



Law Enforcement

June 2002

Digest

HONOR ROLL

543rd Session, Basic Law Enforcement Academy – December 12, 2001 through April 24, 2002

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2002 LEGISLATIVE UPDATE -- PART TWO

LED Introductory Editorial Notes: This is Part Two of a three-part update of 2002 Washington legislative enactments of interest to law enforcement. We included in Part One last month enactments which had already gone into effect. Note that, unless a different effective date is specified in the legislation, enactments adopted during the 2002 regular session take effect on June 13, 2002, i.e., 90 days after the end of the regular session.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys and to Rich Melnick of the Clark County Prosecuting Attorney's Office for providing us with helpful information.

Consistent with our past practice, our legislative updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. We have included at page 16-17 below a cumulative index of enactments covered in the first two parts, as well as legislation that we plan to cover in Part Three next month.

The text of the 2002 legislation is available on the Internet, chapter by chapter, at [http://www.leg.wa.gov/pub/billinfo/2001-02/chapter_to_bill_table.htm]. We will incorporate some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED are the views of the editors and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

REQUIRING LOCAL POLICIES AGAINST RACIAL PROFILING

CHAPTER 14 (ESB 5852)

Effective Date: June 13, 2002

The Final Bill Report summarizes this act as follows:

Local law enforcement agencies are to comply with the recommendations of the Washington Association of Sheriffs and Police Chiefs regarding the issue of racial profiling. The agencies must:

Adopt a written policy designed to condemn and prevent racial profiling... Review existing procedures, practices, and training to ensure that they do not enable or foster the practice of racial profiling...Continue training programs to prevent occurrences of racial profiling...Institute a citizen complaint review process to address instances of racial profiling and to provide appropriate disciplinary procedures within each department...Work with minority groups in their community...Within fiscal constraints, collect demographic data on traffic stops and analyze that data to ensure that racial profiling is not occurring.

The Criminal Justice Training Commission is to ensure that racial profiling issues are addressed in law enforcement training classes conducted by the Commission. The Washington Association of Sheriffs and Police Chiefs must report to the Legislature by December 31, 2002, and each year thereafter, on the progress and accomplishments of local law enforcement agencies in meeting the requirements and goals of the act.

FIXING “FREE SPEECH” PROBLEM IN SECOND DEGREE EXTORTION STATUTE

CHAPTER 47 (SB 6602)

Effective Date: June 13, 2002

Amends RCW 9A.56.130 by inserting the word “wrongful” just before the word “threat.” Thus, only “*wrongful*” threats are covered under the revised law. Section 1 of the act points out that this amendment corrects a “free speech” defect identified by Division One of the Washington State Court of Appeals in State v. Pauling, 108 Wn. App. 445 (Div. I, 2001) **Dec 01 LED:20**.

MODERNIZING “PHOTOGRAPH” DEFINITION IN LAW OF “SEXUAL EXPLOITATION OF MINORS”; PROVIDING QUALIFIED CIVIL IMMUNITY FOR COMPUTER-REPAIR/MAINTENANCE PERSONS WHO MAKE REPORTS IN “GOOD FAITH”

CHAPTER 70 (HB 1512)

Effective Date: June 13, 2002

Amends the definition of the verb, “photograph,” at RCW 9.68A.011(1) to include making a “digital image,” and the definition of the noun “photograph,” to include “intangible” things. Also adds the following civil immunity provisions to RCW 9.68A.080:

(2) If, in the course of repairing, modifying, or maintaining a computer that has been submitted either privately or commercially for repair, modification, or maintenance, a person has reasonable cause to believe that the computer stores visual or printed matter that depicts a minor engaged in sexually explicit conduct, the person performing the repair, modification, or maintenance may report such incident, or cause a report to be made, to the proper law enforcement agency.

(3) A person who makes a report in good faith under this section is immune from civil liability resulting from the report.

EXPANDING “ROBBERY IN THE FIRST DEGREE” TO COVER ALL ROBBERIES FROM “FINANCIAL INSTITUTIONS”

CHAPTER 85 (SSHB 2511)

Effective Date: June 13, 2002

Amends RCW 9A.56.200 to add an alternative way that robbery in the first degree can be committed. If a robbery is committed “within and against a financial institution as defined in RCW 7.88.010 or 35.38.060,” then the robbery is a first degree robbery even if no deadly weapon, apparent deadly weapon, or bodily injury is involved in the crime. “Financial institution” includes any bank, bank branch, state bank, trust company, national banking association, stock savings bank, mutual savings bank, savings and loan association, or a credit union – so long as the institution is authorized by federal or state law to accept deposits in this state.

AGGREGATING VALUE FOR ALL THEFTS COMMITTED IN ONE “CRIMINAL EPISODE”

CHAPTER 97 (HB 2605)

Effective Date: June 13, 2002

Amends RCW 9A.56.010(18)(c) by adding a “criminal episode” alternative for aggregating the value of multiple thefts to determine the degree of crime. “Criminal episode” is defined as “a series of thefts committed by the same person from one or more mercantile establishments on three or more occasions within a five-day period.”

WAIVING FEES, COSTS FOR SOME PROTECTION ORDERS UNDER CHAPTER 10.14 RCW

CHAPTER 117 (EHB 2655)

Effective Date: June 13, 2002

Amends chapter 10.14 to add a new section providing for a statutory waiver of filing and service fees in some circumstances:

No fees for filing or service of process may be charged by a public agency to petitioners seeking relief under this chapter from a person who has stalked them as that term is defined in RCW 9A.46.110, or from a person who has engaged in conduct that would constitute a sex offense as defined in RCW 9A.44.130, or from a person who is a family or household member as defined in RCW 26.50.010(2) who has engaged in conduct that would constitute domestic violence as defined in RCW 26.50.010(1).

Other sections of the act amend RCW 10.14.040, 10.14.100, 10.14.125, and 26.50.125 to reflect this change.

CLARIFYING “ACTING FOR COMMERCIAL PURPOSES” UNDER FISH & WILDLIFE LAWS
CHAPTER 127 (SHB 2426) Effective Date: June 13, 2002

Revises the Fish and Wildlife code to clarify the meaning of “acting for commercial purposes.” This act was in response to the Court of Appeals decision in State v. Mertens, 109 Wn. App. 291 (Div. II, 2001) **Feb. 02 LED: 14**, which held that the then-existing law contained an unconstitutionally conclusive presumption.

Section 1 of the act adds a new section stating legislative intent as follows:

The legislature intends to clarify that when a crime under chapter 77.15 RCW requires proof that a person acted for commercial purposes, that element refers to engaging in particular conduct that is commercial in nature and the element does not imply that a particular state of mind must exist. This act revises the existing definition of that element to confirm that the element is fulfilled by engaging in commercial conduct and to eliminate any implication that a particular mental state of mind must be shown. Examples are given of the type of conduct that may be considered as evidence that a person acts for a commercial purpose; however, these examples do not create a conclusive presumption that a person acts for a commercial purpose.

Section 2 of the act, among other things, amends subsection (1) of RCW 77.15.110 to read as follows:

- (1) For purposes of this chapter, a person acts for commercial purposes if the person engages in conduct that relates to commerce in fish, seaweed, or wildlife or any parts thereof. Commercial conduct may include taking, delivering, selling, buying, or trading fish, seaweed, shellfish, or wildlife where there is present or future exchange of money, goods, or any valuable consideration. Evidence that a person acts for commercial purposes includes, but is not limited to, the following conduct:
- (a) Using gear typical of that used in commercial fisheries;
 - (b) Exceeding the bag or possession limits for personal use by taking or possessing more than three times the amount of fish, seaweed, shellfish, or wildlife allowed;
 - (c) Delivering or attempting to deliver fish, seaweed, shellfish, or wildlife to a person who sells or resells fish, seaweed, shellfish, or wildlife including any licensed or unlicensed wholesaler;
 - (d) Taking fish or shellfish using a vessel designated on a commercial fishery license or using gear not authorized in a personal use fishery;
 - (e) Using a commercial fishery license;
 - (f) Selling or dealing in raw furs; or
 - (g) Performing taxidermy service on fish, shellfish, or wildlife belonging to another person for a fee or receipt of goods or services.

GIVING FULL LAW ENFORCEMENT POWERS TO FISH AND WILDLIFE OFFICERS
CHAPTER 128 (ESSB 6076) Effective Date: June 13, 2002

Amends RCW 77.12.055 to give full law enforcement powers to Fish and Wildlife officers. Subsection (1) of RCW 77.12.055 thus is amended to read as follows:

(1) Fish and wildlife officers and ex officio fish and wildlife officers shall enforce this title, rules of the department, and other statutes as prescribed by the legislature. Fish and wildlife officers who are not ex officio officers shall have and exercise, throughout the state, such police powers and duties as are vested in sheriffs and peace officers generally. An applicant for a fish and wildlife officer position must be a citizen of the United States of America who can read and write the English language. All fish and wildlife officers employed after the effective date of this section must successfully complete the basic law enforcement academy course, known as the basic course, sponsored by the criminal justice training commission, or the basic law enforcement equivalency certification, known as the equivalency course, provided by the criminal justice training commission. All officers employed on [June 13, 2002] must have successfully completed the basic course, the equivalency course, or the supplemental course in criminal law enforcement, known as the supplemental course, offered under chapter 155, Laws of 1985. Any officer who has not successfully completed the basic course, the equivalency course, or the supplemental course must complete the basic course or the equivalency course within fifteen months of [June 13, 2002].

Amends RCW 10.93.020 of the Washington Mutual Aid Peace Officer Powers Act to make Fish and Wildlife officers “general authority Washington law enforcement officers” and amends RCW 10.93.140 to clarify that, as with the powers of officers of the WSP, the powers of Department of Fish and Wildlife officers are not limited by chapter 10.93 RCW, nor is the agency bound by reporting requirements of RCW 10.93.030.

Amends the provisions of RCW 77.15.096 relating to inspection authority of Fish and Wildlife officers by adding a sentence clarifying that:

Authority granted under this section does not extend to quarters in a boat, building, or other property used exclusively as a private domicile, does not extend to transitory residences in which a person has a reasonable expectation of privacy, and does not allow search and seizure without a warrant if the thing or place is protected from search without warrant within the meaning of Article I, section 7 of the state Constitution.

CRIMINALIZING LEAVING CHILD WITH KNOWN, NON-CUSTODIAL SEX OFFENDER

CHAPTER 170 (SHB 2379)

Effective Date: June 13, 2002

Adds a new section to chapter 9A.42 RCW reading as follows:

(1) A person is guilty of the crime of leaving a child in the care of a sex offender if the person is (a) the parent of a child; (b) entrusted with the physical custody of a child; or (c) employed to provide to the child the basic necessities of life, and leaves the child in the care or custody of another person who is not a parent, guardian, or lawful custodian of the child, knowing that the person is registered or required to register as a sex offender under the laws of this state, or a law or ordinance in another jurisdiction with similar requirements, because of a sex offense against a child.

(2) It is an affirmative defense to the charge of leaving a child in the care of a sex offender under this section, that the defendant must prove by a preponderance of the evidence, that a court has entered an order allowing the offender to have unsupervised contact with children, or that the offender is allowed to have unsupervised contact with the child in question under a family reunification plan,

which has been approved by a court, the department of corrections, or the department of social and health services in accordance with department policies.

(3) Leaving a child in the care of a sex offender is a *misdemeanor*.

PREVENTING PUBLIC ACCESS TO RECORDS THE DISCLOSURE OF WHICH COULD COMPROMISE SECURITY AT STATE AND LOCAL CORRECTIONAL FACILITIES

CHAPTER 172 (HB 2421)

Effective Date: June 13, 2002

Adds a new exemption to the Public Disclosure Act, RCW 42.17.310(1), exempting:

Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility or any individual's safety.

ADDRESSING HARASSMENT AND BULLYING IN SCHOOLS

CHAPTER 207 (SHB 1444)

Effective Date: June 13, 2002

The House Bill Report on the final version of this bill summarizes it as follows:

Requires each school district to adopt or amend a policy prohibiting harassment, intimidation, or bullying by August 1, 2003. School districts have local control over each policy so long as it prohibits harassment, intimidation, or bullying of any student. It is the school districts' responsibility to share this policy with parents or guardians, students, volunteers, and school employees.

Harassment, intimidation, or bullying are defined collectively as any intentional written, verbal, or physical act that is reasonably perceived as being motivated by the person's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap, or by other distinguishing characteristics. These characteristics can either be actual or perceived.

Harassment, intimidation, or bullying include any intentional written, verbal, or physical acts that: Physically harms a student or damages the student's property; or Has the effect of substantially interfering with a student's education; or Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or Has the effect of substantially disrupting the orderly operation of the school.

The Office of the Superintendent of Public Instruction (OSPI) must develop and provide to school districts a model policy and training materials by August 1, 2002. The model policy should be developed in consultation with representatives of parents, school personnel, and other interested parties.

Additionally, the OSPI is required to disseminate training materials in a variety of ways. The OSPI's website must have a link to the Safety Center web page, where the OSPI must post training and instructional materials as well as their model policy on harassment, intimidation, or bullying. School districts must have direct access to the Safety Center website where districts can post summaries of their policies, programs, partnerships, vendors, and instructional and training materials, and a link to each school district's website. To the extent that resources are available, the OSPI is given the authority to update their existing technology.

Any reprisals, retaliations or false accusations against a victim, witness or person with reliable information about an act of harassment, intimidation, or bullying are prohibited. Employees, students, and volunteers with reliable information about an incident are encouraged to report the incident to an appropriate school official. Employees, students, and volunteers who report violations in compliance with policy procedures are immune from liability for damages for failure to remedy an incident.

ALLOWING ADULTS TO PURCHASE AND POSSESS HYPODERMIC SYRINGES

CHAPTER 213 (SHB 1759)

Effective Date: June 13, 2002

Amends RCW 69.50.412 by adding subsection (5) reading as follows:

(5) It is lawful for any person over the age of eighteen to possess sterile hypodermic syringes and needles for the purpose of reducing bloodborne diseases.

Amends RCW 69.50.412(3) to permit pharmacies to distribute injection syringe equipment. Adds a new section to RCW 70.115 providing that "Nothing contained in this act shall be construed to require a retailer to sell hypodermic needles or syringes to any person."

CREATING A FOURTH DEGREE OF "CRIMINAL MISTREATMENT"

CHAPTER 219 (SHB 2382)

Effective Date: June 13, 2002

Adds a new section to chapter 9A.42 RCW, creating a fourth degree of criminal mistreatment:

(1) A person is guilty of the crime of criminal mistreatment in the fourth degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

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

(b) With criminal negligence, causes bodily injury or extreme emotional distress manifested by more than transient physical symptoms to a child or dependent person by withholding the basic necessities of life.

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

Adds a new section to chapter 9A.42 RCW, requiring that law enforcement notify DSHS of arrests for criminal mistreatment:

(1) When a law enforcement officer arrests a person for criminal mistreatment of a child, the officer must notify child protective services.

(2) When a law enforcement officer arrests a person for criminal mistreatment of a dependent person other than a child, the officer must notify adult protective services.

Amends RCW 26.44.130 to expand authority of law enforcement officers to arrest on probable cause to include PC as to criminal mistreatment of a child.

Requires DSHS to develop, in conjunction with the Attorney General's Office and law enforcement organizations, a plan for services to families when a family member is charged with criminal mistreatment under chapter 9A.42 RCW.

CLARIFYING LAWS ON "DANGEROUS DOGS"

CHAPTER 244 (SSB 6635)

Effective Date: June 13, 2002

This bill makes a number of changes to RCW 16.08.070, 16.08.080, and 16.08.100, with the primary focus on notice and appeal processes. The Final Bill Report summarizes the amendatory bill as follows:

The definition of dangerous dog includes any dog that inflicts severe injury on a human being without provocation, kills a domestic animal without provocation while the dog is off the owner's property, or has been previously found to be potentially dangerous because of injury inflicted on a human. Notice and appeal procedures are created for situations when an animal control authority seeks to declare a dog to be dangerous. If a city or county has a notification and appeal process already in place, they may continue to utilize its process. A local authority is not required to allow dangerous dogs within its jurisdiction.

Unless a city or county has a more restrictive code requirement, the animal control authority must issue a certificate of registration to the owner of a dangerous dog if the owner complies with all the requirements for ownership and control of a dangerous dog. The requirements include a proper enclosure and securement of a surety bond or liability insurance in the amount of \$250,000. If an animal control authority must confiscate a dangerous dog because the owner has failed to meet the requirements pertaining to ownership of a dangerous dog, notice of the deficiency and that the dog will be destroyed in 20 days if the deficiency is not corrected must be served on the owner. The owner must pay the costs of confinement while the dog is confiscated.

In a situation where a dangerous dog attacks or bites a person or domestic animal and the dog's owner has a prior conviction, it is an affirmative defense for the dog's owner if he or she can prove compliance with the requirements for ownership of a dangerous dog by a preponderance of the evidence. In addition the owner must prove that the person or animal attacked or bitten trespassed on the owner's property or provoked the dog without justification or excuse.

The owner of a dog that causes severe injury or death of a human, whether or not the dog has previously been declared potentially dangerous or dangerous, is, upon conviction, guilty of a class C felony. The state has the burden of showing that the owner of the dog either knew or should have known that the dog was potentially dangerous as defined in law. The state may not meet its burden of proof solely by showing that the dog is a particular breed or breeds. In such a prosecution, it is an affirmative defense that the person injured or killed trespassed on the defendant's property, which was properly fenced and marked with warning signs, or provoked the dog on the defendant's fenced and marked property.

REVISING DEFINITION AND STANDARDS RELATING TO “SALVAGE VEHICLES”

CHAPTER 245 (SB 6530)

Effective Date: June 13, 2002

Amends provisions in RCW 46.12.005 and 46.12.070 relating to “salvage vehicles.”

REGULATING USE OF AN “ELECTRIC PERSONAL ASSISTIVE MOBILITY DEVICE” (EPAMD)

CHAPTER 247 (ESB 6316)

Effective Date: June 13, 2002

Adds a new section to chapter 46.04 RCW, defining “electric personal assistive mobility device” (EPAMD) as follows:

“Electric personal assistive mobility device” (EPAMD) means a self- balancing device with two wheels not in tandem, designed to transport only one person by an electric propulsion system with an average power of seven hundred fifty watts (one horsepower) having a maximum speed on a paved level surface, when powered solely by such a propulsion system while ridden by an operator weighing one hundred seventy pounds, of less than twenty miles per hour.

Amends RCW 46.04.320, .330, and .332 to provide that an EPAMD is not a motor vehicle, not a motorcycle, and not a motor driven cycle for purposes of Title 46 RCW. Also amends RCW 46.04.670 to provide that an EPAMD is not a vehicle or motor vehicle for purposes of chapters 46.12, 46.16, 46.29, 46.37, or 46.70 RCW.

Amends RCW 46.61.710(3) to provide that it is unlawful to operate an EPAMD on a limited access highway. This particular amendment appears to make it lawful to operate an EPAMD on a sidewalk. Also adds two new subsections to RCW 46.61.710 providing as follows:

(6) A person operating an electric personal assistive mobility device (EPAMD) shall obey all speed limits and shall yield the right- of-way to pedestrians and human-powered devices at all times. An operator must also give an audible signal before overtaking and passing a pedestrian. Except for the limitations of this subsection, persons operating an EPAMD have all the rights and duties of a pedestrian.

(7) The use of an EPAMD may be regulated in the following circumstances:

(a) A municipality and the department of transportation may prohibit the operation of an EPAMD on public highways within their respective jurisdictions where the speed limit is greater than twenty- five miles per hour;

(b) A municipality may restrict the speed of an EPAMD in locations with congested pedestrian or nonmotorized traffic and where there is significant speed differential between pedestrians or nonmotorized traffic and EPAMD operators. The areas in this subsection must be designated by the city engineer or designee of the municipality. Municipalities shall not restrict the speed of an EPAMD in the entire community or in areas in which there is infrequent pedestrian traffic;

(c) A state agency or local government may regulate the operation of an EPAMD within the boundaries of any area used for recreation, open space, habitat, trails, or conservation purposes.

Amends RCW 35.75.020 to make it lawful to operate an EPAMD on a bicycle path.

DIVIDING INTO TWO DEGREES THE CRIME OF CHEATING-AT-GAMBLING

CHAPTER 253 (SB 5064)

Effective Date: June 13, 2002

Amends RCW 9A.46.196 to convert it into a definition of “cheating.” Adds the following two new sections to chapter 9A.46 RCW (the “Gambling” chapter), dividing the crime of cheating-at-gambling into two degrees:

First Degree Cheating

(1) A person is guilty of cheating in the first degree if he or she engages in cheating and:

(a) Knowingly causes, aids, abets, or conspires with another to engage in cheating; or

(b) Holds a license or similar permit issued by the state of Washington to conduct, manage, or act as an employee in an authorized gambling activity.

(2) Cheating in the first degree is a class C felony subject to the penalty set forth in RCW 9A.20.021. In addition to any other penalties imposed by law for a conviction of a violation of this section the court may impose an additional penalty of up to twenty thousand dollars.

Second Degree Cheating

(1) A person is guilty of cheating in the second degree if he or she engages in cheating and his or her conduct does not constitute cheating in the first degree.

(2) Cheating in the second degree is a gross misdemeanor subject to the penalty set forth in RCW 9A.20.021.

REVISING VEHICLE TRANSFER, IMPOUND, AND ABANDONED VEHICLE PROCEDURES CHAPTER 279 (SSB 6748) Effective Date: June 13, 2002

Amends RCW 46.12.101(1) by adding a sentence reading as follows:

By January 1, 2003, the department [of licensing] shall create a system enabling the seller of a vehicle to transmit the report of a sale electronically. The system created by the department must immediately indicate on the department's vehicle record that a seller's report of sale has been filed.

Amends RCW 46.12.102 by adding a subsection (2) reading as follows:

(2) When a registered tow truck operator submits an abandoned vehicle report to the department for a vehicle sold at an abandoned vehicle auction, any previous owner is relieved of civil or criminal liability for the operation of the vehicle from the date of sale thereafter, and liability is transferred to the purchaser of the vehicle as listed on the abandoned vehicle report.

Amends RCW 46.55.075 by adding a subsection (2) reading as follows:

(2) By January 1, 2003, the Washington state patrol shall develop uniform impound procedures, which must include but are not limited to defining an impound and a visual inspection. Local law enforcement agencies shall adopt the procedures by July 1, 2003.

Amends RCW 46.55.085 (1) to require the following additional warning for stickers to be placed on unauthorized vehicles left within a highway right-of-way:

If the vehicle is not redeemed as provided in RCW 46.55.120, the registered owner will have committed the traffic infraction of littering -- abandoned vehicle.

Creates a task force involving WSP and local law enforcement agencies as follows:

The Washington state patrol and local law enforcement agencies shall convene a task force to consider the advantages and disadvantages of law enforcement agencies immediately transmitting, electronically or by facsimile, the impound authorization form to the impounding tow operator. The task force shall report its findings and recommendations to the house of representatives and senate transportation committees by January 1, 2003.

Amends RCW 46.55.100(4) to require that tow truck operators who sell abandoned vehicles at auction send a copy of the report to DOL, not WSP; a further change to this subsection provides:

The vehicle buyer information sent to the department on the abandoned vehicle report relieves the previous owner of the vehicle from any civil or criminal liability for the operation of the vehicle from the date of sale thereafter and transfers full liability for the vehicle to the buyer. By January 1, 2003, the department shall create a system enabling tow truck operators the option of sending the portion of the abandoned vehicle report that contains the vehicle's buyer information to the department electronically.

Amends RCW 46.55.105(2) and 46.63.030(4) to insert the following name of the infraction of failure to redeem an abandoned vehicle -- "Littering -- Abandoned Vehicle."

Amends RCW 46.63.110 to provide that the un-reducible monetary penalty for "Littering -- Abandoned Vehicle" is \$250.

EXPANDING CONVICTED OFFENDER DNA DATA BASE

CHAPTER 289 (SHB 2468)

Effective Date: July 1, 2002

Among other things: 1) expands the convicted offender DNA identification system to include all persons convicted of any felony and certain specified misdemeanor offenses; and 2) declares county and city law enforcement agencies responsible for collecting DNA samples in certain circumstances.

CREATING DIRECT RETAIL LICENSES FOR COMMERCIAL FISHERS

CHAPTER 301 (ESHB 2323)

Effective Date: June 13, 2002

The House Bill Report for this act gives the following "brief summary" of the enactment:

Establishes a direct retail endorsement to a commercial fishing license that serves as a single license allowing a commercial fisher to sell his or her harvest at retail.

Removes the requirement that a commercial fisher must have a wholesale license in order to sell his or her catch directly at retail.

Prohibits local governments from requiring additional licenses or permits from the holder of a direct retail endorsement.

DIVIDING INTO TWO DEGREES "TAKING A MOTOR VEHICLE WITHOUT PERMISSION"

CHAPTER 324 (ESSB 6490)

Effective Date: June 13, 2002

Amends RCW 9A.56.070 as follows (underlining shows new language and strikeouts indicate deleted language):

(1) ~~((Every person who shall))~~ (a) A person is guilty of taking a motor vehicle without permission in the first degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away an automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, and he or she:

(i) Alters the motor vehicle for the purpose of changing its appearance or primary identification, including obscuring, removing, or changing the manufacturer's serial number or the vehicle identification number plates;

(ii) Removes, or participates in the removal of, a part or parts from the motor vehicle;

(iii) Exports, or attempts to export, the motor vehicle across state lines or out of the United States for profit;

(iv) Intends to sell the motor vehicle; or

(v) Is engaged in a conspiracy and the central object of the conspiratorial agreement is the theft of motor vehicles for sale to others for profit.

(b) Taking a motor vehicle without permission in the first degree is a class B felony.

(2)(a) A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to ~~((the))~~ possession ~~((thereof))~~, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, ~~((shall be deemed guilty of a felony, and every person))~~ or he or she voluntarily ~~((riding))~~ rides in or upon ~~((said))~~ the automobile or motor vehicle with knowledge of the fact that the ~~((same))~~

~~automobile or motor vehicle was unlawfully taken ((shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of taking a motor vehicle without permission)).~~

((~~(2)~~)) (b) Taking a motor vehicle without permission in the second degree is a class C felony.

MAKING ALL SEAT BELT ENFORCEMENT PRIMARY ACTIONS

CHAPTER 328 (HB 1460)

Effective Date: June 13, 2002

Amends RCW 46.61.688 by striking subsection (7), thus making all seatbelt enforcement primary actions.

LED EDITORIAL NOTE: Several officers have asked whether they may lawfully contact the driver of a vehicle stopped solely because an adult passenger is not wearing a seat belt. While only time will tell how the courts will treat these scenarios, we think it best to look for guidance to how courts have treated the contact of non-violator passengers in vehicles stopped for acts committed by drivers. Washington courts have held that an initial seizure of the driver of a vehicle, based on suspicion that the driver has committed a traffic infraction, does not justify further exercise of authority over non-violator passengers beyond actions reasonably necessary to control the scene, or justified for officer safety purposes. See State v. Mendez, 137 Wn.2d 208, 220 (1999) March 99 LED:04 (officer must be able to articulate objective rationale predicated specifically on safety concerns to justify order to non-violator passenger to stay in vehicle or to get out of vehicle). Essentially, passengers not suspected of violations of law are in the same position as a pedestrians on the street for whom there is no reasonable suspicion; the officer may make only a voluntary contact, and the passengers are free to choose to not respond to an officer's questions and to not produce a license or other identification, and they are free to leave the scene (absent officer safety reasons for them to remain).

On the other hand, while there is some uncertainty in the case law, it appears that, as with a contact with a pedestrian on the street, an officer's mere request (as opposed to a demand) for identification does not rise to the level of a seizure as long as the identification is not required. See State v. Rankin, 108 Wn. App. 948, 954-55 (2001) Jan. 02 LED:04; State v. Larson, 93 Wn.2d 638 (1980). Thus, if a vehicle is stopped because a passenger is not wearing a seat belt, and the officer requests identification from a non-violator driver, the legal question as to the officer's authority to make this request will turn on whether the officer communicated voluntariness. That is, a reviewing court will determine whether a reasonable person in the driver's situation would have believed that he or she could decline to provide identification. Note further that, if the officer holds the identification document while conducting a warrant check on the driver, the courts will likely hold that a Terry seizure (requiring supporting "reasonable suspicion") occurred. See State v. Barnes, 96 Wn. App. 217, 223 (1999) Nov. 99 LED:18.

The safest legal course of action would appear to be either to not ask any questions of the non-violator driver, or to ask any questions or make any request for identification in a manner that makes it clear that the driver is under no obligation to produce identification or answer questions. Additionally, if the driver voluntarily produces identification, it is probably advisable to not hold the identification longer than necessary to record the information on the identification. However, if, upon contacting the passenger, the officer develops reasonable suspicion that the driver is committing an infraction or a crime -- e.g., the driver is also not wearing a seat belt or the driver smells strongly of intoxicants - - then it is clearly appropriate to contact the driver and obtain additional information.

As always, we encourage officers to contact their legal advisors or prosecutors for specific legal advice.

**EXEMPTING SOME GOVERNMENT RECORDS FROM PUBLIC DISCLOSURE TO PROTECT
“DOMESTIC SECURITY”**

CHAPTER 335 (SSB 6439)

Effective Date: June 13, 2002

The Final Bill Report for this act summarizes its effect in part as follows:

The following records are exempt from public inspection and copying: Those portions of records assembled, prepared, or maintain to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, containing: (1) specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or the response or deployment plans; (2) records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided by state or local government officials related to domestic preparedness for acts of terrorism.

Also exempt from public inspection and copying is information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify system vulnerabilities.

**LIMITING PUBLICATION OF PERSONAL INFORMATION ON LAW ENFORCEMENT,
CORRECTIONS AND COURT EMPLOYEES AND VOLUNTEERS**

CHAPTER 336 (ESSB 6700)

Effective Date: June 13, 2002

This bill adds new sections to chapter 4.24 RCW. The Final Bill Report summarizes the act as follows:

Unless exempt by law or court order, a person or organization who sells, trades, gives, publishes, distributes or otherwise releases the residential address, residential telephone number, birth date or social security number of any law enforcement-related, corrections officer-related, or court-related employee, volunteer or someone with a similar name can be liable for damages if (1) intent to harm or intimidate can be shown, (2) the person or organization categorizes the law enforcement-related, corrections officer-related, or court-related employee or volunteer by that occupation, and (3) the person or organization did not obtain express written permission.

The prosecuting attorney or person harmed by a violation of this provision may initiate a civil action to enjoin the violation. A law enforcement-related, corrections officer-related, or court-related employee or volunteer who suffers damages as result of a violation may recover actual damages, attorneys' fees, and costs. A court may issue a permanent injunction against a person or organization engaged in the violation.

CRIMINALIZING CIVIL DISORDER TRAINING

CHAPTER 340 (ESHB 2505)

Effective Date: June 13, 2002

Adds the following new section to chapter 9A.48 RCW:

(1) A person is guilty of civil disorder training if he or she teaches or demonstrates to any other person the use, application, or making of any device or technique capable of causing significant bodily injury or death to persons, knowing,

or having reason to know or intending that same will be unlawfully employed for use in, or in furtherance of, a civil disorder.

(2) Civil disorder training is a class B felony.

(3) Nothing in this section makes unlawful any act of any law enforcement officer that is performed in the lawful performance of his or her official duties.

(4) Nothing in this section makes unlawful any act of firearms training, target shooting, or other firearms activity, so long as it is not done for the purpose of furthering a civil disorder.

(5) For the purposes of this section:

(a) "Civil disorder" means any public disturbance involving acts of violence that is intended to cause an immediate danger of, or to result in, significant injury to the person of any other individual.

(b) "Law enforcement officer" means any law enforcement officer as defined in RCW 9A.76.020(2) including members of the Washington national guard, as defined in RCW 38.04.010.

UPDATING AND HARMONIZING FIREWORKS AND EXPLOSIVES LAWS

CHAPTER 370 (SSSB 6080)

Effective Date: June 13, 2002

Amends some existing definitions and adds some new definitions to chapter 70.74 RCW ("explosives" laws) and chapter 70.77 RCW ("fireworks" laws) to make state terms and definitions conform to Federal definitions.

Amends chapter 70.77 RCW to change sales-and-use periods for consumer-fireworks under state law, and to allow local ordinances to address sales-and-use periods. Imposes additional responsibilities on WSP's "Director of Fire Protection." Also amends RCW 70.77.515 to make it a gross misdemeanor for a licensee to sell fireworks to a person under age 16.

Amends chapter 70.77 RCW to clarify the law on licenses and permits relating to fireworks on the state and local levels, including changing the local permitting authority from the local fire official to the city and the county.

Amends various other provisions in chapter 70.77 RCW to address transportation, storage, seizure, civil penalties, and civil enforcement authority under fireworks laws.

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2000 ACT ON CHILD PASSENGER RESTRAINTS GOES INTO EFFECT

The "Child Passenger Restraint" bill, also known as the "Anton Skeen Act" adopted in 2000 as chapter 190, goes into effect July 1, 2002. Here, with some edits, is the summary that we provided in the June 2000 **LED**:

The Senate Bill Report (as edited for the **LED**) summarizes as follows the changes, effective July 1, 2002, made to provisions in RCW 46.61.687 relating to child passenger restraint systems:

Children under the age of 16 years must be restrained in a vehicle according to the following schedule:

One year of age or under or 20 pounds [or less] - a rear facing infant seat.

Between one year of age or over 20 pounds and four years of age, or under 40 pounds - a forward facing child safety seat.

Between four years of age or over 40 pounds and six years of age and under 60 pounds - a booster seat.

Six years of age and older, regardless of weight - a seatbelt.

The penalty for violations of the above age/weight based child seat requirements is a traffic infraction. **[LED Editorial Note: The total ticket amount is \$86.]** If the person found to be in violation provides proof that he or she purchased an approved child passenger restraint system within seven days of receiving the citation, the court shall dismiss the notice of infraction.

For vehicles equipped with passenger-side air bags and the air bag system is activated, children under the age of eight or under 80 pounds must be transported in the back seat of the vehicle, when practical to do so.

Law enforcement may do a visual inspection of the child restraint system in use to ensure that the system provides the maximum safety and security to each individual child. The enforcement requirement must be applied in conjunction with the specific weight/age criteria.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) PUBLIC HOUSING AUTHORITIES MAY EVICT TENANTS BASED ON VIOLATIONS THAT OTHERS COMMIT WITHOUT THE TENANTS' KNOWLEDGE -- In H.U.D. v. Rucker, 122 S.Ct. 1230 (2002), the U.S. Supreme Court upholds by unanimous decision a federal Department of Housing and Urban Development (H.U.D.) regulation requiring that leases for public housing authorize eviction of a tenant based on illegal drug-related activity by members of the tenant's household, by the tenant's guests, or by any person under the tenant's control, regardless of whether the tenant knew or should have known about the illegal activity.

Result: Reversal of Ninth Circuit U.S. Court of Appeals decision which had affirmed U.S. District Court decision enjoining evictions by the Oakland Housing Authority.

(2) FEDERAL STATUTE BANNING VIRTUAL CHILD PORNOGRAPHY HELD TO BE OVERBROAD IN VIOLATION OF FREE SPEECH PROTECTION OF FEDERAL CONSTITUTION -- In Ashcroft v. The Free Speech Coalition, 122 S.Ct. 1389 (2002), the U.S. Supreme Court rules 6-3 that the ban against virtual (computer-generated) child pornography violates First Amendment free speech protections.

The majority justices in Ashcroft state that the Court's precedents allowing broader prohibitions on real-child pornography than on adult pornography do not support broader prohibitions on

virtual-child pornography. Child porn produced by using actual children victimizes the children used in the production, and that is why the Supreme Court has allowed broader prohibitions in this area of law. That rationale does not apply where virtual child porn is involved, the Ashcroft majority asserts.

Result: Affirmance of Ninth Circuit U.S. Court of Appeals decision reversing a U.S. District Court decision upholding the federal law. See **April 00 LED:04.**

LED EDITORIAL NOTE: The Free Speech Coalition decision also strikes down a provision in the federal statute defining as child pornography that which “conveys the impression” of minors engaged in sexually explicit conduct. Washington statutes addressing child pornography in chapter 9.68A RCW do not include virtual child pornography, nor do they include that which appears to be, but is not, child pornography. Accordingly, the Free Speech Coalition decision should not affect enforcement of Washington’s statutes on child pornography.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

NO TERRY SEIZURES ARE ALLOWED FOR NON-TRAFFIC CIVIL INFRACTIONS -- In State v. Duncan, ___ Wn. 2d ___, 43 Wn.2d 513 (2002), the Washington Supreme Court unanimously rules that the constitutional rule of Terry v. Ohio, which permits officers to make investigatory seizures for crimes and for non-criminal traffic infractions based on the non-probable cause standard of reasonable suspicion, does not apply to non-traffic civil infractions. The Duncan Court thus holds that an investigatory seizure for a non-traffic civil infraction must be based on probable cause that the violation occurred in the officer’s presence.

This case involved a seizure and frisk arising from an investigation of a violation of Seattle’s “open container” ordinance. The Supreme Court notes that in 1999 the Washington Legislature decriminalized the RCW 66.44.100 offense of “opening or consuming liquor in public place.” This effectively decriminalized the similar offense under the Seattle ordinance (SMC 12A.24.025), the Supreme Court declares.

In Duncan, two Seattle police officers spotted three men standing together at a bus stop shelter. One of the officers detected that one of the men, Demetrius Duncan, had the smell of beer on his breath. The other officer did not detect this smell. The officers observed the neck of a bottle protruding from a small bag on a bench in the shelter. Further inspection revealed a cold, half-full bottle of beer in the paper bag. Duncan was closest to the bottle, about six inches away. Duncan did not move as the officers approached.

One of the officers decided to cite Duncan under the Seattle ordinance for possessing an open container of alcohol in public. Duncan was dressed in bulky clothing on this cold October day. Because the officer knew that Duncan had a history of convictions for violent crime and had been known in the past to carry a gun and resist police authority, the officer frisked Duncan. The officer discovered a handgun during the frisk, arrested Duncan as a felon in possession of a gun, and then found stolen credit cards and a purse in a search of Duncan incident to his arrest.

Duncan was charged with unlawful possession of a firearm, possession of a stolen firearm, and possession of stolen property. The trial court suppressed the evidence on grounds that the officer unlawfully seized Duncan before frisking him. In an unpublished opinion, the Court of Appeals reversed the trial court, but now the Supreme Court has reinstated the trial court’s suppression ruling.

As noted above, the Duncan Court holds that officers must have probable cause that a non-traffic civil infraction is occurring in their presence in order to justify a seizure for such an

infraction (mere non-seizure contacts, of course, are not restricted). The Court goes on to conclude that the facts of this case did not add up to probable cause that the infraction of possessing an open container in public was occurring in the officers' presence.

While the Duncan Court appears to concede that the smell of alcohol on the suspect's breath would be a factor in determining whether there was probable cause that he was in constructive possession of the nearby bottle, the Court finds negating significance in the fact that only one of the officers had detected the smell of alcohol on Duncan's breath. Considering that the officers did not witness Duncan drinking the alcohol, holding the container, or reacting to the approach of the officers, the Court concludes that the officers did not have probable cause to believe that the infraction occurred in their presence.

Result: Reversal of unpublished Court of Appeals decision, thus reinstating a King County Superior Court ruling suppressing the evidence and dismissing the charges against Demetrius Marcel Duncan.

Status: The Seattle City Attorney has moved to intervene and is asking the Washington Supreme Court to reconsider its determination that the decriminalization of the state open container law (RCW 66.44.100) automatically or impliedly decriminalized Seattle's open container ordinance (SMC 12A.24.025).

LED EDITORIAL COMMENTS:

1) Officer safety

The Duncan decision contains several pages of what we find to be confusing discussion. The Court appears to hold that both the seizure and the frisk were unlawful. Some attorneys and judges may reasonably read the decision as suggesting that frisking based on articulable objective indicators of danger is not permitted even in those non-traffic civil infraction investigations where probable cause is present. **HOWEVER, IT GOES WITHOUT SAYING: SAFETY FIRST!!!** We assume and hope that officers will not be deterred from frisking in all situations where they have sufficient articulable and objective information to conclude that the person with whom they are dealing is armed and dangerous. We would hope that the Duncan decision would not cause judges to dismiss out of hand an argument under State v. Hall, 60 Wn. App. 645 (Div. I, 1991) June 91 LED:11. In Hall, an officer conducted a frisk based on legitimate and articulable safety concerns posed during a contact, but the officer did not have reasonable suspicion or probable cause as to a crime or infraction before he conducted the frisk.

2) RCW 10.31.100 and the statutory misdemeanor presence rule

For reasons that are not entirely clear to us, the Duncan Court mentions the misdemeanor-presence rule of RCW 10.31.100 several times without making any mention of the multitude of exceptions to the rule set forth in the statute. Although some criminal defense attorneys may argue that Duncan somehow undercuts the constitutional validity of the array of express statutory exceptions to the misdemeanor presence rule, we are confident, despite our questions about some of the "logic" of the opinion, that the Duncan Court did not intend to question the validity of the exceptions to the misdemeanor-presence rule set forth in RCW 10.31.100 and elsewhere in the RCWs.

3) Smell of alcohol on the breath in relation to PC as to alcohol-possession crimes

We are likewise fairly confident that the Duncan Court's probable cause analysis is narrowly limited to the facts of this case. Although, again, criminal defense attorneys are likely to try to broaden the application of this case, we are hopeful that they will fail. For instance, in minor-in-possession cases, we expect that Washington courts will continue to hold that smell-of-alcohol on a minor's breath, coupled with one or two more facts, is enough evidence to sustain a conviction in a constructive possession MIP case (and hence constitutes PC as to possession as well). See State v. Dalton, 72 Wn. App. 674

(1994) Sept. 94 LED:14 (minor emerging from house where keg party in progress smelled of alcohol and appeared to be under the influence); State v. Walton, 67 Wn. App. 127 (1992) Jan. 93 LED:09 (minor near location of juvenile drinking party smelled of alcohol and admitted that he had consumed beer at the party); and State v. Preston, 66 Wn. App. 494 (1992) Oct. 92 LED:08 (minor at a lakefront park was observed tossing a bag of empty beer bottles in the trash, smelled of alcohol, and admitted to having consumed a few of the beers).

WASHINGTON STATE COURT OF APPEALS

CUSTODIAL ARREST FOR DRIVING WHILE SUSPENDED UPHELD EVEN THOUGH OFFICER DID NOT FOLLOW LOCAL POLICY BY CHECKING WITH JAIL BEFORE ARRESTING AND CONDUCTING SEARCH INCIDENT TO ARREST; ALSO, SUSPECT'S LOCKING HIS TRUCK AFTER HE WAS ARRESTED DID NOT PRECLUDE SEARCH-INCIDENT OF TRUCK

State v. O'Neill, ___ Wn. App. ___, 42 P.3d 522 (Div. III, 2002)

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

Late one evening in June 2000, [a Spokane County deputy sheriff] stopped Mr. O'Neill for failing to signal. Mr. O'Neill pulled into the parking lot of a closed business. Mr. O'Neill's Idaho driver's license was suspended.

[The deputy] told Mr. O'Neill he was under arrest for driving with a suspended license. Mr. O'Neill stepped out of the truck, was handcuffed, and placed in the back of [the deputy's] patrol car. When [the deputy] returned to Mr. O'Neill's truck, he found the doors locked and the keys in the ignition. From the window, [the deputy] could see a glass pipe, resembling drug paraphernalia on the passenger seat. After checking with his supervisor, [the deputy] requested an impound tow and a canine unit. When the tow operator opened the truck door, the cocaine was found in the truck. Mr. O'Neill was then arrested for possessing a controlled substance.

Mr. O'Neill moved to suppress the evidence, alleging an unconstitutional search. At the CrR 3.6 hearing, evidence indicated a general Spokane Jail booking restriction on minor traffic offenses, including driving with a suspended license. Exceptions were available for the circumstances presented here. **[LED EDITORIAL NOTE: The O'Neill Court does not explain which particular exceptions were available.]** [The deputy] did not request a booking exception before arresting Mr. O'Neill. [The Spokane County jail commander] testified he could not recall an exception request ever being denied.

The trial court denied Mr. O'Neill's motion to suppress, concluding that probable cause existed to arrest Mr. O'Neill for suspicion of driving with a suspended license. Further, Mr. O'Neill was arrested when [the deputy] returned to the truck and advised Mr. O'Neill to exit because he was under arrest. Finally, the search was proper as incident to Mr. O'Neill's arrest.

ISSUES AND RULINGS: 1) Was O'Neill lawfully subjected to custodial arrest even though the deputy did not follow local policy for DWLS arrests by first checking with the jail? (ANSWER: Yes); 2) Was the search of the truck lawful where O'Neill locked it after being arrested for DWLS? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction of David T. O'Neill for

possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Custodial arrest for DWLS

In New York v. Belton, 453 U.S. 454 (1981), the Supreme Court developed a bright-line rule for searching a vehicle upon the driver's arrest. "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Washington adopted this bright-line rule in State v. Stroud, 106 Wn.2d 144 (1986), but limited the incidental search to unlocked containers in the passenger compartment of the vehicle. A search incident to arrest may precede the actual custodial arrest so long as the search and arrest are closely related in time and place. State v. Brantigan, 59 Wn. App. 481(Div. I, 1990) **Feb. 91 LED:05**.

In Brantigan, the court held that a search incident to arrest can take place prior to the actual custodial arrest so long as probable cause exists to arrest at the time of the search. Mr. Brantigan was pulled over for littering. As the officer was doing a routine check, he observed drug paraphernalia on the front seat. The officer seized the paraphernalia and then advised the driver he was under arrest but did not place him in custody. During the subsequent pat-down search, the officer found cocaine. At the pretrial hearing, the officer testified that had he not found the cocaine, he would have merely cited the defendant for the paraphernalia and released him. In upholding the search prior to arrest, the court held that the officer's subjective intent was irrelevant, as was the fact that the search preceded the arrest, so long as there was probable cause to arrest for possession of drug paraphernalia, and the search was contemporaneous to the arrest. Similarly, the court in State v. Thomas, 89 Wn. App. 774 (1998) **April 98 LED:05** held that the critical issue is whether probable cause for arrest existed, regardless of an officer's beliefs about local jail admission policies.

Here, [the deputy] had probable cause to believe that Mr. O'Neill was driving with a suspended license. Under RCW 10.31.100(3)(e), [the deputy] was authorized to arrest Mr. O'Neill for this offense. State v. Perea, 85 Wn. App. 339 (1997) **June 97 LED:02**. Following the reasoning in Brantigan, so long as there was probable cause and the authority to arrest, a search incident to arrest is justified, even if preceding the ultimate decision to book. Consequently, the trial court did not err in concluding that [the deputy] could properly search Mr. O'Neill's truck incident to his arrest.

Mr. O'Neill argues the bright-line rule of Belton, and its subsequent expansion by Brantigan, have been recently tempered by Knowles v. Iowa, 525 U.S. 113 (1998) **Feb 99 LED:02** and State v. McKenna, 91 Wn. App. 554 (1998) **Oct 98 LED:05**. Both cases held that once an officer issues a citation in lieu of an arrest, the authority to search incident to arrest ceases.

In McKenna, the officer had probable cause to make a custodial arrest, but he chose to cite and release the defendant because of jail overcrowding. After citing the defendant, the officer offered to give her a ride home. He conditioned the ride upon consent to search her for weapons, but when he found drug paraphernalia in her bag, he ordered the defendant to empty her pockets and discovered drugs.

The McKenna court found that the search of the bag was consensual, but the officer's command to the driver to empty her pockets constituted a warrantless search. **LED Editorial Note: The McKenna Court also held that mere possession of drug paraphernalia is not a crime under state law, and therefore the officer did not have separate authority to arrest Ms. McKenna when the officer discovered drug paraphernalia.** While the court recognized that a search incident to arrest may precede the actual arrest, in this case the search was not incidental to the officer's previous arrest of the driver because that arrest was noncustodial and had ended before the officer asked the driver to empty her pockets.

Mr. O'Neill argues McKenna controls in this case because "[t]here is no evidence the officer had effected a custodial arrest when he searched Mr. O'Neill's [sic] vehicle." He argues the best indicator of a custodial arrest is when the suspect is removed from the scene and taken to the police station.

In this case, [the deputy] asked Mr. O'Neill to step from the vehicle, told him he was under arrest, handcuffed him and placed him in the back of the patrol car before returning to Mr. O'Neill's truck to search it. While the definition of "custodial arrest" has not been clearly established, there is little doubt that [the deputy] had placed Mr. O'Neill in custody before searching his truck. See McKenna (arrest was noncustodial where officer issues citation in lieu of arrest). Consequently, the search was valid as incidental to the arrest.

2) Search incident of locked truck

Next, Mr. O'Neill argues that the holding in Perea prevented the officer from searching his locked vehicle. In Perea, a police officer, with his emergency lights activated, pulled in behind Mr. Perea as he was parking his vehicle in his driveway. Mr. Perea locked his car and walked away despite the officer's repeated requests to return to his vehicle. Mr. Perea was arrested shortly before reaching his house. The court determined that Mr. Perea was not seized until he was arrested and handcuffed near his home. Since he was not seized in or near his car, the locked vehicle could not be searched incident to arrest.

Here, the trial court correctly determined that Perea is factually distinguishable and legally inapplicable. Mr. O'Neill had submitted to [the deputy's] authority while still inside his vehicle. Mr. O'Neill pulled over after seeing [the deputy's] emergency lights. He provided the information requested and stepped from the vehicle at [the deputy's] request. Although Mr. O'Neill apparently locked his vehicle before or when he exited his truck, this does not prevent a valid search of the vehicle incident to arrest.

[Some citations omitted]

ORDER FORMS FOR SELECTED RCW PROVISIONS

Order forms for 2001 selected RCW provisions of interest to law enforcement are available on the Criminal Justice Training Commission website on the "Professional Development" page. The direct link to the order form is [<http://www.wa.gov/cjt/forms/rcwform.txt>].

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO 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.

A website maintained by the Municipal Research and Services Center at [<http://legalwa.org/>] includes Washington State Supreme Court opinions from 1969 to the present. It also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

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. Ninth Circuit U.S. Court of Appeals decisions issued over the past several years may be accessed at the following site, updated daily: [<http://www.ca9.uscourts.gov/ca9/newopinions.nsf/opinions>]

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in the 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. 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 web site is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office web site is [<http://www.wa.gov/ago>].

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