



Law Enforcement

May 2003

Digest

HONOR ROLL

556th Session, Basic Law Enforcement Academy – November 19, 2002 through April 2, 2003

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LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 5, 2003

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Monday, May 5, 2003 at the St. Martin's College Pavilion, 5300 Pacific Avenue S.E. in Lacey, Washington, commencing at 1:00 PM. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) NO "EX POST FACTO" PROBLEM UNDER ALASKA'S "MEGAN'S LAW" IN PUTTING SEX OFFENDERS' NAMES, PHOTOS, DESCRIPTIONS AND ADDRESSES ON INTERNET –

In Smith v. Doe, 123 S.Ct. 1140 (2003), the U.S. Supreme Court rules, 6-3, that putting the names, pictures, addresses and other information about sex offenders on an Internet site maintained by the State of Alaska was not an ex post facto constitutional violation of the rights of Alaska offenders who had already served their time for sex crimes.

Constitutional ex post facto provisions protect persons from being punished for an offense that was not punishable when committed or from having punishment increased from that which was provided for under the criminal statute when the crime was committed.

The majority justices in Smith disagree with the Ninth Circuit conclusion that the Internet posting is a form of punishment. The majority therefore rules that the Alaska law does not implicate ex post facto protections. Justices Stevens, Ginsburg, and Breyer dissent.

Result: Reversal of decision of Ninth Circuit, U.S. Court of Appeals, and reinstatement of U.S. District Court decision granting summary judgment to the State of Alaska.

(2) NO DUE PROCESS PROBLEM UNDER CONNECTICUT'S "MEGAN'S LAW" IN NOT GIVING SEX OFFENDERS PRE-DEPRIVATION HEARINGS BEFORE PUTTING THEIR NAMES, ADDRESSES, PICTURES AND DESCRIPTIONS ON THE INTERNET –

In Connecticut Department of Public Safety v. Doe, 123 S.Ct. 1160 (2003), the U.S. Supreme Court rules unanimously that convicted sex offenders have no right to a hearing under constitutional protections of procedural due process before the government puts their names, addresses, photographs and other information on an Internet sex offender site.

The lead opinion of the U.S. Supreme Court carefully explains that the sole issue before it is whether the Connecticut statutory scheme violates procedural due process protections. The Court states that the question of substantive due process justification for the statute is not being addressed by the Supreme Court.

Result: Reversal of decisions of 2nd Circuit, U.S. Court of Appeals and U.S. District Court. The State of Connecticut is entitled to judgment as a matter of law on the singular issue before the court.

(3) FEDERAL CONSTITUTION'S PROHIBITION AGAINST "CRUEL AND UNUSUAL" PUNISHMENT DOES NOT PRECLUDE TWO CONSECUTIVE 25 YEARS-TO-LIFE SENTENCES UNDER CALIFORNIA "THREE STRIKES" LAW FOR MAN WHO COMMITTED TWO PETTY THEFTS, EACH OF WHICH QUALIFIED SEPARATELY UNDER CALIFORNIA'S "THREE STRIKES" LAW AS A "THIRD STRIKE" – In Lockyer v. Andrade, 123 S.Ct. 1166 (2003), the U.S. Supreme Court rules 5-4, that it did not violate the U.S. Constitution's Eighth Amendment for a California trial court to sentence a defendant to two consecutive 25 years-to-life sentences for two petty thefts, each of which qualified as a "third strike" under California's "three strikes" law. Justices Souter, Stevens, Ginsburg and Breyer dissent.

Result: Reversal of ruling of U.S. Court of Appeals for the Ninth Circuit; California state trial court's sentences reinstated.

(4) FEDERAL CONSTITUTION'S PROHIBITION AGAINST "CRUEL AND UNUSUAL" PUNISHMENT DOES NOT PRECLUDE 25-YEARS-TO-LIFE SENTENCE UNDER CALIFORNIA "THREE STRIKES" LAW FOR MAN WHOSE "THIRD STRIKE" WAS FELONY THEFT OF OVER \$1000 WORTH OF GOLF CLUBS – In Ewing v. California, 123 S.Ct 1179 (2003), the U.S. Supreme Court rules, 5-4, that a California trial court did not violate the U.S. Constitution's Eighth Amendment in sentencing a defendant for 25-years-to-life for his theft of over \$1000 worth of golf clubs where he had two prior "strikes" under California's "three strikes" sentencing law.

The defendant's sentence was not grossly disproportionate to his conduct and therefore does not violate the Eighth Amendment's prohibition on "cruel and unusual" punishment, declares the lead opinion of the U.S. Supreme Court authored by Justice O'Connor and joined by Justices Rehnquist and Kennedy. Justices Scalia and Thomas write separate concurring opinions arguing that there is no proportionality principle in the Eighth Amendment.

Justice Stevens filed a dissenting opinion joined by Souter, Ginsburg and Breyer. Justice Breyer writes a separate dissent joined by Stevens, Souter and Ginsburg.

Result: Affirmance of California Court of Appeals decision.

LED EDITORIAL NOTE: Washington has interpreted the Washington State Constitution's prohibition on "cruel" punishment as placing greater limits on statutory sentencing schemes than does the U.S. Constitution's Eighth Amendment. See State v. Fain, 94 Wn. 2d 387 (1980). However, Washington's "three strikes" and "two strikes" sentencing schemes are narrower than the California law at issue in Ewing. The Washington laws are presumably constitutional under either federal or state "cruel"/"cruel and unusual" punishment analysis.

WASHINGTON STATE SUPREME COURT

WHERE 12-YEAR-OLD WAS LAWFULLY STOPPED AFTER MIDNIGHT IN AN ISOLATED INDUSTRIAL AREA, "COMMUNITY CARETAKING FUNCTION" HELD TO JUSTIFY OFFICERS IN DETAINING HIM LONG ENOUGH TO PHONE HIS MOTHER

State v. Acrey, ___ Wn.2d ___, 64 P.3d 594 (2003)

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

On September 18, 2000, in Renton, Washington, at approximately 12:41 in the morning, Renton Police Officers James D. Gould and Tracy Wilkinson, along with other police officers, responded to an anonymous 911 telephone call reporting juveniles fighting in a commercial area along Rainier Avenue North just south of

the 900 block. When Officer Gould arrived in the area he observed five male youths who appeared quite young and fit the description provided by the anonymous caller. He stopped the youths and asked if they had been fighting. They responded they had merely been playing around and were walking to a 7-Eleven convenience store located approximately four to five miles away.

The officers concluded no one had been fighting, no one was injured, and no criminal activity was underway. But since it was after midnight on a week night in a commercial area with no open businesses and no nearby residences, the officers asked for the boys' names and home telephone numbers. They directed the boys to sit on the sidewalk while the officers called their homes.

[Acrey] falsely identified himself as "Jubuaire Davison," but did give his correct telephone number and his mother's name, Ms. Jennifer Landgraf. Officer Wilkinson telephoned Ms. Landgraf, who provided [Acrey]'s correct name and asked the officers to bring him home because she did not have an automobile. Honoring her request, Officer Wilkinson asked Officer Gould to transport [Acrey] home.

Before placing [Acrey] in his patrol car, following standard police procedure, Officer Gould made a pat-down search of [Acrey] for weapons, despite not then believing [Acrey] was armed. He felt something at the bottom of [Acrey]'s pants leg and asked what it was. [Acrey] said it was money, but because it did not feel like money, Officer Gould removed a rubber band securing the object to [Acrey]'s ankle. Coins, paper money, and two baggies of green vegetable matter then fell from [Acrey]'s pants leg. Officer Gould immediately recognized the vegetable matter as marijuana. He placed [Acrey] under arrest. A search incident to the arrest uncovered more packaged marijuana, money, and crack cocaine in [Acrey]'s pants and right sock.

The juvenile court, Judge Julie Spector, found that the officers had reasonable cause to stop [Acrey] to investigate a fight and had lawful grounds to extend the stop to call [Acrey]'s mother as part of their community caretaking function. The court also ruled that the police officers were permitted to pat-down search [Acrey] out of concern for safety before placing him in the patrol vehicle and that removing the objects from [Acrey]'s ankle was within the proper scope of that search.

After admitting the evidence, including the evidence obtained incident to the arrest, the trial court held a disposition hearing on November 17, 2000. The court found [Acrey] "guilty" of both counts of violation of the Uniform Controlled Substances Act. The court imposed a disposition of 2 months of community supervision and 8 hours of community service. [Acrey] appealed to the Court of Appeals, Division One. The Court of Appeals, the Honorable Anne L. Ellington writing, affirmed [Acrey]'s disposition and the order denying his motion to suppress the cocaine and marijuana evidence. State v. Acrey, 110 Wn. App. 769 (Div. I, 2002) **July 02 LED:16** [Acrey] claimed the drugs were the fruit of an illegal search and seizure. The court disagreed and concluded that (1) the initial detaining of [Acrey] was reasonable under Terry v. Ohio, (2) the continued detaining of [Acrey] while the officers telephoned his mother was reasonable under the "community caretaking function" exception to the warrant requirement, and (3) the protective pat-down search of [Acrey] before the officers placed him in the patrol vehicle for transportation home as requested by his mother was reasonable under State v. Wheeler, 108 Wn.2d 230 (1987).

ISSUE AND RULING: Did the totality of the circumstances justify detaining the 12-year-old Acrey long enough to call his mother? (ANSWER: Yes, rules an 8-1 majority, Justice Sanders dissenting.)

Result: Affirmance of decision of Court of Appeals that affirmed King County Superior Court juvenile conviction of Adam Lamour Acrey for possession of cocaine and marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

As he did in the Court of Appeals, [Acrey] concedes that his initial detainer by police officers constituted a lawful Terry stop. He contends, however, that once the officers confirmed he was not involved in criminal activity, he should not have been further detained. The State argues that, under the "community caretaking function" exception to the warrant requirement, because of [Acrey]'s extreme youth and his after-midnight presence in a commercial area, the officers were entitled to detain [Acrey] until they obtained his name and contacted his mother by telephone.

The Court of Appeals correctly observed that "'local police have multiple responsibilities, only one of which is the enforcement of criminal law.'" "[M]any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid."

When police officers are engaged in noncriminal, noninvestigative "community caretaking functions," "whether a particular stop is *reasonable* depends not on the presence of 'probable cause' or 'reasonable suspicion,' but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances."

The United States Supreme Court first enunciated the "community caretaking function" exception to the warrant requirement in Cady v. Dombrowski, 413 U.S. 433 (1973). With respect to the Fourth Amendment to the United States Constitution, the Supreme Court observed that

Local police officers, unlike [federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

In Cady, the Supreme Court held that Wisconsin police officers who had arrested a Chicago police officer for driving while intoxicated did not violate the Fourth Amendment in searching the suspect's automobile for a service revolver which the arresting officers believed Chicago police officers were required to carry at all times. The Court concluded the warrantless search of the disabled vehicle was "constitutionally reasonable" because it was incident to the community caretaking function of the arresting officers to protect "the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."

In this State, the "community caretaking function" exception to the warrant requirement encompasses "not only the 'search and seizure' of automobiles, but also situations involving either emergency aid or routine checks on health and safety." In this case, the State argues that [Acrey]'s encounter with the police officers involved the "routine check on health and safety" aspect of the "community caretaking function" exception.

In determining whether an officer's encounter with a person is reasonable as part of a routine check on safety, we must balance the "individual's interest in freedom from police interference against the public's interest in having the police officers perform a community caretaking function." We must "cautiously apply the community caretaking function exception because of 'a real risk of abuse in allowing even well-intentioned stops to assist.'" Even a routine stop for a safety check, if it involves a "seizure" by detaining, must be necessary and strictly relevant to performance of the noncriminal investigation. "The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled."

The Court of Appeals correctly held that the officers' brief detention of [Acrey] was part of a routine safety check which was necessary and relevant to a noncriminal investigation. In balancing the "State's significant interest in protecting a child against the child's significant interest in moving free of police intrusion" the Court of Appeals stated

Raising child welfare concerns were the facts that [[Acrey]] was a 12-year-old boy, out after midnight on a weeknight without adult supervision, in an isolated area with no residences or open businesses. Most notably, the officers had stopped [[Acrey]] to conduct a criminal investigation in response to a citizen 911 call. Thus, there was reason for heightened concern that the boys may be engaging in conduct that, while not criminal, could bring harm to themselves or others. The record indicates that the time required for the officer to reach [[Acrey]'s] mother was no more than a matter of minutes. The officers' conduct seems entirely reasonable.

[Acrey] argues that under State v. Kinzy [141 Wn.2d 373 (2000) **Sept 00 LED:07**] his brief detention was illegal. In Kinzy, we found unreasonable the "seizure" of a 16-year-old woman by police officers and their actions which followed after balancing the juvenile's "interest in freedom from police intrusion and [her] freedoms of association, expression and movement" against the State's interest in child safety based upon the juvenile's perceived age and height, the late hour, her presence in a high narcotics trafficking area and her association with a narcotics trafficker. The court struck the balance in favor of privacy "because '[t]he policy of the Fourth Amendment is to minimize governmental confrontations with the individual,'" holding the young woman's seizure unreasonable and therefore unconstitutional.

The Court of Appeals distinguished this case from Kinzy, stating the following:

Kinzy teaches that we must examine the particular facts of each police encounter to determine whether the officers acted reasonably under the circumstances. Here, several important facts tip the scales in favor of briefly detaining Acrey while officers

called his mother: Acrey was younger than Kinzy, and the hour much later; Acrey was in an isolated area unaccompanied by an adult; and most important, the officers had initially detained Acrey to investigate a possible crime. The fact that a 911 call had been placed raised at least some degree of concern for Acrey's well-being, regardless of whether there was any criminal activity; the next person to notice the boys "playing around" might have responded with something less benign than a 911 call. Perhaps most important, the fact that Acrey had been legitimately detained in a Terry stop meant that there was merely a momentary additional intrusion for community caretaking purposes.

We also emphasize that the officers' purpose in detaining Acrey was to confer with his mother. In Kinzy, the court suspected the officer was actually enforcing a de facto curfew law, thereby abusing the community caretaking function. One reason juvenile curfew laws are disfavored is because they tend to interfere with parents' rights to choose whether to allow their children out at night. Here, the officers explicitly deferred that decision to Acrey's mother. Thus, this brief seizure served the additional purpose of advancing a mother's right to direct her child's upbringing.

In determining the reasonableness of a governmental intrusion, courts consider the totality of the circumstances, balancing the character of the intrusion and its justification against the individual's right to personal autonomy. Considering those competing interests, we conclude that the State's interest in protecting Acrey outweighed Acrey's interest in moving freely for the brief time it took the officers to call his mother. The brief extension of what had been a valid Terry stop occurred in a lawful exercise of the officers' community caretaking duties.

The Court of Appeals applied a general reasonableness analysis which inquires whether the police officers' actions were appropriate under the surrounding circumstances. The court observed that once the officers concluded that "no crime had been committed, their focus shifted from law enforcement to ensuring the welfare of [Acrey] and his young friends" and that the officers were "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

The Court of Appeals, focusing on reasonableness, correctly balanced the State's significant interest in protecting a child against the significant interest of the child in moving free of police intrusion. There was minimal intrusion in detaining [Acrey] long enough to ask him for his name and telephone number and to telephone his mother. The 12-year-old [Acrey] was younger than the 16-year-old juvenile in Kinzy. The officers encountered [Acrey] after midnight. They were acting on a reasonable, articulable suspicion of criminal activity when they initially detained [Acrey] in the company of other youth and no adults in an isolated commercial area with no open businesses and no nearby residences. The police officers were acting in their "community caretaking function" and not in their law enforcement capacity when they asked [Acrey] for his name and home telephone number and contacted his mother.

[Acrey] did not dispute in the Court of Appeals that once his mother requested the officers' assistance in bringing him home, the officers permissibly complied with the request under their community caretaking function. Nor did he dispute that the officers were justified in conducting a pat-down search of him before placing him in the patrol vehicle because of officer safety concerns.

The Court of Appeals noted the search of [Acrey] before placing him in the patrol vehicle was reasonable to protect the safety of the officers. The search was limited to a pat-down of [Acrey]'s outer clothing. Because that search revealed a suspicious and unidentified bulky object, the officer was entitled to "take the steps necessary to assure himself that the object was not a weapon." The officer appropriately removed a rubber band which secured the object to [Acrey]'s ankle. After coins, money, and two baggies of vegetable matter, immediately recognized by the officer as marijuana, fell from [Acrey]'s pants leg, the officer lawfully arrested [Acrey]. The arrest and subsequent search were reasonable under the Fourth Amendment to the United States Constitution.

[Some citations and footnotes omitted]

DISSENTING OPINION:

Justice Sanders writes a dissenting opinion not joined by any other justice. He disagrees that this case is distinguishable factually from the Court's decision on Kinzy, or that the officers' "community caretaking function" justified the detaining of Acrey while they called his mother. Justice Sanders also argues that the officers were not justified in patting Acrey down before transporting him in the patrol car. On the latter question, however, the majority justices note that the Court of Appeals ruled that the pat-down was justified (see **July 02 LED:16**), and, in any event, Acrey failed to preserve that issue on appeal.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CHILD VICTIM HEARSAY STATUTE RECEIVES PRO-PROSECUTION INTERPRETATION – STATE NEED NOT SHOW THAT CHILD WAS COMPETENT TO TESTIFY AT THE TIME THAT CHILD MADE HEARSAY STATEMENT -- In State v. C.J., ___ Wn.2d ___, 63 P.3d 765 (2003), the Washington Supreme Court rules unanimously that in offering a hearsay statement from a child abuse victim who is unavailable to testify at trial due to incompetency, the State need only meet the statutory requirements of RCW 9A.44.120. Thus, the State need only show (1) that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and (2) that there is corroborative evidence of the act. Therefore, the Supreme Court rules that the Court of Appeals erred in holding that the State was required to make an additional showing of a child's competency at the time of making the hearsay statement at issue.

RCW 9A.44.120 governs the admissibility of a child victim's out-of-court hearsay statements. The statute provides that:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

This case resolves a conflict between decisions of the three divisions of the Washington Court of Appeals which have given conflicting interpretations of the statute governing the admissibility of a child victim's out-of-court hearsay statement. In this case, Division Three reversed a juvenile defendant's conviction for first degree molestation on grounds that the trial court admitted hearsay statements made by the 3-year-old victim without first requiring the state to establish that, at the time the statements were made: 1) the child knew the difference between a truthful statement and a false statement, and 2) the child understood his obligation to speak truthfully about the incident. See February 2002 LED at page 18.

The Supreme Court holds in the C.J. case that the statute does not require a showing that an unavailable child victim understood the difference between the truth and a lie at the time the statement was made, nor does the statute require that the child understood the obligation to speak truthfully about the incident. The statement need only be reliable under the terms of the statute and also be corroborated as required under the statute.

Result: Reversal of Court of Appeals decision; reinstatement of Benton County juvenile court conviction of C.J., the 13-year-old cousin of the 3-year-old victim.

(2) EVIDENCE THAT DEFENDANT TELEPHONED HOME OF PERSON PROTECTED BY NO-CONTACT ORDER AND TALKED TO PERSON'S SPOUSE HELD SUFFICIENT TO SUPPORT CONVICTION FOR VIOLATION OF ORDER -- In State v. Ward, ___ Wn.2d ___, 64 P.3d 640 (2003) (consolidated on appeal with State v. Baker), the Washington Supreme Court holds, among other rulings in this appeal, that the evidence produced at trial was sufficient to support a defendant's misdemeanor conviction for violating a no-contact order by contacting a third person by phone. The Supreme Court affirms the result of the earlier decision of the Court of Appeals (see February 02 LED at page 18), but the Supreme Court states a broader prosecution rationale in doing so.

Ricky Baker was restricted under a no-contact order from having contact with Oleg Ivanov "in person, by telephone or letter, through an intermediary, or in any other way." Baker called Ivanov's phone number. Ivanov's wife, Doreen Cornwell, answered the phone. After Baker said that he thought Ivanov wanted him to call, Baker hung up. Under the following analysis, the Court of Appeals' concluded in a 2001 decision that this telephone call violated the no-contact order because a jury could infer that the spouse answering the phone passed the information on to the other spouse:

Because Baker called A.B.'s telephone number and spoke with his wife rather than with A.B. himself, he argues that he did not have contact with A.B. But the order also prohibited contact through intermediaries. The jury could reasonably

infer that A.B.'s wife told him about Baker's call. A.B. and his wife lived in the same house, both had been affected by the ongoing problems with Baker, and A.B.'s wife was concerned enough to notify police officers. This is sufficient evidence to support Baker's conviction on count 3.

The Supreme Court expands on that rationale for upholding the conviction, holding that the mere fact of the phone call supports the conviction:

We agree with the Court of Appeals that a rational trier of fact could have found Baker guilty beyond a reasonable doubt of the misdemeanor violation. We do not, however, find it necessary to engage in speculation as to whether Cornwell [the person answering the phone] told Ivanov [the person protected by the no-contact order] of the phone call. The no-contact order prohibited Baker from contacting Ivanov by telephone or through an intermediary, and the evidence shows that Baker telephoned Ivanov's home and conveyed information about Ivanov to his wife. Based on this conduct alone, a jury was entitled to find that Baker violated the order. Accordingly, we affirm Baker's conviction of a misdemeanor violation of a no-contact order.

Result: Affirmance of Court of Appeals' decision affirming King County Superior Court convictions of Darin Ward (for felony violation of a no-contact order) and of Ricky B. Baker (for one felony violation of a no-contact order and three misdemeanor violations of a no-contact order); note: this **LED** entry addresses only the Court's ruling on one of Ricky B. Baker's three misdemeanor convictions.

(3) STRICT LIABILITY APPLIED WHERE PROSECUTION UNDER FORMER COMMERCIAL FISHING STATUTE WAS BASED UPON POSSESSION OF MORE THAN THREE TIMES THE PERSONAL BAG LIMIT OF GEODUCKS –In State v. Mertens, ___ Wn. 2d ___, 64 P.3d 633 (2003), the Washington Supreme Court rules, 5-4, that where a prosecution under the former “commercial fishing” statute at RCW 77.15.110 was based upon defendant's possession of more than three times the personal bag limit of geoducks, the defendant was per se guilty of “acting for commercial purposes,” and that he was strictly liable because he exceeded the statutory limit.

Accordingly, the majority justices of the Supreme Court (author Owens joined by Madsen, Ireland, Bridge and Smith) reverse a Court of Appeals' decision (see February 2002 **LED** at 14-15) that held that the statute created an unconstitutional presumption of intent to act for commercial purposes. Dissenting justices (author Chambers joined by Alexander, Sanders and Johnson) argue that the former statute did require proof of actual purpose or intent.

Result: Reversal of Court of Appeals decision and reinstatement of Kitsap County Superior Court conviction of Steven Mertens for commercial fishing without a license in the first degree.

LED EDITORIAL NOTE REGARDING 2002 AMENDMENT TO “COMMERCIAL FISHING” STATUTE: Because the majority in Mertens ruled that the crime at issue was one of strict liability, they did not need to consider whether 2002 amendments to the statute clarifying it to that end were retroactive. We addressed those 2002 amendments in the June 2002 **LED** at pages 4-5.

(4) LOSS OF PROPERTY DUE TO EXECUTION OF SEARCH WARRANT AND PRESERVATION ORDER IS NOT “COMPENSABLE TAKING” UNDER ARTICLE I, SECTION 16 OF WASHINGTON STATE CONSTITUTION – In Eggleston v. Pierce County, ___ Wn.2d ___, 64 P.3d 618 (2003), the Washington Supreme Court rules, 7-2, that where an innocent person's home was rendered uninhabitable by the execution of a criminal search warrant and evidence-preservation order, she could not bring an action for compensable takings of property under article I, section 16 of the Washington State Constitution.

The majority opinion in Eggleston is authored by Justice Chambers and is joined by Justices Smith, Johnson, Madsen, Bridge, Owens and Ireland. Justice Ireland writes a short concurring opinion. The majority opinion emphasizes, in the course of a lengthy discussion of the arcane questions of takings-of-property and of police power under the Washington State Constitution, that the ruling for the government is narrowly limited to the particular state constitutional issue before the Court. The majority opinion explains that there may be another theory under which plaintiff might recover. In fact, Ms. Eggleston is pursuing other theories against Pierce County in her actions which arise from her son's shooting of a Pierce County deputy sheriff during execution of a narcotics search warrant at her home.

Justices Alexander and Sanders write separate dissenting opinions, each arguing that Ms. Eggleston should have permitted to pursue her novel "takings" theory in the Washington courts.

Result: Affirmance of Pierce County Superior Court order granting summary judgment and dismissing Linda Eggleston's article I, section 16 claim.

WASHINGTON STATE COURT OF APPEALS

WARRANTLESS SEARCH OF TRAILER HELD UNLAWFUL BECAUSE SEARCH WAS INVESTIGATORY, NOT "COMMUNITY CARETAKING," AND WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES OR BY CONSENT

State v. Schlieker, 115 Wn. App. 264 (2003)

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

In October 2000, two Pierce County Sheriff's deputies responded to a domestic disturbance call at the home of Connie and Michael Voss. The Vosses' 10-year-old son had telephoned 911 from a neighbor's house to report yelling, screaming, and a gunshot at his home.

The deputies spoke with the Vosses, who were visibly upset. Connie explained that she and Michael were arguing about Schlieker and Butterfield, who had moved a trailer onto the Vosses' property and were staying without permission. The Vosses suspected drug activity at the trailer and wanted Schlieker and Butterfield to leave. Connie asked the deputies to speak with Schlieker and Butterfield. When asked about the gunshot, Connie said that a cigarette lighter had exploded in the clothes dryer. The deputies investigated and found no evidence of an explosion.

As the uniformed deputies neared the trailer, they saw two men and called out to them. The men, Earl Averill and David Bailey, jumped into a nearby car and attempted to flee. Worried about the report of gunfire and being run down, the deputies drew their sidearms, ordered the men out of the car and handcuffed them.

Averill nervously explained that the car belonged to Schlieker, who was in the trailer. Concerned that the men were stealing the car and that someone in the trailer might be injured, the deputies called out to Schlieker through the trailer's open door. Receiving no response, the deputies called out again, waited 10 to 15 seconds, and entered the trailer.

The deputies found Butterfield in bed under a pile of blankets and Schlieker in the bathroom. The deputies handcuffed both Butterfield and Schlieker and removed them from the trailer. While exiting the trailer, one of the deputies commented on a package of lithium batteries by the door. Butterfield responded, "Big deal, lithium batteries; you can't prove anything."

One of the deputies then re-entered the trailer and looked behind the shower curtain to see if anyone was hiding; he saw only funnels and tubing. The other deputy walked around the trailer and saw a pick-up truck; through the truck's open window, he smelled a strong chemical odor and saw several items associated with methamphetamine manufacturing.

[A detective] then advised both Schlieker and Butterfield of their Miranda rights and questioned them separately. Schlieker asserted his right to silence. Butterfield admitted that she and Schlieker lived in the trailer but denied knowing that anyone was manufacturing methamphetamine on the property.

[The detective] then told Schlieker and Butterfield that they were both going to jail because he could not determine who was responsible for the methamphetamine lab. Schlieker announced that nothing in the trailer would indicate that he had manufactured methamphetamine and that the police would only find "some lithium batteries, some Red Devil lye and maybe some toluene" because "everything else was flushed down the toilet."

After obtaining a search warrant for the trailer and the truck, authorities discovered items consistent with methamphetamine production, including: lithium batteries, stained coffee filters, muriatic acid, Mason jars, Isoheat, a hand-held grinder, rock salt, Coleman fuel, liquid drain cleaner, empty propane tanks that had contained anhydrous ammonia, empty cold-tablet packages, and a variety of solvents. Two of the jars contained substances that tested positive for pseudoephedrine. Schlieker's and Butterfield's fingerprints were on jars that did not contain methamphetamine, its precursors, or by-products. The State charged Schlieker and Butterfield with unlawful manufacturing of a controlled substance, RCW 69.50.401(a)(1)(ii).

Schlieker moved to suppress his statements to [the detective], arguing that [the detective] continued to interrogate him after he asserted his right to silence. The trial court denied the motion, concluding that [the detective]'s statement was not reasonably likely to invoke a response from Schlieker and that Schlieker had waived his right to silence.

Both defendants moved to suppress the evidence, challenging the warrantless entry and the probable cause finding. The trial court denied the motions, concluding that the initial entry was lawful under the community caretaking exception and that Butterfield did not have standing to challenge the search of the truck.

[Each defendant was convicted of violating RCW 69.50.401(a)(1)(ii).]

ISSUE AND RULING: Was the warrantless, non-consenting search of the trailer a "community caretaking" search? (**ANSWER:** No, the search was a criminal investigatory search that was not justified by consent or by any exigent circumstances)

Result: Reversal of Piece County Superior Court convictions of Wayne F. Schlieker and Melinda Jo Butterfield for unlawful manufacturing of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The emergency exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property." When the State invokes the emergency exception, "we must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search[.]" Thus, the emergency exception justifies a warrantless entry when: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched. We evaluate "[w]hether [an] officer's acts in the face of a perceived emergency were objectively reasonable . . . in relation to the scene as it reasonably appeared to the officer at the time, 'not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.'"

Competing policies come into play when the State invokes the emergency aid exception: "(1) allowing police to help people who are injured or in danger and (2) protecting citizens against unreasonable searches." We balance these policies in light of the facts and circumstances of each case.

Routine health and safety checks involve less urgency than the emergency aid function. In a caretaking situation, the admissibility of the evidence discovered depends on a "balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform" the community caretaking function. When weighing these interests, "the balance ought to be struck on the side of privacy[.]"

Butterfield assigns error to several of the trial court's findings, including that the deputies entered the trailer out of concern for Butterfield's and Schlieker's safety. Whether the deputies entered the trailer out of concern for the appellants is a close question.

Some evidence supports the community caretaking exception, including: the report of a gunshot on the property; the men who attempted to flee in the car, endangering the deputies; the trailer's open door; and no response to an inquiry. But the deputies' actions following their entry, coupled with their knowledge up to that point, do not satisfy us that the claimed emergency was more than a pretext for conducting an evidentiary search.

We note the following: (1) The State concedes that the deputies were not at the trailer out of concern for the defendants' safety but to investigate allegations of trespassing and drug activity; (2) the domestic violence call concerned the Vosses not anyone at the trailer; (3) the deputies had no information that someone inside the trailer was injured; (4) the gunshot was reported to have come from the house not the trailer; and (5) after finding Butterfield and Schlieker unharmed, the deputies did not inquire about their well-being, but handcuffed and arrested them and searched for evidence of criminal activity.

The deputies' actions and that they did not inquire into the occupants' safety, but instead handcuffed and arrested them, convince us that this was not a circumstance wherein the deputies were attempting to help people who were injured or in danger. The entry was a not so subtle intrusion into the appellants' privacy, rationalized with the "community caretaking" function so that the deputies could perform a search.

Because there is no substantial evidence to support the first prong of the emergency exception, that the deputies subjectively believed someone inside needed assistance, the emergency exception is not applicable here. As there was no other legal justification for the entry, everything discovered as a result of the entry must be suppressed.

Thus, the appellants' statements and the discovery of other evidence based on the warrant was fruit of the poisonous tree, the unlawful entry and arrests, and it was error to deny the motion to suppress.

[Citations omitted]

PERSON CONVICTED OF CLASS A SEX OFFENSE MAY NOT PETITION FOR RESTORATION OF FIREARMS RIGHTS EVEN IF HE HAS NO PRIOR CONVICTIONS

State v. Graham, ___ Wn. App. ___, 64 P.3d 684 (Div. II, 2003)

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

On May 5, 1995, Graham was convicted of second degree child rape, a sex offense and a class A felony. RCW 9A.44.076. He had not been convicted of any felonies, gross misdemeanors, or misdemeanors before or after May 5.

On September 20, 2001, Graham petitioned the superior court under RCW 9.41.040 for restoration of his right to own and possess firearms. He argued that the statute allows an individual to have his or her firearm rights restored if he or she has had no felony convictions and has been crime free for the preceding five years.

The court granted Graham's petition, reasoning that he had not been convicted of any offenses before the current felony that disabled his firearm rights. The court stated in its conclusions of law:

3. The second sentence of RCW 9.41.040(4) provides that a Petitioner who has not previously been convicted of certain offenses may petition to have his/her rights restored; . . .
4. To give meaning to the word "previously" in the second sentence of RCW 9.41.040(4) it would have to refer to a conviction prior to the conviction which is being addressed by the Petitioner.

ISSUE AND RULING: Where a person has been convicted of a class A sex offense and has no prior or subsequent criminal convictions that would prohibit firearms possession, may that person petition a court for restoration of his firearms rights under RCW 9.41.040(4)?
(ANSWER: No)

Result: Reversal of Clark County Superior Court order restoring firearms rights to Todd Noel Graham.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State contends that the word "previously" in the second sentence of RCW 9.41.040(4) refers to Graham's criminal record at the time he petitioned the court to restore his firearm rights, not his criminal record prior to the conviction that disabled his rights.

Here, the statute provides in part:

if a person is prohibited from possession of a firearm under subsection (1) of this section and *has not previously been convicted of a sex offense prohibiting firearm ownership* under subsection (1) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right possess a firearm restored.

RCW 9.41.040(4) (emphasis added). Graham was prohibited from possessing a firearm under RCW 9.41.040(1) because he was convicted of child rape, a class A felony, and a sex offense under the statute. The remaining question is whether the word "previously" as used in the provision means having a sex offense conviction at the time of petition or having one previous to the current conviction.

The State contends that the trial court's interpretation is contrary to legislative intent and would produce absurd results. It argues that the Legislature, by omitting time periods for those convicted of class A felonies to restore their rights, intended that a person situated in Graham's position would never be able to restore his rights, unless he met RCW 9.41.040(3) exceptions.

Turning first to the statutory language, it is clear that the statute distinguishes sex offenses, such as child rape, which is a class A felony, from other class A felonies. RCW 9.41.04.040(4). The statute describes two classes of persons ineligible to petition the court (a) those previously convicted of a sex offense that resulted in a loss of firearm rights under RCW 9.41.040(1) and (b) those convicted of a class A felony or a crime with a maximum sentence of at least twenty years, or both. RCW 9.41.040(4).

Here, Graham was convicted of child rape. The logical interpretation of the provision is that his sex offense conviction is a separate reason, aside from his class A felony, that makes him ineligible to have his firearm rights restored. Any other interpretation would lead to the absurd result of allowing an individual to be convicted of two sex offenses before losing the right to own and possess firearms.

The provision in question was enacted as part of the Hard Time for Armed Crime Act in 1995. Laws of 1995, ch. 129, § 16. The Act intended to deter criminals from possessing and using firearms during commission of crimes. Specifically, the Legislature found that "[c]urrent law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child

luring." Laws of 1995, ch. 129, § 1(1)(c). Declining to easily restore firearm rights to convicted class A felons and sex offenders is a way to promote such stigmatization.

Here, the statutory language, coupled with the Legislature's express intent, leads us to conclude that the reference to "previous convictions" in the second sentence of RCW 9.41.040(4) means any conviction prior to the time of the petition, not a conviction prior to the one that disabled the petitioner's firearm rights. Such a construction is consistent with statutory intent of stigmatizing the use and possession of firearms and discouraging criminals from possessing and using firearms to commit crimes.

[Case citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURTS HAVE NO DISCRETION TO DENY RESTORATION OF FIREARMS RIGHTS UNDER RCW 9.41.040(4) – In *State v. Swanson*, ___ Wn. App. ___, 65 P.3d 343 (Div. II, 2003) (2003 WL 722718), the Court of Appeals rejects by a 2-1 vote the State's argument that a trial court has discretion when considering a petition for restoration of firearms rights under RCW 9.41.040(4).

In February 1999, Siegel T. Swanson was convicted of fourth degree assault and interfering with a report of domestic violence in relation to an incident that occurred on September 9, 1998. The incident of September 9, 1998 included threats to assault with a gun. In September 2001, three years after he committed the crimes, Swanson petitioned to have his firearms rights restored. He had no intervening charges or convictions, and he had satisfied the conditions of his sentence.

Nevertheless, the Superior Court denied his petition because of concerns raised by the State regarding Swanson's alleged continuing dangerous tendencies. The Court of Appeals has now reversed the Superior Court ruling, ruling 2-1 that the Superior Court had no choice to deny the petition.

RCW 9.41.040(1) provides for two degrees of the crime of unlawful possession of a firearm. First degree unlawful possession is where a person convicted of any of certain specified felonies possesses a firearm. Second degree unlawful possession is where a person possesses a firearm after being convicted a) of the non-specified felonies or b) of the non-felony crimes, if committed against a family or household member on or after July 1, 1993, of: assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of certain types of protection or no-contact orders.

RCW 9.41.040(4) provides that persons who have lost their firearms rights may petition for restoration under certain circumstances. For persons with felony convictions, no petition is ever allowed for certain types of sex offenses and for class A felonies. For other felony offenses, the petition may be filed by the convicted person in a Washington "court of record": 1) after five or more consecutive years in the community without being convicted or currently charged with any felony, gross misdemeanor, or misdemeanor crimes; 2) if the petitioner has no prior felony convictions prohibiting firearms possession; and 3) if the petitioner has completed all conditions of sentencing.

For persons such as Swanson convicted of the specified non-felony crimes against family or household members committed on or after July 1, 1993, the petition may be filed in a Washington "court of record": 1) after three or more consecutive years in the community without

being convicted or currently charged with any felony, gross misdemeanor, or misdemeanor crimes; 2) if the petitioner has no prior felony convictions prohibiting firearms possession; and 3) if the petitioner has completed all conditions of sentencing.

The Swanson majority interprets RCW 9.41.040(4) as giving a Superior Court no discretion to deny restoration of firearms rights where, as in Swanson, the petitioner meets all of the statutory requirements noted above. In dissent, Judge Houghton argues in vain that the statute does leave discretion in the Superior Court to consider whether petitioner otherwise may present a danger if armed with a firearm.

Result: Reversal of Pierce County Superior Court denial of Siegel J. Swanson's petition for restoration of firearms rights.

Status: Petition for review pending in Washington Supreme Court.

(2) COURT RULE CrRLJ 3.2(a) DOES NOT PERMIT "CASH ONLY" BAIL - In City of Yakima v. Mollett, ___ Wn. App. ___, 63 P.3d 177 (Div. III, 2003), the Court of Appeals holds that under the circumstances of this case, the court rule at CrRLJ 3.2(a) does not permit the court to order "cash-only" bail.

Mollett was charged with two counts of telephone harassment in the Yakima Municipal Court. When he failed to appear at his arraignment, the court issued a bench warrant and set bail at \$10,000 "cash only." Mollett was arrested and held in jail in lieu of "cash only" bail. Mollett's wife ultimately posted the cash bail, and Mollett was released. Prior to his release, Mollett filed a personal restraint petition in which he challenged the "cash only" provision.

CrRLJ 3.2(a), as it existed at the time, provided in part:

The court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, will not significantly interfere with the administration of justice and not pose a substantial danger to others or the community or, if no single condition gives that assurance, any combination of the following conditions:

- (1) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
- (2) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
- (3) Require the execution of an unsecured bond in a specified amount;
- (4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release;
- (5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;
- (6) Require the accused to return to custody during specified hours; or
- (7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required, assure noninterference with the trial and reduce danger to others or the community.

The City argued, and the superior court (reviewing the case on appeal from the municipal court) agreed, that CrRLJ 3.2(a)(5) and (7) authorize "cash only" bail.

The Court of Appeals holds otherwise, relying on a decision from the Ohio Supreme Court, State ex rel. Jones v. Hendon, 66 Ohio St. 3d 115, 609 N.E.2d 541 (1993). The Court of Appeals states:

Hendon is instructive because it interpreted a Ohio court rule authorizing the trial court to “[r]equire the execution of a bail bond with sufficient solvent sureties, or the execution of a bond secured by real estate in the county, or the deposit of cash or the securities allowed by law in lieu thereof.” Hendon, 609 N.E.2d at 542 n.1 (quoting Ohio Crim.R 46(C)(4)). The Ohio court rejected the State’s argument that the rule authorized a ‘cash only’ bond, reasoning in part the rule ‘constitutes but a single condition which the judge may impose - the condition of a bond.’ Hendon, 609 N.E.2d at 544. ‘Once a judge chooses that condition and sets the amount of bond, we find no legitimate purpose in further specifying the form of bond which may be posted.’ Id. The Hendon court further reasoned that the result of ‘cash only’ bail would be to ‘restrict the accused’s access to a surety’ in violation of the Ohio constitution. Id. Ohio constitution provides in part that ‘{a}ll persons shall be bailable by sufficient sureties’ in noncapital cases.’ Id. at 543 (quoting Ohio Const. art. I, sec. 9). The City contends Hendon ‘essentially eviscerated the options available to a judge’ in making bail determinations. Respondent’s Br. at 22. To the contrary, we find Hendon persuasive. CrRLJ 3.2(a) sets forth separate and discrete conditions of release. CrRLJ 3.2(a)(5) sets forth a single condition, a bond, ‘or the deposit of cash in lieu thereof.’ The ‘deposit of cash’ clause is an option the trial court may order, but not to the exclusion of the bond. The City reads the ‘deposit of cash’ clause as wholly independent. But when CrRLJ 3.2(a) is read in its entirety, it is more reasonable to interpret the ‘deposit of cash’ clause as an option the trial court may order along with the primary condition of a bond. If the rule drafters intended to authorize ‘cash only’ bail, they could have easily set it out as a discrete condition of release. Accordingly, we conclude CrRLJ 3.2(a)(5) does not authorize ‘cash only’ bail to the exclusion of a bond.

The Court of Appeals also rejects the argument that CrRLJ 3.2(a)(7) authorizes “cash only” bail, noting that it authorizes “any condition other than detention.” The Court states:

It would be inconsistent with the rule for the trial court to impose ‘cash only’ bail knowing the defendant probably lacked the means to pay it. See Hendon, 609 N.E.2d at 544 (reasoning ‘the only apparent purpose in requiring a ‘cash only’ bond to the exclusion of the other forms provided in {the rules} is to restrict the accused’s access to a surety and, thus, to detain the accused in violation of {the State constitution}’); see also Brooks, 604 N.W.2d at 353 (noting ‘cash only bail orders can be used to deny bail to those accused who have other means of providing sufficient surety’).

And such an application of CrRLJ 3.2(a)(7) would also be inconsistent with the purposes underlying the rules of securing ‘simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.’ CrRLJ 1.2. It is more likely the rule drafters would have set forth a separate subsection specifically authorizing ‘cash only’ bail if that was their intent.

[Footnote omitted]

In light of the Court of Appeals’ holding that CrRLJ 3.2 does not authorize “cash only” bail, the Court does not reach the constitutional issue raised by Mollett.

Result: Reversal of Yakima County Superior Court’s dismissal of Glenn James Mollett’s personal restraint petition.

LED EDITORIAL COMMENTS: Cash-only warrants are still valid and thus, an individual can still be arrested on a cash-only warrant. However, opinions vary on what procedures should be implemented once the individual arrives at the jail. Many judges and prosecutors are interpreting this decision very narrowly. If your agency operates a jail, you should check with your legal advisor or prosecutor for specific direction. If your agency does not operate a jail, then you should be aware that procedures may vary depending on the jail into which you are booking an individual.

(3) WRITTEN STATEMENT THAT WITNESS GAVE TO INVESTIGATING OFFICER COULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE BECAUSE IT WAS NOT MADE UNDER OATH OR UNDER PENALTY OF PERJURY – In State v. Sua, 115 Wn. App. 29 (Div. II, 2003), the Court of Appeals rules that unsworn written statements that two non-defendant witnesses gave to investigating law enforcement officers were improperly admitted into evidence in a criminal trial. The Sua Court rules that Evidence Rule (ER) 801(d)(1)(i) does not authorize admission of such prior inconsistent statements of witnesses unless the statements are sworn, even if the declarants testify at trial and are subject to cross examination regarding the prior unsworn, out-of-court statements.

ER 801(d)(1)(i) provides that a prior out-of-court statement by a witness that would otherwise be considered “hearsay” will be exempt from “hearsay” status and hence admissible under hearsay rules if: 1) the declarant testifies at trial and is subject to cross-examination; 2) the statement is inconsistent with the declarant’s testimony; and 3) the out-of-court statement was given under oath subject to penalty of perjury at a trial hearing, or other proceeding.

The Sua Court notes two prior Washington appellate court decisions that have construed ER 801(d)(1)(i) in considering admissibility of out-of-court statements that witnesses have given to police. Both prior decisions involved statements that qualified as sworn statements and therefore were admissible, the Sua Court explains:

In 1982, in a case called State v. Smith, 97 Wn.2d 856 (1982), the Washington Supreme Court addressed the rule's requirement that the offered statement have been "given . . . at a trial, hearing, or other proceeding[.]" A woman voluntarily gave the police a written statement that implicated the defendant in a crime. She signed the statement under oath before a notary public. When she testified inconsistently at the defendant's trial, the trial court admitted her written statement for substantive use. After discussing a 1976 Ninth Circuit case called United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976), the Washington Supreme Court noted that in the case presently at bench "the complaining witness- victim voluntarily wrote the statement herself, swore to it under oath with penalty of perjury before a notary, admitted at trial she had made the statement and gave an inconsistent statement at trial where she was subject to cross examination." The court then concluded that the statement had been given in an "other proceeding," and that "under the totality of these circumstances" the statement fell within ER 801(d)(1)(i).

In 1994, in a case called State v. Nelson, 74 Wn. App. 380 (Div. I, 1994) **May 95 LED:21**, Division One seems to have addressed the rule's requirement that the offered statement have been "given under oath subject to the penalty of perjury," as well as the rule's requirement that the offered statement have been "given . . . at a trial, hearing, or other proceeding." A woman told police that she was a prostitute and that the defendant was her pimp. An officer reduced her statement to a writing that she signed before a notary public. Although the notary did not administer an oath, the writing apparently recited, pursuant to RCW 9A.72.085, "that it is certified or declared by the person to be true under penalty of perjury[.]"

Concluding that the statement could "be regarded as . . . sworn" because RCW 9A.72.085 had been complied with, Division One held that the statement had been given in an "other proceeding," and that the statement fell within the scope of ER 801(d)(1)(i).

[Some footnotes and citations omitted]

The Sua Court rejects the State's argument that Smith and Nelson support admissibility of the unsworn witness statement in Sua:

[N]either Smith nor Nelson supports the State's request. The declarant in Smith gave her statement under oath subject to penalty of perjury, for she actually took an oath from a notary public. The declarant in Nelson gave her statement under oath subject to penalty of perjury, for she complied with RCW 9A.72.085. Neither declarant in this case actually took an oath, complied with RCW 9A.72.085, or in any other way gave her statement "under oath subject to the penalty of perjury."

Result: Reversal of Pierce County Superior Court conviction of Elemene Tinie Sua for indecent liberties; remanded to the Superior Court for that Court to determine: a) whether charges must be dismissed on double jeopardy grounds; and b) whether, if re-trial is to occur, there is a corpus delicti defect in the State's case in light of inadmissibility of the witness statements.

(4) UNSWORN WRITTEN STATEMENT THAT A DV VICTIM GAVE TO POLICE HELD ADMISSIBLE AS "PAST RECORDED RECOLLECTION" HEARSAY UNDER ER 803(a)(5) WHERE SHE TESTIFIED AT TRIAL AND DENIED ANY MEMORY OF STATEMENT OR INCIDENT – In State v. Derouin, ___ Wn. App. ___, 64 P.3d 35 (Div. I, 2003), the Court of Appeals rules that where, on the evening of the incident, the alleged victim of domestic violence harassment gave an unsworn written statement to police, but where she later denied at trial any knowledge of the incident or the statement, the statement was admissible in evidence under Evidence Rule 803(a)(5) as a "past recorded recollection."

Following a domestic violence incident, an investigating officer took a statement from the alleged victim. The victim accused her husband of death threats and property damage that night, as well as past abuse. The officer wrote out the statement, and both the victim and the officer signed the statement.

At the time of the husband's trial for domestic violence harassment, the victim claimed no recollection of the evening in question, of the contact with police, or of the statement to police. Evidence Rule (ER) 803(a)(5) makes hearsay admissible as a "past recollection recorded" when the following four requirements are met: 1) the record pertains to a matter about which the witness once had knowledge; 2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; 3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and 4) the record reflects the witness' prior knowledge accurately.

The Derouin Court holds that all four requirements were met in this case, and the victim's statement is therefore admissible. Accordingly, the Court of Appeals reverses the trial court's decision rejecting the evidence.

Result: Reversal of King County Superior Court's denial of State's motion to admit into evidence the written statement given to police by Michelle Derouin; case remanded to Superior Court for prosecution of Boyd M. Derouin for domestic violence harassment.

LED EDITORIAL COMMENT: It is a better practice for investigating officers to have victims make their statement either a sworn affidavit or a declaration under penalty of perjury. When that is done, the prosecution need not meet the requirements of ER 803(a)(5). See the LED entry immediately above regarding State v. Sua, 115 Wn. App. 29 (Div. II, 2002).

(5) EVIDENCE HELD SUFFICIENT TO SUPPORT WOMAN-HATING DEFENDANT'S CONVICTION FOR MALICIOUS HARASSMENT OF FEMALE POLICE OFFICER – In State v. Johnson, ___ Wn. App. ___, 64 P.3d. 88 (Div. III, 2003), the Court of Appeals rejects a malicious harassment defendant's First Amendment and "sufficiency-of-evidence" theories.

The Johnson Court describes the facts surrounding the arrest in this case as follows:

[A male] Spokane Transit Authority (STA) Security Officer saw Mr. Johnson at the STA Plaza. Mr. Johnson had been excluded from the STA Plaza. [The male security officer] called police. [A] Spokane Police Officer responded. [The] officer is a female. She arrested Mr. Johnson for his refusal to leave and for failure to comply with previous trespass orders. At first he was cooperative. But after she placed him in the patrol car, things changed.

During the entire trip to the jail, the defendant continuously threatened to kill the officer, using extremely graphic language described by the court as "stunning" and "shocking." The defendant specifically focused on the officer as a female, calling her a series of derogatory and vulgar female names, threatening to use a knife to cut her in a way that involved a female body part, telling her that he would wait for her in the bushes after he got of jail and he would similarly cut her, and saying that he hoped she died a terrible and painful death.

The Johnson Court continues its description of the facts and proceedings in the case as follows:

[The female police officer] believed that Mr. Johnson had the ability to carry out the threats. He had one knife when arrested. And knives were cheap and easy to obtain in downtown Spokane. Mr. Johnson told her that he had nothing to lose. She did not believe that the threats were "run-of-the-mill"; Mr. Johnson peered at [the female police officer] in the rearview mirror while he threatened her.

Mr. Johnson did not threaten [the male security officer]. Three weeks later when [the female police officer] and a [male police officer] served a warrant for the malicious harassment, Mr. Johnson "was very nice to [the male police officer]. . . . [a]nd not to [the female police officer] at that point in time." The male officer transported Mr. Johnson to the jail. Mr. Johnson was polite and cooperative with the male officer, referring to him as "sir" while still acting belligerently toward [the female police officer].

The court found Mr. Johnson guilty of malicious harassment and entered the appropriate findings of fact and conclusions of law.

RCW 9A.36.080(1) provides that it is malicious harassment if a person maliciously and intentionally because of his or her perception of the victim's gender (among other protected classes):

....
(C) Threatens a specific person or group of persons and places that person, or members of that specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all the circumstances. For purposes of this section, a "reasonable person" is a reasonable person who is a member of the victim's ... gender ... Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

Finding ample evidence to support the trial court's finding that Johnson picked (albeit somewhat spontaneously in the first encounter) the target of his vile threats based on her gender, the Court of Appeals upholds defendant's conviction and rejects his claim that his threats were protected free speech.

Result: Affirmance of Spokane County Superior Court conviction of Gary G. Johnson for malicious harassment.

(6) FAILURE TO REPORT TO DRUG TREATMENT PROGRAM HELD TO BE "ESCAPE" – In State v. Breshon, ___ Wn. App. ___, 63 P.3d 871 (Div. II, 2003), the Court of Appeals rules that defendants required to report daily to a drug treatment program to which they had been sentenced to as a substitute for jail time were in "custody" under the escape statutes (see RCW 9A.76.010(1), 9A.76.110(1)), and therefore the defendants committed first degree escape when they failed to show up for the program.

Result: Affirmance of Pierce County Superior Court convictions of Carla H. Breshon and David R. Simmons for first degree escape.

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 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>].

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