



# Law Enforcement

May 2000

# Digest

## HONOR ROLL

506<sup>th</sup> Session, Basic Law Enforcement Academy – December 16th, 1999 through March 15th, 2000

President:	Warren Grob – Vancouver Police Department
Best Overall:	Carlos E. Gonzalez – Camas Police Department
Best Academic:	Carlos E. Gonzalez – Camas Police Department
Best Firearms:	Eric M. Clark – Pierce County Sheriff's Office
Tac Officer:	Patrick McCurdy – King County Sheriff's Office

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**LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 19, 2000**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 19, 2000 at the Capitol Rotunda in Olympia, commencing at 1:00 PM. This is the last day of Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

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**2000 LEGISLATIVE UPDATE -- PART ONE**

*LED Introductory Notes: This is Part One of what we expect to be a three-part update of 2000 Washington State legislative enactments of special interest to law enforcement. We have tried to include in Part One most of the significant enactments which take effect on or before June 8, 2000 (note that unless a different effective date is specified in the legislation, enactments adopted during the regular session take effect on June 8, 2000, i.e., 90 days after the end of the regular session). A few of the enactments adopted during the regular session specify an effective date later than June 8, 2000.*

*Consistent with our past practice, our update will for the most part not digest legislation in the subject areas of sentencing, civil consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. Part Two next month will include a cumulative index of enactments covered in the first two parts. Part Three will cover any legislation not covered in Parts One and Two, as well as revisiting select enactments. The text of the 2000 legislation is available on the Internet at the following address -- [<http://www.leg.wa.gov>]. Look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.*

*We have tried to incorporate RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. That process will likely not be completed until early fall of this year. Finally, as always, we remind our readers that any legal interpretations that we express in the LED do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.*

**STATEWIDE JAIL BOOKING AND REPORTING DATABASE TO BE KEPT BY WASPC**

CHAPTER 3 (ESHB 2337)

Effective Date: June 8, 2000

Adds a new section to chapter 36.28A to provide that, no later than December 31, 2001, the Washington Association of Sheriffs and Police Chiefs (WASPC) "shall implement and operate an electronic state-wide city and county jail booking and reporting system." The act is contingent on WASPC receiving federal funding for the system by December 31, 2000. Details on the program and management of its "grant fund" will be provided to criminal justice agencies by WASPC.

**"CRIMINAL MISTREATMENT IN THE 3<sup>RD</sup> DEGREE" ADDRESSES SEVERAL SPECIFIED CRIMINAL NEGLIGENCE SITUATIONS**

CHAPTER 76 (SSB 6382)

Effective Date: June 8, 2000

Amends chapter 9A.42 RCW to create new crime as follows:

- (1) A person is guilty of the crime of criminal mistreatment in the third degree if the person is the parent of a child, is a person entrusted with the physical

custody of a child or other dependent person, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life; or

(b) With criminal negligence, causes substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life.

(2) Criminal mistreatment in the third degree is a gross misdemeanor.

Also amends RCW 9A.42.040 and RCW 9A.42.045 to clarify that this new crime does not apply in situations covered by the Natural Death Act, chapter 70.122 RCW.

**USING A PERSON'S IDENTIFICATION INFORMATION TO SOLICIT UNDESIRE MAIL WITH IMPROPER INTENT IS CRIMINALLY, CIVILLY ACTIONABLE**

CHAPTER 77 (SSB 6459)

Effective Date: June 8, 2000

Adds a new section to chapter 9.35 RCW ("Identity Theft" chapter adopted in 1999) as follows to establish a new misdemeanor and a new statutory civil action for using a person's identification information to solicit mailing to that person with specified improper intent:

(1) It is unlawful for any person to knowingly use a means of identification of another person to solicit undesired mail with the intent to annoy, harass, intimidate, torment, or embarrass that person.

(2) For purposes of this section, "means of identification" has the meaning provided in RCW 9.35.020.

(3) Violation of this section is a misdemeanor.

(4) Additionally, a person who violates this section is liable for civil damages of five hundred dollars or actual damages, including costs to repair the person's credit record, whichever is greater, and reasonable attorneys' fees as determined by the court.

This new section in chapter 9.35 RCW uses the existing definition of "means of identification" at RCW 9.35.020(2), which reads as follows:

(2) For purposes of this section, "means of identification" means any information or item that is not describing finances or credit but is personal to or identifiable with any individual or other person, including any current or former name of the person, telephone number, and electronic address or identifier of the individual or any member of his or her family, including the ancestor of such person; any information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; any social security, drivers' license, or tax identification number of the individual or any member of his or her family; and other information which could be used to identify the person, including unique biometric data.

**EXPANSION OF MANDATORY ARREST FOR VIOLATIONS OF DOMESTIC VIOLENCE ORDERS TO COVER DISTANCE RESTRICTIONS; OTHER DV LAW MODIFICATIONS**

CHAPTER 19 (ESSSB 6400)

Effective Date: June 8, 2000

Amends RCW 10.31.100(2)(a) so that it will make arrest mandatory whenever a law enforcement officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.10, 26.26 or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto

the grounds of or entering a residence, workplace, school, or day care or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person.

Also amends RCW 10.31.100(2)(b) in similar fashion so that knowing violations of criminally enforceable distance restrictions in foreign protection orders are also subject to mandatory arrest.

Amends various provisions in chapters 26.44, 10.99, 26.09, 26.26, 26.44, 26.50, and 74.34 RCW to clarify that restrictions on “knowingly coming within, or knowingly remaining within, a specified distance of a location” are criminally enforceable.

Amends various statutes to require the clerk of the court to advise the law enforcement agency specified in a restraining or protective order regarding modification or termination of the order, and requiring that the law enforcement agency remove the order from any computer-based criminal intelligence system.

Amendments to various DV-related statutes clarify that it is a class C felony to violate a no-contact order, a foreign protection order, or restraining order issued in a dissolution, paternity, or nonparental action for custody if the violation constituted an assault, not amounting to assault in the first or second degree, reckless endangerment, or the offender has two or more previous such convictions. A violation of a no-contact order, foreign protection order or restraining order that does not constitute a class C felony is a gross misdemeanor.

The Department of Social and Health Services (DSHS) is authorized to seek orders for protection under RCW 26.50 on behalf of and with the consent of vulnerable adults. Such protection orders may prohibit a person from coming within specified distances of certain locations. Violation of the order is a criminal offense if the person to be restrained knows of the order.

Foreign protection orders filed under RCW 26.52 and orders of protection of vulnerable adults must be entered into the domestic violence database of the Judicial Information System.

Other amendments: A) require that the Office of the Administrator of the Courts update its informational brochures; B) clarify that a “certificate of discharge” by a sentencing court does not necessarily terminate an offender’s obligation to comply with a domestic violence order; and C) declare that a no-contact order issued under chapter 10.99 RCW terminates if the defendant is acquitted or the charges on which the order is based are dismissed.

## **METH MANUFACTURING WITH CHILDREN PRESENT GETS ENHANCED PUNISHMENT**

CHAPTER 132 (SSB 6260)

Effective Date: June 8, 2000

Adds a new section to chapter 9.94A RCW to enhance the penalties for methamphetamine manufacture and possessing ephedrine or pseudoephedrine with intent to manufacture methamphetamine where it is proved that a person under the age of 18 was on the premises of manufacture.

## **RURAL DUMPING OF GARBAGE, JUNK VEHICLES ADDRESSED**

CHAPTER 154

Effective Date: June 8, 2000

Amends RCW 70.93.030, and .060, as well as RCW 70.95.240 and RCW 46.55.230 to address dumping of garbage and junk vehicles in unincorporated areas.

Abandoning a junk vehicle in an unincorporated area is a gross misdemeanor. Such abandonment subjects the vehicle’s registered owner to potential double-restitution sanctions (restitution payments to be distributed to landowner and investigating agency).

Littering in an unincorporated area is: A) a misdemeanor if the amount is greater than one cubic foot but less than one cubic yard; and B) a gross misdemeanor if the amount is one cubic yard or more. Such abandonment subjects the violator to potential double-restitution, or restitution at a certain rate per cubic foot of litter, whichever is greater (money to be distributed to landowner and

investigating agency). Under certain circumstances specified in the act, a first-time offender may avoid or pay a reduced restitution amount, at the judge's discretion, if the offender cleans up and properly disposes of the litter.

### **NARROW AUTHORITY FOR AUDIO-VIDEO RECORDING FOR POLICE VEHICLES**

CHAPTER 195 (SHB 2903)

Effective Date: June 8, 2000

Adds the following subsection (c) to RCW 9.73.090(1) to create a new, limited exception to the general all-party-consent requirement of Washington law as to interception and recording of private conversations:

Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device which makes a recording pursuant to this subsection (1)(c) may only be operated simultaneously with the video camera. No sound recording device may be intentionally turned off by the law enforcement officer during the operation of the video camera.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the incident or incidents which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

In section 1 of this act, the Legislature declares its intent that the exception created in the act be narrowly limited to its express terms:

The legislature intends, by the enactment of this act, to provide a very limited exception to the restrictions on disclosure of intercepted communications.

In section 3 of this act, the Legislature adds a subsection to RCW 9.73.080 to impose criminal sanctions for violation of this act:

(2) Any person who knowingly alters, erases, or wrongfully discloses any recording in violation of RCW 9.73.090(1)(c) is guilty of a gross misdemeanor.

### **POSSESSION OF ANHYDROUS AMMONIA CRIMINALIZED**

CHAPTER 225 (2SSB 6255)

Effective Date: June 8, 2000

Adds a new chapter to Title 69 RCW relating to anhydrous ammonia, addressing theft and illegal storage of the substance, as well as qualified immunity from civil liability for certain persons. In its entirety, the new chapter includes the following three sections:

#### Section 1 - (Theft)

(1) A person who, with intent to deprive the owner or owner's agent, wrongfully obtains anhydrous ammonia, is guilty of theft of anhydrous ammonia.

(2) Theft of anhydrous ammonia is a class C felony.

#### Section 2 - (Unlawful Storage)

A person is guilty of the crime of unlawful storage of anhydrous ammonia if the person possesses anhydrous ammonia in a container that (1) is not approved by the United States department of transportation to hold anhydrous ammonia, or (2) was not constructed to meet state and federal industrial health and safety standards for holding anhydrous ammonia. Violation of this section is a class C felony.

This section does not apply to public employees or private contractors authorized to clean up and dispose of hazardous waste or toxic substances under chapter 70.105 or 70.105D RCW.

Section 3 - (Qualified Civil Immunity)

Any damages arising out of the unlawful possession of, storage of, or tampering with anhydrous ammonia or anhydrous ammonia equipment shall be the sole responsibility of the unlawful possessor, storer, or tamperer. In no case shall liability for damages arising out of the unlawful possession of, storage of, or tampering with anhydrous ammonia or anhydrous ammonia equipment extend to the lawful owner, installer, maintainer, designer, manufacturer, possessor, or seller of the anhydrous ammonia or anhydrous ammonia equipment, unless such damages arise out of the owner, installer, maintainer, designer, manufacturer, possessor, or seller's acts or omissions that constitute negligent misconduct to abide by the laws regarding anhydrous ammonia possession and storage.

In addition, section 4 of this act amends RCW 69.50.440 to make it illegal to possess anhydrous ammonia with intent to manufacture methamphetamine. Another section amends the sentencing laws to incorporate the new crimes in the sentencing scheme.

**REVERSAL OF 1999 VEHICLE, VESSEL, AND AIRCRAFT LICENSE FRAUD CHANGES -- BACK TO PRE-1999 STATUS QUO FOR CRIMINAL MV LICENSE OFFENSE**

CHAPTER 229 (SSB 6467)

Effective Date: March 30, 2000

Amends and repeals various provisions in Title 46 RCW: A) to disband the Washington State Patrol (WSP) "vehicle license fraud" task force created under ESSB 5706 in 1999; B) to reverse the 1999 law's decriminalization of vehicle license fraud; and C) thus restore criminal sanctions and enforcement of vehicle (as well as vessel and aircraft) license laws such that there is again full enforcement authority for license plate fraud in local law enforcement, as well as in WSP.

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**U.S. SUPREME COURT**

**ANONYMOUS PHONE CALL REGARDING YOUNG MAN IN PLAID SHIRT WITH GUN FAILS TO MEET TERRY'S "REASONABLE SUSPICION" STANDARD**

Florida v. J.L., 120 S.Ct.1375 (Decided 03/28/00)

Facts and Proceedings: (Excerpted from lead opinion of Supreme Court)

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip--the record does not say how long--two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to

put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

J.L., who was at the time of the frisk "10 days shy of his 16th birth[day]," was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's "not easily predicted" movements. (quoting Alabama v. White, 496 U.S. 325, 332 (1990) [**Aug 90 LED:07**]). The tip leading to the frisk of J.L., the court observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. Two [Florida Supreme Court] justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips.

**ISSUE AND RULING:** Did officers have "reasonable suspicion" for a Terry stop based solely on an anonymous telephone report that a young black male in a plaid shirt and standing at a bus stop was carrying a gun? (**ANSWER:** No, rules a unanimous Court). **Result:** Affirmance of Florida Supreme Court decision suppressing evidence and dismissing charges.

**ANALYSIS:** (Excerpted from Supreme Court opinion authored by Justice Ginsburg)

Our "stop and frisk" decisions begin with Terry v. Ohio, 392 U.S. 1 (1968). This Court held in Terry

"[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

In White, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a

named motel. Standing alone, the tip would not have justified a Terry stop. Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. Although the Court held that the suspicion in White became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified White as a "close case."

The tip in the instant case lacked the moderate indicia of reliability present in White and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If White was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. The United States as amicus curiae makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip...." These contentions misapprehend the reliability needed for a tip to justify a Terry stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

A second major argument advanced by Florida and the United States as amicus is, in essence, that the standard Terry analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; Terry's rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an

intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see Florida v. Rodriguez, 469 U.S. 1 (1984) and schools, see New Jersey v. T.L.O., 469 U.S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with Terry, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

[Some citations omitted]

#### CONCURRING OPINION:

Justice Kennedy writes a concurring opinion joined by Chief Justice Rehnquist. The concurrence addresses several categorical fact scenarios, not presented in this case, which might have changed the Court's analysis. Thus, Justice Kennedy explains as follows some of the limits of the J.L. opinion of the U.S. Supreme Court:

On this record, then, the Court is correct in holding that the telephone tip did not justify the arresting officer's immediate stop and frisk of respondent. There was testimony that an anonymous tip came in by a telephone call and nothing more. The record does not show whether some notation or other documentation of the call was made either by a voice recording or tracing the call to a telephone number. The prosecution recounted just the tip itself and the later verification of the presence of the three young men in the circumstances the Court describes.

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. In today's case, however, the State provides us with no data about the reliability of anonymous tips. Nor do we know whether the dispatcher or arresting officer had any objective reason to believe that this tip had some particular indicia of reliability.

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered

anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See United States v. Sierra-Hernandez, 581 F.2d 760 (C.A.9 1978).

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, e.g., Fla. Stat. Ann. S 365.171(16) (Supp. 2000); Fla. Stat. Ann. S 817.49 (1994), and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

**LED EDITORIAL COMMENT:** In the September 1990 LED, we suggested that, if faced with the Alabama v. White facts, the Washington Courts likely would interpret our state constitution more restrictively. While our courts have not addressed the exact situation in White or in J.L., we still believe the Washington courts would disagree with White as a matter of state constitutional law. Thus, we believe that reasonable suspicion is not established where police receive a purely anonymous detailed phone report that a described person is a drug dealer who is about to embark on a particular itinerary, and police then observe the described suspect follow that particular itinerary, but the activities involved do not, in and of themselves, suggest that the person is doing anything criminal. It should not be surprising then that we believe that the U.S. Supreme Court's J.L. decision changes nothing for Washington law enforcement officers.

We do find interesting, however, some of the several limitations that the two opinions of the J.L. Court place on the Court's holding. Most noteworthy to us is the suggestion in the following passage by Justice Kennedy stating his view that a fleeting face-to-face report of crime by an unidentified passing motorist has greater credibility than an anonymous phone call:

If an informant places his anonymity at risk, a court can consider this factor in weighting the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See United States v. Sierra-Hernandez, 581 F.2d 760 (CA9 1978).

Division Three of the Washington Court of Appeals took a different view of the credibility of an unidentified passing motorist in State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug 97 LED:16. In our August 1997 LED entry on Jones, we asserted our belief that Division Three got it wrong, and that even our civil liberties-oriented Washington Supreme Court (though it denied review in Jones) would, if the argument were presented in the best light, find such a face-to-face report to have presumed credibility. Justice Kennedy's concurrence in J.L. lends support to our 1997 criticism of the Jones decision.

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## **BRIEF NOTES FROM THE 9<sup>TH</sup> CIRCUIT U.S. COURT OF APPEALS**

**(1) NO EXCLUSION OF CONFESSION FOR VIOLATION OF VIENNA CONVENTION REQUIREMENT THAT LAW ENFORCEMENT OFFICIALS TELL ARRESTED FOREIGN NATIONAL OF THE RIGHT TO CONSULATE NOTIFICATION** – In U.S. v. Lombera-Camorlinga, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2000) [2000 WL 245374], an 11-member panel of the Ninth Circuit of the U.S. Court of Appeals rules by an 8-3 vote that suppression of evidence is not an appropriate remedy for violation of the rights of foreign nationals under the Vienna Convention (see LED article in May 1999 LED at 13-21).

In Lombera-Camorlinga, the defendant in a marijuana smuggling case asserted that, at the time he was given Miranda warnings preparatory to a custodial interrogation, he was not given the necessary “foreign national” warnings under the Vienna Convention. A federal district court judge rejected defendant’s argument, and he was convicted on federal drug smuggling charges. Defendant appealed. A 3-judge panel of the Ninth Circuit reversed, holding that incriminating statements given in this circumstance must be suppressed if the defendant can demonstrate that he was prejudiced by the failure of police to comply with the Vienna Convention by telling him about his right to contact his consulate. See June 99 LED at 03. But now an 11-judge panel has reversed the 3-judge panel and has reinstated the district court decision. The majority view on the 11-judge panel is that exclusion of evidence is never an appropriate remedy for a mere violation of the rights of a “foreign national” under the Vienna Convention. The majority declines to rule, however, that the Vienna Convention does not afford any remedy to individuals whose rights are violated, leaving that larger question to future cases.

Result: Reversal of 3-judge Ninth Circuit panel decision which was reported in the June 99 LED:03; reinstatement of federal district court convictions of Jose Lombera-Camorlinga for importation of marijuana and possession of marijuana with intent to distribute. Status: Time remains for defendant to seek review in the U.S. Supreme Court.

**LED EDITORIAL COMMENT**: Beware! The U.S. Supreme Court could ultimately rule differently on this issue, either in this case or in some future case. State appellate courts in Texas have suppressed statements based on the Vienna Convention, and it is only a matter of time before the issue works its way to the U.S. Supreme Court. So, for that reason, as well as out of respect for the law, officers should try to comply with the Vienna Convention. Our May 1999 LED article at pages 18-21 addresses the most significant aspects of this international treaty. Readers can access the user-friendly WEBPAGE of the Federal Department of State by going to the CJTC Webpage (<http://www.wa.gov/cjt>), clicking on “links,” and then clicking on “Federal Government Web pages – Department of State – Consular Notification (for foreign nationals).”

**(2) JURY MUST CONSIDER WHETHER OFFICERS VIOLATED PAYTON RULE, AS WELL AS WHETHER OFFICERS SHOULD HAVE WASHED PEPPER SPRAY OUT OF ARRESTEE’S EYES** – In LaLonde v. County of Riverside, 204 F.3d 947 (9<sup>th</sup> Cir. 2000), the federal court sends an illegal entry/excessive force civil case back to federal district court for trial.

Officers from the Riverside, California Sheriff’s Office went to John LaLonde’s apartment in response to a neighbor’s noise complaint. The officers had no warrant to search the residence or to arrest LaLonde. Viewing the evidence in the best light for LaLonde (which one must do in a case such as this one, where the trial court has dismissed the case for failure to present a prima facie case), the Circuit Court concludes that LaLonde presented at least a prima facie case that there were no exigent circumstances that would justify entry in this case.

When officers knocked on LaLonde’s door, his female roommate opened the door. LaLonde stood behind her and exchanged unpleasant words with the officers. LaLonde refused consent to police entry into the residence, and he also refused to step outside. At some point the officers stepped inside to seize and arrest LaLonde.

LaLonde forcibly resisted his seizure, and this resulted in the officers applying pepper spray and handcuffs. Ultimately, LaLonde was released from his handcuffs at the scene, and he was never cited or charged for anything that occurred that evening. He subsequently sued.

In his civil rights lawsuit, LaLonde alleged, among other things, that the officers: 1) entered his apartment in violation of the rule of Payton v. New York, 445 U.S. 573 (1980); and 2) used excessive force after using pepper spray to subdue him, because they ignored his pleas of pain from the pepper spray, and they waited at least a half hour before washing the pepper spray out of his eyes.

1) Payton issue: In Payton v. New York, the U.S. Supreme Court held that, in order to enter a person's residence without consent or a search warrant to make an arrest under non-exigent circumstances, officers : 1) must have an arrest warrant (or a search warrant), plus 2) reason to believe the arrestee is presently at home. Mere probable cause to make an arrest is not sufficient justification for a non-consenting entry. "Entry" under the Payton standard occurs either: a) when officers cross the threshold to make the arrest; or b) when they stay outside the threshold, but they seize the resident by ordering him or her outside, or by reaching through the doorway to physically take control of the arrestee and pull him outside.

The LaLonde Court concludes that Mr. LaLonde made a prima facie case establishing a Payton violation. The officers did not have a warrant or consent to enter, nor did they have exigent circumstances, at least under Mr. LaLonde's testimony. Thus, the jury should have been allowed to render a verdict on the Payton issue.

2) Excessive force/pepper spray issue: On the pepper spray issue, the LaLonde Court explains its view as to why the fact issues in the case must be decided by the jury:

LaLonde's third claim of excessive force is that the officers deliberately made him suffer unnecessarily prolonged exposure to the pepper spray. According to the testimony of LaLonde and his roommate, the officers left the pepper spray on LaLonde's face and in his eyes, for twenty to thirty minutes after he had already surrendered and was under control. During this period, LaLonde was seated on his couch with his hands handcuffed behind his back. He was blinded by the pepper spray for that entire time and, as he testified, "[t]he longer it sat on there, like the more it burned.... I felt like it was on fire." LaLonde told the officers that the pepper spray was "burning like hell." The officers observed mucus coming out of LaLonde's nose and tears flowing from his eyes. The officers were trained to know that the symptoms of the pepper spray could last up to forty-five minutes if left untreated. The officers also acknowledged that during their training they were instructed that, after spraying someone, they should offer first aid whenever possible, such as splashing water to flush out the person's eyes. However, Officers Moquin and Horton did not offer LaLonde any assistance whatsoever. By contrast, when Officers Pike and Lampkin arrived on the scene, one of them almost immediately got a wet towel from the kitchen to flush LaLonde's face with water.

In the context of police canines, this court has explained that "no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." [Citations omitted] The same principle is applicable to the use of pepper spray as a weapon: the use of such weapons (e.g., pepper sprays; police dogs) may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.

[Some citations omitted.]

Result: Reversal of Federal District Court dismissal order; case remanded for trial on Payton entry issue and on several excessive force questions, including the pepper spray question addressed above.

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## **WASHINGTON STATE COURT OF APPEALS**

### **ARRESTEE'S EQUIVOCAL STATEMENT TO INTERROGATOR THAT HE "MIGHT" WANT TO TALK TO AN ATTORNEY DID NOT INVOKE MIRANDA RIGHTS**

State v. Aronhalt, 99 Wn. App. 302 (Div. III, 2000)

Facts: Yakima police arrested defendant as a suspect in a kidnapping and rape of a prostitute. The Court of Appeals describes the facts and trial court proceedings relating to Aronhalt's arrest and interrogation:

Mr. Aronhalt and his truck were identified from a mini-mart surveillance video. He was found and arrested about four days later driving a truck matching the description given by Ms. O. He was read the rights and warnings derived from Miranda v. Arizona. He indicated his understanding and willingness to speak with the officers. At the police station about two hours later, Detective Rick Watts read Mr. Aronhalt his Miranda rights, warnings, and waiver form. Mr. Aronhalt read the form, stated his understanding, and signed it. The detectives interviewed Mr. Aronhalt for approximately three hours.

During the interview, Mr. Aronhalt said something about possibly getting a lawyer or that he might want to talk to an attorney. The detectives and Mr. Aronhalt could not recall his exact words but reference was made to the possibility of getting a lawyer. Detective Watts then stopped questioning Mr. Aronhalt and asked him several times whether or not he wanted an attorney. Although Mr. Aronhalt does not remember his response, Detective Watts testified Mr. Aronhalt chose to continue the interview without an attorney. The trial court concluded that Mr. Aronhalt's attorney waiver was voluntary.

Proceedings: (Excerpted from Court of Appeals opinion)

A jury convicted Mr. Aronhalt of attempted first degree kidnapping with sexual motivation, second degree assault with sexual motivation, and second degree rape. At sentencing, the State successfully argued Mr. Aronhalt was a persistent offender subject to a life sentence without the possibility of parole under the Persistent Offender Accountability Act (POAA or three strikes law), RCW 9.94A.120(4).

ISSUE AND RULING: Did the trial court err in finding defendant's request for an attorney was equivocal and in concluding as a matter of law that defendant voluntarily waived his right to counsel? (ANSWER: No; the defendant's statement to the detective was equivocal and therefore was not an assertion of his Miranda right to counsel).

Result: Affirmance of Yakima County Superior Court convictions of Jerry Edmund Aronhalt for kidnapping, assault and rape; vacation of sentence and remand for further review of sentencing (on sentencing law questions not addressed in this LED entry).

ANALYSIS: (Excerpted from Court of Appeals opinion)

The issue is whether the trial court erred in finding Mr. Aronhalt's request for an attorney was equivocal and concluding as a matter of law that Mr. Aronhalt voluntarily waived his right to counsel.

Under Miranda, a suspect must be advised of the right to an attorney during a custodial police interrogation. The State has the burden of establishing waiver. A waiver must be knowing and intelligent. Officers must cease questioning the moment a suspect makes an unequivocal request for an attorney. When the accused makes an equivocal request for an attorney, police questioning may continue for the sole purpose of clarifying the request. **[LED EDITORIAL NOTE: See LED Editorial Comment below re: this statement by the Aronhalt Court.]** The courts use an objective standard when reviewing this question. The test is whether a reasonable officer would know the defendant's statement was a request for an attorney.

The trial court found:

During the interview Mr. Aronhalt made an equivocal request for an attorney. At that time Detective Watts indicated to Mr. Aronhalt that if he wanted an attorney all he had to do was say so and the interview would stop. Detective Watts worked to clarify the equivocal request for an attorney and did not resume questioning designed to elicit incriminating answers until after Mr. Aronhalt unequivocally waived his right to counsel.

After signing a waiver, Mr. Aronhalt "made reference to the possibility that he should get a lawyer." Questioning ceased. Then, Mr. Aronhalt was asked several times whether he wanted a lawyer. Even though Mr. Aronhalt did not remember how he responded, Detective Watts was clear. The time was noted when Mr. Aronhalt again waived his right to an attorney and basically said, "we can continue." Under these circumstances, an officer may clarify by asking the direct question: "Do you want an attorney?" Under these circumstances, the trial court did not err.

[Citations omitted]

**LED EDITORIAL COMMENT:** An equivocal request for an attorney is one which indicates both desire for counsel and desire to go ahead with the interrogation without counsel. Division Three overstates the clarity of the law when it asserts, relying on State v. Robtoy, 98 Wn.2d 30 (1982) Feb 83 LED:11, that "when the accused makes an equivocal request for an attorney, police questioning may continue for the sole purpose of clarifying the request." The restrictive part of Robtoy's 1982 Fifth Amendment interpretation was apparently overruled by the U.S. Supreme Court in Davis v. U.S., 512 U.S. 452 (1994) Sept 94 LED:02. The Davis Court held that officers are not required to clarify a custodial suspect's ambiguous statement in relation to Miranda rights.

In State v. Aten, 130 Wn.2d 640 (1996) March 97 LED:06, four justices signed an opinion subscribing to the Robtoy clarification requirement, while four other Washington Supreme Court justices signed an opinion asserting that the U.S. Supreme Court's 1994 decision in Davis had effectively overruled the State Supreme Court's 1982 decision in Robtoy. This apparent split of opinion of the Aten Court adds another reason to the two reasons we gave in the March 1997 LED (at page 11) for clarifying ambiguous or equivocal statements by suspects arguably invoking the "right to counsel" during custodial interrogation:

First, as Justice O'Connor points out in the text of her opinion [in Davis], the clarification approach will prevent situations from arising where, in

hindsight, trial judges view as a “clear request for counsel” what the interrogating officer felt at the time was an ambiguous request at best. Second, our Washington courts may impose a stricter standard, either through A) an “independent grounds” reading of the Washington constitution, or B) an interpretation of the Rules of Court for Superior Court and Courts of Limited Jurisdiction.

To date, Washington appellate courts have read our state constitution and the Federal constitution to be identical in regard to restrictions on interrogations. See State v. Earls, 116 Wn.2d 364 (1991 May 91 LED:02. However, we have some fear that an issue like this one could be used by a majority of our State Supreme Court to depart from Miranda standards established by the U.S. Supreme Court. As for the Rules of Court, some restrictive readings of the “Right to Counsel” provision in the Criminal Rules, CrRLJ 3.1 and CrR 3.1 have been made in recent years. [See, for example, State v. Trevino, 137 Wn.2d 735 (1995) Jan 96 LED:03.] It seems a bit of a stretch, but we see some risk that this state’s appellate courts could use the right-to-counsel provisions of CrRLJ 3.1 and CrR 3.1 to impose a requirement that police clarify ambiguous or equivocal assertions of rights. Much worse from our point of view, the Washington courts could continue thereafter to use the Court Rules as a basis for imposing other additional limits on interrogations).

#### **AT TRAFFIC STOP, “HEIGHTENED AWARENESS OF DANGER” PER MENDEZ JUSTIFIED TAKING CONTROL OF UNCOOPERATIVE VEHICLE PASSENGER**

City of Spokane v. Hays, \_\_\_ Wn. App. \_\_\_, 995 P.2d 88 (Div. III, 2000)

Facts: (Excerpted from Court of Appeals opinion)

On the afternoon of December 10, 1996, Spokane Police Officers Ron Dashiell and Isamo Yamada made an arrest for assault at 621 S. Cannon, a multi-unit complex. The address was familiar to police as a gang hangout, known for criminal activity. At about 6:00 p.m., as Officers Yamada and Dashiell watched the area, a person left 621 S. Cannon and got into a car parked at the curb. The car pulled away from the curb and entered traffic without signaling. Officers Dashiell and Yamada followed for several blocks before pulling it over. The officers could see the driver and the front passenger "manipulating an article of clothing" on the bench-style seat between them. Officer Dashiell worried that the garment might conceal a gun. Officer Yamada was also concerned.

Officer Yamada went to the driver's side and asked the driver, Michelle Stewart, and the rear passenger to roll down their windows. They complied. Ms. Stewart produced the requested paperwork. Officer Dashiell approached Mr. Hays in the front passenger seat. He heard the door lock engage. He told Mr. Hays to roll down the window. Mr. Hays refused. Through the open driver's side window, Officer Yamada also asked Mr. Hays to cooperate. Mr. Hays eventually cracked the window; Officer Dashiell ordered him out of the car.

Officer Dashiell was "concerned about what had been taken [sic] place there in the front seat of the car. I didn't feel comfortable standing there if there was a weapon inside of the vehicle." Officer Yamada was concerned that Mr. Hays was deliberately escalating the situation with the intent to hurt the officers. "I feared that he may have been planning something for us in relationship to the manipulation of the cloth in between the driver seat and the passenger seat." Officer Dashiell warned Mr. Hays that he was risking arrest for obstructing unless

he got out. Mr. Hays insisted that, as a passenger, he was not required to comply with law enforcement at a traffic stop. He had read this in a newspaper. After ignoring several more orders to get out, Mr. Hays finally opened the car door. Officer Dashiell pulled him from the car.

Officer Dashiell then attempted a Terry frisk. "Because of [Mr. Hays'] furtive movements and his hostility towards me, the area we were in, I felt concern for my safety." He ordered Mr. Hays to spread his feet and interlock his fingers behind his back. When Mr. Hays refused, Officer Dashiell arrested him for obstructing a public servant, pursuant to Spokane Municipal Code (SMC) 10.07.032. He then handcuffed him and made him sit on the ground.

After Mr. Hays was subdued, the officers ordered the driver and back-seat passenger out. The back-seat passenger was also made to sit on the ground. These two cooperated. They were not searched. Officer Dashiell did a protective sweep of the vehicle. No weapon or illegal substance was found, either on Mr. Hays or in the car.

They put Mr. Hays in the back seat of the patrol car. He continued to yell. After about 15 minutes, he signed a citation and walked away.

Proceedings: Hays was convicted of obstructing in a district court jury trial. The Superior Court affirmed, and he appealed.

ISSUE AND RULING: Under State v. Mendez, did the officers have a "heightened awareness of danger" justifying seizure of Mr. Hays as a passenger in a vehicle stopped for a traffic violation? (ANSWER: Yes) Result: Affirmance of Spokane County District Court conviction of Ryan E. Hays for obstructing.

ANALYSIS: In State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04, the State Supreme Court made an "independent grounds" ruling under the Washington Constitution, article 1, section 7, governing law enforcement officer authority over vehicle occupants at a traffic stop. Under Mendez, officers have automatic authority to direct drivers out of, or back into, their vehicles during traffic stops. However, as to non-violator passengers in such vehicles, officers must meet an objective test of "heightened awareness of danger" to justify ordering the non-violator passenger out of, or back into, the vehicle. The Mendez Court described this standard as follows:

To satisfy this objective rationale, we do not mean that an officer must meet Terry's standard of reasonable suspicion of criminal activity. Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale. Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

The New Jersey Supreme Court had adopted a similar rule for ordering passengers to exit a stopped vehicle. Relying on the reasoning in Mimms, the [New Jersey] court in State v. Smith, 134 N.J. 599, 637 A.2d 158, 167 (1994), said:

To support an order to a passenger to alight from a vehicle stopped for a traffic violation, therefore, the officer need not point to specific facts that the occupants are "armed and dangerous." Rather, the officer need only point to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car.

An application of this rule appears in a subsequent New Jersey case, State v. Smith, 306 N.J. Super. 370, 703 A.2d 954 (1997). There, two troopers stopped a vehicle they observed veering across lanes at least six times within a mile. One trooper approached the car from the passenger side and observed a plastic bag protruding from the passenger's right front pocket that appeared to contain marijuana. He also smelled alcohol in the car. The other trooper ordered the driver out of the car and ordered the passenger to keep his hands on the dashboard. Despite that order, one trooper observed the passenger move his hands from the dashboard and out of sight. The trooper immediately went to the passenger side of the car and observed two packages wrapped in duct tape between the passenger's legs. Suspecting cocaine, the troopers arrested both passenger and driver. Citing the earlier Smith case, the court held the order for the passenger to keep his hands on the dashboard was "a valid measure to protect the trooper's safety, especially in light of his strong suspicion of narcotics in the car." This case illustrates the necessity for an objective rationale before an officer may intrude on the privacy interests of a passenger in a vehicle stopped for a noncriminal traffic violation.

After describing Mendez's "heightened awareness of danger" test, the Hays Court explains why the facts of the Hays case meet the Mendez test:

There were three vehicle occupants and two officers. Both officers worried about the apparent interest of those in the front seat in something concealed between them. Mr. Hays was hostile and confrontational for no apparent reason. It was dark. The place was Spokane's "Charlie sector," an area known for crime. The record does not reflect the traffic at the scene or whether other bystanders were present. The officers had no direct knowledge of the occupants. The address from which one of the passengers emerged before getting in the car was, however, particularly notorious for crime and gang activity. These same officers had responded to an assault call there earlier that day.

Mr. Hays was sitting in the passenger seat. He was therefore not seized and was free to walk away from the initial stop. He did not. He elected instead to remain in the vehicle. He was then seized when Officer Dashiell ordered him out of the car. Officers Dashiell and Yamada were nervous about Mr. Hays' intentions. Their safety concerns were reasonable, and therefore tipped the interest balance from Mr. Hays' privacy to officer and public safety. It was reasonable to ask Mr. Hays to get out of the car.

The seizure was, therefore, lawful.

[Some citations omitted]

**LED EDITORIAL COMMENT: We think the Hays Court made the right decision under Mendez. We write this comment to suggest that there is some additional guidance on the meaning of Mendez under New Jersey court decisions.**

As noted by the Hays Court, in making an “independent grounds” constitutional interpretation under article 1, section 7, of the Washington Constitution, the Mendez Court borrowed its Washington “heightened awareness of danger” test from a New Jersey Supreme Court decision creating that standard for taking control of passengers at routine traffic stops. One New Jersey intermediate appeals court decision held that an officer may automatically take control over a passenger who has himself or herself violated the law in some way, such as by not wearing a seat belt. See State v. Legette, 643 A.2d 1063 (N.J. Super. Ct. 1994). Prior to Mendez, the Washington Division Three Court of Appeals decision in State v. Cole, 73 Wn. App. 844 (Div. III, 1994) Sept 94 LED:10, indicated in conclusory manner that the mere fact of a seat belt violation would not justify taking control over the passenger violator. We think Cole has been impliedly overruled by Mendez. Thus, we feel that the fact of suspicion of a law violation by a passenger would justify taking control over the passenger under Mendez.

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

(1) **CORPUS DELICTI FOR DRIVING CRIMES MAY NOT ALWAYS REQUIRE PROOF OF IDENTITY OF DRIVER** – In State v. Flowers, 99 Wn. App. 57 (Div. II, 2000), the Court of Appeals rejects a defendant’s corpus delicti argument in an “attempted felony eluding” case. Along the way, the Flowers Court takes a more flexible approach to the corpus delicti rule for driving crimes than is suggested in the language in some past traffic crime cases.

A police officer spotted a motorcycle recklessly “cutting donuts” in the roadway. When the officer tried to stop the driver, the driver fled. The suspect got away by driving 80 mph in a 25 mph residential zone. The officer found the crashed motorcycle a few minutes later. Within a few days, the officer tracked down the likely driver. The suspect was then physically a little worse for wear, and he confessed to having been the driver.

At defendant’s trial for eluding, he challenged admission of his confession, claiming, among other things, that the State could not establish the elements of the eluding crime without his confession. He was convicted.

The corpus delicti rule requires that the elements of a crime be established in evidence before a person’s confession to that crime can be considered against that person at trial. Establishing that a crime has occurred under this rule does not generally require proof that a particular person committed it. For example, if a body is found shot twelve times in the back, the corpus delicti of criminal homicide is established even though the perpetrator is not identified by this evidence. But some Washington cases have appeared to suggest that, where driving crimes like DUI are involved, in order to establish the corpus delicti for the driving crime, the government must establish that the defendant was driving.

The Flowers Court indicates, however, that application of the corpus delicti rule in a driving crime prosecution, including a DUI case, does not necessarily require proof of the identity of the driver. In cases where there is no evidence at all of the driving crime (for instance, at the scene of a one-car accident where DUI is suspected) an intoxicated suspect’s confession alone won’t establish the corpus delicti of the crime of DUI. In that circumstance, independent evidence must be introduced to show that the defendant was driving the vehicle. But in the Flowers case, the officer observed the crime of felony eluding committed in his presence. In that circumstance there was no need to establish the identity of the driver with evidence independent of the suspect’s next-day confession, the Flowers Court rules.

Result: Affirmance of Pierce County Superior Court conviction of Jeffrey Lloyd Flowers for attempt to elude and for possession of stolen property.

**(2) CORPUS DELICTI OF MANSLAUGHTER NOT ESTABLISHED IN POSSIBLE SIDS CASE** – in State v. Pineda, 99 Wn. App. 65 (Div. II, 2000), the Court of Appeals rules that the corpus delicti of manslaughter was not established in a case where the possibility of criminal suffocation of the child by her mother was no more likely than a Sudden Infant Death Syndrome (SIDS) death.

In Pineda, an infant child died while sleeping with defendant, the child's mother. There were no other witnesses to the death. Under interrogation, the mother admitted that she might have been responsible for the child's death. Some of the mother's admissions were consistent with criminal liability. However, the expert medical testimony in the case indicated that the death was just as consistent with a non-criminal SIDS death as with a criminal homicide.

Relying in large part on a Washington Supreme Court decision under similar facts in State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED at 06**, the Pineda Court rules that, because the evidence was not inconsistent with a hypothesis of innocence, the corpus delicti for manslaughter was not established. Accordingly, the mother's admissions could not be admitted in evidence, and, for that reason, the trial court correctly dismissed the charges against defendant.

**Result:** Affirmance of Kitsap County Superior Court order dismissing second degree manslaughter charge against Kelly Anne Pineda.

**(3) RUNNING A "WARRANTS CHECK" WHILE HOLDING A COAT AND LICENSE OF A CLAIMANT TO "LOST PROPERTY" HELD TO BE UNLAWFUL SEIZURE** – In State v. Burt, \_\_\_ Wn. App. \_\_\_, 995 P.2d 78 (Div. III, 2000), the Court of Appeals rules to be an unjustified seizure an officer's act of holding a "lost property" claimant's coat and driver's license while the officer checked for warrants on the claimant and his companion.

A law enforcement officer was checking out a good quality coat found on the side of the road. A car drove up. Two young men got out of the car, and one of them claimed the coat. While still holding the coat, the officer took the driver's license of the driver and got identification information from the passenger.

The officer found to be a little implausible and confusing the story told by the two young men regarding how the coat had come to be left along the roadway. In addition, the officer felt that the two young men were nervous. So, still holding the coat and the license of the driver, the officer directed both young men to sit on the hood of his patrol car. The officer then checked for warrants. The officer got a warrant hit on the passenger.

A subsequent consent search of the vehicle turned up drugs, drug paraphernalia and \$8500 in cash. Drug charges were subsequently filed against the two, but the trial court later suppressed the evidence on grounds it had been obtained as the fruit of an unjustified seizure of the two young men.

On appeal, Division Three agrees with the trial judge's suppression ruling. In significant part, Burt Court's analysis is as follows:

When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated. If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure.

However, once an officer retains a suspect's identification or driver's license, and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred.

Here, the officer was satisfied with both Mr. Coyne's identity and ownership of the lost property before he and Mr. Burt were directed to sit on the hood of the patrol car while the officer investigated further. The record fails to show a reasonable articulated suspicion supporting the seizure. Mr. Coyne's license contained his address, photograph, and description. The officer was inclined to return the property to Mr. Coyne upon this showing. Nevertheless he seized both Mr. Coyne and Mr. Burt. Mr. Burt was a mere, identified bystander to the transaction between Mr. Coyne and the officer. The lost property statute does not support a seizure for the purpose of running a warrant check under these circumstances. Under the facts, both Mr. Coyne and Mr. Burt would not have believed they were free to leave once they were ordered to sit on the hood of the patrol car and remain there while the officer investigated. The officer retained Mr. Coyne's coat and license during the investigation. Under these circumstances, the trial court properly concluded both Mr. Coyne and Mr. Burt were seized without legal authority. The trial court correctly concluded the later given consent was vitiated by the prior illegal detention.

Other cases have found permissive encounters ripening into seizures when an officer commands the defendant to wait, retains valuable property, or blocks the defendant from leaving. In State v. Ellwood, 52 Wn. App. 70 (1988) **Nov 88 LED:05**, an officer approached the defendant who was walking in a high-crime area late at night. The court found that the defendant was seized after he verbally identified himself and the officer told him to "wait right here" while he ran a warrants check on the verbal identification. In State v. Barnes, 96 Wn. App. 217 (Div. III, 1999) **Nov 99 LED:18, Jan 2000 LED:13**, the court found a seizure when the officer communicated a mistaken belief to the defendant that he had an outstanding warrant, and told him to "wait" while the warrant status was checked. In State v. O'Day, 91 Wn. App. 244 (1998) **Sept 98 LED:15**, the court decided a passenger was seized when the officer ordered her out of the car, placed her purse out of reach, asked if she had drugs or weapons, and asked if she would consent to a search.

The State incorrectly argues no seizure took place because [the officer] was justified under the community caretaking function in identifying the owner of the coat. The community caretaking function is an exception to the requirement of a warrant to stop or search.

We emphasize again, the reason for the initial police contact had been discharged prior to ordering Mr. Coyne and Mr. Burt to sit on the hood of the police car. They were entitled to be free from further governmental interference with their movements at that point. Although the deputy thought their story was "suspicious," this suspicion, similar to a "dazed expression" is not enough to justify further intrusion. In other words, it did not amount to a reasonably articulated suspicion.

[Some citations omitted; **LED** citations added]

The Coyne-Burt Court concludes its analysis by explaining that the unlawful seizure of Coyne and Burt was not cured by their subsequent consent. The Court points out that the request for consent came immediately after the unlawful seizure, and therefore the consent was clearly not free of the taint of the unlawful seizure.

**Result:** Affirmance of Benton County Superior Court order suppressing the evidence and dismissing charges against Daniel William Coyne and Clinton Joseph Burt.

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

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be accessed through a separate link clearly designated.

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 "legislation" or other topical entries in the "Access Washington Home Page "Index."

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [[johnw1@atg.wa.gov](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the LED should be directed to Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 439-3740, ext. 272; Fax (206) 439-3752; email [[EJohnson@cjtc.state.wa.us](mailto:EJohnson@cjtc.state.wa.us)]. LED editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED 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/>].