WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

August 2003

HONOR ROLL

559th Session, Basic Law Enforcement Academy – February 11 through June 18, 2003

President:	Marc Doney – Soap Lake Police Department
Best Overall:	Stacy L. Wilson – Burlington Police Department
Best Academic:	Stacy L. Wilson – Burlington Police Department
Best Firearms:	Christopher B. Roff – Concrete Police Department
Tac Officer:	Sergeant Don Davis – King County Sheriff's Office

****

AUGUST LED TABLE OF CONTENTS

2003 LEGISLATIVE UPDATE – PART FOUR (INDEX) 2

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT 4

VIRGINIA'S CROSS-BURNING STATUTE PARTIALLY STRICKEN, PARTIALLY VALIDATED IN "FREE SPEECH" CHALLENGE
Virginia v. Black, 123 S.Ct. 1536 (2003) 4

TEXAS SODOMY LAW DIRECTED AT SAME-GENDER, CONSENTING ADULT CONDUCT HELD UNCONSTITUTIONAL BECAUSE NOT JUSTIFIED BY LEGITIMATE STATE INTERESTS
Lawrence v. Texas, 123 S.Ct. 2472 (2003) 5

EX POST FACTO CONSTITUTIONAL DEFECT FOUND IN CALIFORNIA LAW THAT PERMITTED PROSECUTION FOR CHILD SEX ABUSE EVEN THOUGH PRIOR STATUTE-OF-LIMITATIONS PERIOD HAD EXPIRED
Stogner v. California, 123 S.Ct. 2446 (2003) 5

WASHINGTON STATE SUPREME COURT 6

OFFICERS NEED NOT GIVE FERRIER WARNINGS IF ASKING FOR CONSENT TO ENTER RESIDENCE ONLY TO TALK TO A SUSPECT (NOT TO SEARCH)
State v. Khounvichai, ___ Wn.2d ___, 69 P.3d 862 (2003) 6

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT 10

UNDER "SAFELY OFF THE ROADWAY" DEFENSE TO CHARGE OF "PHYSICAL CONTROL," THE DEFENDANT NEED NOT BE THE PERSON WHO DID THE MOVING
State v. Votava, 149 Wn.2d 178 (2003) 10

JUVENILE COURT NOT PERMITTED TO ORDER RESTITUTION FOR VICTIM COUNSELING WHERE CRIME IS NOT A SEX OFFENSE
State v. J. P., ___ Wn.2d ___, 69 P.3d 318 (2003) 10

FORMER EXTORTION-TWO STATUTE IS GIVEN A LIMITING INTERPRETATION SO THAT IT DOES NOT UNCONSTITUTIONALLY VIOLATE FIRST AMENDMENT FREE SPEECH PROTECTIONS
State v. Pauling, ___, Wn.2d ___, 69 P.3d 331 (2003) 10

DOL'S SENDING OF LICENSE SUSPENSION NOTICE TO ADDRESS SHOWN ON MOST RECENT TRAFFIC TICKET MEETS CONSTITUTIONAL DUE PROCESS (NOTICE) REQUIREMENT
City of Redmond v. Arroyo-Murillo, ___ Wn.2d ___, 70 P.3d 947 (2003) 11

WASHINGTON STATE COURT OF APPEALS 11

APARTMENT TENANT DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO CONSENT TO SEARCH OF GUEST'S EYEGLASS CASE
State v. Rison, ___ Wn. App. ___, 69 P.3d 362 (Div. III, 2003)..... 11

THEIN RESIDENCE-NEXUS PROBABLE CAUSE TEST MET FOR SEARCH OF OUTDOOR MARIJUANA GROWER'S RESIDENCE; ALSO, TRIAL COURT WAS REQUIRED TO IMPOSE MANDATORY $1000 FINE UNDER RCW 69.50.430(1)
State v. Cowin, ___ Wn. App. ___, 67 P.3d 1108 (Div. II, 2003)..... 14

COURT HOLDS TO BE UNLAWFULLY PRETEXTUAL A TRAFFIC STOP FOR LANE-CHANGE VIOLATIONS WHERE ONE MOTIVE OF THE OFFICER WAS TO INVESTIGATE A POSSIBLE LICENSE SUSPENSION OF THE DRIVER
State v. Myers, ___ Wn. App. ___, 69 P.3d 367 (Div. III, 2003)..... 18

ASKING DRIVER TO STEP FROM VEHICLE TO DETERMINE SOURCE OF ALCOHOL SMELL WAS OK; ALSO, SEARCH OF FANNY PACK WAS CONSENTING
State v. Mackey ___ Wn. App. ___, 69 P.3d 375 (Div. III, 2003) 20

NEXT MONTH 22

****

YEAR 2003 WASHINGTON LEGISLATIVE UPDATE INDEX

APRIL 2003 LEGISLATIVE UPDATE (PART ONE)

SUBJECT	CHAPTER	PAGE
ASSAULT AS PREDICATE FELONY UNDER WASHINGTON'S FELONY MURDER STATUTE – **RETROACTIVE RESTORATION OF ORIGINAL LEGISLATIVE INTENT**	3	2

JUNE 2003 LEGISLATIVE UPDATE (PART TWO)

SUBJECT	CHAPTER	PAGE
RESTORATION OF JUVENILE DRIVING PRIVILEGES UPON REACHING TWENTY-FIRST BIRTHDAY	20	2
COMMUNICATING WITH A MINOR – OR ONE BELIEVED TO BE A MINOR – FOR IMMORAL PURPOSES	26	2
DISTRICT COURT JURISDICTION OVER CIVIL CAUSES OF ACTION INVOLVING COMMERCIAL ELECTRONIC E-MAIL	27	3
SALE, DISTRIBUTION, OR INSTALLATION OF AIR BAGS – CRIME TO KNOWINGLY INSTALL PREVIOUSLY DEPLOYED AIR BAG	33	3
DEVELOPMENT OF MODEL POLICY ON VEHICULAR PURSUITS; ADOPTION AND TRAINING REQUIREMENTS	37	3
THREE-WHEELED MOTORCYCLES – ENDORSEMENTS AND EDUCATION	41	4
EXPANDING RCW 9A.56.290'S PROHIBITION ON "CREDIT CARD FACTORING" AND INCREASING PENALTIES FOR REPEAT OFFENDERS	52	4
REORGANIZING CRIMINAL STATUTES TO FACILITATE COMMUNICATION REGARDING CRIMINAL HISTORY	53	4
VACATION OF CONVICTION RECORDS FOR THOSE CONVICTED PRIOR TO EFFECTIVE DATE OF SENTENCING REFORM ACT	66	5
DECLARING VOID FOR VIOLATION OF PUBLIC POLICY COMMERCIAL CONTRACTS THAT PROHIBIT MERCHANTS OR RETAILERS FROM REQUIRING ADDITIONAL IDENTIFICATION FROM CUSTOMERS PAYING WITH CREDIT OR DEBIT CARDS	89	5

JULY 2003LEGISLATIVE UPDATE (PART THREE)

SUBJECT	CHAPTER	PAGE
Correction to June 03 LED: THREE WHEELED MOTORCYCLES – ENDORSEMENTS AND EDUCATION CHAPTER 41 (ESSB 5229); Effective Date: January 1, 2004		2
BASING JAIL BOOKING FEES ON ACTUAL COST	99	2
REPLACING "APPROPRIATELY MARKED" POLICE VEHICLE WITH "EQUIPPED WITH LIGHTS AND SIRENS" IN ATTEMPT-TO-ELUDE STATUTE, AND CREATING AN AFFIRMATIVE DEFENSE	101	2
CREATION OF STATEWIDE FIRST RESPONDER BUILDING-MAPPING INFORMATION SYSTEM CREATED AND OPERATED BY WASPC	102	2
REQUIRING IGNITION INTERLOCK DEVICE FOR INDIVIDUALS CONVICTED OF DRIVING UNDER THE INFLUENCE WITH CHILDREN UNDER 16 IN THE VEHICLE	103	3
CREATING A STATEWIDE JUSTICE INFORMATION NETWORK	104	3
NEW REQUIREMENTS RELATING TO THE PROHIBITION AGAINST THE MAILING, SHIPPING, OR DELIVERY OF CIGARETTES TO MINORS AND PROVIDING FOR THE SEIZURE OF CIGARETTES SOLD OR DELIVERED IN VIOLATION THEREOF	113	3
PROHIBITING THE MANUFACTURE, SALES, OR POSSESSION OF COUNTERFEIT CIGARETTES AND PROVIDING FOR THE SEIZURE AND FORFEITURE OF CIGARETTES MANUFACTURED, SOLD, AND POSSESSED IN VIOLATION THEREOF	114	3
PROHIBITING INSURERS FROM CANCELING, DENYING, OR REFUSING TO RENEW PROPERTY INSURANCE POLICIES DUE TO CLAIMS FOR MALICIOUS HARASSMENT; INSURED MUST TIMELY REPORT TO LAW ENFORCEMENT	117	4
CREATING SIX FINANCIAL FRAUD CRIMES RELATING TO THE USE, POSSESSION, OR PRODUCTION OF PAYMENT INSTRUMENTS, IDENTIFICATION, OR DEVICES USED TO PRODUCE FRAUDULENT DOCUMENTS	119	4
EXEMPTING BANK AND CREDIT CARD NUMBERS FROM PUBLIC DISCLOSURE	124	6
PROHIBITING BUSINESSES FROM SENDING ELECTRONIC COMMERCIAL TEXT MESSAGES TO CELLULAR TELEPHONES AND PAGERS	137	6
POWER WHEELCHAIRS ARE NOT MOTOR VEHICLES	141	6
AMENDING RCW 46.55.113 AND .120 RELATING TO THE IMPOUND AND RELEASE OF VEHICLES (RESPONSE TO ALL AROUND UNDERGROUND DECISION)	177	6
AUTHORIZING IMPOUND OF ILLEGALLY PARKED VEHICLES IN CERTAIN CIRCUMSTANCES	178	8
ADMISSIBILITY OF CONFESSIONS AND ADMISSIONS IN CRIMINAL AND JUVENILE PROCEEDINGS – CORPUS DELICTI RULE RELAXED	179	9
AUTHORIZING COUNTIES AND CITIES TO CREATE SCHOOL OR PLAYGROUND SPEED ZONES ON HIGHWAYS BORDERING SUCH SCHOOLS OR PLAYGROUNDS	192	10
AUTHORIZING STATE, COUNTY, OR LOCAL TRAFFIC CONTROL ON PRIVATE ROADS BY AGREEMENT	193	10
DEFINING MOTORCYCLE HELMET	197	10
FIX TO VOYEURISM STATUTE	213	11
PROHIBITING THE SALE OR DELIVERY OF STOLEN DRIVER'S LICENSES, AND THE MANUFACTURE, SALE, OR DELIVERY OF FORGED, FICTITIOUS, COUNTERFEIT, FRAUDULENTLY ALTERED, OR UNLAWFULLY ISSUED DRIVER'S LICENSES	214	11
SEX OFFENDERS MUST NOTIFY SHERIFF OF EMPLOYMENT AT PUBLIC OR PRIVATE INSTITUTION OF HIGHER EDUCATION	215	11
REVISING INFORMATION AVAILABLE ON SEX OFFENDER WEBSITE	217	11
CREATING CRIMINAL AND CIVIL DEFENSE TO ALLEGATIONS OF UNLAWFUL DETENTION OF SUSPECTED DRUG AND ALCOHOL VIOLATORS AT OUTDOOR MUSIC FESTIVALS AND RELATED CAMPGROUNDS	219	12
MANDATED REPORTING OF ABANDONMENT, ABUSE, FINANCIAL EXPLOITATION, OR NEGLECT OF VULNERABLE ADULTS	230	12
UNLAWFUL TRANSACTION OF INSURANCE	250	12

EXTENDING TASK FORCE AGAINST THE TRAFFICKING OF PERSONS	266	13
MAKING IT UNLAWFUL TO TRAFFIC IN PERSONS	267	13
REQUIRING INTERNATIONAL MATCHMAKING ORGANIZATIONS TO PROVIDE CERTAIN INFORMATION INCLUDING FOUNDED ALLEGATIONS OF CHILD ABUSE AND EXISTING NO CONTACT ORDERS	268	13
PROHIBITING INJURY OF POLICE HORSES	269	14
REQUIRING TRAINING ON INTERACTING WITH DEVELOPMENTALLY DISABLED AND MENTALLY ILL INDIVIDUALS	270	14
SEX OFFENDER DEATH CERTIFICATES MUST BE SUPPLIED TO LAW ENFORCEMENT AGENCIES FREE OF CHARGE	272	14
AUTHORIZING DISPOSITION OF GOVERNMENT PROPERTY TO FOREIGN ENTITIES	303	14
CRIMINALIZING MINERAL TRESPASS	335	14
CREATING MISDEMEANOR OF "RETAIL FISH SELLER'S FAILURE TO ACCOUNT FOR COMMERCIAL HARVEST"	336	15
CREATING A CLASS OF "POTENTIALLY DANGEROUS LITTER"	337	15
REVISING TRAFFIC CODE TO ADDRESS "NEIGHBORHOOD ELECTRIC VEHICLES" AND "MOTORIZED FOOT SCOOTERS"	353	15
DECRIMINALIZING FAILURE TO USE REQUIRED TRACTION EQUIPMENT	356	16
MAKING IT UNLAWFUL TO SELL VIOLENT VIDEO OR COMPUTER GAMES – I.E., GAMES DEPICTING VIOLENCE AGAINST LAW ENFORCEMENT OFFICERS – TO MINORS	365	17
CHANGING PROVISIONS RELATING TO IGNITION INTERLOCK DEVICES	366	17
PROVIDING ADDITIONAL SENTENCING ALTERNATIVES FOR JUVENILE OFFENDERS	378	17
CHANGING TIMES AND SUPERVISION STANDARDS FOR RELEASE OF OFFENDERS	379	18
INCREASING TRAFFIC INFRACTION AND OTHER ASSESSMENTS AND PENALTIES IMPOSED BY COURTS	380	18
FIRE AND LAW ENFORCEMENT MOBILIZATION	405	18

****

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) VIRGINIA'S CROSS-BURNING STATUTE PARTIALLY STRICKEN, PARTIALLY VALIDATED IN "FREE SPEECH" CHALLENGE – In Virginia v. Black, 123 S.Ct. 1536 (2003), the U.S. Supreme Court, by a split vote, upholds part of Virginia's cross-burning statute and strikes down another part based on First Amendment "free speech" analysis.

Result: Affirmance of Virginia Supreme Court decision setting aside one defendant's cross-burning conviction; reversal of Virginia Supreme Court decision setting aside two other defendants' cross-burning convictions.

LED EDITORIAL NOTE: We find it difficult to try to sort out from the several concurring opinions in the Black case what is now the state of First Amendment law on cross-burning statutes. That is, it is not clear to us how far laws can go in banning cross-burning. For those who want to read the lead opinion, the partial concurrence, the partial dissents and the full dissent, access to the opinions is available at [http://supct.law.cornell.edu/supct/html/01-1107.zs.html]

It is our understanding that Washington's cross-burning law at RCW 9A.36.080 is narrower than the Virginia statute at issue in Black and would easily pass constitutional muster under the free speech analysis by the Black Court. Accordingly, the U.S. Supreme Court ruling in Black does not appear to affect prosecution under the Washington statute.

(2) TEXAS SODOMY LAW DIRECTED AT SAME-GENDER, CONSENTING ADULT CONDUCT HELD UNCONSTITUTIONAL BECAUSE NOT JUSTIFIED BY LEGITIMATE STATE INTERESTS – In Lawrence v. Texas, 123 S.Ct. 2472 (2003), the United States Supreme Court strikes down, on constitutional substantive due process grounds, a Texas law that prohibits certain types of sex acts (including anal sex, which was the act prosecuted in this case), where such sex acts involve persons of the same gender.

The vote is 6-3 to strike down the statute. Five justices sign the lead opinion based on liberty interests deriving from due process protections in the U.S. Constitution. The majority opinion rules that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." One justice (O'Connor) writes separately that the statute violates equal protection guarantees in the constitution. Three Justices (Rehnquist, Scalia and Thomas) dissent, arguing that the Supreme Court got it right when it ruled the opposite way in a 1986 decision.

Result: Reversal of Texas sodomy convictions of John Geddes Lawrence and Tyron Garner.

LED EDITORIAL COMMENT: Washington's criminal laws will not be directly impacted by the ruling in this case. (And we would guess that there are no local ordinances prohibiting consenting, adult sodomy.) Gender-mix is irrelevant under Washington's state criminal laws. Also, we do not believe that the prediction in the dissenting opinion of Justice Scalia will come true; he suggests that the majority's ruling imperils state laws against bigamy, adult incest, bestiality and adult obscenity. Only time will tell of course.

(3) EX POST FACTO CONSTITUTIONAL DEFECT FOUND IN CALIFORNIA LAW THAT PERMITTED PROSECUTION FOR CHILD SEX ABUSE EVEN THOUGH PRIOR STATUTE-OF-LIMITATIONS PERIOD HAD EXPIRED – In Stogner v. California, 123 S.Ct. 2446 (2003), the U.S. Supreme Court rules, 5-4, that the California Legislature violated constitutional ex post facto anti-retroactivity protections when the Legislature amended its child-sex-abuse statute of limitations (SOL) to permit prosecution for some such offenses that were time-barred under the old SOL law at the time of passage of the amendment.

The Stogner majority quotes from a 1798 precedent as follows:

> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. *2d. Every law that aggravates a crime, or makes it greater than it was, when committed.* 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive.

While there have been a number of embellishments and qualifiers put on this articulation of the quoted test for unlawful retroactivity of laws, it remains a relatively accurate summary of the ex post facto standard. The Stogner majority opinion asserts that the California law falls under the second category in the quoted test.

Along the way, the Stogner majority points out that the courts of all other states except California that have addressed this issue agree with the majority. One case cited in this regard is State v. Hodgson, 108 Wn.2d 662 (1987), where the Washington Supreme Court held that it does not violate constitutional ex post facto protections for the Legislature to increase the limitations period of a crime so long as the former limitations period has not already expired on that crime for a given defendant.

Justices Rehnquist, Scalia and Thomas dissent in Stogner.

Result: Reversal of California appellate and trial court decisions rejecting Marion Stogner's motions to dismiss; case remanded to the California courts for dismissal of the indictment.

LED EDITORIAL COMMENT: This decision will not impact any Washington laws, all of which appear to comply with the requirements of the 1987 Hodgson Washington Supreme Court decision and the 2003 Stogner decision of the U.S. Supreme Court.

****

WASHINGTON STATE SUPREME COURT

OFFICERS NEED NOT GIVE FERRIER WARNINGS IF ASKING FOR CONSENT TO ENTER RESIDENCE ONLY TO TALK TO A SUSPECT (NOT TO SEARCH)

State v. Khounvichai, ___ Wn.2d ___, 69 P.3d 862 (2003)
[Khounvichai is pronounced: Koon-vee-chi (long "I" on last syllable)]

Facts and Proceedings below:

> On the night of January 30, 2000, two police officers were called to respond to a malicious mischief report. The complainant told the officers that a man named McBaine had been at her home, and shortly after he left, an object broke her window.
>
> The officers proceeded to the address given by the complainant to question McBaine about the incident. They did not have probable cause to arrest McBaine but considered him a suspect. The officers knocked on the apartment door, and an occupant, Elizabeth Orr, answered. Officer Penwell asked Ms. Orr if McBaine was home and stated that she wanted to talk to him about the incident. Ms. Orr told the officer that McBaine was her grandson and that he was home, and she asked if he was in trouble. Officer Penwell told her that they just wanted to talk to him and requested entry. Ms. Orr replied "oh, yes" and waved the two officers inside. Upon entry, the officers noticed a man lying on the couch in the living room. For safety, Officer Penwell remained near the entry while Officer Bowman followed Ms. Orr down a hallway toward a closed bedroom door. Ms. Orr knocked and called, "there is someone here to see you." When the door opened, the officers smelled marijuana. McBaine stepped out of the room and upon seeing the officers, turned and whispered something to two individuals in the room, one of whom was the petitioner, Viengmone Khounvichai. Khounvichai made a sudden dash across the room and out of the officers' sight.
>
> Concerned that Khounvichai was going for a weapon, Officer Bowman ran into the bedroom where he saw Khounvichai reaching into a closet. The officer demanded that Khounvichai show his hands. When he failed to comply, the officer grabbed at his right hand. During the struggle that ensued, a baggie of white powder, later determined to be cocaine, fell out of Khounvichai's hand. The officers arrested Khounvichai. They also questioned McBaine about the malicious mischief incident.
>
> The State charged Khounvichai in juvenile court with one count of possession of cocaine under RCW 69.50.401(d). At trial, Khounvichai moved to suppress the cocaine, arguing that Ms. Orr's consent was invalid under State v. Ferrier [136 Wn.2d 103 (1998) **Oct 98 LED:02**] because she had not been warned of her right to refuse entry. He also argued that assuming consent was valid police exceeded the scope of that consent. The juvenile court denied the motion and found Khounvichai guilty at the conclusion of the fact finding hearing.

The Court of Appeals affirmed, holding that Ferrier warnings were not required, that Ms. Orr gave voluntary consent for the police entry, and that the police did not exceed the scope of Ms. Orr's consent. State v. Khounvichai, 110 Wn. App. 722 (2002) [**Aug 02 LED:08**].

ISSUE AND RULING: Was Ms. Orr's consent to police entry to talk to her grandson a voluntary consent despite the absence of Ferrier "knock-and-talk" warnings? (ANSWER: Yes, rules an 8-1 majority)

Result: Affirmance of King County Superior Court adjudication of guilt of juvenile Viengmone Khounvichai for possession of cocaine.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

While voluntary consent is an exception to the warrant requirement, we also recognized in Ferrier that to some degree it is inherently coercive whenever a police officer requests consent to search a home without a warrant:

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

Moreover, "like a search warrant, a search resulting from a knock and talk need not be supported by probable cause, or even reasonable suspicion."

We noted that the only way to protect the right against warrantless searches of the home is to require police to inform citizens of their right to refuse consent. "If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be unable to meet its burden of proving that a knowing and voluntary waiver occurred." Accordingly, we held that "article I, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search." Thus:

> [W]hen police officers conduct a knock and talk *for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant,* they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

We have since clarified that the Ferrier requirement is limited to situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search and have declined to broaden the rule to apply outside the context of a request to search. *See* State v. Williams, 142 Wn.2d 17 (2000) [**Dec 00 LED:14**] (Ferrier warnings not required where police request consent to enter a home to arrest visitor pursuant to a valid arrest warrant); State v. Bustamante-

Davila, 138 Wn.2d 964 1999) [**Nov 99 LED:02**] (Ferrier warnings not required where police and agent of Immigration and Naturalization Services gained consensual entry to defendant's home to serve a presumptively valid deportation order).

In Williams, we noted that police often enter homes for investigative purposes, such as inspecting break-ins, vandalism, and other routine responses. We found no constitutional requirement that officers warn of the right to refuse entry every time an officer enters a home to investigate because "[t]o apply the Ferrier rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry."

Moreover, as the State correctly contends, there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes. When police obtain consent to search a home pursuant to a "knock and talk" they go through private belongings and affairs without restriction. Such an intrusion into privacy is not present, however, when the police seek consensual entry to question a resident. Furthermore, the requirements of Miranda, already serve to protect citizens from coercive questioning.

We adopted the Ferrier rule out of a concern that citizens may be unaware that a warrant to search is required or, if aware, may be too intimidated by an officer's presence in the home to deny consent to a warrantless search. As the State correctly emphasizes, the Ferrier warnings target searches and not merely contacts between the police and individuals. In sum, when police seek to conduct a warrantless search of the home, the Ferrier warnings achieve their purpose; when police officers seek entry to question a resident, the home is merely incidental to the purpose. Khounvichai also urges that Ferrier applies in this case because a police officer's request to enter a home to talk to an occupant about an alleged offense has the same result as a request to enter to search--a warrantless "search" for anything in plain view. Khounvichai relies on State v. Kennedy to support his contention. 107 Wn. App. 972 (2001) [**Nov 01 LED:06**].

In Kennedy, police officers received a complaint that a narcotics transaction was in progress in a local motel room. Police officers went to the room and heard sounds consistent with drug activity. When the officers knocked on the door, Kennedy answered. The police identified themselves, explained that they had received a complaint about the room, and requested permission to enter. Kennedy consented to their entry. Once inside, the officers saw contraband in plain view.

The court held that Ferrier warnings were required given that "the sole reason for the officers' visit . . . was to investigate a narcotics complaint" currently occurring in the room. The officers testified that they did not believe that they had probable cause to support a search warrant and that they "probably" would have asked for consent to search the room once they entered. The court reasoned that receiving consent to enter a residence is indistinguishable from receiving consent to search because a request for permission to enter is, in effect, "a request for permission to 'search' for anything in plain view."

In this case, the Court of Appeals distinguished Kennedy on its facts, noting that it did not read the decision as requiring Ferrier warnings whenever the police enter a home to question a resident as part of a legitimate investigation. While

> Kennedy may be distinguishable, the court's reasoning is troubling and must be addressed.
>
> It is well established that a discovery made in plain view is not a search… The plain view discovery of evidence does not violate Article I, section 7 [of the Washington Constitution] if the police officer has a prior justification for the intrusion and the officer immediately recognizes that he has evidence before him. Thus, if an officer observes evidence of a crime or contraband in plain view, he has not conducted a search. Khounvichai's reliance on Kennedy to support his position that every entry potentially involves a plain view "search" is unavailing.
>
> Lastly, Khounvichai argues that public policy is advanced by applying the Ferrier rule whenever a police officer requests entry into a home to speak to a resident in the course of a criminal investigation. He points out that circumstances may change after the officer enters, but the officer will be precluded from requesting consent to search because he failed to give the Ferrier warnings prior to entry.
>
> Khounvichai's argument is not persuasive. As noted earlier, warrantless searches are per se unreasonable. If an officer fails to warn [*i.e., give Ferrier warning – **LED** Ed.]* prior to entering, but once inside desires to search, he must first obtain a search warrant. Of course, no warrant is required if another exception to the warrant requirement *[e.g., exigent circumstances –**LED** Ed.]* justifies a warrantless search.

[Some citations omitted]

DISSENT: Justice Sanders is alone in dissent. He argues that the majority's test for an entry-to-question-not-search exception to Ferrier is a subjective one that law enforcement officers can manipulate by claiming such intent when their real intent is to gain a plain-view-seizure opportunity.

LED EDITORIAL COMMENT: We think that the test under Khounvichai is objective – viewing all of the circumstances, two fact questions must be answered "yes": 1) Did the officer make clear to the occupant that the officer's purpose was to come inside only to talk to that occupant or another person inside (or to do something else that does not constitute a search?); and 2) Did the officer not exceed the scope of that consent (assuming no exigent circumstances arose, ala Khounvichai) once inside?

Officers should pay special attention to the final two sentences in the last paragraph in the excerpt above from the majority's analysis. Including our bracketed additions, we repeat those two sentences here for ease of reference:

> **If an officer fails to warn [*i.e., give Ferrier warning – LED Ed.]* prior to entering, but once inside desires to search, he must first obtain a search warrant. Of course, no warrant is required if another exception to the warrant requirement *[e.g., exigent circumstances –LED Ed.]* justifies a warrantless search.**

The first of these two sentences means that, barring exigent circumstances, such as arose in Khounvichai, officers must take a counterintuitive approach when they develop probable cause to search after gaining consenting residential entry to talk to an occupant. Where officers have gained entry through a non-Ferrier consent, unless they have exigent circumstances, they must secure the premises and apply for a search warrant upon developing probable cause to search.

One wonders whether the majority opinion means what it says in this regard. Why could the officers not satisfy Ferrier at the point when probable cause to search arises by then giving the Ferrier warnings (assuming that the original "entry to talk" was not pretextual)? This is not what the majority opinion says, however, so officers should proceed cautiously, consulting their local prosecutors or legal advisors along the way.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) UNDER "SAFELY OFF THE ROADWAY" DEFENSE TO CHARGE OF "PHYSICAL CONTROL," THE DEFENDANT NEED NOT BE THE PERSON WHO DID THE MOVING – In State v. Votava, 149 Wn.2d 178 (2003), the Washington Supreme Court rules, 8-1, that a prosecution for the offense of being in physical control of a vehicle while under the influence of alcohol (see RCW 46.61.502), the defendant was entitled to a jury instruction on the statutory affirmative defense that a person cannot be convicted of the offense if "the person has moved the vehicle safely off the roadway."

The defendant did not personally drive the vehicle off the roadway into the parking lot where he was found in control of the vehicle. Rather, the defendant took control only after the car had already been moved off the roadway into the parking lot by a friend. Nonetheless, the defendant must be deemed to have "moved" the vehicle where he had earlier directed his friend to drive the vehicle off the roadway and into the parking lot, the majority rules.

Justice Alexander is the lone dissenter. His dissent is fact-based. He primarily questions whether the evidence supports the majority's conclusion that the defendant actually directed his friend to move the vehicle "off the roadway."

Result: Reversal of Court of Appeals decision that had reversed a Spokane County Superior Court decision reversing a district court conviction of Daniel Votava for physical control; case remanded to district court for a new trial.

LED EDITORIAL COMMENTS: We suggest that officers consult their local prosecutors concerning the distinctions between the crimes of physical control and driving under the influence, and the extent to which those distinctions are significant.

(2) JUVENILE COURT NOT PERMITTED TO ORDER RESTITUTION FOR VICTIM COUNSELING WHERE CRIME IS NOT A SEX OFFENSE – In State v. J. P., ___ Wn.2d ___, 69 P.3d 318 (2003), the Washington Supreme Court unanimously reverses a Court of Appeals decision (see **Sept 02 LED:22**), ruling, in an interpretation of chapter 13.40 RCW, that restitution for an assault victim's counseling expenses cannot be ordered by a juvenile court unless the assault was a "sex offense." Because the juvenile defendant was convicted of fourth degree assault (albeit with sexual motivation), which is not a "sex offense," the juvenile court lacked authority to order him to pay his victim's counseling expenses.

Result: Reversal of Court of Appeals decision and reinstatement of King County Superior Court decision denying restitution for the victim's counseling costs against J.P. (B.D. 12/05/85).

(3) FORMER EXTORTION-TWO STATUTE IS GIVEN A LIMITING INTERPRETATION SO THAT IT DOES NOT UNCONSTITUTIONALLY VIOLATE FIRST AMENDMENT FREE SPEECH PROTECTIONS – In State v. Pauling, ___, Wn.2d ___, 69 P.3d 331 (2003), the Washington Supreme Court rules 8-1 that the former extortion-in-the-second-degree statute (RCW 9A.56.130) must be given a limiting construction – reading in a "wrongful threat" requirement – in order to allow the statute to meet constitutional "free speech" requirements. Because the 2002 Washington Legislature added a "wrongful" threat element to the extortion-two statute, (see **June 02 LED at p 3**), the Supreme Court's Pauling analysis apparently will affect enforcement and

prosecution of the extortion-two statute only by providing guidance on what threats are "wrongful" under the 2002 amendments to the extortion-two statute.

The Pauling majority opinion rules, in effect, that a wrongful threat under the extortion-two statute is one that has a "lack of nexus" (lack of logical connection) to any plausible claim of right by the accused. Under this standard, only those threats that bear no relation to plausible claim of right to property or services for which the threat was made would be considered extortionate; such threats are inherently wrongful and are not protected speech. In this case, defendant Pauling knowingly and intentionally attempted to obtain judgment against the victim by threatening to send nude photographs of the victim to the victim's friends and family and to post photographs of her on the Internet. The Pauling majority holds that this conduct was not protected free speech and the conduct constituted second-degree extortion, as there was no reasonable nexus (i.e., connection) between the threat to send nude photographs and the collection of a lawful judgment. The defendant's conduct therefore was not a legal means of executing judgment.

Result: Reversal of Court of Appeals decision (see **Dec 01 LED:20**) and reinstatement of Snohomish County Superior Court judgment and sentence on conviction of Molotov F. Pauling for two counts of second-degree extortion.

(4) DOL'S SENDING OF LICENSE SUSPENSION NOTICE TO ADDRESS SHOWN ON MOST RECENT TRAFFIC TICKET MEETS CONSTITUTIONAL DUE PROCESS (NOTICE) REQUIREMENT – In City of Redmond v. Arroyo-Murillo, ___ Wn.2d ___, 70 P.3d 947 (2003), the Washington Supreme Court rules that DOL did not violate a driver's constitutional right to notice when DOL followed its administrative rule at WAC 308-104-018 in sending notice of license revocation to the address shown on the driver's most recent traffic ticket.

Result: Reversal of King County Superior Court decision that had affirmed the District Court's dismissal of a charge against Juan Arroyo-Murillo of first degree driving while license suspended/revoked; case remanded to the King County District Court for trial.

****

WASHINGTON STATE COURT OF APPEALS

APARTMENT TENANT DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO CONSENT TO SEARCH OF GUEST'S EYEGLASS CASE

State v. Rison, ___ Wn. App. ___, 69 P.3d 362 (Div. III, 2003)

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

> [A law enforcement officer] investigated a noise complaint at Boulder Creek Apartments. He went to a second apartment where he also heard noise. Mr. Rison answered the door. [The officer] smelled marijuana. Mr. Rison was a guest in the apartment. [The officer] read the tenant, Thomas Farrell, complete "Ferrier warnings." Mr. Farrell gave [the officer] permission to search the apartment. [The officer] called for backup.
>
> Four to seven people occupied the apartment, including Mr. Farrell and Mr. Rison. Police required all of the occupants to leave. They found an eyeglass case belonging to Mr. Rison which contained what was ultimately determined to be psilocin/psilocybin (mushrooms). The eyeglass case is not described in any detail -- except it was black and it was closed.
>
> Mr. Rison approached [one of the backup officers] outside of the apartment while the search was underway inside. He told [the backup officer] that there were illegal mushrooms in a black case in the apartment and that they were his. [The

> backup officer] told [the initially responding officer] of Mr. Rison's comments about the mushrooms, but only after the search. [The initially responding officer] gave Mr. Rison his Miranda warnings. Mr. Rison then admitted that the mushrooms were his.
>
> The State charged Mr. Rison with possession of psilocin/psilocybin ("mushrooms"). Mr. Rison moved to suppress the mushrooms. The court concluded that Mr. Rison's consent was not required for a valid search of his eyeglass case because Mr. Farrell, the tenant, gave a valid (and unconditional) consent to search the apartment. . . .
>
> The court denied a motion for reconsideration concluding that Mr. Farrell's consent to search was unlimited. And as a weekend guest, Mr. Rison had no right to challenge or limit that consent.
>
> The court then convicted him as charged in a bench trial on stipulated facts.

ISSUES AND RULINGS: 1) Did guest-Rison have a reasonable expectation of privacy in the closed eyeglass case? (ANSWER: Yes); 2) Did tenant-Farrell have actual authority to consent to a search of guest-Rison's eyeglass case? (ANSWER: No, rules a 2-1 majority); 3) Did tenant-Farrell have apparent authority to consent to a search of guest-Rison's eyeglass case? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of Whitman County Superior Court conviction of Aaron Edwards Rison for possession of psilocybin mushrooms.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Expectation of privacy in eyeglass case

> First, Mr. Rison had a legitimate expectation of privacy as a guest in Mr. Farrell's home. Whether an expectation of privacy gives rise to Fourth Amendment protection presents two questions:
>
> > First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that 'he [sought] to preserve [something] as private.' . . . Second, we inquire whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'
>
> This was a closed container. Mr. Rison kept it with him in the same room. The contents of the case then were not accessible to the general public. And Mr. Rison's expectation of privacy was not diminished simply because other guests might have had access. Mr. Rison would expect — reasonably, we believe — that others would not open the container, without his consent, particularly if he were present. This is especially true for the typical eyeglass case, i.e., one shaped to hold eyeglasses.
>
> Second, '[p]urses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.' A closed eyeglass case is similar. The case serves 'as a repository for personal, private effects' when one wishes to carry them. The eyeglass case here is, then, associated with an expectation of privacy and is protected by the Fourth Amendment.
>
> And Mr. Rison did nothing to defeat his expectation of privacy. He had possession of the case within the room and did not relinquish control over it. Instead, police removed him from the apartment.

Both the Fourth Amendment and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. The protections against unreasonable searches and seizures are personal. Mr. Rison has established the personal right of privacy necessary to challenge this search.

2) No actual authority to consent

Actual Authority. Next, a warrantless search is valid if a person with authority consents to it. And actual authority requires a sufficient relationship to or 'mutual use of the property by persons generally having joint access or control for most purposes.' Mr. Farrell did not jointly own, use, possess, or control Mr. Rison's eyeglass case. Mr. Farrell did not then have actual authority to consent to a search of Mr. Rison's eyeglass case.

3) No "apparent" authority to consent

Apparent Authority. The next question is whether a consent search can be grounded in Mr. Farrell's apparent authority to permit one The Fourth Amendment is satisfied by consent given by one who appears to have authority. State v. Holmes, 108 Wn. App. 511 (2001) **Jan 02 LED:05**. That is as long as the police have a reasonable belief in the authority of the person giving consent.

The standard for whether officers reasonably believe in the authority of a third party to consent is objective. The relevant inquiry is whether "the facts available to the officer at the moment" would justify the belief in a person of reasonable caution that the consenting party had authority.

Here, four to seven people were in the room when the officer came to the door. He ordered them to leave. He did not instruct them to remove their personal property. Nor did he ask for their consent to search their personal property. Under these circumstances, the tenant's consent did not then include a closed container belonging to a guest. First, it was likely that the case belonged to someone besides Mr. Farrell. Second, Mr. Farrell did not have joint control over the closed container--an eyeglass case.

Moreover, apparent authority requires that police make reasonable inquiries when they find themselves in ambiguous circumstances.

Police here did not ask about ownership before opening the case. The officer easily could have and should have requested and obtained the defendant's consent 'when confronted with {the defendant's} presence.' State v. Leach, 113 Wn.2d 735 (1989).

The State asserts that Mr. Rison waived his Fourth Amendment rights because he did not attempt to limit the scope of Mr. Farrell's consent or otherwise object to the search of his belongings. But consent may not reasonably be implied by one's silence or failure to object when the officer did not expressly or impliedly ask him for consent to search.

The State also argues that Mr. Farrell could have and/or should have limited the scope of the search in order to protect Mr. Rison's privacy. But Mr. Farrell did not have a privacy interest in the eyeglass case to assert in the first place. His waiver of Fourth Amendment rights is then not relevant.

[Some citations omitted]

LED EDITORIAL NOTE: See the January 2002 LED at pages 8-9 for some guidance on determing a person's "apparent authority" to consent.

THEIN RESIDENCE-NEXUS PROBABLE CAUSE TEST MET FOR SEARCH OF OUTDOOR MARIJUANA GROWER'S RESIDENCE; ALSO, TRIAL COURT WAS REQUIRED TO IMPOSE MANDATORY $1000 FINE UNDER RCW 69.50.430(1)

State v. Cowin, ___ Wn. App. ___, 67 P.3d 1108 (Div. II, 2003)

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

> On July 20, 2000, the Olympic Peninsula Narcotics Enforcement Team (OPNET) received an anonymous tip from a caller who reported that David Cowin and an associate named "Herbie" were growing marijuana at Cowin's residence at 862 Whiskey Creek Beach Road. The caller said that the growers were moving the plants from the residence into the woods, and added that Cowin's wife also lived at the residence. He also said that David drove a white Chrysler and that "Herbie" drove a pickup truck.
>
> [Detective A] drove by 862 Whiskey Creek Beach Road and found a white Chrysler registered to David Cowin in the driveway. After the same informant called six days later and again implicated Cowin and "Herbie" in a marijuana grow operation, an investigator determined that Cowin had recently married and that Herb Beck was listed as a witness to the wedding. A background check on Beck showed three vehicles registered to him, including a blue and white 1977 Chevrolet pickup, license number 54555J. The registration listed Beck's address as 10212 Southwest Cove Road in Vashon, Washington. When [Detective A] drove by the Whiskey Creek Beach Road residence a second time, he saw three vehicles parked outside: white and red cars registered to David and Kelli Cowin, and a blue and white Chevrolet pickup truck. [Detective A] could not see the truck's license plate.
>
> On July 29, a nearby property owner called the Clallam County Sheriff's Department to report finding marijuana plants growing on his forested property along Whiskey Creek Beach Road. A neighbor reported seeing a blue and white pickup truck parked near the grow site. OPNET detectives found two neighboring grow sites, each with several black pots containing marijuana plants.
>
> On August 1, [Detectives A and B] conducted surveillance over the grow sites. They had to pass the residence at 862 Whiskey Creek Beach Road to get to the sites and saw only the red car parked outside. When they approached the grow sites, [Detective B] saw a blue and white pickup parked near the entrance to the first site. The detectives hid in the woods until the truck left and afterward found the marijuana plants freshly watered. When a third detective drove by the residence 10 or 15 minutes later, he saw a blue and white truck parked outside.
>
> [Detective C] and other members of OPNET subsequently followed the truck and determined that its license number was 57578N. The detectives verified that Beck was driving the truck and saw a watering jug and black pots in the back that resembled those found at the grow site.
>
> [Detective A] knew of the discrepancy concerning the license plate numbers when he applied for a search warrant, but the only vehicle of Beck's that he requested permission to search was the 1977 Chevrolet pickup, license number 54555J. In his affidavit, he stated that Beck had been stopped for speeding in the 1977 pickup the previous June, that marijuana had been found in Beck's possession, and that materials consistent with outdoor marijuana grow

operations had been found in the truck. [Detective A] ended the affidavit with a lengthy paragraph describing how people who grow marijuana use their homes to facilitate their activity.

The resulting warrant authorized the search of the residence, the 1977 pickup, and the two cars registered to the Cowins. In executing the warrant, however, the detectives discovered that the pickup was a 1978 model, license number 57578N. *[Court's footnote: The 1978 truck was registered to Herb 'Back,' with an address of 1212 Southwest Cove Road. The registration indicated that the truck was light and dark blue.]* After they impounded the truck and obtained permission to search it, the detectives found insurance papers and a checkbook in Herb Beck's name in the truck. The address on the papers was 12012 Southwest Cove Road.

The search of the Whiskey Creek Beach Road residence revealed marijuana plants, drying marijuana, and processed and packaged marijuana. Detectives also found pots identical to those found in the grow sites. Kelli Cowin entered the house during the search and said that the three were growing marijuana for their personal use because it was too expensive to buy.

The State charged David and Kelli Cowin with one count of manufacturing marijuana. Kelli Cowin filed a motion to suppress her statements as well as the physical evidence seized, arguing that the facts in the search warrant affidavit did not show a nexus between the grow site and the Cowins' residence. The trial court denied that motion and described the evidence linking the residence with criminal activity in the following written findings and conclusions:

> 1. The residence at 862 Whiskey Creek Beach Road and the grow sites are both located off of Whiskey Creek Beach Road.
>
> 2. The reasonable inference to be drawn is that the two are relatively close together as reflected in the following statement of Detective [A]: "in passing by the residence at Whiskey Creek Beach Road which you would need to view in order to get to the grow site. . . ." and as reflected in the fact that when the two officers left the grow sites they necessarily passed the residence in question.
>
> 3. The anonymous informant stated that three people lived at the residence, Mr. Cowin, his wife, and "Herbie." This was corroborated by the fact that law enforcement observed vehicles belonging to all three at the residence on July 27, 2000. It was also confirmed by law enforcement on August 1, 2000 when both Mr. Beck's and Mr. Cowin's vehicles were at the residence immediately after law enforcement left the grow sites. A close relationship between Cowin, Leary and Beck is seen in the fact that Mr. Beck was the official witness to Cowin and Leary's marriage in March, 2000.
>
> 4. Probable cause was definitely established as to the blue and white pickup and the criminal activity. A clear nexus was established between the two. The pickup was registered to Herb Beck. Based upon the above, it was reasonable for the magistrate to conclude that a nexus existed between Herb Beck, the blue and white pickup, the residence at 862 Whiskey Creek

> Beach Road and the criminal activity. The anonymous informant indicated that the parties lived together and the independent investigation by law enforcement reasonably corroborated this fact. Furthermore, the pickup truck seen at the site of the grow operations is reasonably inferred to be the same truck registered to Mr. Beck and seen at the residence within minutes of leaving the grow sites. Six weeks earlier, this same pickup was seen to contain materials consistent with a grow operation (information not considered stale because of the on-going nature of marijuana grows). Since the grows themselves were isolated in wooded areas, it was reasonable to infer that these and similar materials were, of necessity, being transported by the blue and white pickup to the grow sites from 862 Whiskey Creek Beach Road where the parties lived.

David Cowin subsequently filed his own motion to suppress and requested a Franks hearing, arguing that the trial court had not considered material misrepresentations in the search warrant affidavit when it denied Kelli Cowin's motion.

Following the hearing, the trial court found that Detective [A] acted with reckless disregard for the truth when he applied for the search warrant knowing of the discrepancy between the two license plate numbers identified. [Detective A] should have told the magistrate that the license number of the truck the detectives had been following was different from that originally given, and that the truck followed was a 1978 Chevrolet blue two-tone pickup registered to Herb Back, with an address similar to Beck's. [Detective A] also should have disclosed that the truck in which Beck was stopped the previous June was the 1978 truck rather than the 1977 truck. The court added, however, that the addition of the proper information about the pickup truck did not affect its finding regarding the nexus between the residence and the criminal activity:

> The '78 pick-up is reasonably related to Mr. Beck. The '78 pick-up was seen at the grow site and also seen on several occasions at the Cowin residence. Mr. Beck was seen in a Chevy pick-up truck in June and there were items in the truck that were reflective of a grow operation as indicated in my previous memorandum, he was also found to have marijuana in his possession.
>
> That together with the other information that's in the warrant I think provides a nexus to the Cowin residence.

The court again declined to suppress the evidence seized.

The Cowins waived their right to a jury and were found guilty as charged. The trial court imposed a fine of $ 1000 against David Cowin payable to OPNET but did not assess a similar fine against Kelli Cowin. This court consolidated the Cowins' direct appeals, and the State cross- appealed.

[Footnote omitted]

ISSUES AND RULINGS: 1) Was there sufficient information in the search warrant affidavit to establish probable cause under State v. Thein that there was seizable evidence located in the residence of the Cowins? (ANSWER: Yes); 2) Was the trial court required to impose a $1000 fine under RCW 69.50.430(1)? (ANSWER: Yes)

Result: Affirmance of Clallam County Superior Court convictions of Kelli Jean Cowin and David Allen Cowin for manufacturing marijuana; reversal of trial court's refusal to impose a mandatory $1000 fine under RCW 69.50.430(1).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Thein's residence-nexus test met

Probable cause exists when the affidavit in support of the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring, and that evidence of such activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**. Probable cause thus requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched.

The second nexus is at issue here. In Thein, the Supreme Court held that such a nexus was not satisfied by generalized statements regarding the habits of drug dealers and their practice of storing drugs or drug paraphernalia at their homes. Apart from such statements, there was no incriminating evidence linking drug activity to the home that was searched in Thein: "The only evidence linked to the Austin Street residence is innocuous: a box of nails and vehicle registration." Because the facts did not establish a nexus between evidence of illegal drug activity and the defendant's Austin Street residence, the court ordered the evidence seized from there suppressed.

The Cowins argue here that the only statement in the redacted affidavit that distinguishes this case from Thein is the anonymous informant's allegation that plants grown at the Whiskey Creek Beach Road residence had been moved outside. They maintain that this tip cannot establish probable cause because the affidavit demonstrated neither the informant's basis of knowledge or veracity. The trial court acknowledged that neither prong was satisfied in this instance but noted that independent police investigation may disclose corroborating evidence that shores up any deficiency in either the knowledge or veracity prongs.

Here, the property owner told the sheriff's department about the marijuana on his land shortly after the informant reported the plants' transfer from the Cowin house into the woods. Further investigation disclosed the presence of two grow sites a short distance from the Cowins' residence, and accessible only by passing their house. The detectives saw the same truck at the grow sites that they saw on more than one occasion at the Cowins' residence. This truck was registered to the man who had witnessed the Cowins' marriage and who had the same first name as the man identified by the anonymous informant. Beck was seen in the truck six weeks before the discovery of the grow sites, and at that time the truck contained materials associated with marijuana grow operations.

This evidence was sufficient to corroborate the informant's statement that marijuana plants had been recently moved from the Cowins' residence to an outdoor location, and it established the necessary nexus between that residence and the grow operation. The trial court did not err in denying the motion to suppress.

2) Mandatory fine under RCW 69.50.430(1)

The State alleges in its cross-appeal that the trial court erred in failing to fine Kelli Cowin $ 1000 as required by RCW 69.50.430(1), which provides as follows:

> Every person convicted of a felony violation of RCW 69.50.401 . . . shall be fined one thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court.

There is no question that Kelli Cowin was convicted of a felony violation of RCW 69.50.401. The unlawful manufacture of marijuana is a Class C felony. The fine for such a violation is mandatory under RCW 69.50.430(1) and cannot be waived unless the court makes a finding of indigency. Since there is no evidence that the trial court made a finding of indigency, it erred in failing to fine Kelli Cowin $ 1000.

[Some citations omitted]

COURT HOLDS TO BE UNLAWFULLY PRETEXTUAL A TRAFFIC STOP FOR LANE-CHANGE VIOLATIONS WHERE ONE MOTIVE OF THE OFFICER WAS TO INVESTIGATE A POSSIBLE LICENSE SUSPENSION OF THE DRIVER

State v. Myers, ___ Wn. App. ___, 69 P.3d 367 (Div. III, 2003)

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

> As Eugene Myers drove past [a sheriff's deputy], the deputy recognized Mr. Myers as someone who had a suspended driver's license approximately one year ago. [The deputy] ran a license check. And he followed the car while he waited for a reply. [The deputy] saw Mr. Myers make two lane changes while signaling simultaneously. He stopped Mr. Myers because, "[s]o basically they had, you know, two infractions so I just went ahead and stopped them and thought I would just go and contact them and verify it [the driver's status] that way."
>
> Mr. Myers had a valid license. [The deputy] then asked the passenger for her identification because of a seatbelt violation he saw earlier. The passenger had an outstanding warrant. [The deputy] arrested the passenger and searched the car.
>
> [The deputy] asked Mr. Myers if there was anything in the vehicle he needed to be aware of. Mr. Myers responded, "no, just my paycheck roll[.]" [The deputy] found a $ 1,500 roll. On the floorboard behind the passenger seat, the deputy also found a plastic bag containing several coffee filters with white residue on them. He smelled a chemical odor. The coffee filters field tested positive for methamphetamine. He arrested Mr. Myers. And he found methamphetamine in Mr. Myers' wallet.
>
> The deputy then obtained a telephonic warrant to search the trunk where he found a methamphetamine lab.
>
> The State charged Mr. Myers with one count of manufacturing methamphetamine and one count of possession of methamphetamine. Mr. Myers moved to suppress the physical evidence arguing that the traffic stop was pretextual. The court denied the motion. A jury found him guilty of both charges.

ISSUE AND RULING: Was the stop of Myers an unlawful pretextual stop under the subjective prong of the Ladson "pretextual stop" test? (ANSWER: Yes)

Result: Reversal of Benton County Superior Court convictions of Eugene R. Myers for manufacturing and for possessing methamphetamine.

Status: State's petition for review is pending in the Washington Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Myers argues that this record supports only one conclusion. [The deputy]'s proffered reason for stopping him--minor traffic violations--was a pretext for his true reason--to investigate a suspected driving with license suspended. We agree.
>
> A pretextual traffic stop violates article I, section 7 of the Washington Constitution because it is a warrantless seizure. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**.
>
> The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving. Here, as in Ladson, "[t]he question [is] whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that 'authority of law' represented by a warrant." The constitution of this state requires us to look "beyond the formal justification for the stop to the actual one.
>
> We consider the totality of the circumstances. This includes both the subjective intent of the officer and the objective reasonableness of the officer's behavior. Ladson (disapproving the purely objective inquiry in State v. Chapin, 75 Wn. App. 460 (1994)) [**Dec 94 LED:17**].
>
> Here, [the deputy] began following Mr. Myers' car because he suspected that Mr. Myers was driving with a suspended license. He then stopped Mr. Myers for the infractions so that he could verify this suspicion.
>
> The deputy had stopped cars for lane change violations in the past. But legally the response to that assertion is: so what? He stopped Mr. Myers *in this particular case* because he wanted to verify Mr. Myers' driving status. [The deputy] did not testify that he was on a traffic patrol--not that this is dispositive. But he was in the area on some other business when he saw Mr. Myers and decided to investigate him for driving with a suspended license. And the stop here followed his frustration that the license check was taking longer than usual.
>
> The State suggests that the stop was proper because police may both stop and arrest a person whom the officer has probable cause to believe is driving with a suspended license. *See* State v. Perea, 85 Wn. App. 339 (1997) **June 97 LED:02**. But Perea is distinguishable. There, the court held that third degree driving with a suspended license, a misdemeanor, is an offense for which a person may be arrested on the basis of "*week-old information* known to the officer who observed him operating his car." Here, the information on Mr. Myers' suspended license was approximately *one year old* and, not surprisingly, the suspension had ended.
>
> Finally, the deputy's stop of Mr. Myers was not justified by the mere fact that he was investigating Mr. Myers' driving with a suspended license, a "driving" offense. Driving with a suspended license is a misdemeanor or gross misdemeanor, depending upon the degree. RCW 46.20.342. Ladson's reference to the investigation of suspicions "unrelated to the driving" plainly refers to a driving infraction, not the criminal investigation of driving with a suspended license. See Ladson ("the reasonable articulable suspicion that a

> traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation").

[Some citations omitted]

Dissent:

Judge Brown dissents, forcefully arguing as follows:

> Suspecting Eugene Myers might be driving with an invalid license, [the deputy], while on routine patrol, called for a license check and followed Mr. Myers' car. While awaiting the dispatcher's response, [the deputy] saw Mr. Myers commit two driving infractions and pulled him over. No dispute exists regarding the propriety of the searches conducted incident to the custodial arrests and search warrant. The sole dispute is whether the initial seizure was pretextual. When rejecting Mr. Myers' pretext argument, the trial court reasoned [the deputy] "had every right to pull the vehicle over." I agree.
>
> This case is unlike State v. Ladson, and State v. DeSantiago, 97 Wn. App. 446 (1999) **Nov 99 LED:12**, because here [the deputy's] intent was determined by the trial court, after properly considering the totality of the factual circumstances, to be without pretext. The facts are uncontested and are thus verities. State v. Hill, 123 Wn.2d 641 (1994). The inferences from the facts support the trial court's conclusion. While the deputy wanted to check Mr. Myers' driving status, the stop for the driving infractions was for objectively independent proper reasons, not improper ulterior reasons. Here, the deputy's concerns about Mr. Myers were merely cumulative, not improper. Accordingly, I respectfully dissent.

[Some citations omitted]

ASKING DRIVER TO STEP FROM VEHICLE TO DETERMINE SOURCE OF ALCOHOL SMELL WAS OK; ALSO, SEARCH OF FANNY PACK WAS CONSENTING

State v. Mackey, ___ Wn. App. ___, 69 P.3d 375 (Div. III, 2003)

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

> On March 22, 2001, Washington State Patrol Trooper Donovan Daly saw Mr. Mackey's car change lanes without signaling on Interstate 90 in Kittitas County. Trooper Daly followed. Mr. Mackey's car drifted across the left yellow line. It then drifted across the right lane divider. Trooper Daly stopped the car. The car traveled an unusually long distance before coming to a stop. Trooper Daly saw "a lot of movement" inside the car by both the driver and passenger.
>
> He approached the car from the passenger side and "was immediately met with a strong odor of intoxicants from the car." The passenger reported he had been drinking. Mr. Mackey's eyes were watery and bloodshot. The trooper asked for Mr. Mackey's driver's license, registration, and proof of insurance. Mr. Mackey had difficulty extracting the documents from his wallet.
>
> Trooper Daly asked Mr. Mackey to meet him at the rear of the car. Mr. Mackey got out of the car. Trooper Daly saw a fanny pack hanging from Mr. Mackey's waist. It appeared to be "puffed out" or full. The fanny pack was like the one that the trooper carried his own weapon in. And he had seen others carry weapons in similar fanny packs. So the trooper was concerned.

Trooper Daly asked Mr. Mackey if he had any guns. Mr. Mackey said that he did not. The trooper asked Mr. Mackey if he minded if he checked the fanny pack for officer safety. Mr. Mackey responded, "I guess not." Mr. Mackey then opened the pack and exposed drugs and paraphernalia.

Mr. Mackey and the passenger both testified that Trooper Daly first felt the fanny pack and unzipped it as he asked to look inside. And Mr. Mackey said, "I guess not" sarcastically in response to the trooper's opening the fanny pack and looking inside.

But the trial judge found otherwise. The judge found this version was "incredulous" because taking the fanny pack in the manner suggested by Mr. Mackey and the passenger would be "completely contrary to police procedure and would place Trooper Daly in greater peril." Mr. Mackey does not challenge that finding.

Mr. Mackey was ultimately convicted, as charged, for possession of cocaine, possession of less than 40 grams of marijuana, and unlawful use of drug paraphernalia.

ISSUES AND RULINGS: 1) Was the trooper justified in asking the driver to step from his car to determine the sources of the alcohol smell emanating from the vehicle? (ANSWER: Yes); 2) Was the fanny pack search a lawful consent search? (ANSWER: Yes)

Result: Affirmance of Kittitas County Superior Court conviction of Brian D. Mackey for possession of cocaine, possession of marijuana, and unlawful use of drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Request to driver to stop from vehicle

Mr. Mackey agrees that his driving performance reasonably warranted the traffic stop. But he argues that the trooper's request that he get out of the car and walk to the rear was not necessary to further the investigation.

The permissible scope and duration of a detention is limited to the purpose of the traffic stop absent "increasingly suspicious circumstances." Its scope is a function of: (1) the purpose of the stop; (2) the amount of physical intrusion on the suspect's liberty; and (3) the length of time of the seizure.

The means of investigation need not be the least intrusive available. But police must reasonably try to identify and pursue less intrusive alternatives.

Here, the trooper stopped Mr. Mackey for a traffic infraction for drifting out of his lane. He spoke with Mr. Mackey and smelled alcohol. Mr. Mackey fumbled with his wallet. Having Mr. Mackey get out of the car was then an acceptable intrusion under these circumstances. It is in fact the standard practice. Here, the stop was not lengthy. And removing Mr. Mackey from the car to determine the source of the alcohol smell is not overly intrusive.

2) Consent search

Mr. Mackey next challenges the court's determination that Trooper Daly had "a reasonable belief that [Mr.] Mackey may be armed and dangerous and was justified in conducting a limited search of the fanny pack for weapons."

> "An officer who properly stops a car may conduct a search for weapons within the immediate control of the driver and passengers when one of the persons in the car moves as if to hide a weapon."
>
> But here, the trial judge found that Mr. Mackey exposed the contents of the fanny pack before any search took place. The propriety of the search, its justification, and its scope is then irrelevant. Mr. Mackey consented to the search. The court's findings here amply support that conclusion: "Before he could frisk the pack, [Mr.] Mackey voluntarily opened it and Trooper Daly saw what was in plain view for him to see." This was then consent by Mr. Mackey to view what was in this pack.

[Citations omitted]

****

NEXT MONTH

The September 2003 LED will include entries regarding:

Chavez v. Martinez, 123 S.Ct. 1994 (2003), a May 27, 2003 U.S. Supreme Court decision in a section 1983 federal civil rights case. The Supreme Court is badly splintered in its voting in Chavez. It appears that a majority of the Court has held that a civil rights suit cannot be brought for the mere failure by an officer to give a suspect Miranda warnings; however, a different majority of the Court has voted to remand the case to the Ninth Circuit for further review to address the separate issue of whether the interrogating officer's conduct violated the substantive due process rights of the suspect.

State v. Wentz, 68 P.3d 282 (2003), a May 8, 2003 Washington Supreme Court decision interpreting the phrase "fenced area" in the context of RCW 9A.04's definition of "building" as it pertains to the "burglary" statutes. The Wentz decision gives a broad, pro-state definition to "fenced area," and, in doing so, the Court overrules several Court of Appeals decisions.

****

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. another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]

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 2003, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 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].

****

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 [ledemail@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.cjtc.state.wa.us].