



# Law Enforcement

July 2004

# Digest

## HONOR ROLL

569<sup>th</sup> Basic Law Enforcement Academy – February 3<sup>rd</sup> through June 9<sup>th</sup>, 2004

President: Martin Hodge – King County Sheriff’s Office  
Best Overall: Jason Baird – Redmond Police Department  
Best Academic: Jason Baird – Redmond Police Department  
Best Firearms: Tommie Nicodemus – Pierce County Sheriff’s Office  
Tac Officer: Mike O’Neill – Olympia Police Department

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## JULY LED TABLE OF CONTENTS

**UNITED STATES SUPREME COURT ..... 2**

**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 WL 1144370 (2004) ..... 2

**BRIEF NOTE FROM THE 9<sup>TH</sup> CIRCUIT, U.S. COURT OF APPEALS ..... 5**

**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) ..... 5

**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT ..... 6**

**DRIVERS’ LICENSE SUSPENSIONS (MOSTLY DWLS 3 OFFENSES) WITHOUT OPPORTUNITY FOR PRIOR HEARING HELD UNCONSTITUTIONAL UNDER FEDERAL DUE PROCESS ANALYSIS**  
City of Redmond v. Moore, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2004 WL 1207870..... 6

**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 PUBLIC DISCLOSURE ACT**  
Hangartner v. City of Seattle, \_\_\_ Wn.2d \_\_\_, 90 P.3d 26 (2004) ..... 7

**WASHINGTON STATE COURT OF APPEALS ..... 10**

**IN QUESTIONABLE RULING, COURT OF APPEALS HOLDS THAT INTERROGATION DURING AN INVESTIGATIVE STOP WAS “CUSTODIAL” FOR MIRANDA PURPOSES**  
State v. France, \_\_\_ Wn. App. \_\_\_, 88 P.3d 1003 (2004) ..... 10

**FERRIER WARNINGS ARE NOT REQUIRED FOR NON-CUSTODIAL REQUEST AT ROADSIDE FOR CONSENT TO SEARCH PURSE**

State v. Tagas, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2004 WL 1194483 (Div. I, 2004) ..... 13

**SPITTING IN PATROL CAR IS NOT MALICIOUS MISCHIEF IN THE SECOND DEGREE**

State v. Hernandez, 120 Wn. App. 390 (Div. III, 2004) ..... 15

**HIT-AND-RUN: "INVOLVED IN AN ACCIDENT" PROVEN DESPITE LACK OF EVIDENCE OF ANY VEHICLE CONTACT; "KNOWLEDGE" OF ACCIDENT PROVEN AS WELL**

State v. Perebeynos, \_\_ Wn. App. \_\_, 87 P.3d 1216 (Div. I, 2004) ..... 17

**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS..... 20**

**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, \_\_ Wn. App. \_\_, 89 P.3d 721 (Div. II, 2004) ..... 20

**VIOLATION OF PROTECTION ORDER CAN BE PREDICATE "CRIME AGAINST A PERSON" UNDER RESIDENTIAL BURGLARY STATUTE**

State v. Stinton, \_\_ Wn. App. \_\_, 89 P.3d 717 (Div. II, 2004) ..... 20

**NEXT MONTH ..... 21**

\*\*\*\*\*

**UNITED STATES SUPREME COURT**

**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 WL 1144370 (2004)

Facts and Proceedings below: (Excerpted from majority opinion)

Officer Deion Nichols of the Norfolk, Virginia, Police Department, who was in uniform but driving an unmarked police car, first noticed petitioner Marcus Thornton when petitioner slowed down so as to avoid driving next to him. Nichols suspected that petitioner knew he was a police officer and for some reason did not want to pull next to him. His suspicions aroused, Nichols pulled off onto a side street and petitioner passed him. After petitioner passed him, Nichols ran a check on petitioner's license tags, which revealed that the tags had been issued to a 1982 Chevy two-door and not to a Lincoln Town Car, the model of car petitioner was driving. Before Nichols had an opportunity to pull him over, petitioner drove into a parking lot, parked, and got out of the vehicle. Nichols saw petitioner leave his vehicle as he pulled in behind him. He parked the patrol car, accosted petitioner, and asked him for his driver's license. He also told him that his license tags did not match the vehicle that he was driving.

Petitioner appeared nervous. He began rambling and licking his lips; he was sweating. Concerned for his safety, Nichols asked petitioner if he had any narcotics or weapons on him or in his vehicle. Petitioner said no. Nichols then asked petitioner if he could pat him down, to which petitioner agreed. Nichols felt a bulge in petitioner's left front pocket and again asked him if he had any illegal narcotics on him. This time petitioner stated that he did, and he reached into his

pocket and pulled out two individual bags, one containing three bags of marijuana and the other containing a large amount of crack cocaine. Nichols handcuffed petitioner, informed him that he was under arrest, and placed him in the back seat of the patrol car. He then searched petitioner's vehicle and found a BryCo .9-millimeter handgun under the driver's seat.

A grand jury charged petitioner with possession with intent to distribute cocaine base, possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, and possession of a firearm in furtherance of a drug trafficking crime. Petitioner sought to suppress, [among other things], the firearm as the fruit of an unconstitutional search. After a hearing, the District Court denied petitioner's motion to suppress, holding that the automobile search was valid under New York v. Belton, 453 U.S. 454 (1981).

Petitioner appealed, challenging only the District Court's denial of the suppression motion. He argued that Belton was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car. The United States Court of Appeals for the Fourth Circuit affirmed. It held that the historical rationales for the search incident to arrest doctrine -- the need to disarm the suspect in order to take him into custody' and the need to preserve evidence for later use at trial, 'did not require Belton to be limited solely to situations in which suspects were still in their vehicles when approached by the police. Noting that petitioner conceded that he was in "close proximity, both temporally and spatially, to his vehicle", the court concluded that the car was within petitioner's immediate control, and thus Nichols' search was reasonable under Belton.

[Some text and quotation marks omitted]

**ISSUE AND RULING:** Were the arrestee's prior suspicious activity and his physical location at the time of arrest close enough, distance-wise and time-wise in relation to his car, to justify warrantless searching of his car incident to his arrest, despite the fact that the officer did not initiate contact with the arrestee until after the arrestee had gotten out of his car and had shut?  
**(ANSWER:** Yes)

**Result:** Affirmance of lower Fourth Circuit U.S. Court of Appeals decision that ruled the search lawful and upheld the cocaine and firearms convictions of Marcus Thornton.

**ANALYSIS:**

**Rehnquist opinion:**

The lead opinion for the Supreme Court is authored by Justice Rehnquist. Justices Kennedy, Thomas and Breyer join the Rehnquist opinion in full. The Rehnquist opinion rejects the defendant's argument that police should never be allowed to search a car incident to arrest where the arrestee was not inside the car when police first initiated contact. The Rehnquist opinion finds a reasonably sufficient connection and proximity, distance-wise and time-wise, between the arrestee, his prior suspicious activity, and his nearby car to justify a search of the car under the "bright line" Fourth Amendment rule of New York v. Belton, 453 U.S. 454 (1981). The Belton test of "immediate control" by a recent occupant of the vehicle is met by the facts of this case, the Rehnquist opinion concludes.

### Scalia concurring opinion:

Justice Scalia writes a separate opinion (joined by Justice Ginsburg). Scalia concurs in the result of non-suppression. However, Scalia states the view that the bright-line, car-search-incident rule has been extended too far in the past 20 years. He suggests that the rule should be narrowed in order to restrict “purely exploratory”/“general rummaging” searches of cars following arrests of occupants. Noting that the standard police practice is to completely secure the arrestee before beginning the car search, he implies that looking for weapons generally is not necessary at that point, and he argues for a new standard that would limit warrantless car searches “incident to arrest” to those circumstances where the particular crime for which the custodial arrest is made is likely to have evidence associated with it. Scalia’s opinion asserts that the drug crime for which the arrest was made in the Thornton case meets his proposed new test. However, Scalia asserts that, as to custodial arrests for some other crimes, it is not reasonable to believe that any evidence would be associated with the crime.

### O’Connor concurring opinion:

In a separate opinion not joined by any other justices, Justice O’Connor also concurs in the result of non-suppression. But she also expresses concerns about the present breadth of “search incident” authority where vehicles are involved. She suggests that she might be willing to cut back the Fourth Amendment car-search-incident rule along the lines suggested by Scalia. However, she says that this possible eventuality must wait for a future case where the parties have had a full chance to brief and argue about the new approach that is suggested in the Scalia opinion.

### Stevens dissenting opinion:

Justice Stevens argues that the Court should have adopted the defendant’s suggested restriction on “car-search incident,” a view that would have limited such searches to circumstances where police initiated contact with the arrestee while the arrestee was still inside the car. Justice Souter joins the Stevens opinion. The Stevens opinion does not comment on Justice Scalia’s proposal for a new approach for this search rule.

### **LED EDITORIAL COMMENTS:**

**1. Justice Scalia’s concurring opinion is disturbing: It is disturbing to us that a generally pro-law enforcement Justice like Scalia is suggesting a significant cut-back in the bright-line, car-search-incident rule. For now, the Scalia opinion does not have the force of law. But we are concerned that there is now a possibility that the U.S. Supreme Court could revisit this issue in the near future. Just as much of concern is the possibility that some justices on our State Supreme Court might grab the Scalia suggestion and run with it under independent grounds, article 1, section 7 search-and-seizure “analysis.”**

**2. Washington cases are not necessarily inconsistent with Justice Rehnquist’s view in Thornton, but that is debatable as to a few of the cases: Here’s a list of select published Washington appellate court decisions that bear on the questions addressed by the U.S. Supreme Court in Thornton:**

**State v. Fore, 56 Wn. App. 339 (Div. I, 1989) March 90 LED:05 (MV was subject to “search incident” where: 1) arrestee used car to assist in committing crime of drug sales a few minutes earlier; and 2) arrestee was located near the parked, unlocked vehicle at the point when the arrest was made by officers who had, unbeknownst to the arrestee, followed the arrestee from the scene of the crime)**

State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June 97 LED:02 (MV was not subject to “search incident” where the DWLS suspect got out of his vehicle and locked it before the officer seized him. Note that the officer in Perea had pulled in behind the parked suspect vehicle and had turned on his flashers before the suspect got out of the car and locked it. We would guess that the U.S. Supreme Court would have decided the Perea case differently, and we think that the Washington appellate courts might now reach a different result in light of the fact that the flashers were turned on before the arrestee, Perea, got out of his car – see State v. Young, 135 Wn.2d 498 (1998) Aug 98 LED:02, which held that “seizure” occurs at the moment when the officer makes a show of authority commanding compliance, regardless of whether the suspect complies.)

State v. Porter, 102 Wn. App. 327 (Div. I, 2000) Nov 00 LED:05 (MV was not subject to “search incident” where arrest on warrant was made 300 feet from the vehicle, and the vehicle was not linked to the basis for the arrest)

State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) March 01 LED:04 (MV was not subject to “search incident” where arrest was made in tavern bathroom, even though, during “buy-bust” operation being conducted by police, suspect had only moments earlier gone into his vehicle that was located in the tavern parking lot 50-75 away)

State v. Bradley, 105 Wn. App. 30 (Div. I, 2001) June 01 LED:10 (MV was subject to “search incident” where suspect was leaning into his car as officers drove up; and where the suspect then walked away, leaving the driver's door "somewhat ajar," and was arrested 10-12 feet away from the car, after giving considerable resistance to arrest)

State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) Oct 01 LED:19 (MV was not subject to “search incident” where suspect was arrested as he came out of a store on foot and approached his parked vehicle; even though the arrest took place in the vicinity of the vehicle, the arrestee had no ready access to the vehicle or immediate control of the vehicle at or near the time of the arrest)

State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) – June 02 LED:19 (MV was subject to “search incident” where, after officer told arrestee -- while arrestee was sitting in arrestee’s MV -- that he was under arrest for DWLS, the suspect got out of the MV and locked it)

State v. Turner, 114 Wn. App. 653 (Div. II, 2003) March 03 LED:15 (MV was not subject to “search incident,” as testimony and findings established only that arrestee was “near” the open driver’s side door when the officer first saw arrestee urinating in public, and the testimony and findings did not establish how near the door the arrestee was when the officer first saw him or when the officer arrested him. **NOTE:** We question the reasonableness of the Turner Court’s splitting of semantical hairs over the word “near,” but, in light of Turner, Washington officers should always measure or at least try to estimate distances before writing their reports in cases of this nature. )

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## **BRIEF NOTE FROM THE 9<sup>TH</sup> CIRCUIT, U.S. COURT OF APPEALS**

**SPANISH MIRANDA WARNING BY OREGON OFFICER FAILED TO ADEQUATELY ADVISE OF RIGHT TO AN ATTORNEY** – In State v. Perez-Lopez, 348 F.3d 839 (9<sup>th</sup> Cir. 2003), the U.S. Court of Appeals for the 9<sup>th</sup> Circuit rules that a Spanish-language Miranda warning, advising defendant that, if he did not have enough money, he could solicit the court for an attorney, did not satisfy the Miranda requirement that a defendant be clearly advised of his right to have an attorney appointed to represent him prior to any questioning. Telling the arrestee only that he

could solicit the court for an attorney implied the possibility that an attorney would not be appointed even if he was indigent.

The defective part of the warning read in Spanish as follows:

“En caso de que no tenga dinero, Ud. tiene el derecho de solicitar de la corte un abogado.”

The Ninth Circuit explains that this warning translates into the following English passage, which, as noted above, falls short of conveying what Miranda requires:

“In case you don't have enough money or funds, you have the right to solicit the Court for an attorney.”

Result: Reversal of federal court conviction of Jose Alfredo Perez-Lopez for producing false identification documents.

**LED EDITORIAL NOTE: Because there are alternative ways to accurately communicate the Miranda warnings in the Spanish language, we will not attempt in this LED entry to provide a model Spanish-language Miranda warning.**

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

(1) **DRIVERS' LICENSE SUSPENSIONS (MOSTLY DWLS 3 OFFENSES) WITHOUT OPPORTUNITY FOR PRIOR HEARING HELD UNCONSTITUTIONAL UNDER FEDERAL DUE PROCESS ANALYSIS** -- In City of Redmond v. Moore, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2004 WL 1207870, the Washington State Supreme Court holds (in a 5-4 vote) that the statutory system under which the Department of Licensing suspends drivers' licenses automatically upon being notified by a court that a person has "failed to respond to a notice of traffic infraction, failed to appear a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice or traffic infraction or citation, other than for a standing, stopping, or parking violation" violates federal constitutional due process protections. The Moore Court holds that the statutory scheme that allows such suspension violates federal due process requirements because drivers are not afforded an administrative hearing prior to the suspension. See RCW 46.20.289; RCW 46.20.324(1).

Driving after one's license has been suspended for this reason is one way a person can commit the crime of DWLS 3. See RCW 46.20.342(c)(iv). The practical effect of the Moore decision is that it invalidates the majority of suspensions that would support an arrest for and charge of DWLS 3. Because the underlying license suspension is invalid, there is no criminal violation for these drivers.

In addition, there is a similar defect in the statutory system for some would-be DWLS 2 offenses. Although the Court's decision did not specifically address DWLS 2, many of the underlying suspensions also occur without opportunity for an administrative hearing, so many of these offenses may turn out to be unchargeable as well. There is not such a defect for DWLS 1. Also, it is generally believed that there is not such a defect for out-of-state suspensions.

A list of the types of DOL suspensions that are and are not given hearings can be found at: <http://www.dol.wa.gov/forms/551233.pdf>

Voting in Moore: Justice Sanders authored the majority opinion and was joined by Justices Madsen, Alexander, Chambers and Johnson. Justice Bridge authored the dissent and was joined by Justices Owens, Ireland and Fairhurst.

Result: Affirmance of King County District Court dismissals of DWLS 3 charges against Jason D. Wilson and Dean A. Moore.

Status: At LED deadline, it was the understanding of the LED editors that the City of Redmond planned to file a motion for reconsideration. If the motion is denied, it is possible -- because the Moore decision is grounded in federal constitutional protections -- that review could be sought in the United States Supreme Court.

**LED EDITORIAL NOTE**: Prosecutors, police agency legal advisors and other governmental attorneys are all conferring as they struggle to assess the ramifications of this decision. We believe that there is unanimity that officers should not cite or arrest for DWLS 3 offenses covered by the Moore decision. Beyond that, however, we will not try to describe the various views on a variety of questions, for instance, as to whether officers should make Terry stops for DWLS 3 and/or DWLS 2. Officers will need to follow the guidance of their local prosecutors and of their respective agency legal advisors. We expect to provide additional information on Moore ramifications in next month's LED, but we anticipate that it will likely be several years before anyone will know the full fall-out of the Moore decision (assuming the decision is not set aside on a motion for reconsideration).

**(2) 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 PUBLIC DISCLOSURE ACT** – In Hangartner v. City of Seattle, \_\_\_ Wn.2d \_\_\_, 90 P.3d 26 (2004), in a 5-4 opinion, the Washington State Supreme Court considers the following questions:

(1) [W]hether a request made under the public disclosure act (PDA) for all of an agency's documents is overbroad, thus excusing the agency from complying with the disclosure request [Answer: Yes], (2) whether the mere existence of public debate surrounding a transportation project is a "controversy," as defined in RCW 42.17.310(1)(j), rendering documents related to the project exempt from the PDA [Answer: No], and (3) whether documents covered by the attorney-client privilege are exempt from the PDA [Answer: Yes].

Hangartner involved two consolidated case, both relating to records requests for documents concerning the monorail project. The Court describes the facts of each public disclosure request in part as follows:

Citizens Against the Monorail v. The Elevated Transportation Company

Citizens Against the Monorail (Citizens) sent a PDA request to the Elevated Transportation Company (ETC) in an effort to obtain documents relating to a proposed initiative regarding the development of a new monorail line in Seattle, a matter that was on the November 5, 2002, ballot. In an effort to clarify which documents it was requesting, Citizens modified its request on September 26, 2002, "to ask for the opportunity to inspect *all* books, records, documents of every kind and the physical properties of the Elevated Transportation Company."

Although the ETC informed Citizens that the PDA requires it to produce only “identifiable” public records, it agreed to respond to the request but stated that it would “exercise its responsibility to review for exemptions.” Citizens never narrowed its request.

[Footnotes and citation to the record omitted]

### Hangartner v. City of Seattle

In early 2000, the City of Seattle (the City) announced that it would hold a public hearing on March 21, 2000, regarding Council Bill (CB) 113100. This proposed ordinance was designed to allow the City to issue permits for the “temporary structures and uses” necessary for the construction of a light rail transit system. On February 25, 2000, Rick Hangartner sent a PDA request to the City seeking the disclosure of documents relating to CB 113100. Although the City produced the bulk of the requested documents, it withheld three of the requested documents (hereinafter referred to as the light rail documents), asserting that they were exempt from disclosure under RCW 42.17.260(1) by an “other statute,” the attorney-client privilege set forth in RCW 5.60.060(2)(a), and the so-called “controversy exemption” contained at RCW 42.17.310(1)(j). At the time Hangartner made his request, there was a considerable amount of public debate over the development of the light rail line. The City was not, however, involved in any litigation concerning CB 113100 at that time.

[Footnotes and citation to the record omitted]

#### A. COURT’S ANALYSIS: Citizens’ Public Disclosure Request to ETC

Regarding Citizens’ request for *all* ETC documents, the Court explains:

The ETC contends that it is excused from producing the withheld documents because Citizens’ request was overbroad. Citizens responds that it identified the records it sought as “the CDs containing ETC’s most important electronic communications.”

While there is no official format for a valid PDA request, a party seeking documents must, at a minimum, provide notice that the request is made pursuant to the PDA and identify the documents with reasonable clarity to allow the agency to locate them. The PDA requires agencies to produce only “identifiable public records.” RCW 42.17.270. If a request is too vague, an agency can request a clarification. RCW 42.17.320. Here, it cannot be said that the request was vague. Rather, the issue is whether the request was overbroad.

. . . We agree with the Court of Appeals [in Wood v. Lowe, 102 Wn. App. 872, 878, (2000)] that a government agency need not comply with an overbroad request. We reach that determination because if a requesting party could meet the PDA’s requirement of identifying the desired documents by requesting *all* of an agency’s documents, the identification requirement would be essentially meaningless. We will not interpret a statute in a manner that leads to an absurd result. The PDA was enacted to allow the public access to government documents once agencies are allowed the opportunity to determine if the requested documents are exempt from disclosure; it was not enacted to facilitate unbridled searches of an agency’s property. We hold, therefore, as did the Court

of Appeals in Wood, that a proper request under the PDA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents.

...

When a request is invalid, the agency is excused from complying with it. The ETC was not obligated to comply with Citizens overbroad request, and the trial court erred in holding otherwise. We, therefore, find it unnecessary to consider the ETC's remaining arguments relating to the trial courts orders.

[Some citations omitted]

B. COURT'S ANALYSIS: Hangartner's Public Disclosure Request to the City of Seattle

Regarding the City's claim that requested documents are exempt because they are records relevant to a controversy, the Court explains:

The controversy exemption is contained within the PDA and exempts from disclosure those "[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.17.310(1)(j). In Dawson v. Daly, 120 Wn.2d 782, 791 (1993), we defined the phrase "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." We declined to define this phrase as a "prolonged public dispute, debate or contention" concluding that such a definition would violate the PDA's requirement that exemptions are construed narrowly.

The City contends that the light rail documents were created in reasonable anticipation of litigation because there was a "litigation-charged atmosphere" at the time they were created. The City has, however, failed to establish that there was any threat or reasonable anticipation of litigation concerning the enactment of CB 113100. Indeed, a "litigation-charged atmosphere" is more analogous to the definition of "relevant to a controversy" that we rejected in Dawson than it is to the definition we adopted in that case. We hold, therefore, that the trial court did not err in determining that the light rail documents were not exempt under RCW 42.17.310(1)(j).

[Some citations omitted]

Regarding the City's claim that the documents are exempt because they are covered by the attorney-client privilege, the Court explains in part:

Recognizing an exemption for documents protected by the attorney-client privilege will not, as the dissent contends, "swallow[ ] the PDA's purpose of allowing citizens a right to public records." The attorney-client privilege is a narrow privilege and protects only "communications and advice between attorney and client;" it does not protect documents that are prepared for some other purpose than communicating with an attorney. Thus, should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith. A finding of bad faith could cost the agency dearly since a requesting party is

“entitled” to an award of between \$5 and \$100 for each day that it was wrongfully denied the “right to inspect or copy [the requested] public record.” When deciding where, between \$5 and \$100 per day, the appropriate per day award should rest, the court must consider whether the agency claimed an exemption in bad faith.

“When statutory language is plain and unambiguous, the statute’s meaning must be derived from the wording of the statute itself.” This rule holds true, even if the “Legislature intended something else but failed to express it adequately.” In our view, RCW 42.17.260(1) is clear in including the statutory attorney-client privilege as an exemption. When the legislature amended the PDA to include the “other statute” exemption, it could have easily trumped the attorney-client privilege by excluding it from consideration as an “other statute.” LAWS of 1987, ch. 403, § 3. It did not do so. Although the dissent would have us rewrite the statute to include a requirement that the “other statute” “mesh[ ] with the PDA,” we will not look past the clear language of that statute. Instead, we consider both the PDA’s mandate that exemptions are interpreted narrowly and the statutory language used in creating the exemptions. Because RCW 5.60.060(2)(a) is unquestionably a statute other than RCW 42.17.260(6), 42.17.310, or 42.17.315 that prohibits the disclosure of certain records, documents that fall under RCW 5.60.060(2)(a) are exempt from the public disclosure act. Consequently, the trial court erred in ordering the City to produce its documents because the trial court never determined whether the documents were protected by the attorney-client privilege.

[Footnote and some citations omitted]

**Result:** Citizens – Reversal of King County Superior Court decision that ETC was obligated to comply with the public disclosure request; Hangartner – Affirmance of King County Superior Court decision that documents are not exempt as records relevant to a controversy; reversal of trial court decision that the attorney-client privilege does not apply to the public disclosure act, and remand to determine whether the documents are covered by the attorney-client privilege.

**Status:** A motion for reconsideration has been filed.

**LED EDITORIAL COMMENT:** Law enforcement agencies’ public disclosure officers should keep in mind that the Citizens’ request for *all* ETC documents was for every document the agency possessed. The Court might very well reach a different opinion given a different fact pattern. Similarly, agencies should bear in the mind the Court’s warning about claiming attorney-client privilege for documents prepared for a purpose other than attorney-client communication. As always, check with your public disclosure officer and legal advisor.

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## **WASHINGTON STATE COURT OF APPEALS**

**IN QUESTIONABLE RULING, COURT OF APPEALS HOLDS THAT INTERROGATION DURING AN INVESTIGATIVE STOP WAS “CUSTODIAL” FOR MIRANDA PURPOSES**

State v. France, \_\_\_ Wn. App. \_\_\_, 88 P.3d 1003 (2004)

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

On Sunday, April 7, 2002, at approximately 9:00 A.M., Pierce County Deputy Sheriff [Deputy A] was on duty and driving along Mountain Highway in Spanaway when he noticed France walking alongside the highway. [Deputy A] recognized France from several previous encounters. Two minutes after [Deputy A] passed France, a dispatcher sent a radio call that France was a suspect in a domestic violence incident. [Deputy A] turned his patrol car around and stopped France.

[Deputy A] asked France about the reported domestic violence and told France that he wanted to "clear it up" before he would let France leave. France then told [Deputy A] that he and the victim, Ellen Robinette, argued earlier that morning about whether France owed her money. France also told [Deputy A] that he was living with Robinette and that he knew there was a no-contact order prohibiting him from contacting Robinette. Deputy [B] then arrived but immediately left to speak with Robinette.

[Deputy B] went to Robinette's trailer and noticed that Robinette looked distressed and upset. Robinette told Fuller that on the previous Friday, France came to her trailer. Robinette asked France to leave, but he refused. The next day, on Saturday morning, Robinette asked France again to leave, but France again refused. Robinette left. She returned later Saturday afternoon and again asked France to leave. He refused. The next morning, Robinette asked France for the fourth time to leave and told him that she would call the police if he did not. France threatened to "beat her up" if she called the police. Robinette said she was going to call the police. France then slapped her and left immediately afterward.

[Deputy B] radioed [Deputy A] that Robinette's statement provided probable cause to arrest France. [Deputy A] arrested France and then read him his Miranda rights. France invoked his rights and did not speak to police further about this incident.

On May 7, 2002, the State charged France with one count of violating a no-contact order and one count of fourth degree assault. During the CrR 3.5 hearing, France argued that his first statement about his knowledge of the no-contact order should be suppressed because it was made during a custodial interrogation before [Deputy A] read France his Miranda rights. Following a CrR 3.5 hearing, the trial court ruled that the statements were made during a preliminary investigatory stop and, therefore, no Miranda readings were required and the statement was admissible.

The jury convicted France on both counts. The jury also returned a special verdict, finding that the no-contact order violation was an assault, which raises the no-contact violation conviction from a misdemeanor to a felony.

ISSUE AND RULING: Do the circumstances of questioning support the conclusion that France was "in police custody of the degree associated with a formal arrest" and therefore in "custody" for Miranda purposes? (ANSWER: Yes)

Result: Reversal of Pierce County Superior Court conviction of Duff Richard France for violating a no-contact order; case remanded for possible re-trial on no-contact charge (France's conviction for fourth degree assault affirmed under analysis not addressed in this LED entry).

STATUS: On May 17, 2004, the Pierce County Prosecutor's Office filed a Motion for Reconsideration. At deadline for the July 2004 LED, the motion was still pending.

ANALYSIS: (Excerpted from Court of Appeals opinion)

France claims that his statements to [Deputy A] were part of a custodial interrogation and that they should be suppressed because [Deputy A] had not read France his Miranda rights. The trial court found that when [Deputy A] first initiated contact with France, he was not in custody and that France's statements were part of [Deputy A]'s preliminary investigation. Thus, the trial court found that France's statements were admissible.

The Fifth Amendment right to Miranda warnings attach only when a custodial interrogation begins. An investigative encounter with a suspect based on reasonable suspicion not amounting to probable cause does not require Miranda warnings. State v. Huynh, 49 Wn. App. 192 (Div. I, 1987).

We review the trial court's determination of a custodial interrogation de novo [independently as a matter of law]. State v. Solomon, 114 Wn. App. 781 (Div. III, 2002) **June 03 LED:10**. We apply an objective standard as to whether a reasonable person in the same situation would perceive that he was free to leave. State v. Cunningham, 116 Wn. App. 219 (Div. III, 2003) **June 03 LED:05**; State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) **May 95 LED:10**. The question is not whether a person actually believed he was free to leave, but whether "such a person would believe he was in police custody of the degree associated with formal arrest." In contrast, an investigative encounter is not "inherently coercive" and Miranda warnings are unnecessary. Cunningham, 116 Wn. App. at 228. An investigatory stop is brief and presumptively temporary, less "police dominated," and does not lead to deceptive interrogation tactics. Cunningham, 116 Wn. App. at 228 (citing State v. Walton, 67 Wn. App. 127 (Div. I, 1992) **Jan 93 LED:09**).

Here, the dispatcher advised [Deputy A] that France was a "suspect" in a specified domestic violence incident. The dispatcher gave France's name, and [Deputy A] recognized France as someone he had just seen walking along the side of the road. [Deputy A] stopped France and told him that there was an alleged domestic dispute and that they "needed to clear it up" before France would be free to leave. [*Court's footnote: [Deputy A] testified as follows: Q What did you say specifically? A I told him that there was an alleged domestic dispute between him and Ms. Robinette and we needed to clear it up before I let him proceed or go on or go free or what.*] France then admitted being at Robinette's trailer (a violation of the order), where he argued with Robinette and then left. [Deputy A] then asked France whether he was allowed at the Robinette trailer (a question designed to elicit evidence of France's knowledge of the no-contact order) and France said that "he knew about the restraining order, [that] it was still in existence, and that [France] had been living there for the last year." More importantly, however, no reasonable person in that same situation would have believed that they would have been allowed to leave because [Deputy A] had stated that he would not let France leave until the matter had been cleared up. In addition, [Deputy A] did not ask general or open-ended questions regarding France's presence on the roadside. Instead he asked questions designed to obtain an admission from France that he knew about the no-contact order, an element of the crime charged that is most clearly established by a defendant's admission. When [Deputy A] announced that he was formally arresting France and read him Miranda warnings, France invoked his rights.

[Some citations omitted]

**LED EDITORIAL COMMENT:** This was a disconcerting decision, in that the Court of Appeals correctly described the Miranda “custody” test -- i.e., asking whether the circumstances constituted the functional equivalent of arrest -- but the Court then held that direct questioning during a Terry stop constituted custodial interrogation. Legions of published decisions from the Washington appellate courts and from courts in other jurisdictions have held such questioning to be non-custodial for Miranda purposes. Unless and until the France opinion is withdrawn or overruled, however, Washington officers may want to err on the side of Mirandizing in situations that that even border on “custodial.” Another thought is that officers could expressly tell the suspect in these circumstances that, while the non-Mirandized suspect is not free to go, the suspect is not under arrest and is not required to answer the questions. As always, officers are urged to consult their local legal advisors and prosecutors.

**FERRIER WARNINGS ARE NOT REQUIRED FOR NON-CUSTODIAL REQUEST AT ROADSIDE FOR CONSENT TO SEARCH PURSE**

State v. Tagas, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2004 WL 1194483 (Div. I, 2004)

Facts and Proceedings below:

Officer Blessum stopped a pick-up truck for erratic driving on the freeway when she saw it swerving in its own lane and making unnecessary lane changes. The driver agreed to perform field sobriety tests. The field sobriety tests indicated that the driver was not under the influence of alcohol. The driver said he suffered from multiple sclerosis, which affects his balance. Although Officer Blessum decided not to cite the driver, she believed he was impaired and would not allow him to continue to drive. Nor would she allow Kristin Tagas, the only passenger in the truck, to drive the truck away, because Tagas did not have a valid license with her. Officer Blessum offered to take Burkus and Tagas to a nearby restaurant so that they could call someone for a ride. They agreed, and got into the back of the patrol car.

Tagas brought her purse with her into the patrol car. For officer safety purposes, Officer Blessum asked Tagas to consent to a search of the purse.

According to Officer Blessum's testimony at the suppression hearing, if Tagas had refused, she would have allowed Tagas to put the purse either in the trunk of the patrol car or in the front seat with Officer Blessum. But the officer did not inform Tagas that these other options were available if she refused to consent to the search. Tagas consented. Upon opening the purse, Officer Blessum recognized drug paraphernalia. She removed Tagas from the patrol car and placed her under arrest for possession of the paraphernalia. At the station, police conducted an inventory search of the purse and found crack cocaine in a crumpled up piece of paper.

The State charged Tagas with one count of possession of cocaine. Tagas challenged the legality of the search of her purse. The trial court ruled that the search was justified by consent, and denied the motion to suppress the fruits of the search. Tagas then stipulated to the police reports and was found guilty in a bench trial.

ISSUE AND RULING: Was the officer required in this roadside, non-custodial situation to give Ferrier warnings, including an express warning of the right to refuse consent, in requesting consent to search the defendant's purse? (ANSWER: No)

Result: Affirmance of Snohomish County Superior Court conviction of Kristin Tagas for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Subject only to a few exceptions, warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution and under article I, section 7 of Washington's Constitution. A search that is conducted pursuant to consent is one of these exceptions, but only if the consent is voluntary. Whether consent was voluntary normally is a question of fact to be determined from the totality of the circumstances.

When the subject of the search is not in custody and the question is whether consent is voluntary, knowledge of the right to refuse consent is not a prerequisite of voluntary consent. Tagas does not argue that the search was invalid under the totality of the circumstances. Rather, Tagas argues there is a different test under the state constitution.

A party who seeks to establish that the state constitution provides greater protection than the United States Constitution must engage in the six-factor analysis set forth in State v. Gunwall, 106 Wn.2d 54 (1986). A party is relieved of performing a Gunwall analysis only when an analysis in a previous case has determined that a 'provision of the state constitution independently applies to a specific legal issue'. State v. Ladson, 138 Wn.2d 343 (1999). Tagas, who has not provided a Gunwall analysis, argues that Ferrier has already determined that greater protection is available under the State Constitution when the issue is the validity of a consent to a search. Ferrier holds that under article 1, section 7, police must advise a homeowner of the right to refuse consent when using the "knock and talk" method of investigation. State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02.**

Key to the Gunwall analysis in Ferrier was a concern about warrantless searches of a private residence. The appellant satisfied the need for an independent analysis of Gunwall factor four (pre-existing state law) and factor six (the privacy interest at issue is a matter of particular state or local concern) by showing that the closer an intrusion is to a home, the greater the protection under Washington case law. The Court was explicit that the privacy interest at issue was privacy in the home, not the voluntariness of consent:

Ferrier does not argue that the voluntary standard of consent is unconstitutional under article I, section 7. The core of her argument is that the police here violated her expectation of privacy in her home because they conducted the knock and talk in order to search her home, thereby avoiding the general requirement that a search warrant be obtained.

Indeed, Ferrier argues that the violation of her privacy right was one of the factors that made her eventual consent involuntary.

Ferrier, 136 Wn.2d at 114.

In this case, Tagas was using a public highway; her expectation of privacy in her home is not at issue. And Officer Blessum's request to search the purse was not designed to avoid the necessity of obtaining a search warrant; the search was a measure to protect officer safety. Under these circumstances it is difficult to conclude that Ferrier relieves Tagas of the obligation to present an independent Gunwall analysis, at least as to Gunwall factors four and six.

But even assuming her argument is reviewable, it fails. The Supreme Court has expressly limited the scope of the Ferrier warning to 'knock and talk' procedures. For example, where entry is sought to question a resident rather than to search the home, Ferrier does not require police to inform the owner of the right to refuse consent. State v. Khounvichai, 149 Wn.2d 557 (2003) **Aug 03 LED:06**. When the state is not employing the "knock and talk" procedure, the court employs a 'totality of circumstances' test to determine whether consent to search is valid. State v. Bustamante-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02**; State v. Thang, 145 Wn.2d 630 **May 02 LED:05**.

Ferrier, in short, does not require warnings in every case where police obtain search authority by consent. State v. Williams, 142 Wn.2d 17 (2000) **Dec 99 LED:14**.

We conclude that under article 1, section 7, the validity of Tagas' consent to the search of her purse did not depend on the officer advising her of her right to refuse consent to search. The court did not err in applying the totality of the circumstances test and concluding the officer obtained a valid consent.

**LED EDITORIAL COMMENT:** Readers may note in the Court's factual description (set forth above) that the officer searched Ms. Tagas incident to an arrest for "possession of drug paraphernalia." No issue was raised in the case regarding the lawfulness of the arrest for possession of drug paraphernalia. We have noted in several recent LEDs that there is no crime under RCW 69.50.412 of mere "possession of drug paraphernalia with intent to use." See, for example, State v. O'Neill, 148 Wn.2d 564 (2003) April 03 LED:03; State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) Nov 02 LED:05. However, we have also noted in the LED that cities and counties are free to adopt local ordinances making criminal the mere possession of drug paraphernalia with intent to use. We understand that Snohomish County has an ordinance to this effect, so this likely explains why there was no challenge in Tagas to the lawfulness of the arrest for this offense.

## **SPITTING IN PATROL CAR IS NOT MALICIOUS MISCHIEF IN THE SECOND DEGREE**

State v. Hernandez, 120 Wn. App. 390 (Div. III, 2004)

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

On a Monday in November 2002, Officer Joseph Harris contacted Mr. Hernandez at the Quincy alternative school to discuss Mr. Hernandez's involvement in the theft of a school television the previous Friday. Officer Harris took Mr. Hernandez outside to his patrol car and explained that he was being detained for questioning about the theft. Mr. Hernandez was belligerent and uncooperative when Officer Harris handcuffed him and placed him in the back seat of the patrol car. On the trip to the station, Mr. Hernandez screamed, cursed, and spit several times--twice on the shield partition between the front and back seats, and twice on the floor of the car. Officer Harris told him to stop or he would be charged

with malicious mischief. After he delivered Mr. Hernandez to the Grant County juvenile detention facility, Officer Harris spent about 15 minutes cleaning the back seat of his patrol car with disinfectant.

Mr. Hernandez was charged by information with one count of second degree theft . . . one count of second degree malicious mischief . . . and one count of resisting arrest. . . He was adjudged guilty of the theft and malicious mischief charges and was sentenced to 15 to 36 weeks in a juvenile rehabilitation facility.

ISSUE AND RULING: Was evidence of the defendant's spitting in the patrol car sufficient to support a finding that defendant knowingly and maliciously physically damaged or tampered with the police car, and that he consequently created a substantial risk of interruption or impairment of its service to the public, so as to support his conviction for second degree malicious mischief? (ANSWER: No)

Result: Reversal of Grant County Superior Court conviction of Roberto Carlos Hernandez for second degree malicious mischief. NOTE: Hernandez did not appeal his convictions for second degree theft and resisting arrest.

ANALYSIS: (Excerpted from Court of Appeals opinion)

To prove second degree malicious mischief relevant to the charge against Mr. Hernandez, the State must show that the defendant knowingly and maliciously:

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.080(1). Maliciousness may be inferred from an act wrongfully done without just cause or excuse. RCW 9A.04.110(12).

Mr. Hernandez contends the State failed to prove that he tampered with the police car or physically damaged it sufficiently to support a charge of malicious mischief. The question here is whether the evidence shows that Mr. Hernandez (1) knowingly and maliciously (2) physically damaged or tampered with the police car and (3) thereby created a substantial risk of interruption or impairment of the police officer's service to the public. RCW 9A.48.080(1)(b).

Both parties cite State v. Gardner, 104 Wn. App. 541 (2001) **April 01 LED:17**, one of the few cases to examine the second degree malicious mischief statute. In Gardner, the defendant accessed his foster brother's police radio. He pressed the transmitting button and produced disruptive clicking sounds that briefly interfered with the police communication system. The trial court and Division Two on appeal agreed that the physical act of pushing the button was sufficient to establish the element of "physically damaging or tampering" required by the statute. In doing so, Division Two adopted a dictionary definition of tampering: interfering in a harmful way.

Under the plain terms of RCW 9A.48.080(1), we find insufficient evidence that Mr. Hernandez knowingly and maliciously damaged or tampered with the police vehicle or that he consequently created a substantial risk of interruption or

impairment of its service to the public. Unlike the defendant in Gardner, Mr. Hernandez did not disrupt emergency services by physically manipulating a device crucial to those services. His actions simply did not rise to the level of knowing and malicious creation of a substantial risk of interruption or impairment of service to the public. Accordingly, we find that the evidence is insufficient to establish second degree malicious mischief beyond a reasonable doubt.

**HIT-AND-RUN: “INVOLVED IN AN ACCIDENT” PROVEN DESPITE LACK OF EVIDENCE OF ANY VEHICLE CONTACT; “KNOWLEDGE” OF ACCIDENT PROVEN AS WELL**

State v. Perebeynos, \_\_\_ Wn. App. \_\_\_, 87 P.3d 1216 (Div. I, 2004)

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

On July 11, 2001, Ivan Perebeynos was driving his car northbound on Interstate 5 in heavy traffic. Victor Shuparski, Perebeynos' coworker, was coincidentally driving behind him on the highway. He noticed that Perebeynos was traveling at approximately the same speed or slightly faster than the flow of traffic and switching lanes frequently. In the lane to Perebeynos' right, Betty Stacey was driving her car with her granddaughter in the backseat.

Shuparski said that Perebeynos initiated a lane change near milepost 147. He testified that it appeared as if Stacey was in Perebeynos' "blind spot." Perebeynos' car never left its lane of travel, and upon seeing Stacey's car, Perebeynos immediately corrected his vehicle position back to the center of his lane. In an apparent reaction to Perebeynos' attempted lane change, Stacey suddenly moved her car to the right, hitting a semi-truck traveling in the far right lane. After striking the truck, Stacey hit another vehicle, crossed in front of Perebeynos' car, passed through all five lanes of traffic, and landed upside down on the median near the southbound lanes of Interstate 5.

Perebeynos continued driving toward his workplace. Shuparski testified that he saw him driving "a little bit chaotic[ally]" after the accident, and he saw Perebeynos exit the freeway near their workplace. When he arrived at work, Shuparski saw Perebeynos in the parking lot. Perebeynos appeared shocked, shaky, and his voice quivered. Shuparski told him that he should return to the accident scene and that he thought someone was likely injured. Shuparski did not suggest at that time that he believed Perebeynos caused the accident, nor did Perebeynos suggest that he believed he did. Perebeynos immediately spoke with his work supervisor, telling him that he witnessed a bad accident and wanted to return to the scene. He left work, returning two hours later driving a different car. He told Shuparski that everyone involved in the accident was okay. There is no evidence that Perebeynos actually returned to the scene of the accident.

ISSUES AND RULINGS: 1) Was there sufficient evidence that defendant was “involved in an accident”, despite the absence of any evidence of vehicle contact, to support his conviction under the felony hit-and-run statute, RCW 46.52.010? (ANSWER: Yes); 2) Was there sufficient evidence to prove the “knowledge” element of RCW 46.52.010? (ANSWER: Yes)

Result: Affirmance of King County Superior Court convictions of Ivan Perebeynos for felony hit-and-run (one count) and negligent driving in the second degree (one count). (Note: The sufficiency of the negligent driving evidence was addressed in an unpublished part of the Court of Appeals' opinion and is not addressed in this LED entry.)

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Sufficiency of the evidence: "involved in an accident"

RCW 46.52.020(1) provides:

A driver of any vehicle *involved in an accident* resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

To convict a person of felony hit and run, the State must also prove beyond a reasonable doubt that the defendant knew he was involved in an accident.

Perebeynos argues that there is insufficient evidence supporting the trial court's finding that he was "involved in an accident" under RCW 46.52.020. We disagree. The record shows that Perebeynos was driving his car on Interstate 5 in dense traffic, was driving slightly faster than the rest of traffic, and changing lanes frequently. Shuparski testified that when Perebeynos initiated a lane change, although he never left his lane, his movement *appeared to trigger* Stacey's reaction to "swerve[ ] to the right very rapidly" and hit the semi-truck in the far right lane. Perebeynos aborted the lane change, moving back to the center of his lane in less than "half a second." After hitting the truck, the victim's car crossed in front of Perebeynos' car, traversed the four lanes of traffic, and stopped in a construction zone near southbound traffic. Viewing it in a light most favorable to the State, there is sufficient evidence that Perebeynos was, at the very least, a participant in the events leading up to the accident.

We reject Perebeynos' argument that he could not have been "involved in an accident" because he made no contact with another vehicle, person, or property. This court rejected that argument in State v. Hughes, 80 Wn. App 196 (Div. III, 1995) **April 96 LED:18**. Hughes was drag racing when his opponent's car went off the road and crashed. He argued that he was not required to stop and assist because he could not be "involved in the accident" when he did not make contact with his opponent, his car, or other property. After examining the hit-and-run statute, we concluded that to interpret the statute so narrowly would absolve a driver of his duty to stop, identify, and render aid even if he forced another driver off the road or caused an accident between two other cars by passing or turning unsafely. We rejected this result as absurd, holding that a driver can be "involved in an accident" without making express contact with another vehicle, person, or property. We also noted that Hughes' proposed interpretation did not further the rationale underlying the hit-and-run statute, which is to facilitate investigation of accidents, identify those responsible, and provide immediate assistance to those injured. Although the facts in Hughes are quite different than those in this case, the statutory construction and policy concerns considered in that case are not different and apply equally here. We accordingly reject Perebeynos' argument and hold that Hughes applies to these facts as well.

We also reject Perebeynos' argument that because he did not violate any rules of the road and never left his lane of travel, he cannot have been "involved in an accident." There is no requirement under the hit-and-run statute or in Washington cases interpreting it that suggests a person must proximately cause a collision or engage in illegal behavior to be "involved in an accident." First, causation is not an element of felony hit and run. The statute merely requires that a defendant be "involved," which "is an imprecise term incorporating such concepts as being part of, contributing to and being a participant." Second, the statute does not require that a defendant be engaging in illegal or reckless behavior at the time of the accident to be bound by the statutory duty to stop. Although the cases in Washington and other jurisdictions with similar statutes have typically involved illegal or reckless behavior, Perebeynos cites no authority supporting his assertion that felony hit and run is *limited* to such behavior. We rejected limiting the phrase "involved in an accident" when we held in Hughes that contact was not required. We explained that the term "involved" is imprecise, and the facts in a particular case are essential to determining whether a person is "involved in an accident." A court may consider whether the defendant engaged in reckless or illegal behavior when an accident occurred, but that factor does not determine whether a person was "involved" in the accident. Finally, reading into the statute a requirement that a defendant engage in illegal or reckless conduct as a predicate to imposing a duty to stop would truncate the hit-and-run statute in a way that is contrary to its underlying purpose. That purpose is not only " 'to prevent people from avoiding liability for their acts by leaving the scene without identifying themselves,' " but more importantly " 'to provide assistance for injured persons as soon as possible.' "

2) "Knowledge"

A person acts with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which are described by a statute defining the offense.

Knowledge may be inferred from circumstantial evidence. If information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact may infer that the respondent had knowledge. An appellate court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences.

Perebeynos argues that there is insufficient evidence supporting the trial court's finding that he "knew" he was "involved in an accident" under RCW 46.52.020. But there is evidence in the record of Perebeynos' behavior both during and after the accident from which the trial court reasonably inferred that Perebeynos knew he was "involved in an accident." Shuparski described Perebeynos' actions during the accident. He stated,

[H]e was just changing ... lane[s] ... to the right. And then, of course, he saw [Stacey] jumping away from him because they were just about even. And then he swerved back to [the center of] his lane.

It was immediately after Perebeynos aborted the lane change that Stacey, having lost control of the car, skidded in front of Perebeynos' car. A reasonable person in these circumstances would have known that Stacey was reacting to Perebeynos' attempted lane change and that he was "involved in the accident." The defendant's reaction to the events after the accident also indicates he knew he was "involved in an accident." Shuparski testified that Perebeynos was driving "chaotically" from the scene to work. When he spoke with Shuparski at work after the accident, he appeared nervous, shaky, and pale. At Shuparski's urging, he told his shift supervisor that he witnessed an accident and asked permission to leave work. There is no evidence that Perebeynos encouraged Shuparski, who also witnessed the accident, to return to the scene with him. He then returned to work several hours later in a different car, and he told Shuparski that everyone involved in the accident was okay. That was clearly not true. Although Perebeynos' behavior during and after the accident could indicate that he was simply shaken after witnessing a serious crash, we must view the evidence in the light most favorable to the State. And in this case, that evidence supports an inference that Perebeynos should have known and actually did know that he was "involved" in the accident.

[Some citations and footnotes omitted]

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

**(1) 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** – In State v. Aase, \_\_\_ Wn. App. \_\_\_, 89 P.3d 721 (Div. II, 2004), the Court of Appeals rejects defendant's challenge to the timing of the detective in showing him a copy of a search warrant during execution of the warrant.

The Aase Court rules that substantial evidence in the record supports the proposition that the lead detective showed the defendant a copy of the search warrant several minutes into the search, shortly after the area had been secured. Any delay in handing the warrant to the defendant was not prejudicial to him, the Aase Court notes.

Result: Affirmance of Kitsap County Superior Court conviction of Christian Martin Aase for possession of methamphetamine.

**(2) VIOLATION OF PROTECTION ORDER CAN BE PREDICATE "CRIME AGAINST A PERSON" UNDER RESIDENTIAL BURGLARY STATUTE** – In State v. Stinton, \_\_\_ Wn. App. \_\_\_, 89 P.3d 717 (Div. II, 2004), the Court of Appeals reverses a superior court dismissal order. The Stinton Court holds that defendant's alleged violation of a protection order provision restraining him from harassing contact with the person protected under the order could serve as the predicate "crime against a person" under residential burglary statute (RCW 9A.52.025). The Court of Appeals expressly rejects defendant's claim that, under this analysis, the State could elevate every trespass to burglary. The Court explains that the violation of a protection order is a crime of domestic violence and harassment, and evidence of the defendant's harassing and threatening of the victim in this case was separate and distinct from evidence of defendant's unlawful entry in violation of another provision of the protection order.

Result: Reversal of Cowlitz County Superior Court dismissal order; case remanded for prosecution of residential burglary charge against Matthew Allen Stinton.

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**NEXT MONTH**

The August 2004 **LED** will include entries on (1) State v. Rankin, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2004 WL 1274490 (June 10, 2004), a 6-3 decision of the Washington Supreme Court holding that officers may not routinely request voluntary showing of identification from non-violator passengers in vehicles stopped for traffic violations; and (2) Yarborough v. Alvarado, 124 S.Ct. 2140, (June 1, 2004), a habeas relief case in which the U.S. Supreme Court held that a California appellate court did not act unreasonably in its application of established federal law in finding "non-custodial" status for Miranda purposes as to a 17-year-old suspect being questioned at the police station (among other things, the Alvarado Court addresses questions regarding the extent to which a suspect's chronological age and past experience with law enforcement must be factored into the Miranda "custody" determination).

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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.supremecourt.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.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://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/ago>].

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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](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the **LED** should be directed to [[ledemail@cjtc.state.wa.us](mailto: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>].