



# Law Enforcement

November 2002

# Digest

## HONOR ROLL

### **549<sup>th</sup> Session, Basic Law Enforcement Academy – May 5<sup>th</sup> 2002 through September 6<sup>th</sup>, 2002**

- President: Brian Osborn – King County Sheriff's Office  
Best Overall: Jason A. Petrini – Spokane County Sheriff's Office  
Best Academic: Jason A. Petrini – Spokane County Sheriff's Office  
Best Firearms: Brian Osborn – King County Sheriff's Office  
Tac Officer: Officer Dave Campbell – Lacey Police Department

### **550<sup>th</sup> Session, Basic Law Enforcement Academy – May 20<sup>th</sup> 2002 through October 3<sup>rd</sup>, 2002**

- President: Robert W. O'Meara – Vancouver Police Department  
Best Overall: Michael J. Fiola – Tenino Police Department  
Best Academic: Kevin L. Runolfson – Seattle Police Department  
Best Firearms: Zachary J. Helms – Yakima Police Department  
Tac Officer: Officer Brett Hatfield – Federal Way Police Department

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**BRIEF NOTE FROM THE U.S. SUPREME COURT**

**HANDCUFFING INMATE FOR SEVEN HOURS TO HITCHING POST IN HOT ALABAMA SUN WITHOUT REGULAR BREAKS HELD TO BE CRUEL AND UNUSUAL PUNISHMENT –**  
 In Hope v. Pelzer, 122 S.Ct. 2508 (2002), the U.S. Supreme Court holds that a prison inmate’s Eighth Amendment protection against cruel and unusual punishment was violated by Alabama prison guards when, after he had caused a disturbance, they handcuffed him to a hitching post, shirtless in the hot sun, for seven hours without regular water or bathroom breaks.

The full text of the Hope decision may be accessed at the following internet link:  
 [http://supct. law.cornell.edu/supct/html/01-309.ZS.html]

**Result:** Reversal of lower federal court ruling granting qualified immunity to prison guards; case remanded to federal district court in Alabama for trial.

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## **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

(1) **UP-SKIRT VIDEOTAPING AND PHOTOGRAPHING IN PUBLIC PLACES SUCH AS SHOPPING MALLS DOES NOT VIOLATE STATE VOYEURISM STATUTE** – In State v. Glas, \_\_\_ Wn.2d \_\_\_, 54 P.3d 147 (2002), the Washington Supreme Court rules unanimously that the current voyeurism statute at RCW 9A.44.115 does not prohibit “upskirt” photography or videotaping in public places.

RCW 9A.44.115(2) provides (with emphasis added):

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, *while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.*

RCW 9A.44.115(1)(b)(i), (ii) defines a place where a person "would have a reasonable expectation of privacy" as either "[a] place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another;" or "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance."

In two separate cases, Glas and Sorrells, consolidated for appeal, defendants were convicted of the class C felony of voyeurism for furtively and without permission photographing or videotaping up the skirts of women and girls who were located in public places. In one case, the activity occurred at a mall, and, in the other case, the activity occurred at the Seattle Center, in an open, public area. The Supreme Court asserts that “place” in the statute does not refer to body parts but instead refers to geographical locations. The Court then concludes that the plain language of “expectation of privacy” provisions of the statute does not extend to acts done in public locations. In the following passage, the Glas Court describes the locations where the statute does apply:

It is possible to reach a logical reading of the statute while still granting meaning to both subsections defining a "private place." The first subsection applying to "[a] place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another" applies to standard "peeping tom" locations... This would include a person's bedroom, bathroom, a dressing room or a tanning salon. These locations are all places where a person is expected to, and frequently does, disrobe. This definition is not challenged here.

The second subsection, "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance" applies to locations where a person may not normally disrobe, but if he or she did, he or she would expect a certain level of privacy. These locations could include any room in a person's domicile other than the bedroom or bathroom, such as the kitchen, living room or laundry room; a locker room where someone may undress in front of others, but not expect to have his or her picture taken; or an enclosed office where someone may close the door to breast feed or change for a bike ride commute home. It would also apply to places where someone may not normally disrobe, but would nonetheless expect another not to intrude, either casually or hostilely. An example would include a private suite or office. A person would reasonably expect that another individual would not place a camera under his or her desk to

view or film his or her genital region. Thus, this second subsection is necessary and not superfluous because it expands the locations where a person would possess a reasonable expectation of privacy beyond those of a traditional "peeping tom," but not so far as to include public locations.

The Glas Court also concludes that the statute, as narrowly construed by the Court, does not violate First Amendment constitutional protections against vague or overbroad statutes.

Result: Reversal of voyeurism convictions of Sean Glas and Richard Sorrells by the Yakima County Superior Court and King County Superior Court, respectively.

**(2) EVIDENCE IN MURDER PROSECUTION WAS INSUFFICIENT TO SUPPORT DEFENDANT'S SELF DEFENSE THEORY** -- In State v. Read, \_\_\_ Wn.2d \_\_\_, 53 P.3d 26 (2002), the Washington Supreme Court rules, 7-2, in the context of analysis of an evidence-law question, that a defendant in a murder prosecution was not entitled to claim self-defense. That defense was barred in this case because there was no evidence that the defendant had an apprehension that the victim posed an imminent risk of death or great bodily harm to the defendant or others.

In significant part, the Read Court's analysis of the self-defense issue is as follows:

To raise a self-defense claim in a murder prosecution, a defendant must produce some evidence to establish the killing occurred in circumstances amounting to defense of life and produce some evidence he or she had a reasonable apprehension of great bodily harm and imminent danger. To determine whether a defendant is entitled to an instruction on self-defense or entitled to have a judge consider it in a bench trial, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. Accordingly, when assessing a self-defense claim, the trial court applies both a subjective and objective test. When subjectively assessing a defendant's self-defense claim, the trial court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred.

When objectively assessing a defendant's claim, the trial court must determine what a reasonable person would have done if placed in the defendant's situation. Considering both the subjective and objective inquiries, the trial court must determine whether the defendant produced any evidence to support the claim he or she subjectively believed in good faith he or she was in imminent danger of great bodily harm and whether this belief, viewed objectively, was reasonable.

In this case, the trial court refused to consider Read's self-defense claim for both objective and subjective reasons. We will first address whether the trial court abused its discretion in finding Read did not produce sufficient evidence to support his claim he subjectively believed in good faith he was in imminent danger of great bodily harm.

A person is justified in using deadly force in self-defense only if the person reasonably believes he or she is in imminent danger of death or great personal injury. Great personal injury is that which would result in "severe pain and suffering." Read testified only that he believed Bruce was angry, that Bruce stepped toward him and moved his arms, and that Read did not have a clear path to the door. Read testified he thought he was going to get hurt and "panicked." But even if Read reasonably believed he could get hurt, that does

not excuse the use of deadly force. Read falls far short of producing evidence demonstrating he reasonably believed he was in imminent danger of death or great personal injury. Because Read failed to satisfy the subjective element of self-defense, we hold the trial court did not abuse its discretion by refusing to consider self-defense. Because Read failed to satisfy the subjective element of self-defense, we need not review the trial court's finding regarding the objective element of self-defense.

Result: Affirmance of Court of Appeals' decision affirming Chelan County Superior Court conviction of Jeremy Mark Read for second degree murder and unlawful possession of a firearm.

**(3) INSURANCE COMPANY CAN BE "VICTIM" ENTITLED TO RESTITUTION IN JUVENILE OFFENDER SENTENCING** – In State v. A.M.R., T.J.Z., 147 Wn.2d 91 (2002), the Washington Supreme Court is unanimous in ruling that an insurance company is a "person" for purposes of the definition of "victim" in the restitution provisions of the Juvenile Justice Act. Accordingly, an insurance company can be entitled to mandatory restitution under the Act.

Result: Affirmance of Court of Appeals decision (see **March 02 LED:20**) that reversed King County Superior Court juvenile offender sentencing orders in two juvenile cases.

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### WASHINGTON STATE COURT OF APPEALS

#### **COURT RULES THAT THERE WAS PC TO ARREST DEFENDANT FOR USING DRUG PARAPHERNALIA; COURT ALSO RULES THAT PARAPHERNALIA WAS IN "OPEN VIEW"**

State v. Neeley, \_\_\_ Wn. App. \_\_\_, 52 P.3d 539 (Div. III, 2002)

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

Spokane Police Department Officers Erickson and Kendall were on patrol when at around 2:00 a.m. they encountered Ms. Neeley's vehicle near the downtown intersection of First and Crowley, an area known for high rates of prostitution and drug activity. All the area businesses were closed. No residences exist in the area. Ms. Neeley's vehicle was conspicuous to the officers because of the circumstances.

When the officers shined a light into Ms. Neeley's car they saw someone bending over in the car, possibly trying to hide. After parking and while approaching the car, Officer Erickson saw Ms. Neeley leaning over the passenger seat and bobbing her head up and down in a strange way as if ingesting or concealing something.

As Officer Erickson got closer to the passenger side of the vehicle, he observed a small brillo pad, a small pair of scissors and a lighter. Officer Erickson had at that time three years experience as a Spokane Police Officer. Through his training and experience, Officer Erickson recognized the brillo pad, scissors and lighter as drug paraphernalia. These items were located on the seat in the exact location over which Officer Erickson had seen Ms. Neeley leaning just moments before.

Officer Erickson immediately announced probable cause to arrest Ms. Neeley for possessing drug paraphernalia. Incident to the arrest, Ms. Neeley was searched. The officers found crack cocaine in her pocket.

The State later charged Ms. Neeley with one count of possession of a controlled substance, cocaine.

Ms. Neeley filed an unsuccessful motion to suppress the drug evidence seized from her person in the search incident to her arrest. Reconsideration was denied. She was found guilty after a stipulated facts trial, then appealed.

ISSUES AND RULINGS: 1) Did the officers have probable cause to arrest Neeley for using drug paraphernalia? (ANSWER: Yes); 2) Did the observations of paraphernalia meet the test for non-search "open view"? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction of Phyla Jo Neeley for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause re use of drug paraphernalia

The trial court correctly concluded possession of drug paraphernalia alone does not give probable cause to arrest for possession of such items - bare possession of drug paraphernalia is not a crime. RCW 69.50.412; State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) **Oct 98 LED:12**; State v. Lowrimore, 67 Wn. App. 949 (1992) **March 93 LED:15**. However, the trial court also concluded Ms. Neeley possessed the drug paraphernalia in circumstances giving rise to probable cause that she was using the paraphernalia to ingest a controlled substance. Using drug paraphernalia to "ingest, inhale, or otherwise introduce into the human body a controlled substance" is a misdemeanor. RCW 69.50.412(1). An officer may arrest a person without a warrant when the officer has probable cause to believe the person has committed a misdemeanor or gross misdemeanor involving the possession or use of cannabis. RCW 10.31.100(1).

The unchallenged findings of the trial court show the officers spotted Ms. Neeley's car in an area of Spokane known for high rates of prostitution and drug activity. It was 2:00 a.m., all the area businesses were closed, and no residences existed in the area. Ms. Neeley's vehicle was conspicuous given the area and the time of night. She acted suspiciously when illuminated. Ms. Neeley leaned over the passenger side of the seat, her head bobbing up and down as if she was ingesting or concealing something. This behavior was seen as the officers approached Ms. Neeley's car.

As Officer Erickson approached the passenger side of the vehicle, he saw a small brillo pad, a small pair of scissors, and a lighter. Officer Erickson, relying on experience and training, recognized these items to be drug paraphernalia. At the suppression hearing, Officer Erickson explained how these items were used in the process of ingesting cocaine. The items were lying on the seat in the exact location that Officer Erickson had observed Ms. Neeley to be leaning moments before.

As noted above, possession of drug paraphernalia alone will not support probable cause for an arrest. RCW 69.50.412. [ **LED EDITORIAL NOTE: Arrest is permitted for mere possession where a local ordinance makes this a crime. See LED EDITORIAL COMMENTS below.**] But other evidence indicating the drug paraphernalia had been used to ingest or inhale a controlled substance will support probable cause for arrest under RCW 69.50.412(1). Lowrimore. Here, the combined facts of the timing and location of Ms. Neeley's car, her physical behavior, and the drug paraphernalia lying on the passenger seat, raised a reasonable inference that she used the paraphernalia to ingest a controlled substance.

Ms. Neeley disputes the trial court's conclusion that the facts of her case were more similar to Lowrimore than McKenna. However, In McKenna the defendant manifested no behavior indicating she had used the drug paraphernalia found in her duffel bag. By contrast, the defendant in Lowrimore acted in a bizarre and unstable manner that raised a reasonable inference that she had used the drug paraphernalia found in her purse. Thus, this case is closer to Lowrimore than McKenna because Ms. Neeley exhibited behavior consistent with drug ingestion.

2) Open view

Ms. Neeley next argues the arrest was invalid because the drug paraphernalia was not observed in plain view. But, here the open view doctrine is applicable, not the plain view doctrine, because the officers viewed Ms. Neeley's activities from lawful vantage points, public surroundings. The officers observed the drug paraphernalia while standing outside the vehicle on public streets and sidewalks. "Simply put, the 'plain view' doctrine does not apply if the contraband can be viewed from outside the vehicle." State v. Lemus, 103 Wn. App. 94 (2000) **Feb 01 LED:02**. When an officer standing in a "nonconstitutionally protected area," such as a city street or a sidewalk, observes something readily seen through an automobile's window, the "open view" doctrine applies.

"Under the open view doctrine, if an officer detects something by using one or more of his or her senses, while lawfully present at the vantage point where those senses are used, no search has occurred." Although the open view observation does not constitute a search, the information gained from the observation may provide probable cause for a search warrant or a warrantless arrest.

In Lemus, an officer standing on a city street and peering through the window of an automobile observed a powdery substance on the driver's pant leg. This court held the officer's discovery to be an open view observation of "that which was there to be seen. "An officer's act of observing the interior of an automobile through its windows while the vehicle is parked in a public place is not a search 'in the constitutional sense.'" And the fact that an officer uses a flashlight to enhance his or her nighttime vision does not convert an open view observation into an unconstitutional intrusion.

In sum, the officers saw the drug paraphernalia in open view and that observation and other evidence afforded them probable cause to arrest Ms. Neeley for using that paraphernalia to ingest a controlled substance. Once Ms. Neeley was validly placed under custodial arrest, she was subject to a search incident thereto. Her search resulted in discovery of crack cocaine in her coat pocket, which ultimately resulted in her conviction for possession of a controlled substance. Ms. Neeley does not contend the search incident to her arrest exceeded its constitutional scope.

[Some citations omitted]

**LED EDITORIAL COMMENTS: 1) Local option to prohibit mere possession of drug paraphernalia:** As we have previously noted (see October 98 LED at pages 14-15), local jurisdictions in Washington are free to prohibit "possession of drug paraphernalia with intent to use," even though, as the Court noted in the Neeley case, state statutes do not contain this prohibition. If a local ordinance makes such mere possession a crime, then officers may arrest on probable cause for this criminal violation of the local ordinance.

2) **“Open view”**: We do not question the Neeley Court’s statement that, when a car is located on a public street, observation into a car through a window is generally not a search. We write this comment only to clarify that such an observation does not necessarily permit the officer to *enter* the car. If the car is occupied, and the officer develops probable cause to arrest one or more occupants, then the officer may enter the car to arrest the occupant(s). However, if the car is unoccupied when the officer makes the observation, then warrantless entry into the vehicle is justified only if one of the recognized exceptions to the warrant requirement (consent, exigency/emergency, “community caretaking,” search incident to arrest, or inventory) can be supported by the facts of the case.

**UNDER THEIR’S PC STANDARD, GENERAL STATEMENTS ABOUT THE HABITS OF SEX OFFENDERS FAILED TO ESTABLISH PC TO SEARCH PERSONAL COMPUTER; ALSO, COMPUTER NOT SUBJECT TO SEARCH JUST TO COUNTER POSSIBLE ALIBI**

State v. Nordlund, \_\_\_ Wn. App. \_\_\_, 53 P.3d 520 (Div. II, 2002)

Facts and Proceedings below:

Officers suspected Nordlund of sexually assaulting two women in separate incidents on the same day. Learning that Nordlund made extensive use of a personal computer at his home, a detective sought a search warrant for the personal computer to see: 1) whether evidence as to his usage times would contradict his alibi; and 2) whether the computer contained pornography, which would bear on the issue of intent. The detective’s affidavit described defendant’s non-criminal computer use and also contained some generalized statements about the habits of sex offenders. The Court of Appeals opinion states:

The affidavits supporting the King County warrant describe Nordlund's noncriminal computer use and conclude that the "computer or similar electronic storage device will provide data that will assist in establishing dates and times in which [Nordlund] was at his residence which given the number of assaults and the locations, this will provide necessary information that may serve to establish [Nordlund's] location at critical times relevant to the alleged crimes." ("As stated in [the] attached affidavit [Nordlund] used a computer at this residence to access pornography and communicate with others via E-mail. Therefore, the computer and any electronic storage media could likely provide important evidence in this case regarding intent, dates and locations."). [The affidavit also stated that:] "in the affiant's 'experience and training[,] sex offenders often keep notes, newspaper clippings, diaries and other memorabilia of their crimes,' and that such items had been found on suspects' computers in other sexual assault cases."

The warrant was issued, the computer seized, and officers obtained some information relating to Nordlund’s usage of the computer on certain days. Along with a good deal more evidence obtained from other sources, this information was presented at trial.

Nordlund was convicted on multiple charges.

**ISSUE AND RULING:** Did the affidavit establish a probable cause link between the computer and the crimes under investigation to justify searching the computer? (ANSWER: No)

**Result:** Affirmance of Pierce County Superior Court convictions of Frank Reed Nordlund on one count of indecent liberties by forcible compulsion and one count of unlawful imprisonment; reversal of conviction on one rape count and conviction of one unlawful imprisonment count; remand for re-trial on counts on which convictions were reversed.

ANALYSIS: The Nordlund Court analysis on the probable cause nexus problem is as follows:

Although the affidavits establish the presence of a computer in Nordlund's home and his noncriminal use of that computer, they do not contain particularized information demonstrating the required nexus between the computer and the possible evidence of the crimes under investigation.

The affidavits supporting the King County warrant contain no factual support for the conclusory statement that the computer contained data that would establish Nordlund's "location at critical times relevant to the alleged crimes." Although an examination of the computer could show the times that Nordlund was using his computer and, thus, support an inference that he was home at those times, there is no factual nexus between this information and any alleged criminal activity. At most, this information could establish that Nordlund *did not* commit the charged crimes.

Nor is there a nexus between the alleged crimes and Nordlund's use of the computer to access pornography and send E-mails. Rather, it appears that the State was fishing for some incriminating document, which is precisely what the First and Fourth amendments prohibit.

As the affidavit supporting the Pierce County warrant incorporates and relies upon the affidavits supporting the King County warrant, the Pierce County warrant fails in regard to the computer, along with the King County warrant. Nor is the Pierce County warrant salvageable by the affidavit's generalized statements about the habits of sex offenders such as: in the affiant's "experience and training[,] sex offenders often keep notes, newspaper clippings, diaries and other memorabilia of their crimes," and that such items had been found on suspects' computers in other sexual assault cases. These general statements, alone, are insufficient to establish probable cause. See, e.g., State v. Thein, 138 Wn.2d 133 (1999) **Aug. 99 LED:15** (general statements about the common habits of drug dealers were insufficient to establish a specific factual nexus that evidence of illegal activity was likely to be found at place to be searched). Thus, the State has failed to demonstrate the existence of probable cause to seize and search Nordlund's personal computer.

[Some citations omitted]

The Nordlund Court also analyzes whether the trial court's admission into evidence of the unlawfully obtained evidence was harmless constitutional error. Under analysis that we will not set out or describe in the **LED**, the Nordlund Court rules that admission of the evidence was harmless on two of the counts and not harmless on two others. Accordingly, as noted, the Court affirms conviction on two counts, and reverses and remands for re-trial on the other two.

**NON-COOPERATION WITH BREATH TESTING HELD TO CONSTITUTE "REFUSAL" UNDER IMPLIED CONSENT LAW; COURT ALSO HOLDS THAT THERE IS NO ENFORCEABLE RIGHT TO ATTORNEY IN IMPLIED CONSENT ADMINISTRATIVE LITIGATION**

Ball v. DOL, \_\_\_ Wn. App. \_\_\_, 53 P.3d 58 (Div. II, 2002)

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

[A] police officer arrested James Ball for driving while intoxicated in January 2000. [The officer] read Ball his Miranda rights and took him to jail. There, [the officer] asked Ball to sign a form acknowledging that he understood his rights. Ball refused and said, "I think I'd like my attorney." [The officer] asked Ball if he had an attorney. Without answering the question, Ball asked, "Where are we

going?" [The officer] explained the breath test process and again asked Ball if he had an attorney. Ball replied, "I hope I don't need him." [The officer] asked Ball if he wanted to speak to an attorney and asked for a "yes" or "no" answer. Ball said, "I have an attorney." [The officer] concluded that Ball did not want to speak to an attorney.

[The officer] then read Ball his rights under the implied consent law, as stated in RCW 46.20.308(2), that a driver has the right to refuse to submit to a breath test, subject to revocation of his privilege to drive. Ball indicated that he did not understand. [The officer] read the implied consent warnings again, and Ball repeated that he did not understand. Ball pointed to the RCW citations in the statement and wanted to know what they meant. [The officer] explained that they were state laws, and Ball wanted to see them. [The officer] refused and asked if Ball would like to speak to his attorney to help him understand his rights. Ball replied, "I have a RCW I'd like to speak to." [The officer] again asked if Ball understood his rights, and Ball said, "I know what it says. We all know what it says. I don't think I'm under the influence." [The officer] concluded that Ball understood his rights.

[The officer] then asked Ball if he would submit to a breath test. He said, "I'd rather not, why?" [The officer] explained the process to Ball and again asked if Ball would take the test. Ball again asked why he needed to take the test. [The officer] said that he was going to consider Ball's response a refusal to take the test. Ball said that he was not refusing, so [the officer] began the test. [The officer] explained that if Ball wanted to take the breath test, he could not put anything in his mouth, including water, during the 15-minute observation period or his actions would constitute a refusal to take the test. Ball drank from a drinking fountain four times. [The officer] ended the test and recorded Ball's refusal to comply.

The Department of Licensing revoked Ball's driving privilege. He contested the revocation. The administrative hearing officer upheld the revocation based on Ball's refusal to cooperate with the breath test and determined that Ball had several opportunities to contact an attorney. Ball appealed to Pierce County Superior Court, which reversed the revocation. The trial court concluded that [the officer] denied Ball a reasonable opportunity to contact counsel and that Ball did not refuse to take the breath test.

**ISSUES AND RULINGS:** 1) May Ball challenge his license revocation by arguing that the officer erroneously failed to facilitate Ball's contact with an attorney prior to Ball's making a decision whether to take a BAC test? (**ANSWER:** No, this argument can be raised only in the criminal prosecution setting, not in administrative proceedings under implied consent law; 2) Did Ball's water-drinking antics constitute a refusal of the breath test? (**ANSWER:** Yes, such non-cooperation was a refusal)

**Result:** Reversal of Pierce County Superior Court order that had reversed DOL's revocation of the driver's license of James Ball.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

1) Right-to-attorney issue

A license revocation proceeding is a civil administrative proceeding and is separate from a criminal prosecution for driving while intoxicated. Gonzales v. Dep't of Licensing, 112 Wn.2d 890 (1989). A driver arrested for driving while intoxicated must be given the Miranda warnings, which inform the arrestee of his right to counsel prior to police interrogation. But a person has no right to counsel

in a license revocation proceeding or action. Keefe v. Dep't of Licensing, 46 Wn. App. 627 (1987); Haas v. Dep't of Licensing, 31 Wn. App. 334 (1982); Wolf v. Dep't of Motor Vehicles, 27 Wn. App. 214 (1980). Thus, for license revocation purposes, a driver need not receive counsel nor be advised or reminded of his right to counsel before deciding whether to take a breath test.

In reversing Ball's license revocation, the superior court relied on our opinion in Johnson v. Dep't of Licensing, 71 Wn. App. 326 (1993) **May 94 LED:16**. The parties dispute the meaning of one paragraph in that opinion:

A driver arrested for driving while intoxicated must be advised of his Miranda rights so that he can intelligently respond to a police interrogation request and understand his constitutional and court rule rights of access to counsel. After the police advise a defendant of his rights, "*[i]f the defendant requests the assistance of counsel, access to counsel must be provided before administering the test.*" (Italics ours.)

Ball interprets Johnson as holding that the constitutional and court rule rights of access to counsel apply in a civil proceeding under the implied consent statute. He is incorrect. We did not intend, in Johnson, to alter the longstanding rule that there is no right to counsel in an implied consent proceeding. Furthermore, our statement in Johnson was dicta, as the issue there was whether the record supported a finding that the accused did not ask for an attorney until he was jailed after refusing to take a breath test.

## 2) Refusal issue

Here, we need only decide whether Ball refused to take the breath test. Absent evidence of impossibility, unwillingness to cooperate with the administration of a breath test constitutes a refusal. This is true even if the driver is too intoxicated to comprehend and respond to an officer's request that he submit to the test. Ball repeatedly drank from a drinking fountain, ignoring the officer's order that he not put anything in his mouth, including water. We conclude that Ball refused to take the breath test, and the Department of Licensing properly revoked his driving privilege.

[Some citations omitted]

**LED EDITORIAL COMMENT:** Because this was a DOL license revocation matter, not a criminal matter, the Court holds that, even if the officer violated the driver's right to consult with an attorney by telephone under Washington court rule, CrR 3.1 and CrRLJ 3.1, the driver is not allowed to raise that issue in the DOL administrative proceedings. Of course, **officers should attempt to comply with CrR 3.1 and CrRLJ 3.1 regardless**, because the testing is being done for two reasons: 1) DOL administrative license procedures, and 2) criminal prosecution.

We think that this case presented a close question as to whether the officer complied with the rule. In hindsight, the officer would have been on a safer legal course if the officer had instead: (A) asked the annoying Mr. Ball for the name of his attorney, and, if Mr. Ball refused to identify the attorney or was otherwise unresponsive, then (B) clearly told Mr. Ball that he could talk on the phone with a public defender if he could not afford an attorney.

## **“IDENTITY THEFT” EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION**

State v. Baldwin, 111 Wn. App 631 (Div. I, 2002)

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

Baldwin, representing herself as "Kaytie Allshouse" [victim], purchased a house, forging Allhouse's name to two deeds of trust. The first deed of trust secured the interest of an institutional lender, Global Holdings; the second, subordinate, deed was in favor of the sellers, Diane Masin and David Swadberg. The deeds secured payment of \$ 45,500, and \$ 6,500, respectively.

Two months later, Baldwin rented a mailbox at the Mail Room, a mailbox-rental outlet in Everett. Baldwin presented herself as "Monica Schultz" [victim] and produced a Washington driver's license bearing that name. She signed Schultz's name to the mailbox application and began receiving mail in some fifteen other names.

Baldwin later rented a mailbox from Jerald Landwehr at Cascade Storage, another mailbox-rental outlet. Baldwin again rented under a false name, this time as "Carol Hopey" [victim]. She produced two pieces of identification, including a Washington driver's license. Baldwin told Landwehr the mailbox was for "Econo Accounting," and a number of her "employees" would be receiving mail. Letters and packages in a number of names were received at that mailbox.

Meanwhile, a U.S. postal inspector acting on a complaint placed a thirty-day mail cover on the Cascade Storage box address. Under a mail cover, all mail to a specific address is recorded by postmark, addressee, sender, and class of mail. The mail cover revealed mail in numerous names being sent to the rented box. The inspector then contacted a detective who investigates financial crimes for the Snohomish County Sheriff's Office.

The detective traced the telephone number listed on the Cascade Storage rental paperwork to Baldwin. His suspicions that Baldwin had stolen Hopey's identity were confirmed when Cascade Storage manager Jerald Landwehr picked Baldwin's picture out of a photomontage.

As the detective and inspector proceeded to attempt to locate and call individuals whose names had been gleaned from the Cascade Storage mail cover, they learned the Everett Police Department had been independently investigating allegations of similar multiple name use at the Mail Room in Everett. The detective showed the same photomontage to the Mail Room's manager who immediately picked out Baldwin's picture.

Landwehr had noted the license plate on a car Baldwin and a male companion frequently used when they picked up their mail. The detective "ran" the plate and discovered the car was registered to "Kaytie Allshouse" at a Granite Falls post office box which was registered to "Kaytie Allshouse" and Kevin Hendrickson at 30911 Mountain Loop Highway, Granite Falls. That was the address of the property encumbered by the two deeds of trust Baldwin had executed with the forged name of "Kaytie Allshouse."

A search of the Granite Falls property yielded a wallet containing a Washington driver's license in the name of "Kaytie Allshouse" bearing Baldwin's picture, and two VISA cards, also in the name of "Kaytie Allshouse." The search also uncovered vehicle titles and registrations for four different vehicles in the names

of "Kaytie Allshouse" and "Carol Hopey," and auto insurance policies or cards in the names of "Kaytie Allshouse," "Carol Hopey," and "Monica Schultz." Officers also found a social security card for "Kaytie Allshouse" as well as homeowner's insurance correspondence and a utility bill, all addressed to "Kaytie Allshouse" at the Granite Falls address.

Baldwin was charged with six counts: (1) theft of Kaytie Allshouse's identity; (2) theft of Monica Schultz's identity; (3) theft of Carol Hopey's identity; (4) forgery of a deed in Allshouse's name; (5) forgery of Allhouse's name on an adjustable rider; and (6) forgery of a junior deed in Allshouse's name.

At trial, Kaytie Allshouse testified that she did not sign her name to the two trust deeds on the Granite Falls property. When asked how she felt about finding that someone had used her name to buy a house, she stated, "I don't want this in my name. It's not mine. I do not own it . . . I just can't afford it. I don't want it." Likewise, Hopey testified she did not know Baldwin, had never lived in Snohomish County, had never rented a private mailbox, and had given no one permission to use her name.

The jury found Baldwin guilty on all counts except the alleged forgery of the adjustable rate rider.

**ISSUE AND RULING:** Does the evidence support Baldwin's conviction for identity theft under RCW 9.35.020? (**ANSWER:** Yes)

**Result:** Affirmance of Snohomish County Superior Court convictions of Jeanne Pearl Baldwin on three counts of identity theft and two counts of forgery.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

Baldwin ... argues that there was insufficient evidence to convict her of theft of identity under counts 1, 2 and 3 because the State failed to prove that she harmed or intended to harm the person whose identity was used. Again, we disagree.

Harm was defined by a supplemental instruction proposed by the defense: "Harm means harm to a person's privacy, financial security or other interest." The testimony of Schultz and Allshouse provided sufficient evidence of intent to harm in counts 1 (theft of Allshouse's identity) and 2 (theft of Schultz's identity). The jury could reasonably infer an attempt to harm Hopey and Schultz by Baldwin's renting of mailboxes in their names, and unauthorized receipt of mail at those boxes.

There was also evidence in the record to show Allshouse suffered actual harm; documents seized in the house indicated "Allshouse's" homeowners insurance was cancelled for having too much debris on the porch and too many discarded cars in the yard. Additionally, Allshouse's putative obligation for over \$ 50,000 as purchaser of the real property could potentially affect her credit. Viewed in a light most favorable to the State, this evidence was sufficient for the jury to convict on all three counts of theft of identity.

**LED EDITORIAL NOTE:** While this case was prosecuted under the former "identity theft" statute, we think that these facts would support a conviction for "identity theft" under the current statute as well.

## PRE-CRIME STATEMENTS OF DEFENDANT HELP ESTABLISH CORPUS DELICTI OF CRIMINAL HOMICIDE

State v. Pietrzak, 110 Wn. App. 670 (Div. III, 2002)

### Facts and Proceedings below:

Acting on a tip relating to their months-old investigation of the disappearance of Ms. Conway, a young adult, police searched the basement of the apartment building where she had lived. Hanging from a gas line was a piece of her scalp with attached hair. They also found her bones inside a firebox of the furnace.

Stanley Pietrzak lived in the same apartment building as the victim. Witnesses told police that Stanley had told them prior to the victim's disappearance that he wanted to kill her. Witnesses also said that Pietrzak told them during this period that an easy way to get rid of a murder victim would be to dismember the body and burn the bones in the furnace of the apartment building.

The last time that the victim was seen alive, she was lying on Mr. Pietrzak's bed in a drug-induced stupor. After her disappearance, Pietrzak admitted to witnesses that he had murdered the victim and had tried to dispose of the body in the furnace.

Pietrzak was convicted of first degree murder.

ISSUES AND RULINGS: 1) May Pietrzak's pre-crime statements be used to help establish the corpus delicti of criminal homicide? (ANSWER: Yes); 2) Did the State establish the corpus delicti of criminal homicide such that Mr. Pietrzak's post-crime statements could be lawfully admitted in evidence? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction of Stanley L. Pietrzak for first degree murder.

### ANALYSIS: (Excerpted from Court of Appeals opinion)

"*Corpus delicti*" literally means 'body of the crime.'" "In a homicide case, the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act."

In Washington, the defendant's confessions or admissions are insufficient, standing alone, to establish corpus delicti absent independent evidence. The independent evidence need not be sufficient to support conviction or to even send the case to the jury. But the evidence must be sufficient to support a logical and reasonable inference of the facts to be proved at trial.

Generally, when a defendant elects to introduce substantive evidence on his or her own behalf following denial of a corpus delicti motion, the defendant waives his or her challenge to the sufficiency of the evidence as it stood at that point. State v. Liles-Heide, 94 Wn. App. 569 (1999) [**June 99 LED:19**]. In other words, once the defendant elects to present evidence and that evidence establishes the corpus delicti, he or she cannot prevail on appeal [on the corpus delicti issue].

Additionally, statements made by the defendant in the course of a crime are not confessions or post-crime statements requiring corroboration for purposes of corpus delicti. State v. Dyson, 91 Wn. App. 761 (1998) [**Jan 99 LED:13**]. Other jurisdictions have also held that pre-crime statements need not be corroborated as well. As the United States Supreme Court noted [in a 1941 decision]:

The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

We conclude the foregoing reasoning is persuasive and adopt a rule that pre-crime statements can corroborate post-crime statements for purposes of establishing corpus delicti.

Applying this rule, independent evidence shows Mr. Pietrzak told people prior to Ms. Conway's disappearance he disliked her and wanted to kill her. Ms. Conway was at Mr. Pietrzak's apartment the night before she disappeared. There, Ms. Conway was given drugs. She was last seen alive in Mr. Pietrzak's bed in a stupor. Ms. Conway's burned remains were discovered in a furnace that Mr. Pietrzak had access to, and had referred to as a means of disposing of a body before Ms. Conway's disappearance. Body parts had been removed and discarded separately, apparently to hide her identity. The knife marks on Ms. Conway's remains were inflicted "mighty close to death," before or after.

Interpreting the evidence in a light most favorable to the State, as we must, the foregoing evidence raises a logical and reasonable inference that a criminal act caused Ms. Conway's death. Thus, corroboration exists for Mr. Pietrzak's admissions of guilt. Accordingly, we conclude the evidence established the corpus delicti.

### **CORPUS DELICTI ESTABLISHED FOR TAKING MV WITHOUT PERMISSION**

State v. C.M.C., 110 Wn. App. 285 (Div. I, 2002)

#### Facts and Proceedings below:

The corpus delicti of taking a motor vehicle without permission does not require evidence independently establishing the mens rea element of knowledge. Because the record contains independent evidence establishing that the vehicle was taken without permission and that C.M.C. rode in it, her confession was properly admitted and her conviction is affirmed.

On July 25, 2000, Misuek Clark discovered her Acura Integra automobile missing from her home in Tacoma. She reported her car stolen. Later that day Bellevue police officers investigating a shoplifting report encountered Clark's daughter Stacey and her friend C.M.C. C.M.C. agreed to return a stolen jacket from the car and gave police officers the keys. Police officers located the car and learned that it was reported stolen. C.M.C. was charged with taking a motor vehicle without permission.

At the fact-finding hearing, an officer testified that C.M.C. waived her Miranda rights and admitted riding in the car and admitted knowing that Stacey, who was too young to have a license, did not have permission to drive it. **[Stacey's mother testified that the vehicle was stolen, and that she had not given Stacey or C.M.C. permission to drive it or ride in it. LED Ed.]** The trial judge overruled C.M.C.'s objection that her admissions were inadmissible for want of independent proof of the corpus delicti. C.M.C. then testified that she rode in the car but believed Stacey had taken it with her mother's permission. The trial court found C.M.C. committed the offense and sentenced her to the standard range.

ISSUE AND RULING: Did the victim's testimony and the defendant's testimony in combination establish the corpus delicti of taking a motor vehicle without permission? (ANSWER: Yes)

Result: Affirmance of King County Superior Court's adjudication of guilty of C.M.C. for taking a motor vehicle without permission.

ANALYSIS: (Excerpted from Court of Appeals opinion)

To convict C.M.C. of taking a motor vehicle without permission, the State must prove, among other elements, that C.M.C. knew the car was stolen. C.M.C. confessed to having such knowledge, but her extrajudicial confession is inadmissible unless the State establishes the corpus delicti of the offense by independent proof. C.M.C. contends that the corpus delicti for the offense of taking a motor vehicle without permission requires evidence independently establishing the mens rea element of knowledge. We disagree. "The 'corpus delicti' of the crime charged refers to the 'objective proof or substantial fact that a crime has been committed.'"

[T]he corpus delicti rule generally requires proof, independent of the accused's extrajudicial statements, "that a crime was committed by someone." The underlying premise of the rule is that an accused's statements, standing alone, are insufficient to support an inference that the crime was committed. In assessing whether there is sufficient evidence of the corpus delicti, this Court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State.

Corpus delicti generally involves only two elements: (1) an injury or loss (e.g., death or missing property), and (2) someone's criminal act as the cause thereof. While the mens rea is an essential element of the offense, it is separate and distinct from the initial question of whether the body of the crime has been established.

Courts have sometimes stated in dicta that certain crimes not involving an injury or loss necessarily require identification of a particular defendant to establish that a crime in fact has been committed. But we agree with Division II in State v. Flowers [99 Wn. App. 57 (Div. II, 2000) **May 00 LED:19**] that the proposition is more precisely stated that for such crimes there are "*certain sets of facts* where the identity of a particular person must be established as part of corpus delicti[.]" Generally, proof of identity of a person who committed a crime is not part of corpus delicti, which only requires proof that a crime was committed by someone. Such is the case here where the facts of C.M.C.'s crime involve the traditional corpus delicti element of injury or loss.

Clark testified that her vehicle was stolen and that she had not given Stacey or C.M.C. permission to ride in it. C.M.C. admitted in court under oath that she rode in the vehicle. This independent evidence is sufficient to demonstrate that "a crime was committed by someone." C.M.C.'s confession could thus be considered.

[Some footnotes and citations omitted]

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## **BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

**(1) COURT MAY NOT ISSUE MUTUAL CIVIL ANTIHARASSMENT ORDERS UNLESS BOTH PARTIES FILE PETITIONS** – In Hough v. Stockbridge, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Div. II, 2002) (2002 WL 31096715), a civil case that grew out of a neighborhood dispute, the Court of Appeals rules that a district court lacks authority under chapter 10.14 RCW to issue mutual civil antiharassment protection orders unless both parties file petitions seeking such order. The courts have authority to issue an antiharassment order only to one who petitions for such an order.

**Result:** Remanded to district court to vacate the protection orders entered in favor of the Strockbridges against the Houghs.

**(2) STATE CANNOT CONVICT FOR POSSESSING EXPLOSIVES OR ATTEMPTED POSSESSION THEREOF DESPITE: 1) DEFENDANT’S POSSESSION OF GAS CAN AND GLASS BOTTLE STUFFED WITH GAUZE; PLUS 2) ADMISSION RE INTENT TO MAKE AND USE MOLOTOV COCKTAIL** – In State v. Wiggins, \_\_\_ Wn. App. \_\_\_, 53 P.3d 531, (Div. III, 2002), the Court of Appeals overturns a conviction for possessing explosives under RCW 70.74.022(1) because the defendant, who admitted that he planned to make and use a Molotov cocktail, did not have all of the components for making that Molotov cocktail.

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

On April 2, 2001, William Wiggins called his ex-girlfriend, Yvonne Bezotte, and told her how upset he was that she had recently married another man. Concerned that Mr. Wiggins was suicidal, Ms. Bezotte immediately notified police and asked that someone check on Mr. Wiggins. Shortly thereafter, police officers found Mr. Wiggins wandering down the side of the road near his home. Mr. Wiggins appeared to be crying and was carrying an empty gasoline can and a glass bottle with gauze stuffed into it. Mr. Wiggins told the officers that Jim had stolen his girlfriend and that he going over to Jim's house to hurt him. Mr. Wiggins also told police that he was on his way to a service station to fill up the gasoline can so that he could make a Molotov cocktail to throw on Yvonne's front lawn to scare "them."

Mr. Wiggins was arrested and transported to jail. Detective Chester Gilmore interviewed Mr. Wiggins after reading him his constitutional rights. Mr. Wiggins stated that he did not mean to hurt Jim or Ms. Bezotte. Mr. Wiggins also stated that he was "walking drunk" when first contacted by police and that he wanted to get gasoline so he could "scare the heck out of Jim." Mr. Wiggins also indicated that he intended to throw the Molotov cocktail in the yard so it broke and burned only the yard.

Wiggins was convicted of possessing explosives in violation of RCW 70.74.022(1).

RCW 70.74.022(1) provides:

It is unlawful for any person to manufacture, purchase, sell, offer for sale, use, possess, transport, or store any explosive, improvised device, or components that are intended to be assembled into an explosive or improvised device without having a validly issued license from the department of labor and industries, which license has not been revoked or suspended. Violation of this section is a class C felony. [Underlining by **LED** Eds.]

The Wiggins Court’s statutory interpretation analysis focuses on the underlined term “components.” After extensive discussion, the Court concludes that, contextually, the term’s plural usage in the statute means that “[a] violation of RCW 70.74.022(1) based on a defendant’s control

over components of an explosive or improvised device requires a showing that the defendant possessed all of the components necessary to assemble some type of explosive or improvised device.”

The State argued in the alternative to the Court of Appeals that Wiggins should at least be convicted of attempted possession of explosives under these facts. However, under the following analysis, the Wiggins Court concludes that, because the explosives statute is a strict liability crime (i.e., no mental state element), attempt cannot be prosecuted under the statute:

A person is guilty of attempt to commit a crime if, with intent to commit a specific crime, that person does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). "[T]he crime of attempt requires the actor to act with the objective or purpose of accomplishing a specific criminal result." Unlawful possession of explosives, as described in RCW 70.74.022, does not require a specific intent to manufacture, sell, offer for sale, use, possess, transport, or store an explosive or improvised device--or their components--without a valid license. In short, RCW 70.74.022 describes a strict liability licensing crime with no statutory intent element. Hence, there can be no attempted unlawful possession of explosives under RCW 70.74.022.

[Some citations omitted]

Result: Reversal of Spokane County Superior Court conviction of William R. Wiggins for unlawful possession of explosives. Status: At LED deadline, the State's motion to reconsider was pending in the Court of Appeals.

**(3) OREGON LAW CONTROLS EVIDENTIARY PRIVILEGE QUESTION BECAUSE BLOOD TESTS WERE PERFORMED THERE; ALSO, DEFENDANT LOSES DUE PROCESS ARGUMENT ABOUT NON-PRESERVED BLOOD** - In State v. Donahue, 105 Wn. App. 67 (Div. II, 2001), the Court of Appeals rejects a defendant's challenge to his vehicular homicide conviction, ruling Oregon blood testing admissible and ruling that a Washington detective's failure to preserve blood did not violate the defendant's due process rights.

The Donahue Court describes the facts and trial court proceedings as follows:

On July 11, 1997, James Donahue was driving his vehicle when it collided with another vehicle on a Washington highway. Donahue was seriously injured. Li Sheng Chiu, the driver of the other car, died and another passenger in that car was injured. Donahue was taken to Emmanuel Hospital in Portland, Oregon, where the hospital took a draw of his blood and tested it on an Ektachem machine. This machine runs tests by spectrophotometry methods. In contrast, the approved method in Washington for testing blood alcohol concentration is gas chromatography according to procedures set by the Washington State Toxicologist. At trial, the Washington State Toxicologist testified that Washington's method of gas chromatography is not necessarily more reliable than the Oregon method of spectrophotometry employed by the Ektachem machine.

The blood test results from Emmanuel indicated that Donahue's alcohol level was .241. [A Washington State Patrol detective] obtained the blood alcohol test results from the hospital, but he did not ask for the blood sample or do independent tests. He testified that he did not think about asking the Oregon hospital for the blood sample for evidence. There is no state trooper protocol for dealing with an out-of-state hospital that has blood samples and has done blood alcohol tests. The Oregon hospital had the blood sample in its possession and disposed of it according to its standard procedure.

The jury found Donahue guilty of one count of vehicular homicide and one count of vehicular assault.

1) Oregon law of medical privilege

Defendant argued that the blood test evidence was inadmissible under Washington law of doctor-patient privilege (see State v. Smith, 84 Wn. App. 813 (Div. I, 1997) **June 97 LED:09**). However, since the testing was done in Oregon, the Donahue Court does not reach this question and instead applies Oregon law of privilege. Under Oregon law, doctor-patient privilege does not apply in criminal cases, so Donahue's argument is rejected.

2) Non-applicability of State Toxicologist Rules

Defendant next argued that the blood test results were inadmissible because the Oregon hospital did not follow methods approved by the Washington State Toxicologist. The Donahue Court rejects this argument. The evidence regarding the Oregon testing, while not admissible to prove a "per se" violation of law, was competent evidence. The evidence was therefore admissible on the question whether Donahue was under the influence of intoxicating liquor when the accident occurred.

3) Lost evidence and due process

Defendant also argued that the State of Washington violated his due process rights by not preserving the Oregon hospital's blood sample for his own testing. The Donahue Court explains as follows why this constitutional argument fails:

To comport with due process, the State has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. State v. Wittenberger, 124 Wn.2d 467 (1994) **[Nov 94 LED:03]**. To be material exculpatory evidence, the evidence must possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *[COURT'S FOOTNOTE: We examine this under the Wittenberger standard because the State candidly admitted that the hospital would have saved the blood sample upon a phone call from the police. We were not asked to review this under the case law that provides investigating officers do not have a duty to seek out exculpatory evidence or conduct tests to exonerate a defendant.]*

Here, the exculpatory value of the blood was not apparent; it was more than twice over the per se limit. There was no hint that the test results had been tampered with or that the test results were faulty. There was nothing to indicate that the blood sample contained any exculpatory value. Thus, it was not material exculpatory evidence. It was, at best, only potentially useful to the defense.

Failure to preserve potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State.

In this case, [the WSP detective] had no reason to believe that the test results were faulty. He testified that he did not think about asking the Oregon hospital for the blood sample as evidence. There is no state trooper protocol for dealing with an out-of-state hospital that has blood samples and has performed blood alcohol tests. Moreover, the blood sample was never in the possession of the police. The Oregon hospital had the blood sample and later disposed of it according to their standard procedure. There was no indication that the detective

by design or with malice refused to obtain the blood sample. Contrary to Donahue's contentions, the officers' inability to smell alcohol at the scene of the accident does not contradict the blood alcohol evidence. There was no evidence of bad faith; thus, this assignment of error is meritless.

[Some citations omitted; emphasis added]

**Result:** Affirmance of Clark County Superior Court conviction of James Patrick Donahue for vehicular homicide.

**(4) ACCOMPLICE LIABILITY STATUTE'S "KNOWLEDGE" ELEMENT CLARIFIED IN DRIVE-BY SHOOTING/MURDER CASE; ALSO, BRIBERY STATUTE DOES NOT PRECLUDE PLEA-BARGAIN FOR TESTIMONY** - In State v. Sarausad, 109 Wn. App. 824 (Div. I, 2001), the Court of Appeals clarifies the "knowledge" element of accomplice liability under Washington law. The Sarausad Court holds that jury instructions were adequate and the evidence was sufficient in a drive-by shooting case to convict an unarmed gang member of murder and other charges. The defendant, Sarausad, drove a fellow gang member to the scene, knowing the passenger-shooter had a gun and intended to use it. The evidence was sufficient to convict Sarausad, as an accomplice, of one count of second degree (intentional) murder, two counts of attempted second degree murder, and one count of assault in the second degree while armed with a firearm. The Court also rejects defendant's argument, based on Washington's bribing-a witness laws, that plea-bargaining for truthful testimony from an accomplice is permissible.

1) Accomplice liability

In significant part, the Sarausad Court's explanation of how Washington law of accomplice liability applies in this case is as follows:

[O]ur Supreme Court in State v. Roberts, 142 Wn.2d 471 (2000) clarified accomplice liability law by holding that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate "the crime" for which he or she is eventually charged, and that knowledge of "'a crime' does not impose strict liability for any and all offenses that follow." See also State v. Cronin, 142 Wn.2d 568 (2000). Thus, an accomplice liability jury instruction [in Roberts] that allowed liability to attach if the jury found that the person was an accomplice in the commission of "a crime" as opposed to "the crime" was erroneous because it departed from Washington's accomplice liability statute.

The Roberts Court explained that the language in [a prior decision], stating that an accomplice, having agreed to participate in a crime, runs the risk that the principal actor will exceed the scope of the pre-planned illegality, was not intended to impose strict liability on putative accomplices for any and all crimes but rather was intended to reaffirm the longstanding rule that an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime. The Legislature intended that an accomplice "have the purpose to promote or facilitate the particular conduct that forms the basis for the charge" and the accomplice "will not be liable for conduct that does not fall within this purpose."

"The crime" means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in Roberts, "the crime" for purposes of accomplice liability is

murder, regardless of degree. This is made clear in Cronin, wherein the court said that the State had to prove beyond a reasonable doubt that Cronin, who was charged with premeditated first degree murder, had knowledge that he was aiding in the commission of the crime of murder. And in State v. Bui, consolidated with Cronin, the charge was assault in the first degree and it was charged additionally that "firearms and deadly weapons" were used in committing the crime. The court said that in order to show that Bui was an accomplice to these charged crimes the State had to prove beyond a reasonable doubt that he possessed general knowledge that the crime he was facilitating was assault.

The jury in that case inquired whether Bui had to know whether he was aiding first degree assault or a crime of any kind and the trial court responded that Bui needed to know "the general nature of the crime that will occur[.]" Although this is correct in the abstract, the Supreme Court was concerned that the jury might not have understood from this supplemental instruction that the State had to prove that Bui was aware he was facilitating a physical confrontation between the two gangs, as opposed to merely a verbal confrontation. Thus the supplemental instruction did not cure the instructional error.

From this, we conclude that the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder. Likewise, an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.

Applying this clarification to Sarausad's petition, the obvious question is this: Presuming that the State presented substantial evidence from which the jury could find beyond a reasonable doubt that Sarausad knowingly facilitated a drive-by shooting, is that a sufficient basis to find him guilty as an accomplice to murder for the death of Fernandes, the attempted murders of Lam and Nguyen and the assault of Brent Mason? We conclude that it is. As the Roberts Court observed, our Legislature intended to impose accomplice liability upon those having "the purpose to promote or facilitate the particular conduct that forms the basis for the charge" and not to impose such liability "for conduct that does not fall within this purpose." The particular conduct that formed the basis for the charged crimes here was the drive-by shooting. The State had to prove that Sarausad knowingly facilitated the drive-by shooting; it did not have to prove that Sarausad knew that Ronquillo had formed the premeditated intent to kill rival gang members. In order to promote a drive-by shooting, a putative accomplice necessarily must know that the principal was armed.

A rational trier of fact reasonably could base accomplice liability for a murder, an assault, or both, on its determination that an ordinary person would know that a drive-by shooting is likely to result in the death or injury of one or more people and thereby infer that a given defendant who knowingly facilitated a drive-by shooting thereby knowingly facilitated the murder, attempted murders and assaults that resulted from the drive-by shooting.

[Some citations and text omitted]

After concluding that the trial court's instructions to the jury adequately explained accomplice liability in light of the evidence and arguments in this case, the Court of Appeals moves on to reject Sarausad's argument that the evidence was insufficient to support his convictions:

Sarausad contests the sufficiency of the evidence to convict him as an accomplice in light of Roberts; that is, he contends that there was insufficient evidence that he knowingly facilitated the drive-by shooting as opposed to just a minor physical confrontation. We disagree. Gosho and Marckx testified that "capping" was discussed on the return trip to the school. At some point before the shooting, Ronquillo tied a bandana over the lower part of his face and pulled the gun out of his pants. While parked side by side with the other carload of Diablos, Sarausad said, "Are you ready?" Sarausad then drove the car in such a manner as to facilitate a drive-by shooting, not in such a manner as to stop, park the vehicle and engage in fistcuffs. An expert in gangs testified about the kind of gang mentality that requires the gang to avenge its honor when one of its members is disrespected by a rival gang, and that causes the gang members to see violence is an acceptable means of regaining lost respect. This evidence, although circumstantial in nature, when viewed in the light most favorable to the State is sufficient to allow a rational jury reasonably to infer that Sarausad knowingly facilitated the drive-by shooting.

[Footnotes omitted]

2) Plea-bargained testimony and bribery statute

The Sarausad Court also rejects defendant's argument that the bribery statute (RCW 9A.72.090) precludes the State's long-established practice of prosecutor's offering leniency for truthful testimony from an accomplice.

Result: Dismissal of personal restraint petition of Cesar Frasco Sarausad II, thus upholding his King County Superior Court convictions for one count of second degree (intentional) murder, two counts of attempted murder in the second degree, and one count of assault in the second degree while armed with a firearm.

**(5) ACCOMPLICE-LIABILITY INSTRUCTION PREJUDICIALLY FAILED TO EXPLAIN KNOWLEDGE-OF-INTENDED-CRIME ELEMENT PROPERLY** – In State v. Grendahl, 110 Wn. App. 905 (Div. III, 2002), the Court of Appeals rules that a jury was improperly instructed on accomplice liability in a prosecution for first degree robbery. Earlier this year, in State v. Roberts, 142 Wn.2d 471 (2002), the Washington Supreme Court clarified that knowledge by a defendant only that another person intends to commit "a crime" does not meet the mental state element of accomplice liability for any and all offenses that occur. The defendant must have at least general knowledge of "the crime" that is to be committed, the Roberts Court held.

In Grendahl, the defendant was charged with first degree robbery as the alleged getaway driver in a strong-arm, purse-snatch case. The jury instructions given by the trial court permitted the prosecutor to argue that Grendahl would be guilty of accomplice liability for the robbery even if he did not know that his cohort intended to use force in taking the purse. The Court of Appeals holds that the jury instructions were prejudicially erroneous under Roberts, and that defendant Grendahl must be retried.

Result: Reversal of Spokane County Superior Court conviction of Byron Leslie Grendahl for first degree robbery; robbery case remanded for retrial (NOTE: the Court of Appeals did affirm a drug possession conviction of Grendahl).

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## **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>].

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## **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 at [<http://legalWA.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). 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.

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 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 home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago/>].

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