



# Law Enforcement

December 2004

# Digest

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## 2004 LED SUBJECT MATTER INDEX

**2004 LED SUBJECT MATTER INDEX -- LED EDITORIAL NOTE:** Our annual LED subject matter index covers all LED entries from January 2004 through and including this December 2004 LED. Since 1988 we have published an annual index each December. Since establishing the LED as a monthly publication in 1979, we have published four multi-year subject matter indexes. In 1989, we published a 10-year index covering LEDs from January 1979 through December 1988. In 1994, we published a 5-year subject matter index covering LEDs from January 1989 through December 1993. In 1999, we published a 5-year index covering LEDs from January 1994 through December 1998. In 2004, we published a 5-year index covering LEDs from January 1999 through December 2003. The 1989-1993 cumulative index, the 1994-1998 cumulative index, the 1999-2004 index, as well as monthly issues of the LED starting with January of 1992 are available via the "Law Enforcement Digest" link on the Criminal Justice Training Commission's Internet Home Page at: <http://www.cjtc.state.wa.us>.

### ANIMAL CRUELTY (Chapter 16.52 RCW)

Evidence of malnourishment, poor dentition held sufficient to support convictions for second degree animal cruelty. *State v. Zawistowski*, 119 Wn. App. 730 (Div. II, 2004) – March 04:14.

## **“ARMED WITH A DEADLY WEAPON” (RCW 9.94A.125)**

**Methamphetamine, gun and loaded magazine in backpack behind the driver’s side front seat of pickup justifies sentence enhancement for driver’s being “armed with a deadly weapon.”** State v. Gurske, 120 Wn. App. 63 (Div. III, 2004) – April 04:11

## **ARREST, STOP AND FRISK**

**Probable cause to arrest: Totality of circumstances gave officer probable cause to believe that front-seat passenger constructively possessed cocaine that was found in back seat area of car.** Maryland v. Pringle, 124 S.Ct. 795 (2003) – Feb 04:02

**Police roadblock checkpoint to ask motorists about recent fatal hit-and-run MVA passes muster under Fourth Amendment; closer question would be presented under Washington constitution.** Illinois v. Lidster, 124 S.Ct. 885 (2004) – March 04:02

**Failure to transfer MV title not a “continuing” offense – arrest and “search incident” held unlawful.** State v. Green, 150 Wn.2d 740 (2004) – March 04:08

**Article: Green decision update: In decision addressing arrest authority for failure to transfer MV title, Washington Supreme Court deletes paragraph that limited Terry stop authority.** May 04:02

**Civil liability – where person is jailed after arrest on warrant, jail personnel must release detainee at point when they should know detainee is not person named on warrant.** Stalter v. Washington, Pierce County, and others, 151 Wn.2d 148 (2004) – June 04:10

**Under the 4<sup>th</sup> and 5<sup>th</sup> Amendments of the U.S. Constitution, a domestic violence suspect who refused to identify himself while lawfully being held in a Terry stop could be convicted under the clear wording of a narrow Nevada “stop-and-identify” statute (beware -- Washington state has no such statute).** Hiibel v. Sixth Judicial Dist of Nevada, Humboldt County, 124 S.Ct. 2451 (2004) - August 04:02

**Under Washington state constitution’s article 1, section 7, officer’s routine request to non-violator passenger to show ID during vehicle stop is “seizure” requiring independent justification.** State v. Rankin, 151 Wn.2d 689 (2004) – August 04:07

**Car stop based on Arizona DMV computer database held lawful even though database was INACCURATE ON THIS OCCASION.** U.S. V. MIGUEL, 368 F.3D 1150 (9TH CIR. 2004) – SEPTEMBER 04:10

**DOL information held to establish probable cause to arrest for DWLS.** State v. Gaddy, 152 Wn.2d 64 (2004) – September 04:19

**Knocking on window of sleepers-occupied car parked in Denny’s restaurant parking lot was not a “seizure”.** State v. Cerrillo, 122 Wn. App. 341 (Div. III, 2004) – October 04:14

**State wins on issues of 1) probable cause for search warrant; 2) justification for Terry seizure and frisk; and 3) sufficiency of evidence to support conviction for methamphetamine manufacturing.** State v. Jacobs, 121 Wn. App. 669 (Div. II, 2004) – November 04:08

## **ASSAULT (Chapter 9A.36 RCW)**

**“Putting another in apprehension” under common law definition of “assault” means putting the threatened person in apprehension.** State v. Nicholson, 119 Wn. App. 855 (Div. II, 2004) – April 04:19

### **BAIL JUMPING (RCW 9A.76.120)**

**“I forgot” is not a valid defense to bail-jumping charge.** State v. Carver, 122 Wn. App. 300 (Div. II, 2004) – November 04:22

### **BURGLARY (Chapter 9A.52 RCW)**

**Violation of protection order can be predicate “crime against a person” under residential burglary statute.** State v. Stinton, 121 Wn. App. 569 (Div. II, 2004) – July 04:20

**“Dwelling”? Jury must decide status of unoccupied residential structure that was being renovated.** State v. McDonald, \_\_\_ Wn. App. \_\_\_, 96 P.3d 468 (Div. II, 2004) – November 04:12

### **CIVIL LIABILITY**

**In civil rights case, Fourth Amendment held to have been violated where search was conducted under a warrant in which ATF agent made clerical error by failing to specify the items that were to be seized; qualified immunity is denied to the ATF agent who prepared the warrant, and who led other officers in the search.** Groh v. Ramirez, 124 S.Ct. 1284 (2004) – April 04:02

**Civil liability – where person is jailed after arrest on warrant, jail personnel must release detainee at point when they should know detainee is not person named on warrant.** Stalter v. Washington, Pierce County, and others, 151 Wn.2d 148 (2004) – June 04:10

**Using flash-bang device was excessive force where room into which device was blindly tossed was likely to be occupied by innocent bystanders.** Boyd v. Benton County (Oregon), 374 F.3d 773 (9<sup>th</sup> Cir. 2004) – September 04:09

**Jail civil liability: pattern of 26-hour-plus delays in releasing detainees after court authorization may result in civil liability for the county as violation of constitutional rights.** Berry v. Baca, 379 F.3d 764 (9<sup>th</sup> Cir. 2004) – October 04:05

**County can be liable under “rescue doctrine” for failure of sheriff’s office to adequately warn community about level III sex offender; “public duty” doctrine and statutory-immunity defenses rejected.** Osborn v. Mason County, 122 Wn. App. 823 (Div. II, 2004) – October 04:10

**Good faith immunity provision in firearms statute precludes suit against sheriff’s office for delay in approving pistol purchase.** Deschamps v. Mason County Sheriff’s Office, \_\_\_ Wn. App. \_\_\_, 96 P.3d 413 (Div. II, 2004) – November 04:19

**2-1 majority holds: 1) arrest of citizen for recording police radio communications without consent while citizen was conversing with officer in a public place was an unlawful arrest because such communications are not “private” under RCW 9.73; 2) no “qualified immunity” because officer should have known the “well-established” law; 3) agency liability question must go to jury because agency arguably should have given officer specific training on RCW 9.73; and 4) “outrage” issue must go to jury because elements of that tort action are arguably met on plaintiff’s allegations.** Johnson v. City of Sequim, \_\_\_ F.3d \_\_\_, 2004 WL 2376506 (9<sup>th</sup> Cir. 2004) December 04:14

### **CRIMINAL MISTREATMENT (Chapter 9A.42 RCW)**

**Evidence held sufficient to support convictions for unlawful possession of firearm, unlawful manufacture of a controlled substance, and criminal mistreatment; evidence also supports sentence enhancement for meth manufacturing with children present.** State v. Holt, 119 Wn. App. 712 (Div. II, 2004) – March 04:18

## **DISCOVERY**

**Brady violation occurred where the State failed to disclose that, contrary to the trial testimony of two key witnesses, one of the witnesses was intensively coached and the other was a paid informant.** Banks v. Dretke, 124 S.Ct. 1256 (2004) – April 04:07

## **DOMESTIC VIOLENCE (INCLUDING PROTECTION ORDERS)**

**Knowledge, not personal service, of a DVPA protection order is the prerequisite to a criminal charge for violation of the DVPA protection order.** City of Auburn v. Solis-Marcial, 119 Wn. App. 398 (Div. I, 2003) – Feb 04:12

**Evidence Rule 408 does not bar admission of evidence that DV defendant independently paid for damages.** State v. O'Connor, 119 Wn. App. 530 (Div. I, 2003) – Feb 04:19

## **DUE PROCESS PROTECTION**

**Drivers' license suspensions (mostly DWLS 3 offenses) without opportunity for prior hearing held unconstitutional under constitutional due process analysis.** City of Redmond v. Moore, 151 Wn.2d 664 (2004) – July 04:06; August 04:23; October 04:22.

**Defendant's rights to due process and to silence violated -- prosecutor should not have asked detective to testify that defendant at time of arrest did not deny the charge.** State v. Holmes, 122 Wn. App. 438 (Div. I, 2004) – November 04:20

## **ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)**

**No violation of Chapter 9.73 (Privacy Act) in mom's use of speakerphone function at base of cordless phone to listen in on daughter's conversation – no "device designed to transmit" was used.** State v. Christensen, 119 Wn. App. 74 (Div. I, 2003) – Jan 04:20 (Status: Review is pending in the Washington Supreme Court)

**2-1 majority holds: 1) arrest of citizen for recording police radio communications without consent while citizen was conversing with officer in a public place was an unlawful arrest because such communications are not "private" under RCW 9.73; 2) no "qualified immunity" because officer should have known the "well-established" law; 3) agency liability question must go to jury because agency arguably should have given officer specific training on RCW 9.73; and 4) "outrage" issue must go to jury because elements of that tort action are arguably met on plaintiff's allegations.** Johnson v. City of Sequim, \_\_\_ F.3d \_\_\_, 2004 WL 2376506 (9<sup>th</sup> Cir. 2004) December 04:14

## **ESCAPE AND RELATED CRIMES (Includes Chapter 9A.76 RCW; RCW 72.09.310)**

**Felons who served their time in county jail (not prison) nonetheless are "inmates" for purposes of "escape from community custody" statute.** State v. Rizor, 121 Wn. App. 898 (Div. III, 2004) – November 04:23

## **EVIDENCE LAW**

**Recantation by alleged victim as to her prior unsworn written statement to police held inadmissible under ER 801 – Smith requirements not met.** State v. Nieto, 119 Wn. App. 157 (Div. I, 2003) – Jan 04:14

**No warrant needed for a "second look" in the jail property room at personal effects that were taken at booking; Washington Supreme Court also looks at question of admissibility of expert testimony regarding assessing the reliability of eyewitness identification.** State v. Cheatam, 150 Wn.2d 626 (2003) – Feb 04:05

**Evidence of delivery of drugs was sufficient to convict seller who used middleman; also, co-conspirator statements held admissible under hearsay rules.** State v. Rangel-Reyes, 119 Wn. App. 494 (Div. III, 2003) – Feb 04:09

**Evidence Rule 408 does not bar admission of evidence that DV defendant independently paid for damages.** State v. O'Connor, 119 Wn. App. 530 (Div. I, 2003) – Feb 04:19

**Clergy-penitent privilege applies to youth pastor's "confession" to ordained church elder; "waiver" and "independent source" questions also addressed.** State v. Glenn, 115 Wn. App. 540 (Div. II, 2003) – April 04:12

**At criminal trial, witness is not allowed to express opinion that the defendant is guilty or that another person is not guilty.** State v. Dolan, 118 Wn. App. 323 (Div. II, 2003) – April 04:20

**Restrictions on admissibility of "testimonial" hearsay are tightened under the Sixth Amendment's confrontation clause.** Crawford v. Washington, 124 S.Ct. 1354 (2004) – May 04:20

**Trial court erred in admitting hearsay testimony of interrogating officer regarding what defendant said, as translated by fellow officer.** State v. Gonzalez-Hernandez, 122 Wn. App. 53 (Div. II, 2004) – November 04:14

**Officer's testimony that "Reid Investigative Technique" revealed that defendant had been deceptive during interrogation constituted inadmissible opinion on defendant's guilt.** State v. Barr, \_\_\_ Wn. App. \_\_\_, 98 P.3d 518 (Div. III, 2004) – November 04:16

**"Blue Book" evidence held admissible under "market reports" hearsay exception, ER 803 (17), to show value of stolen item in PSP prosecution.** State v. Shaw, 120 Wn. App. 847 (Div. I, 2004) – November 04:21

**Retailer's computer-generated tally of stolen goods admissible as "business records" per hearsay exception at RCW 5.45.020.** State v. Quincy, 122 Wn. App. 395 (Div. I, 2004) – November 04:21

## **FIREARMS LAWS (Chapter 9.41 RCW) AND OTHER WEAPONS LAWS**

**Prosecution under federal firearms statute prohibiting gun possession by convicted domestic violence assailants, based on prior misdemeanor crime of domestic violence, does not require that a domestic relationship be an express element of the underlying crime. However, defendant's conviction under Wyoming battery statute did not satisfy "physical force" requirement of the federal statute; also, defendant did not validly waive his right to counsel per the statute.** United States v. Belless, 338 F.3d 1063 (9<sup>th</sup> Cir. 2003) – Jan 04:08

**Concept of constructive possession of firearm does not include element of immediate accessibility of the firearm allegedly possessed.** State v. Howell, 119 Wn. App. 644 (Div. I, 2003) – Jan 04:19

**Unconstitutionality declared as to RCW 9.41.040(1)(b)(iv)'s prohibition of gun ownership (but not as to its prohibition on possession or of control) for those free on bond or PR pending trial, pending appeal or pending sentencing.** State v. Spiers, 119 Wn. App. 85 (Div. II, 2003) – Jan 04:21

**Knowledge by defendant that he is in possession of an unlawful firearm (here, a short-barreled shotgun) is an element of the crime under RCW 9.41.190; evidence in this case was sufficient, however, to support the jury's verdict of knowledge as to some charges under RCW 9.41.190 and RCW 9.41.040.** State v. Warfield, 119 Wn. App. 871 (Div. II, 2003) – Feb 04:17

**Article:** Federal legislation (H.R. 218) adopted to provide an exemption for qualified current and former law enforcement officers from state laws on carrying concealed handguns. – September 04:02

Backyard is not part of “place of abode” for purposes of unlawful-display-of-a-weapon charge under RCW 9.41.270(1). State v. Smith, 118 Wn. App. 480 (Div. I, 2003) – September 04:23

Mere lack of warning to convicted felon as to his ineligibility to possess firearm held to be no excuse for violating RCW 9.41.040. State v. Blum, 121 Wn. App. 1 (Div. III, 2004) – October 04:17

Firearms possession charge under RCW 9.41.040 based on juvenile convictions in 1995 held properly dismissed because 1995 juvenile court judge affirmatively misled defendant as to effect of conviction. State v. Moore, 121 Wn. App. 889 (Div. III, 2004) – October 04:18

Washington courts do not have inherent or statutory authority to issue “certificates of rehabilitation” to restore firearms rights. State v. Masangkay, 121 Wn. App.904 (Div. I, 2004) – October 04:19

Reading the unlawful-possession-of-firearms law at RCW 9.41.040 together with the former juvenile sealed-records statute, Court of Appeals rules that RCW 13.50.050(14) requires that prior “serious offenses” adjudications be treated as if they never happened if a sealing-and-expunging order is obtained. Nelson v. State, 120 Wn. App. 470 (Div. I, 2003) – October 04:20

Good faith immunity provision in firearms statute precludes suit against sheriff’s office for delay in approving pistol purchase. Deschamps v. Mason County Sheriff’s Office, \_\_\_ Wn. App. \_\_\_, 96 P.3d 413 (Div. II, 2004) – November 04:19

#### **FIREWORKS, EXPLOSIVES AND RELATED LAWS (Chapter 70.74 and 9.40)**

Maker of incendiary device (“Molotov cocktail”) can be convicted without proof that he designed the device for use in “willful destruction.” State v. Flinn, 119 Wn. App. 232 (Div. I, 2003) (2003 WL 22764870) – Jan 04:17

#### **FREEDOM OF SPEECH (First Amendment of the U.S. Constitution)**

State is not required to prove defendant’s intent to carry out threat in order to convict for felony harassment. However, the evidence in the Kilborn case does not meet the Free Speech clause’s “true threat” standard. Therefore, the evidence is insufficient to support a conviction under the facts of the Kilborn case. State v. Kilborn, 151 Wn.2d 36 (2004) – October 04:05

Seattle ordinance barring the posting of notices on city-owned property, including utility poles, upheld against freedom-of-speech attack. City of Seattle v. Mighty Movers, \_\_\_ Wn.2d \_\_\_, 96 P.3d 979 (2004) – November 04:07

#### **HARASSMENT (Chapter 9A.46 RCW – see also “Malicious Mischief”)**

Where felony charge of harassment is based on a threat to kill, the state must prove that the victim had a reasonable fear of death based on the threat. State v. C.G., 150 Wn.2d 604 (2003) – Feb 04:09

Under unique circumstances, search warrant upheld even though it did not identify a specific crime under investigation; also, evidence held sufficient to convict of second degree theft, criminal harassment, stalking, and criminal libel. State v. Askham, 120 Wn. App. 872 (Div. III, 2004) – June 04:18

State not required to prove defendant’s intent to carry out threat in order to convict for felony harassment; however, evidence in Kilborn case does not meet free speech clause’s “true threat” standard and is, therefore, insufficient to convict under facts of present case. State v. Kilborn, 151 Wn.2d 36 (2004) – October 04:05

## **IMPLIED CONSENT (RCW 46.20.308)**

Breath test instruments that were certified under a former protocol did not meet testing standards of WAC 448-13-035. Seattle v. Clark-Munoz, 152 Wn.2d 39 (2004) – August 04:22

## **INITIATIVE SIGNATURE GATHERING**

**Article:** Revisiting the rules regarding citizens' collecting of signatures for initiatives and referendum petitions. – June 04:24

## **INTERROGATIONS AND CONFESSIONS (See also "Sixth Amendment Right to Counsel and Related Court Rule Protections")**

State may not introduce evidence in its case in chief showing that defendant selectively exercised his right to silence during police interrogation. State v. Silva, 119 Wn. App. 422 (Div. III, 2003) – Feb 04:20

6th Amendment required that police give Miranda warnings prior to questioning indicted defendant in his kitchen; case is remanded to 8th Circuit of U.S. Court of Appeals to determine if 5th Amendment's limit on exclusion of evidence applies to this 6th Amendment violation. Fellers v. U.S., 124 S.Ct. 1019 (2004) – March 04:05

Spanish Miranda warning by Oregon officer failed to adequately advise of right to an attorney. State v. Perez-Lopez, 348 F.3d 839 (9<sup>th</sup> Cir. 2003) – July 04:05

In questionable ruling, Court of Appeals holds that interrogation during an investigative stop was "custodial" for Miranda purposes. State v. France, 121 Wn. App. 394 (2004) – July 04:10  
Status: Prosecutor's petition for review by the Washington Supreme Court is pending consideration.

In habeas review, Miranda "custody" questions relating to the relevance of youth and inexperience of suspects discussed but not fully resolved by the U.S. Supreme Court. Yarborough v. Alvarado, 124 S.Ct. 2140 (2004) – August, 04:04

Bad faith, premeditated, two-step-interrogation approach -- (1) questioning first and (2) then Mirandizing and questioning immediately afterward -- violates Miranda and cannot lead to a valid waiver of Miranda rights. The violation in this case requires exclusion from evidence of all statements of the suspect. Missouri v. Seibert, 124 S.Ct. 2601 (2004) – September 04:04

Physical evidence that was the fruit of a custodial interrogation held admissible even though the defendant was not properly Mirandized prior to the interrogation. United States v. Patane, 124 S.Ct. 2620 (2004) – September 04:08

Questioning of suspect on the porch of her trailer home was not "custodial" for Miranda purposes; also, suspect's "focus"/PC argument is rejected (Court explains that its Dictado "focus" analysis has been overruled). State v. Lorenz, 152 Wn.2d 22 (2004) – September 04:10

Noncommissioned city park security officers were "state agents" for purposes of Miranda; but Terry stop was not "custodial" equivalent of arrest, so no Miranda warnings were required. State v. Heritage, 152 Wn.2d 210 (2004) – September 04:12

Where suspect voluntarily accompanied FBI agent to FBI office, and FBI agent then told suspect that he was free to leave at any time, suspect was not in "custody" for Miranda purposes. U.S. v. Crawford, 372 F.3d 1048 (9<sup>th</sup> Cir. 2004) – October 04:03

Defendant's rights to due process and to silence violated -- prosecutor should not have asked detective to testify that defendant at time of arrest did not deny the charge. State v. Holmes, 122 Wn. App. 438 (Div. I, 2004) – November 04:20

## **JUVENILE LAW (INCLUDING INFANCY DEFENSE)**

**Declination of juvenile court jurisdiction in premeditated murder case was not an abuse of discretion.** State v. H.O., 119 Wn. App. 549 (Div. I, 2003) – March 04:17

**Infancy defense – substantial evidence held to support superior court’s ruling that 11-year-old sex offender lacked criminal capacity.** State v. Ramer, 151 Wn.2d 106 (2004) – June 04:14

**Age element in Juvenile Act’s automatic-decline provisions RCW 13.04.030(1)(e)(v) refer to age at the time of the decline proceedings.** State v. Salavea, 151 Wn.2d 133 (2004) – November 04:07

**Juvenile’s age at time of MIP offense controls on drivers’ license revocation under RCW 66.44.365(1).** State v. R.J., 121 Wn. App. 215 (Div. I, 2004) – November 04:21

## **LAW ENFORCEMENT DIGEST CONTENTS**

**Article:** In an article titled “Information regarding the Law Enforcement Digest” an explanation is provided regarding what types of appellate court decisions and new legislation are covered in the LED. The article also addressed LED priorities for the timing of appearance of entries in the LED. May 04:03.

## **LEGISLATIVE UPDATES**

**2004 WASHINGTON LEGISLATIVE UPDATE – PART ONE** – May 04:05

**2004 WASHINGTON LEGISLATIVE UPDATE – PART TWO** – June 04:02

**2004 WASHINGTON LEGISLATIVE UPDATE INDEX** – June 04:04

## **LIBEL (CRIMINAL) (RCW 9.58.010)**

**Under unique circumstances, search warrant upheld even though it did not identify a specific crime under investigation; also, evidence held sufficient to convict of second degree theft, criminal harassment, stalking, and criminal libel.** State v. Askham, 120 Wn. App. 872 (Div. III, 2004) – June 04:18

## **LOSS OF, DESTRUCTION OF, OR FAILURE TO PRESERVE, EVIDENCE**

**Due process requirements not violated in good faith police destruction of cocaine after police had kept cocaine for over ten years while the charged defendant was on the lam.** Illinois v. Fisher, 124 S.Ct. 1200 (2004) – April 04:05

## **MALICIOUS MISCHIEF (Chapter 9A.48 RCW)**

**Arrestee’s intentional spitting on floor and on shield partition of patrol car held not to be malicious mischief in the second degree because spitting is deemed not to be an act of physically damaging or tampering with the vehicle.** State v. Hernandez, 120 Wn. App. 389 (Div. III, 2004) – April 04:09; July 04:15

## **MINOR IN POSSESSION (RCW 66.44.365)**

**Juvenile’s age at time of MIP offense controls on drivers’ license revocation under RCW 66.44.365(1).** State v. R.J., 121 Wn. App. 215 (Div. I, 2004) – November 04:21

## **OBSTRUCTING AND RELATED CRIMES (See, e.g., Chapter 9A.76 RCW)**

Under the 4<sup>th</sup> and 5<sup>th</sup> Amendments of the U.S. Constitution, a domestic violence suspect who refused to identify himself while lawfully being held in a Terry stop could be convicted under the clear wording of a narrow Nevada “stop-and-identify” statute (beware -- Washington state has no such statute). Hiibel v. Sixth Judicial Dist of Nevada, Humboldt County, 124 S.Ct. 2451 (2004) - August 04:02

## **POLYGRAPH EVIDENCE**

In custodial interference prosecution against mother of a child, evidence that father passed polygraph should not have been admitted. State v. Justesen, 121 Wn. App. 83 (Div. I, 2004) – April 04:18

## **PROSECUTOR MISCONDUCT**

Brady violation occurred where state failed to disclose that, contrary to the trial testimony of two key witnesses, one of the witnesses was intensively coached and the other was a paid informant. Banks v. Dretke, 124 S.Ct. 1256 (2004) – April 04:07

## **PUBLIC DISCLOSURE ACT (RCW 42.17.310)**

Public disclosure request for “all” agency documents is overbroad; documents are not exempt under “controversy” exemption to the Public Disclosure act; attorney-client privileged documents are exempt under the PDA. Hangartner v. City of Seattle, 151 Wn.2d 439 (2004) – July 04:07

## **RAPE AND OTHER SEX OFFENSES (See primarily Chapter 9A.44 RCW)**

Crime of engaging in sexual intercourse with patient (RCW 9A.44.050(1)(d)) includes circumstance where health care provider makes inappropriate personal detour from professional duties. State v. Castilla, 121 Wn. App. 198 (Div. I, 2004) – June 04:22

## **RESTITUTION**

Father who paid shoplifting civil penalty entitled to restitution from his shoplifting juvenile son. State v. T.A.D., 122 Wn. App. 290 (Div. I, 2004) – November 04:22

Restitution duty applies broadly to juvenile rider in joyriding case. State v. Keigan C., 120 Wn. App. 604 (Div. I, 2004) – November 04:22

## **SEARCH AND SEIZURE (WITH, WITHOUT WARRANT)**

### **Anticipatory Search Warrant**

Anticipatory search warrant fails because the “triggering event” was identified only in the supporting affidavit, and the resident at the premises was not shown a copy of the affidavit. U.S. v. Grubbs, 377 F.3d 1072 (9<sup>th</sup> Cir. 2004) – October 04:04

### **Border Search Exception To Search Warrant Requirement**

Federal border agents do not need reasonable suspicion to justify removing and disassembling car’s gas tank. U.S. v. Flores-Montano, 124 S.Ct. 1582 (2004) – June 04:05

### **Community Caretaking Exception To Search Warrant Requirement**

State loses on issues of 1) forced entry to enforce civil warrant based on RCW 10.31.040; 2) “community caretaking” entry; and 3) harmless error; State wins on issues of 4) co-occupant status for purposes of consent search and 5) “fruit of the poisonous tree.” State v. Thompson, 151 Wn.2d 793 (2004) – August 04:13

### Consent Exception To Search Warrant Requirement

**Ferrier warnings are not required for non-custodial request at roadside for consent to search purse.** State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) – July 04:13

**State loses on issues of 1) forced entry to enforce civil warrant based on RCW 10.31.040; 2) “community caretaking” entry; and 3) harmless error; State wins on issues of 4) co-occupant status for purposes of consent search and 5) “fruit of the poisonous tree.”** State v. Thompson, 151 Wn.2d 793 (2004) – August 04:13

**Warrantless search of home upheld based on defendant’s advance consent as participant in roommate’s electronic home-monitoring detention agreement.** State v. Cole, 122 Wn. App. 319 (Div. II, 2004) – September 04:21

### DNA Sample-Taking At Felony Conviction

**Ninth Circuit of the U.S. Court of Appeals reverses 3-judge panel’s decision, and, under Fourth Amendment analysis, upholds federal statute requiring the taking of samples from convicted persons for DNA-testing-and-cataloging purposes.** U.S. v. Kincade, 379 F.3d 813 (9<sup>th</sup> Cir. 2004) – October 04:02

**Statute authorizing taking of biological samples from felon for DNA ID profiling upheld against Fourth Amendment challenge.** State v. Surge, 122 Wn. App. 448 (Div. I, 2004) – October 04:21

**Cheek swab is a permissible method for collecting biological sample from a convicted felon.** State v. S.S., 122 Wn. App. 725 (Div. I, 2004) – October 04:22

### Exclusionary Law

**State loses on issues of 1) forced entry to enforce civil warrant based on RCW 10.31.040; 2) “community caretaking” entry; and 3) harmless error. State wins on issues of 4) co-occupant status for purposes of consent search and 5) “fruit of the poisonous tree.”** State v. Thompson, 151 Wn.2d 793 (2004) – August 04:13

### Execution Of Search Warrant

**In search warrant execution, a delay of several minutes before giving a copy of the warrant to the defendant does not require suppression of evidence.** State v. Aase, 121 Wn. App. 558 (Div. II, 2004) – July 04:20

**Using flash-bang device was excessive force where room into which device was blindly tossed was likely to be occupied by innocent bystanders.** Boyd v. Benton County (Oregon), 374 F.3d 773 (9<sup>th</sup> Cir. 2004) – September 04:09

### Exigent Circumstances Exception To Search Warrant Requirement

**No search, no unlawful seizure – where an instructor did a show-and-tell in a public presentation with a rifle that he had modified into a machine gun, he cannot make a privacy argument as to inspection of the illegal firearm that was seized at the time of the public showing. Also, the investigators’ seizure of the firearm was justified under the “exigent circumstances” exception to the Fourth Amendment search warrant requirement.** State v. Carter, 151 Wn.2d 118 (2004) – June 04:06

## Incident To Arrest (Arrest From Motor Vehicle) Exception To Search Warrant Requirement

**Putting suspended driver in back seat of patrol car and telling him he is under arrest is held not to constitute a “custodial arrest” for “search incident” purposes – 1) where driver was not frisked, searched or handcuffed; and 2) where he was allowed to use his cell phone to make multiple phone calls while in the back seat of the patrol car.** State v. Radka, 120 Wn. App. 43 (Div. III, 2004) – March 04:11

**Officer’s individual practice of making custodial arrests of all DWLS violators held not to violate statutes giving discretionary authority either to merely issue citation or instead to make full custodial arrest.** State v. Pulfrey, 120 Wn. App. 270 (Div. I, 2004) – April 04:17

**Fourth Amendment allows MV search incident to arrest even though suspect was first contacted after he got out of his car; time and space proximity reasonably connected the suspect, his car and his suspicious activity, thus justifying warrantless search of his car under the “bright line” rule of New York v. Belton.** Thornton v. U.S., 124 S.Ct. 2127 (2004) – July 04:02

## Jail Booking Inventory Of Effects, Second Look

**No warrant needed for a “second look” in the jail property room at personal effects that were taken at booking; Court also looks at question of admissibility of expert testimony regarding assessing the reliability of eyewitness identification.** State v. Cheatam, 150 Wn.2d 626 (2003) – Feb 04:05

## Knock And Announce (RCW 10.31.040 And Constitutional Requirements)

**Exigency justified forced entry where officers executing a search warrant for cocaine entered after “knocking and announcing” and then waiting 15 to 20 seconds with no response.** U.S. v. Banks, 124 S.Ct. 521 (2003) – Jan 04:02

**State loses on issues of 1) forced entry to enforce civil warrant based on RCW 10.31.040; 2) “community caretaking” entry; and 3) harmless error; state wins on issues of 4) co-occupant status for purposes of consent search and 5) “fruit of the poisonous tree.”** State v. Thompson, 151 Wn.2d 793 (2004) – August 04:13

## Particularity Requirement

**In civil rights case, Fourth Amendment held to have been violated where search was conducted under a warrant in which ATF agent made clerical error by failing to specify the items that were to be seized; qualified immunity is denied to the ATF agent who prepared the warrant and who led other officers in the search.** Groh v. Ramirez, 124 S.Ct. 1284 (2004) – April 04:02

**Under unique circumstances, search warrant upheld even though it did not identify a specific crime under investigation; also, evidence held sufficient to convict of second degree theft, criminal harassment, stalking, and criminal libel.** State v. Askham, 120 Wn. App. 872 (Div. III, 2004) – June 04:18

## Pretextual Search

**“Pretext” challenge asserting police were actually hoping to see drug evidence in plain view does not succeed because police got the warrant to search for a person on the premises, and the supporting affidavit established probable cause to arrest a person and PC that the person would be present at the target premises when the warrant was executed.** State v. Busig, 119 Wn. App. 381 (Div. III, 2003) – Feb 04:16

## Privacy Expectation

No warrant needed for a “second look” in the jail property room at personal effects that were taken at booking; Court also looks at question of admissibility of expert testimony regarding assessing the reliability of eyewitness identification. State v. Cheatam, 150 Wn.2d 626 (2003) – Feb 04:05

No search, no unlawful seizure – where an instructor did show-and-tell in a public presentation with a rifle that he had modified into a machine gun, he cannot make a privacy argument as to inspection of the illegal firearm that was seized at the time of the public showing. Also, the investigators’ seizure of the firearm was justified under the “exigent circumstances” exception to the Fourth Amendment search warrant requirement. State v. Carter, 151 Wn.2d 118 (2004) – June 04:06

Ninth circuit reverses panel decision, and, under Fourth Amendment analysis, upholds federal statute requiring the taking of samples from convicted persons for DNA-testing-and-cataloging purposes. U.S. v. Kincade, 379 F.3d 813 (9<sup>th</sup> Cir. 2004) – October 04:02

Statute authorizing taking of biological samples from felon for DNA ID profiling upheld against Fourth Amendment challenge. State v. Surge, 122 Wn. App. 448 (Div. I, 2004) – October 04:21

## Probable Cause To Search

Affidavit for child porn search warrant fails to justify search, as it fails to establish probable cause that suspect who accessed a child porn website actually downloaded child porn. U.S. v. Gourde, 382 F.3d 1003 (9<sup>th</sup> Cir 2004) – November 04:02

State wins on issues of 1) probable cause for search warrant; 2) justification for Terry seizure and frisk; and 3) sufficiency of evidence to support conviction for methamphetamine manufacturing. State v. Jacobs, 121 Wn. App. 669 (Div. II, 2004) – November 04:08

If new facts are learned after search warrant’s issuance but before its execution, police need not return to magistrate unless new facts negate probable cause; new facts did not negate PC as to ongoing drug-dealing. State v. Maddox, \_\_\_ Wn.2d \_\_\_, 98 P.3d 1199 (2004) – December 04:18

## Telephonic Search Warrants

Where judge gave telephonic authorization for search, but no one prepared and executed a written warrant, search was warrantless, and the search violated the Washington constitution because the circumstances did not fall within any of the exceptions to the warrant requirement. State v. Ettenhofer, 119 Wn. App. 300 (Div. II, 2003) – Jan 04:12

## SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES

Restrictions on admissibility of “testimonial” hearsay are tightened under the Sixth Amendment’s confrontation clause. Crawford v. Washington, 124 S.Ct. 1354 (2004) – May 04:20

Trial court’s admission of “excited utterance” evidence did not violate Sixth Amendment’s confrontation clause under Crawford rule. State v. Orndorff, 122 Wn. App. 781 (Div. II, 2004) – November 04:20

## SIXTH AMENDMENT RIGHT TO COUNSEL AND RELATED COURT RULE PROTECTIONS

Sixth Amendment required that police give Miranda warnings prior to questioning indicted defendant in his kitchen; case is remanded to 8th Circuit of U.S. Court of Appeals to determine if 5th Amendment’s limit on exclusion of evidence applies to this 6th Amendment violation. Fellers v. U.S., 124 S.Ct. 1019 (2004) – March 04:05

**Trial court must obtain evidence from cellmate-informant to determine if defendant's Sixth Amendment right to counsel was violated.** Randolph v. California, 380 F.3d 1133 (9<sup>th</sup> Cir. 2004) – November 04:05

### **SPEEDY TRIAL/SPEEDY ARRAIGNMENT (CrR 3.3)**

**Striker/Greenwood speedy arraignment/speedy trial rule under CrR 3.3 violated where State did not try, as defendant had earlier requested, to locate him through his attorney.** State v. Austin, 119 Wn. App. 319 (Div. II, 2003) – May 04:21

### **STALKING (RCW 9A.46.110)**

**Under unique circumstances, search warrant upheld even though it did not identify a specific crime under investigation; also, evidence held sufficient to convict of second degree theft, criminal harassment, stalking, and criminal libel.** State v. Askham, 120 Wn. App. 872 (Div. III, 2004) – June 04:18

### **TAMPERING WITH A WITNESS (RCW 9A.72.120)**

**Indirect witness tampering is still “witness tampering”; also, 1990 Rempel decision distinguished.** State v. Williamson, 120 Wn. App. 903 (Div. II, 2004) – June 04:21

### **THEFT (Chapter 9A.56 RCW)**

**Used generator stolen from rental business not shown to be worth over \$1500 for purposes of first degree theft statute.** State v. Morley, 119 Wn. App.939 (Div. III. 2004) – April 04:18

**Under unique circumstances, search warrant upheld even though it did not identify a specific crime under investigation; also, evidence held sufficient to convict of second degree theft, criminal harassment, stalking, and criminal libel.** State v. Askham, 120 Wn. App. 872 (Div. III, 2004) – June 04:18

### **TRAFFIC (Title 46 RCW) (See also “Implied Consent”)**

**Traffic code does not require that a driver signal in turning from a private driveway onto a public roadway. Therefore, officer's traffic stop of driver for not signaling held unlawful.** State v. Brown, 119 Wn. App. 473 (Div. II, 2003) – Feb 04:14

**Failure to transfer MV title not a “continuing” offense – arrest and “search incident” held unlawful.** State v. Green, 150 Wn.2d 740 (2004) – March 04:08

**Drivers' license suspensions (mostly DWLS 3 offenses) without opportunity for prior hearing held unconstitutional under federal due process analysis.** City of Redmond v. Moore, 151 Wn.2d 664 (2004) – July 04:06; August 04:23; October 04:22.

**Hit-and-run under RCW 46.52.020: “involved in an accident” element of crime is supported by the evidence despite lack of evidence of any vehicle contact; “knowledge” of accident is supported by the evidence as well.** State v. Perebeynos, 121 Wn. App. 189 (Div. I, 2004) – July 04:17

### **UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW); OTHER DRUG LAWS**

**Evidence of delivery of drugs was sufficient to convict seller who used middleman; also, co-conspirator statements held admissible under hearsay rules.** State v. Rangel-Reyes, 119 Wn. App. 494 (Div. III, 2003) – Feb 04:09

**Evidence held sufficient to support convictions for unlawful possession of firearm, unlawful manufacture of a controlled substance, and criminal mistreatment; evidence also supports sentence enhancement for meth manufacturing with children present. State v. Holt, 119 Wn. App. 712 (Div. II, 2004) – March 04:18**

**Evidence held sufficient to support conviction for possessing methamphetamine with intent to deliver. State v. Goodman, 150 Wn.2d 774 (2004) – August 04:21**

**State wins on issues of 1) probable cause for search warrant; 2) justification for Terry seizure and frisk; and 3) sufficiency of evidence to support conviction for methamphetamine manufacturing. State v. Jacobs, 121 Wn. App. 669 (Div. II, 2004) – November 04:08**

### **VIDEOTAPE PRIVACY PROTECTION ACT (FEDERAL)**

**Article: Beware of 1988 federal “Videotape Privacy Protection Act.” May 04:04**

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### **NINTH CIRCUIT, UNITED STATES COURT OF APPEALS**

**2-1 MAJORITY HOLDS: 1) ARREST OF CITIZEN FOR RECORDING POLICE RADIO COMMUNICATIONS WITHOUT CONSENT WHILE CITIZEN WAS CONVERSING WITH OFFICER IN A PUBLIC PLACE WAS AN UNLAWFUL ARREST BECAUSE SUCH COMMUNICATIONS ARE NOT “PRIVATE” UNDER RCW 9.73; 2) NO “QUALIFIED IMMUNITY” BECAUSE OFFICER SHOULD HAVE KNOWN THE “WELL-ESTABLISHED” LAW; 3) AGENCY LIABILITY QUESTION MUST GO TO JURY BECAUSE AGENCY ARGUABLY SHOULD HAVE GIVEN OFFICER SPECIFIC TRAINING ON RCW 9.73; AND 4) “OUTRAGE” ISSUE MUST GO TO JURY BECAUSE ELEMENTS OF THAT TORT ACTION ARE ARGUABLY MET ON PLAINTIFF’S ALLEGATIONS**

Johnson v. City of Sequim, \_\_\_ F.3d \_\_\_, 2004 WL 2376506 (9<sup>th</sup> Cir. 2004)

Facts and Proceedings below: (Excerpted from majority opinion for Ninth Circuit)

The undisputed facts show that on January 28, 2000, [Anthony L.] Johnson was videotaping several of his friends at Sequim's public skateboard park when he noticed [Sequim police officer A] drive up to the park in his patrol vehicle. [Officer A], who was on duty and had come to the park to look for a missing juvenile, stopped his patrol car in the park's parking lot about seventy-five feet away from where Johnson was standing on an elevated cement ramp. From this distance, [Officer A] observed Johnson videotaping him as he sat in his vehicle with his driver's side window rolled down. After a short time, Johnson stopped recording [Officer A] and approached the car. As Johnson approached, [Officer A's] police radio "was operating" and he was "dialing [his] cellular phone" to contact dispatch to obtain a description of the runaway he was attempting to locate. Johnson resumed videotaping when he reached the rear of the car. As Johnson came around to the passenger side of the car, [Officer A] rolled down the passenger window, deactivated his cellular phone, and asked Johnson "What do you think you're doing?" Although Johnson stopped recording [Officer A], he continued to point his video camera at [Officer A], who twice told Johnson to stop because Johnson "did not have permission to record [him] and ... it was a violation of the law to record conversations without consent." After the second warning, [Officer A] got out of his car and "contacted" with Johnson, physically struggling with him to obtain the video camera. With the assistance of another officer, whom he had called for backup, [Officer A] placed Johnson under arrest and transported him to the Clallam County Jail in Port Angeles.

After Johnson had spent three days in county jail, prosecutors filed a criminal complaint against him, charging one count of recording communication without permission, in violation of the Privacy Act, and one count of resisting arrest. Prosecutors also moved for a determination of probable cause, based solely upon a declaration from [Officer A] that Johnson videotaped him "while [he] was making telephone contact with dispatch in an attempt to verify juvenile runaway information." Although the state court found probable cause for the arrest, Johnson was released and the charges were dropped. Nearly two months later, prosecutors again filed charges against Johnson, this time for "attempted recording communication without permission" and for resisting arrest.

On May 10, 2000, Judge Coughenour of the Clallam County District Court dismissed the charges against Johnson. Judge Coughenour found that [Officer A] was not engaged, by cellular phone or police radio, in any conversation or communication with anyone while Johnson was recording him, and that Johnson therefore could not have "inten[ded] to record a conversation that [was not] occurring." Moreover, Judge Coughenour found that even if [Officer A] had been involved in a communication in his vehicle, there was no expectation of privacy because he had voluntarily exposed any such communication to the public by parking his vehicle in a public place with the windows rolled down.

On June 16, 2000, Johnson filed this action pursuant to 42 U.S.C. § 1983 action against the City of Sequim, [Officer A], Sequim's Mayor, several Doe officers, Clallam County, and the County Sheriff, seeking a declaration that he had been arrested, incarcerated, and prosecuted in violation of his First and Fourth Amendment rights. He also sought injunctive relief, monetary damages, and attorney's fees pursuant to 42 U.S.C. § 1988(b). [Officer A] and the other individual defendants filed counterclaims against Johnson for malicious prosecution under Wash. Rev.Code § 4.24.350(2). Ruling on cross motions for summary judgment on Johnson's claims, Magistrate Judge Arnold granted judgment for defendants and dismissed Johnson's claims. After defendants voluntarily dismissed their counterclaims, Johnson appealed [to the Ninth Circuit].

ISSUES AND RULINGS: 1) As a matter of law under the undisputed facts on this issue, was arrestee Johnson acting lawfully under Washington's Privacy Act, chapter 9.73 -- i.e., were the radio communications not "private" -- such that the arrest of Johnson violated the Fourth Amendment? (ANSWER: Yes, rules a 2-1 majority, the arrest was unlawful because the communications were not "private" and Johnson could lawfully record the non-private communications; therefore the officer did not have probable cause to arrest Johnson under RCW 9.73);

2) As a matter of law under the undisputed facts on this issue, must the arresting officer be denied "qualified immunity" on the rationale that the law was well-established at that time, and a reasonable officer would have known that Johnson was not committing a crime when Johnson recorded the radio communications? (ANSWER: Yes, rules a 2-1 majority);

3) Does a genuine issue of material fact exist as to whether the self-training program of the employer was so inadequate that the employer can be held liable under a "deliberate indifference" alternative standard for determining whether an officer was acting under an agency policy or custom? (ANSWER: Yes, rules a 2-1 majority, a jury question is presented on this issue);

4) Does a genuine issue of material fact exist as to whether the elements of the common law tort of outrage are presented by the facts – i.e., was the nature and result of the officer’s unlawful conduct extreme enough to meet the standards for this tort? (ANSWER: Yes, rules a 2-1 majority, a jury question is presented on this issue.

Result: Reversal of order of the United States District Court for Western Washington granting summary judgment to government agencies and employees; case remanded for entry of judgment for Johnson on certain issues and for possible civil trial on certain remaining issues.

ANALYSIS BY MAJORITY:

**LED EDITORIAL NOTE**: The following summary of the majority’s analysis is very condensed. Also, we will not address in this LED entry the analysis in the strongly worded dissent: 1) siding with the arresting officer and his agency; 2) criticizing the majority’s analysis; and 3) criticizing the majority’s failure to refer this case to the Washington Supreme Court to interpret RCW 9.73. The entire majority and dissenting opinions can be accessed at the following internet link – [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0A139FEFFACCACD588256F0000828E40/\\$file/0335057.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0A139FEFFACCACD588256F0000828E40/$file/0335057.pdf?openelement) ]

1) Unlawful arrest in violation of the civil rights of Johnson

Under chapter 9.73 RCW, Washington’s electronic surveillance statute, it is not a crime for a citizen to tape record a conversation with police on the street or at another public place. In State v. Flora, 68 Wn. App. 802 (Div. I, 1992) **July 93 LED:17**, the Washington Court of Appeals held that a conversation in this setting is not a “private” conversation, and therefore the requirement under chapter 9.73 for all-party consent to tape record private conversations and private communications does not apply to these circumstances. In Alford v. Haner, 33 F.3d 972 (9<sup>th</sup> Cir. 2003) **Sept 03 LED:06**, the Ninth Circuit ruled to the same effect on similar facts. **LED Editorial Note**: Review is pending in the U.S. Supreme Court in Alford, but only on an issue unrelated to the RCW 9.73 issue here.]

The Johnson majority opinion holds that police radio communications that are audible in a public place are similarly not private. Accordingly, the majority holds that the arrest of Johnson was an arrest without probable cause in violation of the Fourth Amendment. Therefore, Johnson has a cause of action under the federal Civil Rights Act.

2) No “qualified immunity” for the arresting officer

The Johnson majority opinion also holds that the Flora Court’s interpretation of chapter 9.73 RCW was “clearly established” when the officer arrested Johnson. Therefore, the Johnson Court holds, the officer is not entitled to defend against personal liability under the federal Civil Rights Act on the “qualified immunity” ground that a reasonable officer would not have known of the controlling law at the time of the arrest.

3) Agency liability for “deliberate indifference” to risks relating to RCW 9.73

The Johnson majority opinion explains as follows the Court’s rejection of summary judgment for the City of Sequim on the agency-liability issue:

The district court rejected Johnson's municipal liability claim under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. at 658 (1978), on the basis that Johnson "had set forth no evidence to support the establishment of a policy

or custom" which the Chief followed in arresting Johnson. This ruling is incorrect because Johnson submitted the declaration of law enforcement expert Alan H. Baxter. Baxter opined that the Sequim Police Department's "self-training" program, which assigned responsibility to the individual officer for keeping abreast of recent court decisions involving law enforcement, amounted to a "failure to train" Sequim police officers about enforcement of suspected violations of the Privacy Act.

Under City of Canton v. Harris, 489 U.S. 378 (1989), the Department's failure to train its officers about the Privacy Act may amount to "deliberate indifference" toward unlawful arrests under its provisions. As the Supreme Court has explained:

[A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policy-makers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation--that the municipality's indifference led directly to the very consequence that was so predictable.

Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397 (1997) (discussing Canton). In light of the many Washington cases addressing enforcement of the Privacy Act by public officers performing official duties, Johnson's evidence creates at least a genuine issue as to whether "self-training" in this context amounted to deliberate indifference.

In its municipal liability analysis, the district court failed to address either Johnson's "failure to train" theory of municipal liability or expert Baxter's supporting opinions. The district court also did not rule on defendants' motion to strike expert Baxter's declaration for Johnson's alleged failure to comply with his expert witness disclosure and discovery obligations under Federal Rule of Civil Procedure 26. We decline to reach these issues in the first instance, and direct the district court to address them upon remand.

[Some citations omitted]

#### 4) Tort of outrage

The Johnson majority opinion explains as follows the Court's reason for reversing the District Court's order of summary judgment for the City of Sequim on the "outrage" issue:

The district court erroneously dismissed Johnson's state law outrage claim for failure to state a prima facie case, ruling: "[T]here is nothing unusual about the acts of the defendants as law enforcement officers, nor is there any indication that the acts viewed in a light most favorable to [Johnson] would generate severe emotional distress. No reasonable juror could find otherwise."

The dismissal was in error. "To state a claim for the tort of outrage or intentional infliction of emotional distress, a plaintiff must show '(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual

result to the plaintiff of severe emotional distress.' " . . .The determination of whether conduct is outrageous is ordinarily a jury question, but the court must initially "determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability." In light of our holding that [Officer A] arrested Johnson for recording "private" communications for which there was no reasonable expectation of privacy, reasonable minds could surely differ on whether that conduct amounted to more than "mere annoyance, inconvenience, or normal embarrassment," and the issue must go to a jury.

[Some citations omitted]

**LED EDITORIAL COMMENT:** The following warning is looking sillier with each appellate court decision in this subject area, but, despite the rulings in Johnson v. City of Sequim, Alford v. Haner and State v. Flora, because all three of those cases involved citizens taping officers and not the reverse situation, we continue to extra-conservatively warn that officers should not simply conclude that all street conversations are non-private, and hence that they can turn the tables by recording conversations with citizen contacts and detainees on the street without their consent, i.e., without at least making a prior express announcement of audio taping (see RCW 9.73.030). Agency legal counsel should be consulted on this question and on questions relating to applying the audio/video, patrol car taping authorization added to RCW 9.73.090(1) four years ago in chapter 195, Laws of 2000.

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### **WASHINGTON STATE SUPREME COURT**

**IF NEW FACTS ARE LEARNED AFTER SEARCH WARRANT'S ISSUANCE BUT BEFORE ITS EXECUTION, POLICE NEED NOT RETURN TO MAGISTRATE UNLESS NEW FACTS NEGATE PROBABLE CAUSE; NEW FACTS DID NOT NEGATE PROBABLE CAUSE AS TO ONGOING DRUG-DEALING**

State v. Maddox, \_\_ Wn.2d \_\_\_, 98 P.3d 1199 (2004)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

On September 15, 2000, an informant for the Clark-Skamania Drug Task Force made a controlled buy of approximately one ounce of methamphetamine from the defendant, Christopher Dorian Maddox, at Maddox's home. The informant asked if Maddox had any more methamphetamine to sell. Maddox told the informant "maybe," if the informant would bring back cash.

In September 18, 2000, [Detective A] obtained a search warrant in Clark County District Court to search Maddox's residence. The affidavit for the search warrant described the September 15 controlled buy. The affidavit also stated that the informant had purchased methamphetamine from Maddox approximately 35 times over the prior four years.

The warrant authorized a search of Maddox's house for methamphetamine; paraphernalia used in the distribution of methamphetamine, including scales, baggies, and other items; currency; and books, photographs, and other records related to the manufacture, sale, and distribution of methamphetamine. The warrant required the search occur within 10 days in accordance with CrR 2.3(c).

The State did not execute the warrant immediately. [Detective A] testified that the task force was concerned that immediate execution of the warrant would jeopardize other investigations in which the informant was participating.

On September 21, 2000, the informant made another controlled buy from Maddox at Maddox's home. This time the informant did not have enough money to purchase the prepackaged one-ounce methamphetamine, and Maddox refused to split a package into smaller quantities. Therefore, Maddox accepted the informant's money as partial payment for one ounce of methamphetamine and "fronted" the informant the balance.

On September 27, 2000, Maddox demanded by phone that the informant pay the balance of money owed to him "now." The informant went to Maddox's home with \$1,000 cash from the task force to pay the drug debt and also to complete a third controlled buy of methamphetamine. Maddox collected \$720 as payment of the informant's debts. Maddox told the informant that he did not have any methamphetamine to sell to the informant; he said that "he was out and that he would have some in a couple of days."

On September 28, 2000, the task force executed the search warrant. Officers seized an electronic scale, 881.6 grams of marijuana, 45 pills of ecstasy, and \$2,100 in cash. No methamphetamine was found.

The State charged Maddox with two counts of unlawful delivery of methamphetamine, one count of unlawful possession of marijuana with intent to deliver, and one count of unlawful possession of ecstasy with intent to deliver. Later, the State amended the complaint, adding a school-zone enhancement to each count. The two methamphetamine counts were severed and following a jury trial, Maddox was acquitted.

Prior to the bench trial for the two remaining counts, unlawful possession with intent to deliver ecstasy and marijuana, Maddox filed a motion to suppress the ecstasy and marijuana seized under the warrant. The court denied the motion to suppress and found Maddox guilty on both counts. Maddox appealed and the Court of Appeals affirmed. [State v. Maddox, 116 Wn. App 796 (Div. II), **Oct 03 LED:06**].

**ISSUE AND RULING:** When police learned that the suspect had told the CI, between the dates of issuance and execution of the search warrant, that the suspect did not presently have a supply of methamphetamine to sell, were police then required to go back to the magistrate for a redetermination of probable cause? (**ANSWER:** No, rules a 7-2 majority, because police still had probable cause to believe they would find drug paraphernalia and other evidence of drug dealing on the premises.)

**Result:** Affirmance of Court of Appeals decision that affirmed the Clark County Superior Court conviction of Christopher Dorian Maddox for unlawful delivery of methamphetamine and for unlawful possession of marijuana with intent to deliver.

**ANALYSIS:** (Excerpted from Supreme Court majority opinion)

1) What post-issuance developments require return to the magistrate?

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**.

A delay in executing the warrant may render the magistrate's probable cause determination stale. Common sense is the test for staleness of information in a search warrant affidavit. The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.

In evaluating whether the facts underlying a search warrant are stale, the court looks at the totality of circumstances. The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity. See, e.g., Andresen v. Maryland, 427 U.S. 463 (1976) (probable cause not stale despite three month delay in warrant's execution because of the nature of documentary evidence and defendant's ongoing criminal activity).

For example, in State v. Hall, 53 Wn. App. 296 (1989), the court rejected the defendant's argument that the facts supporting the search warrant were stale. Following surveillance of a marijuana grow operation, police arrested Mason, who identified defendant Hall as the supplier of the marijuana plants. It had been two months since Mason had been in Hall's home to purchase marijuana plants. Nevertheless, the court held that probable cause to search existed because it was reasonable to believe that a grow operation was still in existence considering the number of plants found in Mason's possession and Mason's comment about the size of the plants remaining at the house.

This accords with the majority rule followed in other jurisdictions that the determination of whether probable cause is stale depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized.

In this case, Maddox does not complain that probable cause dissipated simply because of the delay in the execution of the warrant. Rather, Maddox asserts that law enforcement's acquisition of information in the interim, which negatively impacted probable cause, rendered the initial probable cause determination stale and thus required a redetermination of probable cause by the magistrate. This court has not previously considered this specific issue.

The Court of Appeals held that the police are required to return to the magistrate for a redetermination of probable cause when information acquired after issuance but before execution would, if believed, negate probable cause. State v. Maddox, 116 Wn. App. 796 (2003). The court further held that absent exigent circumstances, the redetermination of probable cause must be made by a neutral and detached magistrate. Maddox, 116 Wn. App. at 817 **Oct 03 LED:06**. Maddox contends this rule places too much responsibility on the police for deciding when to return to the magistrate for a redetermination of probable cause, thus subverting the constitutional requirement of oversight by a detached and neutral magistrate. We disagree and affirm the well-reasoned opinion of the Court of Appeals.

Maddox proposes that a neutral magistrate must reconsider probable cause when *any* material evidence is discovered. This goes too far and would require too many unnecessary reviews by a magistrate.

2) Did the new facts negate PC as to drug dealing?

Maddox also contends the Court of Appeals erred in holding that redetermination of probable cause was not necessary in this case because the warrant's authorization to search for evidence of methamphetamine dealing was unaffected by Maddox's statement that he currently had no methamphetamine to sell. Maddox argues that the warrant should not have authorized a search for evidence of methamphetamine dealing because the informant did not claim to have seen methamphetamine (except what he was purchasing) or any drug dealing paraphernalia while in the Maddox residence during the controlled buy. We disagree and affirm the Court of Appeals that there was probable cause to search for evidence of methamphetamine dealing.

The facts of the present case are similar to those of United States v. Rankin, 261 F.3d 735 (8th Cir. 2001). In Rankin, the police learned from a confidential informant that the defendant was selling crack cocaine from his residence and that the defendant possessed paraphernalia used in drug trafficking. The police obtained a warrant but did not execute it until nine days later, after learning that the defendant had told the informant that most of the crack cocaine had been moved out of the residence. The defendant argued that this information rendered the probable cause determination stale. The court disagreed, noting that even if the warrant had been stale as to the cocaine, the residence could lawfully be searched under the warrant for paraphernalia. The court concluded that even in light of the additional information, a reasonable person would suspect that items relating to the distribution of crack cocaine would be found at the residence. Rankin, 261 F.3d at 739.

Similarly, in this case, a reasonable person could infer from the facts and circumstances set forth in the affidavit that evidence of methamphetamine dealing remained at Maddox's home even if he was temporarily out of the drug itself. The warrant authorized a search for evidence of methamphetamine dealing as well as methamphetamine itself. The warrant included authorization to search for nonsaleable residue, scales, baggies, customer lists and accounts, and currency. The likelihood that scales, baggies, customer lists, and other evidence of methamphetamine dealing would be found at Maddox's home was not negated by Maddox's statement that he did not have methamphetamine to sell to the informant.

Maddox argues no factual nexus exists here because during the controlled buys the informant did not see scales, baggies, and other paraphernalia inside Maddox's home. However, the magistrate may infer the existence of evidence from the facts and circumstances provided in the affidavit. As we have often stated, the affidavit is not required to establish a prima facie case of guilt, but rather a likelihood that evidence of criminal activity will be found. Here, there were ample facts in the affidavit from which a magistrate could infer the likely presence of drug dealing paraphernalia.

The affidavit in support of the search warrant indicates the informant had known Maddox for five years and had been purchasing methamphetamine from him for four years. The informant had purchased methamphetamine from Maddox at least 35 times in various quantities, up to four ounces of methamphetamine at a time.

The affidavit details the controlled buy from Maddox at Maddox's home on September 15, 2000, just three days prior to the warrant's issuance. The affidavit also includes Maddox's statement that he might have more to sell if the informant returned with cash.

In addition, the affidavit contained [Detective A]'s recitation of her training and experience in investigating drug crimes with the task force. The experience and expertise of an officer can be taken into account in determining whether probable cause has been established. In her affidavit, [Detective A] stated that she learned from her experience that dealers use baggies and scales in packaging controlled substances for distribution and that they generally maintain records of their drug business. While generalizations regarding common habits of drug dealers, *standing alone*, cannot establish probable cause, such generalizations may support probable cause where a factual nexus supported by specific facts is also provided and where the generalizations are based on the affiant's experience. Thein, 138 Wn.2d at 148 **Aug 99 LED:15**. In this case, the affidavit recounted the controlled buy, which provided a factual nexus between Maddox's drug dealing and his home, along with specific facts regarding Maddox's long history as a drug dealer. In addition, [Detective A]'s general statements about the types of drug dealing paraphernalia were based on her training and her experience in investigating over 230 drug cases. Therefore, the magistrate issuing the warrant appropriately considered Detective Parsons' statements.

The affidavit also recited Maddox's criminal history, including a felony conviction two years earlier for possession and delivery of a controlled substance. Prior convictions of a suspect may be used in determining probable cause, particularly when a prior conviction is for a crime of the same general nature. Maddox's criminal history supported the issuing magistrate's determination of probable cause.

Furthermore, the probable cause to search for drug paraphernalia was not affected by Maddox's statement to the informant that Maddox was out of drugs temporarily. On the contrary, the statement that he was temporarily out of drugs, but would soon receive more drugs to sell, reinforced the probability that Maddox was engaged in the ongoing activity of drug dealing. Rather than negating probable cause as to evidence of drug dealing paraphernalia, the statement enhanced the probable cause determination as to those items.

There are ample facts from which the magistrate could infer that paraphernalia used in the sale and distribution of methamphetamine would be found at Maddox's home. Common sense is "the ultimate yardstick" of probable cause. A commonsense evaluation of the facts in the affidavit indicates that Maddox was involved in ongoing sales of methamphetamine and that evidence of that dealing would probably be found there.

We conclude that the magistrate did not abuse his discretion in issuing the search warrant. There was probable cause to believe that Maddox had methamphetamine and paraphernalia at his house on September 18 when the warrant was issued. We further hold that probable cause as to the paraphernalia and currency authorized by the warrant was not affected by Maddox's statement negating probable cause as to methamphetamine.

[Some citations omitted]

Dissent: Justice Alexander authors a dissent that is joined by Justice Sanders. The dissenting opinion argues that the Court should have held that PC to search was negated by the new factual information. The dissenters argue in vain that methamphetamine was the main object of the warrant, and that the majority should not have upheld the warrant on grounds that PC as to other objects of the search (documents and paraphernalia showing drug dealing) was not negated by the new information.

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## **NEXT MONTH**

The January 2005 LED will include entries regarding three recent Public Disclosure Act (PDA) decisions: 1) the Washington Supreme Court decision in Yousoufian v. Office of Ron Sims, \_\_\_ Wn.2d \_\_\_, 98 P.3d 463 (2004), holding that when a trial court has determined that a violation of the PDA has occurred, “penalties need not be assessed per record, and that trial courts must assess a per day penalty for each day a record is wrongfully withheld”; 2) the Washington Court of Appeals decision in Koenig v. City of Des Moines, \_\_\_ Wn. App. \_\_\_, 95 P.3d 777 (Div. I, 2004), holding that “highly offensive information” must be redacted before records are disclosed under the PDA; and 3) the Washington Court of Appeals decision in Sperr v. City of Spokane & County of Spokane, \_\_\_ Wn. App. \_\_\_, 96 P.3d 1012 (Div. III, 2004), holding that an agency has no duty under the PDA to create records that do not exist, and that a requestor is not entitled to indiscriminately sift through agency files in search of records that the agency has demonstrated do not exist.

The January 2005 LED may also address the Washington Court Rule, GR 31, governing “Public Access to Court Records.” Most officers likely have already heard something from their respective prosecutors' offices regarding this new rule. Of particular interest to law enforcement is that the rule's subsection (e) limits some “private” information that may be included in some law enforcement paperwork that becomes part of court records. GR 31, which became effective on October 26, 2004, may be accessed at the following link on the Courts' website:

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=GR&ruleid=GAGR31](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=GAGR31)

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## **INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules/>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.:/www.ca9.uscourts.gov/>] and clicking on “Opinions.” Federal statutes can be accessed at [<http://www.:/www4law.cornell.edu/uscode>]

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 2004, 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.agp>].

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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>].