



Law Enforcement

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Digest

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WASHINGTON STATE COURT OF APPEALS

SEARCH OF JACKET LEFT BY ARRESTEE AT SCENE OF ARREST UNLAWFUL -- THEORIES OF ABANDONED PROPERTY AND INVENTORY SEARCH REJECTED

State v. Dugas, ___ Wn. App. ___, 36 P.3d 577 (Div. I, 2001)

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

Two officers were dispatched to an apartment complex to investigate a report of domestic violence. Dugas was observed in the parking lot of the apartment complex walking toward a white Jeep. The officers contacted him because the dispatch had broadcast that the suspect would be leaving in a white truck. During the contact, Dugas admitted that he had had an argument with his girlfriend.

One officer stayed with Dugas while the other left to speak with the victim of the alleged domestic violence. Dugas, stating that he was hot and sweaty, requested and was given permission to remove his jacket. He placed the jacket on the hood of his vehicle. After talking with the victim, the officers determined that they had probable cause, and arrested Dugas.

One officer then transported Dugas to the jail, while the other officer remained at the scene. That officer noticed that Dugas' jacket was still on top of the vehicle. The officer seized the jacket and searched it. No consent to search or seize the jacket was sought. During the search, the officer found a closed key ring pouch in the jacket pocket. The officer opened the pouch and found several small white rocks that later tested positive for cocaine. Dugas' unlocked Jeep was not impounded and remained in the parking lot.

Dugas was charged with possession of a controlled substance. He moved to suppress the evidence on grounds that the warrantless search of his jacket violated his constitutional right to privacy. The officers testified that the routine procedure followed for an impound search was to record all items impounded, including items in jacket pockets, in order to avoid false claims and to discover

drugs and any dangerous contents. The court denied the motion, holding that a lawful impound search had been conducted. [The trial court convicted Dugas as charged - **LED Ed.**]

ISSUES AND RULINGS: 1) Was the jacket abandoned by Dugas and therefore not protected by constitutional search-and-seizure restrictions? (ANSWER: No); 2) Did the police have the authority to impound the jacket? (ANSWER: Yes); 3) Did the police have the authority to search the contents of the closed containers found in the jacket as part of an inventory of a lawfully impounded item? (ANSWER: No)

Result: Reversal of Snohomish County Superior Court conviction of Parris Adrian Dugas for possession of a controlled substance.

Status: No further review has been sought by the State, so this decision is final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Abandonment question

We conclude that under the totality of the circumstances and objective standards, Dugas did not abandon his jacket by simply placing it on the hood of his car and not mentioning it after his arrest.

Law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution. Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered. The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished [his or] her reasonable expectation of privacy so that the search and seizure is valid. In the law of search and seizure, the question is whether the defendant has, in discarding the property, relinquished his [or her] reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment.

Here, Dugas cannot be said to have voluntarily relinquished his expectation of privacy simply by placing his jacket on top of his vehicle. The State attempts to analogize this case to United States v. Morgan, 936 F.2d 1561 (10th Cir.1991) where the court concluded the defendant abandoned his property when he threw his bag containing contraband in his friend's yard that abutted an open field. Morgan is inapposite. Dugas did not throw anything away, but rather asked the police if he could remove his jacket because he was hot and then placed the jacket on the hood of his vehicle.

It is true that Dugas did not ask the police to leave his jacket with his girlfriend or in his car. At the suppression hearing, Dugas testified that this was "[b]ecause my girlfriend would have taken it ... with the Jeep. And I had asked them to tell her to take the Jeep, which they said they did." But the officer seized the jacket very soon after Dugas was removed from the scene. Taking into consideration all of the relevant circumstances, we conclude that Dugas did not voluntarily abandon the jacket.

2) Impound of the jacket

Next, Dugas argues that when a suspect is arrested and leaves a jacket at the scene, it is improper for the police to impound the jacket for safekeeping. We disagree. A police inventory of an arrestee's possessions "presents no problem when a person is arrested in some public place while carrying a suitcase or like object, for it would be clearly improper for the police to simply leave the container unattended at the scene of the arrest." We reach the same conclusion with regard to wearing apparel removed and laid aside by the arrestee.

3) Inventory search of closed containers in the jacket

Next, we consider whether it is reasonable for police to search the contents of closed containers found in a jacket incident to an impound. We hold that it is not. Dugas was no longer present, he did not consent, and there was no indication of dangerous contents. There were no exigent circumstances.

A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions. Searches pursuant to a lawful arrest and routine inventory searches are recognized exceptions to the warrant requirement. The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. Knowledge of the precise nature of the property protects against claims of theft, vandalism, or negligence.

Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they serve a purpose other than discovering evidence of criminal activity. But an inventory search may not be unlimited in scope. The permitted extent of such searches must be restricted to effectuating the purposes that justify their exception to the Fourth Amendment.

In State v. Houser, 95 Wn.2d 143 (1980), the [Washington] supreme court considered whether a search of a piece of luggage found in the trunk of an automobile during the course of an inventory search was reasonable. It stated that the court must balance "the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects." The Houser court held that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.

In reaching its decision, the court in Houser relied on People v. Counterman [a 1976 decision by a Colorado court]. In that case, the [Colorado] court held that police had exceeded the proper scope of an inventory search in opening and searching the contents of a knapsack. The [Colorado] court noted that the contents were securely sealed and did not give any indication of danger or other reasons for special inventory. They concluded that the legitimate purposes of the inventory search could have been fully accomplished by noting the knapsack as a sealed unit, and by offering the defendant a choice of a full inventory of the

contents. Because the knapsack was tightly sealed and there was no danger of anything slipping out, the court noted that the purposes of the inventory search are better served if the knapsack is inventoried as a unit. "In this way the knapsack, which is locked up as a whole in police headquarters, has never been opened and its contents have never been removed, reshuffled and replaced." The Houser court concluded that "this would minimize the possibility of loss and the possibility of false claims against police by the owner."

This appeal does not involve the inventory search of a vehicle, but the cases discussed above lead us to a similar conclusion--the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents. The search of the jacket was conducted in the field, outside the presence of Dugas or other witnesses. Opening a closed container found in the jacket was not a step necessary or reasonable to guard against a false property loss claim. The officers testified that their standard procedure for an inventory search included a search for illegal drugs, a purpose outside the scope of a valid inventory search.

Balancing the legitimate needs of the police against the right to be free of warrantless intrusions into ones personal effects, we conclude that it was unreasonable to search inside the closed container.

[Some citations omitted]

LED EDITORIAL COMMENT: The Dugas Court fails to acknowledge (or perhaps to recognize) that there appears to be a conflict between Washington decisions addressing the permissible scope of inventory searches of vehicles following impound and Washington decisions addressing the permissible scope of jail-booking inventory searches of personal property. The Dugas facts may fall into a third inventory-search category, non-abandoned property seized in the field for safekeeping and return to the owner. The Dugas ruling appears to be consistent with the restrictive Washington case law limiting the scope of vehicle inventory searches, but not with the jail-booking inventory search case law.

The jail-booking inventory cases allow a thorough search of the contents of items and containers before they are placed in a jail property area, so long as that search is consistent with standardized jail policies or practices. See State v. Garcia, 35 Wn. App. 174 (Div. III, 1983) Jan. 84 LED:12 (inventory of contents of wallet of booked arrestee held lawful); State v. Ward, 65 Wn. App. 900 (Div. III, 1992) Nov. 92 LED:16 (search of opaque paper bundle found under clear cellophane of cigarette pack found on booked arrestee held lawful); State v. Smith, 76 Wn. App. 9 (Div. I, 1994) May 95 LED:17 (search of the contents of the booked arrestee's purse held lawful).

On the other hand, as noted by the Dugas Court, the Washington Supreme Court declared in State v. Houser, 95 Wn.2d 143 (1980) -- based on the Fourth Amendment of the U.S. Constitution -- that officers inventorying the contents of a lawfully impounded vehicle should not inspect the contents of closed containers, wherever located (or the contents of a locked trunk) absent "manifest necessity" to do such further inspection. The Washington courts have not since addressed the question of the permissible scope of inventories of closed containers found in impounded vehicles. However, when confronted with the indisputable argument that Houser's locked-trunk rule for MV-inventory scope was clearly contrary to the MV-inventory scope rule stated in a post-Houser Fourth Amendment ruling by the U.S. Supreme Court, the Washington Supreme

Court held, in State v. White, 135 Wn.2d 761 (1998) Sept. 98 LED:08, Nov. 98 LED:20, that the 1980 MV-inventory-scope ruling in Houser barring searches of locked trunks (absent “manifest necessity”), was now an “independent grounds” ruling under article 1, section 7 of the Washington constitution.

Presumably then, the Houser declaration that closed containers are not to be opened and inspected during MV inventories, absent “manifest necessity” to do so, is also a Washington constitutional rule. (NOTE: No Washington court decision until Dugas had addressed the 1980 “closed container” discussion of Houser, and no Washington decision has ever addressed what constitutes “manifest necessity” under the Houser rule. The Dugas Court assumes that the Washington Supreme Court meant what it said in 1980 in its “closed container” discussion in Houser, at least as applied to MV inventory searches. We guess also that Houser’s “manifest necessity” exception is something close to an “exigent circumstance,” which seems to make Houser’s “manifest necessity” exception almost meaningless, in that an “exigent circumstance” would justify a warrantless search of a locked trunk or closed container in a MV in and of itself.)

The rationales for permitting inventory searches in MV-inventory situations and in jail-booking situations are similar. In each circumstance, the courts here and elsewhere have said that law enforcement or corrections officers who are following standardized policies, procedures or practices, are permitted to inspect and make an inventory list to protect the person’s property, to protect the government against false claims that seized property was subsequently lost or stolen, and to protect against any danger that may be posed by the property. In light of the differing factual contexts of MV inventories and jail-booking inventories, however, application of these rationales arguably may yield different rules as to permissible inventory scope for the two categorical situations.

Despite the failure of the Dugas Court to distinguish between MV inventories and jail-booking inventories in its reasoning, we think that the decision should not be interpreted as imposing a Houser-type limit on jail-booking inventories of personal effects and closed containers. However, we do think that the Washington courts will apply the Houser limit on inspecting the contents of containers and personal effects in non-booking inventory situations, such as the situation presented in Dugas. Depending on the proximity of Dugas to his jacket at the point when officers placed him under arrest, the officers in Dugas might have been justified under the “search incident to arrest” rule in searching the contents of the nearby jacket immediately after arresting Dugas. That is, the jacket may have been within the “lunge area” at that point. However, once the officers had transported him to jail, any search of the jacket left at the scene would no longer qualify as “incident to arrest,” and, as noted above, the Dugas Court holds that the search did not qualify as a permissible inventory either. Only time and a careful exploration by the Washington courts of the rationales and rulings of Washington courts on the various types of inventory searches will tell: 1) whether the Court of Appeals in Dugas has correctly interpreted the Washington precedents on the permissible scope of inventory searches, and 2) whether the Dugas ruling will be extended to restrict jail-booking inventories.

BURGLARY CONVICTION UPHELD BECAUSE DEFENDANT EITHER HAD NO PERMISSION TO ENTER APARTMENT OR EXCEEDED ANY LIMITED PERMISSION RECEIVED

State v. Gohl, ___ Wn. App. ___, 37 P.3d 293 (Div. I, 2001)

Facts: (Excerpted from Court of Appeals opinion)

Heather Giaudrone and Douglas Gohl dated for about two months in late 1997 and early 1998. On the night of January 28, Gohl came to Giaudrone's apartment. She told him he could not come in because her roommates were sleeping. They went to a park for a while, then returned to Giaudrone's apartment. Gohl asked for a quarter so he could call a friend to come get him. Giaudrone told Gohl to wait outside while she went in to get the quarter. She left the door ajar because she was coming right back. Gohl came inside and asked for a glass of water. Giaudrone brought the water to him and took it into the kitchen when he was done. As she turned around to say goodbye, she was hit hard in the back of the head and screamed for help.

Jane Vollant, Giaudrone's roommate, heard the scream and came out of her room. She saw a man hitting Giaudrone. He came after her, and she ran out the open front door and began to run down the stairs. The man ran after her and pushed her, causing her to fall to the bottom of the stairs. The man came down and hit her hard on the left side of the head. She got up and ran up the stairs of the neighboring building.

Mary Young lived in an apartment in the neighboring building. She heard a female screaming for help and looked out the peephole of her front door. She saw a woman lying in front of the door opposite hers. A man ran up and hit the woman about the face and head between five and ten times, then ran away.

Proceedings: Gohl was convicted of multiple charges, including first degree burglary.

ISSUE: Was there sufficient evidence of "unlawful ent[ry]" or "unlawful remain[ing]" to support Gohl's conviction for first degree burglary? (ANSWER: Yes)

Result: Affirmance of King County Superior Court first degree burglary conviction of Douglas Alan Gohl; vacation of assault convictions (two counts) based on double jeopardy ruling not addressed in this LED entry; remand to re-sentence Gohl on the burglary conviction and on two counts of attempted first degree murder.

ANALYSIS: (Excerpted from Court of Appeals opinion)

An individual is guilty of first degree burglary when he enters or remains unlawfully in a building with intent to commit a crime therein and, either inside or while fleeing, was armed with a deadly weapon or assaulted someone. Entry is unlawful if made without invitation, license, or privilege. Limitation or revocation of such a license may be inferred from the particular facts and circumstances of a case. State v. Collins, 110 Wn.2d 253 (1988).

In this case, the facts show that Gohl had no license to be in the apartment. Giaudrone testified that she told Gohl numerous times during the evening that he could not come inside because her roommates were asleep. She stated that she never invited Gohl in and told him to stay outside while she went in to get the quarter for his telephone call. Once he was inside, she did not ask him to come further in to the apartment or sit down; she merely gave him some water at his request, thinking he would drink it and leave. A reasonable person would not conclude that Giaudrone extended an invitation or granted a license to Gohl to be in the apartment.

Even if a license existed, it was limited to the specific purpose of getting a quarter and some water. In Collins, two homeowners invited a stranger who appeared lost to enter their home to make a telephone call. He dragged them to another

room and assaulted them. The court held that the invitation or license extended to him was limited to a specific area and purpose, and that it was impliedly revoked when he exceeded it. The evidence in this case shows that Giaudrone screamed for help, Vallot attempted to escape and to call help, and both women suffered severe injuries. Gohl attempted to prevent their calls for help, and subsequently fled the scene. This evidence gives rise to an inference that Giaudrone revoked any invitation or license she may have given earlier, and that Gohl exceeded any such license by assaulting Giaudrone and Vollant. There is ample evidence supporting the first degree burglary conviction.

[Some citations omitted]

DRIVER WHO SIGNED A FALSE NAME ON A TRAFFIC CITATION COMMITTED FORGERY

State v. Richards, ___ Wn. App. ___, 36 P.3d 1119 (Div. II, 2001)

Facts: (Excerpted from Court of Appeals opinion)

On June 10, 1997, [a] Washington State Patrol Trooper was on routine patrol when he saw a motorcycle lying on its side at the edge of the road. When [the trooper] approached, Richards and a woman were standing beside the motorcycle.

When [the trooper] asked Richards if he had a driver's license, Richards presented a laminated Idaho license with the name "Kyle A. Richardson" typed and signed on it. [The trooper] examined it and thought that the photo and physical description matched Richards.

[The trooper] subsequently arrested Richards for DUI and took him to the Kitsap County Jail. [The trooper] filled out a uniform traffic citation for driving under the influence and asked Richards to sign it in the space indicated. In printed text above the signature block, the citation stated, "Without admitting having committed each of the above offense or offenses, I promise to respond as directed on this notice." Richards signed the citation using the name "Kyle Richardson." After being photographed and fingerprinted, he was released.

After Richards failed to appear in court on the DUI citation, the court issued a bench warrant in the name of "Kyle Richardson." After receiving the warrant, the real Richardson called [the trooper] and said that he had never been to Kitsap County and had not been arrested for DUI. [The trooper] asked him to forward a copy of his driver's license, which Richardson did. Although the copy was of poor quality, [the trooper] wrote in a report that the photo on the license did not appear to be the person he had arrested for DUI.

[The trooper] then had Richards's fingerprints processed and discovered his true identity as well as the fact that he was wanted on outstanding warrants. Richards was arrested in Kitsap County on March 16, 2000, and was charged with forging a Washington uniform traffic citation.

Proceedings: The trial court convicted Richards of forgery for signing a false name on the traffic citation.

ISSUE AND RULING: Is it forgery under RCW 9A.60.020 to sign a false name on a traffic citation with intent to avoid responsibility for the charged violation? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Steven Ivor Richards for forgery.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Richards contends that the evidence was insufficient to support his conviction for forging the traffic citation because such a citation has no legal efficacy and thus is not a written instrument susceptible to forgery.

RCW 9A.60.020(1) sets forth the crime of forgery:

A person is guilty of forgery if, with intent to injure or defraud:

(a) He falsely makes, completes, or alters a written instrument or;

(b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

Former RCW 9A.60.010(1) (1987) defines a "written instrument" as follows:

"Written instrument" means: (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, ... token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification[.]

Washington courts have read into that definition the common-law requirement that the written instrument have "legal efficacy." That is, the instrument must be "something which, if genuine, may have legal effect or be the foundation of legal liability."

Richards argues that the citation issued served only to notify him of the DUI charge and had no legal effect. He also contends that the citation was complete whether he signed it or not.

We observe initially that it is forgery to sign the name of another person with the intent to defraud. "[A]ny document required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties may be the subject of forgery."

It is part of a state trooper's duties to issue a traffic citation to someone suspected of violating the state's traffic laws. RCW 46.64.015. Such a citation "shall include ... a place where the person arrested may sign." RCW 46.64.015. The statute adds that in order to secure release, the arrested person "must give his or her written promise to appear in court as required by the citation and notice by signing in the appropriate place the written citation and notice served by the arresting officer...." RCW 46.64.015. The detention arising from an arrest for a traffic violation may be no longer than reasonably necessary unless the arrested person refuses to sign a written promise to appear in court as required by the citation. RCW 46.64.015(1).

It thus appears that the "promise to appear" portion of a citation is an essential feature of a traffic citation. If the arrestee refuses to sign the citation, he or she may be held in jail. Furthermore, if the arrestee signs and then fails to appear as promised, a bench warrant may result, as it did in the present case. See CrRLJ 2.5. Therefore, attempting to obtain an arrestee's signature on a citation is necessary to the discharge of a state trooper's public duties. The failure to give that signature has legal effect, as does the failure to appear as promised after a signature is provided.

We conclude that a signed traffic citation is a written instrument with legal efficacy that may be susceptible to forgery. By signing another's name to the citation at issue, Richards falsely completed a written instrument. The evidence was sufficient to support the forgery conviction as charged in Count II.

[Some citations omitted]

LED EDITORIAL COMMENT: In an unpublished part of the opinion of the Court of Appeals, the Court reverses a separate forgery conviction of Richards. Richards was charged in a separate count of forgery for using a false drivers' license. Such usage can be forgery, the Court of Appeals explains, citing State v. Esquivel, 71 Wn. App. 868 (1993) May 94 LED:04. However, the State failed to present sufficient admissible evidence at trial to support the charge in this case, the Reynolds Court holds.

UNDER RCW 9.41.040 (3), THERE COULD BE NO RESTORATION OF GUN RIGHTS ON 1975 ROBBERY CONVICTION DESPITE DISMISSAL OF CASE UNDER RCW 9.95.240

Nakatani v. State, ___ Wn. App. ___, 36 P.3d 1116 (Div. I, 2001)

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

In 1975, Andrew Nakatani pleaded guilty to robbery and received a five-year probationary sentence. In 1984, after fulfilling the conditions of his probation, Nakatani was allowed to withdraw his guilty plea and enter a plea of not guilty. The trial court then set aside the finding of guilt and dismissed the information against him pursuant to RCW 9.95.240.

In November 2000, Nakatani filed a petition in Superior Court for "an RCW 9.41.040/9.41.047 Certificate," in order to restore his right to possess a firearm. The trial court dismissed the petition on the ground that Nakatani was statutorily ineligible to make the petition. The trial court's dismissal was without prejudice.

ISSUE AND RULING: Was Nakatani eligible to have his Washington firearms rights restored under subsection (4) of RCW 9.41.040? (ANSWER: No)

Result: Affirmance of King County Superior Court dismissal of petition of Andrew Ryuichi Nakatani for restoration of his firearms rights under RCW 9.41.040(4).

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9.41.040(1) prohibits anyone convicted of a felony from possessing a firearm. Notwithstanding that prohibition, RCW 9.41.040(4) contains several exceptions, including a provision that allows some felons to petition for reinstatement of their firearm rights after a statutory waiting period. These exceptions do not apply to Nakatani, however, because he was convicted of robbery and because that crime carried a maximum penalty of over 20 years when he was convicted.

Nakatani nevertheless argues that he is eligible for restoration of his firearm rights under RCW 9.41.040(3). That subsection provides, in relevant part: "A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted[.]" RCW 9.41.040(3). In his brief, Nakatani argues that the withdrawal of his guilty plea and the subsequent dismissal of the charges against him should

be deemed a finding of rehabilitation equivalent to a certificate of rehabilitation for purposes of the above provision.

We disagree. The statute requires that such "equivalent procedure" must be based on a "finding" of either innocence or rehabilitation RCW 9.41.040(3). See also State v. Radan, 143 Wn. 2d 323 (2001) **June 01 LED:06**. Radan held that although the statute does not specify how explicit such a "finding" must be, it requires something more than another state's automatic restoration of a person's firearm rights after a period of time. Nevertheless, the [Radan] court held that a felon's early release from custody in Montana was sufficient to satisfy RCW 9.41.040(3) because such early release was authorized only where it was in the best interests of society and would not present an unreasonable risk of danger to the victim of the offense. Here, the only prerequisite for allowing Nakatani to withdraw his guilty plea and enter a plea of not guilty was that Nakatani "fulfilled the terms of his probation for the entire period thereof." RCW 9.95.240. This is not a finding of rehabilitation for purposes of RCW 9.41.040(3).

Further, Nakatani's above interpretation of RCW 9.41.040(3) conflicts with the following language of RCW 9.41.040(4):

Notwithstanding subsection (1) of this section, a person convicted of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401(a) and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction...

(Emphasis added). The above language shows a clear legislative intent that those convicted of robbery should be excluded from reinstatement of firearm possession rights by mere virtue of a suspended sentence and subsequent dismissal. It would be unreasonable to read the previous subsection of the statute in a way that contradicts that intent.

Finally, Nakatani argues that the court erred by failing to give him the opportunity for a hearing in which he could obtain a finding of rehabilitation to satisfy RCW 9.41.040(3). The trial court did not err in dismissing the petition, however, because Nakatani petitioned under RCW 9.41.040(4), and that subsection did not authorize the court to reinstate firearm possession rights for anyone convicted of a crime with a maximum sentence of 20 years or longer. RCW 9.41.040(4). Thus, the trial court correctly concluded that it did not have the authority to reinstate Nakatani's firearm possession rights under RCW 9.41.040(4).

[Court's footnote: Nothing in this opinion prohibits Nakatani from petitioning for reinstatement of his firearm possession rights, pursuant to RCW 9.41.040(3), in the event that he is granted a pardon or certificate of rehabilitation. At oral argument, the State indicated that the Legislature has not created any statutory proceeding by which one can petition for a certificate of rehabilitation and opined that this term in the statute was intended to apply to convictions from other jurisdictions where such procedures are available. Nevertheless, the authority of

Washington courts to issue such certificates is not before us in this case. We also express no opinion regarding Nakatani's right to request an equivalent finding of rehabilitation in a separate Superior Court proceeding. If Nakatani files such a petition, the trial court will then be in a position to evaluate whether and under what circumstances RCW 9.41.040(3) authorizes the court to issue certificates of rehabilitation or make equivalent findings.]

[Some footnotes, citations omitted]

LEAVING HOLDING CELL WITHOUT PERMISSION NOT “ESCAPE TWO” WHERE DEFENDANT WAS NOT BEING HELD THERE BASED ON AN ARREST FOR AN OFFENSE

State v. Hendrix, ___ Wn. App. ___, 35 P.3d 1189 (2001)

Facts: (Excerpted from Court of Appeals opinion)

Lynnwood police officers James Helms and Eric Tomkins arrested a male suspect for possession of stolen property. Officer Tomkins questioned a young woman who was with the suspect at the time of his arrest. She told the officer that her name was Crystal Davis, gave a date of birth, and said she was from Portland, Oregon. Tomkins was unable to verify the accuracy of that information when he checked police databases. He asked her if she would be willing to provide information about her friend. She agreed to accompany the police to the station to give a written statement.

At the station, she confessed that her name was really Candice Hendrix, and that there were warrants out for her. *[Court's footnote: The warrant itself is not a part of the record on appeal. But the record suggests that the warrant was an "at risk youth" warrant or a "runaway warrant."]* A detective handcuffed her to a couch while he verified this information, then turned her over to jail staff. Staff placed her in the "juvenile holding cell area," which is a family visiting area. This is used for juveniles to keep them separated from adult inmates of the jail. Hendrix left the holding cell without permission and ran out of the building. Jail staff soon found her hiding in a nearby dumpster.

Proceedings below: Hendrix was adjudicated guilty in juvenile court of second degree escape.

ISSUE AND RULING: For purposes of the “escape two” statute, RCW 9A.76.120, where defendant ran from a holding cell while being detained there based on a “runaway warrant,” did she run from a “detention facility” as that term is defined in RCW 9A.76.010? (ANSWER: No, because her detention was not for “an offense”)

Result: Reversal of Snohomish County Superior Court juvenile adjudication of Candice A. Hendrix for second degree escape; remand for entry of adjudication for third degree escape.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The second degree escape statute, RCW 9A.76.120, requires the State to prove that:

- (a) [The person charged] escapes from a detention facility;
- (b) Having been charged with a felony or an equivalent juvenile offense, he or she escapes from custody; or
- (c) Having been found to be a sexually violent predator and being under an order of conditional release, he or she leaves the State of Washington without prior court authorization.

The parties agree that the case turns on a proper construction of the definition of "detention facility," subpart (a) of the above quotation. That definition is found in RCW 9A.76.010:

(2) "Detention facility" means any place used for the confinement of a person (a) arrested for, charged with or convicted of an offense, or (b) charged with being or adjudicated to be a juvenile offender as defined in RCW 13.40.020 as now existing or hereafter amended, or (c) held for extradition or as a material witness, or (d) otherwise confined pursuant to an order of a court, except an order under chapter 13.34 RCW or chapter 13.32A RCW, or (e) in any work release, furlough, or other such facility or program.

Hendrix and the State disagree over the meaning of "detention facility." The State argues that the statute defines "a place, not people." It argues that the reason for the person's confinement is irrelevant.

It is true that the statute begins with a focus on place. But it also lists categories of persons who are confined for specific reasons. Thus, persons confined "pursuant to an order of the court" constitute one category. Persons "arrested for, charged with or convicted of an offense" constitute another. And those who are "charged with being or adjudicated to be a juvenile offender" constitute still a third category. Had the Legislature intended that the categories of persons confined, as described by the reasons for their detention, would play no role in the definition, it could have omitted any reference beyond the place of confinement. Instead, it included references to persons, as defined by the reasons for their confinement. The net effect of the State's argument is to ignore the significance of these references. We will not read out of the statute words that the Legislature took care to include.

Applying our construction of the statute to this record, we hold that there was insufficient evidence to support the adjudication. In its order denying reconsideration, the trial court stated that:

[T]he court finds that the respondent was lawfully restrained pursuant to a lawful arrest. That RCW 9A.76.010(2)(a) defining a detention facility as any place used for the confinement of a person arrested for an offense does apply to juvenile....

The court made no finding that Hendrix had been arrested, charged, or convicted of an offense. And the State's proper concession at oral argument that there was no offense at issue here is well taken. Thus, there was insufficient evidence to support the adjudication under RCW 9A.76.010(2)(a) and RCW 9A.76.120(a). Likewise, there was no evidence to show that Hendrix was "charged with being or adjudicated to be a juvenile offender" under RCW 9A.76.010(2)(b). These two subparts were the only provisions of the definition at issue here. Neither supports the adjudication on this record.

The State argues that, even if Hendrix was not actually arrested for an offense, the statute should apply in this case because the officers had probable cause to arrest her for two offenses. The definition of detention facility does not include any reference to probable cause. "Arrested for" does not mean "probable cause to arrest for." The State's search and seizure analogy is not useful in this context. The cases the State cites to support this analogy are not, in our view,

applicable here. Thus, the plain language of the statute also defeats this argument.

We reverse the adjudication for escape in the second degree, and remand for resentencing for the lesser-included offense of escape in the third degree.

[Some text, footnotes, and citations omitted]

PHOTO MONTAGE WHERE JUST ONE PICTURE MET VICTIM'S DESCRIPTION OF A BUCK-TOOTHED PERSON WITH WIDE GAPS BETWEEN HIS BUCK TEETH WAS IMPROPERLY SUGGESTIVE, BUT IN-COURT IDENTIFICATION WAS RELIABLE

State v. Kinard, ___ Wn. App. ___, 36 P.3d 573 (Div. III. 2001)

Facts and Proceedings below:

Glenda Davis was a confidential informant who made a controlled buy of rock cocaine at a residence. She described to police the man who sold her the drugs. She said he was a large black man, with a large forehead and with wide-gapped buck teeth. While in the residence for a few minutes, she got a good look at him while sitting directly across from him at a distance of about six feet.

Police showed her a photo montage with six pictures of black men who were of large build. Defendant Kinard's photo was included in the array. His photo showed his gapped buck teeth. No other photos in the montage showed men with gapped front teeth. Ms. Davis picked Kinard's photo.

Kinard was charged with delivery of a controlled substance. Prior to trial, claiming the montage was suggestive, Kinard moved to suppress the pretrial identification, and to bar Ms. Davis from identifying him in court at trial. The trial court agreed that the photo montage was improperly suggestive, but that on the totality of the circumstances, the identification need not be suppressed because it was reliable.

Kinard was convicted of delivery of a controlled substance.

ISSUE AND RULING: Was the photo montage so suggestive that, on the totality of the circumstances, it tainted the identification process such as to make it unreliable? (ANSWER: No, while the photo array was suggestive, when considered with the other circumstances, the procedure did not make it substantially likely that Ms. Davis misidentified Kinard.)

Result: Affirmance of Spokane County Superior Court conviction of Odell Kinard, Jr. for delivery of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals decision)

Introduction

"An out-of-court photographic identification meets due process requirements if it is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

A two-step test is employed to determine whether a photo identification is so impermissibly suggestive that it creates a substantial likelihood of irreparable misidentification. First, the defendant must show that the identification procedure

was suggestive. A suggestive identification procedure is " 'one that directs undue attention to a particular photo.' "

If the defendant shows that the identification was suggestive, the court must then decide whether "the suggestiveness created a substantial likelihood of irreparable misidentification." The trial court's decision must be guided by a list of judicially imposed factual considerations.

Suggestiveness of identification procedure

Ms. Davis described the person who sold her drugs as a black man with a gap in his teeth who appeared to be mildly retarded or have Down's Syndrome. She also stated he had a large forehead. But she was primarily fixated on his teeth.

The photomontage the police showed Ms. Davis included pictures of six black men of large build. But the only photograph showing prominent gapped teeth is Mr. Kinard's. The trial court found that the photomontage was suggestive. We have looked at the photomontage. And the court's finding is amply supported. But that does not end our inquiry. The next question is whether the suggestive montage created a substantial likelihood of irreparable misidentification.

Substantial likelihood of irreparable misidentification

Deciding whether there is a substantial likelihood of irreparable misidentification requires the trial judge to consider the following factors:

- (1) the opportunity of the witness to view the criminal at the time;
- (2) the witness's degree of attention;
- (3) the accuracy of the witness's prior description of the criminal;
- (4) the level of certainty demonstrated at the confrontation;
- and (5) the time between the crime and the confrontation.

Each requires a factual finding. And our review is limited to whether the trial court's findings are supported by substantial evidence.

Here, the trial court's finding is:

The Court applied the five factors as set forth in Neil v. Biggers, 409 U.S. 188 (1972) to the evidence before it. Ms. Davis had the opportunity to view the defendant at the scene of the crime. Her attention was focused on the defendant. Her description of the suspect fit that of the defendant and is accurate. She exhibited a high level of certainty in her identification of the defendant independent of the photomontage. She had the opportunity to make an identification of the defendant within a day or two following the alleged incident.

The court applied the required test. And Mr. Kinard does not challenge the court's finding. It is therefore a verity on appeal. Given these findings, the court did not abuse its discretion by admitting evidence of the photo identification.

In sum, the admission of evidence of a photo identification is reviewed under the same standard as any other evidentiary ruling--abuse of discretion. Here, the trial court exercised its discretion guided by appropriate factors. These are

tenable grounds and reasons. And the court did not then abuse its discretion by admitting the pretrial photographic identification of Mr. Kinard.

[Citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) IN “PHYSICAL CONTROL” PROSECUTION, AFFIRMATIVE DEFENSE FOR MOVING MOTOR VEHICLE OFF THE ROADWAY NOT APPLICABLE IF SOMEONE ELSE DOES THE MOVING -- In State v. Votava, ___ Wn. App. ___, 36 P.3d 296 (Div. III, 2001), the Court of Appeals reverses a superior court decision that concluded that a defendant in a “physical control” prosecution under RCW 46.61.504 should be permitted to present to the jury an affirmative defense under the statute that the vehicle had been moved safely off the roadway, even though he was not the person who drove the vehicle off the roadway.

The Votava Court describes as follows the facts of the case:

A Washington State Patrol trooper saw Mr. Votava’s vehicles, with its engine running and its headlights on, in a Spokane parking lot at about 1 a.m. on April 17, 1999. the vehicle was illegally parked, with its nose on the curb of the roadway. Mr. Votava was asleep in the driver’s seat. The trooper awakened Mr. Votava, conducted a field sobriety test, and concluded he was under the influence of alcohol. Breath tests later confirmed that conclusion.

Mr. Votava testified he had been drinking at a bar with friends earlier that evening. He left the bar with a friend, who drove his car while he rode in the passenger seat. The friend drove the car into the parking lot, where she had parked her own car earlier, and left Mr. Votava there. Mr. Votava testified he then realized the friend had left the driver’s-side door open, so he walked around to the driver’s side of the vehicle, got in, closed the door, reclined the seat, and waited for his son to get home so he could call for a ride. The next thing he remembered was being awakened by the trooper.

RCW 46.61.504 (2) provides in relevant part that “No person may be convicted of [physical control] if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.” Finding no ambiguity or room for interpretation of the underlined language, the Votava Court concludes that the moved-safely-off-the-roadway defense is never available to a person who did not move the vehicle off the roadway himself or herself.

Result: Reversal of Spokane County Superior Court order; reinstatement of Spokane County District Court conviction of Daniel Votava for violating RCW 46.61.504.

(2) IDAHO RESIDENT WHO COMMUTED INTO WASHINGTON TO WORK, BUT DID NOT SPEND HIS NIGHTS IN WASHINGTON, WAS NOT A WASHINGTON RESIDENT FOR PURPOSES OF THE STRIKER/GREENWOOD SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE; ALSO, EVIDENCE SUPPORTS FELONY-ELUDING CONVICTION -- In State v. Treat, ___ Wn. App. ___, 35 P.3d 1192 (Div. III, 2001), the Court of Appeals rejects the argument of an Idaho resident that, because he commuted into Washington to work on a regular basis during the relevant time period, he should be treated as if he were a Washington resident under the speedy trial/speedy arraignment rule of CrR 3.3. The Court also holds that there is sufficient evidence in the record to support defendant’s conviction for felony-eluding.

Speedy trial/speedy arraignment

Under CrR 3.3 as interpreted in the Washington Supreme Court decisions in State v. Striker, 87 Wn.2d 870 (1976) and State v. Greenwood, 120 Wn.2d 585 (1993), a person must be arraigned within a certain period of time after being charged. However, the Striker/Greenwood rule does not apply to a defendant who is not amenable to service. One circumstance that makes a person not amenable to service is residence in another state. This is a "bright line" rule the Treat Court holds. Thus, even though defendant visited Washington on a regular basis to work, he was not amenable to service for purposes of the rule.

Felony-eluding evidence

The Treat Court explains as follows why it rejects defendant's challenge to the sufficiency of the evidence of felony-eluding under RCW 46.61.024:

The elements of eluding are:

- (1) a uniformed officer in a marked vehicle gives a signal to stop, (2) a driver willfully fails to stop, and (3) the driver exhibits a willful or wanton disregard for others in attempting to elude the police vehicle.

The purpose of the eluding statute is to prevent unreasonable conduct in resisting law enforcement activities.

The Spokane deputies were uniformed. And they signaled Mr. Treat to stop by using their overhead lights and sirens. The first element is then satisfied.

Mr. Treat sped down the road for approximately one-quarter mile before stopping. He then stopped briefly, accelerated at a deputy, and then attempted to once again drive away. Mr. Treat argues the facts are insufficient to establish that he willfully failed to stop. He claims that pulling over after one-quarter mile is reasonable. And his subsequent attempt to escape cannot be used to prove eluding because the deputies had already left their car.

First, Mr. Treat presents no evidence that he could not stop sooner than one-quarter mile. Next, while the eluding statute requires that the defendant elude a "pursuing police vehicle," it does not require that the police vehicle remain moving at all times. RCW 46.61.024. Thus, Mr. Treat was attempting to elude a pursuing police vehicle even though it had stopped and the deputies got out. The second element of attempting to elude is satisfied.

Finally, Mr. Treat argues that he was not wanton or willful. Wanton or willful does not require "that the defendant's driving endangered anyone else, or that a high probability of harm actually existed. Instead, the evidence need only establish that the defendant engaged in conduct from which a juror could infer wanton or willful disregard for the lives or property of others."

Mr. Treat attempted to speed away from the deputies after they signaled him to stop. He then accelerated his pickup at a deputy. Mr. Treat continued his flight from the deputies even after they shot out two of his tires. Indeed, Mr. Treat left the pickup only after he rolled it in his attempt to get away. The court's finding of

wanton or willful disregard for the lives or property of others is then amply supported by this evidence.

[Citations omitted]

Result: Affirmance of Spokane County Superior Court conviction of Everett C. Treat for felony-eluding in violation of RCW 46.61.024.

LED EDITORIAL NOTE RE SPEEDY TRIAL RULE: If a charged defendant moves back and forth between residences in Washington and another state (as opposed to merely commuting here from another state to work, as in Treat), the CrR 3.3 speedy trial period may run during times the defendant is resident in Washington.

(3) DESPITE ITS FORM AS A NONPROFIT PRIVATE CLUB, ADULT ENTERTAINMENT FACILITY WAS IN REALITY A “COMMERCIAL PREMISES” CONSTITUTIONALLY SUBJECT TO CITY ORDINANCE -- In City of Shoreline v. Club for Free Speech Rights, ___ Wn. App. ___, 36 P.3d 1058 (Div. I, 2001), the Court of Appeals rules that a non-profit private membership club featuring live adult entertainment, which sold memberships and non-alcoholic drinks, operated in a location that was zoned commercial, and had members who paid adult entertainers for performances, constituted “commercial premises,” for purposes of the City of Shoreline adult cabaret ordinance prohibiting live adult entertainers in commercial premises from performing at a distance of less than four feet from paying customers.

The City of Shoreline Court also rejects First Amendment freedom-of-association arguments of the “Club” to the effect that: 1) the 2300 or so members of the non-profit private club featuring live adult entertainment were protected by the First Amendment right of freedom of association as to the city’s adult cabaret ordinance prohibiting live adult entertainers from performing at distance of less than four feet from paying customers; 2) the city’s covert police surveillance of the non-profit private membership club featuring live adult entertainment, with police officers misrepresenting their identities in order to gain admission to the club, did not violate the club members’ First Amendment rights to associate for expressive purposes.

Result: Affirmance of King County Superior Court order granting summary judgment and injunctive relief to the City of Shoreline.

(4) INSURANCE COMPANY HAS RIGHT TO RESTITUTION IN JUVENILE OFFENDER SENTENCING -- In State v. A.M.R., 108 Wn. App. 9 (Div. I, 2001) the Court of Appeals holds that a trial judge sentencing a juvenile for damaging private property does not have discretion to limit restitution to the property owner’s out-of-pocket costs, but must also extend restitution to the owner’s insurance company. The A.M.R. Court describes the facts and procedural background in the case as follows:

In these consolidated cases, the State appeals from the juvenile court's denial of restitution to the insurance companies of the primary victims. The juvenile respondents pleaded guilty to crimes resulting in damages to vehicles owned by victims who were insured. At the respective hearings, the State provided documentation to the juvenile court of the losses to the vehicle owners and to their insurance companies. The State sought restitution to the victims and to their insurance companies. Over objection, the trial court refused to order restitution to the insurance companies, citing general juvenile court "practice" that it would order only the out-of-pocket expenses to the primary victims.

[Footnotes omitted]

The A.M.R. court summarizes its ruling as follows:

The Juvenile Justice Act of 1977 requires that juvenile courts order restitution to any persons suffering loss or damage as a result of the offense committed by a juvenile respondent. Restitution is part of the sentence for a criminal act, and an insurer of the primary victim is entitled to restitution. A trial court's refusal to order restitution covering the loss of the insurance company is an abuse of discretion.

Result: Reversal of King County Superior Court juvenile offender sentencing in two cases; remand for entry of revised restitution order.

NEXT MONTH

The April 2002 LED will include a summary of the January 15, 2002 U.S. Supreme Court decision in U.S. v. Arvizu, 122 S.Ct. 744 (2002), reversing a Ninth Circuit suppression decision, and ruling that the totality of circumstances, most of which individually had possible innocent explanations, added up to reasonable suspicion for a Terry stop for possible drug smuggling, once such facts were properly considered together in light of the investigating officer's experience and training.

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. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible 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.

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/>]. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. Information about bills filed in the 2001 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. 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.wa.cjt>], while the address for the Attorney General's Office web site is [<http://www/wa/ago>].

The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the LED should be directed to Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; E mail [dtangedahl@cjtc.state.wa.us]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do 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 via a link on the Commission's Internet Home Page at: [<http://www.wa.gov/cjt>].