



Law Enforcement

October 2004

Digest

HONOR ROLL

571st Basic Law Enforcement Academy – April 14th through August 19, 2004

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Best Academic: Carl Klein – WA St Dept of Fish & Wildlife
Best Firearms: Peter Ross – Central WA U Police Department
Tac Officer: Henry Gill – Tacoma Police Department

572nd Basic Law Enforcement Academy – April 28th through September 9th, 2004

President: Kevin Stackpole – King County Sheriff's Office
Best Overall: Benjamin L. Kelly – WA State Gambling Commission
Best Academic: Benjamin L. Kelly – WA State Gambling Commission
Best Firearms: James R. Headrick – Stillaguamish Tribal Police Department
Tac Officer: April Meyers – Seattle Police Department

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BRIEF NOTES FROM THE 9TH CIRCUIT, U.S. COURT OF APPEALS

(1) **NINTH CIRCUIT REVERSES PANEL DECISION, AND, UNDER FOURTH AMENDMENT ANALYSIS, UPHOLDS FEDERAL STATUTE REQUIRING THE TAKING OF SAMPLES FROM CONVICTED PERSONS FOR DNA-TESTING-AND-CATOLOGING PURPOSES** -- In *U.S. v. Kincade*, 379 F.3d 813 (9th Cir. 2004), an 11-member panel of the Court disagrees with the earlier ruling of a 3-judge panel and holds in a 6-5 vote that the Fourth Amendment does not bar the taking of DNA from convicted individuals pursuant to a Federal statute that calls for testing and cataloging of the DNA:

The lead opinion joined by five members of the Court explains those judges’ view that the statute can be upheld under either a totality-of-the-circumstances rationale or under a special-needs rationale:

In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues -- squarely holding that the DNA Act satisfies the requirements of the Fourth Amendment.

A sixth judge writes an opinion declaring that the Federal statutory scheme can be upheld under more limited special-needs rationale. Two separate dissenting opinions are issued with a total of five judges in dissent.

Result: Affirmance of California Federal District Court order that Kincade submit to DNA profiling.

LED EDITORIAL NOTE/COMMENT: In our view, this is a narrow sub-area for Fourth Amendment analysis, and the Ninth Circuit decision does not have major ramifications for police work generally (note, however, that a broad spectrum of Fourth Amendment case law is discussed in the majority opinion, concurring opinion and two dissenting opinions, and that the dissenting opinions in Kincade claim argue that this ruling has ominous ramifications for preservation of the right of privacy). We believe that the rationale of the Ninth Circuit majority for upholding the statutory scheme is not of great importance to most law enforcement officers. We also believe that the statutory scheme will be upheld by the U.S. Supreme Court whenever the issue reaches that Court, and that the U.S. Supreme Court's decision will be limited in a way that the decision will not have significant ramifications for police work. Therefore, we will not explore in the LED the analysis underlying any of the views expressed in the majority and dissenting opinions of the Ninth Circuit judges in Kincade.

The very lengthy set of opinions may be found at the following Internet site:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/BADFFFC872DBA30288256EF300802EBD/\\$file/0250380.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/BADFFFC872DBA30288256EF300802EBD/$file/0250380.pdf?openement)

(2) WHERE SUSPECT VOLUNTARILY ACCOMPANIED FBI AGENT TO FBI OFFICE, AND FBI AGENT THEN TOLD SUSPECT THAT HE WAS FREE TO LEAVE AT ANY TIME, SUSPECT WAS NOT IN "CUSTODY" FOR MIRANDA PURPOSES – In U.S. v. Crawford, 372 F.3d 1048 (9th Cir. 2004), the Court of Appeals rules that defendant's questioning at an FBI office did not constitute custodial interrogation requiring administration of Miranda warnings before questioning.

The Ninth Circuit opinion's discussion of the Miranda custody issue includes the following:

"An officer's obligation to administer Miranda warnings attaches ... 'only where there has been such a restriction on a person's freedom as to render him "in custody." ' " Whether a suspect is in custody turns on whether there is a " 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." This inquiry requires a court to examine the totality of the circumstances from the perspective of a reasonable person in the suspect's position.

Defendant's situation at the FBI office is remarkably similar to those in which the Supreme Court has held that Miranda warnings are not required. As in Mathiason, Defendant was questioned in a closed room in the office of a law enforcement agency. Although taking place in an admittedly "coercive

environment," such questioning does not amount to custodial interrogation where, as here, the suspect is told that he is not under arrest and is free to leave, and he does in fact leave without hindrance.

Neither does the fact that Agent Bowdich and Detective Gutierrez escorted Defendant to the FBI office . . . require Miranda warnings. In this regard, the present case resembles Beheler, where the suspect agreed to accompany police to the station house. In Beheler, the Court held that Miranda warnings were not required although the suspect was the target of a police investigation, had been escorted by police, and was ultimately questioned at the station house. Although adding to the coercive environment, these factors do not lead to the conclusion that a suspect is in custody.

Perhaps most significant for resolving the question of custody, Defendant was expressly told that he was not under arrest after interrupting Bowdich's attempt to recite the Miranda warnings. Bowdich testified that he read the Miranda warnings in order to make the questioning of Defendant "as clean as possible." Defendant stopped him and said, "Oh, I'm under arrest?" Agent Bowdich answered in the negative and later repeated that Defendant was not under arrest and was free to leave. Defendant was, in fact, returned home at the end of the interview, without being arrested. Being aware of the freedom to depart, and in fact departing after questioning at a law enforcement office, suggest that the questioning was noncustodial.

Viewing the "totality of the circumstances" from the perspective of a reasonable person in Defendant's position, and applying the Supreme Court's guidance, we hold that the questioning of Defendant at the FBI office did not amount to custodial interrogation. The district court thus did not err in holding that Miranda warnings were not required.

[Some text and some citations omitted]

Result: Affirmance of a California U.S. District Court conviction of Rayphal Crawford for armed bank robbery.

(3) ANTICIPATORY SEARCH WARRANT FAILS BECAUSE THE “TRIGGERING EVENT” WAS IDENTIFIED ONLY IN THE SUPPORTING AFFIDAVIT, AND THE RESIDENT AT THE PREMISES WAS NOT SHOWN A COPY OF THE AFFIDAVIT – In U.S. v. Grubbs, 377 F.3d 1072 (9th Cir. 2004), the Ninth Circuit of the U.S. Court of Appeals holds in a possessing-child-pornography case that an anticipatory search warrant was not lawfully executed because the only description of the search-triggering event was in an “incorporated” affidavit, and the affidavit was not shown to the resident when officers executed the warrant.

“Anticipatory search warrants” are search warrants that become operative only when some future event occurs. They are valid only under certain conditions. Such a warrant is valid only if: 1) the triggering event probably will occur; 2) the triggering event, together with other facts described in the affidavit establishes probable cause to search a particular premises; and 3) the warrant (or an attached incorporated affidavit) describes the triggering event with particularity. See State v. Goble, 88 Wn. App. 503 (Div. II, 1997) **Jan 88 LED:15**. Anticipatory search warrants are most often used when contraband (usually illegal drugs) is first intercepted in transit, and then is transmitted by law enforcement agents to the particular address intended by the sender. The anticipatory search warrant will authorize a search of the addressee’s premises at the point when the delivery – the “triggering event” – has occurred.

The Grubbs case deals with an anticipatory search warrant for child pornography. Investigators were responding to a purchase order that Mr. Grubbs placed for child pornography. The search

warrant in Grubbs failed to describe the event that would trigger lawful execution of the warrant. An affidavit in support of the search warrant did describe the triggering event (i.e., delivery of the child porn by an undercover postal inspector), and the search warrant on its face expressly incorporated the affidavit by reference. However, the officers executing the search warrant did not show the affidavit to the residents at the premises to be searched. While an affidavit that is not incorporated in a search warrant would not have to be shown to persons at premises searched, an incorporated affidavit is, by virtue of the incorporation, part of the warrant itself. Therefore, both the warrant and the incorporated affidavit must be shown to an occupant who is present when the warrant is executed, and both the affidavit and the warrant must be left at the scene following the search. Here, the Ninth Circuit holds, law enforcement officers violated the Fourth Amendment rights of the residents when the officers failed to show the residents anything in the search warrant or in the incorporated affidavit identifying the triggering event.

Result: Reversal of California Federal District Court conviction of Jeffrey Grubbs for receiving child pornography in violation of federal child pornography laws.

LED EDITORIAL COMMENT: Whenever officers are applying for an “anticipatory search warrant,” regardless of whether the officers use the technique of attaching and incorporating their affidavit to the search warrant, they should describe the triggering event in the search warrant itself.

(4) JAIL CIVIL LIABILITY: PATTERN OF 26-HOUR-PLUS DELAYS IN RELEASING DETAINEES AFTER COURT AUTHORIZATION MAY RESULT IN CIVIL LIABILITY AS VIOLATION OF CONSTITUTIONAL RIGHTS – In Berry v. Baca, 377 F.3d 764 (9th Cir. 2004), the U.S. Court of Appeals rules that a jury must hear the plaintiffs’ evidence in a section 1983 civil rights case alleging that application of county policies resulted in arrestees being routinely detained in the jail for periods ranging from 26 to 29 hours after courts had authorized their release following resolution of charges, that that this was unreasonable under the circumstances, and thus amounted to a policy of deliberate indifference to the arrestees’ constitutional rights.

Result: Reversal of California U.S. District Court summary judgment ruling for government; case remanded for trial.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

STATE NOT REQUIRED TO PROVE DEFENDANT’S INTENT TO CARRY OUT THREAT IN ORDER TO CONVICT FOR FELONY HARASSMENT; HOWEVER, EVIDENCE IN KILBORN CASE DOES NOT MEET FREE SPEECH CLAUSE’S “TRUE THREAT” STANDARD AND IS, THEREFORE, INSUFFICIENT TO CONVICT UNDER FACTS OF PRESENT CASE – In State v. Kilborn, 151 Wn.2d 36 (2004), the Washington State Supreme Court holds that the state is not required to prove a defendant’s intent to carry out a threat in order to convict a defendant of felony harassment, but the evidence of a “true threat,” i.e., a subjectively knowing threat, in the present case is insufficient to convict the defendant.

The facts and proceedings (excerpted from the majority opinion) are as follows:

On March 21, 2001, at Mount Baker Middle School in King County, eighth grade student K.J. was sitting next to Kilborn at the end of their last class, an accelerated reading class. Kilborn said to K.J., "I'm going to bring a gun to school tomorrow and shoot everyone and start with you," and then he said, "maybe not you first." K.J. was surprised and said, "yeah right" and turned away.

K.J. immediately told a friend about Kilborn's statement but did not tell her teacher because she did not know what to do. She thought Kilborn might have been joking, but she was not sure. K.J. went home and continued to think all that afternoon and into the evening about what Kilborn had said, and the more she thought about it the more she became afraid that Kilborn was serious.

K.J. did not know Kilborn to be a mean or scary person. He had never done anything like this before. K.J. had no reason to think that Kilborn would make a threat of this kind, but she testified that "we all knew we weren't suppose to say things like that so the fact that he said it made me think he was serious." Kilborn, on the other hand, stated in a written statement admitted at his trial that he had said that "[t]here's nothing an AK 47 wouldn't solve" and stated this was only a joke.

Eventually that evening K.J. told her mother and father what Kilborn had said, and her mother called 911. K.J. testified that she felt that "if he wasn't joking she saved lives." Kilborn was arrested and charged with felony harassment, which requires the State to prove that Kilborn knowingly threatened to cause bodily injury to K.J. immediately or in the future, the threat being one to kill, and by words or conduct placed K.J. in reasonable fear that the threat would be carried out. RCW 9A.46.020.

The trial court found K.J.'s testimony credible and that K.J. reasonably feared that Kilborn would carry out the threat. The trial court adjudicated Kilborn guilty of felony harassment, involving a threat to kill, and entered written findings and conclusions. During its oral ruling, the court rejected Kilborn's argument that the State had to prove that he actually intended to carry out the threat. In the course of addressing this matter, the court also said that

in retrospect and in analyzing the Respondent, both in terms of, you know, what [K.J.] said about him and any other limited knowledge I have, there is no reason to believe that he in fact intended to bring a gun to school and shoot everybody. But the cases say, and the law says, that that is not relevant; that we are simply talking about whether there is a threat and whether that threat is communicated.

[Citations to record omitted]

On appeal, the defendant challenged his conviction on First Amendment grounds, arguing that it was not a "true threat" because he was only joking. RCW 9A.46.020, the harassment statute, provides in part:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any; other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; or

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

The Court explains that because the statute criminalizes pure speech, "it must be interpreted with the commands of the First Amendment clearly in mind." Although the First Amendment protects most speech, there are categories that are not protected. Those categories include libelous speech, fighting words, incitement to riot, obscenity, child pornography, and "true threats."

"True threats" are the category at issue in the present case. "To avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only 'true threats'" The Court explains that, while the State need not prove intent to carry out the threats, the State must prove a subjectively knowing "true threat." The Court states:

The reason that "true threats" are not protected speech is because there is an overriding governmental interest in the " 'protect[ion of] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.' " We have adopted an objective test of what constitutes a "true threat": A "true threat" is " 'a statement made in a "context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life" ' " of another person. A true threat is a serious threat, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

. . . [F]ederal courts have overwhelmingly concluded that the First Amendment does not require that the speaker intend to actually carry out the threat." . . .

This conclusion accords with the reasons why true threats are not protected speech. The fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear are some of the reasons why true threats are not protected speech. That fear does not depend upon whether the speaker in fact intends to carry out the threat. For this reason, we hold, along with the vast majority of courts, that the First Amendment does not require that the speaker intend to carry out a threat for it to constitute a true threat.

Kilborn argues, however, that this court has held there must be an actual intent to carry out the threat. He is mistaken. He cites to [State v. Williams, 144 Wn.2d 197m 297 (2001)] but the court there simply quoted the test for "true threat,"

which, as noted above, is one that a reasonable person would foresee would be interpreted " 'as a serious expression of intention to inflict bodily harm....' " The requirement is that the words express the intent to inflict harm, not a requirement that the speaker actually intends to carry out the threat. Kilborn also cites State v. J.M., 144 Wn.2d 472, 481082 (2001). However, we expressly said in J.M. that the speaker need not intend to carry out the threat, and repeated the same point made in Williams--that the communication must be of intent to inflict bodily harm.

In J.M. we also said that the communication must be a serious threat, and not just idle talk, joking or puffery. Kilborn evidently takes this to mean that if the speaker subjectively intends a joke, no true threat is made. This is incorrect. As the State points out, the United States Supreme Court has observed that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.

...

We hold that the First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat, and that the State need not prove such intent.

We add, however, that the harassment statute itself does require a mental element. The statute requires that the defendant "knowingly threatens...." RCW 9A.46.020(1)(a)(i). This means that "the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person threatened or to another person." Thus, one who writes a threat in a personal diary or mutters a threat unaware that it might be heard does not knowingly threaten. The statute does not require that the State prove that the speaker intended to actually carry out the threat.

[Some citations omitted]

Although the state did not prove intent to carry out the threat, the Court holds that under the facts of this case there is insufficient evidence of a real threat. The Court explains:

Here, we apply the rule of independent review because the sufficiency of the evidence question raised involves the essential First Amendment question--whether Kilborn's statements constituted a "true threat" and therefore unprotected speech. We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.

As noted, Kilborn maintains he was joking. Some of K.J.'s uncontroverted testimony that did not find its way into the trial court's findings bears this out. Importantly, the trial court found K.J.'s testimony to be credible, a finding this court must defer to. K.J. testified that at the end of the last class the students were chatting, giggling, and laughing as they often did at the end of the school day. Kilborn and K.J. started talking about books they were reading; Kilborn had a book that had military men and guns on it. Kilborn then turned to K.J. and, half smiling, said he was going to bring a gun the next day and shoot everyone, beginning with her. Then he began giggling, and said maybe not her first. K.J.

testified that Kilborn started to "laugh or giggle" as if he were not serious, and that "he was acting kind of like he was joking." testified that she said "okay," and that she said "right" in an exaggerated tone.

At one point K.J. testified that she did not feel scared when Kilborn spoke, just surprised. They had known each other two years and had never had a fight or a disagreement. She testified Kilborn always treated her nicely. She testified that Kilborn made jokes on occasion and the other students, including her, laughed at the jokes. He also talked and joked with his friend who sat behind him. She testified that she later wondered whether he was joking or serious.

These facts all suggest that a reasonable person in Kilborn's position would foresee that his comments would not be interpreted seriously. In particular the testimony about K.J.'s and Kilborn's past history and relationship, his treatment of her in the past, the regularity of Kilborn joking with her and others, and his giggling or laughter as he made the comments, "acting kind of like he was joking," make it difficult to conclude that he would reasonably foresee his comments being taken seriously. In addition, Kilborn and K.J. had been discussing their books, and he had guns on it--perhaps the origin of his comment about guns.

K.J. testified, however, that at the time Kilborn made the statement, "It freaked me out, cause we know that we're not supposed to say anything about bringing a gun or even say the word 'gun' at school"; she testified that if Kilborn said it, given that the students knew they were not to speak of guns, "he must have been serious...." She also testified that she "didn't know if it would happen" and that it "could have, with all the shooting things going around, and I didn't really know [Kilborn] that well...."

We conclude that the evidence is insufficient for a reasonable person in Kilborn's place to foresee that K.J. would interpret his statement as a serious threat to cause bodily injury or death, given his past relationship with K.J., his having joked with her and his other friend in the class before, the discussion that had been taking place about the books they were reading, and his laughing or giggling when he made his comments. We are not concerned here with whether he might have been serious or not. We apply an objective standard which is, given the First Amendment values at issue, a difficult standard to satisfy.

Because of the First Amendment implications, a conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands--by proving a true threat was made--and the statute, by proving all the statutory elements of the crime. Here, the State has failed to show a true threat, the conviction must be reversed, and we need not decide whether statutory elements are otherwise satisfied.

Dissent: Justice Owens dissents in an opinion joined by Justices Ireland, Chambers, and Fairhurst. The dissenters would hold that the utterance by Kilborn was a "true threat," that the utterance therefore was unprotected by the constitution, and that the State met its burden in proving all of the necessary elements of harassment.

Result: Reversal of Martin Kilborn's King County Superior Court conviction for felony harassment.

WASHINGTON STATE COURT OF APPEALS

COUNTY CAN BE LIABLE UNDER “RESCUE DOCTRINE” FOR FAILURE OF SHERIFF’S OFFICE TO ADEQUATELY WARN COMMUNITY ABOUT LEVEL III SEX OFFENDER; “PUBLIC DUTY” DOCTRINE AND STATUTORY-IMMUNITY DEFENSES REJECTED

Osborn v. Mason County, ___ Wn. App. ___, 95 P.3d 1257 (Div. II, 2004)

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

On February 24, 2001, level III sex offender Rosenow raped and murdered Jennie Mae Osborn. Between June 2000, when Rosenow was released from prison, and December 2000, when he moved to Shelton, Rosenow had lived in Jennie's neighborhood in Hoodspport, Mason County, less than a mile away from the Osborn residence. Jennie was a friend of Rosenow's daughter, who attended Shelton High School with Jennie.

Rosenow pleaded guilty to third degree rape in 1993 and to second degree assault in 1999. In the 1993 incident, he raped a woman at knifepoint. In the 1999 incident, he choked a young woman with whom he had previously had consensual sex until she was unconscious and displayed a knife to her. When Rosenow was released from prison in June 2000, he was required to register as a sex offender and in July, the County reclassified him from a level II to a level III offender--the category of sex offender at the highest risk to re-offend.

Beginning in the summer of 2000, [Detective A] handled sex offender registration and community notification for the Mason County Sheriff's Department. He spent only about 10 percent of his work time on those activities. [Detective A] posted a sex offender notice regarding Rosenow on the County's website but did not provide any other notification to the community. For another level III sex offender who was released in late 2000, for example, [Detective A] had posted flyers, stuffed mailboxes, and notified the schools in the Shorecrest area of unincorporated Mason County.

Before Rosenow's release, Hoodspport, Mason County resident Shannyn Wiseman, who was concerned about Rosenow, called the Sheriff's Department and spoke with [Detective A]. [Detective A] informed Wiseman that he intended to post fliers and notify the community about Rosenow. About a month after Rosenow's release, Wiseman learned from her neighbor that Rosenow had followed the neighbor's 13-year-old daughter and another 12-year-old in his car while they rode their bikes. Wiseman reported this incident to [Detective A], who told her not to worry because that was "not Rosenow's M. O."

Wiseman then asked [Detective A] if he still intended to distribute fliers in the neighborhood, but he said he was too busy. Wiseman asked him if she and her friends could notify neighbors door-to-door, but [Detective A] advised her not to because "it would be like a 'vigilante' group."

In December 2000, Wiseman learned that Rosenow had moved to within one block of Hood Canal Grade School in Shelton, and she again called the Sheriff's Department. But [Detective A] was away, so she talked to someone else. The Sheriff's Department posted the change of address on its website on January 9, 2001. But the Department did not provide any other notification.

Shelton High School vice principal Rick Wells's declaration establishes that the high school had not received a sex offender notification regarding Rosenow and

that Rosenow had even taken his car in for repairs at the high school's auto shop. The high school posts sex offender notifications it receives from the Sheriff's Department on a bulletin board.

In October 2001, eight months after Jennie's death, the Osborns sued Rosenow, the State Department of Corrections, and the County. On February 3, 2003, the County moved for summary judgment, arguing that former RCW 4.24.550(5) and (6) (1998) and the public duty doctrine barred liability. The Osborns submitted various materials in opposition to the motion, including Wiseman's declaration.

In a March 18, 2003 letter ruling, the trial court denied the County's summary judgment motion, stating:

despite the directive of the statutes regarding immunity of liability in this case if followed pursuant to Mason County's argument would render the entire warning mechanism meaningless. It is obvious that there is an issue regarding the actions and/or inactions of Mason County.... It then becomes a question of fact as to whether the actions of Mason [C]ounty were appropriate under the circumstances. Thus, under the allegations by the plaintiffs in this case it is this court's position that this matter be resolved at trial.

ISSUES AND RULINGS: 1) Is Mason County entitled to summary judgment on the issue of "immunity" under RCW 4.24.550(6)? (ANSWER: No); 2) Is Mason County entitled to summary judgment on plaintiff's theory under the common law "rescue doctrine?" (ANSWER: No); 3) Is Mason County entitled to summary judgment under the common law "public duty doctrine?" (ANSWER: No)

Result: Affirmance of Grays Harbor County Superior Court order denying summary judgment; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Immunity under RCW 4.24.550(6)

Former RCW 4.24.550(6) states, "*Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a public official, public employee, or public agency for failing to release information authorized under this section.*" (Emphasis added.) Finally, under former RCW 4.24.550, local law enforcement agencies are permitted to disclose some or all of the offender's registration information "when the agency determines that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender."

The plain language of former RCW 4.24.550(6), applicable here, does not grant the County immunity from suit. Where the Legislature intended to grant immunity it is expressed. Another subsection of the same statute, which the parties concede does not apply in this case, grants public officials immunity from lawsuits by sex offenders for classification decisions and the release of information. Former RCW 4.24.550(5) states:

An appointed or elected public official, public employee, or public agency ... is immune from civil liability for damages for any discretionary risk level classification decisions or release of relevant and necessary information, unless it is shown that the

official, employee, or agency acted with gross negligence or in bad faith.

Former RCW 4.24.550 does not *create* a new duty to notify on the part of law enforcement. The statute provides that "nothing in [RCW 4.24.550] shall impose any liability" (former RCW 4.24.550(6)). Even without that language, the statute did not create an affirmative duty on the part of an agency to notify the public regarding sex offenders--by its own terms, "[p]ublic agencies *are authorized*," but not required, to release the information. Former RCW 4.24.550(1). *Compare* e.g. former RCW 9.94A.155 (1996) (requiring Department of Corrections to issue written notice of release of violent offenders, sex offenders, and felony harassment offenders to, among others, victims and witnesses who testified against them). Although the statute did not create a duty to notify, it also did not confer immunity from any lawsuit related to notification. The statute clearly indicates that the County may be liable as "otherwise ... provided by law." Former RCW 4.24.550(6). Therefore, we consider whether the County's actions in this case might make it liable under another legal theory, the rescue doctrine.

2) Rescue Doctrine

In deciding whether the facts the Osborns asserted support such a rescue doctrine claim, we look to two cases.

In the first case, Brown v. MacPherson's, Inc., 86 Wn.2d 293 (1975), plaintiff property owners sued for damages resulting from an avalanche that occurred near Stevens Pass. The plaintiffs asserted that an avalanche expert had informed an agent of the State Real Estate Division that their cabins were in a high-risk avalanche zone and that the State agent led the avalanche expert justifiably to believe the Division would pass on the warning to the plaintiffs. The State then failed to notify plaintiffs of the avalanche danger and allegedly led the developer of the cabins to believe that no danger existed.

Reversing the trial court's grant of the State's CR 12(b)(6) motion to dismiss, our Supreme Court held:

One who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by our law to exercise reasonable care in his efforts, however commendable. If the State's agents, acting out of concern for the safety of appellants and others similarly situated, negligently or intentionally conveyed the impression that the danger of avalanches was less than it was to Mr. MacPherson (or anyone else), causing him to refrain from action on appellants' behalf he otherwise would have taken, the State is answerable for any damage caused by that misimpression.

In the second case, Meneely v. S.R. Smith, Inc., 101 Wn. App. 845 (2000), Division Three of this court relied on Brown to find that swimming pool manufacturers' trade association owes a duty of care where it "undertakes the task of setting safety standards and fails to change those standards or issue warnings after it becomes aware of a risk posed by the standards."

The Osborns' situation here is analogous. According to Wiseman's declaration, [Detective A] told Wiseman that he would provide notification to the community, including posting fliers. [Detective A] did not post fliers or notify the community as he indicated he would. [Detective A] told Wiseman that he was too busy to

post fliers and, significantly, preventing her from notifying the community by telling her that disseminating Rosenow's conviction information would be vigilantisms. These facts, taken in the light most favorable to the Osborns, create a material issue of disputed fact whether [Detective A] affirmatively undertook to render aid but then, by prohibiting Wiseman from sounding an alarm, negligently increased the risk of harm to Rosenow's potential victims.

The County argues that the rescue doctrine does not apply because the Osborns had no contact with [Detective A] or Wiseman and therefore they have not shown reliance, which is a necessary element of the rescue doctrine. But under Brown, Meneely, and the Restatement [of Torts], *the Osborns'* reliance is not a necessary element. For example, the Brown court upheld a claim of individual cabin owners based on a State agent (1) having led an avalanche expert to believe that he would pass on the expert's warning and (2) having led the developer to believe erroneously that no avalanche danger existed.

Here, as in Brown, all that is required for a plaintiff to assert a claim under the rescue doctrine is that an actor who, having undertaken to render aid to plaintiffs, "increase[d] the risk of harm" to the plaintiffs through his or her negligent acts. The Osborns have asserted facts sufficient to overcome Mason County's summary judgment motion.

3) Public Duty Doctrine

Finally, the County contends that the public duty doctrine bars liability because the State owed no duty to the Osborns in particular.

The public duty doctrine provides that "for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one)." Absent a duty running to the injured plaintiff from agents of the municipality, no liability may be imposed for a municipality's failure to provide protection or services to a particular individual.

But Washington courts have identified at least four situations in which a governmental agency acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs, rather than the general duty of care owed to the public as a whole. The rescue doctrine is one of these exceptions:

- (1) [W]hen the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent), (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce), (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff (rescue doctrine), or (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity (special relationship).

The rescue doctrine as set forth in Brown provides the necessary exception to the public duty doctrine.

We do not hold that the Osborns may sue Mason County for breaching a duty under former RCW 4.24.550. We hold only that the Osborns have asserted facts from which a trier of fact could find that Mason County's actions affirmatively created a separate duty under the rescue doctrine. These facts, viewed in the light most favorable to the Osborns, raise the inference that Jennie or her parents would have received notice of the danger that Rosenow presented as a level III sex offender but for [Detective A]'s statements to Wiseman. *[Court's footnote: Our holding here does not, of course, relieve the Osborns of their task of proving that [Detective A]'s actions were the proximate cause of Jennie's death.]* Although we do so on grounds other than those expressed by the trial court, we affirm the trial court's denial of summary judgment.

[Some citations and some footnotes omitted]

KNOCKING ON WINDOW OF SLEEPERS-OCCUPIED CAR PARKED IN DENNY'S RESTAURANT PARKING LOT WAS NOT A "SEIZURE"

State v. Cerrillo, ___ Wn. App. ___, 93 P.3d 960 (Div. III, 2004_

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

Early one morning in April, 1999, [officer A] responded to a report of a suspicious vehicle parked near Denny's Restaurant in Moses Lake. He and [officer B] approached a parked pickup, saw two men asleep inside, and knocked on the windows to wake the men up. Either [officer A] or the man in the driver's seat opened the door and [officer A] asked to see the man's identification. **LED EDITORIAL NOTE: See our comment at the end of this entry. We think it could make a difference who opened the car door.** The man comp lied and proved to be Mr. Cerrillo. Due to the odor of alcohol and observations of Mr. Cerrillo's behavior, [officer A] decided Mr. Cerrillo was intoxicated. He told Mr. Cerrillo to "sleep it off" and not to drive.

The officer left and [officer A] continued to patrol the area, keeping an eye out for the pickup. About 30 minutes later, he saw the pick up leaving the parking lot and followed. Only one person was in the vehicle at this time. [Officer A] observed the drive make a turn without using a signal, move into a lane without using a signal, and fade form the inside lane to the outside lane while making a turn. When [officer A] activated his lights, the pickup pulled over. Mr. Cerrillo, who was driving, was arrested and charged with driving under the influence of alcohol.

Before trial in district court, Mr. Cerrillo moved to dismiss pursuant to State v. Knapstad, 107 Wn.2d 346 (1986) (the trial court has inherent power to dismiss a case that is not supported by sufficient evidence). He argued that the officers were not authorized to stop him during the initial encounter under any of the exceptions to the warrant requirement, including the community caretaking function. He further argued that the second stop was unavoidably tainted by the first unlawful seizure.

[Officer A] was the only witness to testify at the Knapstad hearing. He testified that he did not know who reported the suspicious vehicle and admitted he saw no evidence of a crime in or around the pickup. When asked if he would have pulled

the pickup over if he had not had the prior contact, [officer A] responded, "I really can't say one way or the other. I've made traffic stops for exactly the same thing."

The trial court found that the initial contact was based on the radio report of a suspicious vehicle, and not on the observations of the officers. The court additionally found that the second contact was based on knowledge gained from the first contact, and not on observations of behavior indicating unsafe or impaired driving. Concluding that Mr. Cerrillo was seized without a warrant during the first contact, the trial court further concluded that no exception to the warrant requirement justified the police intrusion. The court also found that the second stop was a pretext because it was based on information obtained from the initial, unlawful seizure. All evidence from the two contacts was suppressed and the charge was dismissed with prejudice.

The State appealed the district court's ruling to superior court, which affirmed. This court granted discretionary review. During oral arguments before this court, the State for the first time specifically argued that the initial contact between [officer A] and Cerrillo did not rise to the level of seizure. Because we found that the trial court's findings of fact and conclusions of law did not address the factors relevant to whether this encounter constituted a seizure, we declined to address this issue and affirmed. Cerrillo, 114 Wn. App. At 264 [Jan 03 LED:14]. The State petitioned for review to the Supreme Court, noting that the issue of seizure was listed in the designation of claimed errors in the motion for discretionary review to the Court of Appeals. By order entered on July 8, 2003, the Supreme Court remanded the case for reconsideration in light of O'Neill. The parties submitted supplemental briefing.

ISSUE AND RULING: Was Cerrillo seized when the officer knocked on the window of the parked car? (**ANSWER:** No)

Result: Reversal of Grant County Superior Court affirmance of District Court suppression order; case remanded for prosecution of Eduardo Cerrillo for DUI.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under article 1, section 7 of the Washington Constitution, a person is seized when an officer, by physical force or show of authority, restrains the person's freedom of movement and a reasonable person under the circumstances would not have believed he or she was free to go or decline the officer's request. O'Neill, 148 Wn.2d 564 (2003) [April 03 LED:03]. The standard is objective based on what a reasonable person would believe, not on the motives or suspicions of the officer. No seizure occurs when an officer approaches a person in public and "requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away."

In O'Neill, an officer saw a car parked in front of a closed store that had been burglarized twice in the previous month. The officer ran a computer check of the license plate and learned that the car had been impounded recently due to a drug situation. Noting that the windows were fogged, the officer assumed someone was inside the car. He approached, shined his flashlight in the driver's face, and asked the driver to roll down the window. The driver complied, and when asked why he was there, he demonstrated that the car would not start.

When asked for his identification, the driver responded he did not have identification because his driver's license had been revoked. At this point, the officer asked the driver to step out of the car. As the driver got out, the officer saw a spoon on the floorboard that appeared to contain narcotics residue. Additional evidence of narcotics use was discovered in a subsequent search of the car.

On the basis of these undisputed facts, O'Neill held that the officer's initial contact was not a seizure. The court first noted that it is not improper for an officer to engage a citizen in conversation in a public place. It follows that it is not an unreasonable intrusion for an officer to engage in conversation with a driver of a vehicle parked in a public parking lot.

Pivotal, of course, is the question whether a reasonable person would have felt free to terminate the encounter. In the case of a person sitting in a parked car, O'Neill held that such a person is free "to refuse an officer's request to open the window, and is under no obligation to engage in conversation with the officer." Even if the officer asked for identification, the window, and is under no obligation to engage in conversation with the officer." Even if the officer asked for identification, the circumstances may not amount to a show of authority that rises to the level of a seizure. Circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

In this case, the trial court's findings of fact do not indicate that [officer A] presented a show of authority sufficient to constitute a seizure of Mr. Cerrillo. The court found that [officer A] knocked on Mr. Cerrillo's window and "then asked the driver for identification and to explain what he was doing in the parking lot." **LED EDITORIAL NOTE: The Court here neglects to state that the communication occurred after the car door was opened, and the Court neglects to say whether it was the officer or the car occupant who opened the car door to engage in the conversation. See our comment at the end of this entry. We think it could make a difference in the legal analysis of "seizure" whether it was an officer or instead an occupant who first opened the car door.** Mr. Cerrillo was not forced to comply by a show of force or by the tenor of the officer's words. Noticing that Mr. Cerrillo smelled of alcohol and appeared intoxicated, [officer A] directed him not to drive and to sleep it off. As in O'Neill, the officer's actions, viewed objectively, do not support the conclusion that he compelled compliance with a show of authority. Consequently, his first encounter with Mr. Cerrillo did not rise to the level of a seizure.

The trial court found that [officer A] would not have initiated the second encounter – the traffic stop – without the information gathered from the first encounter. Because the first encounter was not an unlawful seizure, [officer A]'s awareness of Mr. Cerrillo's intoxication was lawfully gained. [Officer A] stopped Mr. Cerrillo's car because he believed he had probable cause to arrest Mr. Cerrillo for driving under the influence of alcohol. RCW 46.61.502. Probable cause exists when the facts and circumstances known to an arresting officer are sufficient to convince a reasonable person that a crime has been committed and that the person to be arrested committed the crime. Establishment of probable cause does not require evidence sufficient to show guilt beyond a reasonable doubt.

A reasonable person would agree with [officer A] that the smell of alcohol emanating from Mr. Cerrillo during the first encounter indicated that Mr. Cerrillo likely was under the influence of alcohol. Consequently, the subsequent traffic stop was based on probable cause to believe that Mr. Cerrillo was unlawfully driving under the influence of alcohol.

The trial court's suppression of the evidence and dismissal of the charge is reversed and the matter is remanded for trial.

LED EDITORIAL COMMENT: We are perplexed by the Court of Appeals' failure to demand that the facts be nailed down on who opened the car door in the initial conversation between the officer and the car occupant. See our bolded and bracketed "**LED Editorial Notes**" above in the excerpts from the **Cerrillo** opinion. We think that, in the absence of exigent circumstances, an officer would be making an unjustified "seizure" if the officer were – without first trying to rouse the occupants by knocking on the windows or otherwise reasonably trying to get their attention – to open the car door based solely on the fact that occupants of a lawfully parked car were sleeping. One cannot be certain what the **Cerrillo** Court thinks in that regard.

MERE LACK OF WARNING TO CONVICTED FELON OF INELIGIBILITY TO POSSESS FIREARM HELD TO BE NO EXCUSE FOR VIOLATING RCW 9.41.040

State v. Blum, 121 Wn. App. 1 (Div. III, 2004)

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

In 1990, the State of Colorado convicted and sentenced Blum to prison for the felony crimes of second degree burglary and attempted sexual assault of a child. Blum served his sentence, and the Colorado Department of Corrections discharged him on March 11, 1995.

The Colorado Department of Corrections apparently provided no written notice informing Blum that he could no longer possess firearms. The State has no information to show that Blum received written notice from Colorado or Washington that he could not possess firearms.

Blum later returned to Washington and, in December 2000, an armored car company hired him as a security guard. When making deliveries, Blum carried a Smith and Wesson revolver issued by his employer. A detective investigating Blum's role in an unrelated theft discovered that Blum was an unregistered sex offender and that he had been working as an armed guard despite being ineligible to possess a firearm.

The State charged Blum with second degree unlawful possession of a firearm. Blum moved to dismiss the charge because of "lack of written notice." The trial court granted Blum's motion to dismiss.

ISSUE AND RULING: Did the lack of a warning to Blum following his 1990 felony convictions in Colorado preclude his prosecution under RCW 9.41.040 for unlawful possession of a firearm? (**ANSWER:** No)

Result: Reversal of Pierce County Superior Court order dismissing charge against Raymond George Blum, Jr. for violating RCW 9.41.040; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In 1994, Washington enacted RCW 9.41.047, which requires courts to notify felons if they cannot possess firearms. The court must notify the person both orally and in writing at the time of their conviction to "immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record." RCW 9.41.047(1).

The State did not give Blum notice under RCW 9.41.047 because he was not convicted in Washington. Moreover, knowledge that the possession is a crime is not an element of the crime charged. State v. Krzeszowski, 106 Wn. App. 638 (Div. I, 2001) **Nov 01 LED:18** (citing State v. May, 100 Wn. App. (2000)); State v. Semakula, 88 Wn. App. 719 (1997) **March 98 LED:21**.

Blum argues that due process requires the State to give him notice of the statutory prohibition on possessing firearms, citing Lambert v. People of the State of California, 355 U.S. 225 (1957). In Lambert, the Los Angeles municipal code required all convicted felons who remained in the city for more than five days to register with the police. The defendant, a convicted felon, had lived in the city for more than seven years without registering. The Supreme Court reversed her conviction for violating the registration ordinance, holding that the statute violated due process because it did not require notice to the defendant. Key to the court's reasoning was the defendant's "wholly passive" conduct. And in distinguishing other registration statutes, the court said: "But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test." The court concluded that the State could not convict under the ordinance without proving the defendant's actual or probable knowledge of the registration requirement.

Lambert does not help Blum. The conduct here is not the wholly passive conduct the court found in Lambert. Blum is not being charged with "mere presence" in a location. Rather the State has charged him with the activity of possessing a firearm. And we have held that the State is not required to prove notice of the law to convict. Krzeszowski, 106 Wn. App. 638; Semakula, 88 Wn. App. 719; State v. Reed, 84 Wn. App. 379 (Div II,1997) **April 97 LED:11**.

Blum contends, however, that State v. Leavitt, 107 Wn. App. 361 (2001) **Nov 01 LED:17**, supports the dismissal of his charges. In Leavitt, the conviction occurred in Washington in 1998 -- four years after the enactment of RCW 9.41.047. We held that the defendant's conviction violated due process principles because the sentencing court and the probation department misled the defendant concerning his right to possess firearms after his one-year probation period. Here, Blum does not argue that he was misled by any State agency about his right to possess a firearm; thus, his reliance on Leavitt is misplaced.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) FIREARMS POSSESSION CHARGE UNDER RCW 9.41.040 BASED ON JUVENILE CONVICTIONS IN 1995 HELD PROPERLY DISMISSED BECAUSE 1995 JUVENILE COURT JUDGE AFFIRMATIVELY MISLED DEFENDANT AS TO EFFECT OF CONVICTION – In State v. Moore, 121 Wn. App. 889 (Div. III. 2004), the Court of Appeals rules that a defendant's rights

were prejudicially violated because a 1995 juvenile sentencing court failed to advise him (as required under RCW 9.41.047) that he could not legally possess firearms, and, more importantly, because he was affirmatively misled by things the 1995 juvenile sentencing court did say. This affirmatively led the defendant into believing that his juvenile convictions would not have a disqualifying effect on his future right to possess a firearm under RCW 9.41.040, the Court holds. Citing State v. Leavitt, 107 Wn. App. 361 (Div. II, 2001) **Nov 01 LED:17**, the Court of Appeals rules the 1995 juvenile sentencing court committed governmental misconduct under CrR 8.3(b). Accordingly, the Court of Appeals upholds dismissal of firearms possession charges against defendant for a 2002 incident in which he was found in possession of a firearm.

Result: Affirmance of order of Spokane County Superior Court dismissing firearms possession charge under RCW 9.41.040 against Dale M. Moore.

LED EDITORIAL COMMENT: We do not know what the Moore holding means as to Dale M. Moore's future possession of firearms. Now that he knows that the 1995 juvenile court judge misled him, why should he now be permitted to possess a firearm? In the Moore opinion, the Court of Appeals does not suggest the answer to this question, and no Washington precedent has addressed the question whether a previously-misadvised person in Moore's situation can continue to possess a firearm indefinitely. We would hope not, and we find some support for our view in State v. Locati, 111 Wn. App. 222 (Div. III, 2002) **Aug 02 LED:21** (holding that a felon in possession of a rifle could not reasonably claim he was misled by this CCO's advice that he could have a rifle, because the felon was subsequently warned by police that he could not lawfully possess the rifle). On the other hand, maybe Mr. Moore can now argue that the Court of Appeals misled him, as the Court of Appeals' decision is silent on Mr. Moore's current right, or lack thereof, to possess a firearm.

(2) WASHINGTON COURTS DO NOT HAVE AUTHORITY TO ISSUE "CERTIFICATES OF REHABILITATION" TO RESTORE FIREARMS RIGHTS – In State v. Masangkay, 121 Wn. App.904 (Div. I, 2004), the Court of Appeals rules that Washington courts lack authority under subsection (3) of RCW 9.41.040 to grant "certificates of rehabilitation" restoring firearms rights. Washington courts have authority to restore gun rights only as specified in subsection (4) of RCW 9.41.040.

The Court of Appeals describes as follows the facts and relevant procedural history in Masangkay:

After pleading guilty to second degree robbery in juvenile court, 14-year-old Jason Masangkay was sentenced to several months in custody. As a result of his conviction, he lost the right to possess firearms. In December 2002, when he was 18 years old and had been out of custody for almost three years, Masangkay petitioned the court to grant him a certificate of rehabilitation under RCW 9.41.040(3), so that he could regain his right to possess firearms and join the Marines. He presented evidence that he had made substantial achievements toward becoming a good student and citizen during his time out of custody.

The trial court initially decided that Washington law did not authorize it to grant Masangkay's petition, but on reconsideration, it decided that RCW 9.41.040(3) could be interpreted to permit it to issue certificates of rehabilitation.

In detailed analysis only briefly summarized in this **LED** entry, the Masangkay Court then explains that nothing in the language of RCW 9.41.040 and that nothing in the extensive case law interpreting that statute supports Mr. Masangkay's argument. No Washington court can issue a certificate of rehabilitation under subsection (3) of RCW 9.41.040 or under any other

Washington statute. Hence, no Washington court has authority to restore firearms rights to a person such as Mr. Masangkay who does not qualify under the waiting period required under RCW 9.41.040's subsection (4) (in Mr. Masangkay's case, five years). The Court of Appeals also rejects Mr. Masangkay's arguments that courts can grant certificates of rehabilitation: a) under the equitable powers of courts; b) under the Washington constitution; or c) under implied powers in the Juvenile Justice Act.

Result: Reversal of King County Superior Court decisions that granted a "certificate of rehabilitation" and firearms possession rights to Jason E. Masangkay.

LED EDITORIAL NOTE: Among the Washington appellate court firearms decisions discussed and harmonized in Masangkay are the following: Smith v. State, 118 Wn. App. 464 (Div. III, 2003) Nov 03 LED:16; Nakatani v. State, 109 Wn. App. 622 (Div. I, 2001) March 02 LED:10; State v. Swanson, 116 Wn. App. 67 (Div. II, 2003) May 03 LED:17; and State v. Radan, 143 Wn.2d 323 (2001) June 01 LED:06.

(3) READING THE UNLAWFUL-POSSESSION-OF-FIREARMS LAW AT RCW 9.41.040 TOGETHER WITH THE FORMER JUVENILE SEALED-RECORDS STATUTE, COURT OF APPEALS RULES THAT RCW 13.50.050(14) REQUIRES THAT PRIOR "SERIOUS OFFENSES" ADJUDICATIONS BE TREATED AS IF THEY NEVER HAPPENED IF A SEALING-AND-EXPUNGING ORDER IS OBTAINED – In Nelson v. State, 120 Wn. App. 470 (Div. I, 2003), the Court of Appeals rules that there are no firearms-possession restrictions under RCW 9.41.040 on a man who was convicted in juvenile court in December 1992 of "serious offenses," and who in April 2000 obtained a superior court order sealing and expunging his juvenile record.

After obtaining the April 2000 court order expunging and sealing his juvenile felony conviction records, Jeffrey Nelson petitioned the superior court for an order restoring his right to carry a firearm. The superior court denied his petition, but the Court of Appeals reverses, explaining its decision in part as follows:

After expungement of juvenile records in Washington, "the proceedings in the case shall be treated as if they never occurred." RCW 13.50.050(14). A court may not use an expunged offense as the basis of a sentence enhancement. The State Patrol may preserve records of an expunged offense insofar as the records include information identifying the person, such as fingerprints, but not information about the conviction itself. RCW 13.50.050(23).

If the proceedings never occurred, logically the end result--a conviction--never occurred either. The plain language of the expungement statute entitles Nelson to act and be treated as if he has not previously been convicted. If he has not previously been convicted, he may legally possess firearms.

The trial court did find that Nelson had previous convictions, and the State contends the finding is supported by Nelson's acknowledgement of his prior convictions in his petition. But even if the fact of Nelson's juvenile convictions is undisputed, legally the court could not conclude he had been "convicted" for purposes of the firearm statute, because the court was obligated to treat the juvenile proceedings as if they never occurred.

Nelson acknowledged his prior convictions only to assist the court in determining whether he was entitled to a certificate and order restoring his right to carry a firearm. Theoretically, Nelson could have avoided acknowledging his convictions if he had simply begun to carry firearms without seeking a certificate of his right to do so. Then, if arrested and charged, he could have asserted the expungement order as a defense and would have been entitled to dismissal of

charges based on the reasoning in this opinion. But given the uncertainty about the outcome, and his prior experience with arrest, his attempt to clarify his status before carrying firearms was a prudent course. Under the circumstances it would be unjust to hold that by acknowledging his previous convictions, Nelson waived his right to the clean slate provided by the expungement order.

Not only does the expungement statute support Nelson's position, the firearm statute itself states that where "no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge." RCW 9.41.040(3). The State did not present any records showing that Nelson has been convicted of a predicate offense that precludes him from possessing firearms. The State could not have done so, because there are no longer official records of any such offense. Nelson's conviction record from the Washington State Patrol is in evidence and it shows no prior convictions. Accordingly, Nelson was entitled to the statutory presumption that he was not convicted. This presumption is consistent with the expungement statute's directive to treat Nelson's convictions as if they never occurred.

[Footnotes omitted]

Along the way, the Nelson Court rejects, based on well-established Washington precedent, Nelson's alternative argument, an ex post facto challenge to the amendment to RCW 9.41.040 that made juvenile convictions disqualifiers to firearms possession. See *State v. Schmidt*, 143 Wn.2d 658 (2001) Sept 01 LED:08; *State v. Watkins*, 76 Wn. App. 726 (Div. I, 1995) April 95 LED:02.

Finally, the Nelson Court notes that "[s]tatutes enacted by the Legislature in 1997 and 2001 to restrict eligibility for firearms possession did not preclude Nelson from obtaining expungement because of the particular timeline in his case."

Result: Reversal of Whatcom County Supreme Court order; remanded to Superior Court for entry of order declaring that Jeffrey Nelson may carry a firearm (assuming he has no other disqualifying convictions).

(4) STATUTE AUTHORIZING TAKING OF BIOLOGICAL SAMPLES FROM FELON FOR DNA ID PROFILING UPHeld AGAINST FOURTH AMENDMENT CHALLENGE – In *State v. Surge*, ___ Wn. App. ___, 94 P.3d 345 (Div. I, 2004), the Court of Appeals, in a consolidated appeal involving six defendants, upholds RCW 43.43.757 (mandating DNA sampling and cataloging for felons) against Fourth Amendment attack under the following analysis:

Following their felony convictions, the appellants in these six consolidated appeals were ordered to submit to a collection of biological samples for purposes of DNA identification analysis as required by RCW 43.43.754. Each appellant raises the same issue on appeal: whether our state supreme court's opinion in *State v. Olivas*, 122 Wn.2d 73 (1993) upholding an earlier version of this same statute under Fourth Amendment "special need" analysis is still good law, in light of intervening United States Supreme Court and Ninth Circuit authority. In *United States v. Kincade*, 345 F.3d 1095 (9th Cir.2003), a panel of the Ninth Circuit Court of Appeals held that a similar federal statute violates the Fourth Amendment. The Kincade court refused to follow Ninth Circuit precedent to the contrary, reasoning that the prior case had been undermined by two intervening United States Supreme Court cases.

But while these appeals were pending, the Ninth Circuit ordered that Kincade be reheard en banc. See, *United States v. Kincade*, 354 F.3d 1000 (9th Cir.2004) (ordering that the case be reheard and that the three-judge panel opinion not be cited as precedent pending further ruling of the court en banc). At this writing, an en banc opinion has not been issued in Kincade. [LED EDITORIAL NOTE OF CROSS REFERENCE: On August 18, 2004, an 11-member panel of

the Ninth Circuit issued a new Fourth Amendment-based decision in Kincade, this time upholding the Federal statute there under review. See the entry above in this month's LED at pages 2-3.]

We disagree with the Kincade majority's conclusion that intervening United States Supreme Court case law has effectively overruled Ninth Circuit precedent that is consistent with Olivas. We believe that the Olivas court properly concluded that the drawing of blood from convicted felons to establish a DNA data bank serves a special need beyond normal law enforcement that properly may be balanced against the privacy interests of convicted felons. But even if the Olivas court's special needs analysis is analytically flawed, our DNA statute nevertheless passes Fourth Amendment muster under a different exception to the general warrant requirement, in that obtaining biological samples from convicted felons serves a compelling state interest, the means of collecting such samples are minimally intrusive, and convicted felons have no reasonable expectation of privacy in such identifying markers as their fingerprints and DNA. Accordingly, we affirm the judgments and sentences here at issue.

Result: Affirmance of six separate King County Superior Court rulings rejecting challenges by six defendants (Antoine Robert Surge, Christopher Yarbrough, Shabray McMurry, James McClinton, Ricardo Guzman-Gil, and Allen Bowman) to that part of their sentences that required that they submit to DNA sampling pursuant to RCW 43.43.757.

(5) CHEEK SWAB IS A PERMISSIBLE METHOD FOR COLLECTING BIOLOGICAL SAMPLE FROM A CONVICTED FELON – In State v. S.S., ___ Wn. App. ___, 94 P.3d 1002 (Div. I, 2004), the Court of Appeals rules that, in taking a biological sample for DNA analysis and cataloguing as required by RCW 43.43.754, it is permissible to take the sample by means of a cheek swab (rather than by blood sample, which S.S. unsuccessfully argued was required).

Result: Affirmance of King County Supreme Court order taking a cheek swab was permissible on the King County Supreme Court conviction of S.S. for second degree taking of a motor vehicle without permission.

UPDATE: SUPREME COURT'S REDMOND v. MOORE DECISION IS NOW FINAL

In the July and August LEDs, we digested City of Redmond v. Moore, 151 Wn.2d 664 (2004), the Washington State Supreme Court decision holding unconstitutional (on due process grounds) the statutory system under which DOL suspends certain types of 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." In late August 2004, the Washington Supreme Court denied motions to reconsider its decision and mandated the finality of the decision previously reported in the LED.

NEXT MONTH

The November LED will include an entry on the August 31, 2004 decision of the Ninth Circuit, U.S. Court of Appeals, in Johnson v. Hawe and the City of Sequim, ___ F.3d ___, 2004 WL 1936295 (9th Cir. 2004), where a 2-1 majority of the 3-judge panel ruled that: 1) a citizen who audiotapes a law enforcement officer's conversation and who audiotapes police radio transmissions (both from a public location) does not violate Washington's Privacy Act (chapter 9.73) in doing so; 2) the officer's act of arresting the citizen in this situation violates the citizen's Fourth Amendment right to be free from unconstitutional seizure; 3) an officer who made such

an arrest in the year 2000 is not entitled to “qualified immunity” for this unlawful conduct because a reasonable officer would have known better; and 4) the officer’s agency can also be held liable on a failure-to-train theory where the only evidence of agency training in relation to such a violation of the Privacy Act is that the officer’s agency has merely directed officers to “stay abreast” of developing case law.

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>].

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>].