Law Enforcement Digest

March 2004

HONOR ROLL

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UNITED STATES SUPREME COURT

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)

LED CAUTIONARY EDITORIAL NOTE: Our comments at the conclusion of this LED entry suggest that it is possible that, because the Washington appellate courts have interpreted the privacy protections of the Washington constitution (article 1, section 7) as placing greater restrictions on police in some circumstances, the Washington courts might rule differently on the facts of this case than did the U.S. Supreme Court under the Fourth Amendment.

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

> On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a 70-year-old bicyclist. The motorist drove off without identifying himself. About one week later at about the same time of night and at about the same place, local police set up a highway checkpoint designed to obtain more information about the accident from the motoring public.
>
> Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer. The flyer said "ALERT ... FATAL HIT & RUN ACCIDENT" and requested "assistance in identifying the vehicle and driver in this accident which killed a 70 year old bicyclist."
>
> Robert Lidster, the respondent, drove a minivan toward the checkpoint. As he approached the checkpoint, his van swerved, nearly hitting one of the officers. The officer smelled alcohol on Lidster's breath. He directed Lidster to a side street where another officer administered a sobriety test and then arrested Lidster. Lidster was tried and convicted in Illinois state court of driving under the influence of alcohol.
>
> Lidster challenged the lawfulness of his arrest and conviction on the ground that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment. The trial court rejected that challenge. But an Illinois appellate court reached the opposite conclusion. The Illinois Supreme Court agreed with the appellate court. It held (by a vote of 4 to 3) that our decision in Indianapolis v. Edmond, 531 U.S. 32 (2000) **Jan 01 LED:02**, required it to find the stop unconstitutional.

ISSUE AND RULING: Was it reasonable under the Fourth Amendment of the U.S. Constitution for police to set up a roadblock checkpoint at which all motorists were systematically stopped so that police: 1) could ask them for information regarding a recent fatal hit-and-run motor vehicle accident on that highway, and 2) hand each driver a flyer requesting assistance in identifying the vehicle and the driver involved in the accident? (ANSWER: Yes, because the public concern was grave, the stop advanced the concern, and the stop interfered only minimally with the liberty of the people stopped).

Result: Reversal of Illinois Supreme Court decision that overturned Lidster's DUI conviction.

ANALYSIS BY MAJORITY:

The majority opinion for the Supreme Court explains that the Court's 2000 decision in Edmond does not govern the outcome of this case. In Edmond, the Court held that, absent special circumstances, the Fourth Amendment forbids police from making stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. Specifically, the checkpoint in Edmond was designed to ferret out drug crimes committed by the motorists themselves. Here, the Lidster majority explains, the stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask the occupants, as members of the public, for help in providing information about a crime in all likelihood committed by others. Edmond's language, as well as its context, makes clear that an information-seeking stop's constitutionality was not then before the Court.

The Lidster majority further explains that the Fourth Amendment does not require courts to apply an Edmond-type rule of automatic unconstitutionality to such stops. The fact that checkpoints normally lack individualized suspicion cannot by itself determine the constitutional outcome, as the Fourth Amendment does not treat a motorist's car as his castle. Citing its 1990 decision in the Sitz DUI roadblock case, the Lidster majority notes that special law enforcement concerns will sometimes justify highway stops without individualized suspicion. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) **Aug 90 LED:08**.

The Lidster majority next asserts that the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play, and an information-seeking stop is not the kind of event that involves suspicion, or lack thereof, of the relevant individual. In addition, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive, since they are likely brief, the questions asked are not designed to elicit self-incriminating information, and citizens will often react positively when police ask for help. The law also ordinarily permits police to seek the public's voluntary cooperation in a criminal investigation, the Lidster majority says. That the importance of soliciting the public's assistance is offset to some degree by the need to stop a motorist -- which amounts to a "seizure" in Fourth Amendment terms -- is not important enough to justify an Edmond-type rule here.

Finally, the Lidster majority concludes, such a rule is not needed to prevent an unreasonable proliferation of police checkpoints. Practical considerations of limited police resources and community hostility to traffic tie-ups seem likely to inhibit any such proliferation, (the majority declares) and the Fourth Amendment's normal insistence that the stop be reasonable in context will still provide an important legal limitation on checkpoint use.

The Lidster majority therefore holds that the checkpoint stop was constitutional. In judging its reasonableness, majority says that the Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." The relevant public concern was grave, as the police were investigating a crime that had resulted in a human death, and the stop advanced this

concern to a significant degree given its timing and location. Most importantly, the Lidster majority says, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Finally, the Lidster majority explains that, viewed objectively, each stop required only a brief wait in line and contact with police for only a few seconds. Viewed subjectively, the systematic contact provided little reason for anxiety or alarm, and there is no allegation that the police acted in a discriminatory or otherwise unlawful manner.

Concurring/Dissenting Opinion:

Justice Stevens writes a separate opinion that is joined by Justices Ginsburg and Souter. They agree that this was a special kind of roadblock case that must be analyzed on its special facts (not rejected automatically per the Illinois Supreme Court decision). Justice Stevens argues, however, that the U.S. Supreme Court should have remanded the case to the Illinois courts for those lower courts to analyze the reasonableness of the roadblock, taking into account the following concerns, among other things:

> [T]he likelihood that questioning a random sample of drivers will yield useful information about a hit-and-run accident that occurred a week earlier is speculative at best. To be sure, the sample in this case was not entirely random: The record reveals that the police knew that the victim had finished work at the Post Office shortly before the fatal accident, and hoped that other employees of the Post Office or the nearby industrial park might work on similar schedules and, thus, have been driving the same route at the same time the previous week. That is a plausible theory, but there is no evidence in the record that the police did anything to confirm that the nearby businesses in fact had shift changes at or near midnight on Saturdays, or that they had reason to believe that a roadblock would be more effective than, say, placing flyers on the employees' cars.

LED EDITORIAL COMMENTS: In light of past Washington Supreme Court decisions placing tighter restrictions on roadblocks under the Washington constitution (article 1, section 7) than have been imposed by the U.S. Supreme Court under the federal constitution's Fourth Amendment, we question whether a roadblock set up one week after an accident (no matter how serious the accident) would be upheld by our Washington State Supreme Court.

Although there is no Washington decision directly on point factually, we doubt that the Washington appellate courts would uphold the roadblock check point that was conducted in this case. We think that our appellate courts would find that the intrusion on liberty and privacy here were too great when weighed in the balance against the relatively small chance (as assessed by our Washington judiciary) that a motorist passing the checkpoint one week after the fatal accident would provide information helpful to the investigation.

The leading Washington case on checkpoints/roadblocks is Seattle v. Mesiani, 110 Wn.2d 454 (1988), a case holding that a City of Seattle DUI checkpoint program violated article 1, section 7 of the Washington constitution. An alternative rationale for the ruling in Mesiani was that the checkpoint program violated the Fourth Amendment of the U.S. Constitution. The U.S. Supreme Court implicitly overruled that Fourth Amendment holding when the U.S. Supreme Court subsequently upheld a similar DUI checkpoint program in Michigan v. Sitz, 496 U.S. 444 (1990). The Fourth Amendment analysis by the U.S. Supreme Court in Sitz conflicts with the Fourth Amendment analysis by the Washington Supreme Court in Mesiani so what remains of the Mesiani decision is its holding against DUI checkpoints under article 1, section 7 of the Washington constitution.

While we think that the Mesiani decision left a bit of room for the Washington Legislature to authorize carefully limited and carefully justified DUI checkpoint programs (something the Washington Legislature has to date declined to do), we think that non-statutory, discretionary checkpoints or roadblocks in Washington would be upheld only if used under particularly exigent circumstances.

Such exigent circumstances were presented, we believe, in State v. Silvernail, 25 Wn. App. 185 (Div. I, 1980). In Silvernail, police got a call from a victim who reported that he had just been robbed in a home invasion armed robbery. The victim told police that the suspects had inadvertently revealed during the robbery that, in making their escape, the suspects planned to take a particular scheduled ferry just about to depart Vashon Island for West Seattle. In those special circumstances, the Court of Appeals held in its 1980 Silvernail decision that police were justified in briefly stopping all disembarking cars, and questioning the occupants of those cars, disembarking that particular ferry when the ferry arrived in West Seattle. We believe that the Washington appellate courts would uphold Silvernail if similar exigent circumstances were to arise again.

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)

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

> On February 24, 2000, after a grand jury indicted petitioner for conspiracy to distribute methamphetamine, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister went to petitioner's home in Lincoln, Nebraska, to arrest him. The officers knocked on petitioner's door and, when petitioner answered, identified themselves and asked if they could come in. Petitioner invited the officers into his living room. **[References by the Supreme Court to "petitioner" are to defendant Fellers. -- LED Eds.]**
>
> The officers advised petitioner they had come to discuss his involvement in methamphetamine distribution. They informed petitioner that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. The officers told petitioner that the indictment referred to his involvement with certain individuals, four of whom they named. Petitioner then told the officers that he knew the four people and had used methamphetamine during his association with them.
>
> After spending about 15 minutes in petitioner's home, the officers transported petitioner to the Lancaster County jail. There, the officers advised petitioner for the first time of his rights under Miranda v. Arizona and Patterson v. Illinois, 487 U.S. 285 (1988). Petitioner and the two officers signed a Miranda waiver form, and petitioner then reiterated the inculpatory statements he had made earlier, admitted to having associated with other individuals implicated in the charged conspiracy, and admitted to having loaned money to one of them even though he suspected that she was involved in drug transactions.
>
> Before trial, petitioner moved to suppress the inculpatory statements he made at his home and at the county jail. A Magistrate Judge conducted a hearing and recommended that the statements petitioner made at his home be suppressed because the officers had not informed petitioner of his Miranda rights. The

Magistrate Judge found that petitioner made the statements in response to the officers' "implici[t] questions," noting that the officers had told petitioner that the purpose of their visit was to discuss his use and distribution of methamphetamine. The Magistrate Judge further recommended that portions of petitioner's jailhouse statement be suppressed as fruits of the prior failure to provide Miranda warnings.

The District Court suppressed the "unwarned" statements petitioner made at his house but admitted petitioner's jailhouse statements pursuant to Oregon v. Elstad, 470 U.S. 298 (1985), concluding petitioner had knowingly and voluntarily waived his Miranda rights before making the statements.

Following a jury trial at which petitioner's jailhouse statements were admitted into evidence, petitioner was convicted of conspiring to possess with intent to distribute methamphetamine. Petitioner appealed, arguing that his jailhouse statements should have been suppressed as fruits of the statements obtained at his home in violation of the Sixth Amendment. The Court of Appeals affirmed. 285 F.3d 721 (C.A.8 2002). With respect to petitioner's argument that the officers' failure to administer Miranda warnings at his home violated his Sixth Amendment right to counsel under Patterson, the Court of Appeals stated: "Patterson is not applicable here ... for the officers did not interrogate [petitioner] at his home." 285 F.3d, at 724. The Court of Appeals also concluded that the statements from the jail were properly admitted under the rule of Elstad, 285 F.3d, at 724 (" 'Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made' " (quoting Elstad, *supra,* at 309).

ISSUES AND RULINGS: 1) Did the officers violate the Sixth Amendment by deliberately eliciting incriminating responses from the indicted Mr. Fellows without first giving him Miranda warnings? (ANSWER: Yes; even though Fellers was not in “custody” for Fifth Amendment purposes when questioned in his kitchen, the Sixth Amendment requires that police obtain a Miranda waiver before questioning a charged suspect about the charged matter); 2) Under Oregon v. Elstad, 470 U.S. 298 (1985), if police obtain a statement from a custodial suspect without giving Miranda warnings, this Miranda violation will not necessarily preclude admission of a later Mirandized confession. Elstad requires that the reviewing court look at all of the circumstances to determine if the subsequent waiver of rights was knowingly voluntary. Does the Elstad approach to cat-out-of-the-bag situations apply to Six Amendment violations? (ANSWER: This question is not ready for a U.S. Supreme Court answer; the lower federal courts must first address the issue)

Result: Reversal of conviction and pro-government ruling of Eighth Circuit of the U.S. Court of Appeals on suppression issue; remand to the Eighth Circuit to review the question of whether the Elstad rule applies under the Sixth Amendment.

ANALYSIS: (Excerpted from the Supreme Court opinion)

1) Sixth Amendment Violation (Questioning Charged Person Without Mirandizing Him)

The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " Brewer v. Williams, 430 U.S. 387 (1977). We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at

his trial evidence of his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel." Massiah v. United States, 377 U.S. 201 (1964); cf. Patterson v. Illinois (holding that the Sixth Amendment does not bar postindictment questioning in the absence of counsel if a defendant waives the right to counsel).

We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, see United States v. Henry, 447 U.S. 264 (1980) ("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements ... within the meaning of Massiah"); (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"), and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard, see Michigan v. Jackson, 475 U.S. 625 (1986) ("[T]he Sixth Amendment provides a right to counsel ... even when there is no interrogation and no Fifth Amendment applicability"); Rhode Island v. Innis, 446 U.S. 291 (1980) ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable"); cf. United States v. Wade, 388 U.S. 218 (1967) (holding that the Sixth Amendment provides the right to counsel at a postindictment lineup even though the Fifth Amendment is not implicated).

The Court of Appeals erred in holding that the absence of an "interrogation" foreclosed petitioner's claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home. First, there is no question that the officers in this case "deliberately elicited" information from petitioner. Indeed, the officers, upon arriving at petitioner's house, informed him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators. Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in Massiah and its progeny.

2) Elstad Applicability to Exclusionary Rule for Sixth Amendment Violations

[B]ecause of its erroneous determination that petitioner was not questioned in violation of Sixth Amendment standards, the Court of Appeals improperly conducted its "fruits" analysis under the Fifth Amendment. Specifically, it applied Elstad to hold that the admissibility of the jailhouse statements turns solely on whether the statements were " 'knowingly and voluntarily made.' " The Court of Appeals did not reach the question whether the Sixth Amendment requires suppression of petitioner's jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard. We have not had occasion to decide whether the rationale of Elstad applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards. We therefore remand to the Court of Appeals to address this issue in the first instance.

LED EDITORIAL COMMENT REGARDING DIFFERENCES BETWEEN RESTRICTIONS ON UNMIRANDIZED QUESTIONING UNDER FIFTH VS. SIXTH AMENDMENT

Under the Fifth Amendment of the U.S. Constitution, officers must Mirandize if: 1) a suspect is in the level of custody that is the functional equivalent of custodial arrest (not just a Terry seizure), and 2) officers "interrogate" the suspect. Under the Sixth Amendment of the U.S. Constitution, officers must Mirandize if: 1) a suspect has been formally charged, and 2) officers "deliberately elicit" incriminating statements from the suspect.

The Fellers decision indicates that the Fifth Amendment concept of "interrogation" is somewhat narrower than the Sixth Amendment concept of "deliberate eliciting" of incriminating statements. In our view, however, any subtle distinctions between these concepts should not generally be of concern to law enforcement personnel. A good working rule for law enforcement officers is that anything the officers deliberately do or say to a suspect in order to elicit an incriminating response will constitute both "interrogation" under the Fifth Amendment and "deliberate eliciting" under the Sixth Amendment. For an article describing some aspects of the interplay between the Fifth and Sixth Amendments in relation to interrogation of suspects, see the following article on the CJTC's LED page: "'Initiation of Contact' Rules Under Fifth and Sixth Amendments."

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WASHINGTON STATE SUPREME COURT

FAILURE TO TRANSFER MV TITLE NOT A "CONTINUING" OFFENSE – ARREST AND "SEARCH INCIDENT" HELD UNLAWFUL

State v. Green, ___ Wn.2d ___, 82 P.3d 239 (2004)

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

> Two Pierce County Sheriff deputies decided to stop the 1989 Mercury Sable that Green was driving because they thought the car had been sold and the purchaser had failed to transfer the title, a misdemeanor. She produced her driver's license, but when asked for the car's registration, she said she was on her way to get one. One of the deputies then asked for a bill of sale, and Green said she had borrowed the car.
>
> The deputies placed Green under arrest for failing to transfer the title. In a search incident to this arrest, the deputies found a small quantity of cocaine in a dental floss container Green had taken from her purse.
>
> The State charged Green with possession of a controlled substance. She sought to suppress the evidence, claiming that the deputies could not arrest her for a misdemeanor she did not commit in their presence. The trial court denied her motion. Green then stipulated to the facts and the trial court found her guilty. The Court of Appeals affirmed [by unpublished opinion]. In response to Green's challenge to her arrest, the court reasoned that the title transfer misdemeanor was an ongoing crime which was thus committed in part in the deputies' presence.

ISSUE AND RULING:

Is the misdemeanor crime of failure to timely transfer title to a motor vehicle a continuing offense such that an officer lawfully may arrest the violator when [the officer] observes the violator after the failure to transfer title? (ANSWER: No, rules a unanimous Supreme Court; this is not a continuing offense, and therefore an arrest in this circumstance violates the misdemeanor presence rule of RCW 10.31.100).

Result: Reversal of Pierce County Superior Court conviction of Velda Annette Green for possession of a controlled substance.

Status: The Pierce County Prosecutor's office has requested reconsideration.

ANALYSIS: (Excerpted from Supreme Court opinion)

> Under the common law, and since 1969 by statute, a law enforcement officer cannot generally make a warrantless arrest for a misdemeanor unless the crime is committed in the officer's presence. RCW 10.31.100; City of Tacoma v. Harris, 73 Wn.2d 123 (1968). *[Court's footnote: While there are some statutory exceptions to this rule, none applies here.]* Some offenses, for purposes of determining when they are committed, can be considered continuing offenses.
>
> But the doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended. Toussie v. United States, 397 U.S. 112 (1970); *accord* State v. Klump, 61 Wn. App 911 (1991) **March 92 LED:12**; *see also* 21 AM.JUR.2D *Criminal Law* § 298 (1998). In Toussie, for example, the defendant failed to register for the draft, and eight years later was convicted of the misdemeanor of failing to register. The prosecution argued that while the crime was committed on the first day the defendant was supposed to register, it continued each day thereafter that he failed to register and thus the statute of limitations had not run when the prosecution began. The United States Supreme Court disagreed, concluding that the failure to register at the earliest time constituted the crime, and it was not "continuing" simply because the defendant continued to fail to register.
>
> In Klump, similarly, the defendant failed to appear for a court date, which under the circumstances constituted a misdemeanor. When officers pulled him over for an unrelated traffic offense, they discovered he had failed to appear, although no arrest warrant had been issued. The officers arrested the defendant for the misdemeanor and, in an attendant search, found some drugs. Reasoning that the statute defining the crime had no specific language that would make it a continuous offense, the Court of Appeals reversed the conviction. The court held that the evidence should have been suppressed due to the unlawful arrest, since the misdemeanor was not committed in the presence of the arresting officer.
>
> As noted, Green was arrested for failure to transfer the title to a car. A person who buys a car must apply to transfer the title within 15 days after delivery of the vehicle. RCW 46.12.101(3). If the person does not do so, he or she will be assessed $25 for the 16th day, and $2 for each day thereafter, not to exceed $100. RCW 46.12.101(6). Failure to apply for a transfer of the title within 45 days after delivery of the vehicle is a misdemeanor. RCW 46.12.101(6). The Court of Appeals cited the statutory language prescribing the monetary penalty, inferred that it meant the misdemeanor was ongoing, and concluded it was thus committed in the deputies' presence.

> But the statute contains no express language indicating that failure to transfer title within 45 days is a continuing offense. The subsection of the statute relied upon by the Court of Appeals simply imposes a monetary penalty on those who apply to transfer title after 15 days. Since those fees begin to accrue 30 days before failure to register becomes a misdemeanor, the fees have nothing to do with the separate subsection of the statute that creates the crime. The misdemeanor is committed only when 45 days have passed since the date of delivery of the vehicle, and is completed at that point. Green thus did not commit a misdemeanor in the presence of the arresting deputies. Her arrest and the subsequent search were unlawful.
>
> The Court of Appeals also concluded the initial stop was valid, citing State v. Miller, 91 Wn. App. 181 (1998) **Dec 98 LED:18** (officer may stop an individual based on a reasonable suspicion that criminal activity is afoot). But since failure to transfer title is not an ongoing offense, there was no criminal activity afoot to investigate.
>
> We hold that failure to transfer title under RCW 46.12.101(6) is not an ongoing misdemeanor offense. Green's arrest was thus unlawful, and the trial court erred by not suppressing the evidence obtained as a result of that arrest. We reverse the Court of Appeals and remand with instructions to vacate Green's conviction.

[Some citations omitted]

LED EDITORIAL COMMENTS: As we noted above, the Pierce County Prosecutor has asked the Washington State Supreme Court to reconsider its decision. The Supreme Court rarely grants motions for reconsideration. However, Green is a very unusual case in terms of the process of review, in that the Washington Supreme Court made its decision without hearing oral argument or allowing supplemental briefs after the Supreme Court granted review. This abbreviated approach to review is very unusual at the Supreme Court level of review, as well it should be for decisions that are the "last word" on the meaning of Washington law. So we think that there is a reasonable chance that the Supreme Court will reconsider. We will report any developments in future LEDs.

Meanwhile, we understand that prosecutors generally are making a fairly narrow reading of the Green decision, limiting its restrictions on investigatory stops and arrests to the particular type of crime there addressed – failure to transfer title – or at least to just that crime and a few other crimes (e.g., bail-jumping) whose elements are similar in nature to the crime of failure to transfer title. Under that interim advice, officers would not make either 1) stops (on reasonable suspicion) or 2) arrests or citations (on probable cause) for the offense of failure to transfer title. As always, we urge officers to consult their local prosecutors and legal advisors.

In our view, by far the most troubling aspect of the Green opinion is the next-to-last paragraph stating that the officers did not even have justification to make a Terry stop because they were not witness to a crime occurring in their presence. We were stunned by the wording of this paragraph in the opinion in light of the precedents in Washington and in other jurisdictions holding that officers may make a Terry stop based on reasonable suspicion that a crime or traffic infraction is occurring, is about to occur, or has occurred in the past. See U.S. v. Hensley, 469 U.S. 221 (1985) and Washington cases citing and discussing Hensley. Taken to its "logical" extreme, the Green Court's arguable restriction on Terry stops could be disastrous for law enforcement. We are, however, hopeful that the Pierce County prosecutor will be able to convince the Supreme

Court to reconsider at least the disturbing next-to-last paragraph of the opinion. Ideally, the Supreme Court would just delete the paragraph. And, if that effort fails, we hope that prosecutors will take the view that the next-to-last paragraph of the Green decision addressing Terry stops was dicta (language not necessary to support the court's decision) and need not be followed, at least as to offenses other than the failure-to-transfer offense at issue in Green.

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WASHINGTON STATE COURT OF APPEALS

PUTTING SUSPENDED DRIVER IN BACKSEAT OF PATROL CAR AND TELLING HIM HE IS UNDER ARREST IS HELD NOT TO CONSTITUTE A "CUSTODIAL ARREST" FOR "SEARCH INCIDENT" PURPOSES WHERE DRIVER WAS NOT FRISKED, SEARCHED OR HANDCUFFED, AND HE WAS ALLOWED TO USE HIS CELL PHONE TO MAKE PHONE CALLS WHILE THE SEARCH WAS OCCURRING

State v. Radka, ___ Wn. App. ___, ___ P.3d ___, 2004 WL 193113 (Div. III, 2004)

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

> Late on an evening in October 2002, [a] Spokane County Deputy Sheriff stopped Mr. Radka's vehicle for speeding. A check of Mr. Radka's driver's license revealed that it was suspended. [The deputy] placed Mr. Radka under arrest for third degree driving with a suspended license and put him in the back of the patrol car, although without handcuffs. Throughout the encounter, Mr. Radka's cell telephone repeatedly rang, and [the deputy] allowed Mr. Radka to talk on the telephone while in the patrol car. The deputy assumed that Mr. Radka may have been trying to arrange transportation.
>
> [The deputy] searched Mr. Radka's vehicle pursuant to the arrest and found a duffel bag containing glass drug pipes, two baggies of white powder that field tested positive for methamphetamine, a digital scale, numerous empty baggies, and a notebook with a list of names and monetary amounts. At this point, [the deputy] again arrested Mr. Radka, this time for possession of methamphetamine with intent to deliver. The deputy did not give Mr. Radka the Miranda warnings during this encounter.
>
> At a pretrial CrR 3.5 hearing to suppress a statement made by Mr. Radka, [the deputy] testified that he did not originally intend to book Mr. Radka for the driver's license violation. "As far as the driving suspended," [the deputy] states, "I planned on citing and releasing him at that point prior to--prior to finding the paraphernalia."
>
> During closing arguments at the CrR 3.5 hearing, defense counsel orally moved to suppress the physical evidence pursuant to CrR 3.6, arguing that the search was not justified because it was incident to a noncustodial arrest. The State objected to the timeliness of the CrR 3.6 motion, but the court decided to consider the issue. Although the trial court found that the traffic stop was proper and Mr. Radka was eligible for arrest because he was driving with a suspended license, the court concluded that when "a custodial arrest isn't going to occur by the intent of the officer, you can't have a warrantless search." The trial court suppressed the evidence, dismissed the case, and released the jury.

ISSUE AND RULING: Under an objective analysis of the totality of the circumstances (uncuffed, unfrisked, suspended driver told he is "under arrest" and is placed in back seat of patrol car with his cell phone), did the deputy make a full custodial arrest before searching the driver's car such that the car search qualified as a lawful "search incident to arrest"? (ANSWER: No, rules a 2-1 majority, this did not constitute a full custodial arrest, and the search was therefore unlawful.

Result: Affirmance of Spokane County Superior Court order suppressing the evidence and dismissing drug charges against Leonard Anthony Radka.

Status: At LED deadline for this March LED, time remained for the Spokane County Prosecutor's Office to decide whether to file a petition seeking review in the Washington Supreme Court. We will report in the April LED whether a petition for review is filed in Radka.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> "Under article I, section 7 [of the Washington constitution], a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. It is the fact of arrest itself that provides the 'authority of law' to search . . . ." State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** (citations omitted) (quoting State v. Parker, 139 Wn.2d at 486 (1999) **Dec 99 LED:13**). The function of the search incident to arrest is to ensure officer safety and to preserve evidence of the crime for which the suspect was arrested. However, without a lawful custodial arrest, a full search may not be made, no matter the exigencies. Probable cause to arrest is not enough; only an actual custodial arrest provides the authority to justify a search incident thereto.
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> A police officer may effect a custodial arrest without a warrant if the officer has probable cause to believe a driver has a suspended license. RCW 10.31.100(3)(e). Typically, however, a person arrested for a violation of the traffic laws that is punishable as a misdemeanor or by imposition of a fine is subjected to a temporary detention while the officer issues a citation. RCW 46.64.015. To secure release, the arrested person must give a written promise to appear in court as required by the citation. RCW 46.64.015. For certain crimes listed in RCW 10.31.100(3)—including driving with a suspended license--the officer may choose to make a full custodial arrest rather than the temporary cite-and-release detention. RCW 46.64.015(2).
>
> In cases such as the present one, it is often difficult to determine whether an arrest qualifies as the limited detention of a cite-and-release or as a full custodial arrest. Courts have differed on the test to apply: an examination of the arresting officer's subjective intent, or an objective determination of what a reasonable detainee would consider to be the extent of the detention. A case in point is State v. McKenna, 91 Wn. App. 554 (1998) **Oct 98 LED:05**, wherein the arresting officer testified that he never intended to arrest Ms. McKenna because the county jail, plagued with overcrowding, refused to book anyone arrested for a nonviolent misdemeanor. In reversing the trial court's denial of a motion to suppress, McKenna held that the arrest for driving without an operator's license was noncustodial because the arresting officer "never formed an intent, much less manifested an intent, to arrest McKenna custodially." [**LED EDITORIAL COMMENT: The Division Three majority here is a bit misleading regarding Division Two's analysis in McKenna; the Division Two majority made clear in McKenna that the Court was aware that the standard is purely "objective" for determining "custodial" status of an arrest for "search**

incident" purposes.] Additionally, however, the court noted that after the officer issued a citation to Ms. McKenna, he told her she was free to go and only searched her after she accepted the officer's offer of a ride home.

Appellate court examinations of the issue of custodial arrest following McKenna have retreated from the consideration of the arresting officer's intent. For example, in State v. Clausen, 113 Wn. App. 657 (2002) **Dec 02 LED:17** and State v. Craig, 115 Wn. App. 191 (2002) **March 03 LED:12**, the determination of custody hinges upon the "manifestation" of the arresting officer's intent. In other words, rather than the subjective intent of the officer, the test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest. Typical manifestations of intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport. Telling the suspect that he or she is under arrest also suggests custodial arrest, unless the suspect is also told that he or she is free to go as soon as the citation is issued (rather than after he or she is booked, as was the case in Clausen and Craig).

In this case, [the deputy] first arrested Mr. Radka for driving with a suspended license. The trial court found that [the deputy] could have made a custodial arrest but did not do so. The court further found that the deputy did not have a safety concern and intended to cite and release Mr. Radka. Although [the deputy] told Mr. Radka he was under arrest and placed Mr. Radka in the patrol car, additional circumstances would indicate to a reasonable person that the arrest was not custodial. First, the deputy did not put Mr. Radka in handcuffs. Second, the deputy did not frisk Mr. Radka and allowed him to make cell telephone calls from the back of the patrol car, presumably to arrange transportation. Although the trial court erroneously considered [the deputy]'s subjective intent to cite and release Mr. Radka as a factor in determining whether the arrest was custodial, the additional circumstances of the arrest adequately support the conclusion that Mr. Radka's detention was noncustodial.

Under these circumstances, the record supports the trial court's finding that although [the deputy] had probable cause for a custodial arrest of Mr. Radka, he did not actually place Mr. Radka under custodial arrest. Consequently, the deputy had no justification under article I, section 7 to execute a warrantless search incident to arrest. The trial court properly granted Mr. Radka's motion to suppress the evidence.

[Some citations omitted]

DISSENT:

Judge Brown dissents from the majority opinion (authored by Judge Schultheis, concurred in by Judge Kato). Judge Brown argues that the facts of this case meet the objective standard of a full custodial arrest and therefore justify the search of Radka's vehicle.

LED EDITORIAL COMMENT: The Radka majority is correct that the standard for determining whether a full custodial arrest has occurred is objective, not subjective. An officer's undisclosed intent to cite and release does not transform a custodial arrest into a non-custodial detention.

We think, however, that the Radka majority is wrong and that Judge Brown is correct on the question of whether the arrest in this case qualified as a "full custodial arrest." We think that case law in this jurisdiction and in other jurisdictions supports the conclusion

under the facts of this case that the arrest was custodial and justified a "search incident." Having stated our opinion, however, we recognize that Radka is a published precedent that should be followed by Washington officers until and unless it is overturned. We think that Washington officers conducting a "search incident" of a vehicle, following arrest of an occupant, would be well advised, both for legal reasons and for officer-safety reasons (though we do not purport to be experts on officer-safety matters) not to get too casual in how they make "custodial arrests." We think that, in order to make it clear that a full custodial arrest is occurring, the officer should: (1) tell the would-be arrestee that he or she is "under arrest for (____ e.g., DWLS)" and not indicate to the arrestee that the officer plans to cite and release the arrestee if the officer finds nothing in the search; 2) handcuff the arrestee; 3) thoroughly search -- not just frisk -- the arrestee's person for weapons and evidence; and 4) take and hold the arrestee's personal effects, including his or her cell phone, during the search. Officers should also consider giving counsel-right warnings at this point under CrR 3.1/CrRLJ 3.1 ("You have the right to an attorney at this time. If you are unable to pay for counsel, you are entitled to have one provide without charge.").

The Radka decision will no doubt fuel the hot fire of the ongoing controversy over whether an officer should ever conduct a search "incident to arrest" where the officer's subjective intent at the time of the "arrest" and "search" is to cite and release the suspect unless the officer finds criminal evidence during the search. We discussed this thorny legal issue in a comprehensive article in the March 2003 LED, with particular focus on car "search incidents" involving suspended drivers. We qualifiedly warned in that article that, while the case law to date was not clearly against searching "incident to arrest" where the officer had absolutely no intent to book (at least administratively) unless something was found in the search, such a course of conduct would face a very difficult challenge in the Washington appellate courts. The Radka decision does not change our analysis of the "search incident" issue in that March 2003 article. The Radka decision does constitute more evidence that Washington appellate courts do not like what they perceive to be "fishing expeditions." At the very least, Washington officers should take from the Radka decision that they should cut very square corners if they want an "arrest" to hold up as a "full custodial arrest" that will justify a "search incident." As always, we urge officers to consult their local prosecutors and legal advisors.

EVIDENCE OF MALNOURISHMENT, POOR DETENTION HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR SECOND DEGREE ANIMAL CRUELTY

State v. Zawistowski, ___ Wn. App. ___, 82 P.3d 698 (Div. II, 2004)

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

> In late March 2001, Tasha Deptula moved out of state for work, requiring her to seek a new home for her horse, Princess Tarzana. Princess Tarzana was a 26 or 27-year-old white mare that Deptula described as a "pretty chubby horse." Deptula placed an ad at local feed stores and received several responses.
>
> One response came from the Zawistowskis, who themselves kept several horses, including a horse named Silver, at their Pierce County property. The Zawistowskis visited Princess Tarzana several times and took possession of her at the end of March 2001. At that time, Princess Tarzana was in good physical condition, but not skinny.

Deptula next saw Princess Tarzana on June 21 of the same year. By this time, the Pierce County Humane Society had served a warrant on the Zawistowski property and seized five horses, including Princess Tarzana and Silver. Pierce County had received complaints about the horses' condition from several neighbors and other individuals. When seized, the horses appeared severely underweight, there was little vegetation on the ground inside their paddock or suitable food on the property, and they had little or no protection from the elements.

Pierce County charged Vern and Katonya Zawistowski, individually, with various crimes, including six counts of second degree animal cruelty. The Zawistowskis were tried jointly in district court. The trial evidence consisted of testimony from various neighbors, several Pierce County Humane Society officers and other county officials, and several veterinarians. The State's evidence indicated a poorly maintained paddock with little vegetation or shelter, and it described several ailments that the horses were suffering. Specifically, the State's veterinarian testified that Princess Tarzana and Silver suffered from poor dentition and that they were severely underweight. The State also introduced various photographs of the horses, which generally depicted skinny animals with protruding bones. The evidence also reflected a paucity of suitable equine food at the Zawistowski property.

The jury returned a guilty verdict for the Zawistowskis on two charges of second degree animal cruelty. These counts pertained specifically to Princess Tarzana and Silver. On appeal to the superior court, however, the court reversed these convictions, finding the evidence insufficient to support the jury's verdicts. The State challenges this ruling.

ISSUE AND RULING: Was the evidence regarding the severe malnourishment of several horses and the extremely poor, long-term detention of one of the horses sufficient to satisfy the "pain" element of the "animal cruelty" statute at RCW 16.52.207(2)(a)? (ANSWER: Yes)

Result: Reversal of Pierce County Superior Court order and reinstatement of convictions (two counts each) of Vern and Katonya Zawistowski for animal cruelty in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

An owner of an animal is guilty of second degree animal cruelty if he or she knowingly, recklessly, or with criminal negligence

> [f]ails to provide the animal with necessary food, water, shelter, rest, sanitation, ventilation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.

RCW 16.52.207(2)(a).

Jury instruction 12 defined "[n]ecessary [f]ood" as "the provision at suitable intervals of wholesome foodstuff suitable for the animal's age and species and sufficient to provide a reasonable level of nutrition." The superior court did not reverse Zawistoski's conviction for insufficient evidence on this element, which was proper as the requisite quantum of proof certainly existed. As noted above, evidence showed that the horses' paddock lacked adequate vegetation, that the food that was on the property did not meet the veterinarian's recommended daily

allowances, and that the horses were severely underweight. A reasonable inference from this evidence is that the Zawistowskis knowingly, recklessly, or with criminal negligence failed to provide necessary food.

The superior court's ground for reversal was, instead, insufficient evidence that Princess Tarzana and Silver suffered pain. As "pain" is not defined by the statute, we must give it its ordinary, dictionary meaning. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1621 (1969) defines "pain", in pertinent part, as "a state of physical or mental lack of well-being or physical or mental uneasiness that ranges from mild discomfort or dull distress to acute often unbearable agony." WEBSTER'S II NEW COLLEGE DICTIONARY 539 (1999) defines "hunger" as "[t]he discomfort, weakness, or pain caused by a lack of food."

The State had essentially two theories on pain. First, it theorized that the horses suffered pain as a result of "serious problems with their teeth." Evidence suggesting the poor condition of the teeth was certainly supportive. The veterinarian testified that Princess Tarzana "had some real serious teeth problems," including "hooks" on the upper front and lower back teeth that needed to be "floated," and her lower left jaw teeth "were pointing in all different directions." Silver also needed her teeth floated, "[h]er lower left first tooth was split," and she had "the regular old sharp points that needed to be floated down."

But poor dentition alone does not constitute second degree animal cruelty. It must have caused unnecessary pain. On this point, the veterinarian testified that Silver may have experienced "some uncomfortableness when she was eating [ ] because of the points and because of that one tooth that was split in half." She also stated, "I think to some degree there would be some pain associated with [the horses' poor dentition]." Although this evidence may have been thin, it enabled a rational determination that the horses' poor dentition caused, at the very least, "mild discomfort." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1621. This was sufficient for a finding of "pain" under RCW 16.52.207(2)(a).

But the State's burden did not end with pain either: it was also required to prove a causal connection between the horses' poor dentition and the Zawistowskis' neglect. Thus, the evidence was sufficient only if it enabled a rational choice that the horses' poor dentition resulted from a knowing, reckless, or criminally negligent act by the Zawistowskis. See RCW 16.52.207(2)(a).

Our review of the evidence reveals just one short colloquy on point. The veterinarian stated that the horses' dentition problems "would normally be the subject of routine preventative care." She continued, "[s]tandard is once a year to--horses get their teeth checked and floated, if they need to be floated. And while they're under sedation, you can find these things that may be a problem and keep them from becoming really bad, by doing them once a year."

Evidence established that the Zawistowskis had possession and care of Princess Tarzana for just a short time during spring 2001 -- from the "end of March" to June 21st of the same year. If the standard of care was maintenance once a year, as the State's evidence suggested, then the Zawistowkis cannot be said to have failed in their duty of maintaining a horse that was in their possession for a mere three months. Thus, as to the poor dentition theory applicable to Princess Tarzana, the evidence was insufficient.

The same is not true for Silver, however. Evidence suggests that the Zawistowskis possessed Silver for several years.

As this is a sufficiency challenge, we allow reasonable inferences from the evidence. Examined in this light, the evidence of pain caused by Silver's dental condition was sufficient because the veterinarian's testimony, though not entirely certain that the horses felt pain, provided the factual basis from which the jury could have rationally concluded that the horses felt pain. The poor dentition of Silver alone supports the convictions concerning the counts pertaining to Silver; but we find other support for convictions concerning both horses discussed below.

The State theorized, secondly, that the horses suffered pain as a result of being "severely underweight." The Zawistowskis acknowledge that the horses were underweight, responding only that "no evidence [indicated] that the horses were suffering pain as a result of their diet or pasture conditions."

The jury heard testimony from several neighbors, Humane Society officers, and the aforementioned veterinarian, all of whom supported the State's theory that the horses were underweight and malnourished. Specifically, the veterinarian testified that Princess Tarzana was "pretty much a rack of bones," that her jawbone was very prominent, her eyes were sucked in, and her backbone and ribs were showing. The veterinarian stated that Silver was also severely underweight and had protruding ribs, pelvis, and jawbone.

That Princess Tarzana and Silver felt extreme hunger is a reasonable inference from this evidence. And that extreme hunger is capable of causing at least "mild discomfort" is also a reasonable inference. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1621. The nature of our sufficiency review requires that we accept these inferences. Therefore, sufficient evidence indicates that Princess Tarzana and Silver suffered unnecessary and unjustifiable "pain" under the governing definition of the term. The superior court erred in reversing; the evidence was sufficient.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DECLINATION OF JUVENILE COURT JURISDICTION IN PREMEDITATED MURDER CASE WAS NOT AN ABUSE OF DISCRETION – In State v. H.O., ___ Wn. App. ___, 81 P.3d 883 (Div. I, 2003), the Court of Appeals rejects the defendant's argument that the trial court erred by declining juvenile court jurisdiction an trying her as an adult under first degree murder charges. The defendant was age 13 at the time of the killing and age 14 at the time of the declination hearing.

The Court of Appeals first holds that the standard of proof for the trial court to apply is "preponderance of evidence," not a higher standard (such as "beyond a reasonable doubt") as defendant contended. Next, the H.O. Court notes that review in the Court of Appeals of the trial court's declination decision is under an abuse of discretion standard. The H.O. Court rules that the trial court did not abuse its discretion.

The H.O. Court explains that the trial court was required to look at certain factors in making its discretionary declination decisions. Those factors were enumerated by the U.S.

Supreme Court in Kent v. U.S., 383 U.S. 541, 566-57 (1966). These "Kent" factors are as follows:

> 1) The seriousness of the alleged offense to the community and whether the protection of the community requires [declination].
> 2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3) Whether the alleged offense was against persons or against property…
> 4) The prosecutive merit of the complaint…
> 5) The desirability of trial and disposition of the entire offense in one court when the juvenile's [accomplices] in the alleged offense are adults…
> 6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7) The record and previous history of the juvenile…
> 8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available [in] the Juvenile Court.

The H.O. Court concludes that substantial evidence supported the juvenile court's decision under both Kent and applicable statutory factors to decline jurisdiction. The seriousness of the alleged offense and the need to protect the community could not be disputed in light of the following facts: 1) defendant and her mother allegedly planned the murder for months and recruited several friends to help carry it out; 2) defendant allegedly stabbed the victim repeatedly at the time of the murder; and 3) defendant allegedly showed no remorse for the killing.

Result: Affirmance of King County Superior Court decision that declined juvenile jurisdiction and remanded H.O.'s case to adult court.

(2) 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 – In State v. Holt, ___ Wn. App. ___, 82 P.3d 688 (Div. II, 2004), the Court of Appeals upholds the criminal convictions of husband-and-wife methamphetamine manufacturers. The defendants raised many issues on appeal, including challenges to the sufficiency of the evidence to support their convictions and sentences. The Court of Appeals' analysis of these sufficiency-of-the-evidence issues is as follows:

Possession of firearm conviction

> As sufficient evidence, the State first cites [a relative]'s testimony that "normally nobody went in [the computer room] unless Bobby was in there. **["Bobby" is defendant Bobby Gene Holt – LED Eds.]** Because it's Bobby's personal stuff." The State also cites testimony given by the officer who took and recorded [the relative]'s pre-trial statement, which generally established the same point as [the relative]'s trial testimony: that Bobby controlled the computer room. Finally, the State points to Bobby's pre-trial statement that the guns "were his."
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> Evidence also established that Bobby lived in the trailer that housed the guns. This point was properly inferable from evidence indicating that Bobby owned the trailer; that Linda, his wife, lived there; and from an officer's testimony that, on several previous occasions, he had been able to contact Bobby at the trailer.

Although several witnesses, including Bobby, testified that he lived in another trailer nearby, the jury could have concluded that the testimony was self-serving and drawn the inference that Bobby lived in the trailer with Linda.

Evidence suggesting that Bobby lived in the trailer and controlled access to the specific room that contained the firearms adequately supports the second degree unlawful possession convictions. And though not directly related to possession or control, Bobby's statement that the guns were his can only strengthen the inferences from this evidence.

Second degree criminal mistreatment conviction

The jury instructions indicated that the essential elements of second degree criminal mistreatment are that the defendant (1) had been entrusted with the physical custody of a child, and (2) recklessly created an imminent and substantial risk of death or great bodily harm to the child.

Evidence that Linda and Bobby had been entrusted with Pebbles and Anthony's physical custody was substantial. It established that Linda was the biological grandmother, that the children had lived with her "since they were babies," and that each had a bedroom at the trailer. When the officers arrived, the children's school books were on the coffee table in the living room, and at some point during the investigation, the children went into the residence to put on coats and eat dinner. Further, a Child Protective Service investigation confirmed that the children lived with and were cared for by Linda and Bobby. And Alice Hollingshead, Linda's relative and next door neighbor, testified that Linda and Bobby had primary care of the kids. Finally, although Bobby denied much of a relationship with the children, evidence established that he was married to Linda, he owned the trailer, and the jury could have reasonably inferred that he lived in the trailer with Linda and the children. This evidence provided the factual basis necessary for a jury determination that Linda and Bobby had been entrusted with Pebbles and Anthony's physical custody.

Linda and Bobby dispute their entrustment by vaguely asserting that Tammy's presence precludes any entrustment finding because she was the children's mother. We disagree. Though the factual assertions are valid--Tammy was present and is the children's mother--there is no indication that she had wrested physical custody from Linda and Bobby prior to the officers' arrival. The only reasonable conclusion from the trial evidence was that Pebbles and Anthony's physical custody had been entrusted solely to Linda and Bobby at some time well before the charged crimes. Nothing indicates that Tammy ended that entrustment. Therefore, her presence at the trailer was insignificant.

The evidence was also sufficient for the jury to find an imminent and substantial risk of death or great bodily harm to the children. The jury instructions defined great bodily harm as "injury [that] creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." Evidence supporting this element consisted of a forensic scientist's testimony that fires and explosions are common in the manufacture of methamphetamine and his statement that the anhydrous ammonia manufacturing method, which Linda and Bobby used, "will eat your lungs out," From this, the jury could have found a risk of great bodily harm.

Finally, the crime required proof that Linda and Bobby's conduct in placing the children at such risk was reckless. The jury instructions stated that "[a] person is reckless ... when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

As to Bobby, evidence on this element consisted of a prior conviction for conspiring to manufacture methamphetamine and a knowledge of the manufacturing processes and of the dangerousness of several of the chemicals used to manufacture methamphetamine--e.g., methanol, muriatic acid, xylol, acetone, and anhydrous ammonia. As to Linda, evidence shows that she was in the process of manufacturing methamphetamine when the children were on the premises. From Bobby's general knowledge of methamphetamine manufacturing and Linda's actual manufacture, the jury could have inferred that the defendants knew, during their manufacture, that their conduct posed an imminent and substantial risk of death or great bodily harm to the children. The evidence was therefore sufficient.

Manufacture of methamphetamine conviction

[T]he jury instructions required proof that Linda and Bobby (1) manufactured or were accomplices to the manufacture of methamphetamine and (2) knew that the substance manufactured was methamphetamine.

The State theorized that Linda and Bobby were accomplices to the manufacture of methamphetamine.

"Manufacture means the production, preparation, propagation, compounding, conversion, processing, directly or indirectly, as well as the packaging or repackaging of any controlled substance." To prove the actual, physical manufacture of methamphetamine, a forensic scientist stated that tests conducted on a paper towel and a jar containing a liquid, both of which were recovered from the trailer, revealed the presence of methamphetamine. He further testified that [t]he liquid is a solvent so it would be consistent with the last step where you wash--have made methamphetamine and added solvent to wash out the container but haven't yet salted it out. He concluded that the liquid sample that he tested was a step in the methamphetamine manufacturing process but that the methamphetamine had not yet been reduced to a solid, usable form. Further, officers recovered from the trailer and nearby property various items necessary for the anhydrous ammonia manufacturing method, including lithium batteries, various chemicals, pseudoephedrine/ephedrine tablets, and reference materials titled, Secrets of Methamphetamine Manufacturing. From this evidence, the jury could have concluded that methamphetamine was manufactured at the trailer.

Evidence also proved Linda's complicity in the manufacture. She lived in the trailer where the manufacture occurred; on the day of her arrest, Bobby entered the trailer and found her and several others engaged in what appeared to be the active manufacture of methamphetamine; and while conducting officers through the trailer, she attempted to hide the jar that later tested positive for methamphetamine. Also, the forensic scientist testified that tests done on powder residue from several other items seized from the trailer were positive for

methamphetamine. From this evidence, the jury could have reasonably inferred that Linda was more than merely present; it could have inferred that she aided and encouraged the manufacture of methamphetamine.

Finally, evidence establishing Bobby's complicity was also sufficient. As discussed earlier, a reasonable inference from the evidence was that Bobby lived in the trailer where the methamphetamine was manufactured. Thus, the forensic scientists testimony establishing that various items in the trailer tested positive for methamphetamine applies equally to Bobby. And though he makes much of his testimony describing other legal uses for the various chemicals found on the property--i.e., xylene, muriatic acid, acetone--the chemicals are ingredients for manufacturing methamphetamine as well. The jury could therefore have disbelieved Bobby's version on the utility of these chemicals, choosing instead to infer that Bobby used the chemicals to manufacture methamphetamine. These circumstances provide sufficient evidence for the jury to have reasonably concluded that Bobby aided and encouraged the manufacture of methamphetamine.

Sentence enhancement for meth manufacturing with children present

As to Linda and Bobby's sufficiency of the evidence claim, we hold that the evidence was sufficient for the enhancement relating to the presence of a minor during the manufacture of methamphetamine. Taken in the light most favorable to the State, the jar seized in the computer room--i.e., the jar that Linda knocked over when showing officers through the trailer--contained a liquid that tested positive for methamphetamine but was not yet reduced to a solid, usable form. The forensic scientist confirmed this theory. Evidence further showed, in a light favorable to the State, that the children lived at the trailer, they arrived at the premises immediately after Bobby discovered Linda and others manufacturing what appeared to be methamphetamine, and they were present when the officers arrived. From this evidence, the jury could have reasonably concluded that a person under the age of 18 was present during the methamphetamine manufacture.

Result: Affirmance of Thurston County Superior Court convictions of Bobby Gene Holt and Linda Belle Holt for unlawful manufacture of methamphetamine (one count each); affirmance of convictions of Bobby Gene Holt for unlawful possession of a firearm (three counts); affirmance as to both defendants of sentence enhancement for meth manufacturing with children present; and reversal of convictions of both defendants for criminal mistreatment (two counts each) based on instructional error (not addressed in this LED entry), and remand for possible re-trial of those criminal mistreatment charges.

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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/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]. 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].