



Law Enforcement

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Digest

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LED ACCESS ON CJTC WEBSITE MADE EASY

The Criminal Justice Training Commission has made LED electronic access easier on its recently revised website. As of the April 2001 **LED** deadline, electronic access to **LED**'s is as follows: 1) Enter address for CJTC website at [<http://www.wa.gov/cjt>]; 2) on homepage, click on “Law Enforcement Digest.” We will keep readers advised if there are any further changes in access to the **LED**.

U.S. SUPREME COURT

WHERE POLICE AT SCENE DEVELOP PC TO SEARCH HOME, AND RESIDENT VOLUNTARILY STEPS OUTSIDE, 4TH AMENDMENT AUTHORIZES POLICE TO RESTRICT RESIDENT’S RE-ENTRY OF HOME WHILE THEY SEEK WARRANT

Illinois v. McArthur, ___ U.S. ___ (2001) [2001 WL 137449]

Facts and Proceedings: (Excerpted from U.S. Supreme Court majority opinion)

On April 2, 1997, Tera McArthur asked two police officers to accompany her to the trailer where she lived with her husband, Charles, so that they could keep the peace while she removed her belongings. The two officers, Assistant Chief John Love and Officer Richard Skidis, arrived with Tera at the trailer at about 3:15 p.m. Tera went inside, where Charles was present. The officers remained outside.

When Tera emerged after collecting her possessions, she spoke to Chief Love, who was then on the porch. She suggested he check the trailer because “Chuck had dope in there.” She added (in Love’s words) that she had seen Chuck “slid[e] some dope underneath the couch.” Love knocked on the trailer door, told Charles what Tera had said, and asked for permission to search the trailer, which Charles denied. Love then sent Officer Skidis with Tera to get a search warrant.

Love told Charles, who by this time was also on the porch, that he could not reenter the trailer unless a police officer accompanied him. Charles subsequently reentered the trailer two or three times (to get cigarettes and to make phone calls), and each time Love stood just inside the door to observe what Charles did. Officer Skidis obtained the warrant by about 5 p.m. He returned to the trailer and, along with other officers, searched it. The officers found under the sofa a marijuana pipe, a box for marijuana (called a “one-hitter” box), and a small amount of marijuana. They then arrested Charles.

Illinois subsequently charged Charles McArthur with unlawfully possessing drug paraphernalia and marijuana (less than 2.5 grams), both misdemeanors. McArthur moved to suppress the pipe, box, and marijuana on the ground that they were the “fruit” of an unlawful police seizure, namely, the refusal to let him reenter the trailer unaccompanied, which would have permitted him, he said, to “have destroyed the marijuana.” The trial court granted McArthur’s suppression

motion. The Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied the State's petition for leave to appeal. [The U.S. Supreme Court] granted certiorari to determine whether the Fourth Amendment prohibits the kind of temporary seizure at issue here.

ISSUE AND RULING: Where police have probable cause to search a home for illegal drugs, does the Fourth Amendment prohibit police from restricting a suspect's access to his home for a reasonable period of time while they seek a search warrant? (**ANSWER:** No, rules an 8-1 majority)

Result: Reversal of Illinois courts' suppression rulings; case remanded for trial.

ANALYSIS BY SUPREME COURT MAJORITY: (Excerpted from majority opinion)

In the circumstances of the case before us, we cannot say that the warrantless seizure was per se unreasonable. It involves a plausible claim of specially pressing or urgent law enforcement need, i.e., "exigent circumstances." Moreover, the restraint at issue was tailored to that need, being limited in time and scope. Consequently, rather than employing a per se rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.

We conclude that the restriction at issue was reasonable, and hence lawful, in light of the following circumstances, which we consider in combination. First, the police had probable cause to believe that McArthur's trailer home contained evidence of a crime and contraband, namely, unlawful drugs. The police had had an opportunity to speak with Tera McArthur and make at least a very rough assessment of her reliability. They knew she had had a firsthand opportunity to observe her husband's behavior, in particular with respect to the drugs at issue. And they thought, with good reason, that her report to them reflected that opportunity.

Second, the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant. They reasonably might have thought that McArthur realized that his wife knew about his marijuana stash; observed that she was angry or frightened enough to ask the police to accompany her; saw that after leaving the trailer she had spoken with the police; and noticed that she had walked off with one policeman while leaving the other outside to observe the trailer. They reasonably could have concluded that McArthur, consequently suspecting an imminent search, would, if given the chance, get rid of the drugs fast.

Third, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant. Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer unaccompanied. They left his home and his belongings intact—until a neutral Magistrate, finding probable cause, issued a warrant.

Fourth, the police imposed the restraint for a limited period of time, namely, two hours. As far as the record reveals, this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible.

Our conclusion that the restriction was lawful finds significant support in this Court's case law. In Segura v. United States, 468 U.S. 796 (1984) **Oct. 84 LED:10**, the Court considered the admissibility of drugs which the police had

found in a lawful, warrant-based search of an apartment, but only after unlawfully entering the apartment and occupying it for 19 hours. The majority held that the drugs were admissible because, had the police acted lawfully throughout, they could have discovered and seized the drugs pursuant to the validly issued warrant. The minority disagreed. However, when describing alternative lawful search and seizure methods, both majority and minority assumed, at least for argument's sake, that the police, armed with reliable information that the apartment contained drugs, might lawfully have sealed the apartment from the outside, restricting entry into the apartment while waiting for the warrant.

We have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time. But Welsh v. Wisconsin, 466 U.S. 740 (1984) **July 94 LED:06** (holding warrantless entry into and arrest in home unreasonable despite possibility that evidence of noncriminal offense would be lost while warrant was being obtained).

Nor are we persuaded by the countervailing considerations that the parties or lower courts have raised. McArthur argues that the police proceeded without probable cause. But McArthur has waived this argument. And, in any event, it is without merit.

The Appellate Court of Illinois concluded that the police could not order McArthur to stay outside his home because McArthur's porch, where he stood at the time, was part of his home; hence the order "amounted to a constructive eviction" of McArthur from his residence. This Court has held, however, that a person standing in the doorway of a house is "in a 'public' place," and hence subject to arrest without a warrant permitting entry of the home. United States v. Santana, 427 U.S. 38 (1976). Regardless, we do not believe the difference to which the Appellate Court points—porch versus, e.g., front walk—could make a significant difference here as to the reasonableness of the police restraint; and that, from the Fourth Amendment's perspective, is what matters.

The Appellate Court also found negatively significant the fact that Chief Love, with McArthur's consent, stepped inside the trailer's doorway to observe McArthur when McArthur reentered the trailer on two or three occasions. McArthur, however, reentered simply for his own convenience, to make phone calls and to obtain cigarettes. Under these circumstances, the reasonableness of the greater restriction (preventing reentry) implies the reasonableness of the lesser (permitting reentry conditioned on observation).

Finally, McArthur points to a case (and we believe it is the only case) that he believes offers direct support, namely, Welsh v. Wisconsin. In Welsh, this Court held that police could not enter a home without a warrant in order to prevent the loss of evidence (namely, the defendant's blood alcohol level) of the "nonjailable traffic offense" [under Wisconsin law] of driving while intoxicated. McArthur notes that his two convictions are for misdemeanors, which, he says, are as minor, and he adds that the restraint, keeping him out of his home, was nearly as serious. We nonetheless find significant distinctions. The evidence at issue here was of crimes that were "jailable," not "nonjailable." In Welsh, we noted that, "[g]iven that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of

committing that offense.” The same reasoning applies here, where class C misdemeanors include such widely diverse offenses as drag racing, drinking alcohol in a railroad car or on a railroad platform, bribery by a candidate for public office, and assault.

And the restriction at issue here is less serious. Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search. Payton v. New York, 445 U.S. 573 (1980) **June 80 LED:01**(the Fourth Amendment’s central concern is the warrantless entry and search of the home).

We have explained above why we believe that the need to preserve evidence of a “jailable” offense was sufficiently urgent or pressing to justify the restriction upon entry that the police imposed. We need not decide whether the circumstances before us would have justified a greater restriction for this type of offense or the same restriction were only a “nonjailable” offense at issue.

In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home’s resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment’s demands.

[Some text, footnotes, and citations omitted]

LED EDITORIAL COMMENTS:

(1) SECURING A RESIDENCE WHILE A WARRANT IS SOUGHT WOULD BE OK UNDER WASHINGTON LAW ON MCARTHUR’S LIMITED FACTS -- The Washington courts interpreting article 1, section 7 of the Washington constitution have found greater privacy protection in the Washington constitution in certain categorical circumstances, and hence have imposed greater restrictions on police searches and seizures in those circumstances. But the McArthur factual context does not fall under those Washington “independent grounds” rulings. Thus, the McArthur decision is consistent with Washington case law to date.

It is important, however, to note two critical limiting facts in the McArthur case: (1) the officers first developed their probable cause to search while they were at the scene, at the point when Mrs. McArthur told them about the marijuana as she was leaving the premises; and (2) Mr. McArthur voluntarily stepped outside before the police secured the residence. Those facts limit the scope of the analysis and holding in the case.

Washington case law allows officers who develop probable cause for a search under similar circumstances to secure a residence from the outside while they seek a search warrant. See, among other Washington cases, State v. Solberg, 66 Wn. App. 66 (Div. I, 1992) (a later Washington Supreme Court decision in Solberg addressed a different search issue in the case, and did not disturb the Court of Appeals holding on the “securing of premises” question); and State v. Ng, 104 Wn.2d 763 (1985) Feb. 86 **LED:05** (Ng involved the securing of a suspect’s bedroom in a third party’s residence where the third party had given consent to search for the suspect in the residence).

Beware, however, of trying to create exigent circumstances: Although Solberg and Ng can be read more broadly than the suggested approach in our following point, we think, based on mixed case law from other jurisdictions, that there may be “pretext-type” problem in some cases where, unlike the McArthur facts, police have probable cause to search before they go to the target premises. Even where the police merely intend to

secure, not enter, a residence, and even where they are able to secure the residence without entering it (by getting the residents to come out voluntarily), some of the case law from other jurisdictions suggests that, if police possess, before going to the residence, the probable cause that would support issuance of a search warrant, the act of securing the residence without exigent circumstances is unlawful. Washington courts are likely to interpret “exigent circumstances” narrowly in this context. Hence, officers generally should wait for the warrant, and they should not go to the residence hoping to “create” an exigency requiring the securing of the premises (see the “creating an exigency” discussion in the next paragraph).

Case law in Washington present a more clear hurdle where officers must make a forcible warrantless entry of the premises to arrest or detain an occupant in order to secure the evidence suspected to be inside. Assume that Mr. McArthur had refused to come out of his house. In that circumstance, to justify entry for securing purposes, the officers clearly would have needed to be able to articulate exigent circumstances. That is, if Mr. McArthur had refused to come outside in this case, the officers could have entered to seize him (or ordered him outside) only if they could have articulated clear probable cause that Mr. McArthur would destroy evidence if they did not enter immediately. They might have been able to claim such an exigency in this case. Compare State v. Hall, 53 Wn. App. 296 (Div. III, 1989) April 89 LED:12 (Hall held that the mere fact that other suspects presently in custody elsewhere might get word to Mr. Hall did not constitute an exigent circumstance justifying forced warrantless entry of Hall’s residence to secure his residence; the Hall Court went on, however, to admit the evidence that was later obtained under the subsequently issued warrant based on the “independent source” exception to the Exclusionary Rule). And, as noted in the preceding paragraph, officers are not allowed to “create” an exigency by going to the premises with advance probable cause to search, hoping that the presence of uncooperative occupants inside will, upon confrontation, provide police with exigent circumstances justifying forced warrantless entry.

We should note that it is possible that officers, while at a location away from the residence, may develop probable cause to search the residence, and that special circumstances will be deemed to be exigent circumstances permitting them to go to the residence and to make a warrantless entry to secure the premises (or even to search it under certain circumstances). An example is found in the special facts of State v. Komoto, 40 Wn. App. 200 (Div. I, 1985) Aug. 85 LED:18. In Komoto, officers were at the scene investigating a hit-and-run accident involving serious injuries. The officers developed probable cause to believe the hit-and-run driver had been drinking. Based on license plate information provided by a witness, the officers quickly determined the address of the driver. They went to his apartment immediately, where they found his damaged and still-warm car parked outside. Because evidence was being destroyed (blood alcohol was being dissipated in his body), the Komoto Court held that the officers had “exigent circumstances” justifying a forcible, warrantless entry to arrest him.

Bottom line: Officers should try to get a search warrant before going to the target premises whenever: (1) they have advance probable cause for a search, and (2) there are no exigent circumstances requiring immediate action.

(2) UNDER PAYTON V. NEW YORK, THE OFFICERS DID NOT HAVE AUTHORITY, BASED SOLELY ON PC TO ARREST, TO FORCE ENTRY TO ARREST MR. MCARTHUR -- It is clear under Payton v. New York, 445 U.S. 573 (1980) that the mere fact of probable cause to arrest a person does not justify a forcible warrantless entry to arrest him, nor does PC to arrest alone justify ordering a person out of his residence. So, if Mr. McArthur had refused to come outside, the officers would not have been justified under

Payton in forcing entry to make a warrantless arrest or seizure absent exigent circumstances (see discussion of exigent circumstances in the preceding comment).

(3) **WASHINGTON OFFICERS WILL WANT TO GET CONSENT OR AT LEAST GIVE AN OFFICER-ENTRY WARNING BEFORE ALLOWING A RESIDENT TO GO BACK INTO A SECURED PREMISES** – Washington officers who have lawfully secured a residence and are waiting for the warrant to be issued should, at the very least, expressly caution a resident who, during the wait, wants to go back inside to retrieve cigarettes, turn off the oven, let the cat out, etc. The warning by the officers would be that the officer will not allow the person to go back inside without the officer at his side. While we think that it is debatable whether an express consent request regarding such officer-entry is necessary in this context, that is the safest legal route. We make this suggestion in light of the “independent grounds” ruling of the Washington Supreme Court in State v. Chrisman, 100 Wn.2d 814 (1984) April 84 LED:01 (holding that an officer who had arrested a college student for MIP did not have automatic authority as an incident of the arrest to accompany the student into the student’s 11th floor dorm room into which the officer had allowed the student to go to obtain identification). Chrisman and subsequent Washington court decisions are very protective of the privacy of a residence. Therefore, we think it is advisable to obtain consent before allowing the person to go back inside the secured premises with the officer at his side.

(4) **MRS. MCARTHUR PROBABLY LACKED AUTHORITY TO CONSENT TO A SEARCH OF THE PREMISES WHILE MR. MCARTHUR WAS PRESENT** -- The Illinois officers took a wise approach on the consent question. They asked Mr. McArthur for consent to search, and they did not try to get consent to enter from the departing Mrs. McArthur. In State v. Leach, 113 Wn.2d 735 (1989) Feb. 90 LED:03, the Washington Supreme Court interpreted the Fourth Amendment as establishing an “all parties present” consent rule for fixed premises. All residents (or other occupants with privacy interests in the premises) who are at home when police ask for consent to search a residence must be asked for consent. Thus, under the rule of Leach, the Illinois officers could not have finessed their situation by asking Mrs. McArthur for consent to search the residence.

BRIEF NOTE FROM THE U.S. SUPREME COURT

HIGH COURT UPHOLDS WASHINGTON’S SEXUAL PREDATOR LAW AGAINST “AS APPLIED” CONSTITUTIONAL ATTACK -- In Seling v. Young, 121 S.Ct. 727 (2001), the United States Supreme Court upholds against a constitutional attack the Washington civil commitment law designed to protect the public and provide treatment for violent sexual predators. In an 8-1 decision (Justice Stevens dissenting), the Supreme Court holds that the law is not an unconstitutional second punishment of the criminals to which it is applied, even if the Washington statutory scheme is applied to these criminals in a manner that is punitive.

The Young majority rules that the nature of treatment (or lack thereof) for a convicted rapist at the state’s Special Commitment Center (SCC) can’t be used as constitutional grounds to overturn Washington’s civil-commitment law for sexually violent predators. The case was filed by Andre Brigham Young, a rapist who was civilly committed under the Sexually Violent Predator Law in 1990. The law, the first of its kind in the country, was passed by the Washington Legislature earlier that same year. The law is intended to protect the public by incapacitating and treating the persons who suffer from psychological disorders that make them likely to commit sexually violent acts in the future.

In his suit, Young had claimed that allegedly punitive conditions and alleged lack of treatment at the SCC converted the state’s civil statute into a criminal law. He argued that keeping him institutionalized for “treatment” under these circumstances makes the statutory scheme a form

of second “punishment” for the same crime. The Young majority holds that he would be entitled to sue if he believes punitive conditions exist at the SCC, and that he may obtain other remedies for failings in the program, but that proof of such alleged failings would not render the statute unconstitutional.

In 1997 the U.S. Supreme Court upheld the constitutionality of a Kansas civil commitment law that was based on and virtually identical to Washington’s sexual predator statute. The Young decision concerns only the manner in which such laws are applied to individuals.

Result: Reversal of decision of the 9th U.S. Circuit Court of Appeals, which held that Young was entitled to a hearing to demonstrate that conditions at the SCC are punitive, thus transforming an otherwise civil law into criminal punishment.

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

UNDER FOURTH AMENDMENT, GUEST’S OVERNIGHT STAY IN HOME NEED NOT HAVE SOCIAL PURPOSE FOR GUEST TO HAVE PRIVACY PROTECTION -- In U.S. v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000), in a 2-1 ruling, a 3-judge panel of the Ninth Circuit rules that the expectation of privacy enjoyed by an overnight guest in a dwelling is not dependent on the visit’s being social rather than commercial in nature. Accordingly, drug smuggling defendants who were allowed to stay overnight in a trailer owned by others with alleged connections to the smuggling may raise Fourth Amendment challenges to officers’ search of the trailer. The reasonableness of a guest’s privacy expectation turns on the private nature of the activities in which the guest engages, not on the host’s motivation in giving the guest shelter, the majority reasons.

Result: Reversal of narcotics trafficking conviction by U.S. District Court (Arizona) of Juan Rodrigo Gamez-Orduno; case remanded for new suppression hearing.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

“WHOLE STATEMENT” APPROACH TO CO-DEFENDANT’S STATEMENTS AGAINST INTEREST REJECTED; ALSO, “MAJOR PARTICIPATION” REQUIRED TO JUSTIFY DEATH SENTENCE FOR ACCOMPLICE TO MURDER -- In State v. Roberts, 142 Wn.2d 471 (2000), the State Supreme Court splits 6-3 on two issues in reversing a death penalty. The majority rejects the so-called “whole statement” approach to determining the admissibility of an unavailable witness’s confession pursuant to the hearsay exception for statements against interest. The majority agrees with defendant that he should have been allowed by the trial judge to bring in piecemeal the admissions of a co-participant in the crime. The majority also agrees with defendant that jury instructions did not adequately describe the requirements of the state and federal constitutions of “major participation” in a murder before a defendant may be held liable as an accomplice for capital punishment purposes.

Justices Ireland, Talmadge and Bridge dissent on both issues.

Result: Reversal of King County Superior Court conviction of Michael Kelly Roberts for aggravated premeditated first degree murder; affirmance of conviction for first degree felony murder; vacation of death sentence; remand to Superior Court for re-trial on the vacated murder conviction.

WASHINGTON STATE COURT OF APPEALS

EMERGENCY EXCEPTION TO WARRANT REQUIREMENT JUSTIFIES RESIDENTIAL ENTRY TO INVESTIGATE DV REPORT; ALSO, CONSENT JUSTIFIES FOLLOW-UP SEARCH

State v. Johnson (Donovan Q.), ___ Wn. App. ___, 16 P.3d 680 (Div. II, 2001)

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

In September 1998, officers responded to a report of domestic violence at a home. The call came from a relative outside the house who reported that the victim had locked herself in the bathroom. Officer Lasnier arrived first and, as he approached the house, Donovan Johnson came out. Lasnier twice asked Johnson if anyone was in the house. Slow to answer, Johnson finally said that his girlfriend was still in the bathroom. Johnson had a bloody cut on his wrist, smelled of marijuana, and appeared to be under the influence of marijuana. Lasnier handcuffed Johnson and put him in his patrol car.

In the meantime, Deputy Gary Velie arrived and knocked on the front door. After several knocks, Babette Markishtum answered. She was shaking and had blood on her lip. It appeared to Deputy Velie that Markishtum was going to come out of the house, but he told her to stay and he walked inside. Deputy Velie immediately smelled marijuana in the house. The trial court found that Deputy Velie entered the house to protect Markishtum and other potential victims, to keep Markishtum and Johnson separate for safety, and to ensure an orderly investigation.

Sergeant Turner also arrived and looked for victims. After asking Markishtum about the domestic violence, the officers asked about the marijuana smell. Markishtum said that she and Johnson had just been smoking marijuana. She showed the officers marijuana paraphernalia, and they noticed a coffee grinder with green residue. The officers asked Markishtum if she would consent to a search of the entire house. She said they would have to ask Johnson because it was not her house.

Sergeant Turner went outside, removed Johnson from Officer Lasnier's patrol car, and read him his rights. Turner then asked if they could search the house. Johnson asked if they needed probable cause. Turner replied that he had probable cause because of what he had seen and smelled and because of what Markishtum had told the officers. Johnson asked whether he could limit the scope of the search, and Turner said that if he did, the officers would apply for a warrant. Turner also told Johnson that he had the right to refuse consent. Johnson eventually said, "[y]ou can look," and he signed a consent form. During the search, the officers found marijuana plants growing in the lower level of the house. The trial court denied Johnson's motion to suppress the evidence of the marijuana grow operation.

ISSUES AND RULINGS: 1) Was the initial, warrantless, non-consenting entry of Johnson's residence to investigate the DV report justified under the emergency exception to the constitutional requirement of a search warrant? (ANSWER: Yes); 2) Was the follow-up search of Johnson's residence lawful under the consent exception to the warrant requirement? (ANSWER: Yes)

Result: Affirmance of Clallam County Superior Court order denying suppression motion of Donovan Quedessa Johnson; remand for trial.

ANALYSIS:

1) Emergency Exception To Warrant Requirement

The Johnson Court rejects defendant's argument that the Court should create a higher standard for "emergency" searches under the Washington constitution (article 1, section 7) than exists under the federal constitution (Fourth Amendment). The Johnson Court then proceeds as follows to analyze this case under the Fourth Amendment:

The emergency exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property."

But when the State invokes the emergency exception "we must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search[.]" Thus, the exception may be invoked only when

- (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons;
- (2) a reasonable person in the same situation would similarly believe that there was a need for assistance;
- and (3) there was a reasonable basis to associate the need for assistance with the place searched.

And the officer must be able to articulate facts and reasonable inferences that justify the warrantless search.

Johnson argues that Deputy Velie had neither a subjective nor an objective belief that someone inside the house needed help. The State argues that Deputy Velie had an obligation to make sure no one else was in the house and secure any evidence of domestic violence.

This trial court found that the deputy subjectively believed that someone in the house might need help. Because Johnson does not challenge this factual finding, it is a verity on appeal. Furthermore, Deputy Velie's belief that other victims could be in the home was objectively reasonable. The dispatch call stated only that a woman had locked herself in the bathroom because her boyfriend was beating her. When Deputy Velie arrived, Johnson was in custody. And when Deputy Velie knocked on the door, Markishtum came out and had a bloody lip. Although the officers had already found the sole suspect and sole victim, they did not know this. Deputy Velie described the home as a large split-level. And the deputy said that he entered because he did not know how many victims he had and whether any children were involved.

Courts have held that, after accounting for one victim of violence, officers may search for additional victims. *[At this point the Johnson Court discusses decisions from Washington and elsewhere. **LED** Ed.]*

Johnson argues that Deputy Velie could have asked Markishtum whether anyone else was inside. But "victims of domestic violence are sometimes uncooperative with police because they fear retribution from their abusers."

Although another officer may have questioned Markishtum before entering, we test Deputy Velie's entry by his subjective belief and whether it was objectively reasonable. "Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, 'not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.'" Deputy Velie decided to enter without questioning Markishtum about other victims. And the trial court did not find that Velie entered the home to

search for drugs or contraband. An officer does not have to question the one known victim before entering to search for other victims. Deputy Velie's belief that there may have been other victims was objectively reasonable and he was justified in entering to conduct a brief walk-through search to look for other victims.

[Some text and citations omitted]

2) Consent Exception To Warrant Requirement

Johnson's challenge to the follow-up consent search is then rejected by the Court of Appeals under the following analysis:

Johnson also contends that his consent was invalid under article I, section 7 because he was in custody at the time. He cites Ferrier, where the court held that officers must inform individuals of the right to refuse, revoke, or limit consent to a search when using a "knock and talk" procedure. [State v. Ferrier, 136 Wn.2d 106 (1998) **Oct 98 LED:02**]. The court was concerned that people would make rash decisions to consent to searches:

[T]he great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.

Johnson argues that these concerns "apply with even greater force where, as here, the person was arrested and handcuffed." The State argues that complying with the rule in Ferrier by informing Johnson of his right to refuse, revoke, or limit his consent was enough.

The rule announced in Ferrier applies only when police officers use a "knock and talk" procedure to obtain consent to search a home. See also State v. Bustamante-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02**. In other situations, the court considers the total circumstances to determine whether consent was voluntary. The relevant circumstances include "(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent." These factors are not dispositive; outside the context of a "knock and talk," whether the police told the defendant he had the right to refuse consent is simply one factor to be considered. And a person may voluntarily consent to a search even though he is under arrest.

Sergeant Turner advised Johnson of his Miranda rights before requesting consent to search the house and advised Johnson that he could refuse to consent. And Johnson understood the implications of consenting to the search. Johnson asked Sergeant Turner if he needed probable cause to search the house and asked whether he could limit the scope of the search. The trial court found that, considering the total circumstances, Johnson voluntarily consented even though Sergeant Turner threatened to get a warrant if he did not consent or limit the scope of the search. This finding is supported by the record.

[Some citations omitted]

DRIVER WHO KEPT HIS GUN IN HIS PASSENGER'S PURSE NOT ALLOWED TO RAISE PARKER "SEARCH INCIDENT TO ARREST" CHALLENGE TO PURSE SEARCH

State v. Jones, __ Wn. App. __, __P.3d __ (Div. II, 2001) [2001 WL 125943]

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

Shortly after midnight, [officer 1] stopped Jones for a traffic violation. Deputy Michael Hayes soon arrived at the scene. [Officer 1] called in a license check, and the dispatcher confirmed that Jones had an outstanding arrest warrant. [Officer 1] then arrested Jones, handcuffed him, and placed him in [officer 1]'s patrol car.

Marie Gale, Jones' girlfriend of seven years, was seated on the passenger side of the car. [Officer 2] approached her and asked for identification, which she produced from "[h]er purse." Gale had no known outstanding warrants, she gave no reason to suspect her of criminal activity, and "she was very cooperative." [Officer 2] put Gale in his patrol car and advised her "that she was not under arrest, that she was just being placed in my vehicle at the time for officer safety issues." At the officer's direction, Gale left her purse in the car.

Incident to Jones' arrest, the officers searched the car. One officer found a gun inside Gale's purse on the passenger seat and unloaded it. Dispatch reported the gun stolen. Jones confirmed that Gale commonly kept his personal items in her purse and explained that he expected his property to remain private there.

The State charged Jones with second degree unlawful possession of a firearm under RCW 9.41.040(1)(b). The trial court denied Jones' motion to suppress the gun and his admission of ownership. At the subsequent bench trial, the trial court considered the CrR 3.6 suppression hearing record and found Jones guilty.

ISSUE AND RULING: Did the search of the passenger's purse, which violated the nonarrestee-passenger's rights under State v. Parker 139 Wn. 2d 486 (2000) **December 99 LED:13**, violate the arrestee-driver's rights or otherwise provide grounds for him to challenge the search? (**ANSWER**: No)

Result: Affirmance of Mason County Superior Court denial of suppression motion and affirmance of conviction of Kurt Jones for unlawful possession of a firearm in the second degree under RCW 9.41.040(1)(b).

ANALYSIS:

Under State v. Stroud, 106 Wn.2d 144 (1986) **Aug. 86 LED:01** and subsequent decisions, the Washington appellate courts have established that, 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 effects that the police reasonably believe belong to occupants who themselves are not subject to custodial arrest.**

In State v. Parker the Washington Supreme Court established the restriction on searches of the effects of non-arrestee occupants as described in the bolded part of the final sentence of the preceding paragraph. The Jones Court first addresses "standing" issues and concludes that Mr. Jones had standing to challenge the search of the purse. The Jones Court then notes Mr.

Jones “exercised dominion and control over his car and the contents therein, he also stored items in [the passenger’s] purse, and he admitted that the gun in [the passenger’s] purse belonged to him.” The Court then goes on to hold as follows that **Jones’** privacy rights were not violated by the search:

That Jones' gun was found in the purse of another does not expand his privacy rights beyond those he would have enjoyed if the purse had belonged to him. [COURT’S FOOTNOTE: And this determination is without regard to whether the privacy rights of another may have been violated.] Certainly, Gale had a legitimate expectation of privacy in her purse, and the Parker rule makes the use of the gun as evidence against her inadmissible. But contrary to Jones' assertion, it does not follow that the gun was also, therefore, inadmissible against him. [citing State v. Williams, 142 Wn.2d 17 (2000) **Dec 2000 LED:14**]

We therefore hold that the officer searched Gale's purse incident to Jones' lawful arrest, that the officer lawfully seized the gun from the purse, and that Jones' subsequent admission that he owned the gun was also lawful. The trial court did not err in denying Jones' motion to suppress.

[Some citations omitted]

WARRANT TO ARREST CONVICTED-BUT-NOT-YET-SENTENCED FELON FOR VIOLATING TERMS OF RELEASE PENDING APPEAL MAY BE BASED ON LESS THAN PC

State v. Fisher, ___ Wn. App. ___, ___ P.3d ___ (Div. III, 2001) [2001 WL 83264]

Facts and Proceedings Below: (Excerpted from Court of Appeals decision)

Carey Fisher pleaded guilty to possession and delivery of methamphetamine, arising out of events that occurred in 1998. Before entry of her plea and sentencing, she was released after she posted bail. The court issued, and Ms. Fisher signed, an order establishing the conditions of her release. Four days after entering her guilty plea, she was arrested on a bench warrant.

The warrant was issued based on an application made by Deputy Prosecuting Attorney Gabriel Acosta, the deputy assigned to Ms. Fisher's drug case. Mr. Acosta presented an affidavit to the court indicating that he had received information from Ms. Fisher's community corrections officer, Alice Rogers. Ms. Rogers was contacted by a probationer who asserted she was an acquaintance of Ms. Fisher's. The probationer reported that she overheard Ms. Fisher declare that there was "no way she was going to stick around for sentencing" and that Ms. Fisher appeared high on drugs during her plea.

Mr. Acosta's affidavit also stated that he had been contacted by the grandmother of Ms. Fisher's child. The grandmother reported that Ms. Fisher had been spending considerable time at a known drug user's home, including spending one night there, and that she was using drugs at that residence.

Mr. Acosta's affidavit concluded by stating that he was informed by Walla Walla Police Department Detective Ascencion Castillo that Ms. Fisher had been observed at a known drug user's home on several occasions since she was released on bail.

On the basis of Mr. Acosta's affidavit, the court entered an Order for Issuance of Bench Warrant. Subsequently, Ms. Fisher was arrested. Upon the arrest, Ms. Fisher's purse was seized and searched. The purse contained controlled

substances and paraphernalia. As a result, Ms. Fisher was charged with possession of methamphetamine, marijuana, and drug paraphernalia.

Ms. Fisher moved to suppress the evidence discovered in the search because she contended the bench warrant was issued without probable cause. The motion was denied because the trial court found that a warrant can be issued on the basis of a well-founded suspicion, rather than probable cause.

A jury convicted Ms. Fisher.

ISSUE AND RULING: Does a felon conditionally released pending sentencing and pending appeal of conviction like a probationer or parolee or a person released pending appeal after sentencing, have a diminished liberty right or expectation of privacy, such that an arrest warrant for violation of the conditions of release need not be based on probable cause but instead may be based on a well-founded suspicion? (**ANSWER:** Yes)

Result: Affirmance of Walla Walla County Superior Court conviction of Carey Virginia Fisher for possession of methamphetamine, marijuana, and drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals decision)

The Fourth Amendment establishes a probable cause standard for both seizures of property and persons. In response to Ms. Fisher's Fourth Amendment argument, the State asserts that we should apply to her detention the exception to the probable cause requirement that case law has established for searches of probationers and parolees. Although Ms. Fisher had not been sentenced by the court, the court had accepted her plea of guilty and entered an order adjudicating her guilty of the two felonies. Thus, her legal status under the Fourth Amendment, according to the State, should be like that of a probationer and a parolee, as opposed to a presumptively innocent, accused person.

The State relies upon State v. Lucas, 56 Wn. App. 236 (1989) **May 90 LED:17**. In Lucas, the court ordered a probationer to submit to a search of his person, residence, vehicle, and other belongings when ordered to do so by the community corrections officer. When the corrections officer became suspicious regarding Mr. Lucas's compliance with the drug laws, the corrections officer conducted a warrantless search. On appeal, the issue was whether the officer's warrantless search required probable cause or a well-founded suspicion.

Generally, searches without a valid warrant are per se unreasonable unless a public interest exception exists to the general warrant requirement. Such an exception exists for probationers and parolees, who have a diminished right of privacy that permits a warrantless search, if reasonable. For these reasons, the court concluded that the probation officer need have only a well-founded suspicion, not probable cause, to search Mr. Lucas. The rationale for excepting probationers and parolees is that a person judicially sentenced to confinement but released on parole remains in custody while serving the remainder of the sentence. Additionally, these individuals have a diminished right of privacy because " 'the State has a continuing interest in the defendant and its supervision of him as a probationer.' "

Similarly, the State has a continuing interest in convicted felons who are released pending appeal. The stay of execution acts to preserve the status quo pending appeal; however, it does not release an appellant from the obligation to serve the full penalty imposed by the sentence. As a result, felons released pending

appeal have the same diminished privacy expectation as probationers and parolees.

For the same reasons that the State has a continuing interest in probationers, parolees and convicted felons free pending appeal, it has a continuing interest in admitted felons awaiting sentencing. In this case, Ms. Fisher was released prior to her plea under an Order Establishing Conditions of Release Pending Trial Pursuant to CrR 3.2. One of the conditions imposed was that "defendant have no violation of any criminal laws." Additionally, the order signed by Ms. Fisher states, "I agree to follow the conditions and understand that a violation will lead to my arrest and may be punishable by contempt of court. I also understand that my pretrial release may be revoked in the event of violation." After Ms. Fisher pleaded guilty, the court accepted her guilty plea and allowed her to remain free pending sentencing. Under RCW 10.64.025(1), the court may release a defendant who is awaiting sentence if it finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of others or the community if released.

Given Ms. Fisher's status after pleading guilty to possession and delivery of methamphetamine, the court had a continuing interest in supervising her. The court's continuing interest in supervising Ms. Fisher is the same interest the court has in supervising parolees, probationers, and convicted felons whose sentences are stayed pending appeal. That is, the court has a continuing interest in supervising Ms. Fisher because she has pleaded guilty to a felony and, by virtue of her plea, she has submitted herself to the supervision of the court. Because Ms. Fisher occupies a similar legal position, she should have the same diminished privacy expectations under the Fourth Amendment of the United States Constitution. As a result, we conclude that probable cause was not required for the issuance of the bench warrant for her arrest. In order to obtain a bench warrant under CrR 3.2(j)(1) for a person who has been adjudicated guilty of a felony and released pending sentencing, the court need require only a well-founded suspicion that a probation violation has occurred.

Taken together, this information provides a well-founded suspicion of a violation of the conditions of Ms. Fisher's release. While the unidentified probationer's observations alone would likely not be sufficient, the remaining evidence corroborates that Ms. Fisher was spending time with a known drug user. Additionally, it is not clear how the grandmother knew about Ms. Fisher's whereabouts, but this deficiency is irrelevant because the fact was corroborated by the detective's report. Finally, the mere fact that Ms. Fisher was spending a considerable amount of time with a known drug user might not rise to probable cause to believe she had violated the conditions of her release by violating criminal laws. However, this information does support a well-founded suspicion that Ms. Fisher might be violating the conditions of her release and therefore violating criminal laws.

Because sufficient evidence was presented that provided a well-founded suspicion of a violation of Ms. Fisher's release, the arrest warrant was properly issued. It follows that the evidence discovered incident to the arrest was properly admitted.

[Some text and citations omitted]

EVIDENCE OF SECOND DEGREE MALICIOUS MISCHIEF HELD SUFFICIENT IN CASE OF PRANKSTER PLAYING WITH FOSTER BROTHER'S POLICE RADIO

State v. Gardner, ___ Wn. App. ___, 16 P.3d 699 (Div. II, 2001)

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

[T]he parties submitted the case to the bench on the following stipulated facts:

- a. On November 20, 1999 in Kitsap County the defendant obtained his foster brother's official police radio. The defendant's foster brother was a cadet with a local law enforcement agency.
- b. The defendant keyed the microphone, causing disruptive clicking sounds on the law enforcement frequency.
- c. The defendant spoke on the radio, taunted law enforcement officers and played music on the radio. At one point the defendant attempted to imitate the voice of an actual deputy sheriff, causing confusion in the communication system.
- d. The defendant's use of the law enforcement radio and the law enforcement radio frequency caused a significant disruption in the law enforcement radio communication system, interfering with the ability of local public law enforcement agencies to use the frequency for legitimate law enforcement business.
- e. The defendant did not physically damage the radio. The defendant did not change channels on the radio or physically alter the radio.

The trial court found Gardner guilty.

ISSUE AND RULING: Was the evidence sufficient to convict Gardner of malicious mischief second degree? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Jacob Gardner for second degree malicious mischief.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under RCW 9A.48.080:

A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

....

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

The first question is whether the State established that Gardner physically tampered with the police radio. The State concedes that the rule of lenity requires that "physically" modify both "damaging" and "tampering." Gardner asserts that the State did not prove that he physically tampered with the radio. We disagree.

"Tampering" is defined as "[t]o interfere in a harmful way." WEBSTER'S II NEW COLLEGE DICTIONARY 1126, (1999). Under the stipulated facts, Gardner "keyed the microphone, causing disruptive clicking sounds on the law enforcement frequency." At oral argument, the parties agreed that keying the microphone means depressing the transmitting button. And the physical act of keying the microphone caused "disruptive clicking sounds" that interfered with the police communication system. Thus, the State's evidence was sufficient to

establish the statutory element of "physically damaging or tampering" with the police radio.

Gardner also argues that a police frequency or a police radio is not a " 'mode of communication rendering service to the public.' " According to Gardner, public communication only refers to the media and does not include a police frequency. But Gardner did not make this argument before the trial court; rather, he argued only that he did not physically tamper with the radio. Generally, we need not consider an issue raised for the first time on appeal that does not fall under any of the RAP 2.5 exceptions.

But Gardner contends that he argued sufficiency of the evidence below, which necessarily included his present argument that the police radio was not a mode of communication rendering service to the public. Again, we disagree. The stipulated facts focused on Gardner's argument that he did not physically tamper with the radio. If Gardner had argued that the police communication system was not public within the meaning of the statute, the parties could have agreed to additional facts or the State could have proved additional facts pertaining to the issue. But because Gardner did not argue the "public communication" issue, the State did not develop the record on the question. Under these circumstances, we are unwilling to consider the question on appeal.

[Some citations and a footnote omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) OFFICER'S REASON FOR SEIZING MENTALLY ILL PERSON IS NOT AN ELEMENT OF PROOF IN CIVIL COMMITMENT PROCEEDING -- In State v. V.B., ___ Wn. App. ___ (Div. II, 2001) [2001 WL 125979], the Court of Appeals rules that an officer's legal justification for seizing a mentally ill person is not a necessary part of a civil commitment proceeding under chapter 71.05 RCW.

One of the ways in which the civil commitment process can be triggered is where a person is seized by a peace officer. If a peace officer has reasonable cause to believe that a person is suffering from a mental disorder, and that person either presents an imminent likelihood of serious harm (to that person or others) or is in imminent danger because of being gravely disabled, the officer may take that person into custody. RCW 71.05.150(4)(b). The officer then must immediately deliver the detainee to an evaluation and treatment facility or the emergency department of a local hospital. RCW 71.05.150(4). The facility may hold the detainee for up to 12 hours, but only if a mental health professional examines the detainee within three hours of arrival. RCW 71.05.150(5). Civil commitment procedures are then addressed in further provisions of RCW 71.05.

The first three sentences of the preceding paragraph state the extent to which the civil commitment statute addresses the officer's role under the civil commitment law. The V.B. Court holds that, while an officer might be called to testify in a chapter 71.05 civil commitment hearing in circumstances where the officer has relevant evidence bearing on whether the person should be committed, testimony about why the officer seized a person is not a necessary element of a civil commitment proceeding. The V.B. Court responds as follows to the appellant's argument that the civil commitment statute does not provide sufficient protection of the due process rights of a detainee:

[N]umerous procedural safeguards minimize the risk of an erroneous deprivation of this liberty. The series of evaluations and hearings that chapter 71.05 RCW

mandates guards against holding a detainee who is not mentally ill and dangerous or gravely disabled at the time of the decision to continue detention.

A facility may not hold a detainee for more than three hours merely on the word of the detaining police officer. At that point, a mental health professional must perform an additional evaluation. RCW 71.05.150(5). And to hold the detainee for more than 12 hours, the CDMHP must evaluate the alleged facts and the detaining officer's reliability and credibility. Independent observations by the facility's evaluators must support any detention beyond 72 hours. RCW 71.05.150(2); RCW 71.05.230(1). Finally, there are other civil and criminal remedies if the police fail to act in good faith or act with gross negligence. See RCW 71.05.120(1).

The State's interest is in protecting the public and in caring for those in need of mental health treatment. It would waste officer time and financial resources to require the testimony of an officer who has no relevant or non-cumulative information to provide. And releasing a detainee who meets the criteria for detention merely because of officer unavailability puts the public and the detainee at an unnecessary risk.

Balancing all these factors, we conclude that although the protection of the detainee's liberty interest is important, the procedures in the involuntary civil commitment statutes provide adequate protection against erroneous detention. The significant State interest in protecting the public and caring for those in need of treatment clearly outweighs any minimal enhancement to due process protections that might be gained by requiring the detaining officer's testimony as to his or her reasonable cause to detain.

[Footnote, some citations omitted]

(2) PENCIL WAS “DEADLY WEAPON” UNDER THE “ASSAULT ONE” STATUTE BASED ON THE TOTALITY OF THE CIRCUMSTANCES; BUT COURT QUESTIONS WHETHER JAIL CELLMATES ARE “COHABITANTS” COVERED BY DV STATUTES -- In State v. Barragan, 102 Wn. App. 754 (Div. III, 2000), the Court of Appeals: 1) rules, based on the totality of the factual circumstances underlying the charge, that a sharpened pencil was a deadly weapon for purposes of the first degree assault statute, RCW 9A.36.011; but 2) questions whether the prosecutor was correct in alleging in his charging document that jail cellmates were “cohabitants” for purposes of domestic violence statutes.

Facts

During a fist fight in jail, Mr. Barragan yelled to his victim, “you’re gonna die,” grabbed a pencil and swung it at the victim’s left eye. The victim partially blocked the attack, causing the pencil tip to strike him in the left temple. The pencil broke and about ½ inch of the tip was left sticking in the victim’s temple. The pencil tip was difficult to remove, but it did not cause a serious wound or injury.

Proceedings below

Barragan was charged with multiple crimes based on this attack. After a jury trial, he was convicted of first degree assault and, as a “Three Strikes” loser, he was sentenced to life without possibility of early release.

“Deadly weapon” analysis

On appeal, Barragan argued, among other things, that the pencil was not a “deadly weapon” for purposes of the “first degree assault” statute. Rejecting this argument based on the totality of the circumstances of this case, the Court of Appeals explains:

Mr. Barragan next assigns error to the jury instruction defining “deadly weapon” as it relates to the charge of first degree assault. He contends the instruction is unjustified because a pencil could not constitute a deadly weapon.

To support the charge of first degree assault, the State had to prove that, with intent to inflict great bodily harm, Mr. Barragan assaulted Mr. Garcia with a deadly weapon. RCW 9A.36.011(1)(a). “Deadly weapon” is defined in the jury instruction as “any weapon, device, instrument or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.” This definition is essentially identical to the statutory definition contained in RCW 9A.04.110(6). “Substantial bodily injury,” as defined in the jury instruction and by statute, means injury that involves a temporary but substantial disfigurement or that causes a fracture or a temporary but substantial impairment of a body part. RCW 9A.04.110(4)(b).

An item may be either a deadly weapon per se, such as a firearm or explosive, or a deadly weapon in fact, due to the manner of its use. A pencil is not a deadly weapon per se. To justify a deadly weapon instruction, the State had to show that the pencil had both the inherent capacity to cause substantial bodily injury or death and that it was readily capable of causing such injury or death under the circumstances of its use. The circumstances of a weapon’s use include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted.

Here, a reasonable trier of fact could have found that the pencil, as wielded by Mr. Barragan, constituted a deadly weapon. According to Mr. Garcia’s testimony, Mr. Barragan swung the pointed end of the pencil -- with force -- at Mr. Garcia’s left eye, and only missed Mr. Garcia’s eye because the blow was deflected. Due to the force of the attack and the fact that Mr. Barragan accompanied it with the promise, “You’re gonna die,” a reasonable person could infer that Mr. Barragan intended to commit great bodily harm or death with the pencil. Expert testimony is unnecessary to prove the obvious fact that a pencil can put out an eye. And the testimony of the officer who pulled out the embedded pencil -- describing it as like pulling out a nail with pliers -- indicates that while the actual injury was minor, it could have been serious if not deflected from the eye. On the whole, the evidence is substantial that the pencil constituted a deadly weapon under the circumstances of its use.

[Citations omitted]

Court questions whether inmates are DV “cohabitants”

As a side note on a point no longer pertinent to the case, the Court of Appeals questions whether the prosecutor was legally justified in adding a domestic violence element to each of the charges based on the fact that the jail dorm in question was occupied by nine inmates. The Barragan Court comments as follows:

We must comment on the State’s decision to charge domestic violence under these circumstances. The intent of the Legislature in adopting RCW 10.99 was to enforce the criminal laws against domestic violence regardless of whether the persons involved are married, cohabiting or involved in a relationship. RCW

10.99.010. We question the wisdom of considering inmates in a penal institution - at least those who are not "involved in a relationship" - as cohabiting adults for the purposes of this act.

Result: Affirmance of Grant County Superior Court "third strike" conviction of Miguel Barragan for first degree assault.

BEIGH DECISION UPDATE

The Washington Supreme Court has accepted review in City of Kent v. Beigh, 102 Wn. App. 269 (Div. I, 2000) (the Court of Appeals held that an interference reading on a BAC machine does not justify blood testing of a DUI arrestee). In the January 2001 LED at pages 14-15, we digested Beigh, and we pointed out that the Court of Appeals had apparently misread the implied consent provisions at RCW 46.20.308(2). We noted that, while the actual question before the Beigh Court was fairly narrow, the Court's analysis of the implied consent statute could have broader ramifications, thus jeopardizing police use of blood testing in other circumstances. At LED deadline, the Supreme Court had not yet set an oral argument date in Beigh.

NEXT MONTH

The May 2001 LED will include, among other things, entries on the following decisions from the Washington Court of Appeals:

- (1) State v. Johnson (Larry E.), 17 P.3d 3 (Div. II, 2001) (the Court applies Thein PC analysis to invalidate part of a search warrant that had authorized a search of a suspected child molester's residence, and the Court rejects the State's "plain view" argument in relation to viewing of the contents of videotapes, but the Court upholds the search based on consent);
- (2) State v. McReynolds, 2000 WL 33153144 (Div. III, 2000) (the Court applies Thein PC analysis to invalidate a search warrant that had authorized a search of the residence of suspected burglars, and the Court remands the case for a determination of the extent to which this violation tainted other evidence in the case);
- (3) State v. Dyreson, 2001 WL 96085 (Div. III, 2001) (the Court rules that -- even though the garage door was open, loud music was playing inside, and a tenant at the scene had suggested that officers look for the citizen in the garage -- officers violated the citizen's constitutional privacy protections when they walked into the citizen's garage looking for him on a matter unrelated to the drugs they saw after they walked into the garage); and
- (4) State v. O'Neill, 2001 WL 114661 (Div. I, 2001) (the Court makes pro-State rulings on issues of "seizure-of-person" and "motor vehicle search incident to arrest" in a case that began with an officer's spotlighting of and contact with a man sitting behind the wheel of a car parked in the lot of a supermarket closed for the evening).

INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND WAC 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 more simply 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 many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, can be found at [<http://slc.leg.wa.gov/>]. Information about bills filed in the 2001 Washington Legislature may be accessed 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. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's webpage is [<http://www.wa.cjt>], while the address for the Attorney General's Office webpage is [<http://www.wa.ago>].

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]. Questions regarding the distribution list or delivery of the LED should be directed to Kim McBride of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; 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>].