motor vehicle collision form filed by a motorist with the local police agency. The amendment allows the local agency to send a copy of the report to WSP only. Then WSP is to share information with DOL. The local agency will no longer need to send a copy of the form separately to DOL.

ACCESS TO DEPARTMENT OF REVENUE RECORDS

CHAPTER 184 (2ESHB 1967)

Effective Date: January 1, 1997

Among other things, amends RCW 82.32.330 to allow the Washington Department of Revenue to disclose state tax return information to peace officers and prosecutors for official purposes, but only:

. . . in response to a search warrant, subpoena, or other court order, unless the disclosure is for the purpose of criminal tax enforcement. A peace officer or county prosecuting attorney who receives the return or tax information may disclose that return or tax information only for

use in the investigation and a related court proceeding, or in the court proceeding for which the return or tax information originally was sought.

Also amends various penalty provisions relating to vehicle, vessel, and aircraft licensing fraud.

GREYHOUND RACING PROHIBITION

CHAPTER 252 (EHB 2672)

Effective Date: June 6, 1996

Amends chapter 9.46 RCW to prohibit greyhound racing conducted in this state for gambling purposes, and also to prohibit off-track gambling relating to greyhound racing conducted out of state.

ASSAULT THREE -- COUNTY FIRE EMPLOYEES

CHAPTER 266 (HB 2791)

Effective Date: June 6, 1996

Amends RCW 9A.36.031 (assault third degree) to clarify that employees of the "county fire marshal's office" and the "county fire prevention bureau" are protected by the provisions of the statute along with other public safety personnel and others currently protected.

ABANDONMENT OF DEPENDENT PERSONS

CHAPTER 302 (2SSB 5417)

Effective Date: June 6, 1996

Adds three new sections to chapter 9A.42 RCW creating the crimes of "abandonment of a dependent person" in the first, second, and third degrees as follows:

- (1) A person is guilty of **abandonment of a dependent person in the first degree** if:
- (a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, or a person employed to provide to the child any of the basic necessities of life;
 - (b) The person recklessly abandons the child or other dependent person; and
 - (c) As a result of being abandoned, the child or other person suffers great bodily harm.
- (2) Abandonment of a dependent person in the first degree is a class B felony.

- (1) A person is guilty of **abandonment of a dependent person in the second degree** if:
- (a) The person is parent of a child, a person entrusted with the physical custody of a child or other dependent person, or a person employed to provide to the child or other dependent person any of the basic necessities of life; and
 - (b) The person recklessly abandons the child or other dependent person; and
 - (i) As a result of being abandoned, the child or other dependent person suffers substantial bodily harm; or
 - (ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other dependent person will die or suffer great bodily harm.
- (2) Abandonment of a dependent person in the second degree is a class C felony.

- (1) A person is guilty of **abandonment of a dependent person in the third degree** if:
- (a) The person is the parent of a child, a person entrusted with the physical custody of a

- child or other dependent person, or a person employed to provide to the child or dependent person any of the basic necessities of life; and
 - (b) The person recklessly abandons the child or other dependent person; and
 - (i) As a result of being abandoned, the child or other dependent person suffers bodily harm; or
 - (ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other person will suffer substantial bodily harm.
- (2) Abandonment of a dependent person in the third degree is a gross misdemeanor.

Definitions of "employed" and "abandons" are added to chapter 9A.42 RCW, and the definition of "**basic necessities of life**" is expanded so that it now reads:

. . . food, water, shelter, clothing, and health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.

Current definitions of "bodily injury," "substantial bodily injury," "great bodily injury," "child," "dependent person," and "parent" are not modified. Also, an affirmative defense is added for persons who *lawfully* terminate services to dependent persons *under "termination of services" rules to be established by DSHS.*

B. MORE INFORMATION ON 1996 LEGISLATION PREVIOUSLY ADDRESSED

DEATH BENEFITS FOR POLICE, FIREFIGHTERS

CHAPTER 226 (ESSSB 5322)

Effective Date: March 28, 1996

The July 1996 LED corrected erroneous information on this legislation previously addressed in the June 1996 LED at page 11. We'll now make another try at describing this legislation.

Chapter 226 adds new sections to chapters 41.26 RCW and 43.43 RCW to provide a \$150,000 death benefit award where death of the following categories of personnel "occurs as a result of injuries sustained in the course of employment": Plan I and Plan II members of LEOFF & commissioned WSP officers in the WSP retirement system. The administrative determination of whether a death occurred "as a result of injuries sustained in the course of employment" will be made by the Department of Labor and Industries consistent with the Industrial Insurance Act.

Chapter 226 also has a section providing for a legislative committee study (report due to Legislature by December 1, 1996) "on providing a similar death benefit for volunteer fire fighters and reserve law enforcement officers."

FIREARMS

CHAPTER 295 (SHB 2420)

Effective Date: June 6, 1996

Questions and answers

Q Did the 1996 amendments to chapter 9.41 RCW succeed in giving Washington State concealed pistol licenses "Brady-permit-alternative" status under Federal law?

A Yes, by letter dated June 20, 1996, the ATF's Western District Director, Vikki Rennekar, declared that "[N]o Statement of Intent to Obtain a Handgun (ATF F 5300.35 will be required for the acquisition of a handgun by a holder of a Washington State concealed pistol license which was issued on or after July 1,

1996." Director Rennecker explained further, however, that all persons with Washington CPL's issued before July 1, 1996 will continue to be required to complete AFT F 5300.35 and therefore will continue to be subject to the statutory waiting period.

Q: The 1996 amendments define "law enforcement officer" for purposes of the exception to the concealed pistol license requirement. The new "leo" definition references terms in chapter 10.93 RCW and includes "general authority" and "specially commissioned" Washington peace officers (including reserves) without restriction; it also includes "limited authority Washington peace officers" (e.g. wildlife officers) but only if such officers are duly authorized by their employers to carry a concealed pistol. Does this exemption apply to out-of-state officers?

A: Probably not, unless the officers also hold commissions in state or local Washington agencies. All of the new definitions incorporate references to "**Washington**" officers.

... LOOK FOR MORE FIREARMS Q & A NEXT MONTH.

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UNITED STATES SUPREME COURT

NO "PRETEXT STOP" RULE UNDER FOURTH AMENDMENT

Whren v. U.S., 1996 W. L. 305735 (U.S.)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time -- more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signalling, and sped off at an "unreasonable" speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws, including 21 U.S.C. § § 844(a) and 860(a). At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle -- to give the driver a warning concerning traffic violations -- was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."

Petitioners were convicted of the counts at issue here. The Court of Appeals affirmed the convictions, holding with respect to the suppression issue that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation."

ISSUE AND RULING: Was the arrest of defendants and the search of their vehicle unlawful as the fruit of an unlawful "pretext" seizure? (ANSWER: No, the officers had probable cause to suspect a traffic violation, and the officers' motive in acting on this suspicion is irrelevant) Result: Washington D.C. district court drug law convictions of defendant's Whren and Brown affirmed.

ANALYSIS:

Justice Scalia delivers the opinion for a unanimous U.S. Supreme Court, rejecting petitioners' pretext theory. The Court's opinion begins by pointing out that Fourth Amendment cases from the Supreme Court have held that police may stop and detain motorists based on probable cause to believe they have committed even the most minor traffic offenses. The Fourth Amendment probable cause standard is a purely objective one, the Whren opinion emphasizes, and turns entirely on what a reasonable officer would suspect under the circumstances.

The Supreme Court rejects the defendant's argument that traffic statutes are so broadly proscriptive that attentive police officers with ulterior motives can generally stop almost any motorist at any time for some traffic infraction. Subjective considerations generally play no role in Fourth Amendment probable cause analysis, the Whren Court declares, whether one is looking at the state of mind of officers or of suspects.

The Whren opinion also rejects the argument by defendants that their proposed pretext rule -- Did the officer deviate materially from standard police practices? -- is a purely objective test. Justice Scalia responds that in this context, the proposed pretext rule calling for speculation about "the hypothetical reaction of a hypothetical constable," is "an exercise that might be called virtual subjectivity." **LED EDITOR'S COMMENT: We're not sure we fully understand this statement by Justice Scalia.**

Even more important, the Whren opinion points out, is that the defendants' proposed pretext rule would result in widely varying standards from jurisdiction to jurisdiction. Justice Scalia explains:

Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable . . . and can be made to turn upon such trivialities. The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others." Metropolitan Police Department -- Washington, D. C., General Order 303 This basis of invalidation would not apply in jurisdictions that had a different practice. And it would not have applied even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser.

For these and other reasons, the U.S. Supreme Court unanimously rules in effect that there is no pretext seizure rule which would bar probable cause seizures under the Fourth Amendment.

LED EDITOR'S COMMENT: The Whren decision effectively overrules two recent Washington State Court of Appeals opinions subscribing to a Fourth Amendment "pretext stop" rule. See State v. Chapin, 75 Wn. App. 460 (Div. I, 1994) Dec. '94 LED:17 (declaring that a seizure will violate the Fourth Amendment if the officer was not following normal practices and procedures) and State v. Blumenthal, 78 Wn. App. 82 (Div. I, 1995) Nov. '95 LED:13 (reiterating the Chapin articulation of a pretext rule).

We regret that space limitations required that we condense our summary of the Whren opinion. Justice Scalia is crystal clear and compelling in his analysis rejecting the idea of a pretext restriction under Fourth Amendment doctrine. In a fit of naive optimism, we hope that Washington judges will consider with care Justice Scalia's point about the need for fairly uniform rules before giving any consideration to a pretext rule under the state constitution.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) **IN REM CIVIL FORFEITURES--WHETHER BASED ON USE OF PROPERTY OR ON STATUS OF PROPERTY AS PROCEEDS--ARE NOT PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES; SUCH CIVIL FORFEITURES THEREFORE DO NOT BAR CRIMINAL PROSECUTIONS--** In consolidated cases which will be known as U.S. v. Ursery, 1996 WL 340815 (U.S.), the United States Supreme Court rules that civil in rem forfeiture under federal drug statutes is not punishment for purposes of the "double jeopardy" protections of the Fifth Amendment, whether the forfeiture is for illegal use of property (8-1 ruling) or as proceeds of illegality (9-0 ruling).

The Ursery Court states that lower courts had been misinterpreting recent U.S. Supreme Court decisions in: U.S. v. Halper, 490 U.S. 435 (1989) [**Nov. '89 LED: 05**] (a case involving The False Claims Act's civil penalties against the individual violator, and, while decided under "double jeopardy," not addressing civil forfeiture); Austin v. U.S., 509 U.S. 602 (1993) [**Dec. '93 LED:15**] (a case involving the federal drug forfeiture laws but decided under the Eighth Amendment's

clause prohibiting "excessive fines", not under the Fifth Amendment's clause prohibiting "double jeopardy"); and Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. ___ (1994) (a case involving a state tax on a marijuana grower and, while decided under "double jeopardy," not involving civil forfeiture).

The Ursery Court concludes that Halper, Austin, and Kurth Ranch do not undercut the longstanding position of the Court that civil in rem forfeiture is not punishment and is not criminal in nature. Accordingly, the Ursery Court rules, double jeopardy does not apply to the drug forfeiture statutes before it, one authorizing forfeiture for use of property in the manufacture of a controlled substance, and the other authorizing forfeiture of proceeds of illegal drug activity.

Result: Sixth Circuit Court of Appeals decision setting aside a criminal conviction on double jeopardy grounds reversed; Ninth Circuit Court of Appeals decision setting aside a forfeiture on double jeopardy grounds reversed.

LED EDITOR'S COMMENT:

The Ursery ruling on double jeopardy appears to flatly contradict a critical portion of the analysis of the Washington State Supreme Court in the cases of State v. Clark, 124 Wn.2d 90 (1994) [Oct. '94 LED: 05] and State v. Cole, 128 Wn.2d 262 (1995) [Feb. '96 LED: 02]. Not only are the Washington drug forfeiture provisions at issue in Clark and Cole extremely close in substance to the Federal forfeiture provisions at issue in Ursery, but also, the Washington State Supreme Court has declared that the constitutional prohibitions on double jeopardy are the same under both the Federal and the State constitutions. Accordingly, there is now a very strong argument that civil forfeiture under RCW 69.50.505 is not punishment and hence not subject to double jeopardy restrictions. Prosecutors expect that argument to prevail in light of Ursery.

It nonetheless remains to be seen what the Washington courts will do with Ursery's double jeopardy analysis as it applies to the Washington drug forfeiture laws and other Washington forfeiture provisions. More important, the Ursery decision did not undercut the argument in forfeiture cases that forfeiture constitutes an "excessive fine" in violation of the Eighth Amendment. That issue is still very much alive and in need of clarification.

Barbara Mack of the King County Prosecutor's Office recently reminded fellow prosecutors of the excessive fines issue in commenting on the Ursery decision:

Be aware: excessive forfeitures will be challenged and litigated by the defense bar, under the Excessive Fines Clause. Therefore we should all make sure that our forfeitures are fair, under the circumstances of the particular case. Guidelines for excessiveness have not yet been developed, so the defense bar will be looking for the "worst case" scenarios to appeal.

In the October 1994 LED, we presented an article on the double jeopardy/excessive fines limitations on forfeiture. The article, entitled "Pig Theory of Forfeiture Explained," was authored by Pat Sainsbury, Chief Fraud Deputy of the King County Prosecutor's Office. Pat confirms that most of the advice in that article remains valid following the Ursery decision and pending further clarification from the Washington courts. Pat reminds everyone:

Don't be the agency to make bad law for everyone else. Remember the pig theory: *If you make a pig of yourself in a forfeiture, the courts will make a sausage of you.*

Barbara Mack can be contacted with questions about excessive fines and double jeopardy issues at the King County Prosecutor's Office at (206) 296-9010. Another good source is Deputy Prosecutor Tami Perdue of the King County Sheriff's Asset Forfeiture Unit at (206) 205-7871.

(2) NO CONSTITUTIONAL REQUIREMENT FOR "INNOCENT OWNER" PROTECTION IN FORFEITURE LAWS -- In Bennis v. Michigan, 58 Cr L 2060 (1996), the U.S. Supreme Court rules that the Fourteenth Amendment's Due Process Clause does not forbid the in rem forfeiture of a property owner's interest in property that another has put to a proscribed use without the knowledge of the owner; the Fifth Amendment does not require that an innocent property owner be compensated for property that is lawfully forfeitable pursuant to a nuisance abatement statute. **[LED EDITOR'S NOTE: The Bennis case involved a Michigan law which allowed forfeiture of a vehicle used in relation to a prostitution offense and which did not allow an unknowing, "innocent owner" to re-claim the vehicle. By way of contrast, to the best of our knowledge all Washington State forfeiture statutes allow for an innocent owner to overcome forfeiture.]**

Result: forfeiture/abatement order of Michigan court affirmed.

WASHINGTON STATE SUPREME COURT

FACTS FAIL TO SUPPORT DEFENDANT'S UNLAWFUL SEIZURE CLAIM-- NO SEIZURE IN OFFICER'S SIMPLE QUESTION TO PARKED CAR OCCUPANT: "WHERE'S THE PIPE?"

State v. Thorn, 129 Wn.2d ___ (1996)

Facts:

All pertinent facts in this case were stipulated to between the State and defendant. The stipulation declared that a Spokane police officer was attempting to observe the activity of three people in a parked car when he saw a flicker of light consistent with a flame related to drug usage. The officer saw nothing else suspicious in the car occupants' behavior. He approached the car and asked the driver, James Thorn: "Where's the pipe?"

Thorn responded by fishing a pipe out of a coat pocket and handing it to the officer. During a search incident to Thorn's arrest **[LED EDITOR'S NOTE: On appeal, Thorn did not question that there was probable cause for arrest]**, the officer found a bag of psilocybin mushrooms.

Proceedings:

Thorn was charged with possession of a controlled substance. Prior to trial, he moved to suppress the evidence, arguing that the arrest and search were the fruit of an unlawful seizure of his person. Thorn argued that the seizure occurred at the moment when the officer initially

approached the car and asked for the pipe. The trial court agreed with Thorn, suppressed the evidence, and dismissed the case, because the officer did not have reasonable suspicion as to any criminal activity at the moment of the initial contact. The Court of Appeals affirmed in an unpublished opinion.

ISSUE AND RULING: Did Thorn meet his burden of proving that, at the moment when the officer asked Thorn about the pipe, as a reasonable person Thorn would not have felt free: (a) to leave or (b) otherwise to decline the officer's request and terminate the encounter? (**ANSWER:** No) **Result:** Spokane County Superior Court suppression and dismissal orders reversed by 7-2 decision; case remanded for trial under reinstated charges.

ANALYSIS BY MAJORITY:

The State Supreme Court majority begins its analysis by noting that the question of whether a person has been seized is a mixed question of fact and law for purposes of Fourth Amendment analysis. Therefore, contrary to the erroneous assertion by the Court of Appeals in State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992)[**March '93 LED:09**], an appellate court must make its own independent determination of whether the factual record in a case establishes that a "seizure", as opposed to a mere contact or less, has occurred.

The majority opinion also notes at the outset that, because the defendant failed to properly brief the issue, the Court would not consider whether the Washington Constitution, article 1, section 7, provides "independent grounds" for greater restrictions on police than does the Fourth Amendment stop-and-frisk standard announced in Terry v. Ohio, 392 U.S. 1 (1968). [**LED Editor's Note: To date, no reported appellate decision in Washington has made an independent grounds ruling in the stop-and-frisk area of search and seizure law.**]

Turning to the Fourth Amendment Terry seizure question, the majority notes that the leading case is the U.S. Supreme Court decision in Florida v. Bostick, 501 U.S. 429 (1991) **Sept. '91 LED: 06**. In Bostick, the Supreme Court held that police officers did not necessarily seize a bus passenger by asking him for ID, explaining that they were narcotics officers, and requesting consent to search his luggage. Bostick holds that the relevant Fourth Amendment seizure question is whether, under all of the circumstances, *a reasonable person would have felt free to leave or otherwise decline the officer's requests and to terminate the encounter.*

The Thorn majority opinion then analyzes the facts of the case before it under the Bostick standard. The majority opinion criticizes the reasoning of Division III Court of Appeals, which, in its earlier unpublished opinion in the case, had found to be determinative the fact that Thorn was sitting in a parked car when the contact was made, and therefore would have had to drive or walk away to free himself. Under Bostick, the Thorn majority points out, the pertinent question is not merely whether a reasonable person would or would not have felt free to leave, but whether such a person, under all the circumstances, would have "felt free to terminate the encounter, refuse to answer the officer's question, or otherwise go about his business."

Thus, the Thorn majority opines that the focus is on arguable police coercion, not the circumstances of the citizen. That one would find it more difficult to leave the scene because one is in a parked car, rather than afoot, is not significant. What is significant is what the officer did by acts and words to convey intent to make a seizure. Turning to the very minimal stipulation of facts in the record, the majority notes that varying interpretations could be given the encounter in which

the officer asked "Where's the pipe?" The majority asks: "[D]id the officer approach and ask in a pleasant or joking tone of voice where the pipe might be or did the officer stride forcefully toward the car, impliedly demanding that Thorn respond?"

Finally, the Thorn majority resolves its problem with the ambiguity of the stipulation by noting that, as the moving party, defendant Thorn had the burden of proving that a seizure occurred. Thorn failed to satisfy this burden, the majority rules. The majority concludes its analysis by warning that it is not establishing a "blanket rule that an officer does not seize a person merely by asking a question..." [but that] "...where the question is, as here, capable of more than one interpretation, it does not per se constitute a 'seizure'."

DISSENT:

Justice Alexander writes a dissent joined by Justice Johnson. The dissenters disagree with the majority's "burden of proof" analysis. The dissenting opinion argues that defendant Thorn satisfied a threshold burden of showing a seizure, and that the State then had a burden of showing that there was none, or that there was reasonable suspicion.

LED EDITOR'S COMMENT: One of the muddiest sub-areas of Fourth Amendment law is the issue of whether a "seizure" has occurred in any given officer-citizen contact. The Thorn decision clarifies this area only to the extent that it holds that the posing of a question to a citizen by a uniformed officer does not, by itself, constitute a "seizure", and hence does not require that the officer be able to state a reasonable suspicion to justify the contact. Unfortunately from a law enforcement point of view, one can imagine a number of differing fact patterns where the "seizure vs. mere contact" issue remains debatable.

It is not clear what additional facts will transform a mere contact into a Terry seizure. Past Washington cases have held that if an officer activates the flashers on the patrol car this is a show of authority which must be treated as a seizure. See State v. Stroud, 30 Wn. App. 392 (Div. III, 1981) Feb. '82 LED:05, and State v. De Arman, 54 Wn. App. 621 (Div. I, 1989) Nov. '89 LED:19. Past cases have also held that holding a citizen's identification or ordering the citizen to stay put while the officer steps away to run a warrant check will generally be deemed to be a seizure. See State v. Ellwood, 52 Wn. App. 70 (Wn. App. 70 (Div. I, 1988) Nov. '88 LED:05, and State v. Dudas, 52 Wn. App. 832 (Div. I, 1988) March '89 LED:06. Washington officers should assume that these situations do constitute seizures requiring reasonable suspicion. Beyond these situations, however, we find little "bright line" guidance in the case law here or elsewhere. But the following general proposition can be drawn from the cases-- the more the facts suggest that a reasonable citizen would have felt free to request or effect termination of the encounter, or to refuse to answer the officer's questions, the more likely the courts will hold that there was no seizure.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **PARTIALLY FABRICATED STORY TOLD IN 911 CALL NOT AN "EXCITED UTTERANCE"** - In State v. Brown, 127 Wn.2d 749 (1995), the State Supreme Court reviews the issue, among others, of whether an alleged rape victim's 911 phone call qualified as an "excited utterance" under the hearsay rule. The alleged victim had called police to report that she had just escaped

after being abducted and gang-raped by several men. She later admitted at trial that she had lied to the police about being abducted. She explained at trial that, as a known prostitute who had gone to the premises in question to voluntarily commit an act of prostitution, she didn't think her rape report would be believed by police unless she falsely reported an abduction. Her trial testimony was that she had not lied about being gang-raped, however.

A unanimous State Supreme Court rejects the State's "excited utterance" argument under the following analysis:

Under ER 803(a)(2), an out-of-court statement is admissible if it relates to "a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Brown acknowledges that the rape constituted a startling event. He argues, however, that because there was evidence that T.G. had decided to lie to the police about being abducted *prior* to making the 911 call, the call cannot constitute an excited utterance. [W]e agree.

The court of appeals upheld the trial court's ruling, reasoning that despite T.G.'s apparent ability to reflect on the credibility of her story prior to making the 911 call, there nevertheless were tenable grounds for admitting the tape. The trial court had heard T.G.'s testimony that she feared the police would not believe that she had been raped if she admitted to having initially consented to an act of prostitution. The court of appeals concluded that it was within the trial court's discretion to consider this evidence when evaluating the reliability of the statements contained in the 911 tape.

While we are sympathetic to the court of appeals' desire to defer to the trial court's evaluation of the complaining witness' credibility and hence ultimately of the tape's reliability, this approach has no place in the excited utterance rule. The excited utterance exception is based on the idea that:

'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.' The utterance of a person in such a state is believed to be 'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,' rather than an expression based on reflection of self-interest.

As a result, the "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" It is thus apparent that T.G.'s testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court's conclusion that the content of her call was admissible as an excited utterance. Therefore, the 911 tape is to be excluded on remand.

[Citations omitted]

Result: King County Superior Court conviction for second degree rape reversed for reasons unrelated to the "excited utterance" issue; case remanded without prejudice to the State's power

to file a new charge of second degree rape.

(2) STATEMENT FOLLOWING LENGTHY QUESTIONING WAS NOT AN "EXCITED UTTERANCE" -- In State v. Owens, 128 Wn.2d 908 (1996), the Washington Supreme Court overrules in part a Court of Appeals decision (see case reported at 78 Wn. App. 897 (Div. I, 1995) **Feb. '96 LED:14**) and rules that a hearsay statement related by a child rape victim's mother did not qualify as an excited utterance.

Following a visit to the doctor in which the possibility of the rape of her young child had been raised, the child's mother asked him if he had been molested and by whom. He denied that he had been molested. The mother continued to question the child over a several-hour period until he finally said "yes" and began screaming, not identifying the molester. The excited utterance exception to the hearsay exclusion does not apply under these facts, the Supreme Court rules. The Court asserts that "a declarant who changes a statement after lengthy questioning has necessarily reflected upon the previous responses," and such reflection disqualifies the statement as an "excited utterance."

Result: Snohomish County Superior Court convictions for first degree rape (two counts) affirmed (erroneous admission of the hearsay ruled harmless error).

(3) ATTEMPTED RAPE OF A CHILD MAY BE PROSECUTED DESPITE LACK OF MENTAL STATE ELEMENT IN CRIME -- In State v. Chhom, 128 Wn.2d 739 (1996), the State Supreme Court rules that it is possible under Washington law to attempt to commit a crime that lacks a mental state element. The defendant, Chhom, charged with attempted rape of a child, obtained dismissal from the trial court on the basis of a passage in State v. Dunbar, 117 Wn.2d 587 (1991) **April '92 LED:05**. In Dunbar the State Supreme Court had declared in 1991 that "one may not attempt a nonintent crime." That statement was not Dunbar's holding, the Supreme Court says in Chhom.

One element of attempt is the intent to commit a specific crime. Dunbar reasoned that when a crime is defined in terms of acts causing a particular result, attempt requires specific intent to accomplish that result. In Dunbar, the defendant was charged with attempted first-degree murder by creation of a grave risk of death. The mental state element for the base crime rose only to the level of aggravated negligence and thus was inconsistent with the attempt statute's mental state element requirement, which in that context would be an intent that death result. Dunbar does not apply to the present case, the Chhom court declares. "When coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse. . . . Because there is no mens rea [mental state] element, there is no inconsistency between the elements of rape of a child and the intent to have sexual intercourse required by the criminal attempt statute."

Result: King County Superior Court order of dismissal reversed; case remanded for trial.

WASHINGTON STATE COURT OF APPEALS

ROUTINE WARRANT CHECK DURING CIVIL TRAFFIC STOP OK

State v. Rife, 81 Wn. App. 258 (Div. I, 1996)

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

Officer Chittenden of the Seattle Police Department was on routine patrol when he noticed Rife crossing Aurora Avenue, outside of the crosswalk and against the red light. Chittenden stopped Rife to cite him for jaywalking. After informing Rife of the purpose of the stop, Chittenden obtained Rife's identification and ran a check for outstanding warrants. Chittenden testified that although it was not department policy to run such a check, he did so in accord with the procedure he was taught at the police academy.

Within five to ten minutes, Chittenden was informed that there were two outstanding warrants for Rife's arrest. The warrants were verified within another five to ten minutes. Chittenden testified that while he was running the warrant check, Rife was not free to leave. Upon verification of the warrants, Chittenden placed Rife under formal arrest. Chittenden did not issue Rife a citation for jaywalking.

At the station, Chittenden performed a search incident to arrest and discovered a bundle of heroin in Rife's pocket. Rife was charged with one count of possessing a controlled substance in violation of RCW 69.50.401(d). At a CrR 3.6 hearing on May 11, 1994, Rife moved to suppress the evidence obtained during the search incident to his arrest . . . The trial court denied the motion . . . Rife subsequently agreed to a stipulated trial, after which the trial court found him guilty as charged.

ISSUE AND RULING: Does it violate either the Fourth Amendment of the U.S. Constitution or Article 1, Section 7 of the Washington Constitution for an officer to detain a person for a reasonable period of time in order to check for outstanding warrants, and upon receiving a positive response, for the additional time it takes to verify the warrant(s)? (ANSWER: No)
Result: affirmance of Travis Lee Rife's King County Superior Court conviction for possession of heroin.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution prohibit unreasonable seizures. A seizure has occurred within the meaning of the constitution when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Because Rife was not free to leave while Officer Chittenden was running and verifying the warrant check, he was seized within the meaning of the constitution. The issue is thus whether Rife's seizure was constitutionally reasonable.

In determining the reasonableness of governmental intrusions, courts consider the totality of the circumstances, balancing the character of the intrusion and its justification against the individual's right to personal autonomy.

Given the development of computerized data storage, the length of time required to run a warrant check is usually minimal. Thus, the impact of a warrant check on the scope of a detention is generally minimal.

Under ordinary circumstances, the additional intrusion is far outweighed by the State's interest in apprehending persons who have outstanding warrants for their arrest.

Accordingly, we hold that it is constitutionally reasonable for an officer to run a warrant check during the course of a routine traffic stop, as long as the period of the detention is not unduly long, and as long as the stop itself is not pretextual.

[LED EDITOR'S NOTE: See the more recent U.S. Supreme Court decision in the Whren case digested above at pages 7-9. Whren holds that pretextual seizure is not prohibited under the Fourth Amendment if probable cause supports the seizure.]

Here, Chittenden stopped Rife for committing a traffic infraction in his presence, and detained him for the period necessary to run a warrant check. Finding outstanding warrants within five to ten minutes, Chittenden was justified in detaining Rife the additional five to ten minutes necessary to verify the warrants. The detention was within the scope of the stop, and the duration was not unreasonable.

Although Rife contends that the detention exceeded the permissible scope and duration of an investigative stop under *Terry*, the seizure in the present case did not constitute a *Terry* stop. The commission of a traffic infraction in an officer's presence justifies a stop outside the *Terry* analysis. We hold that an officer need not have a reasonable, articulable suspicion that a citizen stopped for a routine traffic infraction has outstanding warrants before running a warrant check. Neither is the running of a warrant check a search within the meaning of the Fourth Amendment or Article 1, Section 7, because a citizen has no reasonable expectation of privacy in his or her record of outstanding warrants. We reject any contention that an officer must release a citizen stopped for a traffic infraction before running a warrant check, thus giving the citizen who proves to have outstanding warrants a head start, as it were. Public interest justifies the running of a warrant check during the stop, when the detention is short and the inquiry routine.

Because Chittenden's detention of Rife pending the results of the warrant check was a lawful exercise of his authority, the evidence obtained during the search incident to Rife's subsequent arrest was properly seized and admitted.

[Citations and footnotes omitted.]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **DETAINEE'S APPARENT NERVOUSNESS DID NOT JUSTIFY FRISK** -- In State v. Henry, 80 Wn. App. 544 (Div. III, 1996), the Court of Appeals rules that an officer's observations that a person stopped for a traffic violation appeared to be "unusually nervous", had somewhat "glassy" eyes, and seemed to be in a daze, did not justify a frisk of the detainee. Result: Benton County Superior Court conviction for possession of a controlled substance reversed. **LED EDITOR'S COMMENT**: Each stop-and-frisk case must be evaluated on the totality of its own circumstances. Of course, the officer's report and testimony are of critical importance in such cases. Safety first, of course, but based on the Henry Court's description of the facts, we would agree with the Court's conclusion that the Terry standards were not met under the described facts. On the other hand, one would hope that the appellate courts are always apprised of the declaration by the State Supreme Court in State v. Collins, 121 Wn.2d 168, 173 (1993) July '93 LED:07, that, in evaluating an officer's determination that a suspect is presently armed and dangerous:

A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing. [Internal citations omitted]

(2) **POLICE OFFICER MAY BE CRIMINALLY PROSECUTED FOR (A) ALLEGED BAD FAITH WARRANTLESS SEARCH, (B) CRIMINAL TRESPASS, (C) OFFICIAL MISCONDUCT** -- In State v. Groom, 80 Wn. App. 717 (Div. III, 1996), the Court of Appeals addresses the issues of whether a police chief who entered the home of one of his officers could be prosecuted for: (A) warrantless search under RCW 10.79.040, (B) criminal trespass under RCW 9A.52.070, and (C) official misconduct under RCW 9A.80.010.

On the warrantless search issue under RCW 10.79.040, the Court of Appeals notes that there is no reported appellate decision under this 1921 statute which reads as follows:

It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

The Court of Appeals rules that an officer can be prosecuted for making a warrantless search of a residence under this statute, but only if it can be shown that the officer acted in bad faith.

Similarly, on the "official misconduct" and "criminal trespass" charges, the Court of Appeals concludes that the charge can be prosecuted, but that a finding of the chief's intent to violate the resident's constitutional or other rights is required.

Result: Grant County Superior Court order dismissing all charges reversed; case remanded for trial.

(3) **TOXICOLOGIST'S REQUIREMENT OF PRESERVATION OF BLOOD SAMPLES WITH ANTICOAGULANT MANDATORY** -- In State v. Garrett, 80 Wn. App. 651 (Div. III, 1996), the Court of Appeals rules that the State toxicologist's regulation adopted under Title 46 RCW -- WAC 448-14-020(3) -- directing that blood samples "shall be preserved with an anticoagulant" is absolutely mandatory. Accordingly, where the government had failed to add an anticoagulant to

Ernest Alford Garrett's blood sample taken after his DUI arrest, the blood alcohol test results could not be admitted into evidence even though the government could show that the blood sample was actually unadulterated.

Result: affirmance of Spokane County Superior Court order reversing Spokane County District Court conviction for DUI.

(4) JUVENILE COURT ADJUDICATIONS WERE FIREARMS POSSESSION DISQUALIFIERS UNDER PRE-1994 VERSION OF RCW 9.41.040 -- In State v. Cheatham, 80 Wn. App. 269 (Div. I, 1996), the Court of Appeals rejects defendant Cheatham's argument that, under the pre-1994 version of RCW 9.41.040, he should not be barred from firearms possession based on a prior juvenile court adjudication for an offense (burglary second) which would have disqualified Cheatham from firearms possession if the offense had been committed by an adult.

However, the Court of Appeals concludes its opinion by suggesting that the 1994 amendments to RCW 9.41.040 (not applicable in this case) removed from the statute the disqualifier for prior juvenile adjudications. **[LED EDITOR'S NOTE: In chapter 295, Laws of 1996 (effective June 6, 1996), the Washington Legislature made clear that juvenile adjudications for offenses which would bar adults from firearms possession based on adult court convictions do constitute bars to firearms possession. Accordingly, to the extent that it can be argued that the 1994 amendments removed the bar on juvenile felons, the bar was clearly back in place as of June 6, 1996.]**

Result: King County Superior Court (juvenile division) adjudication of guilt for violation of RCW 9.41.040 affirmed.

(5) OFFICERS' TESTIMONY RE ARRESTEES' LEVEL OF INTOXICATION ADMISSIBLE IN DUI CASES; DUE PROCESS AND SEARCH INCIDENT ISSUES ALSO ADDRESSED -- In State v. Lewellyn, 78 Wn. App. 788 (Div. III, 1995), the Court of Appeals rules admissible in two consolidated cases the testimony of arresting law enforcement officers that their DUI arrestees were "under the influence of alcohol." The Court of Appeals rules that the testimony of the officers -- based in each case on observations and field sobriety testing -- was not impermissible opinion testimony.

The Court of Appeals also rejects in one of the two cases a claim by one of the defendants that his constitutional due process rights were violated because the arresting officer did not record the result of a PBT. The same defendant also challenged the administration of a BAC test as an illegal search, but the Court of Appeals points out that this "search" was lawful as a search incident to the DUI arrest.

Result: Spokane County Superior Court affirmance of District Court DUI conviction of Gary Lewellyn affirmed; Spokane County Superior Court reversal of District Court DUI conviction of Rodger Smith reversed.

(6) CHAPLAINCY PROGRAM GETS FIRST AMENDMENT SCRUTINY -- In Malyon v. Pierce County, 79 Wn. App. 452 (Div. II, 1995), the Court of Appeals reviews a constitutional (establishment of religion) challenge to the Pierce County Sheriff's chaplaincy program. The Pierce County chaplaincy program is operated under a contract pursuant to which Pierce County does not compensate the chaplains, but Pierce County does provide office space,

communications equipment, sheriff's office jackets, liability insurance, and other items, services, and reimbursements. Other than using the term "chaplaincy" and prohibiting discrimination on the basis of creed, the contract says nothing about religion.

The trial court had granted summary judgment to the sheriff's office, dismissing the challenge. However, the Court of Appeals rules that the case must be sent back to the trial court for more fact-finding, because of unresolved factual questions on the following: (1) whether the volunteer chaplains offer unsolicited religious counsel; (2) whether the county assists in fund-raising efforts for the chaplains; (3) whether the county applies public funds to a religious establishment; (4) whether the program is being operated consistently with the contract for services with the county; and (5) whether the program is administered in a religion-neutral manner or whether the program instead improperly coerces or endorses sectarian religious belief.

Result: case remanded to Pierce County Superior Court for further fact-finding and for a further ruling on the validity of the Pierce County chaplaincy program. Status: On April 9, 1996, the State Supreme Court accepted review of this case; oral argument will likely be scheduled for the fall of 1996.

(7) JUVENILE GUILTY OF BURGLARIZING FATHER'S LOCKED BEDROOM -- In State v. Crist, 80 Wn. App. 511 (Div. II, 1996), the Court of Appeals upholds a burglary conviction of a juvenile who lawfully lived in his father's home, but who had been forbidden by his father to enter the father's locked bedroom. The Court holds that, while a child has a general privilege to enter the family home, the privilege to enter and remain does not extend to every portion of the home. **[LED EDITOR'S NOTE: The leading case on the child's qualified general privilege to enter the parental home is State v. Howe, 116 Wn.2d 466 (1991) June '91:17]**

Here, the juvenile Crist violated the limits of his privilege to remain in his father's home when he used a handsaw to cut through the locked door to his father's bedroom. Crist stole cigarettes and money from the father's bedroom. This constituted burglary, the Court of Appeals rules, because Crist had remained unlawfully in the home with intent to commit the crime of theft.

Result: Clark County Superior Court juvenile adjudications of guilt of residential burglary affirmed.

(8) NO UNSTIPULATED EVIDENCE OF POLYGRAPH OF DEFENDANT, EVEN OF CHILD HEARSAY ADMISSIBILITY QUESTION -- In State v. Gregory, 80 Wn. App. 516 (Div. I, 1996), the Court of Appeals rejects defendant's argument that he should have been permitted to submit as evidence the results of a polygraph exam which allegedly showed that he had not committed sexual acts on his young daughter.

The rule in Washington is that, absent a written stipulation between the prosecutor and the defendant, polygraph tests are inadmissible in evidence. Defendant apparently had two theories in this case as to why the general bar on admission of polygraph evidence should not be followed.

First, Gregory argued that the polygraph should at least have been considered in the trial court's determination of whether the child victim's hearsay was admissible under RCW 9A.44.100. However, the Court of Appeals rules that the polygraph evidence would not be of assistance in determining the reliability of the victim's hearsay, so defendant's argument on this point failed.

Second, Gregory apparently argued that the general rule against admissibility of polygraph

evidence has been undercut by federal cases overruling the "Frye" test for admission of scientific evidence. Under the Frye test, only those scientific tests which are generally accepted in the scientific community are admitted in evidence. However, the Court of Appeals notes on this point that the Washington State Supreme Court held in State v. Riker, 123 Wn.2d 351 (1994) **July '94 LED:07** that the Frye test continues to apply in criminal cases in Washington.

Result: Snohomish County Superior Court convictions for rape of a child (two counts) affirmed.

(9) WHERE MISDEMEANOR SENTENCE TO RUN CONSECUTIVELY TO FELONY SENTENCE, MISDEMEANOR TIME SERVED IN COUNTY JAIL -- In State v. Besio, 80 Wn. App. 426 (Div. I, 1995), the Court of Appeals rules that, where a convict was sentenced for several felonies (first degree robbery, first degree burglary, intimidating a witness), plus one gross misdemeanor (third degree theft) to run consecutively to the term for the felonies, the convict was required to serve the time for the gross misdemeanor in the county jail, not a state prison.

Result: Whatcom County Superior Court conviction for intimidating a witness reversed on grounds not addressed here; other convictions affirmed and sentence clarified as noted above.

(10) NO "EXCITED UTTERANCE" WHERE PERSON NO LONGER UNDER STRESS OF STATEMENT-TRIGGERING EVENT -- In State v. Sharp, 80 Wn. App. 457 (Div. III, 1996), the Court of Appeals rules that the "excited utterance" exception to the hearsay rule does not apply to the victim-declarant's statement under review.

In Sharp, defendant had been convicted of unlawful imprisonment and attempted second degree kidnapping. The alleged victim was a 12-year-old who was mentally and physically handicapped. Important evidence against defendant was the testimony of an investigating officer who had taken a statement from the 12-year-old. The Court of Appeals rules that the testimony of the officer was inadmissible, because the child's declaration did not qualify under the "excited utterance" exception to the hearsay rule.

There are three elements to the excited utterance exception: (1) a startling event or condition; (2) a statement by the declarant while under the stress of excitement caused by the event or condition; and (3) a relationship between the declaration and the event or condition. In Sharp, the focus of the Court of Appeals was on the second element, the question of continuing excitement. The child victim in Sharp had first been calmed by his grandparents immediately after the stressful event, and then again by the interviewing officer. The child's demeanor just prior to and during the officer's questioning appeared calm, according to the witnesses. Under these facts, the Court of Appeals holds, there was no basis for the trial court's admission of the child's hearsay statement as an excited utterance.

Result: reversal of Benton County Superior Court convictions for unlawful imprisonment and attempted second degree kidnapping; case remanded for new trial.

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

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