



# Law Enforcement

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# Digest

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**WASHINGTON STATE SUPREME COURT**

**CONSENT FOR ENTRY OF RESIDENCE FOR PURPOSES OTHER THAN SEARCH FOR CONTRABAND NOT SUBJECT TO WARNINGS REQUIREMENT OF STATE V. FERRIER**

State v. Bustamonte-Davila, \_\_\_ Wn. 2d \_\_\_ (1999) [983 P.2d 590]

Facts and Proceedings:

An INS agent went to defendant’s home with the intent to arrest him on a federal deportation order. The INS agent was accompanied by several uniformed city and county law enforcement officers. When defendant came to the door, the INS agent asked for permission to enter. The agent did not advise defendant of his right to refuse entry (or of other consent rights or Miranda rights), nor did the agent advise of his purpose for being there.

Defendant expressly consented to entry by the INS agent by saying “yeah, you can come.” Defendant then stepped back to allow the agent and the local officers to enter. Upon entry, the agent and officers observed a rifle leaning against a wall. The officers seized the rifle, and Bustamonte-Davila, who had a felony record, was ultimately charged with unlawful possession of a firearm in violation of RCW 9.41.040. He unsuccessfully challenged the entry which led to seizure of the rifle, and he was convicted. He lost on appeal in an unpublished opinion by Division Two of the Court of Appeals. The State Supreme Court then granted review.

**ISSUE AND RULING:** Was the evidence sufficient to establish a “voluntary” consent by defendant to entry of his residence, despite the failure of the law enforcement officers to advise defendant of his rights to 1) refuse consent, 2) restrict scope, and 3) retract consent at any time? (**ANSWER:** Yes, rules a 5-4 majority, holding that the rule of State v. Ferrier, 136 Wn.2d 103 (1998) [**Oct LED:02**] does not apply to consent requests which are not part of “knock-and-talks” conducted to search for contraband.) **Result:** Affirmance of Court of Appeals decision which

affirmed a Cowlitz County Superior Court conviction of Jorge Luis Bustamonte-Davila for unlawful possession of a firearm in the second degree. RCW 9.41.040(1)(b).

ANALYSIS BY MAJORITY:

In State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**, the State Supreme Court held, in an independent grounds interpretation of article 1, section 7 of the Washington constitution, that law enforcement officers conducting knock-and-talk consent search operations at private residences must advise people of the "3 R's" of consent search rights: 1) right to refuse, 2) right to retract, and 3) right to restrict scope. The Bustamonte-Davila majority explains as follows that the Ferrier rule does not apply to the facts of this case.

This Court limited its holding in Ferrier to employment of a "knock and talk" procedure. No such procedure was involved in this case. The police officers in this case did not proceed to Petitioner's residence with the intent to find contraband without obtaining a search warrant. They merely accompanied the INS agent as backup, a standard practice in INS arrest and deportation matters. Petitioner did not consent to a search, but consented to entry into his home by the INS agent who in good faith believed he was executing a presumptively valid deportation order issued by an immigration judge under established INS procedures. Petitioner at least impliedly consented to entry by the local police officers accompanying the INS agent.

Under the facts in this case, Ferrier is distinguishable. In this case, there is the unchallenged finding of fact that Petitioner allowed the INS agent to enter his home. The INS agent testified that the police officers with him at the front of the house were within view of Petitioner when he came to the window. When Petitioner stepped back from the open door and did not object to the police officers entering with the INS agent, he impliedly gave consent to their entry. Although the officers testified Petitioner did not expressly consent to their entry, Petitioner could have objected to their entering his residence. He did not object. Under these circumstances, the fact that he did not expressly object "amounted to an implied waiver of [his] right to exclude them."

Because the police officers did not employ a "knock and talk" procedure in this case, the court employs a "totality of circumstances" test to determine whether the consent was valid. The State has the burden of demonstrating the voluntariness of the consent. To be valid, the consent must be voluntary and the search must not have exceeded the scope of consent. Whether consent is freely given is a question of fact dependent upon the totality of the circumstances which includes "(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent." No one factor is dispositive.

Although Petitioner was not informed of his right to refuse entry, he consented to entry into his residence by the INS agent and did not object to entry by the police officers accompanying the agent. There was no drawing of weapons by either the agent or the police officers, nor was Petitioner ordered to open the door. In addition, it is evident from Petitioner's testimony that he is a person of at least average or higher intelligence.

The majority opinion goes on to hold that the rifle was lawfully seized, because it was in plain view as the officers walked into the premises. Knowing that defendant was an illegal alien and a convicted felon, the officers had two independently sufficient probable cause bases for seizing the

rifle. As an illegal alien in possession of a firearm, defendant was violating a federal firearms law (18 U.S.C.A. sec. 922 (g)(5)); and, as a convicted felon in possession of a firearm, he was violating a state law (RCW 9.41.040). Hence, because they were lawfully inside the premises by consent, the officers could seize the rifle under the “plain view” rule.

DISSENT: Justice Alexander authors a dissent joined by Justices Sanders, Madsen and Johnson. The dissenting opinion appears to argue that the Court should have applied the Ferrier rule broadly to all requests to enter or search private residences.

### **LED EDITOR’S COMMENTS:**

#### **1. FERRIER QUESTION:**

In the October LED at pages 5-8, we digested State v. Leupp, 980 P.2d 765 (Div. II, 1999), a Division Two Court of Appeals decision holding that a request for consent to enter a home to look for a possible domestic violence victim was not subject to the Ferrier warnings requirement. Now, in Bustamonte-Davila, the Washington Supreme Court has ruled that Ferrier warnings are not necessary to obtain consent to enter a home to make an arrest. The Bustamonte-Davila Court’s discussion of the Ferrier issue suggests that Ferrier is aimed only at residential “knock-and-talk” operations which have the singular goal of searching for contraband. Nonetheless, we would suggest the slightly more conservative reading of Bustamonte-Davila suggested in the next paragraph of our comments until such time as the Court gives a little more guidance.

In an abundance of caution, we suggest that officers should continue to assume that Ferrier warnings are required in any residential situation where officers are seeking consent to search for either contraband or evidence. And we also would conservatively suggest that officers wishing to conduct “random” consent searches (or “fishing expedition” consent searches) during vehicle stops continue to give the Ferrier warnings. It could well be that the Washington appellate courts will continue to constrict the Ferrier rule, and that these types of searches will eventually be found also to be outside the restrictions of Ferrier. However, the safest course for now is to be wary of the special sensitivity of the Washington courts to residential, as well as hunch-driven, searches, and therefore to give the Ferrier warnings in the above two circumstances, as well as in the standard “knock and talk” operation.

#### **2. “IMPLIED” CONSENT TO ENTER RESIDENCE:**

Officers should not read too much into the “implied consent” discussion in Bustamonte-Davila’s majority opinion. The defendant had expressly consented to entry by the INS agent. The Bustamonte-Davila majority opinion’s “implied consent” discussion was arguably addressing only whether the backup officers had implied consent to enter based on: (1) the express consent that defendant gave to the INS agent, in combination with (2) the defendant’s act of stepping back inside his house after expressly giving the agent permission to enter. In U.S. v. Shaibu, 920 F.2d 1423 (9<sup>th</sup> Cir. 1990), the Ninth Circuit Court of Appeals held that, where officers asked an apartment resident whether a suspect was then inside the apartment, and the resident then turned without a word of response and walked from the hallway back into his apartment, the officers did not have consent to enter the apartment. The difference in Bustamonte-Davila was that the agent expressly asked for permission to enter, arguably in behalf of the entire group of officers, so a greater inference could be drawn from the defendant’s act of silently stepping back into his residence in response to the request. Nonetheless, again in an abundance of caution, we think that officers should always ask for permission to enter in the Shaibu situation, and that they should also try hard to get express words or an express affirmative gesture in response to their request. At the very least, when their request for

permission to enter is greeted with the resident's silence, followed by his or her passive step backwards from the open door into the premises, officers should at least announce that they take that as a "consent" before they step inside.

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

**(1) COLLATERAL ESTOPPEL RULE BARS LICENSE REVOCATION WHERE KEY ISSUE IN LICENSE MATTER WAS PREVIOUSLY RESOLVED AGAINST THE STATE IN A CRIMINAL PROSECUTION ARISING FROM THE SAME INCIDENT** – In Thompson v. DOL, \_\_\_ Wn. 2d \_\_\_ (1999) [982 P.2d 601], the Washington Supreme Court rules unanimously that a final (unappealed) suppression decision in a criminal proceeding precluded a different decision in a subsequent DOL administrative action on the same issue.

On February 24, 1995, Clayton Thompson, a commercial truck driver, was arrested; a) for driving under the influence of alcohol and b) for driving a commercial vehicle with a BAC concentration of .04% or more. The arresting WSP trooper gave Thompson warnings as to his rights in regard to both offenses for which he had been arrested. Thompson subsequently registered BAC readings of .07 and .08. Criminal charges were filed by the county prosecutor. See RCW 46.25.170(2) – driving a commercial vehicle with alcohol in one's system. DOL also instituted administrative revocation of Thompson's commercial driver's license. See RCW 46.25.090(1) – revocation of a commercial driver's license for either blowing .04 or more or for refusing a breath test.

The criminal case proceeded first. The trial court suppressed the BAC results and dismissed the charges on grounds that the trooper's warning to Thompson had been confusing. The county prosecutor did not appeal this district court suppression decision in the criminal case, so it became final.

In subsequent DOL revocation proceeding, the result was different. The administrative law judge (ALJ) ruled that the warnings given Thompson were not confusing, and the ALJ revoked Thompson's commercial driver's license based on the BAC evidence. Thompson argued that the BAC evidence should be suppressed automatically because of the earlier final ruling in the criminal case regarding the warnings given by the WSP trooper. Thompson lost this argument in proceedings at DOL, at superior court, and at the Court of Appeals, Division Two. However, he has now won in the Supreme Court.

The Supreme Court explains that the doctrine of collateral estoppel (also known as "issue preclusion") precludes re-litigation of an issue previously decided, even if erroneously, under certain circumstances. The party seeking to have the doctrine applied must prove: 1) the issue decided in the prior adjudication is identical with the one presented in the second action; 2) the prior adjudication must have ended in a final judgment on the merits; 3) the party against whom the preclusion theory is asserted was a party or in privity with a party to the prior adjudication; and 4) application of the doctrine does not work an injustice.

The Supreme Court unanimously agrees in Thompson that all elements of proof were met under the facts of this case. Along the way, the Court holds that: 1) the "State," as represented by the county prosecutor, and the "State," as represented by DOL's staff and DOL's Assistant Attorney General, are the same party; and 2) an error of law in the first proceeding (the Supreme Court assumes that the original "confusion" ruling regarding the implied consent warnings was erroneous) is not an "injustice" which destroys the preclusive effect of the first ruling.

Result: Reversal of license revocation decisions against Clayton Thompson by the Court of Appeals (Division Two), by the Clark County Superior Court and by DOL.

**(2) ANTI-MERGER PROVISION OF BURGLARY STATUTE MEANS WHAT IT SAYS** – In State v. Sweet, 138 Wn.2d 466 (1999), the Washington Supreme Court unanimously rejects arguments by two defendants that they could not, based on the same incident (a brutal strong-arm

robbery), be separately charged and punished for 1) burglary in the first degree and 2) assault in the first degree.

The Sweet Court interprets RCW 9A.52.050 which reads:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.

The statute means what it says, the Sweet Court says, despite implications in some contrary “gratuitous” language in a prior Supreme Court opinion.

Result: Affirmance of Court of Appeals decisions which had affirmed Pierce County Superior Court convictions and exceptional sentences of Isaac Donald Sweet and Robert James Slaton for first degree burglary and first degree assault.

**(3) CREDIFORD’S IMPLIED DUI ELEMENT EXPLAINED** – In State v. Robbins, 138 Wn.2d 486 (1999), the State Supreme Court clarifies its ruling in State v. Crediford, 130 Wn.2d 747 (1996) **March 97 LED:03**, a case in which the Court had established an implied element under the DUI statutes.

In Crediford, the State Supreme Court ruled that the two-hour rule of Washington’s DUI statute, which prohibits a person from having a specified BAC reading (pre-1999, .10% or above; and post-1999, .08% or above) within two hours of driving, requires that the prosecution negate the possibility of post-driving alcohol consumption. After Crediford was decided, Division One of the Court of Appeals ruled in the Norby case that the prosecution must put on evidence to meet this burden in every case, even where there is no evidence of post-driving consumption of alcohol. See City of Seattle v. Norby, 88 Wn. App. 545 (Div. I, 1997) **May 98 LED:14**.

Now the Supreme Court has ruled that in Norby Division One read too much into Crediford. The Robbins Court overrules Norby and explains as follows that the State does not have the burden of proving “no drinking” unless the defendant claims to have consumed alcohol after driving:

The court in Norby went too far, however, in concluding that the State must meet the burden of establishing the “implied element” in every case. Regrettably we did not make it clear, as we should have, that the State need not meet the burden in cases where the defendant has not asserted that what he or she had to drink after driving influenced the blood alcohol concentration (BAC) reading. We now clarify our decision in Crediford and expressly hold that the State has the burden to show the “implied element” of a connection between the results of a defendant’s blood or breath test and his or her blood alcohol level at the time of driving only in cases where the defendant affirmatively asserts that he or she consumed alcohol after driving and that this caused the result of the blood or breath test to equal or exceed 0.10. **[LED EDITOR’S NOTE: Under 1999 amendments, the standard is 0.08].**

Result: Affirmance of Court of Appeals decision upholding the Okanogan County Superior Court’s affirmance of Ellsworth Robbins’ district court conviction of DUI.

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### **WASHINGTON STATE COURT OF APPEALS**

**ENTIRE WINNEBAGO SUBJECT TO SEARCH INCIDENT TO CUSTODIAL ARREST OF OCCUPANT; ALSO, ZIPPED CUSHION NOT A “LOCKED” CONTAINER UNDER STROUD**

State v. Vrieling, \_\_\_ Wn. App. \_\_\_ (Div. I, 1999) [983 P.2d 1150]

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

On July 29, 1997, police dispatch reported that a vehicle prowler had just occurred in the parking lot of a store. Dispatch provided a description of the suspects and the vehicle (a white Winnebago), as well as the Winnebago's license plate number. Deputy Cervarich spotted the reported Winnebago, which had swerved over the fog line and was driving well under the speed limit. Appellant Christina Vrieling was later identified as the driver of the Winnebago, with her husband in the passenger seat.

When Cervarich stopped the Winnebago and asked for identification, Vrieling did not produce one. Instead, she gave a false name with two different birth dates; neither combination could be found in Cervarich's computer check of Washington, Montana, and Colorado. Faced with an unverifiable identification, Cervarich effected a full custodial arrest of Vrieling for driving without a valid license and placed her in the patrol car. Cervarich then had Vrieling's husband step out of the Winnebago while he searched the interior. Cervarich unzipped a seat cushion found at the back of the Winnebago. Inside the cushion, he discovered a fully loaded pistol, together with a second full clip or magazine.

Dispatch informed Cervarich that the pistol had been reported stolen, at which time Cervarich arrested Vrieling's husband for possession of a stolen firearm. At the police station, Vrieling told Deputy Hawkins that the gun was actually hers (not her husband's), and that she used it for target practice. After Vrieling finally admitted her true identity, it was discovered that she had a previous felony conviction. She was charged with second degree unlawful possession of a firearm.

The trial court denied Vrieling's motion to suppress evidence of the gun. Following a jury trial, Vrieling was convicted as charged. She received a sentence of four months' confinement.

**ISSUE AND RULING:** 1) Is it permissible to search the entire living quarters of a Winnebago incident to the custodial arrest of vehicle occupant? (**ANSWER:** Yes); 2) Is a zipped seat cushion a "locked container" under the Stroud rule, such that it cannot lawfully be searched in a search incident to arrest? (**ANSWER:** No, a zipper is not a lock). **Result:** Affirmance of Snohomish County Superior Court conviction and sentence of Christina Vrieling for second degree unlawful possession of a firearm.

**ANALYSIS:**

1) WINNEBAGO NOT A HOUSE

The Court of Appeals begins its analysis by summarizing the "independent grounds" interpretation of the Washington Constitution (article 1, section 7) in State v. Stroud, 106 Wn. 2d 144 (1986):

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

[Some citations omitted]

The Vrieling Court goes on to explain how the Washington Supreme Court, in State v. Johnson [128 Wn.2d 421 (1996) **March 96 LED:06**], applied Stroud to searches of vehicles used as temporary residences:

In so holding, the Stroud Court found that the heightened protection of article I, section 7 required Washington to diverge from the federal rule enunciated in New York v. Belton, 453 U.S. 454 (1981), and thus limited the permissible search to unlocked containers and unlocked glove compartments.

The parties do not dispute that the Winnebago in question was a motor vehicle and was being used as a vehicle at the time of the stop and arrest. Rather, the inquiry posed by Vrieling is whether Stroud applies to a motor home. We conclude that it does, under the Supreme Court's decision in Johnson.

[In Johnson], the Court was faced with the question of whether a search of the sleeping compartment in the cab of a tractor-trailer was permissible as a search incident to the arrest of the driver. The sleeper contained a bed and a clothes closet, and was accessible to the cab by an open portal or "walk-through area connected by a rubber boot." A curtain could be drawn to separate the cab from the sleeper.

The [Johnson] Court upheld the search under both state and federal constitutional grounds. In analyzing the issue under article I, section 7, the Court rejected the argument that the sleeper was a temporary residence or home entitled to the same protections as a fixed residence. Instead, the [Johnson] Court found that "a sleeper in the passenger compartment of an over-the-road tractor-trailer is not really a home," and furthermore, articulated a bright-line rule applicable to homes located in vehicles. One may argue that the sleeper is something like a home. But a sleeper in the passenger compartment of an over-the-road tractor-trailer is not really a home. [The State] correctly discerns that [Vrieling] asks the court to retreat from Stroud and return to the confusion of [State v. Ringer, 100 Wn.2d 686 (1983)], where it was 'virtually impossible for officers to decide whether . . . a warrantless search would be permissible.' . . .

Vehicles traveling on public highways are subject to broad regulations not applicable to fixed residences. This broad regulation does not afford [Vrieling] the same heightened privacy protection in the sleeper that he would have in a fixed residence or home. The reasoning of the Court of Appeals is sound:

[W]hen a home is located in a vehicle, in such a way as to make it readily accessible from the passenger compartment, the safety of law enforcement officers and the need for a bright-line rule militate against prohibiting officers from searching a sleeping area which is readily accessible from the passenger compartment.

Thus, although the Supreme Court noted that a sleeping compartment is "not really a home" - which arguably could distinguish our case from Johnson -- the Court proceeded to adopt this court's distinction between "homes that are located in vehicles" and "homes that are fixed residences." The Court clearly re-affirmed the need for a definitive rule based on Stroud, lest we retreat to the confusion of a case-by-case Ringer analysis. We therefore conclude that under Johnson, the inquiry is whether the home is located in a vehicle "in such a way as to make it readily accessible from the passenger compartment." In other words, so long as the home is located in a vehicle, no distinction is to be drawn based on the vehicle's use as a permanent residence, as opposed to its use as a temporary sleeping compartment.

Applying the Johnson rule to the facts of our case, we find that the living quarters of the Winnebago in question were within the scope of a permissible search. It is

undisputed that the living area was readily accessible from the passenger compartment, and there is no indication from the record of any partition between the driver's seat and the rest of the Winnebago. Moreover, it is undisputed that Vrieling left the driver's seat and walked to the back of the Winnebago to the bathroom when Deputy Cervarich was attempting to verify her identity. As such, we conclude that our case falls under the purview of Johnson.

[Some citations omitted]

## 2) A ZIPPER IS NOT A LOCK

The Vrieling Court explains as follows that a zipped cushion is not a "locked container" under the Stroud rule:

Vrieling compares the zipped cushion to a locked container. We find such a comparison unpersuasive. A zipped item is simply not a locked item, and thus constitutes a container subject to search under Stroud. The Supreme Court reiterated application of this bright-line rule in State v. Fladebo, 113 Wn.2d 388 (1989):

In constructing her argument [challenging the search of her purse conducted immediately after her arrest], Ms. Fladebo stresses Stroud's example of balancing the exigencies of an arrest against the privacy interest of the individual. Stroud presented a bright line rule for determining the scope of a warrantless search of an automobile incident to an arrest: the police can search the contents of the passenger compartment exclusive of locked containers or locked glove box. Ms. Fladebo argues that a woman's purse traditionally carries with it the same notions of privacy as those associated in Stroud with locked containers. These notions of privacy are so strong, she maintains, that purses are not manufactured with locks. Thus, Ms. Fladebo seeks to extend the Stroud rule to include women's purses along with locked containers.

A purse, however, is not a locked container. Consequently, it does not fall within Stroud's exception. The Stroud locked container rule carries a double purpose. It identifies a point at which privacy interests outweigh the exigencies of an arrest and, by allowing the search of unlocked containers, helps to protect the arresting officer from danger. An unlocked purse could well conceal a readily usable weapon.

The reasoning of Fladebo was re-affirmed by the Court in Johnson: "But in State v. Fladebo we extended the Stroud rule, holding that all unlocked containers found inside the passenger compartment of a vehicle could be searched during, or soon after, custodial arrest of its occupant. . . ."

Because we find that a zipped cushion cannot fairly be characterized as a locked container, and because we again reject Vrieling's invitation to depart from Stroud's bright-line rule, we conclude that the search of the cushion was lawful under article I, section 7 of the Washington constitution. We affirm.

[Some citations omitted]

## **LED EDITOR'S COMMENTS REGARDING RINGER DISCUSSION IN VRIELING**

The discussion of State v. Ringer in Vrieling should be limited to its context relating to law enforcement authority to search “incident to arrest” under the Stroud rule. The 1983 State Supreme Court decision in Ringer did two things, both based on “independent state constitutional grounds.” First, the Court abolished the Carroll doctrine. Second, the Ringer Court greatly constricted authority of officers to search vehicles “incident to arrest.” However, as to the latter Ringer holding, in 1986 the Washington Supreme Court issued its Stroud decision reinstating officers’ authority, under a “bright line” rule, to search vehicles incident to arrest. Stroud continues to be the rule in Washington for searches incident to arrest, but the Washington Supreme Court has never reinstated the Carroll doctrine under article 1, section 7 of the Washington constitution. See the discussion of the federal “Carroll doctrine” in the September 99 LED at page 3.

**WACIC STOLEN VEHICLE REPORT, ALONE, NOT PROBABLE CAUSE TO ARREST, BUT COMBINED WITH DAMAGE TO VEHICLE’S DRIVER DOOR AND TRUNK, MEETS PC TEST**

State v. Sandholm, \_\_\_ Wn. App. \_\_\_ (Div. I, 1999) [980 P.2d 1292]

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

Kenneth Sandholm was charged with and convicted of possession of cocaine. As Sandholm and his passenger exited a vehicle, two officers noticed open containers of alcohol inside. Sandholm was given a warning. Both men "appeared nervous during the contact." Shortly thereafter, officers noticed that the driver's side door handle and trunk lock had been damaged and "[a]n ignition key appeared to be laying on the floorboard." One officer called in the vehicle license by radio, and the Washington Criminal Information Center (WACIC) reported that the vehicle was stolen. The other officer located Sandholm and placed him under arrest. Incident to that arrest, Johnson found cocaine in the coin pocket of Sandholm's trousers.

ISSUE AND RULING: Did the WACIC report along with the evidence of damage to the vehicle add up to probable cause to arrest Sandholm? (ANSWER: Yes) Result: Affirmance of King County Superior Court conviction of Kenneth W. Sandholm for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Relying on State v. Mance [82 Wn. App. 539 (Div. II, 1996) **Nov 96 LED:14**], the State argues that the radio report was presumptively reliable, and sufficient basis for the officers to take action. We disagree. As the court noted in Mance, the burden is on the State to establish the reliability of the radio report when the validity of a warrantless search or seizure is at issue. If the validity of a seizure based on a radio report of an outstanding warrant were at issue, the State would be correct that the courts will treat the report as presumptively reliable, and the defendant would bear the burden of disproving the presumption. But here, the record provides no evidence concerning the source of the stolen vehicle report or evidence regarding the procedures followed by WACIC in accepting and broadcasting the information.

Nevertheless, while it is true that exclusive reliance on the WACIC stolen vehicle report would not have provided sufficient basis for the State to establish probable cause to arrest, there was additional evidence here. The WACIC report, coupled with the strong physical evidence suggesting that the vehicle had been stolen (damage to driver's door and trunk locks) and Sandholm's demeanor, provided probable cause.

**LED EDITOR'S NOTE:** We were recently asked whether officers would have reasonable suspicion to justify a vehicle stop where a radio check established: a) that the vehicle was sold more than 45 days previously, and b) no transfer of the title had been filed. We think it would be reasonable to make such a stop, but, in light of the "hot sheet" discussion in Mance and Sandholm, in such cases, it appears to us that the prosecutor would want to either get a stipulation establishing reliability, or put on testimonial evidence establishing the reliability, of the pertinent DOL/WACIC information.

**"PRETEXT STOP" FOUND WHERE PATROL OFFICER FOLLOWED SUSPECT'S CAR FROM DRUG HOT SPOT SEVERAL BLOCKS BEFORE SEEING TRAFFIC VIOLATION**

State v. DeSantiago, \_\_\_ Wn. App. \_\_\_ (Div. III, 1999) [983 P.2d 1173]

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

[A city patrol officer], saw an automobile pull up to a small apartment complex. The apartment complex is a narcotics hot spot. [The officer] was watching the complex. The driver entered an apartment, returned two to five minutes later and drove away.

[The officer] followed the car for several blocks because he suspected the driver had bought drugs and he wanted to stop the car. Mr. DeSantiago made a left-hand turn and then immediately moved into the outside or right-hand lane. [The officer] did not see a turn signal, stopped the car, and asked Mr. DeSantiago for his driver's license, vehicle registration, and proof of insurance. Mr. DeSantiago did not have a driver's license or insurance. He produced his Washington identification card. [The officer]'s background check showed that Mr. DeSantiago had a suspended license and an outstanding misdemeanor warrant.

[The officer] cited Mr. DeSantiago for making an improper left turn and arrested him for driving with a suspended license and for the outstanding warrant. He searched Mr. DeSantiago and the vehicle, incident to arrest, and found a small bundle of methamphetamine on the floorboard of the car and a handgun.

Mr. DeSantiago was charged with unlawful possession of a controlled substance, methamphetamine, and second degree unlawful possession of a firearm. Mr. DeSantiago moved to suppress the methamphetamine and gun. He argued that the stop was pretextual and RCW 46.61.290(2), the left-hand turn statute, is ambiguous. The court denied his motion. The court found Mr. DeSantiago guilty as charged.

**ISSUE AND RULING:** Was the officer's stop of DeSantiago unlawfully pretextual under the Washington constitution as interpreted in State v. Ladson? ((**ANSWER:** Yes) **Result:** Reversal of Franklin County Superior Court conviction of Armando DeSantiago for unlawful possession of methamphetamine and second degree unlawful possession of a firearm.

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

We evaluate the constitutional validity of this stop by the requirements of article I, section 7, of our state constitution, not the Fourth Amendment to the United States Constitution. State v. Ladson, 138 Wn.2d 343 (1999) [**Sept 99 LED:05**]. In Ladson, the court held article I, section 7, of the state constitution has broader application than does the Fourth Amendment of the United States Constitution.

A pretextual traffic stop violates article I, section 7, because it is a warrantless seizure.

The Ladson court noted a fundamental difference between the detention of a citizen for the purpose of discovering evidence of crimes and a community caretaking stop aimed at enforcing the traffic code. The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving. Here, as in Ladson, "[t]he question [is] whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that 'authority of law' represented by a warrant." Ladson clearly answers that question: "Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one." "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior."

The [trial] court found that:

[The officer] saw Mr. DeSantiago exit an apartment complex that was a narcotics hot spot. Mr. DeSantiago drove away in an automobile. Findings of Fact 1-3.

[The officer] followed Mr. DeSantiago because he "wanted to identify [his] license plate and was looking for a basis to stop the vehicle." Findings of Fact 4-5.

After following him for several blocks, [the officer] saw Mr. DeSantiago make an improper left-hand turn from Fifth Street onto Court Street. Findings of Fact 4, 6.

[The officer] pulled Mr. DeSantiago over for an improper left-hand turn. Finding of Fact 8.

...

This was a pretextual stop. And the evidence from this search must then be suppressed.

The State tries to distinguish Ladson. It notes that in Ladson the police were narcotics detectives who usually do not make routine traffic stops, while here [the officer] was a patrol officer. This is a distinction, but not a material one. [The officer] was not on routine traffic patrol here. He was watching a "narcotics hot spot" and saw what he came to see - someone apparently buy drugs. He then followed up on that suspicion. [The officer] was clearly "looking for a basis to stop the vehicle" and subjectively intended to engage in a pretextual stop. So regardless of the title, patrol officer or narcotics detective, both were doing the same work - narcotics investigation.

The evidence seized following this traffic stop - methamphetamine and pistol - should have been suppressed.

[Some citations omitted]

## **LED EDITOR'S COMMENT:**

### **1) Problems with Ladson:**

Among our criticisms of the subjective “pretext stop” test of the Washington Supreme Court’s decision in Ladson are the following: 1) while the decision may seem reasonable to some who may have ambivalent feelings about drug laws, the Ladson rule will adversely impact investigation of all crimes; and 2) the Ladson rule disturbingly creates a powerful incentive for law enforcement officers to omit certain facts from their reports (if not their memories).

On the first point, what if the patrol officer in DeSantiago had been watching a potential terrorist or a possible serial murderer, robber, rapist, burglar, or thief who appeared to be repeating his M.O. but whose behavior, as did DeSantiago’s suspected drug-buying behavior here, fell short of reasonable suspicion? Why would the courts not want the police to be able to watch and wait for a traffic violation to facilitate their investigation of the suspected criminal activity?

On the second point, the result in this case would have been different if the officer had not testified regarding his observations of, and suspicions about, the activity at the drug “hot spot.” If the officer had simply testified that his patrol route took him in the same direction as DeSantiago, and that he then observed the left turn violation, there would have been no pretext issue. It is very troubling, as we pointed out in the September 99 LED, that the Ladson decision’s subjective intent rule puts so much emphasis on what is in the mind of the officer at the time of the stop.

2) DeSantiago decision leaves open the question of whether a “warrant hit” would have independently justified a stop.

In our September 99 LED comments on Ladson at page 10, we pointed out that two pre-Ladson Washington Court of Appeals decisions had held that stops based solely on arrest warrants are not subject to “pretext” restrictions. In DeSantiago, if the officer had gotten a warrant “hit” while following DeSantiago’s car, a stop on the basis of the warrant hit might have escaped pretext review. Of course, as we said in the September 99 LED, only time and further Court decisions will tell whether there is indeed a warrant exception to the Ladson “pretext stop” rule.

LED EDITOR’S NOTE RE LEFT TURN LAW ANALYSIS: Along the way, Division Three rejects defendant’s “vagueness” challenge of the left turn statute. The Court explains why the statute applied to DeSantiago’s driving:

RCW 46.61.290(2) (left turns) requires:

The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of the vehicle. Whenever practicable the left turn shall be made to the left of the center of the intersection and so as to leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as the vehicle on the roadway being entered.

RCW 46.61.290(2) is not a model of clarity. But it is not ambiguous. First, a driver intending to turn left must approach the turn from the left lane closest to the center dividing line being exited from that [which] is lawfully available. Second, whenever practicable the driver must make the turn to the left of the center of the intersection on the roadway being entered. This means the driver shall not cross over centerlines of the intersecting streets until executing the turn. Finally, and of importance here, whenever

practicable the driver shall exit the intersection and enter the roadway the driver is turning onto in the left lane closest to the center dividing line that is lawfully available. RCW 46.61.290(2). Mr. DeSantiago should have turned into the left-hand lane of Court Street. So by this statute he had to leave 5th Street from the extreme left-hand lane, not cross over the centerlines of the 5th Street and Court Street intersection until executing the turn, and then turn into the extreme left-hand lane of Court Street. The court found that Mr. DeSantiago did not turn onto the extreme left-hand lane of Court Street.

**DOMESTIC VIOLENCE PROTECTION ORDER'S DISTANCE RESTRAINT PROVISIONS AGAIN (AS IN JACQUES V. SHARP) HELD NOT CRIMINALLY ENFORCEABLE**

State v. Chapman, 96 Wn. App. 495 (Div. III, 1999)

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

On June 7, 1998, Rosanna Cowan was in Titchell's apartment watching Titchell's children. Cowan saw Chapman standing in some bushes across the street from Titchell's apartment complex. Chapman saw Cowan and began walking toward her. Knowing that Titchell had a protection order against him, Cowan became frightened and ran inside to tell her mother, Gwen Abba, that Chapman was outside.

Abba went outside, peeked around a corner, and saw Chapman. Abba then went to warn Titchell, who was with her children in a park behind their apartment complex. After Abba warned her, Titchell walked around the building and saw Chapman in some bushes, approximately 50 feet from her front door. Chapman "took off" after seeing Titchell. Titchell telephoned 911 dispatch to tell the authorities that Chapman had violated her protection order. Deputy Gary Daurelio responded to the call and picked up Chapman approximately one-eighth of a mile away from the apartment complex. The State charged Chapman with felony violation of a protection order, RCW 26.50.110, excluding him from coming within one mile of the residence of Titchell and her children. Before trial, Chapman moved to dismiss, challenging the validity of the protection order. The trial court denied Chapman's motion.

At the close of the State's case in chief, Chapman moved to dismiss, again arguing that the protection order was invalid and that he had not committed a crime under RCW 26.50.110. The trial court denied the motion. Chapman then proposed a jury instruction consistent with his assertion that he committed no crime when he stood across the street from Titchell's residence. The trial court declined to instruct the jury as Chapman proposed.

The jury found Chapman guilty of felony violation of a protection order.

ISSUE AND RULING: Is it a crime to violate only a distance provision in a domestic violence protection order? (ANSWER: No) Result: Reversal of Thurston County Superior Court conviction of Gregory Wayne Chapman for felony violation of a domestic violence protection order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Chapman was convicted of felony violation of a protection order under RCW 26.50.110(5). RCW 26.50.110 provides, in part, as follows:

(1) Whenever an order for protection is granted under this chapter and the respondent or person to be restrained knows of the order, a violation of the restraint provisions or of a provision excluding the person from a residence, workplace, school or day care is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 26.50.110 makes it a crime to violate only three types of provisions in a protection order. Jacques v. Sharp, 83 Wn. App. 532 (1996) [Dec 96 LED:20]. Two are "restraint" provisions; one restrains the respondent from committing acts of domestic violence on the petitioner, RCW 26.50.060(1)(a), and the other restrains the respondent from contacting a victim of domestic violence or his or her family, RCW 26.50.060(1)(g). The third provision excludes the respondent from the petitioner's residence, workplace, school or day care. RCW 26.50.060(1)(b). The statute provides that all other violations of a protection order do not constitute crimes, but rather, subject the respondent to contempt proceedings. RCW 26.50.110(3).

Here, the parties do not dispute that Chapman was within one mile of Titchell's residence in violation of an exclusion provision of the protection order. The parties also stipulated that Chapman had been previously convicted of two separate violations of a no-contact order or a protection order.

Chapman argues that his violation of the exclusion provision subjected him only to contempt and not criminal proceedings. In support of his contention, Chapman cites Jacques v. Sharp, and argues that he did not violate one of the three types of provisions that allow for criminal penalties. Chapman asserts that his conduct did not constitute a crime because RCW 26.50.060(1)(b) authorizes a court only to exclude a respondent from the petitioner's residence, and that it does not authorize a court to exclude a respondent from coming within one mile of the petitioner's residence. Moreover, Chapman argues that although RCW 26.50.060(1)(e) allows a court to provide "other relief as it deems necessary for the protection of the petitioner," a respondent who violates RCW 26.50.060(1)(e) is subject only to contempt proceedings.

In Jacques, the protection order prohibited the respondent from "entering the Magnolia area in Seattle for a period of 10 years." Jacques was arrested for violation of the protection order while at a market in the Magnolia district. The court determined that the "geographic scope of the order [was] too broad to constitute an exclusion from [petitioner's] Magnolia residence." Thus, the court held that the respondent's violation of the protection order did not constitute one of the three types of criminal violations under RCW 26.50. Accordingly, Jacques was subject only to contempt proceedings.

Here, as in Jacques, the geographic scope of the order excludes Chapman from more than Titchell's residence, workplace, school or day care. RCW 26.50.060(1)(b) does not authorize a court to exclude a respondent from any particular distance from such sites. **[LED EDITOR'S COMMENT: What the Chapman Court means to say in this sentence is that the issuing court cannot make criminal such a restriction; the issuing court does have the power to impose the restriction, but the restriction is enforceable only under the civil contempt power of the court.]** Because we cannot read words into a statute that are not there, we conclude that Chapman was not subject to criminal prosecution for coming within one mile of Titchell's residence.

[Citations omitted]

**FELON WHO LEFT GUN IN CAR FOR 3 DAYS "USED" THE CAR TO COMMIT FELONY POSSESSION OF GUN, AND HENCE DRIVER'S LICENSE REVOCATION WAS REQUIRED**

State v. Batten, 95 Wn. App. 127 (Div. II, 1999)

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

Camas police stopped Batten in his automobile for license plate and vehicle registration infractions. Police discovered that Batten also had an outstanding

warrant and placed him under arrest. During a search of Batten's vehicle incident to arrest, police discovered on the front console a spoon and cotton ball with methamphetamine residue and a .380 pistol under the driver's seat. Batten explained to the officer that he had taken the gun to go shooting in the hills three days earlier and had forgotten that it was in the automobile.

The State charged Batten with one count of unlawful possession of a controlled substance, RCW 69.50.401(d), and unlawful possession of a firearm in the second degree, RCW 9.41.040(1)(b)(i) (felon in possession of a firearm). Batten pleaded guilty to both counts. At sentencing, the court found that Batten's driver's license should be revoked for one year because it determined that he used a vehicle in the commission of the crimes.

ISSUE: For purposes of RCW 46.20.285, did Batten "use" his car to commit felony gun possession? (ANSWER: Yes) Result: Affirmance of Clark County Superior Court order revoking James Allen Batten's driver's license. Status: The State Supreme Court has accepted review of this decision, a decision from that Court can be expected some time in 2000.

ANALYSIS: RCW 46.20.285 requires the revocation of a person's driver's license for one year if the person is convicted of, among other crimes, "any felony in the commission of which a motor vehicle is used." The Court of Appeals notes in Batten that California and Pennsylvania have similar statutes. The courts in those states have required under their parallel laws that the use of the vehicle must contribute in some reasonable way to the crime, as opposed to being merely incidental to the crime. The Batten Court adopts that approach and then explains as follows why the "reasonable relationship" rule does not let Batten off the hook:

We adopt a similar rationale and hold that the vehicle must contribute in some way to the accomplishment of the crime. There must be some relationship between the vehicle and the commission or accomplishment of the crime. Accordingly, where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony. We further hold this test is met when prohibited items such as drugs or a firearm are present in a motor vehicle, provided that the items are not on the person of someone in the vehicle. This, then, constitutes a "use" of the vehicle sufficient to revoke the driver's license of the driver.

Under this standard, possession of the firearm is sufficient in this case to warrant revocation. Batten left the gun in the vehicle, hidden under the seat, for several days. He was using the vehicle as a place to store and conceal the gun. [T]he use of the vehicle to conceal the contraband creates a sufficient nexus between the crime of possession and the vehicle use.

The possession of methamphetamine is also sufficient to justify revocation. Although the paraphernalia and residue were not hidden, they were on the console of the car. The automobile was the repository of, or the container for the drugs. It was the location where the possessed drugs were kept. Thus, it was an integral element and contributed in some reasonable degree to the commission of the crime.

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

(1) **"COMMUNITY CARETAKING" ROLE JUSTIFIES "SEIZURE" OF YOUNG-LOOKING TEEN GIRL TO ENSURE HER SAFETY; ALSO, FRISK UPHOLD ON TOTALITY OF FACTS** - In State v. L. K., 95 Wn. App. 686 (Div. I, 1999), the Court of Appeals rules 2-1 that it was lawful, under the "community caretaking exception" to the constitutional warrant requirement, for Seattle police officers to temporarily

seize a young-looking teenage girl. The officers stopped the teen when the officers saw her with three older-looking companions (a man and two women who all appeared to be in their early twenties) late on a school night on a downtown Seattle street in a high drug activity area. The three companions of the young-looking teen girl (she looked under 13, though she was actually 16) had all been investigated in the past for illegal drug activity. While recognizing that the “community caretaking exception” must generally be applied cautiously lest it be abused by police officers, the L.K. majority asserts that it was reasonable for the officers to temporarily stop the young girl when she tried to evade their contact under the above-described circumstances.

The L.K. majority opinion goes on to uphold a frisk of the young girl, which followed the Terry stop. The frisk led to a search which eventually caused illegal drugs to come into plain view. The girl’s evasive behavior, plus the other attendant circumstances (including her nervous placement of her hands into and out of the pockets of her large puffy jacket) justified a frisk of her outer clothing. Once the frisking officer detected a hard weapon-like object through the coat, it was reasonable for the officer to direct defendant to open her jacket, thus bringing into plain view flecks of rock cocaine on the jacket lining.

In dissent, Judge Becker argues that the majority judges have misapplied the “community caretaking exception.” Judge Becker finds no justification for the forcible stop by police under the circumstances of this case.

Result: Affirmance of King County Superior Court juvenile adjudication of guilt against Loreal M. Kinzy for possession of controlled substances.

**(2) “SEIZURE” OF PERSON OCCURRED WHERE OFFICER ASKED SUSPECT TO WAIT WHILE OFFICER CHECKED TO SEE IF ARREST WARRANT WAS STILL OUTSTANDING ON SUSPECT** – In State v. Barnes, 96 Wn. App. 217 (Div. III, 1999), the Court of Appeals rules 2-1 that the following sequence of facts presented an unlawful seizure situation: 1) a Spokane Police Officer approached Ivan Barnes on foot and told Barnes that the officer had seen an outstanding arrest warrant on him; 2) Barnes told the officer that the warrant had been cleared; 3) the officer then said something like “Would you mind sticking around while I check on it?”; 4) while they waited for a return report on the radio, Barnes began fidgeting and nervously placing his hands in his pockets, leading to a frisk; 5) Barnes physically resisted the frisk and was arrested for obstructing; and 6) a radio dispatch then informed the arresting officers that Barnes did not have any outstanding warrants.

The two majority judges conclude that Barnes was seized without justification at the point when the officer asked if Barnes would wait while the radio check was made. The majority opinion states that the test of seizure is objective: “Would a reasonable person...have felt free to walk away at that point?” The majority judges say this was a seizure regardless of whether the exact words were, “please wait aright here,” or “why don’t you wait right here,” or “would you mind waiting right here,” instead of just plain “wait right here.”

The majority judges go on to rule that, since the seizure was unlawful, the subsequent obstructing arrest was also unlawful. Accordingly, the drugs and paraphernalia seized incident to the arrest must be suppressed, the majority rules.

Judge Brown dissents, arguing that the contact between Barnes and the officer was purely voluntary up to the point when Barnes wouldn’t take his hands out of his pockets. At that point, a frisk was justified, Judge Brown asserts, and Barnes’ resistance to the frisk justified his arrest for obstructing.

Result: Reversal of Spokane County Superior Court conviction of Ivan Barnes for possession of controlled substances.

#### **LED EDITOR’S COMMENT:**

**The majority judges may have gotten this one wrong, but these “seizure without reasonable suspicion” questions are difficult to call. The more that the officer’s words and actions suggest voluntariness on the part of the person contacted, the better chance that a court will find the “contact” not to be a “seizure.”**

**(3) SUSPECT’S REFUSAL TO SIGN MIRANDA FORM IS NOT ASSERTION OF RIGHTS; ALSO, HIS BLACK-HOODED DEMAND FOR MONEY FROM BANK-TELLER SUPPORTS ROBBERY CONVICTION** – In State v. Parra and Kent, 96 Wn. App. 95 (Div. I, 1999), the Court of Appeals rejects

defendant's challenges to his second degree robbery conviction. Defendant's appeal was grounded in, among other things, issues relating to Miranda and to sufficiency-of-the-evidence.

The Miranda issue revolved around the fact that defendant refused to sign a written Miranda rights waiver but voluntarily agreed to talk to police interrogators. The Court of Appeals holds on the totality of the circumstances that defendant understood and waived his Miranda rights, and therefore that his statement was admissible. The two precedents discussed by the Kent Court are: North Carolina v. Butler, 441 U.S. 369 (1979) (holding that a mere refusal to sign a Miranda waiver form does not preclude a finding of waiver), and State v. Grieb, 52 Wn. App. 573 (1987) (holding that a statement by a suspect that "I'll talk to you but I won't waive my rights" does not constitute a waiver of rights).

Another issue in the case was whether there was sufficient evidence of use of force or threats to support defendant's second degree robbery conviction. Defendant demanded money from two tellers without ever making an express threat or stating he had a weapon. However, during the robbery, he did hide one hand in his waist at times, as if he had a gun. Citing State v. Collinsworth, 90 Wn. App. 546 (Div. I, 1998) **March 99 LED:12**, the Kent Court finds this evidence sufficient to support the conviction.

Result: Affirmance of Whatcom County Superior Court conviction of Richard R. Kent of second degree robbery.

**(4) "SEXUAL CONTACT" EVIDENCE SUFFICIENT IN TOUCH-THROUGH-CLOTHING CHILD MOLESTING CASE INVOLVING ADULT WITH NO CARETAKING FUNCTION AS TO VICTIM** – In State v. Whisenhunt, 96 Wn. App. 18 (Div. III, 1999), the Court of Appeals rejects a child molesting defendant's challenge to the sufficiency of the evidence under which he was convicted.

The Whisenhunt Court briefly recounts the trial proceedings as follows:

At trial, M.L., a 5-year-old girl, testified she frequently rode the school bus with Mr. Whisenhunt. M.L. testified Mr. Whisenhunt sat in the seat ahead of her on the school bus, reached his arm over the seat and touched her privates. She testified he did so on three separate occasions. Based on this testimony, Judge Tompkins inferred that Mr. Whisenhunt touched M.L. for the purpose of sexual gratification. Judge Tompkins found Mr. Whisenhunt guilty. Mr. Whisenhunt appealed.

The Court then analyzes the sufficiency-of-evidence issue as follows:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. Sexual contact is defined by RCW 9A.44.010(2) as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

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

In Powell [State v. Powell, 62 Wn. App. 914 (Div. III, 1991) **Feb 92 LED:09**], the victim knew the defendant as Uncle Harry. The defendant hugged the victim around the chest while she was seated in his lap and later touched her front and bottom on her underpants under her skirt when he lifted her off of his lap. On another occasion, he touched both of her thighs on the outside of her clothing. Both times the contact was fleeting. The court held the evidence was insufficient to support the inference the defendant touched the victim for sexual gratification. It reasoned that the evidence of the defendant's purpose in touching the victim was open to innocent explanation.

Here, M.L. testified unequivocally that Mr. Whisenhunt touched her privates indicating her genital area, a primary erogenous zone, under her skirt but over her body suit. Unlike in Powell, this touching was not equivocal or fleeting in the sense the purpose of the contact was not open to innocent explanation. M.L. testified Mr. Whisenhunt, a person with no

caretaking function, sat in the seat ahead of her on the school bus and reached his arm over the seat to touch her in the vaginal area. M.L. testified Mr. Whisenhunt touched her on three separate occasions. In view of these facts, Judge Tompkins could reasonably infer from evidence in this record that Mr. Whisenhunt acted for the purpose of sexual gratification. We conclude the evidence is sufficient to support a conviction.

Result: Affirmance of Spokane County Superior Court adjudication of Anthony Whisenhunt for first degree child molestation.

**(5) CORPUS DELICTI FOR KNOWING VIOLATION OF DV PROTECTION ORDER SATISFIED BY “RETURN OF SERVICE” EVIDENCE** – In *State v. Phillips*, 94 Wn. App. 829 (Div. I, 1999), the Court of Appeals holds that the corpus delicti for the knowledge element of the crime of knowing violation of a domestic violence protection order is met by a “return of service” from a process server showing service of the protection order on defendant. Accordingly, Phillips’s admission to the arresting officer that he knew of the order was properly allowed as evidence at his trial.

Result: Affirmance of King County Superior Court conviction of Roy A. Phillips for felony violation of a domestic violence protection order (RCW 26.50.110).

**(6) STARTER’S PISTOL NOT A FIREARM OR DANGEROUS WEAPON FOR PURPOSES OF NO-GUNS-AT-SCHOOLS PROHIBITION OF RCW 9.41.280** – In *State v. C.Q.*, 96 Wn. App. 273 (Div. I, 1999), the Court of Appeals holds that a starter’s pistol having no bore through its barrel is not a firearm, nor is it a dangerous weapon under RCW 9.41.280, which bars possession of firearms and dangerous weapons on K-12 school facilities. Therefore, the Court of Appeals reverses the guilt adjudication under RCW 9.41.280 of a 16-year-old caught with a starter’s pistol at school.

The Court of Appeals summarizes its ruling as follows:

A starter's pistol having no bore through its barrel, and thus capable only of discharging blank cartridges, is not a firearm nor is it a dangerous weapon as that term is defined by the Legislature. The definitional statute in question, RCW 9.41.280, lists a variety of weapons of a kind capable of producing death or serious bodily injury. While we recognize that a starter's pistol is capable of producing the fear of such injury in any person not aware of its true nature, fear of injury is not a term the Legislature chose to use in the definition. Thus, taking one to school may and should be grounds for grave disciplinary action, but it is not a crime under current law, absent facts showing it was used to instill fear, facts not charged here.

Result: Reversal of King County Superior Court adjudication of C.Q. for possession of a weapon on school facilities in violation of RCW 9.41.280.

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## **GREGOIRE AND BERGESON RELEASE SAFETY GUIDE TO ALL WASHINGTON SCHOOLS**

**Olympia** – State Attorney General Christine Gregoire and Superintendent of Public Instruction Dr. Terry Bergeson have released a new tool to assist local school safety efforts.

Paper and compact disc copies of "It's Our School—Some Practical Tools for School Safety" were distributed recently to school districts statewide. In addition, CDs were sent to principals of all of Washington's K-12 public and private schools. School board presidents statewide received a letter informing them that the information is also available through the Internet for copies and widespread distribution at <http://www.wa.gov/ago/ourschool/>.

The offices of the Attorney General and SPI began working together early this summer to research, compile and create information on:

- Developing school violence prevention and crisis response plans that effectively meet unique local needs and circumstances;
- Sharing of student background information between law enforcement and school authorities;

- Preventing harassment and fostering mutual respect and acceptance among diverse student populations;
- Creating a shared sense of responsibility for maintaining order, reducing the risk of violence, and making sure troubled children get the help they need; and
- Defining a school's legal rights and duties regarding searches, seizure of property, and disciplinary actions.

"Stopping violence before it begins is the best strategy. That is the purpose of this guide," said Gregoire. "It is also important this information be readily available to concerned people across the state - education professionals, parents, students, emergency managers, law enforcement officials, and other community members - to help all of them actively participate in creating safe learning environments for our youth," added Bergeson.

Gregoire and Bergeson recognize there is no single blueprint or policy for keeping schools safe. But this guidebook gives Washington's schools one of the most comprehensive reference tools available to help them tailor their plans at the local level.

Link to the electronic version of the guide, "It's Our School—Some Practical Tools for School Safety," or obtain an electronic copy of this release by visiting the AG's website at [www.wa.gov/ago](http://www.wa.gov/ago), or the OSPI's website at [www.k12.wa.us/](http://www.k12.wa.us/).

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### **INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES**

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. One address provides just decisions which have been issued within the preceding 14 days [<http://www.wa.gov/courts/opinpage/recent.htm>]. Two other addresses provide more court information and also include decisions issued within the preceding 90 days [<http://www.wa.gov/courts/home/htm>] and [<http://www.wa.gov/courts/opinpage/home.htm>].

United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [<http://slc.leg.wa.gov/WACBYTitle.htm>]. Washington legislation and other state government information can be accessed at [<http://access.wa.gov/>] clicking on "L" and then "legislative information" or other topical entries in the "Access Washington Home Page "Index."

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The Law Enforcement Digest is edited by Senior Counsel, John Wasberg, Office of the Attorney General. Phone 206 464-6039; Fax 206 587-4290; Address 900 4<sup>th</sup> Avenue, Suite 2000, Seattle, WA 98164-1012; E Mail [[johnw1@atg.wa.gov](mailto:johnw1@atg.wa.gov)]. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice. LED's from January 1992 forward are available on the Commission's Internet Home Page at:[\[http://www.wa.gov/cjt\]](http://www.wa.gov/cjt). Also available on the CJTC Home Page are five-year cumulative subject matter indexes for 1989-1993 and for 1994-1998.