



Law Enforcement

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Digest

HONOR ROLL

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BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

KNOWLEDGE THAT GUN POSSESSION VIOLATES DV RESTRAINING ORDER IS NOT AN ELEMENT OF FEDERAL CRIME -- IGNORANCE OF THE LAW IS NO EXCUSE - In U.S. v. Kafka, 222 F.3d 1129 (9th Cir. 2000), the Ninth Circuit of the U.S. Court of Appeals holds that a person who knows that he is subject to the type of domestic violence restraining order covered by the federal statute at 18 U.S.C. violates the statute if he is in possession of a gun, even if he does not know that gun possession is barred under the federal law. The Kafka Court explains that the federal statute at 18 U.S.C. section 922(g) (8):

...prohibits the possession of a firearm by an individual subject to a domestic violence restraining order issued after a hearing in state court. 18 U.S.C. § 922(g)(8). An individual charged under this statute must have received actual notice of the restraining order hearing and must have had an opportunity to participate in the hearing. In addition, section 922 (g)(8) requires that the restraining order include either 1) a finding that the individual represents a credible threat to physical safety of his intimate partner or child, or 2) an explicit prohibition on the individual's use of physical force against his intimate partner or child.

The Kafka Court then summarizes its view that knowledge of unlawfulness is not an element of the federal crime of gun possession by a DV order respondent:

To obtain a conviction, the government must prove, as set forth in 18 U.S.C. 924 (a)(2), that a defendant “knowingly” violated section 922 (g)(8). This knowledge requirement applies only to the act of possession, not to the prohibition on possessing firearms.

Also, the Kafka Court rejects Kafka’s constitutional due process challenge to the federal law, pointing out that Kafka’s argument ignores the traditional rule of law that “ignorance of the law excuses no one.”

Result: Affirmance of U.S. District Court (Eastern Washington) conviction of Joe John Kafka for possession of a firearm while under a DV restraining order in violation of 18 U.S.C. section 922(g)(8).

LED EDITORIAL CROSS REFERENCE NOTE: The rule for firearms possession crimes is the same under Washington statutes. If a person is barred from possessing a firearm under Washington statutes, it does not matter that the person did not know that he or she was barred from possession. See State v. Anderson, 141 Wn.2d 357 (2000) Oct. 2000 **LED:13** (Anderson did hold, however, that knowledge of the presence of the firearm is an element of the crime of unlawful possession under RCW 9.41.040, and therefore that the State must prove beyond a reasonable doubt that the defendant charged with this crime was aware of the presence of the firearm).

Compare the Kafka and Anderson Courts’ traditional adherence to the rule that “ignorance of the law is no excuse” to the Court of Appeals interpretation of the “unlawful imprisonment” statute in State v. Warfield, ___ Wn. App. ___, 5 P.3d 1280 (Div. II, 2000) See this month’s **LED** at 21. The Warfield Court made an unusual interpretation of law in holding that the State must prove beyond a reasonable doubt that an “unlawful imprisonment” defendant knew that he or she did not have lawful authority to restrain the alleged victim.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

PRO-STATE CAUSATION RULING IN MURDER CASE PRECLUDES STABBER FROM ARGUING THAT VICTIM'S POST-STABBING ILLEGAL DRUG-USE OR FAILURE TO TIMELY SEEK MEDICAL CARE CAUSED HIS DEATH -- In State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000), the State Supreme Court rules, 5-4, that the trial court did not err in a murder trial in precluding the defendant from arguing to the jury that the victim's illegal drug use following a stabbing by the defendant was a proximate cause of the victim's death.

The majority opinion's description of the key facts and of the trial court proceedings are as follows:

Samuel "Lucky" Thomas allegedly robbed Antonio Perez-Cervantes. Thereafter, and presumably in retribution, Perez-Cervantes and several accomplices severely beat Thomas. During the affray, Perez-Cervantes twice stabbed Thomas with a pocketknife. The stabbing punctured an artery between Thomas' ribs, which caused blood to rush into the left side of his chest cavity. The blood eventually exerted enough pressure on Thomas' left lung to dangerously restrict his breathing.

Paramedics were summoned to the scene of the incident and, on arrival, determined that Thomas should be transported to a hospital for surgery. During surgery, doctors inserted a tube into his chest and successfully evacuated the blood and air from his chest cavity. Thomas remained at the hospital for several days, until his condition stabilized sufficiently to permit him to be released. He then went home to recuperate.

Two days after he was released from the hospital, Thomas began complaining to his girl friend, Annette Holman, about his injuries. Two days later, he began experiencing chest pain and shortness of breath. When Thomas' breathing became alarmingly shallow, Holman called 911 to summon help. Unfortunately, Thomas stopped breathing before the medics arrived. Efforts to resuscitate him failed and he was pronounced dead.

An autopsy on Thomas' body indicated that, at the time of his death, he had approximately five liters of fresh blood in his left chest cavity. Pierce County medical examiner, Dr. Emmanuel Lacsina, found significant hematoma around the area of the stab wound and, therefore, ruled out any other trauma as the cause of Thomas' internal bleeding and death. He determined that Thomas' "death was due to a stab wound," with chronic obstructive pulmonary disease, which Dr. Lacsina described as "real bad emphysema," as the only "contributing factor."

Toxicology tests revealed the presence of the "breakdown product[s]" of heroin and cocaine in Thomas' bloodstream at the time of death. Consequently, Dr. Lacsina amended the death certificate to add "acute cocaine and heroin abuse as contributing factors."

Thereafter, an eyewitness to the attack on Thomas informed a Tacoma police detective that Perez-Cervantes had stabbed Thomas. Based on that information, the Pierce County prosecutor charged Perez-Cervantes with murder in the second degree.

At trial, Dr. Lacsina was the only witness who testified about the cause of Thomas' death. He said that Thomas died from "internal bleeding as a result of the stab wound." He also testified that cocaine use could have caused an elevation in blood pressure, leading to "re-bleeding" from Thomas' stab wound, and that heroin use could have masked the pain of this re-bleeding.

Although Dr. Lacsina opined that the levels of cocaine in Thomas' blood could be enough to cause a "heart attack or a jolt," he agreed that "the presence of blood in [Thomas'] stab wound" ruled out the possibility that Thomas' death was due to a drug

overdose. He, therefore, classified Thomas' death as a "homicide," rather than as "undetermined," the classification for a death by drug overdose. Dr. Lacsina did not express an opinion as to whether any amount of cocaine and/or heroin could independently cause spontaneous rupturing of a drug user's vascular structure. He did indicate, however, that the toxicology test results did not change his opinion as to cause of death.

Following presentation of the evidence, the State moved to limit closing argument by defense counsel "relating to the cause of death." After hearing argument on the motion, the trial judge stated: "[t]here are other contributing factors; that's the evidence, contributing factors. But there is no testimony, none has been offered, that those factors rise to the level of cause." He, therefore, granted the State's motion and prohibited defense counsel from arguing to the jury that Thomas' drug use or failure to seek medical care caused his death.

The majority opinion begins its analysis of the causation issue by discussing arguably analogous cases in which Washington courts have precluded murder charge defendants from arguing they were not the cause of death. In those cases, murder defendants were not allowed to argue as the cause of death: hospital or doctor negligence in treating the injuries caused by defendant, or a lawful removal of life support from defendant's victim. The majority opinion then summarizes why Mr. Perez-Cervantes cannot argue his causation theory:

Had there been evidence that Thomas' drug use had some other effect on him, such as causing a "heart attack or jolt," and that this caused his death independently of the stab wounds, counsel would have been entitled to make the argument he wished to make. There was, though, no such evidence. Dr. Lacsina did not testify that cocaine use alone could possibly cause the internal bleeding, or that Thomas died as the result of anything other than that bleeding. In fact, as we have noted, his testimony was quite to the contrary. In sum, Perez-Cervantes can point to no evidence in the record which gives rise to an inference that the sole cause of Thomas' death was his ingestion of drugs or failure to seek medical attention.

Even if there had been evidence that Thomas' drug use or his failure to seek medical attention was an intervening proximate cause of his death, it would not be a superseding cause under the jury instruction set forth above, if in the exercise of ordinary care, Perez-Cervantes should reasonably have anticipated the cause. This does not mean that the injury is foreseeable, but, rather, in the words of the instruction, that the "death fall within the general field of danger which the defendant should have reasonably anticipated." Here, the bleeding which filled Thomas' chest cavity may have been facilitated by Thomas' drug use or failure to seek medical attention, but it was certainly within the general field of danger created by Perez-Cervantes' act of plunging his knife into Thomas.

In sum, we are satisfied that there was insufficient evidence that Thomas' death was proximately caused by his use of drugs or his failure to seek medical care. In any event, neither of those causes superseded Perez-Cervantes' act as a proximate cause of Thomas' death. The trial court, therefore, did not abuse its discretion in preventing Perez-Cervantes' counsel from making that argument to the jury.

The dissent authored by Justice Johnson and joined by Justices Smith, Madsen, and Sanders argues that the defendant should have been allowed to argue that the victim's ingestion of illegal drugs and failure to seek medical attention following release from the hospital were intervening causes of his death.

Result: Reversal of Court of Appeals decision and affirmance of Pierce County Superior Court conviction of Antonio Perez-Cervantes for second degree murder.

WASHINGTON STATE COURT OF APPEALS

ARREST ON WARRANT MADE 300 FEET AWAY FROM VEHICLE RECENTLY OCCUPIED BY ARRESTEE DID NOT JUSTIFY “SEARCH INCIDENT” OF VEHICLE UNDER STROUD RULE

State v. Porter, ___ Wn. App. ___, 6 P.3d 1245 (Div. I, 2000)

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

On January 9, 1997, [a police detective] observed Porter driving her van on Trospen Road in Tumwater. Porter's adult son, Charles, sat in the passenger seat next to her. [The detective] recognized both of them from prior incidents and he suspected that Charles had an outstanding warrant for his arrest. A computer warrants check confirmed [the detective's] suspicion.

[The detective] did not attempt to stop the van himself. At the time, he was dressed in civilian clothes and was driving an unmarked police car. Instead, he called for a uniformed Tumwater police officer to make the arrest.

Meanwhile, Porter drove to a gas station, legally parked the van next to a pay telephone, and got out to place a call. [The detective] then saw the two occupants go to the rear of the van, do "something which [he] really couldn't see," and close the van doors. According to [the detective], Porter and Charles looked directly at him. Charles then re-entered the van, emerged with a leashed dog, and began walking along Trospen Road. [The detective] did not follow Charles. He chose to maintain his position, keeping both Charles and the van within sight.

A uniformed police officer arrived approximately 25-30 seconds later. The officer arrested Charles on the side of the road about 300 feet from the van. The officer searched Charles and discovered a small plastic bag containing methamphetamine. Charles was then handcuffed and placed in the back of the officer's patrol car.

Porter observed the arrest and walked from the van to the arrest location. She retrieved the dog from Charles and continued to walk it along the road away from the van. She did not return to the van.

The uniformed officer then drove to Porter's van where [the detective] was waiting. Acting without a warrant, [the detective] opened the van and saw items consistent with the manufacture of methamphetamine. The van was impounded and later, based upon [the detective's] observations, a search warrant was obtained authorizing a full search. The subsequent search revealed glass vials and plastic bags, which were later found to contain amounts of pseudoephedrine, a precursor to methamphetamine.

The State charged Porter with possession of pseudoephedrine with the intent to manufacture methamphetamine. Porter moved to suppress the evidence seized from the van, arguing [the detective's] initial search could not be justified as a search incident to the arrest of her son. The trial court denied the motion. Porter appeals from her jury conviction.

ISSUE AND RULING: Was the search of the van a lawful vehicle search “incident to arrest” under the Stroud rule, where the warrant arrestee was 300 feet from the van at the time of arrest, and, though a recent occupant of the van, the arrestee had not been observed to be engaged in probable illegal activity in or near the van during the time of occupancy? (ANSWER: No, the search was unlawful)

Result: Reversal of Thurston County Superior Court conviction of Karen Leann Porter for possession of pseudoephedrine with the intent to manufacture methamphetamine.

ANALYSIS:

The Washington rule on warrantless search of a vehicle incident to arrest of an occupant of the vehicle derives from the “independent grounds” state constitutional ruling in State v. Stroud, 106 Wn.2d 144 (1986). The Stroud “bright line” rule can be summarized roughly as follows (this is the LED’s summary, not the Court’s):

During the process of making a custodial arrest of a vehicle occupant, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed securely in a patrol car, officers have automatic authority to search the passenger compartment of the vehicle for weapons or destructible evidence. The search must occur reasonably soon after the arrestee has been secured, and the search must occur while the arrestee is still at the scene. This warrantless search may not extend to locked containers nor to the trunk or under the hood. The search may extend to any unlocked containers in the passenger area of the vehicle, except for containers that the police reasonably believe belong to occupants who themselves are not subject to custodial arrest.

The Porter case raises the issue of when an arrestee who is not inside an unlocked vehicle at the moment of arrest will be deemed a vehicle occupant so as to trigger authority to search the vehicle under Stroud. The Porter Court notes that the Washington Supreme Court has not yet squarely addressed this issue, though the Porter Court does note that, in Stroud, neither arrestee was inside the vehicle when the officer drove up on the vending machine thieves in that case (one arrestee in Stroud was in the swing of the door of the car, while the other arrestee was a few feet away near the vending machine). The Porter Court instead focuses on two Washington Court of Appeals decisions, one by Division One, and one by Division Three, that have more squarely addressed the issue of whether a nearby, recently occupied, unlocked vehicle may searched as an incident of arrest.

In State v. Fore, 56 Wn. App. 329 (Div. I, 1989) **March 90 LED:05**, Division One upheld a warrantless vehicle search case in a case which began when a Seattle police officer watched through binoculars as drug-dealer Fore and his companion operated out of Fore’s car, selling baggies of marijuana to visitors to Magnuson Park. Fore appeared to have a stash of marijuana under the passenger-side dash of the car. Fore then drove out of the park with his companion, and the officer followed in his police car moments later. The officer temporarily lost sight of Fore’s car, but the officer then spotted the car parked at a small market. Fore was on the pay phone near the market, while Fore’s companion was standing in the market’s doorway. Officers arrested them and then searched their car, which was very close by in the mini-mart’s small parking lot. The officers found Fore’s supply of marijuana under the passenger-side dash.

Division One of the Court of Appeals held that this warrantless car search was a lawful “search incident” because: (1) Fore’s car had been used in the suspected criminal activity in the previous few minutes, and (2) the two arrestees were standing fairly near the car at the time of arrest. The Fore Court explained:

[T]he search of Fore’s vehicle was essentially contemporaneous with the arrest and occurred while Fore was still on the scene. ...[N]o significant amount of time elapsed between the arrest and the search. ...Although neither Fore nor Reber was in the vehicle, both were sufficiently close to be immediately visible to the arriving officers. Moreover, both men had been occupants of the moving vehicle just a few minutes prior to the arrest. Finally, the vehicle itself was directly connected to the probable cause determination supporting the arrest.

Under these circumstances, we need not explore the outer boundaries of a permissible vehicle search incident to an arrest. The search of Fore’s vehicle was sufficiently proximate, both temporally and physically, to the arrest to preclude any meaningful distinction between this case and Stroud.

[Some citations omitted]

In State v. Lopez, 70 Wn. App. 259 (Div. III, 1993) **Nov. 93 LED:15**, Division Three of the Court of Appeals upheld a warrantless vehicle search in a case which involved a “reverse sting” operation. Lopez had driven his pickup truck to a confidential informant’s home to make a buy of a large quantity of marijuana. Lopez parked his pickup on the street and walked 50 to 60 feet to the CI’s garage to make the buy. Police were electronically monitoring the transaction pursuant to a lawful authorization under chapter 9.73 RCW.

At one point in the conversation between Lopez and the CI, Lopez returned to his pickup for an unrevealed purpose, got inside for a few moments, and then returned to the garage to complete the deal. The conversations between Lopez and the CI gave the monitoring officers both (A) probable cause to arrest Lopez and (B) concern that the CI was in immediate danger from Lopez. The officers therefore arrested Lopez while he was still in the garage. The officers then searched Lopez’s pickup without consent or a warrant, finding large amounts of money and other incriminating evidence. Division Three concluded under these facts that there was a sufficient link of Lopez to the pickup – in terms of time, location and nature of use of the pickup – to justify the warrantless search as one conducted incident to arrest.

In Porter, Division Two appears to agree with Division One’s analysis in Fore, but Division Two appears to disagree with Division Three’s analysis in Lopez. The Porter Court concludes under the following analysis that the facts of the case before it do not justify the warrantless search of Ms. Porter’s van, determining the van to be insufficiently linked to the arrest in terms of time, distance and nature of activity:

Applying this reasoning here, the search of the van was impermissible. At the time the police initiated the arrest, Charles was 300 feet from Porter’s van. At such a distance Charles had no opportunity to destroy evidence or obtain a weapon from inside the van. It would be unreasonable to conclude that the van was within his area of “immediate control.” Although the officer had the authority to arrest him while he was in the vehicle, the arrest did not occur until he was walking along the street. When the officer arrested Charles, a proper search of his person was conducted and a bag of methamphetamine was discovered. However, the record shows the van had no connection with the arrest. Nor did the officer have reason to believe that contraband would be found in the van. As [the detective] plainly testified, he “really couldn’t see” what Charles and Porter were doing before the arrest. Therefore, the search exceeded its permissible scope.

Our holding requires a case-by-case evaluation of the proper scope of a search incident to an arrest. Consistent with Stroud, however, our holding does not require the police to demonstrate actual exigent circumstances to permit a search incident to an arrest. Where a valid custodial arrest occurs, police officers are not required to weigh whether the totality of the circumstances justifies a search incident to an arrest. The totality of the circumstances will determine, however, the proper scope of the search. Police officers will have to determine whether a vehicle that the arrestee has recently occupied is within the area of the arrestee’s immediate control at the time they initiate the arrest. If so, the scope of the search incident to the arrest may include the interior compartment of an unlocked vehicle. We see this task as being no different than determining the permissible area to search incident to an arrest in a home. As recently stated by our Supreme Court, “Officers in the field routinely make, often subtle, factual determinations of probable cause, articulable suspicion, and the like.”

[Some citations omitted]

LED EDITORIAL NOTE AND COMMENTARY: In a footnote, the Porter Court cites Division Two’s decision in State v. Perea, 85 Wn. App. 339 (Div. II, 1997) **June 97 LED:02** for the proposition that “police officers may not validly search a locked vehicle incident to an arrest of the driver.” (Emphasis added) We believe that this dicta (i.e., a statement by the Court on a

point not necessary to the decision in the case at hand) oversimplifies the “search incident” rule for locked vehicles.

Even though Stroud was an “independent grounds” ruling making locked containers off-limits in a search incident to arrest, we are fairly confident, based on our reading of a handful of court decisions from other jurisdictions, that, if an initially unlocked vehicle would otherwise be subject to search incident to arrest, and if an officer with authority to make a custodial arrest announces to person that he or she is under arrest before that person is able to lock the vehicle, then the vehicle’s passenger area will remain subject to search under Stroud. See State v. Smith, 119 Wn.2d 675 (1992) Nov. 92 LED:04 (Smith is a non-vehicle “search incident” decision where the Washington Supreme Court held that the scope of search incident to arrest is determined by the circumstances existing at the moment that the arrest process begins).

On the other hand, if the person is initially stopped for a mere traffic violation, and the person disembarks and locks the vehicle before the custodial arrest process begins, then, while we have previously questioned the strength of Perea in this hypothetical circumstance, in light of the post-Perea decision of the Washington Supreme Court in State v. Young, 135 Wn.2d 498 (1998) Aug. 98 LED:02, we now think the arresting officer would be on fairly thin state constitutional ice in relying on “search incident” authority to make a warrantless search of the locked vehicle absent consent or exigent circumstances.

Of course, if a search warrant or consent can be obtained in these circumstances, that is the way for the officer to proceed.

TRAFFIC STOP HELD NON-PRETEXTUAL BASED ON TRIAL COURT FACT-FINDING MEETING LADSON’S COMBINATION OBJECTIVE-SUBJECTIVE TEST

State v. Hoang, 101 Wn. App. 732 (Div. I, 2000)

Facts and Proceedings: Seattle Police Department patrol officer Kamalu parked his patrol car in a secluded spot with lights-out, watching a narcotics hotspot street area. The officer watched a car stop in sequence at two clusters of people, consistent with drug-dealing, but the officer saw no actual transactions. That car then proceeded to make a left turn in front of the officer without signaling the turn. Officer Kamalu immediately activated his overhead lights and stopped the car, driven by Minh Hoang.

The officer learned that Hoang’s driver’s license was suspended. In a search of the car incident to Hoang’s arrest for driving while license suspended, the officer found a rock of cocaine in the passenger area of the car. The officer took Hoang to jail and booked him for possession of cocaine. Following what he later testified was his “usual practice” where evidence of a felony develops during a traffic stop, Officer Kamalu did not cite Hoang for his traffic offenses.

Proceedings: (Excerpted from Court of Appeals opinion)

The State charged Hoang with possession of cocaine. At the CrR 3.6 suppression hearing, Officer Kamalu testified to the above facts. In response to questioning, he explained that he pulled Hoang over for failing to signal a left turn. But for the failure to signal the turn, the officer testified that he would not have stopped the vehicle. In response to further questioning, he explained that it was not his practice to issue a citation for traffic violations where felony charges would ultimately be filed.

Hoang also testified at the suppression hearing. He admitted that the left-turn signal on the Honda Civic was not in working order on the night of his arrest.

Defense counsel argued that the stop for the traffic infraction was pretextual. Because the suppression hearing was held some five months before the Supreme Court handed down its opinion in State v. Ladson, 138 Wash.2d 343 (1999) **Sept 99 LED:05**, neither counsel articulated the “totality of the circumstances” requirement found in that case, and both sides argued that the question before the court was whether the traffic stop was objectively reasonable. In summing up, the trial court in

this case found that the traffic stop was objectively reasonable, but also noted the following circumstances supporting the ruling that the stop was not pretextual:

[T]he officer did nothing to depart from [normal procedure] in making a stop to enforce traffic regulations....[W]hen he made contact with the Defendant, it was very clear in the testimony that the officer did not inquire about anything except [] questions that would be asked on a routine traffic stop: Do you have a driver's license, can I see your registration and your insurance [] certificate. There were no questions about what he was doing there at that time of the morning.

The trial court subsequently entered the following written finding of fact, among others:

[Officer] Kamalu was acting within his normal traffic control duties when he acted by pulling the defendant over for failing to signal. The court finds that [Officer] Kamalu would have made the same decision to contact the defendant in the course of a general traffic patrol. The court finds that there is no issue of a "pretext" stop on this record.

The [trial] court also found that Officer Kamalu was credible with respect to the reason for the traffic stop, and that the traffic stop was appropriate and supported by the observation of a traffic violation. The court concluded that the subsequent arrest was justified by the determination that Hoang's driver's license was suspended, and that the search leading to the discovery of the cocaine was a valid search incident to arrest. Accordingly, the court denied the request to suppress the cocaine. The case proceeded to trial and Hoang was convicted as charged. This appeal followed.

ISSUE AND RULING: Did the trial court err as a matter of law in ruling that the stop of Hoang was not pretextual? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of Minh Hoang for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

"[P]retaxual traffic stops violate article 1, section 7 [of the Washington constitution] because they are seizures absent the 'authority of law' which a warrant would bring." The essence of every pretextual traffic stop is that "the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." "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." This is because "our constitution requires [that] we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary." Nevertheless, the police may still enforce the traffic code, so long as they do not use that authority as a pretext to avoid the warrant requirement for an unrelated criminal investigation. [LED Editorial Note: All quotations in the paragraph above are from the State Supreme Court's Ladson opinion.]

It is clear from the record that the trial court did consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his behavior -- this notwithstanding the fact that Ladson was not handed down until some five months after the suppression hearing in this case, and notwithstanding the fact that both counsel argued that the objective reasonableness standard applied. In summing up its oral ruling, the trial court observed that, upon making the stop, the officer asked only the questions that would be asked on a routine traffic stop: Do you have a driver's license? May I see the vehicle

registration? May I see the certificate of insurance? He asked no questions regarding what Hoang was doing in that area at that time of morning. We also observe that, unlike Ladson and DeSantiago [State v. DeSantiago, 97 Wn. App 446 (Div. III 1999) **Nov 99 LED:12**], here, the officer did not follow Hoang hoping to find a legal reason to stop him: Hoang made a left-hand turn without signaling right before the officer's eyes, and the officer immediately pulled him over, just as he would have for any other routine stop for a traffic infraction committed in his presence.

Hoang's position in this appeal is tantamount to a contention that this court may look behind an unchallenged finding of fact that the traffic stop in question would have been made in any event, and conclude instead as a matter of law that the stop was unconstitutionally pretextual merely because the officer who made the stop first saw the vehicle while observing a narcotics hotspot and saw the driver of the vehicle engage in behavior that could be entirely innocent (such as asking for directions) or not entirely innocent (such as asking if drugs were for sale) – and because the officer, not being entirely naive, suspected that the behavior was not entirely innocent. But Ladson does not stand for that proposition. Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

That Officer Kamalu ultimately elected not to cite Hoang for turning without signaling, or for driving while his license was suspended, or for driving without license plates on the car, and instead to book him only for unlawful possession of cocaine are among the factors to be considered in determining the officer's subjective intent for making the stop, but are not dispositive. Here, even up to the date of the suppression hearing, the prosecutor was still considering the possibility of charging Hoang with driving while license suspended in the second degree -- but ultimately decided not to do so. We find nothing in Ladson that limits prosecutorial discretion with respect to charging decisions, or that requires police to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext.

In sum, here the trial court entered unchallenged findings of fact that fully support its conclusion of law that this stop was not unconstitutionally pretextual, and in making that determination the trial court applied the standard required by Ladson, by considering the totality of the circumstances, including the officer's subjective intent and the objective reasonableness of the officer's behavior. The trial court did not err in denying the motion to suppress evidence. Accordingly, we affirm Hoang's conviction for unlawful possession of cocaine.

[Some citations omitted]

POLICE BICYCLE CAN BE “POLICE VEHICLE” UNDER “FELONY ELUDING”

State v. Refuerzo, ___ Wn. App. ___, 7 P.3d 847 (Div. I, 2000)

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

Because he suspected Refuerzo was involved in criminal activity, a uniformed Seattle police officer rode his officially marked police bicycle alongside the car Refuerzo was driving. The driver's side window was open, and the officer identified himself and commanded Refuerzo to pull over. Instead, Refuerzo fled.

He proceeded to weave through heavy, late-afternoon vehicular and pedestrian traffic, cut across four lanes of traffic in order to make a turn, disobeyed stop signs, and drove through several cross walks in the Pike Place Market area. During his

pursuit, the bicycle officer radioed the description of the car and was soon joined by a uniformed officer in a marked patrol car, who activated his flashing lights and siren. After continuing to drive for a few more blocks, Refuerzo pulled over, fled into a building, and was arrested inside.

A jury found Refuerzo guilty of violating RCW 46.61.024, attempting to elude a pursuing police vehicle. He received a standard range sentence and appealed.

ISSUE AND RULING: 1) Is Refuerzo's conviction under RCW 46.61.024, the "felony eluding" statute, independently sustainable by evidence that he attempted to elude a marked police car which, with lights and siren activated, joined the bicycle officer's chase? (Answer: Yes); 2) Alternatively, is an appropriately marked police bicycle a "police vehicle" such that Refuerzo's attempt to elude the bicycle officer after he verbally ordered Refuerzo to stop his vehicle could constitute "felony eluding"? (Answer: Yes); 3) Was Refuerzo's driving behavior, which did not exceed the speed limit and which did not force pedestrians to dodge his car, nonetheless "willful and wanton disregard for the lives or property of others," where there was evidence that: a) he wove through downtown traffic during a busy time, b) he disregarded several stop signs and lights, c) he cut across four lanes of traffic while turning and went through a series of crosswalks in the presence of heavy pedestrian traffic, and d) his vehicle struck a parked vehicle during the chase? (Answer: Yes).

Result: Affirmance of King County Superior Court conviction of James Melecio Refuerzo for violation of RCW 46.61.024.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Police car chase as support for conviction

RCW 46.61.024 provides:

Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

Refuerzo admits that the State proved that a uniformed police officer in a marked police car activated his lights and siren and joined the chase. He implicitly contends, however, that the prosecutor elected, during closing argument, to rely solely on Refuerzo's flight from the bicycle officer as the basis for the charge. Therefore, he implies, jurors were precluded from relying on the driving officer's signal and pursuit to find him guilty. We disagree.

The court instructed the jury that the only evidence it could consider was witness testimony and admitted exhibits. The judge also told jurors the attorneys' remarks and arguments were not evidence. Both the bicycle officer and the uniformed driving officer testified that Refuerzo disregarded the flashing signal lights and siren of the marked police car. The required signal to stop given by the officer may be by emergency light or siren, as well as by hand or voice. Therefore, although the incident began when Refuerzo fled from the bicycle officer, jurors could have reasonably relied on his disregard of the flashing lights and siren of the pursuing officer's marked police car to find him guilty. [Court's Footnote Directs Attention To: State v. Ritts, 94 Wn. App. 784 (1999) June 99 LED: 16 (eluding charge may not be

proven where driver failed to stop for flashing lights of police car that was not properly marked with identifying lettering or logo).]

2) Police bicycle chase as support for conviction

Moreover, even if the prosecutor elected to base the charge solely on Refuerzo's flight from the bicycle officer, and even if the jury considered only that means, the result would be the same because an appropriately marked police bicycle is "an official police vehicle" for purposes of the attempting to elude statute, and substantial evidence supports either means of violating the statute.

The Motor Vehicle Code defines "vehicle" as follows:

"Vehicle" includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. The term does not include devices other than bicycles moved by human or animal power or used exclusively upon stationary rails or tracks. Mopeds shall not be considered vehicles or motor vehicles for the purposes of chapter 46.70 RCW. Bicycles shall not be considered vehicles for the purposes of chapter 46.12, 46.16, or 46.70 RCW.

Refuerzo acknowledges that this provision includes bicycles within the definition of "vehicle." But he contends that within the context of its use in the eluding provision, RCW 46.61.024, "police vehicle" refers back to "motor vehicle."

Refuerzo also relies on the "marking" statute, which applies to the eluding provision. The "marking" statute requires publicly owned "automobile[s] or other motor vehicle[s]" to be so identified by conspicuous labels.

We disagree with Refuerzo's analysis of this statutory scheme. The reference to "motor vehicle" in the eluding statute applies to the alleged offender's vehicle, not the officer's. In other words, one cannot be convicted of attempting to elude unless one is driving a motor vehicle. Had the Legislature intended "police vehicle" to exclude police bicycles, it would have used the term "police motor vehicle," or a similar term. Because it used different words, we presume a different meaning was intended to attach to the terms.

Our interpretation that police bicycles are official police vehicles within the meaning of the eluding statute is also consistent with State v. Malone [106 Wn.2d 607 (1986)], which broadly interpreted the terms "police vehicle" and "police officer" to include vehicles and officers from other jurisdictions.

The Malone court also concluded that the Legislature enacted the eluding statute to address the dangers of high-speed chases. Refuerzo argues that this supports excluding bicycles from the definition of police vehicle. We disagree. "High-speed" does not necessarily mean speeds beyond that which bicycles can travel, or driving in excess of the posted speed limit. Rather, when read in conjunction with the "wanton and wilful" element, "high-speed" simply means driving substantially faster than conditions warrant--such as here, when a driver attempts to elude an officer in the presence of heavy auto and pedestrian traffic.

We also will not read a statute hypertechnically so as to yield an absurd result. Refuerzo's reading results in an absurdity. Bicycles are widely used by police for a variety of law enforcement functions, from general patrol to undercover operations. A driver who attempts to elude an officer by weaving in and out of heavy traffic, disregarding stop signs and lights, and proceeding through crosswalks in the

presence of numerous pedestrians is no less culpable merely because the pursuing officer is on a bicycle.

For these reasons, we hold that an appropriately marked bicycle is an official police vehicle for purposes of the eluding statute.

3) Sufficiency of evidence of wilfulness or wantonness

Refuerzo claims that the State failed to prove wilful or wanton conduct because he did not exceed the speed limit or force pedestrians to evade his car during the chase. This claim lacks merit.

The State need not prove that the defendant's driving endangered anyone else, or that a high probability of harm actually existed. Instead, the evidence need only establish that the defendant engaged in conduct from which a juror could infer wanton or wilful disregard for the lives or property of others.

The State's proof meets that standard here. Refuerzo weaved through traffic during a busy time in downtown Seattle. He disregarded several stop signs and lights, cut across four lanes of traffic while turning, and went through a series of crosswalks in the presence of heavy pedestrian traffic in the Pike Place Market area. In addition, the bicycle officer testified that he saw damage to a parked car and Refuerzo's car consistent with a minor collision.

From these facts, a reasonable juror could infer that Refuerzo drove with a wanton and wilful disregard for lives and property.

[Citations and footnotes omitted]

MENTAL STATE ELEMENT OF HARASSMENT STATUTE GETS PRO-STATE INTERPRETATION IN MIDDLE SCHOOL INDIRECT THREATS CASE

State v. J.M., 101 Wn. App. 716 (Div. I, 2000)

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

On April 28, 1999, approximately one week after the highly-publicized school shootings at Columbine High School in Littleton, Colorado, two Denny Middle School students, fourteen-year-old S.B. and thirteen-year-old J.T., were walking home from school. Thirteen-year-old J.M., who had recently been suspended from Denny Middle School, joined S.B. and J.T. and began to complain about the punishment he received at school. According to J.T., J.M. was angry at Wayne Hashiguchi, the principal of Denny Middle School; John Boyd, a Denny Middle School administrator; and Kevin Sharper, a Denny Middle School security person. The three students began talking about the Columbine shootings and J.M. said, "[T]hat's like something I would do [but] I'll only kill Mr. Hashiguchi, Mr. Boyd and Mr. Sharper." J.M. stated that he and his neighbor had a plan to enter the school, kill these men, and then move out of state. According to J.T., J.M. seemed excited and was "socking" his own hand as he spoke. S.B. also observed that J.M. was excited and anxious.

At first, S.B. did not take J.M.'s statements seriously. But "[a]s he thought about it that night he started to think that it was possible [J.M.] would do something like that." The next day at school, S.B. told a friend what J.M. had said and asked that friend if he thought J.M. "would carry through on his threat." A Denny Middle School teacher overheard this conversation and reported it to a school counselor. The counselor brought S.B. to Hashiguchi, and S.B. told Hashiguchi what J.M. had said the previous day. Hashiguchi-who was aware of J.M.'s disciplinary problems at school and had observed J.M. "cry and be emotional, angry and loud"-was "shocked, surprised and concerned" and "afraid for his personal safety[.]"

Hashiguchi reported the incident to the Seattle Police Department, and the State charged J.M. with felony harassment. At J.M.'s adjudicatory hearing at the close of the State's case, J.M. moved for dismissal, arguing that the State presented insufficient evidence that J.M. knew his threat would be communicated to the school principal. The juvenile court disagreed that it was necessary for the State to prove such knowledge, and denied the motion. Subsequently, the court found that J.M. made threats that were communicated to Hashiguchi, that J.M. made these threats knowingly, and that Hashiguchi's fear for his safety was reasonable, in light of the recent shootings at Columbine High School, J.M.'s disciplinary record, and Hashiguchi's personal experience with J.M.'s emotional reaction to disciplinary measures that had previously been imposed. The court adjudicated J.M. guilty of felony harassment.

ISSUES AND RULINGS: In a harassment prosecution based on a perpetrator's threatening statements to third parties who are not the target of his threats, must the State prove that the perpetrator: 1) knew or should have known that the person threatened would learn of the threat; or 2) knew or intended that the person threatened would be placed in fear the threat would be carried out? (ANSWERS: 1) No, 2) No)

Result: Affirmance of King County Superior Court juvenile adjudication of guilt for felony harassment.

ANALYSIS:

The Court of Appeals summarizes its holding in the opinion's opening paragraph:

The juvenile court adjudicated J.M. guilty of felony harassment in violation of RCW 9A.46.020(1)(a)(i) and he appeals, contending that reversal is required because the State failed to prove beyond a reasonable doubt that J.M. knew or reasonably should have known that his threat to kill his school principal would be communicated to the principal, and also failed to prove that J.M. knowingly engaged in words or conduct that placed the school principal in reasonable fear that the threat would be carried out. We conclude that the only mens rea [i.e., mental state] intended by the Legislature is as stated in the plain language of section (1)(a)(i) of the harassment statute: The perpetrator must knowingly communicate a threat to cause bodily injury immediately or in the future to the person threatened or to any other person. The State need not prove, in addition, that the perpetrator knew or should have known that the person threatened would learn of the threat, but only that the person threatened did learn of it and, based on words or conduct of the perpetrator, was placed in reasonable fear that the threat would be carried out. The State also need not prove the perpetrator's state of mind with respect to the words or conduct that placed the person threatened in reasonable fear that the threat would be carried out. Accordingly, we affirm the adjudication.

The J.M. Court goes on to explain in detail (not included in this LED entry) why, under its interpretation of the statute: a) the State need not prove that J.M. knew his school peers would pass his threat on to the principal, and b) the State need not prove that J.M. knew or intended that the principal would be placed in reasonable fear when he learned of the threat.

NO "STANDING" FOR VISITOR WHO WAS VIOLATING DV "NO CONTACT" ORDER; FURTHERMORE, RESIDENTIAL ENTRY BY POLICE TO MAKE ARREST OF TRANSIENT HOUSEGUEST WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES

State v. Jacobs, 101 Wn. App. 80 (Div. II, 2000)

Facts: (Excerpted from Court of Appeals opinion)

In June 1997, Kitsap County District Court entered a domestic violence no-contact order prohibiting Jacobs "from making any attempts to contact . . . James Russell." In

July 1997, Jacobs was convicted of second degree criminal trespass and fourth degree assault (domestic violence) and again ordered to "[h]ave no contact with . . . James Russell." Jacobs was convicted multiple additional times for violating the no-contact order and ordered to "not have any contact w/James Russell": in August 1997, in October 1997, and in February 1998. In June 1998, Jacobs was convicted of attempting to violate the no-contact order and once again ordered to "[h]ave no contact w/James Russell." Another domestic violence no-contact order was entered, again restraining Jacobs from "making any attempts to contact . . . James Russell."

On November 17, 1998, at 5:30 a.m., a person identifying himself as "James" called 911 from 3736 1/2 "F" Street in Bremerton, but then hung up the telephone. Dispatch notified deputy Nicole Bergmann, who headed to the residence. A few minutes later, James called 911 back, stated "things had gotten out of hand last night," and hung up. Dispatch notified Bergmann, who was still en route.

Deputy Bergmann stopped down the street from the residence and waited for back-up. Dispatch advised her that there had been numerous prior instances of domestic violence at the "F" Street address, causing injury to the victim, James. Dispatch told Bergmann that they had telephoned James, who stated: there was no longer a problem; the person with whom he had an altercation had left; and he (James) did not want contact with police.

Following the arrival of back-up Deputy Birkenfeld, Bergmann and Birkenfeld approached the residence; saw a person, later identified as James Russell, exit the residence, go back in, and then exit once more; and contacted James at the front gate. James "said [the deputies] couldn't really enter"; appeared intoxicated; and "was talking exceptionally fast, flailing his arms about." He initially told the deputies that there was no problem, but then conceded, "[Jeffrey] was beating on me" but "Jeffrey left." James indicated he had bruises from the beating, but did not show them to the deputies; "He kept saying, 'It's fine, he's left. Everything is fine.'"

James told the deputies that no one, except for his small dog, was in the residence. When Bergmann asked to "look . . . inside the residence briefly to make sure no one was in there with a gun waiting for him, no one was in there injured," James responded, "No, no, you can't come in my residence," "I have a big dog, I have a very big dog in there." As Bergmann walked away to check the exterior of the residence, she overheard James tell Birkenfeld that "Chad" was the person who had assaulted him and that "Chad" had left.

Bergmann returned, telling James that she "felt obligated to check his residence . . . to briefly look inside to make sure that no one was inside bleeding, hurt, or anything like that." She believed there was no time to get a warrant because "the time period that it would take . . . to get a warrant, somebody could be dying, bleeding out, who knows." Bergmann was also aware, based on her training and experience, that victims of domestic violence are sometimes uncooperative with police because they fear retribution from their abusers. James tried to prevent Bergmann from entering the residence and Birkenfeld restrained him.

Bergmann entered the residence and saw Jacobs sitting on the couch, rolling a cigarette. Bergmann ascertained his identity and relayed it to dispatch, who informed her of the existence of a domestic violence no-contact order "with Mr. Jacobs as the respondent and Mr. Russell as the petitioner." Bergmann then arrested Jacobs.

Proceedings: The State charged Jacobs with violation of the no-contact order. Jacobs moved to suppress evidence of his presence at Russell's residence, but the trial court denied his motion. The trial court concluded that Jacobs was without standing to challenge the police entry of the residence, both because Jacobs had been at the residence in violation of the no-contact order, and because

Jacobs, as a transitory visitor, did not have a privacy interest in the premises. The trial court held in the alternative that, even if Jacobs had standing, exigent circumstances justified the residential entry.

ISSUES AND RULINGS: 1) Where defendant's presence at the residence was a violation of a no-contact order, and where defendant was a mere transitory visitor at the residence, did he have standing to challenge the police entry of the residence to arrest him? (ANSWER: No); 2) Assuming for the sake of argument that Jacobs had standing, was entry of the residence justified by exigent circumstances? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Jeffrey J. Jacobs for violating a domestic violence no-contact order.

ANALYSIS:

1) Standing

The Jacobs Court explains as follows why the Court will not engage in "independent grounds" analysis under the Washington constitution, and why Jacobs had no reasonable expectation of privacy, and hence no "standing," under the Fourth Amendment:

Jacobs attempts to invoke the greater search and seizure protections typically provided by article I, section 7 of our state constitution but he does not engage in ["independent grounds" analysis under State v. Gunwall, 106 Wn. 2d 54 (1986)]. There are no reported cases in which a Gunwall analysis has been performed to determine the scope of constitutional protections guaranteed to a criminal defendant who, like Jacobs, only showers and stores his clothing at a residence, and who is prohibited by law from contacting the residence's owner. Because Jacobs has failed to engage in the mandatory Gunwall analysis, we decide his constitutional claims under federal constitutional law.

To qualify for Fourth Amendment protection, a criminal defendant must, at a minimum, show that he or she has standing to contest the invasion of privacy. Standing "to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." This involves "a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?"

In [Rakas v. Illinois, 439 U.S. 128 (1978)], the United States Supreme Court noted that society does not recognize as reasonable the privacy rights of a defendant whose presence at the scene of the search is "wrongful":

Obviously, . . . a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate."

Here, Jacobs was prohibited by court order from contacting or attempting to contact James Russell, the owner of the residence in which police discovered Jacobs. And on the date of the arrest, Jacobs had contact with Russell at the residence. Although Jacobs kept clothing at Russell's residence and, with Russell's permission, came over regularly to shower and change clothes, Jacobs did not live there; rather, he lived with various friends or in a park.

A domestic violence no-contact order is not vitiated by reconciliation between the abuser and his victim or by the victim's consent to the contact. Further, Jacobs did not present any evidence at the CrR 3.6 hearing that he was an "overnight guest" in the residence, with a legitimate expectation of privacy under Minnesota v. Olson, 495 U.S.

91 (1990). Consequently, Bergmann's warrantless entry into Russell's home did not invade Jacobs' legitimate expectation of privacy, and therefore, Jacobs has no standing to challenge the search. We hold that the trial court did not err in refusing to suppress the search.

[Footnotes, some citations omitted]

2) Exigent circumstances

In a footnote, the Court of Appeals states its view that the residential entry would have been justified by exigent circumstances even if the Court had concluded that Jacobs had standing to challenge the entry:

Even assuming Jacobs had standing to challenge the warrantless search of Russell's home, the search was justified by exigent circumstances because (1) the officers subjectively believed that someone inside might need medical assistance; (2) a reasonable person in the same situation would have similarly believed that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched in light of the preceding 911 domestic violence call. See State v. Menz, 75 Wn. App. 351 (1994) **Feb 95 LED:17**.

[One citation omitted]

LED EDITORIAL COMMENT: It is important to note that this case did not involve a question of “automatic standing.” The United States Supreme Court has abandoned the “automatic standing” rule as a matter of Fourth Amendment interpretation. However, while there is some muddiness in the Washington cases, it appears that the Washington Supreme Court continues to apply the “automatic standing” rule as an “independent grounds” interpretation of article 1, section 7 of the Washington Constitution.

The “automatic standing” doctrine uses a two-pronged test. Under that test 1) possession must be an essential element of the offense for which the defendant is charged, and 2) the defendant must have been in possession of the seized/searched property at the time of the contested seizure/search. It is not clear how this test translates to various fact situations. We think, however, that a car thief caught inside the stolen car would be entitled to automatic standing to challenge a search of the car if the car thief were charged with possession of the stolen car. On the other hand, a car thief who had temporarily left the car on a public street and was arrested elsewhere would not qualify to assert automatic standing (because he would not have been in the car when it was seized and searched).

Thus, if Jacobs had been charged with possession of controlled substances hypothetically found in the house (rather than violation of the no-contact order), then, under current Washington case law, Jacobs probably could have challenged the entry. In our view, accordingly, the following footnote from the Jacobs opinion regarding Fourth Amendment case law probably would not be helpful in an “automatic standing” case under the Washington Constitution:

[C]ourts have ruled that criminal defendants have no expectation of privacy in hotel rooms acquired by fraud, People v. Satz, 61 Cal. App. 4th 322 (1998); United States v. Wai-Keung, 845 F. Supp. 1548 (S.D. Fla. 1994), or stolen vehicles, State v. Schad, 129 Ariz. 557 (1981)....

Of course, as noted above, even if defendant Jacobs had been charged with a possession crime in this case, the “automatic standing” doctrine would not have helped him, because the entry was independently justified by the DV exigent circumstances.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) STRIKER/GREENWOOD SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE VIOLATED WHERE ONE COUNTY DID NOT DO ENOUGH TO TRY TO ARRAIGN DEFENDANT WHO WAS IN ANOTHER COUNTY'S JAIL -- In State v. Huffmeyer, ___ Wn. App. ___, 5 P.3d 1289 (Div. II, 2000), the Court of Appeals rules that the State violated the speedy trial/speedy arraignment rule of State v. Striker and State v. Greenwood when it did not get defendant Huffmeyer out of the King County jail to timely arraign him in Kitsap County.

Huffmeyer was in jail in King county on pending charges when unrelated charges were filed against him in Kitsap County. A few days later, December 8, 1997, Kitsap County served the warrant on the King County jail, which returned the warrant, indicating that Huffmeyer was in jail. At that time and over the next 8-plus months, no one advised Huffmeyer of the pending Kitsap County charges.

On April 27, 1998 Huffmeyer pleaded guilty to the King County charges. When Huffmeyer completed his King County sentence in August 1998, Kitsap County transported Huffmeyer for arraignment.

The Huffmeyer Court's analysis of the speedy trial/speedy arraignment question is as follows:

Under CrR 3.3(c)(1), if a defendant is detained in jail, he must be arraigned not later than 14 days after the information is filed and brought to trial no later than 60 days after arraignment. But when the defendant is not detained in jail, he must be arraigned no later than 14 days after his first appearance in court and brought to trial within 90 days after arraignment. When a person is held in custody in another county on an unrelated charge, he is not detained in jail on the current charge for purposes of CrR 3.3(c)(1). State v. Greenwood, 120 Wn.2d 585 (1993). Therefore, the 90-day speedy trial rule applies.

But CrR 3.3 does not address the effect of an unnecessary delay between the filing of the information and the arraignment. Thus, in State v. Striker, 87 Wn.2d 870 (1976), the court held that "where a long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court, CrR 3.3's 90-day trial period is deemed to commence at the time the information was filed, instead of when the defendant finally appeared before the court."

When the defendant is amenable to process and there is an unnecessary delay in bringing the defendant before the court, Striker applies and creates a constructive arraignment date 14 days after the filing of the information. Thus, a defendant who is not detained in jail must be brought to trial within 104 days of the filing of the information. (90 + 14 days). A criminal charge not brought within this time period must be dismissed with prejudice. Here, there was a 263-day delay between the filing of the information and Huffmeyer's arraignment. A 45-day delay has been held sufficient to invoke Striker. Before the Striker rule applies, the court must consider whether any time is excluded from the speedy trial calculation under CrR 3.3(g). CrR 3.3(g)(2) specifically excludes from the speedy trial calculation "[p]reliminary proceedings and trial on another charge."

However, the trial court did not exclude the time Huffmeyer spent in the King County jail because the State made no attempt to return Huffmeyer to Kitsap County after it became aware of his location. Relying on State v. Anderson, 121 Wn.2d 852 (1993), the trial court concluded that the time spent in preliminary proceedings and trial on another charge will not be excluded unless the prosecution acts with good faith and due diligence in bringing the defendant before the court. In Anderson, the Supreme Court held that CrR 3.3(g)(6), which excludes the time a defendant is detained in jail

or prison outside the state or in federal jail or prison, impliedly incorporates the good faith and due diligence requirement.

There is a conflict in the case law regarding whether a showing of good faith and due diligence is required before the time spent in preliminary proceedings and trial on another charge will be excluded under CrR 3.3(g)(2). But we need not attempt to resolve this conflict because we conclude that the exclusionary period under CrR 3.3(g)(2) ends when the guilty plea is entered. After Huffmeyer entered his plea, he spent an additional 121 days in the King County jail awaiting sentencing. This exceeds the 104-day speedy trial period under Striker and CrR 3.3. And, the State has not shown that it exercised due diligence in arraigning Huffmeyer during this time period.

[Footnotes and some citations omitted]

Result: Affirmance of Kitsap County Superior Court order dismissing charges against Chad T. Huffmeyer for possessing stolen firearms.

(2) “KNOWINGLY” MENTAL STATE OF “UNLAWFUL IMPRISONMENT” STATUTE MODIFIES PHRASE “WITHOUT LEGAL AUTHORITY” – HENCE, IGNORANCE OF THE LAW IS AN EXCUSE TO THIS CHARGE – In State v. Warfield, ___ Wn. App. ___, 5 P.3d 1280 (Div. II, 2000), the Court of Appeals rules that a person cannot be found guilty of committing “unlawful imprisonment” under RCW 9A.40.040 unless the State proves that the person knew that he or she did not have lawful authority to restrain the alleged victim in the case.

The Court of Appeals sets out the stipulated facts as follows:

1. On April 19, 1997, Defendants Samuel Warfield, Mark Richardson, and Derek Gonzales drove to Kelso, Cowlitz County, Washington for the purpose of arresting Mark DeBolt on a 1987 UIBC misdemeanor warrant out of Maricopa County, Arizona.
2. On that date, there was a valid warrant out of Maricopa County for Mark DeBolt's arrest. A certified copy of this warrant is attached hereto, and incorporated as part of this Finding of Fact.
3. On April 19, 1997, defendants Samuel Warfield, Mark Richardson, and Derek Gonzales arrived in Kelso and waited for Mr. DeBolt at the Target Store parking lot. When Mr. DeBolt arrived, defendants Samuel Warfield, Mark Richardson, and Derek Gonzales physically grabbed Mr. DeBolt and took him to their van, where they substantially restrained his movement without his consent while waiting for the police to arrive. The substantial restraint continued until the police arrived. The physical contact was offensive to Mr. DeBolt.
4. Within 5 to 10 minutes, Kelso Police arrived and interviewed everyone present, including defendants Samuel Warfield, Mark Richardson, and Derek Gonzales.
5. Following the interviews, the Kelso Police reviewed the warrant that Mr. Gonzales had. The Kelso Police then told Mr. DeBolt and the three defendants that the warrant appeared valid. At that point, the Kelso Police allowed defendants Samuel Warfield, Mark Richardson, and Derek Gonzales to retake custody of Mr. DeBolt under the Arizona warrant for the purpose of taking Mr. DeBolt to Arizona.
6. Defendants Samuel Warfield, Mark Richardson, and Derek Gonzales then drove Mr. DeBolt directly to the Mojave County Jail at Kingsman, Arizona, where they turned custody of Mr. DeBolt over to the Mojave County Sheriff.
7. The Mojave County jail at Kingsman, Arizona was the nearest jail in Arizona to which the defendants could take Mr. DeBolt.
8. None of the three defendants has a surety relationship with a bail bondsman. All three defendants are private citizens. None of the three defendants is a law enforcement officer.

9. All three of the defendants had a good faith belief that they had legal authority to arrest Mr. DeBolt on the Arizona warrant, take him into custody, and transport him to jail in Arizona.
10. Mark DeBolt had never been admitted to bail in Arizona. The warrant had been issued upon his failure to appear on a criminal summons.

All three men were charged with unlawful imprisonment by the Cowlitz County prosecutor. Trying the case without a jury, the trial judge convicted all three defendants, reasoning that the defendants were guilty because: a) they had no legal authority to restrain DeBolt, and b) their ignorance of the law was irrelevant.

Reversing, the Court of Appeals concludes that the State was required to prove that the civilian defendants knew that the misdemeanor Arizona warrant did not give them authority to make an arrest in Washington. The Warfield Court explains:

We acknowledge that usually, "ignorance of the law is no excuse." Here, however, knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand. It is uncontroverted that defendants believed they were acting lawfully because they had a warrant for DeBolt's arrest, and the police, whom they summoned, appeared to ratify the lawfulness of their actions. Therefore, we reverse and dismiss defendants' unlawful imprisonment convictions.

[Footnote and citations omitted]

Result: Reversal and dismissal of Cowlitz County Superior Court unlawful imprisonment convictions of Samuel Warfield, Mark Richardson, and Derek Gonzales.

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.

Many 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>]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [<http://www.leg.wa.gov/wsladm/ses.htm>]. The text of acts adopted in the 2000 Washington legislature is available 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.

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7372; Fax (206) 439-3752; e mail [kmcbride@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>].