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WASHINGTON STATE COURT OF APPEALS

**INTERCEPTION OF FEDERAL EXPRESS PACKAGE FOR DRUG-SNIFFING DOG'S CHECK
OK WHERE BASED ON CONFIDENTIAL INFORMANT'S REPORT OF "CRANK" SHIPMENT**

State v. Jackson, 82 Wn. App. 594 (Div. II, 1996)

Facts and Proceedings:

The former police chief of Kelso, Tony Stout, had a confidential informant (CI) with a track record showing credibility. The former chief gave Hamilton, a Kelso officer, the CI's detailed information about James Levene Jackson, Jr., a "crank" dealer who allegedly was receiving weekly packages of crank through Federal Express delivery.

Officer Hamilton contacted Fed Ex to find out if any packages were presently en route to Jackson. The officer did not direct the Fed Ex employee to do anything with any such package, planning instead to get a warrant and serve it on Fed Ex upon learning of any such package. However, on his own, a Fed Ex driver who discovered a package addressed to Jackson decided to deliver it directly to the local Sheriff's office.

Learning that the package was at the Sheriff's office, the investigating officer brought in a trained drug detection dog within two hours. The dog alerted on the Fed Ex package and the officer also learned that the return address on the package was fictitious. Officer Hamilton set out the above information in an affidavit, and he obtained a search warrant within a few hours of the dog's alert. He searched the package and found 16.7 grams of methamphetamine.

The package was then resealed, sprayed with a substance observable under UV light, and was then delivered to Jackson by an officer posing as a Fed Ex employee. Within a few minutes police officers served a search warrant on the Jackson residence. The searching officers found the package and the methamphetamine, along with other drugs, drug paraphernalia, and other incriminating evidence. They also observed the sprayed substance on Jackson's hands. After losing a pretrial suppression motion, Jackson and his wife stipulated to certain facts, and they were found guilty of UCSA crimes (Mr. Jackson: possession of methamphetamine with intent to deliver; and Mrs. Jackson: possession of methamphetamine).

ISSUES AND RULINGS:

(1) Did the Fed Ex employee's actions constitute a seizure subject to Fourth Amendment restrictions? (ANSWER: No); (2) Did Officer Hamilton's act of directing that the package be held based on the suspicious circumstances so it could be checked by a drug detection dog constitute an unlawful seizure? (ANSWER: No); (3) After the dog's alert, did Officer Hamilton act properly in holding the package for two hours while a search warrant was being obtained? (ANSWER: Yes). Result: Cowlitz County Superior Court UCSA convictions of Mr. and Mrs. Jackson affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) FED EX EMPLOYEE'S TAKING OF PACKAGE TO POLICE STATION

Generally, a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." More specifically, a seizure of mail occurs when a package is detained or removed from the normal flow of delivery. A seizure cannot occur, however, without governmental participation.

...

In this case, there was no seizure before Federal Express delivered the package to the sheriff's front counter.

Likewise, there was no seizure when Federal Express delivered the package to the sheriff's office.

(2)(3) TEMPORARY SEIZURE OF MAIL BY POLICE

A temporary seizure of mail is initially justified if the authorities have a reasonable and articulable suspicion of criminal activity. Although "temporary," it can last for a number of hours if that length of time is reasonable under the circumstances. [COURT'S FOOTNOTE: *This assumes that the detention of a person is not involved. See United States v. Place, 462 U.S. 696, (1983) Sept. '83 LED:04 (90 minutes too long where detention of person involved).*]

Once an investigative detention ripens into probable cause to search, the State can detain the property for the time reasonably needed to prepare and secure a search warrant.

Here, the State has shown that Hamilton's initial seizure of the package was justified. Hamilton had received, through Chief Stoutt, an informant's tip that James Jackson, who lived at 151 Cowlitz Gardens, #11, was obtaining drugs weekly by Federal Express. Although Hamilton did not have the informant's name, he knew that Chief Stoutt did, and he knew, through Chief Stoutt, that information from the informant had previously led to felony arrests. Hamilton independently verified Jackson's address, the fact that Federal Express had been delivering

packages to Jackson approximately weekly, and the fact that Federal Express presently possessed a package addressed to Jackson. Based on this information, Hamilton had a reasonable and articulable suspicion of criminal activity when he initially seized the package.

The State has also shown that it detained the package for only a few minutes before acquiring probable cause to search. Generally, an “alert” by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance. Here, the dog’s training and track record were known to the police on the scene and were subsequently shown in the affidavit submitted to obtain a search warrant. Thus, the State had probable cause to search the package after the dog alerted, which, according to Hamilton, was about 11:45 a.m.

Because only a few minutes elapsed between Hamilton’s initial seizure of the package and his acquisition of probable cause to search, the duration of the temporary investigative seizure was plainly reasonable. Moreover, once Hamilton had probable cause to search, he did not detain the package for longer than the time reasonably needed to prepare and secure a warrant. It follows that the seizure and detention of the package was lawful.

[Some text, footnotes, and citations omitted]

TERRY SEIZURE SUPPORTED BY REASONABLE SUSPICION; CONSENT SEARCH OK

State v. Armenta and Cruz, ___ Wn. App. ___, 920 P.2d 257 (Div. III, 1996)

Facts: (Excerpted from Court of Appeals opinion)

Hubert Armenta and David Cruz approached Officer G.J. Randles at a truck stop around noon on a Sunday. They told him their car would not start and asked if he knew of an open automobile repair shop. The officer replied that he did not know of any repair shop open on Sunday, but offered to take a look at their car himself. The men accepted his offer.

After they led him to their car, Officer Randles asked them for identification. Mr. Armenta handed over an Arizona driver’s license. Mr. Cruz told Officer Randles he had lost his wallet in Idaho and did not have identification.

Noticing a bulge in Mr. Cruz’s back pants pocket, the officer asked if that was his wallet. Mr. Cruz answered “no,” then pulled from the pocket a large roll of money tied with rubber bands. Officer Randles asked how much money was there and Mr. Cruz replied that it was \$1,000. Asked where he got the money, Mr. Cruz said he had earned it working on a ranch in Seattle. He said he had recently cashed his paycheck, but did not have the pay stub and could not remember the name of the ranch. Officer Randles asked Mr. Cruz his name and birth date. Mr. Cruz said he was Luis Perez Gonzalez.

Mr. Armenta also pulled out three rolls of money and showed them to the officer, who asked how much was there. Mr. Armenta told him each bundle contained

\$1,000. Asked where he had obtained the money, Mr. Armenta answered he had sold a car. He told Officer Randles he had no receipt from the sale but that he still had the title to the car.

Officer Randles called in the names and birth dates for Mr. Armenta and Mr. Cruz. [COURT'S FOOTNOTE: *It was standard operating procedure to supply this information to the police dispatcher for officer safety.*] The dispatcher told him Mr. Armenta's driver's license had been suspended in Arizona and there was no record of the name Mr. Cruz had given. The car was listed in Mr. Armenta's name.

Officer Randles called dispatch for backup, locked the \$4,000 in his patrol car and asked Mr. Armenta if there were weapons or drugs in his car. Mr. Armenta said "no." The officer asked something like, "Do you mind if I take a look? You do not have to let me." Mr. Armenta told him to go ahead.

Officer Randles searched the passenger compartment where he found only a pack of Zig-Zag cigarette papers. He looked up through a car window and saw Mr. Cruz holding an opened pocket knife with a blade approximately two and one-half to three-inches long. The officer approached Mr. Cruz, told him to close the knife and to hand it over along with any other weapons. Mr. Cruz complied and gave the officer two pocket knives.

Officer Randles frisked both men and did not find additional weapons. He asked Mr. Armenta if he could search in the car's trunk, adding that Mr. Armenta did not have to permit the search. Mr. Armenta said to go ahead, and unlocked the trunk himself. Hidden under the spare tire, Officer Randles found 75 baggies of cocaine, each weighing about 3.5 grams. [COURT'S FOOTNOTE: *After obtaining a search warrant later, the police also found in the car a black tar substance believed to be heroin and a marijuana cigarette.*] The back-up officer arrived, Mr. Armenta and Mr. Cruz were arrested, and each were told he had the right to an attorney.

The men later admitted they used the car to transport cocaine from Idaho to Seattle and earned \$4,000 for the delivery. Mr. Armenta also admitted he gave Officer Randles permission to search his car. He later testified he thought he would not get his money back from Officer Randles unless he gave the police permission to search.

Proceedings:

Armenta and Cruz were charged under the UCSA. However, they prevailed in a pretrial suppression motion when the trial judge ruled that they had been unlawfully seized at the point when they were asked for consent to search.

ISSUE AND RULING: Did Officer Randles have reasonable suspicion of criminal activity when he locked the defendant's money in the patrol car? (ANSWER: Yes, the seizure was therefore lawful; the follow up consent was voluntary, and accordingly the subsequent consent search was lawful). Result: Benton County Superior Court suppression order reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Consent to a search is a recognized exception to the Fourth Amendment warrant requirement. The consent may not be valid if it is obtained as a result of an unlawful seizure. State v. Soto-Garcia, 68 Wn. App. 20 (1992), **March '93 LED:09**. A person is seized, for purposes of the Fourth Amendment if, under all the circumstances, the conduct of the police would cause a reasonable person to believe he was not free to terminate the encounter.

Officer Randles did not seize Mr. Armenta and Mr. Cruz merely by asking for identification and, upon being shown large sums of cash, asking for some explanation. But once he had locked their money in the patrol car, they could reasonably believe they were not free to end the encounter. In evaluating the reasonableness of a Terry stop, the inquiry is whether, considering the totality of the circumstances, there was a substantial possibility criminal conduct had occurred or would occur. We encourage law enforcement officers to investigate suspicious situations. A police officer need not allow suspected criminal activity to escape further scrutiny.

Two individuals, each possessing a large amount of cash, each for a different reason, may be a coincidence. When one explains he sold his car, has no receipt and still has a title, while the other explains he cashed his paycheck from a ranch in Seattle but cannot remember his employer's name, the coincidence becomes suspicious. When the individual gives a name for which no driver's license or other information is available, we think the situation is one requiring further scrutiny. The circumstances known to Officer Randles justified his securing the cash and conducting a pat-down search. Mr. Armenta and Mr. Cruz were lawfully detained.

Mr. Armenta's consent to the search of the car trunk was not the product of an unlawful seizure. The search falls within the consent exception to the warrant requirement. Exclusion of the fruits of the search was error.

[Some citations omitted]

Dissent:

Judge Schultheis dissents, arguing that the investigating officer did not have reasonable suspicion when he took actions to seize Armenta and Cruz.

LED Editor's Query:

Are there ranches in Seattle?

LED EDITOR'S COMMENT:

In his dissent, Judge Schultheis appears to be over-reading the "seizure" holding in the 1992 Division Two decision in Soto-Garcia. In Soto-Garcia, in a now-debatable ruling (see Thorn case discussed in the August '96 LED at 13-15) Division Two held that it was an unlawful "seizure" where an officer, without reasonable suspicion, contacted a person standing on a street corner and: (1) ran an ID check, (2) asked if the person possessed illegal drugs, and (3) asked for consent to search his person, all without informing the person that he did not have to comply with the requests. Judge Schultheis implies in his

dissent in Armenta and Cruz that the Soto-Garcia court held the seizure had occurred as soon as the question about illegal drugs was asked. That is not so. It was the totality of the above-described facts on which Division Two based its decision. NOTE, HOWEVER: These “contact vs. seizure” cases all turn on their own special facts. The more that an officer does to inform the citizen that he or she need not provide ID, answer questions, or allow a search, the more likely the contact will be held to be not a seizure.

NO PRETEXT STOP IN WARRANT ARREST; FORCE REASONABLE

State v. Witherspoon, 82 Wn. App. 634 (Div. III, 1996)

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

Spokane Police Officer Terry Preuninger recognized the defendant, Johnnie W. Witherspoon, Jr., on sight because of previous encounters. Mr. Witherspoon is African American. On January 27, 1994, Officer Preuninger saw Mr. Witherspoon standing on the corner of First and Madison Streets in downtown Spokane - an area with a reputation for drug activity. Officer Preuninger ran a warrant check. Mr. Witherspoon had an outstanding warrant. Officer Preuninger approached Mr. Witherspoon to arrest him. He handcuffed Mr. Witherspoon and began to search him. Mr. Witherspoon was cooperative. Officer Preuninger noticed he had something in his mouth. He asked Mr. Witherspoon to open his mouth; Mr. Witherspoon refused and started to chew.

Officer Preuninger saw what he thought were flakes of cocaine coming from Mr. Witherspoon's mouth. He knew that swallowing cocaine could be fatal and he ordered Mr. Witherspoon to spit the substance out. Mr. Witherspoon again refused and continued to chew and swallow. Officer Preuninger placed his hand on Mr. Witherspoon's throat “right up above his Adam's apple to prevent him from swallowing.” Officer Preuninger denied that his actions interfered with Mr. Witherspoon's ability to breathe. According to Officer Preuninger, not only could Mr. Witherspoon breathe, but he was talking and insisting he had nothing in his mouth at the same time. He also continued to swallow. Officer Preuninger took Mr. Witherspoon to a hospital, rather than jail, because he was convinced that Mr. Witherspoon had swallowed a “bunch of rock.”

While en route to the hospital, Mr. Witherspoon spit in the patrol car. Officer Preuninger later collected a sample; it field tested positive for cocaine. Mr. Witherspoon was charged with possession of crack cocaine. He moved to suppress evidence of the cocaine. At the suppression hearing, he testified that Officer Preuninger had roughed him up, handcuffed him, and threatened to break his teeth with a flashlight if he did not open his mouth. Mr. Witherspoon also testified that he was coughing and could not breathe when the officer was pushing on his throat. Following the hearing, the trial court concluded that the officers had not used excessive force in effecting the arrest, or in obtaining the evidence, and that Mr. Witherspoon had voluntarily surrendered the evidence by spitting in the car. [Mr. Witherspoon was subsequently convicted of possession of cocaine in a jury trial. LED Ed.]

ISSUE AND RULING: (1) Was the stop of Witherspoon unlawfully “pretextual”? (ANSWER: No; whatever the “pretext stop” rule may be, it does not apply to seizure on an arrest warrant); (2) Did the arresting officer use excessive force in trying to prevent Witherspoon from swallowing the cocaine? (ANSWER: No). Result: Spokane County Superior Court denial of suppression affirmed, but conviction for possession of cocaine reversed on grounds not addressed here, i.e. that race-biased juror should have been excluded from jury; case remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals decision)

(1) PRETEXTUAL SEARCH

Relying on *State v. Hobart*, 94 Wn.2d 437 (1980) **Nov. ‘80 LED:01**, Mr. Witherspoon argues that Officer Preuninger’s stop was pretextual. But his reliance on *Hobart* is misplaced. There, the officer followed the defendant’s car, which quickly turned up a street. The driver went to an apartment building. The officer recognized the driver as someone he had previously arrested and asked if he was lost. The officer then patted the defendant down and felt two spongy objects which he believed were balloons containing narcotics. Like Officer Preuninger here, the officer in *Hobart* then checked for outstanding warrants. He found there were none.

Here, Mr. Witherspoon was approached and arrested only after Officer Preuninger discovered an outstanding warrant for Mr. Witherspoon. When there is a preexisting warrant, “the basis for the rule preventing use of a pretext arrest to search for evidence of another crime no longer exists.” *State v. Davis*, 35 Wn. App. 724 (1983) **Jan. ‘84 LED:06**. The stop was not pretextual.

(2) EXCESSIVE FORCE

Mr. Witherspoon next argues that his due process rights were violated under both the United States and the Washington State Constitutions because the force used by Officer Preuninger in seizing the evidence was unreasonable and excessive. He relies on *State v. Williams*, 16 Wn. App. 868 (1977).

In *Williams*, police entered the defendant’s home and shortly thereafter noticed that he was trying to swallow drugs. The defendant refused to open his mouth. An officer struck the defendant’s hand away from a glass of water with a flashlight, grabbed his nose and chin, and opened his mouth. Another officer grabbed the defendant around the throat to prevent swallowing. The defendant was pinned to the couch while the officers used a spoon to extract balloons of heroin from his mouth. About 30 to 60 seconds elapsed, after the time the officers seized the defendant, until the heroin was retrieved. The defendant said he could not breathe while the officers held him. He did not, however, lose consciousness or need medical treatment. The trial court found that the officers were choking the defendant so that he “could not and/or had extreme difficulty breathing” and suppressed the evidence.

Williams is distinguishable for two reasons. First, the evidence used to convict Mr. Witherspoon came as a result of his voluntarily spitting in the patrol car, after he was arrested. Second, even if that were not the case, the trial court here found that during Officer Preuninger's search, Mr. Witherspoon's breathing was not obstructed and the force used was neither excessive nor unwarranted under the existing circumstances. The court accordingly did not err in denying Mr. Witherspoon's motion to suppress.

[Some citations omitted]

"AUTOMATIC STANDING" ISSUE UNDER STATE CONSTITUTION NOT CLARIFIED

State v. Boot, 81 Wn. App. 546 (Div. III, 1996)

Facts and Proceedings:

Jeremy Boot was a casual adult visitor at a house where a drinking party was in progress involving juveniles and adults. Police came to the house in response to a "shots fired" call. After a home occupant opened the door in response to the officers' knocking, the officers entered the house, apparently without obtaining consent or having other sufficient legal basis for entry.

Ultimately, upon talking to people inside the house, the officers developed probable cause to believe that Boot had assaulted a person or persons inside the house by making threats with a handgun. The gun was found in the basement area. Prior to his trial for assault, Boot moved to suppress the gun on grounds that the officers had entered the house without legal basis (i.e. consent, a warrant, or exigent circumstances). The trial court granted the motion.

ISSUES AND RULINGS ON APPEAL:

(1) Did Boot make a sufficient argument to invoke "independent grounds" consideration of the "standing" issue under the state constitution? (ANSWER: No); (2) Did Boot have standing under the Fourth Amendment of the U.S. Constitution to challenge the police entry of the home? (ANSWER: No). Result: Spokane County Superior Court suppression order reversed; case remanded for trial on second degree assault charges.

ANALYSIS:

(1) INDEPENDENT GROUNDS REVIEW

Boot asked the Court of Appeals to rule that he should have "automatic standing" under the Washington State constitution's article 1, section 7, to challenge the entry of the home where he was arrested. The Court explains:

The United States Supreme Court has abolished the federal constitutional doctrine of automatic standing. Whether the doctrine of automatic standing remains viable in Washington is unsettled. [COURT'S FOOTNOTE: In State v. Simpson, 95 Wn.2d 170 (1980) [April '81 LED:04] a plurality of our Supreme Court adhered to the automatic standing rule as a matter of state constitutional law. Const. Art. I, §

7. In State v. Zake, 119 Wn.2d 563 (1992), [Nov. '92 LED:06], the Court refused to decide whether Washington would continue to recognize the automatic standing rule. In the concurrence, five justices indicated that the court was not reaching the issue of whether the automatic standing rule was viable under the state constitution. Again, in State v. Goucher, 124 Wn.2d 778 (1994)[Dec. '94 LED:14], the Court held it would not resolve the issue of whether the automatic standing exception applies. Recently, in State v. Carter, 74 Wn. App. 320 (1994)[June '95 LED:17], Aff'd, 127 Wn.2d 836 (1995)[Jan '96 LED:07], Division One interpreted Zake as support for the proposition that there is no binding state authority to apply the automatic standing doctrine. But the Supreme Court again declined to overrule Simpson. Accordingly, we do not have a clear guidance as to whether a defendant in Washington may claim automatic standing. See State v. Gonzalez, 77 Wn. App. 479 (1995)[Aug. '95 LED:16] (Simpson is not binding but "proper respect" for stare decisis suggests we should continue to adhere to it.)

But here we need not decide the question of automatic standing under our state constitution. In State v. Gunwall, 106 Wn.2d 54 (1986)[Aug. '86 LED:04] our Supreme Court set out six nonexclusive neutral criteria to be used in determining whether a provision of the Washington Constitution affords broader protection than its federal counterpart. Mr. Boot has not addressed the Gunwall factors and we accordingly decline to consider independent state constitutional grounds.

(2) FOURTH AMENDMENT

On the Fourth Amendment issue, the Court explains:

The question presented then is whether Mr. Boot had a legitimate expectation of privacy at the residence under the Fourth Amendment. Mr. Boot asserts he was a temporary guest at the residence with a subjectively reasonable expectation to privacy.

A challenge to a search and seizure requires that the accused has a legitimate expectation of privacy in the place searched or the item seized. That legitimate expectation of privacy exists if the "individual has manifested an actual, subjective expectation of privacy in the area searched or item seized and society recognizes the individual's expectation of privacy as reasonable." The burden is, however, on the defendant to establish the expectation of privacy.

Presence alone is not sufficient. . . .

Mr. Boot concedes he must show more than a legitimate presence. He relies on State v. Rodriguez, 65 Wn. App. 409 (1992)[Oct. '92 LED:06]. But in Rodriguez, it was undisputed that the defendant was a temporary overnight guest in his mother's apartment. The issue we addressed there was whether the defendant had a right to privacy in the bathroom, separate from the privacy right his mother enjoyed. Unlike Mr. Rodriguez, Mr. Boot was not a temporary or overnight guest in the Contreras home with the owner's permission. Police found Mr. Boot in the basement. The basement area did not give rise to a privacy expectation. At most, Mr. Boot showed that he was casually on the premises. He had not established a

legitimate subjective expectation of privacy. Therefore, Mr. Boot did not have standing to challenge the warrantless search and seizure.

[Some citations omitted]

NO THEFT AGGREGATION FOR “COMMON SCHEME” BECAUSE SEPARATE THEFTS OCCURRED AT DIFFERENT TIMES AND PLACES WITH DIFFERENT VICTIMS

State v. Atterton, 81 Wn. App. 470 (Div. I, 1996)

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

Atterton solicited orders and accepted advance payments for plastic cup holders from eight car dealerships, claiming to be a representative of Premier Concepts, his former employee. He had no authority to represent the manufacturer or any other business associated with the cup holders. The checks from the dealerships totaled \$1,850.36, the individual amounts being \$219.36, \$228.00, \$150.00, \$279.00, \$279.00, \$270.00, \$239.00, and \$189.00.

The State charged Atterton with one count of first degree theft, based on the aggregated amount of the eight checks, and the trial court found him guilty.

ISSUE AND RULING: Did the trial court lawfully allow the State to aggregate the separate thefts to total over \$1500 and charge defendant with first degree theft? (ANSWER: No, because the separate thefts took place at different times and places, and each involved a different victim). Result: King County Superior Court conviction for first degree theft reversed; case remanded for judgment of guilty of one count of second degree theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

First degree theft is theft of property which exceeds \$1,500.00 in value. RCW 9A.56.030(a). Aggregation of individual transactions to meet the threshold for a particular degree of theft is allowed by common law and by statute.

The common law allows aggregation of a series of thefts, so long as the thefts are from the same owner and the same place and result from a single criminal impulse pursuant to a general larcenous scheme. The common law also allows aggregation of thefts from the same victim over a period of time or from several victims and the same time and place, if the takings are part of a common scheme or plan. But, the common law does not allow aggregation of thefts from different victims at different times and places.

As with common law aggregation, statutory aggregation is impermissible unless the thefts to be aggregated are part of a common scheme or plan. RCW 9A.56.010(12)(c). Washington courts have interpreted the common scheme requirement as being consistent with that of the common law; thefts involving different victims in different places cannot be statutorily aggregated.

[COURT'S FOOTNOTE: Furthermore, only transactions which would constitute third degree theft may be aggregated under the statute. RCW 9A.56.010(12)(C); . . . third degree theft is theft of property which does not exceed \$250.00 in value. RCW 9A.56.050. Here, only five of the checks were for less than \$250.00 and they total less than \$1,500.00. Thus, even if the statute allowed aggregation of some of Atterton's thefts, the aggregated third degree thefts would be insufficient to support a first degree theft conviction.]

In conclusion, Atterton's eight thefts cannot be aggregated under the statute or the common law because each involved a different victim, place, and time. . . .

Because the eight thefts cannot be aggregated, there was insufficient evidence of first degree theft. In order to reach \$1,500.00, however, the trial court necessarily found at least two second degree thefts and three third degree thefts, both of which are lesser degree offenses of first degree theft. When the evidence is insufficient to convict of the crime charged, but sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree. Because the State charged Atterton with only one count, we direct the trial court to enter judgment and sentence for one count of second degree theft.

[Some text, citations, and a footnote omitted]

"FOLLOWS" DEFINED FOR PURPOSES OF PRE-1994 "STALKING" LAW

State v. Lee, 82 Wn. App. 298 (Div. I, 1996)

Facts: (Excerpted from Court of Appeals opinion)

In October 1993, Lee began to appear at Gross' workplace, a restaurant in a large shopping mall. During the last two weeks of the month, Lee was there at least every other day. Typically, Lee would approach and attempt to talk to Gross. When Gross refused to talk to him, Lee would buy a soda, sit down in the adjacent food court, and stare at Gross. When Gross refused to talk to him, Lee would buy a soda, sit down in the adjacent food court, and stare at Gross. Lee would maintain this behavior for as long as ten hours at a time. Lee also left a series of notes for Gross, saying that he wanted to talk to her, that he had "feelings" for her, and that he would keep her constantly in sight to make sure she did not get hurt. He wrote, "You know that I will not let anyone hurt you if I'm still your friend." At least once, Gross saw Lee on the bus as she traveled home in the evening.

Lee contends there was insufficient evidence to show he "followed" Gross within the meaning of the stalking statute. Lee asserts, relying on one dictionary definition, that the word "follows" refers only to situations where the follower moves along behind someone. Lee did not walk behind Gross as she went in or out of the mall; he simply appeared there during her working hours.

ISSUES AND RULINGS: (1) Was there sufficient evidence of "following" to support Lee's stalking conviction under the former stalking statute? (ANSWER: Yes); (2) Was there sufficient evidence

of the reasonableness of the victim's fear to support the stalking conviction? (ANSWER: Yes)
Result: affirmance of King County Superior Court (Juvenile Court) adjudication of guilt of stalking.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) EVIDENCE OF FOLLOWING

At the time of Lee's conviction, the statute [**RCW 9A.46.110**] did not define the term "follows". Where a term is not defined in a statute, this court looks to the plain, ordinary meaning of the word. The meaning of "follow" is not limited to "trail" or "tail". The plain and ordinary meaning of the word includes movement correlated with the movement of the followee.

This court will not adopt "a forced, narrow, or overstrict construction which defeats the intent of the legislature." The statute as a whole reflects a legislative purpose of proscribing persistent and threatening social contact. We conclude that a person "follows" another within the meaning of the statute if he deliberately and repeatedly correlates his movements or appearances with another person's in order to have contact with the person. The evidence was sufficient to show that Lee followed Gross to her place of work.

(2) EVIDENCE OF REASONABLE FEAR

Lee also contends there was insufficient evidence to show that Gross' fear of him was reasonable. The determination of whether Gross' fear was reasonable was one for the finder of fact in light of "all the circumstances", including Lee's staring behavior, his repeated references in the notes to Gross' need for protection, and testimony that Lee's mother had warned Gross to avoid Lee and not to trust him. On this record the trial court's conclusion that Gross' fear was reasonable will not be disturbed.

[Footnotes and citations omitted]

LED EDITOR'S NOTE: In a footnote, the Court of Appeals notes that the 1994 Washington Legislature adopted the definition below of "follows" under the stalking statute:

"Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

Clearly under this new definition, Lee's conduct would constitute "following".

"HOT SHEET" ARREST INVALID WHERE SHEET SHOULD HAVE BEEN CORRECTED

State v. Mance, 82 Wn. App. 539 (Div. II, 1996)

Facts: (Excerpted from Court of Appeals opinion)

At the suppression hearing, the parties stipulated to the following facts. On March 4, 1994, Tacoma police arrested Mance in downtown Tacoma because the car he was driving was listed on their "hot sheet," a list of recently reported stolen vehicles. Several days earlier, Mance had purchased the car from Paulson's Fine Cars, but a misunderstanding occurred that resulted in owner Gerald Paulson reporting the car as stolen. The problem was resolved on March 2, and, with Mance present, Paulson called police to cancel the stolen vehicle report. The police report states that a call was received on March 3 attempting to cancel the stolen vehicle report, but no cancellation report was on file.

The police report of Mance's arrest, upon which the trial court relied, states that police

made a felony stop at S. 19th & Fawcett and arrested the driver, later ID'ed as Mance. Mance appeared to be under the influence of some kind of drug and immediately began struggling with [Officer] Roberts as Roberts was handcuffing him. Mance eventually had to have leg restraints put on him, and while he was lying prone on the concrete, he spit out a large rock of suspected crack cocaine.

Mance was initially charged with possession of narcotics and possession of a stolen car. The latter charge was dropped.

ISSUES AND RULINGS: (1) Was there probable cause to arrest Mance based on the "hot sheet"? (ANSWER: No); (2) Is the burden of proving probable cause on the State under the facts of this case? (ANSWER: Yes) Result: Pierce County Superior Court conviction for possession of a controlled substance reversed.

ANALYSIS:

(1) PROBABLE CAUSE

The Court of Appeals analysis on probable cause is as follows:

Mance argues that reliance on the "hot sheet" alone did not give the officers probable cause to arrest him. Probable cause exists when the arresting officers are aware of facts and circumstances, based on reasonable trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. Probable cause is determined by the facts and circumstances "within the officer's knowledge *at the time of the arrest.*" Probable cause cannot be supported by information police gain *following* an arrest.

The police report set forth the sequence of events: first, Mance was stopped and arrested; he appeared to be under the influence of some kind of drug; then he struggled and spat out the cocaine. Because Mance was arrested before the police were aware of any facts that might have established probable cause to arrest for an offense other than possession of stolen property, the question is whether the police had probable cause to arrest solely on the basis of the "hot

sheet." If police did not have probable cause, the arrest violated Fourth Amendment guarantees against unlawful seizure, and any evidence obtained must be suppressed.

The "fellow officer" rule justifies an arrest on the basis of a police bulletin, such as a "hot sheet," if the police agency issuing the bulletin has sufficient information for probable cause. The bulletin does not, however, insulate the arresting officer from problems with the sufficiency or reliability of the information known to the issuing police agency. If the issuing agency lacks probable cause, then the arresting officer will also lack probable cause.

Here, the police who initially placed the car's license plate number on the "hot sheet" on March 2 had probable cause to believe a crime had been committed. Paulson's report of a stolen car was reasonably trustworthy because it was a report from a person who believed himself the victim of a crime. Thus, if there had been no attempt to cancel the stolen vehicle report, police would have had probable cause to arrest Mance for possession of stolen property.

But when police fail to correct their records, probable cause may no longer exist by the time an arrest is made. "[P]olice may not rely upon incorrect or incomplete information *when they . . . are at fault in permitting the records to remain uncorrected.*" No Washington courts have addressed this issue, but courts in other jurisdictions are generally in accord with this principle.

(2) BURDEN OF PROOF

After discussing some of its reasons for placing the burden of proof on the State in this case, the Court of Appeals continues on this point:

The rationale for placing the burden on the prosecution is particularly compelling where the issue is the existence of probable cause. In cases such as the one before us, placing the burden of proof on the defendant places him in an impossible situation because the facts allegedly constituting probable cause "are peculiarly within the knowledge and control of the police." Although no Washington cases have addressed the burden of proof issue in the context of proving probable cause, we are confident that a distinction drawn on the basis of whether a warrant had been issued is the correct approach. Thus, because the State made no effort to prove that its delay was reasonable, Mance's conviction must be reversed.

[Some citations omitted]

(3) DISTINCTION FROM MERE STOP

Finally, the Court of Appeals concludes its analysis by pointing out that if Mance had been merely stopped initially, instead of being arrested, the stop may have been upheld:

We emphasize that our holding is limited by the stipulated facts stating that Mance's arrest occurred first in the sequence of events. If Mance had simply been

detained for investigation and not arrested until after he spat out the cocaine, the analysis would be different and the arrest might have been lawful.

LED Editor's Note: Presumably, the Court of Appeals makes this final assertion on the rationale that the uncorrected "hot sheet" may have established "reasonable suspicion," just not "probable cause."

CORPUS DELICTI RULE FOR RENDERING CRIMINAL ASSISTANCE ADDRESSED

State v. Dodgen, 81 Wn. App. 487 (Div. I, 1996)

Facts and Proceedings:

Dwayne Dodgen confessed to the Everett Police: (1) that he was present when two other men committed a murder, and (2) that he helped them hide the body under a log. Dodgen then took officers to the body. **LED EDITOR'S NOTE: Significant facts on the corpus delicti issue in this case are found in the Court of Appeals "analysis" excerpted below.** At his trial for rendering criminal assistance, Dodgen objected to the sufficiency of the evidence against him, arguing that his confession was inadmissible under the corpus delicti rule. The trial court denied Dodgen's motion for dismissal, and a jury convicted him of rendering criminal assistance in the first degree.

ISSUE AND RULING: Was there sufficient evidence of the crime of rendering criminal assistance to establish the corpus delicti of that crime, and was Dodgen's confession therefore admissible under that rule? (**ANSWER:** Yes) **Result:** affirmance of Snohomish County Superior Court conviction for rendering criminal assistance in the first degree.

ANALYSIS:

In significant part, the Court of Appeals analysis of the issue on the corpus delicti rule is as follows:

The purpose of that rule is to ensure that a defendant does not, for whatever reason, confess to a crime that has not been committed. Under the rule, a defendant's extrajudicial confession or admission is not admissible unless there is independent prima facie proof that the crime charged has been committed by someone. A prima facie showing requires evidence of sufficient circumstances supporting a logical and reasonable inference that the charged crime occurred. . .

Corpus delicti is usually proved by establishing (1) an injury or loss and (2) a person's criminal act as a cause thereof. To show that the crime of rendering criminal assistance has been committed in the present circumstances, there must be independent proof that a homicide victim was concealed by someone other than the person who committed the murder. See RCW 9A.76.050. We disagree with the State that the only fact required to show the corpus delicti here is a hidden homicide victim. The mere fact that a body was hidden does not logically support an inference that anyone other than the killer concealed the body. Instead, there

must be evidence that someone other than the murderer hid, or assisted in hiding, the body.

In the present case, the evidence showed that Everist's death was a homicide and permits the inference that hiding the body required the efforts of more than one person. The body was carried some distance, thrown into a hollow, and covered with a log. In addition, it is clear from Crane's statement and Dalton's testimony that Weber was assisted by at least one other person in concealing the body. Independent proof that the criminal act was intentional is not needed to establish the corpus delicti when, as here, the intent element of a crime merely establishes the degree of the crime charged. There was sufficient independent proof of the crime of rendering criminal assistance, and Dodgen's confession was properly considered by the jury in determining who helped Weber conceal the body.

[Some text, a footnote, citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION DOES NOT LIMIT PRIVATE SEARCHES -- In Personal Restraint of Maxfield, 81 Wn. App. 705 (Div. II, 1996), the Court of Appeals rejects a drug defendant's argument that his former attorney rendered ineffective assistance to him in an earlier appeal in which the former attorney failed to argue that the state constitution barred a PUD employee's act of providing certain information to law enforcement personnel. The Court of Appeals describes the pertinent facts on the "private search"/ privacy-invasion issues as follows:

On June 6, 1991, an employee of the local public utility district (PUD) informed the police that power consumption at one of the houses was high. He also said the PUD's records could be examined only after law enforcement filed a request for inspection, pursuant to the public disclosure act, RCW 42.17. The employee had not been directed to call law enforcement with suspicious power readings, or asked to investigate the particular house on which he was reporting.

The Court then rejects defendant's state constitutional theories as follows:

To prevail on an appellate ineffectiveness claim, an appellant "much show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice."

Here, a PUD employee volunteered information to the police after conducting a private search of PUD records (i.e., a search without police involvement). Thus, the legal issue is whether Article I, § 7 treats private searches differently from, and more protectively than, the Fourth Amendment.

On at least four occasions, the Court of Appeals has held that Article I, § 7 does not protect against private, non-governmental action. . . .

Additionally, the Supreme Court has twice characterized the privacy interest in power records as "minimal." Speaking through Justice Pearson in a case involving the public disclosure act, it said:

[T]he privacy interest in the power usage records is minimal; the information is fairly innocuous and reasonable persons would not be highly offended by its release. We admit that its release to police officers would "highly offend" anyone who engages in illegal activities, e.g., growing marijuana; but this person is not the appropriate measure of a "reasonable person".

And speaking in the Fourth Amendment portion of Maxfield's earlier appeal, it said:

The United States Supreme Court has concluded that the Fourth Amendment does not prohibit law enforcement from obtaining information without a warrant where the information was initially revealed to a third person, even where the information was initially revealed in confidence and on the assumption that it would be used only for a limited purpose. Thus, under the Fourth Amendment, there is no legitimate expectation of privacy in bank records, or in pen register records of a telephone company showing numbers dialed by a particular individual.**[LED Editor's Comment: There is privacy protection against law enforcement searches of such records under the Washington Constitution Article 1, § 7, but there was no law enforcement search here.]** An individual's expectation of privacy in power consumption records is far less than that expected in bank records and telephone numbers. Unlike telephone and bank records, power records disclose no discrete information about an individual's activities. Furthermore, as we have previously determined, there is but a minimal privacy interest in power records. Such an interest, if it is actual and subjective, is not one that society is willing to recognize as reasonable. [Citations omitted]

These authorities clearly establish that Article I, § 7 does not apply to private, non-governmental searches such as the one involved here. As a result, Maxfield's Article I, § 7 argument could not have succeeded in his earlier appeal, and he cannot show the elements of a claim for ineffective assistance of counsel.

[Citations and footnotes omitted]

Result: personal restraint petition by Mark Maxfield dismissed.

(2) BOY'S INTENTIONAL, UNLAWFUL TOUCHING OF GIRL'S BREAST IS ASSAULT IN THE FOURTH DEGREE -- In State v. Parker, 81 Wn. App. 731 (Div. III, 1996), the Court of Appeals rejects a juvenile's challenge to the sufficiency of the evidence to support a juvenile court adjudication that he had committed an assault in the fourth degree. The juvenile had been prosecuted for assault, based on an incident in the freshman pre-algebra class at the high school. During class, Christopher Parker had reached over and touched the underside of the left breast of a female student seated immediately to his right. The Court of Appeals explains as follows why it believes that the evidence supported the assault four conviction:

The essential elements of fourth degree assault are found in RCW 9A.36.041(1): "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." Intent is a court-implied element of assault in the fourth degree. The intentional unlawful touching of the body of another is an assault.

From the evidence presented, the [trial] court could reasonably infer Mr. Parker reached under his classmate's outstretched left arm and intentionally contacted the underpart of her breast. The [trial] court was not required to believe his testimony that the contact was accidental and there was no time to apologize. The evidence is sufficient to support the [trial] court's determination Mr. Parker was guilty of fourth degree assault.

[Citations omitted]

Result: Spokane County Juvenile Court adjudication that Parker was guilty of fourth degree assault affirmed; sentencing based on "sexual gratification" factor reversed for lack of adequate findings of fact by the trial court; case remanded for a new disposition hearing.

(3) NO CLOSURE OF DECLINATION HEARING WITHOUT SPECIFIC FINDING RE RIGHT TO FAIR TRIAL -- In State v. Loukaitis, 82 Wn. App. 460 (Div. III, 1996), the Court of Appeals holds that the trial court abused its discretion in closing a declination hearing on a 16-year-old juvenile charged with three counts of aggravated first degree murder and one count of first degree assault following a highly publicized shooting at a Moses Lake area junior high school. The Court holds that the trial judge in this case erred by failing to assess and make factual findings on how and why an open hearing would prejudice the juvenile's right to a fair trial.

Result: Grant County Superior Court order closing declination hearing reversed.

(4) CHILD VICTIM HEARSAY STATUTE REQUIRES CORROBORATION OF ALLEGED ACTS WHERE CHILD DOESN'T TESTIFY; ISSUE: WHAT CONSTITUTES "TESTIFYING"? -- In State v. Rohrich, 82 Wn. App. 674 (Div. III, 1996), the Court of Appeals interprets the statutory hearsay exception of RCW 9A.44.120. The statute provides an exception for child victim hearsay statements in certain circumstances. The Court of Appeals notes that, under the statute, if the child victim of a sexual contact testifies about the contact at trial, then the hearsay statements are admissible so long as they have certain indicia of reliability. On the other hand, if the child does not testify about the incident at trial, then the statements are admissible only if the State: (1) proves that the child is "unavailable" to testify by one of several means, and (2) establishes corroboration of the alleged unlawful sexual contact.

In the Rohrich case, the prosecutor called the eight-year-old victim to the witness stand at trial, but the child was not asked any questions about any alleged sexual contacts. This circumstance was the equivalent of the child not testifying at all, the Court of Appeals declares. The Court of Appeals then asserts that, in order to make the hearsay admissible under RCW 9A.44.120, the State was required in this situation both: (1) to show the unavailability of the child victim ("unavailability" can be shown in a variety of ways, including through adequate proof of fear or intimidation); and (2) to corroborate the alleged act. There was no showing of unavailability or corroboration in the record, however, and the Court of Appeals therefore reverses defendant Rohrich's conviction.

Result: Whitman County Superior Court conviction for child rape and child molesting reversed; case remanded for re-trial.

(5) DEFENDANTS ENTITLED TO "NO DUTY TO RETREAT" INSTRUCTION IN STREET FIGHT ASSAULT PROSECUTION -- In State v. Williams, 81 Wn. App. 738 (Div. I, 1996), the Court of Appeals rules that two co-defendants were entitled to an instruction informing the jury in their second degree felony-murder prosecutions that they had "no duty to retreat" during the street fight out of which the charges had arisen. The Court of Appeals notes that under Washington law defendants have a right to such an instruction whenever there is evidence that they were assaulted in a place where they were lawfully entitled to remain. The street is such a place, the Court of Appeals says. In response to the State's argument that a "no duty to retreat" instruction was not needed in this case because the defendants actually did retreat, the Court of Appeals declares that defendants' movements were more in the nature of the "ebb and flow" of a street fight than a retreat. Result: reversal of King County Superior Court convictions of Nalem Pierce Williams and Charles Nathaniel Williams III; cases remanded for re-trial.

NEXT MONTH

The December 1996 LED will include our annual subject matter index and will also address, among other cases, the Court of Appeals false arrest/civil liability decision in Jacques, et.al. v. Sharpe, et.al. and Seattle, ___ Wn.App. ___ (Div. I, 1996)(holding that violation of a court order under the Domestic Violence Prevention Act directing a respondent not to enter "the Magnolia area" of Seattle was not a crime and therefore did not justify an arrest under the DVPA, RCW 26.50.110).

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