



Law Enforcement

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Digest

HONOR ROLL

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President: Andrew Guerrero - Pierce County Sheriff's Office
Best Overall: Christopher L. Caplan - Seattle Police Department
Best Academic: Dustin G. Breen - Lewis County Sheriff's Office
Best Firearms: Anthony F. Messineo - Kent Police Department
Tac Officer: Officer Vic Williams - Des Moines Police Department

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CJTC WEBSITE HAS BEEN REVISED – LED ACCESS HAS CHANGED

The Criminal Justice Training Commission recently revised its website, and electronic access to the LED was changed. As of the March 2001 LED deadline (February 10), electronic access to LED's was as follows: 1) Enter address for CJTC website at [<http://www.wa.gov/cjt>]; 2) on homepage, click on “Basic Law Enforcement Academy”; 3) on BLEA-page, click on “Law Enforcement Digest.” We will keep our readers advised of any further changes in access to the LED.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

**PREMEDITATION EVIDENCE SUFFICIENT TO SUPPORT FIRST DEGREE MURDER
CONVICTION**

-- In State v. Townsend, ___ Wn.2d ___, 15 P.3d 145 (2001), the Washington Supreme Court rejects defendant’s argument that the premeditation evidence against him was not sufficient to support his first degree murder conviction.

The Supreme Court declares that the following facts, as described by the Supreme Court, “overwhelmingly” support a finding of premeditation by the trial court:

On November 1, 1996, Roy Townsend, Jack Jellison and the victim, Gerald Harkins, attended a party at Mike Brock’s home. Several hours prior to the party, Brock mentioned to Townsend that he was angry at Harkins for spreading rumors about Brock’s sister. After hearing the rumors, Townsend replied, “either you can deal with it or I can deal with it.”

Brock suggested a hunting trip, at which time Brock would confront Harkins about the rumors. Brock later decided to not go hunting. Harkins, however, left the party in his pickup truck with Townsend and Jellison to go hunting. On the way, they stopped at Townsend’s house where they picked up a spotlight and Townsend changed clothes. After the stop, Harkins drove while Townsend sat in the passenger seat, using a spotlight to search for deer and occasionally taking shots at road signs with his .45 caliber pistol.

Eventually, Harkins turned the truck onto a road which was blocked by a locked gate that prevented further access to the road. Townsend exited the vehicle and shot the lock several times but was unsuccessful in opening the gate. Townsend then got into the back of the pickup truck and Harkins turned the truck around. Later, Harkins turned onto a side road in another attempt to get up into the mountains. This road, too, was impassable, blocked by a large mound of dirt. As Harkins began backing up to go back down the hill, Jellison, then sitting in the passenger seat, heard a shot from the rear of the truck. Turning around, Jellison saw that Townsend had fallen out of the truck and lay on the ground many feet away from the truck. Townsend then asked “(a)re you guys ok?” Jellison replied

that they were fine, but then Harkins slumped over his arm and Jellison realized that Harkins had been shot. Jellison jumped out of the truck and yelled to Townsend “(O)h my God, you shot him. What the hell are you doing?” Townsend said that it was an accident.

Townsend asked if Harkins was still alive. Jellison noticed that Harkins was still breathing and that his eyes were open, staring at him. They argued about taking Harkins to the hospital but Townsend insisted that they could not do so since the police would never believe that the shooting was an accident. Jellison asked why the police would not believe them if it was an accident and Townsend reminded Jellison of their prior criminal histories. *[COURT’S FOOTNOTE: Townsend had prior adult convictions for burglary, possession of stolen property, unlawful possession of a firearm, and robbery. The trial court record reveals only that Jellison was convicted as an adult for “felony eluding.”]* Townsend then approached the driver’s side of the truck, looked inside, and raised the gun up to “the general area where the head was laying...” Townsend said “God forgive me,” and pulled the trigger again.

Townsend moved Harkins body over to the passenger seat and Jellison drove the truck back to the gate where Townsend dumped the body nearby in the dense woods.

Result: Affirmance of Court of Appeals decision affirming the Mason County Superior Court conviction of Roy James Townsend for first degree murder.

STAATS V. BROWN UPDATE—AUTHORITY TO ARREST FOR F&W VIOLATIONS

In the December 2000 LED at pages 21-22, we summarized the Washington Supreme Court decision in Staats v. Brown, 139 Wn.2d 757 (2000). We said that "fish and wildlife officers" (defined at RCW 77.08.010(5)) and "ex officio fish and wildlife officers" (defined at RCW 77.08.010(6) to include city police officers and county deputy sheriffs) are not limited by the "in the presence" rule in enforcing F&W statutes and rules, but may act on probable cause alone. On further review of the multiple opinions issued in Staats, as well as the current language of RCW Title 77 and its history, we believe that a strong argument can be made that authority to cite or arrest for such F&W violations is limited by the "in the presence" rule.

The multiple opinions in the split decision in Staats varied in their interpretation of former RCW 75.10.020(2). That former statute provided in part that “[f]isheries patrol officers and ex officio fisheries patrol officers may arrest without a warrant a person they have reason to believe is in violation of this title or the rules of the director.” (Emphasis added) That statutory provision was repealed in its entirety by LAWS OF 1998, ch. 190, § 124. In our December 2000 LED entry, we explained that, in reviewing the multiple opinions underlying the split decision in Staats, we found a majority view on the Court that the plain language of former RCW 75.10.020 gave officers authority to arrest for F&W violations without regard to whether the violations occurred in their presence. However, as noted, RCW 75.10.020 has been repealed.

RCW 77.15.092 currently provides that “[f]ish and wildlife officers and ex officio fish and wildlife officers may arrest without warrant persons found violating the law or rules adopted pursuant to [Title 77].” (Emphasis added). The underlined phrase, “found violating,” has never been interpreted in a reported Washington appellate opinion. But giving the phrase its ordinary meaning, we think the phrase supports the argument that, as to F&W violations, officers may arrest only when violations are committed in their presence.

As always, officers will want to check with their own legal advisors for specific advice.

WASHINGTON STATE COURT OF APPEALS

IN "BUY-BUST" OPERATION, ARREST MADE IN TAVERN BATHROOM 50-75 FEET AWAY FROM VEHICLE WHICH SUSPECT HAD BRIEFLY OCCUPIED FOLLOWING DRUG SALE DID NOT JUSTIFY "SEARCH INCIDENT" OF VEHICLE UNDER STROUD RULE

State v. Wheless, ___ Wn. App. ___, 14 P.3d 184 (Div. I, 2000)

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

On February 5, 1999, several Seattle police officers were conducting a "buy-bust" operation near the Hook, Line and Sinker tavern on Rainier Avenue. Working undercover, Officer [1] made contact with Wheless in the tavern's parking lot and asked Wheless for "a forty", a common street term for 40 dollars worth of crack cocaine. Wheless pulled a folded bottle cap out of his pocket, opened it and handed [Officer 1] two rocks of what appeared to be crack cocaine, a suspicion later confirmed by crime lab testing. In exchange, [Officer 1] gave Wheless two pre-marked 20-dollar bills.

As [Officer 1] walked away from Wheless, he signaled the successful buy to three other officers who were participating in the operation. After hearing a description of the suspect over the radio, Officer [2] observed Wheless, who matched the description, walk to a yellow pick-up truck parked in the lot about 50-75 feet from the tavern's entrance. Wheless got into the driver's seat and, a few moments later, an unidentified woman exited the tavern, walked to the truck, and got into the passenger seat. While Wheless and the woman sat in the car for less than a minute, the observing officers were unable to see their hands. When the woman got out of the truck and walked away, Wheless also left the vehicle and walked toward the tavern's entrance.

Officers followed Wheless into the tavern and arrested him in the tavern's bathroom. They searched him and found six dollars, but they did not find the buy money. A short time after Wheless' arrest, Officer [3] searched the pick-up truck using a narcotics detection dog. The dog located a glass tube of the type customarily used to smoke crack cocaine under the floor mat on the driver's side.

Wheless was charged with unlawful delivery of cocaine within 1,000 feet of a school bus stop. At the CrR 3.6 hearing, he argued that the truck search was an unlawful warrantless search and moved to suppress the crack pipe. The trial court denied the motion, concluding that the search was lawful as incident to an arrest. A jury found Wheless guilty.

[Officers' names deleted]

ISSUE AND RULING: Was the search of the pick-up truck a lawful search "incident to arrest" under the Stroud rule, where the arrestee was 50-75 feet from the truck at the time of arrest, but where he had been inside the truck briefly between the time he made a sale of illegal drugs to the police and the time of his arrest? (ANSWER: No, the search was unlawful because there was insufficient time-and-distance proximity in relation to the arrest.)

Result: Reversal of King County Superior Court conviction of Atlas Wheless for unlawful delivery of cocaine within 1000 feet of a school bus stop.

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 Wheless 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. In State v. Fore, 56 Wn. App. 329 (Div. I, 1989) **March 90 LED:05**, Division One upheld a warrantless vehicle search in a case which began when a Seattle police officer watched through binoculars as drug-dealer Fore and Fore's 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 in its 1989 decision in Fore that this warrantless car search was a lawful "search incident" because: (1) Fore's car had been used by Fore and his companion 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]

Accepting Fore's analysis and holding, the Wheless Court explains as follows why the search of the pick-up truck did not qualify as a "search incident to arrest" under Stroud and Fore:

Applied to the facts here, Stroud and Fore require that items in the truck were at least arguably within Wheless' control at the time of the arrest. They were not. Even assuming temporal proximity, there was no physical proximity between the arrest, which took place inside the tavern's bathroom, and the car search, which occurred in the tavern parking lot. As such, it was not a proper search incident to arrest. [COURT'S FOOTNOTE: Accord, State v. Porter, 102 Wn. App. 327

(Div. II, 2000) **Nov. 2000 LED:05** (holding that warrantless vehicle search was illegal where van searched was 300 feet from defendant when he was arrested). In Porter, Division II reaffirmed that the immediate control principle is the essential measure for determining whether the Belton-Stroud bright-line rule applies and justifies the search: "[I]f the police initiate an arrest and the passenger compartment of a vehicle is not within an arrestee's area of 'immediate control,' Stroud does not apply." The trial court's conclusion that physical and temporal proximity was present because Wheless "was seen sitting in the driver's side of the car in question immediately after having sold narcotics to an undercover police officer" missed the mark. Rather than evaluating the physical and temporal proximity between the arrest and the vehicle search, the court mistakenly focused on the temporal proximity between the drug transaction and the time Wheless spent in the truck. This is not the rule, and the search was unconstitutional. We must reverse the conviction because we cannot conclude beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. Our concerns about the verdict are significant here because the buy money was never located and the crack pipe could have unduly influenced the jury.

Citing Fore, the State argues that because the officers believed that relevant items like the buy money might have been in the truck because Wheless had recently sat in it, the search was legal. In Fore, this court supported its decision that a car search was a lawful search incident to arrest by commenting that "both men had been occupants of the moving vehicle just a few minutes prior to the arrest [and] the vehicle itself was directly connected to the probable cause determination supporting the arrest." But these observations were dicta because the court had already reaffirmed the Stroud rule and determined that there was temporal and physical proximity between the arrest and search. The overriding criterion for evaluating a warrantless vehicle search incident to arrest is that weapons or evidence be accessible to the arrestee. Where they are not, the search cannot be incident to arrest, and a warrant is required.

[Some footnotes and citations omitted]

WHEN VEHICLE PASSENGER GAVE FALSE NAME DURING TRAFFIC STOP, OFFICERS WERE JUSTIFIED IN REQUESTING ID DOCUMENTS FROM THAT PASSENGER AND IN MAKING SUBSEQUENT ARREST BASED ON "OPEN VIEW" OF ILLEGAL DRUGS

State v. Cook, ___ Wn. App. ___, 15 P.3d 677 (Div. III, 2001)

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

In November 1998, Deputy Wayne Dubois of the Benton County Sheriff's Department stopped a truck for having inadequate license plate lights. Mr. Cook was one of two passengers in the front seat of the truck. He sat closest to the passenger door. Deputy Dubois asked the driver for her license and other documents and asked Mr. Cook his name. Mr. Cook answered that he was "Lonnie Cook." The deputy recognized Mr. Cook and knew that his name was not Lonnie. When Officer Wayne Meyer of the Kennewick police arrived soon after, Deputy Dubois told him that Mr. Cook had lied about his identity and might have outstanding warrants.

Officer Meyer stood outside the passenger door to prevent the passengers from leaving. Although Deputy Dubois later testified he thought he heard Officer Meyer ask for Mr. Cook's name and identification card, Officer Meyer testified he could not remember asking for either. Mr. Cook pulled out a hard pack of cigarettes. As he flipped up the top flap of the pack, a piece of plastic knotted around a white powder fell out and landed on the passenger door armrest, in view of Officer Meyer. Recognizing that the packaging was common for narcotics, the officer asked Mr. Cook to step out of the truck, patted him down for weapons, and placed him in custody. A syringe loaded with methamphetamine was found in Mr. Cook's left front pocket. During a later search of the vehicle, officers found Mr. Cook's identification in a little wallet or fanny pack, not in his cigarette pack.

Mr. Cook was charged by information with possession of methamphetamine, RCW 69.50.401(d). He challenged the admission of the evidence in a CrR 3.6 hearing held in December 1998. After the two officers testified, Mr. Cook took the stand and testified that Officer Meyer asked him to produce his identification. He explained that he usually kept his identification in his cigarette pack and only opened the pack because he was ordered to hand over the identification card. The trial court concluded that Officer Meyer had probable cause to arrest Mr. Cook because the officer recognized, in plain view, the substance that fell from the pack of cigarettes as a controlled substance. Consequently, the evidence was admitted and Mr. Cook was convicted in a bench trial on stipulated facts.

ISSUES AND RULINGS: 1) Was the vehicle passenger “seized” for constitutional purposes when an officer asked his name during a traffic stop? (ANSWER: No); (2) When an officer requested that the vehicle passenger show him identification papers, did the officer violate the rule under State v. Larson, 93 Wn.2d 638 (1980) that vehicle passengers not be asked or required to show ID during traffic stops unless other circumstances justify the request? (ANSWER: No; because the officer reasonably suspected that the passenger had given a false name, the officer was justified in demanding the passenger show ID.)

Result: Affirmance of Benton County Superior Court conviction of Gregory James Cook for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) “Seizure”

A person is seized when, by means of a show of force or authority, his or her freedom of movement is restrained. The test is whether a reasonable person, under the circumstances, would have believed he or she was not free to leave. A traffic stop does not automatically effect a seizure of the passengers in the stopped car. Further, an officer's request for a passenger's identification is unlikely to constitute a Fourth Amendment seizure. Here, although Officer Meyer indicated that he placed himself outside the passenger door so that he could prevent the passengers from leaving the scene, Mr. Cook never testified that he wanted to leave or tried to leave. Because he elected to remain in the truck, his freedom of movement was not restrained and he was not seized until after Officer Meyer saw the contraband.

2) Requiring ID From Vehicle Passenger And Arresting Him Based On “Open View” Of Contraband)

Although he was not seized in the initial contact, Mr. Cook's privacy interests as a passenger afford him a second basis for challenging the officers' conduct in this exchange. Article I, section 7 of the Washington Constitution protects certain

privacy rights from trespass absent a warrant. The right to be free from unreasonable governmental intrusion into a citizen's private affairs encompasses automobiles and their contents. While officers can take all necessary steps to control the driver during a traffic stop, the Washington Constitution restricts police authority over automobile passengers. Police officers may not require people in the car other than the driver to give identification unless other circumstances give the police independent cause to question the passengers. State v. Larson, 93 Wn.2d 638 (1980).

For the purposes of this analysis we assume the request was made. The next question is whether the request [for information] was justified by an independent basis for suspicion that Mr. Cook was involved in criminal activity. Deputy Dubois testified that before Officer Meyer contacted Mr. Cook, Deputy Dubois told Officer Meyer that Mr. Cook had given a false name. Mr. Cook's false identifying information gave Officer Meyer a reasonable basis to suspect that Mr. Cook might be hiding the fact that there were outstanding warrants for his arrest. [See State v. Chelly, 94 Wn. App. 254 (Div. I, 1999) **[April 99 LED:03]**. It follows that Officer Meyer's reasonable suspicions justified a request for Mr. Cook's identification.

When Mr. Cook opened the pack of cigarettes to purportedly remove his identification card, the knotted piece of plastic fell out in full view of Officer Meyer. The officer testified that based on his training and experience, he recognized that the plastic was typical packaging for narcotics. The trial court's evaluation of Officer Meyer's credibility is not subject to review. Because the officer was lawfully present at his vantage point, his view of the plastic did not constitute a search, and his subsequent arrest and search of Mr. Cook incident to that arrest was proper.

[Some citations omitted]

LED EDITORIAL COMMENT: As noted by the Cook Court, the Washington State Supreme Court held in its 1980 Larson decision that, during ordinary traffic stops, officers may not routinely request identification documents from non-violator passengers. We believe that Larson does not preclude officers from asking such non-violator passengers for ID if officers first advise the passengers of the right not to provide the ID. Also, as suggested by the Cook Court, asking the person for his or her name, as opposed to asking for ID documents, does not come within the restriction of Larson.

APARTMENT MANAGER AND DEFENDANT'S MOTHER ACTED AS "PRIVATE" SEARCHERS, NOT AS GOVERNMENT AGENTS

State v. Krajieski, ___ Wn. App. ___, ___ P.3d ___ (Div. II, 2001) [2001 WL 10829]

Facts: (Excerpted from Court of Appeals opinion)

On August 22, 1998, a black and yellow Cannondale mountain bike valued at approximately \$2,600 was stolen from a Tacoma bicycle store. Officer Kevin Lorberau of the Tacoma Police Department learned from a juvenile informant that the bicycle was stolen by another juvenile and a person named "Jason" who was white, 22 years-old, and worked at Discount Tire. The informant said that Jason had the bicycle in his apartment.

On September 5, 1998, Officer Lorberau went to Discount Tire and spoke with Jason Krajieski, a white 23-year-old employee, about the burglary and bicycle. Krajieski denied any knowledge and refused Officer Lorberau's request to search

his apartment. Officer Lorberau arrested Krajieski on four unrelated felony warrants and two misdemeanor warrants and booked him into jail.

Officer Lorberau contacted Krajieski's neighbor, who was also Krajieski's supervisor at work. The neighbor told him that he had seen an expensive Cannondale mountain bicycle in Krajieski's apartment on August 28 or 29. While talking to the neighbor, the apartment manager and assistant manager (landlords) approached Officer Lorberau and said they had called Krajieski's mother to come and get his dog. They were worried that the dog would damage the apartment while Krajieski was in jail. They asked Officer Lorberau whether he wanted to search Krajieski's apartment or have them do so. He said no, since the defendant had refused to give his consent and the search would be illegal. He told them he could not authorize them to search and that whatever they did was of their own free will.

The landlords and Krajieski's mother entered the apartment. Officer Lorberau did not question the landlords in any way before or after they entered the apartment. He also did not ask Krajieski's mother to check the apartment. Nevertheless, when they exited the apartment, both the landlords and the mother contacted Officer Lorberau and told him they had seen a black and yellow Cannondale mountain bike there. Based upon the statements of the landlords, Krajieski's mother, and other witnesses, Officer Lorberau submitted an affidavit of probable cause and obtained a warrant to search Krajieski's apartment. He then searched the apartment and found the stolen Cannondale mountain bike and a stolen Trek mountain bike.

On September 7, 1998, Krajieski's mother returned to the apartment to remove and safeguard Krajieski's belongings while he was in jail. She did not have his permission to do so. She found a loaded automatic handgun, which she knew he should not have. She turned it over to the Tacoma Police Department because she did not want to take the handgun to her house in her car. No one asked her to search the apartment and no law enforcement officer knew she was going back into Krajieski's apartment. Krajieski later asked her whether she found the pistol.

Proceedings:

The State charged Krajieski with two counts of possession of stolen property (the bicycles) and one count of unlawful possession of a firearm. After denying Krajieski's motion to suppress, the trial court convicted him on all three counts on stipulated facts.

ISSUE AND RULING: Were the searches by the defendant's apartment manager and mother "private searches" not subject to constitutional restriction; i.e., were the searchers not acting as government agents? (ANSWER: Yes, the searches were "private" searches)

Result: Affirmance of Pierce County Superior Court convictions of Jason Peter Krajieski for two counts of possession of stolen property and one count of unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Generally, the Fourth Amendment does not protect against unreasonable intrusions by private individuals. "Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies" The Fourth Amendment does, however, prohibit searches by private individuals who are acting as government instruments or agents.

The mere purpose of private individuals to aid the government is insufficient to transform an otherwise private search into a government search. The critical factors for determining whether a private party is acting as a government instrument or agent are: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.

There were two searches in this case. In the first search, Krajeski's mother and the landlords entered Krajeski's apartment and saw the black and yellow Cannondale mountain bike. In the second search, Krajeski's mother found a gun. We consider each search separately.

Krajeski contends that his mother and the landlords acted as state agents when they entered his apartment, saw the black and yellow Cannondale bike, and reported it to the police. However, the landlords and mother entered the apartment because of Krajeski's dog. Officer Lorberau specifically declined to have the landlords search on his behalf, told them it would be illegal, and said he could not authorize them to do so. He also did not ask Krajeski's mother to check the apartment. When the landlords and mother returned from the apartment, he did not question them. Nevertheless, they contacted him and told him that the Cannondale mountain bike was there. Officer Lorberau did not acquiesce in the search. The trial court correctly decided that the landlords and Krajeski's mother were not acting as agents of the State conducting an illegal search.

Similarly, Krajeski's mother did not act as an agent of the State when she returned to the apartment a few days later, after the search warrant had already been executed. She went on her own initiative, discovered the gun, and turned it over to the police. The police did not know that she would return to the apartment, and her intent in doing so was to gather and preserve her son's belongings while he was in jail.

[Citations omitted]

EVIDENCE SUFFICIENT TO CONVICT FOR “OBSTRUCTING” AND FOR “UNLAWFUL POSSESSION OF FIREARM” (ON “CONSTRUCTIVE POSSESSION” RATIONALE)

State v. Turner, 103 Wn. App. 515 (Div. II, 2000)

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

On the evening of December 28, 1998, Sergeant Rogen of the Skamania County Sheriff's Department was patrolling Second Street in Stevenson when he saw Turner from behind standing and urinating alongside a truck. Rogen parked his patrol car and approached Turner to ask why he had been urinating in public. Turner denied it. When Rogen asked him for identification, Turner did not produce any; instead, he became agitated and profane, telling the deputy that he "had no reason to stop him." Rogen could smell beer on Turner and noted that his speech was slurred. Rogen testified that Turner threatened to assault him and lunged toward him, brushing up against him. Turner did not state his name until after Rogen arrested him for public indecency and failing to identify himself. Rogen then asked Turner if he had any weapons, and Turner retorted that it was none of his business. Deputy Helton arrived on the scene and searched the truck, finding a rifle inside.

Helton testified that Donald Graham was seated in the passenger seat of the small, import pickup. Helton checked Graham's identification and told him he was free to leave. Graham identified an archer's bow inside the pickup as his,

then retrieved a fanny pack from the truck and walked away. Graham did not take the bow when he left. Helton then searched the truck's interior, finding another bow, a small caliber rifle, and ammunition. The rifle was inside a bow case that was lying partially open across the back seat behind the driver's seat.

Graham testified that he and Turner had been out in Turner's pickup "bow hunting and four-wheeling" and had stopped in Stevenson to clean the truck's wheels. Graham said that the rifle and one of the bows were his and that he had bought the rifle from Turner a few years earlier for \$100. He said that Turner had not handled the rifle or had it in his possession the entire day.

Turner knew that a prior conviction precluded him from having firearms, and he testified that he had "sold all my rifles, got rid of all my guns." Turner said that he knew Graham was bringing the rifle along that day, but he never touched it.

Turner was charged with unlawful possession of a firearm, obstructing a law enforcement officer, and indecent exposure. The trial court granted Turner's motion for a directed verdict for the count of indecent exposure because of insufficient evidence. The jury found Turner guilty of the remaining two counts.

The State concedes jury instruction four was improper and constitutes reversible error. But Turner seeks dismissal with prejudice because the evidence was insufficient on both counts.

ISSUES AND RULINGS: 1) Is the "constructive possession" evidence sufficient to support the conviction for "unlawful possession of a firearm"? (ANSWER: Yes); 2) Is the evidence sufficient to support the conviction for "obstructing"? (ANSWER: Yes)

Result: Affirmance of Skamania County Superior Court convictions of Rickey Franklin Turner for "unlawful possession of a firearm" and "obstructing."

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Unlawful possession of a firearm

To convict Turner of unlawful possession of a firearm as charged, the State had to prove that he knowingly had a firearm in his possession or his control and that he had previously been convicted of a felony. RCW 9.41.040(1)(b). State v. Anderson, 141 Wn.2d 357 (2000) **Oct 2000 LED:13**. Turner conceded he previously had been convicted of a felony.

Possession may be actual or constructive. State v. Echeverria, 85 Wn. App. 777 (1997). A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. A vehicle is a "premises" for purposes of this inquiry. State v. Mathews, 4 Wn. App. 653 (1971). One can be in constructive possession jointly with another person.

As Turner asserts, close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. But the ability to reduce an object to actual possession is an aspect of dominion and control. No single factor, however, is dispositive in determining dominion and control. The totality of the circumstances must be considered.

This case is similar to Echeverria, where the court found that a rational trier of fact could reasonably infer that the defendant possessed or controlled a gun that was within his reach. The gun was in plain sight, sticking out from underneath the defendant's driver's seat.

Here, Turner admitted that he was driving his truck with his friend, Graham, and that he knew the rifle was in the back seat. Graham claimed the gun was his. The evidence showed that Turner was in close proximity to the rifle, knew of its presence, was able to reduce it to his possession, and had been driving the truck in which the rifle was found. Turner does not dispute that the truck was his and that he had dominion and control over the truck. Officer Helton searched the truck after Turner was arrested. He testified that he could see the rifle in a partially open case in the back seat behind the driver's seat in the extended cab of the small pickup truck. He stated that the rifle was within an arm's reach. Like Echeverria, a rational trier of fact could find that Turner possessed or controlled the rifle found in the open case on the back seat of his truck.

Turner essentially claims his case is indistinguishable from State v. Callahan, 77 Wn.2d 27 (1969), which held that close proximity to illegal drugs was not sufficient to establish constructive possession. Turner is correct that, in Callahan and in this case, there was another person present who claimed the item. But exclusive control by the defendant is not required. Another person claiming ownership is only one factor in evaluating whether the defendant has constructive possession. Moreover, Turner confuses the concepts of dominion and control over premises with mere close proximity to an item. The defendant in Callahan [who was a mere visitor at the residence there in question -- LED Ed.] did not have dominion and control over the premises where the drugs were found. In contrast, Turner had dominion and control of the truck where the rifle was found; he owned the truck and was the driver.

Turner asserts that "proof of control over premises alone is insufficient to show dominion of an item." Turner ignores that the Supreme Court in Callahan relied on a line of cases that held that when there is sufficient evidence of the defendant's dominion and control over the premises, the defendant may be found guilty of constructive possession of drugs. Further, Turner misconstrues the holding of State v. Mathews [4 Wn. App 653 (1971)]. In Mathews, the court held that the defendant, who was a passenger in an automobile on a trip from Portland, exercised dominion and control over the area in the back seat of the automobile where heroin was found. The [Mathews] court stated:

We find substantial evidence in the record establishing circumstances which would justify a finding that defendant was in constructive possession of the narcotic drug heroin because he exercised dominion and control of the area in which the heroin was found. Our decision should not be construed as establishing a rule that a passenger seated in proximity to concealed narcotic drugs in an automobile is deemed to be in constructive possession of the drugs. However, that proximity coupled with the other circumstances linking him to the heroin was sufficient to create an issue of fact on constructive possession.

The [Mathews] court held that under the facts of that case proximity to the drugs along with evidence of control of the back seat area was sufficient evidence for a trier of fact to find constructive possession. Contrary to Turner's assertions, the [Mathews] court was not holding that proof of control over premises is insufficient to show constructive possession. Instead, the [Mathews] court was reemphasizing that there is no bright line rule that a passenger seated near drugs is automatically deemed to be in constructive possession of the drugs.

The court in Cantabrana highlighted this point when it held that jury instructions cannot compel the jury to infer constructive possession if it found the defendant had dominion and control over the premises where the item is found. State v. Cantabrana, 83 Wn. App. 204 (Div. I, 1996) **June 97 LED:16**. "Instead, dominion and control over premises in which police discover drugs is but one factor in determining whether the defendant had dominion and control, i.e., constructive possession, over the drugs themselves." [Cantabrana] Significantly, the [Cantabrana] court added:

It is important to distinguish cases involving claims of improper jury instructions from cases involving claims of insufficient evidence.... When the sufficiency of the evidence is challenged on the basis that the State has shown dominion and control only over premises, and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs.

The court in Cantabrana explained its holding with an example of an appropriate instruction in a constructive possession case: "A person who has dominion and control over premises where drugs are found may be inferred to have dominion and control over the drugs themselves. This inference is not binding upon you and it is for you to determine what weight, if any, the inference is to be given." Thus, a jury may infer that a defendant has constructive possession of an item when that person has dominion and control over the premises where an item is located. Ownership and actual control of a vehicle establish dominion and control.

The evidence clearly showed that the truck was Turner's, that he knew the firearm was in his truck for most of the day, and that it was directly behind him in the truck. He knew that he was transporting the firearm and did nothing to remove it from his presence. In State v. Reid, 40 Wn. App. 319 (1985), we held that if there was a reasonable basis for either constructive or actual possession, the matter was sufficient to present to the jury. We maintain our past position and add the requirement of knowledge as set forth by Anderson **Oct 2000 LED:13**. [COURT'S FOOTNOTE: In Anderson, the Washington Supreme Court rejected the [State's] assertion that unlawful possession of a firearm is a strict liability defense and held that knowledge of the possession or presence of a firearm is an element of the crime.] Thus, where there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go to the jury. In this case, there was even more to convict Turner, the proximity of the firearm, the extended duration of the time the firearm was in the truck, and that Turner did nothing to reject the presence of the firearm in the truck.

We hold that there was sufficient evidence for a rational trier of fact to find that Turner had constructive possession of the firearm located in his truck.

2) Obstructing

"A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1).

Turner argues that he did not obstruct the officer by merely refusing to give the officer his name. Turner is correct that mere refusal to answer questions cannot be the basis of an arrest for obstruction of a police officer. But Turner did more than merely refuse to talk.

The State cites State v. Contreras, 92 Wn. App. 307 (1998) **March 99 LED:10**, where the defendant refused to talk with the police. In Contreras, the defendant's additional actions of disobeying police orders to put his hands up and to exit a vehicle and giving false information hindered and delayed the officers' investigation of a possible vehicle prowler. The [Cantanbrana] court held those actions were sufficient to support an arrest for obstructing a law enforcement officer.

Here, Turner not only refused to give his name, he threatened Officer Rogen and lunged at him. We hold that Turner's actions are sufficient to support a conviction for obstructing a law enforcement officer.

Turner further contends that Rogen was not performing official duties as required by the statute because Rogen was not acting lawfully at the time of the alleged obstructive behavior. Specifically, he maintains that Rogen did not have reasonable suspicion to detain him and lacked probable cause to arrest him. The statute only requires that an officer be discharging his official powers or duties. Contrary to Turner's contention, the officer was performing official duties because there is no evidence that he was acting in bad faith. 'A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.' " Officers are performing official duties, even during an arrest that later turns out to be without probable cause, provided they were not acting in bad faith or engaging in a "frolic" of their own. Here, Rogen had a reasonable suspicion that Turner was committing the crime of public indecency, RCW 9A.88.010, when he saw Turner standing with his legs apart, his hands between his legs, and a steady stream of urine.

[Some citations and footnotes omitted]

LED EDITORIAL NOTE REGARDING COURT'S DISCUSSION OF INDECENT EXPOSURE STATUTE: While the Turner Court may be correct in saying that the office could lawfully make a Terry stop on reasonable suspicion of "indecent exposure" under RCW 9A.88.010, we think that, under most circumstances, urinating in public will not support an "indecent exposure" prosecution. That is because the ordinary urinating-in-public fact situation does not meet the elements of: 1) "intentionally" making, 2) "any open and obscene exposure" of one's person, 3) "knowing that such conduct is likely to cause reasonable affront or alarm." Cities and counties without ordinances on point may want to consider adopting an ordinance like the following sample that was provided to us by the Municipal Research Center in Seattle [Phone: (206) 625-1300]:

- A) A person is guilty of urinating or defecating in public if he or she intentionally urinates or defecates in a public place other than a washroom or toilet room, or at a place and under circumstances where such act could be observed by any member of the public.
- B) Urinating or defecating in public is a misdemeanor.

It may be useful to define "public" or "public place" in such an ordinance, as did the ordinance supplied to us by the Municipal Research Center.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **EVIDENCE HELD SUFFICIENT TO SUPPORT SENTENCE ENHANCEMENT FOR BEING ARMED WITH A DEADLY WEAPON AT THE TIME OF COMMISSION OF A CRIME -- In State v.**

Schelin, ___ Wn. App. ___, 14 P.3d 893 (Div. III, 2000), the Court of Appeals rejects a marijuana grower's challenge to his sentence enhancement under RCW 9.94A.125 for being armed at the time of a commission of the crime.

Officers executed a search warrant at Schelin's residence. Schelin was home at the time. The officers found a loaded revolver hanging on a wall. The revolver was ten feet from Schelin at the time of initial police contact with him. Along with convicting him for manufacturing marijuana and weapons crimes, the trial court gave Schelin a "deadly weapon" sentence enhancement under RCW 9.94A.125.

RCW 9.94A.125 provides (italics added) in pertinent part:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was *armed with a deadly weapon at the time of the commission of the crime*, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, *a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.*

The Schelin Court notes that Washington decisions interpreting this statute have not been consistent with each other. After discussing that case law, the Schelin Court states its relatively narrow interpretation of the statute:

Officer safety is the policy behind the deadly weapon enhancement, at least, when other potential victims or bystanders are absent. Police face danger when they pull a suspect's car over, when they first enter a suspect's home, or otherwise first contact a suspect. So officer safety is best served if the court's focus is on the nexus between the defendant and the weapon at the time police enter a residence, or first contact the suspect, rather than when they discover the gun or the crime. This is because the officer is most at risk when police first make contact with the defendant or first enter the defendant's home. So for us it makes more sense for the court to look at the nexus between the defendant and the weapon at that time. Not after the defendant has been cuffed or taken into custody. The risk to officers is little to none then.

Of course the deadly weapon enhancement is just that, an enhancement to a sentence stemming from an underlying crime. The weapon, therefore, must also be tied to the crime. See RCW 9.94A.125 ("armed with a deadly weapon at the time of the commission of the crime . . .") But when the crime is discovered is less critical to officer safety than the proximity between the defendant and weapon when police first make contact. There must then be a nexus between the defendant, the weapon, and the underlying crime.

[Citations omitted]

Applying this standard to the facts of the case before it, the Schelin Court concludes the sentence enhancement was justified:

Mr. Schelin's revolver hung on a wall six to seven feet from the bottom of the stairs. Detective Hill believed "[t]he firearm was readily available to Mr. Schelin." Detective Paynter testified the gun was approximately 10 to 15 feet from the bottom of the basement stairs. And he believed the revolver could have been reached from the bottom of the stairs in a "very short time."

Private investigator Fred Young stated the revolver was accessible from the holster, but removing the weapon would take a certain level of strength. He measured the distance from the bottom of the stairs to where the holster was hanging; it was 15 feet. Mr. Young concluded it would take approximately four seconds to walk that 15 feet. The revolver was located in a room that also contained substantial amounts of marijuana and materials used in the distribution of marijuana.

Mr. Schelin was, at most, only a few seconds from his loaded revolver when police entered his home. It was at this point that the officers were most at risk. The jury's finding that Mr. Schelin was armed with a deadly weapon fully supports the policy consideration of officer safety. There is also the necessary nexus between the revolver and the crime. The revolver was in close proximity to Mr. Schelin's grow operation.

The evidence therefore supports the jury's finding that Mr. Schelin was armed at the time of this crime.

Result: Affirmance of drug and firearm convictions and sentence enhancement against Mark L. Schelin by Spokane County Superior Court.

(2) FIRING A SINGLE SHOT INTO A CAR OCCUPIED BY TWO PEOPLE SUPPORTS TWO CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER EVEN IF SHOOTER THOUGHT ONLY ONE PERSON WAS IN CAR -- In *State v. Price*, ___ Wn. App. ___, 14 P.3d 841 (Div. II, 2000), the Court of Appeals rejects a defendant's argument that, because he fired just a single shot into a car, and because he thought the car was occupied only by a driver, he could not be convicted of two counts of attempted first degree murder for firing the shot. The *Price* Court explains why defendant's argument fails:

A person commits the crime of first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). To convict of an attempt, the State must prove both intent to commit the crime and a substantial step toward its commission. RCW 9A.28.020(1). Thus, a person commits first degree attempted murder when, with premeditated intent to cause the death of another, he/she takes a substantial step toward commission of the act. In order for conduct to comprise a substantial step, it must be strongly corroborative of a defendant's criminal purpose. "[A]n overt act is . . . a direct, ineffectual act done toward commission of a crime[.]" Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.

We hold that a reasonable jury could have found that the act of firing a single bullet into a vehicle occupied by two people sufficiently corroborated that Price took a substantial step toward commission of first degree murder for both victims.

First, Price seems to be arguing that firing one shot cannot constitute a substantial step toward the commission of attempted first degree murder for more than one victim. This argument is without merit; Price did not need to fire two bullets (one for each victim) at Nakano's car to kill or injure both victims. Moreover, factual impossibility is not a defense to an attempted crime. RCW 9A.28.020(2). *State v. Roby*, 67 Wn. App. 741 (1992) **June 93 LED:18**. *[COURT'S FOOTNOTE: "If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally*

impossible of commission." RCW 9A.28.020.] Price deliberately fired the gun at Nakano's vehicle. The act of deliberately firing a gun toward an intended victim clearly is "strongly corroborative" of an attempt to commit first degree murder. See State v. Vangerpen, 125 Wn.2d 782 (1995) **May 95 LED:07** (holding that the act of reaching quickly toward a loaded, cocked, concealed gun is strongly corroborative of an attempt to fire the gun with an intent to kill [a police officer making a traffic stop]). The evidence in this case sufficiently supports the finding of attempted first degree murder.

Second, neither does the fact that Price may have thought that the car was only occupied by the driver prevent him from possessing the requisite intent as to the passenger, Hooper. The State argues that the doctrine of transferred intent is applicable to this case. But the statutory definition of first degree murder does not require specific intent for a specific victim. What is required is the specific intent to cause someone's death. The statute provides that a defendant is guilty if he, with the intent to cause the death of any person, in fact caused the death of that person or of a third person. RCW 9A.32.030. Consequently, RCW 9A.32.030 does not require specific intent to kill a specific victim. Had the bullet killed the passenger, a charge for the completed act of first degree murder would have been appropriate for the passenger's death, while at the same time maintaining the attempt charge against the driver. Thus, the State appropriately charged attempted first degree murder for the action involving the passenger.

Examining the substantiality of the evidence, Price does not dispute that he possessed the requisite intent to shoot and kill Nakano, or that he fired the single shot into her vehicle on Deschutes Parkway. *[COURT'S FOOTNOTE: Price cites his statement made when exiting his truck on Deschutes Parkway -- that he was going to "cap the motherf***er," as evidence of his intent to harm only one person.]* Furthermore, a jury could reasonably infer specific intent to kill as a logical probability from the evidence indicating that the defendant fired a weapon at the victims. State v. Hoffman, 116 Wn.2d 51 (1991) **April 91 LED:04**. See also State v. Salamanca, 69 Wn. App. 817 (1993) (holding evidence sufficient to support shooter's intent to harm all five occupants of vehicle when shooter fired into moving vehicle after altercation with driver). Thus, firing the single bullet provided sufficient evidence of intent to kill both victims because Price formed the requisite intent to shoot Nakano and he fired a weapon at the vehicle occupied by both her and Hooper. Price therefore possessed the requisite intent with regard to Hooper sufficient to support his conviction. We hold that a rational trier of fact could have found the essential elements of attempted first degree murder as to both Nakano and Hooper. Therefore, there was no error in convicting Price of attempt of first degree murder on both Counts I and II.

[Some citations omitted]

Result: Affirmance of multiple convictions by Thurston County Superior Court of Claude Allen Price, Jr.; reversal on sentencing issue not addressed in this **LED** entry; remand to Superior Court for resentencing.

(3) CONSTRUCTIVE POSSESSION EVIDENCE SUFFICIENT, BUT OUTDOOR MARIJUANA GROWER COULD BE CONVICTED ON ONLY ONE CHARGE – In State v. Portrey, 102 Wn. App. 898 (Div. III, 2000), the Court of Appeals addresses the appeal by the cultivator of an outdoor marijuana grow who was caught by a helicopter operation while he was in a marijuana patch. The "grow" was located in a canyon area, an undeveloped, hilly, and rocky area with no fences. Defendant Portrey did not own the property where the marijuana plants were found, but he lived about 200 yards away.

In rejecting Portrey's argument that the evidence was insufficient to establish that he was in possession of the marijuana, the Court of Appeals explains:

Because Mr. Portrey was not in actual possession of the marijuana, the issue here is whether there was sufficient evidence of constructive possession. The analysis requires us to “look at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them.”

The evidence here is ample. In addition to Mr. Portrey’s presence near one of the clusters, there was evidence suggesting he attempted to hide himself and one of the plants from detection by the aerial spotter. He was wearing a camouflage jacket on a warm day. Trails near the clusters led to and from Mr. Portrey’s residence. At his residence, deputies found black plastic tubing like that used around the base of the plants. From this evidence, a jury reasonably could infer that Mr. Portrey constructively possessed the marijuana. There was no error.

However, the Court of Appeals does agree with Portrey’s argument that it violated his rights against double jeopardy to convict him, based solely on the single marijuana “grow,” of both: 1) possession of marijuana with intent to manufacture or deliver, and 2) possession of more than 40 grams of marijuana.

Result: Affirmance of Lincoln County Superior Court conviction of William R. Portrey for possession of marijuana with intent to manufacture or deliver, but reversal of his conviction for possession of more than 40 grams of marijuana.

(4) RESPONDENT’S ACT OF DOMESTIC VIOLENCE NEED NOT BE RECENT TO JUSTIFY PERMANENT DVPA PROTECTION ORDER - In Spense v. Kaminski, 103 Wn. App. 325 (Div. III, 2000), the Court of Appeals rules that a court may issue a permanent protection order under the Domestic Violence Protection Act, chapter 26.50 RCW, even though the party against whom the order is sought has not recently committed an act of domestic violence against the petitioner.

In the Spense case, the respondent, Mr. Kaminski, had committed acts of domestic violence against his now-ex-wife several years previously. He had committed no acts of DV against her in the past few years. However, he had recently engaged in alleged custodial interference in relation to a daughter of the former marriage. His ex-wife was fearful, based in part on Mr. Kaminski’s recent temper outbursts of which she had learned second-hand.

This was enough for issuance of a permanent DVPA order, the Court of Appeals holds. In light of the Legislature’s compelling justification for the DVPA -- preventing domestic violence and protecting DV victims -- Mr. Kaminski’s constitutional theories arguing for a “recent act requirement” -- under the due process clause, equal protection clause, and under the First Amendment -- all fail.

Result: Affirmance of Okanogan County Superior Court permanent DVPA order restraining Michael Kaminski from contacting or getting near his ex-wife, Sarah Spense.

(5) NO ERROR IN TRIAL COURT’S MINOR RESTRICTION ON DEFENSE ATTORNEY’S QUESTIONS ABOUT OFFICER’S SURVEILLANCE LOCATION -- In State v. Darden, 103 Wn. App. 368 (Div. I, 2000), the Court of Appeals holds that the rule the Court articulated in State v. Reed, 101 Wn. App. 704 (2000) **Oct 2000 LED: 18** -- concerning a drug defendant’s right to inquire into location of a police surveillance post -- was not violated under the circumstances of the case before the Court.

In Reed, the Court of Appeals had ruled that, where a hidden police observer’s testimony was the only evidence of defendant’s illegal drug sale, the trial court erred in not requiring the State to disclose the surveillance location. The Reed Court noted that a criminal defendant has a constitutional right at trial to confront and cross-examine witnesses against him. The Reed Court concluded that, where a hidden police observer’s testimony in relation to a “buy-bust” police operation, is the sole evidence against defendant, then constitutional right to confront and cross-examine adverse witnesses outweighs any governmental “surveillance location” privilege. Finally, the Reed Court suggested that the State might be allowed to protect a surveillance location in pre-trial proceedings, and perhaps even at trial in cases, provided there is corroborating evidence of guilt

beyond the officer's testimony (the Reed Court gave as an example a case involving videotape evidence of a drug deal.)

In Darden, the surveillance officer's testimony at trial provided very specific evidence about his location in relation to a "buy-bust" police operation. The surveillance officer testified that he:

...was stationed in a fixed position on the west side of Fourth Avenue, three-fifths of a block north of Stewart Street and two-fifths of a block south of Virginia Street in a building between fifty and sixty feet off the ground. Visibility was clear, and lighting on the street was good. His location was on some part of the structure that was outside the building, such as a deck or the roof. He used high quality 10x40 binoculars to view the street below.

The prosecutor objected only to a defense question whether the surveillance post was on the roof or on a deck on the building.

In upholding the trial court's sustaining of this objection, the Darden Court distinguishes the Reed case as follows:

In Reed, the officer only testified about his height off the ground. The trial court allowed no testimony about his location in relation to the location of the transaction he observed. By limiting his testimony so severely, the trial court deprived Reed of an opportunity to impeach the officer's observations. Here, Sergeant Vandergiessen testified with great specificity about his location. Further, he marked his location on a diagram mapping the street. For all intents and purposes, Sergeant Vandergiessen's surveillance location was disclosed. Based on the information provided, Darden would have been able to independently verify or refute Sergeant Vandergiessen's ability to observe had he chosen to do so.

A criminal defendant's rights of confrontation and cross-examination are subject to the limitation that the evidence sought must be relevant. The State objected to further questioning about the surveillance location on the basis that it was not relevant, and the trial court sustained that objection based not upon privilege, but because it agreed that that further details were not relevant. Because further testimony about the details of Sergeant Vandergiessen's surveillance location would not have made any fact or circumstance more or less likely to be true, it was not relevant. The trial court properly sustained the State's objection to further questioning.

Moreover, as we held in Reed, evidence of the location of a surveillance post is not likely to be relevant when no question is raised about the ability of a witness to observe. In Reed, the officer watched the suspect for only a short time and testified that he observed the suspect provide what appeared to be cocaine in exchange for money. However, when the suspect was apprehended less than a minute later, there was no money on him. This gave rise to legitimate questions about the officer's ability to observe the suspect. In this case, Sergeant Vandergiessen observed Darden for nearly an hour. He testified in great detail about his observations of Darden's appearance and his transactions. The evidence found on Darden [following his arrest] was consistent with Sergeant Vandergiessen's observations.

[Some citations omitted; footnote incorporated in body of analysis]

Result: Affirmance of King County Superior Court conviction of Clarence Darden for possession of cocaine with intent to deliver.

CORRECTION NOTE REGARDING POSSIBLE ADMISSIBILITY OF PBT RESULTS

In a comment in the February 2001 LED at page 21, we stated, based on a 1996 Washington Supreme Court decision, that portable breath test (PBT) results are not admissible in evidence

for any purpose. It has since been pointed out to us that admissibility analysis must take into consideration the fact that in 1999 the State Toxicologist adopted rules relating to the PBT. See WAC 448-15. PBT results are now arguably admissible in evidence if the WAC rules are met, at least under some circumstances and for some purposes. There have not been any reported appellate court decisions on admissibility of PBT test results addressing the impact of the 1999 adoption of WAC 448-15.

These and other administrative rules are accessible on the Internet at [<http://slc.leg.wa.gov/WACBYTitle.htm>]. Officers should check with their prosecutors and legal advisors for advice regarding use of the PBT, as well as regarding admissibility in evidence of PBT results.

Thank you to Joel Guay, Spokane County Deputy Prosecutor, for pointing out the PBT rule.

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 many 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 and State Toxicologist rules at WAC 448-15) 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.

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) 439-3860; 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/>].