



Law Enforcement

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Digest

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UNITED STATES SUPREME COURT

FEDERAL CIVIL RIGHTS LAWSUIT – REGARDLESS OF THE SPECIFIC OFFENSE THAT OFFICERS IDENTIFY AT THE TIME OF ARREST OR BOOKING, THE KNOWN FACTS GIVING PROBABLE CAUSE FOR A LAWFUL ARREST AS TO ANY CRIME WILL SUPPORT THE ARREST FOR PURPOSES OF DEFENDING AGAINST SECTION 1983 CIVIL RIGHTS ACTION UNDER QUALIFIED IMMUNITY DOCTRINE

Devenpeck v. Alford, 125 S.Ct. 588 (2004)

Facts: (Excerpted from Supreme Court opinion)

On the night of November 22, 1997, a disabled automobile and its passengers were stranded on the shoulder of State Route 16, a divided highway, in Pierce County, Washington. Alford v. Haner, 333 F.3d 972, 974 (C.A.9 2003) **Sept 03 LED:03**. Respondent Jerome Alford [plaintiff in the subsequent lawsuit] pulled his car off the road behind the disabled vehicle, activating his "wig-wag" headlights (which flash the left and right lights alternately). As he pulled off the road, Officer Joi Haner of the Washington State Patrol, one of the two petitioners here, passed the disabled car from the opposite direction. He turned around to check on the motorists at the first opportunity, and when he arrived, respondent, who had begun helping the motorists change a flat tire, hurried back to his car and drove away. The stranded motorists asked Haner if respondent was a "cop"; they said that respondent's statements, and his flashing, wig-wag headlights, had given them that impression. They also informed Haner that as respondent hurried off he left his flashlight behind.

On the basis of this information, Haner radioed his supervisor, Sergeant Gerald Devenpeck, the other petitioner here, that he was concerned respondent was an "impersonator" or "wannabe cop." He pursued respondent's vehicle and pulled it over. Through the passenger-side window, Haner observed that respondent was listening to the Kitsap County Sheriff's Office police frequency on a special radio, and that handcuffs and a hand-held police scanner were in the car. These facts bolstered Haner's suspicion that respondent was impersonating a police officer. Haner thought, moreover, that respondent seemed untruthful and evasive: He told Haner that he had worked previously for the "State Patrol," but under further questioning, claimed instead to have worked in law enforcement in Texas and at a shipyard. He claimed that his flashing headlights were part of a recently installed car-alarm system, and acted as though he was unable to trigger the system; but during these feigned efforts Haner noticed that respondent avoided pushing a button near his knee, which Haner suspected (correctly) to be the switch for the lights.

Sergeant Devenpeck arrived on the scene a short time later. After Haner informed Devenpeck of the basis for his belief that respondent had been impersonating a police officer, Devenpeck approached respondent's vehicle and inquired about the wig-wag headlights. As before, respondent said that the

headlights were part of his alarm system and that he did not know how to activate them. Like Haner, Devenpeck was skeptical of respondent's answers. In the course of his questioning, Devenpeck noticed a tape recorder on the passenger seat of respondent's car, with the play and record buttons depressed. He ordered Haner to remove respondent from the car, played the recorded tape, and found that respondent had been recording his conversations with the officers. Devenpeck informed respondent that he was under arrest for a violation of the Washington Privacy Act, Wash. Rev.Code § 9.73.030 (1994). Respondent protested that a state court-of-appeals decision, a copy of which he claimed was in his glove compartment, permitted him to record roadside conversations with police officers. Devenpeck returned to his car, reviewed the language of the Privacy Act, and attempted unsuccessfully to reach a prosecutor to confirm that the arrest was lawful. Believing that the text of the Privacy Act confirmed that respondent's recording was unlawful, he directed Officer Haner to take respondent to jail.

A short time later, Devenpeck reached by phone Mark Lindquist, a deputy county prosecutor, to whom he recounted the events leading to respondent's arrest. The two discussed a series of possible criminal offenses, including violation of the Privacy Act, impersonating a police officer, and making a false representation to an officer. Lindquist advised that there was "clearly probable cause," and suggested that respondent also be charged with "obstructing a public servant" "based on the runaround [he] gave [Devenpeck]." Devenpeck rejected this suggestion, explaining that the State Patrol does not, as a matter of policy, "stack charges" against an arrestee.

At booking, Haner charged respondent with violating the State Privacy Act, and issued a ticket to respondent for his flashing headlights under Wash. Rev.Code § 46.37.280(3) (1994). Under state law, respondent could be detained on the latter offense only for the period of time "reasonably necessary" to issue a citation. § 46.64.015 (1994). The state trial court subsequently dismissed both charges.

Proceedings below: (Excerpted from Supreme Court opinion)

[After the jury returned a verdict in favor of the WSP officers] a divided panel of the Court of Appeals for the Ninth Circuit reversed, finding "no evidence to support the jury's verdict." The majority concluded that petitioners could not have had probable cause to arrest because they cited only the Privacy Act charge and "[t]ape recording officers conducting a traffic stop is not a crime in Washington." The majority rejected petitioners' claim that probable cause existed to arrest respondent for the offenses of impersonating a law-enforcement officer, Wash. Rev.Code § 9A.60.040(3) (1994), and obstructing a law-enforcement officer, § 9A.76.020, because, it said, those offenses were not "closely related" to the offense invoked by Devenpeck as he took respondent into custody. The majority also held that there was no evidence to support petitioners' claim of qualified immunity, since, given the Washington Court of Appeals' decision in [State v. Flora, 68 Wn. App. 802 (Div. I, 1992) July 93 LED:17], "no objectively reasonable officer could have concluded that arresting [respondent] for taping the traffic stop was permissible." Judge Gould dissented on the ground that it was objectively reasonable for petitioners to believe that respondent had violated the Privacy Act.

ISSUE AND RULING: If the facts known to an officer provide probable cause as to the commission of any crime, will an arrest be lawful even if, at the time of arrest, the arresting

officer identifies a different crime as the one for which the person is being arrested? (ANSWER: Yes, rules a unanimous Court)

Result: Reversal of Ninth Circuit U.S. Court of Appeals decision that held that the arresting officers could not defend against a federal civil rights lawsuit by pointing to probable cause to arrest for an offense other than the offense (or one "closely related" thereto) which the officers identified when they booked Jerome Anthony Alford.

ANALYSIS: (Excerpted from Supreme Court opinion)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. In this case, the Court of Appeals held that the probable-cause inquiry is further confined to the known facts bearing upon the offense actually invoked at the time of arrest, and that (in addition) the offense supported by these known facts must be "closely related" to the offense that the officer invoked. We find no basis in precedent or reason for this limitation.

Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. Whren v. United States, 517 U.S. 806 (1996) **Aug 96 LED:09**. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer--eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not "closely related" to that subjective reason. This means that the constitutionality of an arrest under a given set of known facts will "vary from place to place and from time to time," depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection.

Those who support the "closely related offense" rule say that, although it is aimed at rooting out the subjective vice of arrests made for the wrong reason, it

does so by objective means--that is, by reference to the arresting officer's statement of his reason. The same argument was made in Whren, in defense of the proposed rule that a traffic stop can be declared invalid for malicious motivation when it is justified only by an offense which standard police practice does not make the basis for a stop. That rule, it was said, "attempt[s] to root out subjective vices through objective means." We rejected the argument there, and we reject it again here. Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

Finally, the "closely related offense" rule is condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required. Hence, the predictable consequence of a rule limiting the probable-cause inquiry to offenses closely related to (and supported by the same facts as) those identified by the arresting officer is not, as respondent contends, that officers will cease making sham arrests on the hope that such arrests will later be validated, but rather that officers will cease providing reasons for arrest. And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which probable cause could conceivably exist.

The facts of this case exemplify the arbitrary consequences of a "closely related offense" rule. Officer Haner's initial stop of respondent was motivated entirely by the suspicion that he was impersonating a police officer. Before pulling respondent over, Haner indicated by radio that this was his concern; during the stop, Haner asked respondent whether he was actively employed in law enforcement and why his car had wig-wag headlights; and when Sergeant Devenpeck arrived, Haner told him why he thought respondent was a "wannabe cop." In addition, in the course of interrogating respondent, both officers became convinced that he was not answering their questions truthfully and, with respect to the wig-wag headlights, that he was affirmatively trying to mislead them. Only after these suspicions had developed did Devenpeck discover the taping, place respondent under arrest, and offer the Privacy Act as the reason. Because of the "closely related offense" rule, Devenpeck's actions render irrelevant both Haner's developed suspicions that respondent was impersonating a police officer and the officers' shared belief that respondent obstructed their investigation. If Haner, rather than Devenpeck, had made the arrest, on the stated basis of *his* suspicions; if Devenpeck had not abided the county's policy against "stacking" charges; or if either officer had made the arrest without stating the grounds; the outcome under the "closely related offense" rule might well have been different. We have consistently rejected a conception of the Fourth Amendment that would produce such haphazard results, see Whren.

Respondent contended below that petitioners lacked probable cause to arrest him for obstructing a law-enforcement officer or for impersonating a law-enforcement officer. Because the Court of Appeals held that those offenses were legally irrelevant, it did not decide the question. We decline to engage in this inquiry for the first time here. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

FEDERAL CIVIL RIGHTS LAWSUIT -- OFFICER WHO SHOT SUSPECT BECAUSE HE APPEARED TO BE A DANGER TO BYSTANDERS AND TO OTHER OFFICERS AS HE WAS ATTEMPTING TO FLEE IS HELD ENTITLED TO QUALIFIED IMMUNITY IN SECTION 1983 CIVIL RIGHTS ACTION

Brosseau v. Haugen, 125 S.Ct. 596 (2004)

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

Officer Rochelle Brosseau, a member of the Puyallup, Washington, Police Department, shot Kenneth Haugen in the back as he attempted to flee from law enforcement authorities in his vehicle. Haugen subsequently filed this action in the United States District Court for the Western District of Washington pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged that the shot fired by Brosseau constituted excessive force and violated his federal constitutional rights. [*Court's footnote: Haugen also asserted pendent state-law claims and claims against the city and police department. These claims are not presently before us.*] The District Court granted summary judgment to Brosseau after finding she was entitled to qualified immunity. The Court of Appeals for the Ninth Circuit reversed. 339 F.3d 857 (2003). Following the two-step process set out in Saucier v. Katz, 533 U.S. 194 (2001), the Court of Appeals found, first, that Brosseau had violated Haugen's Fourth Amendment right to be free from excessive force and, second, that the right violated was clearly established and thus Brosseau was not entitled to qualified immunity. Brosseau then petitioned for writ of certiorari, requesting that we review both of the Court of Appeals' determinations. We grant the petition on the second, qualified immunity question and reverse.

The material facts, construed in a light most favorable to Haugen, are as follows. [*Court's footnote: Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party, Haugen.*] On the day before the fracas, Glen Tamburello went to the police station and reported to Brosseau that Haugen, a former crime partner of his, had stolen tools from his shop. Brosseau later learned that there was a felony no-bail warrant out for Haugen's arrest on drug and other offenses. The next morning, Haugen was spray-painting his Jeep Cherokee in his mother's driveway. Tamburello learned of Haugen's whereabouts, and he and cohort Matt Atwood drove a pickup truck to Haugen's mother's house to pay Haugen a visit. A fight ensued, which was witnessed by a neighbor who called 911.

Brosseau heard a report that the men were fighting in Haugen's mother's yard and responded. When she arrived, Tamburello and Atwood were attempting to get Haugen into Tamburello's pickup. Brosseau's arrival created a distraction, which provided Haugen the opportunity to get away. Haugen ran through his mother's yard and hid in the neighborhood. Brosseau requested assistance, and, shortly thereafter, two officers arrived with a K-9 to help track Haugen down. During the search, which lasted about 30 to 45 minutes, officers instructed Tamburello and Atwood to remain in Tamburello's pickup. They instructed Deanna Nocera, Haugen's girlfriend who was also present with her 3-year-old daughter, to remain in her small car with her daughter. Tamburello's pickup was parked in the street in front of the driveway; Nocera's small car was parked in the driveway in front of and facing the Jeep; and the Jeep was in the driveway facing

Nocera's car and angled somewhat to the left. The Jeep was parked about 4 feet away from Nocera's car and 20 to 30 feet away from Tamburello's pickup.

An officer radioed from down the street that a neighbor had seen a man in her backyard. Brosseau ran in that direction, and Haugen appeared. He ran past the front of his mother's house and then turned and ran into the driveway. With Brosseau still in pursuit, he jumped into the driver's side of the Jeep and closed and locked the door. Brosseau believed that he was running to the Jeep to retrieve a weapon.

Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the vehicle. Haugen ignored her command and continued to look for the keys so he could get the Jeep started. Brosseau repeated her commands and hit the driver's side window several times with her handgun, which failed to deter Haugen. On the third or fourth try, the window shattered. Brosseau unsuccessfully attempted to grab the keys and struck Haugen on the head with the barrel and butt of her gun. Haugen, still undeterred, succeeded in starting the Jeep. As the Jeep started or shortly after it began to move, Brosseau jumped back and to the left. She fired one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she was " 'fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area.' "

Despite being hit, Haugen, in his words, " 'st[ood] on the gas' "; navigated the " 'small, tight space' " to avoid the other vehicles; swerved across the neighbor's lawn; and continued down the street. After about a half block, Haugen realized that he had been shot and brought the Jeep to a halt. He suffered a collapsed lung and was airlifted to a hospital. He survived the shooting and subsequently pleaded guilty to the felony of "eluding." Wash. Rev.Code § 46.61.024 (1994). By so pleading, he admitted that he drove his Jeep in a manner indicating "a wanton or wilful disregard for the lives ... of others." He subsequently brought this § 1983 action against Brosseau.

ISSUE AND RULING: Did the officer's shooting of Haugen violate his clearly established legal right to be free from excessive force such that the officer was not entitled to qualified immunity under federal civil rights law? (**ANSWER:** No, rules an 8-1 majority; the officer is entitled to qualified immunity because her actions did not violate a clearly established right of plaintiff Haugen regarding police application of deadly force. The Supreme Court does not answer the threshold "excessive force" question, addressing only the "qualified immunity" question.)

Result: Reversal of Ninth Circuit U.S. Court of Appeals decision denying qualified immunity to the officer; officer is held entitled to qualified immunity; case remanded to lower federal courts for further proceedings.

ANALYSIS: (Excerpted from Supreme Court opinion)

When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz. As the Court of Appeals recognized, the constitutional question in this case is governed by the principles enunciated in Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's " 'objective reasonableness' " standard. Specifically with regard to

deadly force, we explained in Garner that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead." But "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity.

Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Saucier v. Katz (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force' "). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

It is important to emphasize that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."

The Court of Appeals acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in Graham and Garner. In so doing, it was mistaken. Graham and Garner, following the lead of the Fourth Amendment's text, are cast at a high level of generality. The present case is far from the obvious one where Graham and Garner alone offer a basis for decision.

We therefore turn to ask whether, at the time of Brosseau's actions, it was " ' "clearly established" ' " in this more " 'particularized' " sense that she was violating Haugen's Fourth Amendment right. Saucier v. Katz. The parties point us to only a handful of cases relevant to the "situation [Brosseau] confronted": whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. Specifically, Brosseau points us to Cole v. Bone, 993 F.2d 1328 (C.A.8 1993), and Smith v. Freland, 954 F.2d 343 (C.A.6 1992).

In these cases, the courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others. Cole v. Bone, (holding the officer "had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves"); Smith v. Freland, (noting "a car can be a deadly weapon" and holding the officer's decision to stop the car from possibly injuring others was reasonable). Smith is closer to this case. There, the officer and suspect engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a dead-end residential street. The suspect, however, freed his car and began speeding down the street. At this point, the officer fired a shot, which killed the suspect. The court held the officer's decision was reasonable and thus did not violate the Fourth Amendment. It noted that the suspect, like Haugen here, "had proven he would do almost anything to avoid capture" and that he posed a major threat to, among others, the officers at the end of the street.

Haugen points us to Estate of Starks v. Enyart, 5 F.3d 230 (C.A.7 1993), where the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect. There, the court concluded that the threat created by the fleeing suspect's failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force.

These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the " 'hazy border between excessive and acceptable force.' " Saucier v. Katz. The cases by no means "clearly establish" that Brosseau's conduct violated the Fourth Amendment.

The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

[Some citations, footnotes omitted]

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SAN DIEGO POLICE OFFICER WHO MARKETED SEX VIDEO FEATURING HIMSELF AS A STRIPPING AND MASTURBATING OFFICER IS NOT ENTITLED TO FIRST AMENDMENT FREE SPEECH PROTECTION AGAINST FIRING – In City of San Diego v. Roe, 125 S.Ct. 521 (2004), the Supreme Court rules, 9-0, off-duty activities of a San Diego police officer, who videotaped himself stripping off a generic police uniform and engaging in acts of masturbation and who offered home-made videos of this activity for sale on an online auction site, fell outside First Amendment protection that is given to speech by employees that is unrelated to employment and that has no effect on the mission and purpose of one's employer. Although the officer's activities took place outside the workplace and purported to be about subjects not related to his employment, his employing San Diego Police Department demonstrated legitimate and substantial interests of its own that were compromised by the officer's activity.

Result: Reversal of decision of Ninth Circuit of the U.S. Court of Appeals and remand of case, presumably for reinstatement of U.S. District Court decision that dismissed the officer's section 1983 civil rights lawsuit against the City of San Diego.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

MOTHER VIOLATED PRIVACY ACT, CHAPTER 9.73 RCW, WHEN SHE USED SPEAKERPHONE FUNCTION TO INTERCEPT A PHONE CONVERSATION BETWEEN HER DAUGHTER AND HER DAUGHTER'S BOYFRIEND – In State v. Christensen, ___ Wn.2d ___, 102 P.3d 789 (2004), the Washington Supreme Court unanimously votes to reverse a second degree robbery conviction where important evidence in the case was testimony from a woman who listened in on a phone conversation between her daughter and her daughter's boyfriend (the defendant).

The Christensen Court holds: 1) that a phone conversation between two people under the circumstances of this case, where the participants do not know that their conversation is being monitored, is “private” under the Privacy Act, RCW 9.73; and 2) the use of a speaker-phone function of a phone to intercept a conversation constitutes use of a “device designed to transmit” in violation of the Privacy Act.

On the issue of whether the conversation was private, the Supreme Court rejects the State’s arguments: a) that parents should be able to monitor their children’s phone conversations, and b) that past interceptions by the mother destroyed any reasonableness of the daughter’s expectation of privacy.

Violations of the Privacy Act, whether by law enforcement officers or by civilians, require exclusion of all testimony relating to the contents of the interception. Accordingly, the Christensen Court orders the testimony of the mother excluded, and the Court remands the case for possible re-trial without such evidence.

Result: Reversal of Court of Appeals’ decision (see 119 Wn. App. 74 (Div. I, 2003) **Jan 04 LED:20**) and hence reversal of San Juan County Superior Court conviction of Oliver C. Christensen for second degree robbery, remand for possible re-trial.

LED EDITORIAL COMMENT: The Supreme Court in Christensen does not expressly overrule State v. Bonilla, 23 Wn. App. 869 (1979), which contained discussion suggesting that an extension phone is not a “device” under the Act. However, our reading of the Christensen Court’s discussion of Bonilla leads us to believe that the Supreme Court’s Christensen analysis implicitly overrules Bonilla in part by deeming listening to a private conversation on an extension phone as a form of “interception” by a “device,” just like the speakerphone interception that occurred in Christensen.

WASHINGTON STATE COURT OF APPEALS

“PROTECTIVE SWEEP” DURING SEARCH WARRANT EXECUTION HELD UNJUSTIFIED BECAUSE NO REASONABLE OFFICER-SAFETY CONCERNS ESTABLISHED; ALSO, AFFIDAVIT FOR WARRANT HELD NOT TO MEET EITHER PRONG OF AGUILAR-SPINELLI TEST FOR INFORMANT-BASED PROBABLE CAUSE

State v. Boyer, ___ Wn. App. ___, 102 P.3d 833 (Div. III, 2004)

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

Mr. Boyer and his wife own a house in Moses Lake on the western shore of the lake. The house is divided into three living spaces: two upstairs apartments and one apartment in about one-half of the basement. The Boyers live in one of the upstairs quarters. Separate from their living space upstairs is apartment A, accessible only from the street. A stairway connects the Boyers' quarters with their storage area in the basement. Entry to the basement apartment is from the rear of the house, at a door labeled apartment B. This door opens to an 18-foot hallway, with the actual door to apartment B to the immediate right. At the end of the hallway on the left is the door into the Boyers' storage area of the basement. This door, called door no. 2 at the suppression hearing, is usually closed and locked so that the tenant of apartment B cannot enter. Stairs rise from the Boyers' storage area in the basement to the foyer of the Boyers' quarters. At the top of these stairs is a door missing a doorknob.

In early June 2002, Moses Lake police officer [A] received information from a confidential informant that someone living in the basement apartment was receiving stolen goods in exchange for cocaine. Officer [A] spoke with a neighbor of the Boyers and learned that the house was divided into three units: two upstairs and one in the basement. On June 14, 2002, Officer [A] applied for and received a search warrant for " [t]he apartment located in the bottom south east corner of 1363 Lakeside Dr. in Moses Lake. " Entry to apartment B is in the southeast corner of the Boyer house at that address.

Officer [A] executed the warrant on June 16 with two other officers, [B and C]. When they knocked and announced at the outside door labeled apartment B, Mr. Macias responded and let them into his apartment. Officer [C] remained in the hallway while Officers [A] and [B] conducted a protective sweep of apartment B. Leaving Officer [B] to deal with Mr. Macias, Officer [A] then called to Officer [C] and asked if the area was secure. Officer [C], who was standing at door no. 2, said that he had found an unlocked door. He and Officer [A] entered the Boyers' storage area, where they found drug paraphernalia and a white powder on a dresser. They searched the entire basement area but found no one there.

At the far end of the storage area (the northwest area of the basement), the officers found a stairway rising to the top floor. Officer [A] could hear voices coming from the upstairs area. He looked up the stairway and saw that the door was ajar and had no doorknob. The two officers climbed the stairs and walked into the Boyers' apartment. There they encountered Mr. Boyer and his wife. Officer [A] told Mr. Boyer he was serving a search warrant on the downstairs apartment and he was unsure where the basement apartment ended and Mr. Boyer's quarters began. He also told Mr. Boyer he had found what appeared to be cocaine on the basement dresser. Mr. Boyer responded, "Yea[h], that's mine." Officer [A] and Mr. Boyer then walked downstairs to the basement and Mr. Boyer showed the officer how the apartments were segregated. He was eventually arrested for possession of cocaine.

In a subsequent search of Mr. Boyer's quarters pursuant to a second warrant, officers found paraphernalia, child pornography, and two rifles. He was charged by amended information in December 2002 with possession of cocaine (RCW 69.50.401); second degree possession of a firearm (RCW 9.41.040); and sexual exploitation of a minor (RCW 9.68A.070).

A CrR 3.6 suppression hearing was held in March 2003. After hearing the testimony of Officer [A] and Mr. Boyer, the trial court concluded that (1) the first search warrant described the place to be searched--apartment B-- with reasonable particularity; (2) the officers reasonably entered door no. 2 and the Boyers' storage area in the basement to secure officer safety and to determine the extent of apartment B; and (3) cocaine was found in plain view during the protective sweep of the storage area and therefore should not be suppressed. However, the trial court also concluded that police entry into the Boyers' upstairs residence was unreasonable and all statements and evidence discovered after this entry must be suppressed. Declaring that it was unable to proceed on the charges without that evidence, the State moved for an order dismissing the case. On April 15, 2003, the charges against Mr. Boyer were dismissed without prejudice.

The State timely appealed the order of dismissal and the order of suppression. Mr. Boyer cross-appealed the portion of the trial court's findings that justified the Macias search warrant and the protective sweep of the basement storage area.

[Additional facts are described in the "analysis" excerpts below]

ISSUES AND RULINGS: 1) Was the "protective sweep" objectively justified by reasonable concerns for officer safety? (ANSWER: No); 2) Did the officers reasonably believe that the search of Boyers' basement storage area was within the scope of the warrant to search apartment B? (ANSWER: Yes); 3) Did the affidavit establish the credibility of the confidential informant? (ANSWER: No), 4) Did the affidavit establish that the CI had reasonable bases, based on first-hand observations, regarding his conclusions as to probable criminal activity at the premises to be searched? (ANSWER: No)

Result: Reversal of Grant County Superior Court order that dismissed, without prejudice to the State's re-filing of charges for cocaine possession and other criminal charges against Michael Allen Boyer; instead, the case is remanded for entry of judgment of dismissal with prejudice to the State's re-filing of charges.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Protective sweep

Warrantless searches and seizures inside a home are presumptively unreasonable. One of the few exceptions to this rule is the "protective sweep" recognized in Maryland v. Buie, 494 U.S. 325 (1990).

The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest. Buie. Generally officers executing an arrest warrant may search the premises for the subject of that warrant, but must call off the search as soon as the subject is found. However, the risk of danger with in-home arrests justifies steps by the officers "to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Consequently, "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."

To justify a protective sweep beyond immediately adjoining areas, the officers must be able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." State v. Hopkins, 113 Wn. App. 954 (2002) **Jan 03 LED:06**. The sweep is limited to a cursory inspection of places a person may be found and must last no longer than necessary to dispel the reasonable suspicion of danger or to complete the arrest, whichever occurs sooner. Buie.

No Washington case has addressed a protective sweep incident to execution of a search warrant. We agree with the trial court that, even if a protective sweep was justified under these circumstances, there was no valid reason to extend the search to the upstairs apartment. However, given the weight of authority specifically limiting protective sweeps to arrests or to executions of arrest

warrants, we find that the trial court erred as a matter of law in concluding that the warrantless search of the basement rooms behind door no. 2 was justified as a protective sweep. Even those jurisdictions--such as the First Circuit--that have extended Buie to the execution of a search warrant would find the sweep here unjustified because the officers articulated no specific facts that would support a prudent officer's belief that the area harbored a dangerous person. See, e.g., Drohan, 176 F.3d at 22; Daoust, 916 F.2d at 759; Smith, 141 N.H. at 277, 681 A.2d 1215; see also Hopkins (a general desire to make sure no one is hiding is not sufficient to justify a protective sweep outside the immediate area where an arrest has occurred).

2) Scope of search under warrant

The trial court also concluded, however, that the search of the Boyers' basement storage area was reasonable because the officers were unclear whether that area was or was not part of apartment B. This conclusion raises questions concerning the validity of the warrant.

A search warrant sufficiently describes the place to be searched with particularity if it enables the executing officer to find and identify the location without mistake. Perfection in the description is not required. The operative question is whether the description will prevent exploratory searches. The warrant here described the place to be searched as:

The apartment located in the bottom south east corner of 1363 Lakeside Dr. in Moses Lake. This is a wood structured residence white in color which is divided into three apartments. The front door is in the basement portion of the house and faces the lake. This has a dark colored screen door and is the furthest door to the south on the basement floor.

A diagram of the basement shows that the back side of the house forms a three-sided arc roughly facing south-southeast. Apartment B occupies the south central and southeast portion of the basement. The only door to the basement lies in the center of the back side of the house and the door to apartment B allows entry into the southeast corner of the basement. Viewed in light of the facts available to Officer [A] at the time he prepared the affidavit, the description of the place to be searched is sufficiently particular to support the validity of the warrant. The question turns, then, on whether the officers exceeded the scope of the warrant.

The circumstances of the present case support the trial court's conclusion that it was not clear whether the area behind door no. 2 was "a part of, or used in conjunction with" apartment B. Officer [A]'s testimony supports the trial court's finding that he "expected the apartment to be located to the left of the exterior door, in the area subsequently found to be part of Defendant's quarters." Further, the trial court found that when Officer [A] walked down to door no. 2, he was "at that point uncertain of the layout and physical extent of the apartment to be searched." The fact that the outside door was labeled apartment B implied to the casual visitor that the hallway and its doorways were all part of apartment B. [T]hese findings support the conclusion that it was reasonable for the officers to believe the Boyers' storage area was appurtenant to apartment B.

3), 4) PC based on informant's report (two-pronged Aguilar-Spinelli test)

Here, the affidavit for the warrant to search the basement apartment was based on information from a confidential informant. To establish probable cause based on an informant's tip, the magistrate must apply the two prongs of the Aguilar-Spinelli test, determining whether the affidavit establishes (1) the basis for the informant's information and (2) the basis for the officer's conclusion that the informant was credible. Both prongs of the test must be established. However, independent police investigation that corroborates the tip may cure a deficiency in either or both prongs. Mr. Boyer challenges both the veracity of the informant and the basis of the informant's information.

The magistrate concluded, from "information provided to the court which cannot be revealed without revealing the informant," that the anonymous informant here was a citizen informant as opposed to a professional informant. When the identity of a citizen informant is not revealed to the magistrate, Washington courts require a heightened demonstration of the informant's veracity. This more rigorous test protects against the possibility that the informant is an " 'anonymous troublemaker' " involved in the criminal activity or motivated by self-interest. The affidavit must contain sufficient background facts to support an inference that the anonymous citizen informant is telling the truth.

The affidavit at issue here lacks any facts at all to support the veracity of the citizen informant. All we know from the facts presented are that the informant had been to the basement apartment several times over the past four or five months, had reportedly seen stereos and stolen telephone calling cards traded for cocaine, and wished to remain anonymous because he or she feared retaliation. Nothing in the affidavit addresses the informant's background, including any possible criminal associations, standing in the community, reasons for being present at the scene of a crime, or motivation in providing information to the police. Looking only at the information available to the magistrate, we find insufficient information to establish the veracity of the citizen informant.

The affidavit also fails to establish the basis of the citizen informant's knowledge. Usually the basis of knowledge prong is satisfied when the informant declares that he or she is passing on firsthand information. Although the informant here provided information from firsthand observation, the affidavit does not address the informant's expertise to identify cocaine or basis for belief that the stereos and calling cards were stolen. Without sufficient underlying circumstances, the magistrate had no apparent basis to independently determine that the informant had a factual basis for his or her allegations.

Finally, we find insufficient independent police investigation to support the missing elements of the Aguilar-Spinelli test. Corroborating evidence must point to criminal activity along the lines suggested by the informant. The informant here indicated that 25 or 30 telephone calling cards stolen from "Taco El Rey's" were traded for cocaine around June 1, 2002. According to the officer preparing the affidavit, this information was consistent with a report made in late May 2002 that about 20 calling cards had been stolen. The affidavit does not, however, indicate whether the May 2002 incident involved Taco El Rey's. Theft of calling cards in May does not sufficiently corroborate the informant's assertion that cocaine was traded for stolen calling cards in June.

To summarize, the affidavit of probable cause fails to provide any facts to establish the veracity of the confidential informant or the basis for that informant's conclusion that someone was trading cocaine for stolen goods in apartment B. Independent police investigation failed to corroborate the informant's information sufficiently to overcome the possibility that he or she was an anonymous troublemaker. As a consequence, the search warrant was issued without probable cause and all evidence obtained in its execution must be suppressed.

[Some citations omitted]

AFFIDAVIT FOR SEARCH WARRANT HELD TO MEET BOTH PRONGS OF THE AGUILAR-SPINELLI TEST FOR INFORMANT-BASED PROBABLE CAUSE; ALSO, THE INFORMATION PROVIDED BY THE IDENTIFIED INFORMANT WAS NOT STALE

State v. Merkt, __ Wn. App. __, 102 P.3d 828 (Div. III, 2004)

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

[A] Richland Police Detective began watching a residence located at 1942 Luther in Richland, Washington, where Ms. Merkt allegedly lived. The detective was familiar with Ms. Merkt because in 1999 and 2000 her former neighbors complained about suspiciously heavy traffic coming and going at all times of the day and night from her residence. In September 2001, the detective received new information that Ms. Merkt was selling illegal drugs from the residence on Luther. The detective drove past the Luther residence on at least 20 to 25 different occasions between September 2001 and April 2002 to watch for signs of drug activity. Ms. Merkt's vehicle was nearly always present at different times during both daytime and evening hours. The detective contacted Amy Simpson at the Luther address on September 19, 2001. Ms. Simpson admitted Ms. Merkt was her roommate.

In January 2002, informant Doug Turner, a convicted felon, contacted [The detective] offering to provide information regarding drug activity in Richland in exchange for help on a pending driving while under the influence (DUI) charge. The detective told Mr. Turner no deals could be made. Mr. Turner told the detective he was a methamphetamine user tired of the effect it was having on his life. Mr. Turner directed the detective to 1942 Luther. He told the detective "Denise" lived there and sold "dope" out of that location. He said he had received methamphetamine from Denise at that location and had been present when her supplier brought drugs needing to be sold to the residence. Mr. Turner did not know Denise's last name, but knew she drove a blue-colored minivan. [The detective] already knew Ms. Merkt had a blue minivan registered in her name. Mr. Turner told the detective he had been at the Luther residence many times and there were always drugs there. Mr. Turner said he had not been to the Luther residence since December 2001.

The detective independently learned Ms. Merkt's van was driven to a Rite Aid store in Richland on January 26, 2002, where a man and woman each purchased the maximum amount of pseudoephedrine products allowed by law. From his training and experience, the detective knew that the over-the-counter medicine was often used in the manufacture of methamphetamine and could be traded by the purchaser to a methamphetamine cook for a small amount of the finished product.

On March 25, 2002, [the detective] met with informant Brett Wilder, an inmate at the Benton County jail. Mr. Wilder wanted to talk with the detective about drug activity in the Tri-Cities. Although Mr. Wilder asked for favorable treatment in exchange for the drug information, the detective told him no deals could, or would be made. Mr. Wilder then told the detective a woman named Denise Merkt, who lived on Luther, sold dope. Mr. Wilder said he had last purchased dope from Denise during the first week of March 2002. He also said he could purchase dope from her at any time.

On April 1, 2002, [the detective] applied for, and received, a warrant allowing him to search the residence at 1942 Luther, as well as Ms. Merkt's vehicle and person. Based on evidence gathered as a result of the search, Ms. Merkt was charged with unlawful possession of a controlled substance; maintaining a dwelling for controlled substances; and criminal mistreatment in the second degree.

Ms. Merkt unsuccessfully moved to suppress evidence based on an allegedly defective search warrant. Ms. Merkt was found guilty by a jury solely of the possession and mistreatment charges.

ISSUES AND RULINGS: 1) Under all of the circumstances, including the fact that the informants were named in the affidavit and were giving information against their respective penal interests, did the affidavit establish the credibility of the two informants under the Aguilar-Spinelli test for informant-based probable cause (PC)? (ANSWER: Yes, rules a 2-1 majority); 2) Was the PC information in the affidavit state? (ANSWER: No, rules a 2-1 majority).

Result: Affirmance of Benton County Superior Court conviction of Denise Lene Merkt for unlawful possession of a controlled substance and criminal mistreatment in second degree.

ANALYSIS: (Excerpted from Court of Appeals' majority opinion)

1) Information credibility

Probable cause exists if the affidavit for a search warrant sets out facts and circumstances sufficient to establish a reasonable inference the defendant is probably involved in criminal activity and that evidence of the particular crime will be found in the place to be searched. Mere speculation or an officer's personal belief will not suffice. An affidavit of probable cause must show "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched."

When the probable cause affidavit is based on an informant's hearsay, it must show the informant is probably trustworthy and has personal knowledge regarding the facts asserted under Aguilar-Spinelli. [Court's footnote: Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).] Under Aguilar-Spinelli, the informant's statements are tested by the familiar two-pronged test, (1) credibility/reliability, and (2) basis of knowledge. The credibility prong may be satisfied by an informant's track record, if any, or by showing the informant was acting against his penal interest. State v. Jackson, 102 Wn.2d 432 (1984). The basis of knowledge prong may be satisfied if the informant has personally witnessed the facts asserted. Here, the basis of knowledge prong is uncontested.

The existence of probable cause is tested in a commonsense fashion. If an affidavit does not establish probable cause, a defense motion to suppress evidence seized as a result of an improper warrant should be granted.

The probable cause affidavit supports the magistrate's decision to issue the search warrant. The detective knew from his investigation and prior contacts with Ms. Merkt that she associated with Danny Hunter, a well known local methamphetamine cook. [The detective] knew Ms. Merkt had two previous felony drug convictions. [The detective] had spoken with Ms. Simpson, who admitted Ms. Merkt lived at 1942 Luther. [The detective] monitored the absence or presence of Ms. Merkt's blue minivan at that residence. Details surrounding the informal surveillance were flushed out at trial, but were sufficiently revealed to the magistrate.

Both informants, Mr. Turner and Mr. Wilder, gave statements against their penal interests, thus establishing the reliability of their information as discussed in State v. Lair, 95 Wn.2d 706 (1981) and Jackson, 102 Wn.2d at 437. They voluntarily agreed to speak with the detective in spite of the detective's refusal to make any deals and gave incriminating evidence against Ms. Merkt and themselves. That an informant is named is one fact the court considers in determining the sufficiency of an affidavit of probable cause. State v. Duncan, 81 Wn. App. 70 (1996) **Sept 96 LED:11**. Significantly, while making statements against their penal interests, both witnesses volunteered critical evidence that linked Ms. Merkt to illegal drug activity occurring at the Luther address. These informants provided first-hand knowledge of purchases. Thus, both Aguilar-Spinelli prongs are satisfied.

2) Staleness

Finally, Ms. Merkt infers the information provided in the affidavit was stale. The test for staleness is commonsense. State v. Hall, 53 Wn. App. 296 (1989). To determine whether information is stale, we review a number of factors, which include (1) the amount of time that has elapsed; and (2) the nature and scope of the suspected activity. Here, one witness had purchased illegal drugs about four months prior to the search warrant issuing and the other approximately one month prior.

Ms. Merkt had a past criminal drug history. The witnesses' voluntary statements to [the detective] corroborated each other. Ms. Merkt's vehicle was used to purchase large amounts of a drug precursor approximately three months prior to the search. While a single piece of information, viewed in isolation, might have been considered stale, the totality of the information established probable cause that the drug sales were current and on-going. The trial court did not abuse its discretion in deciding the information taken together in a commonsense fashion was not stale. We defer to the trial court's decision and resolve doubts in favor of the warrant.

[Some citations omitted]

CONFESSION SUPPRESSED UNDER EVIDENCE RULE 410 – NATURE AND EXTENT OF PROSECUTOR'S PARTICIPATION IN POLICE INTERROGATION GAVE DEFENDANT REASONABLE BELIEF HE WAS ENGAGED IN PLEA NEGOTIATION

State v. Nowinski, ___ Wn. App. ___, 102 P.3d 840 (Div. I, 2004)

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

The murder victim, Daniel Dabalos, was discovered in August 2000 on a wooded embankment in an unpopulated area of King County east of Lake Young. The cause of death was multiple stab wounds to the chest.

Police suspected 20-year-old Simon Nowinski who they knew had been involved with Dabalos in a recent incident of felony flight. When they asked Nowinski if he knew anything about the murder, he denied having anything to do with it. Detectives A and B decided to arrest Nowinski on an outstanding warrant. The warrant was for a robbery charge that had once been dismissed but had recently been refiled. They arrested Nowinski in front of his mother's house just after 5 p.m. on October 4, 2000. Detective A read the Miranda warnings to Nowinski as she drove him down to the Kent Regional Justice Center. The two detectives began to question Nowinski about the robbery, but they soon turned to the murder of Dabalos.

According to the findings of fact entered by the trial court in support of the motion to suppress, the detectives -- using cell phone records and gas receipts -- had constructed a timeline of the night they believed Dabalos was murdered. They questioned Nowinski for several hours and eventually showed him a gruesome autopsy photograph of the victim. Detective A told him that "if something got out of control that night, this was his opportunity to tell the truth." Nowinski, with tears in his eyes, said he had things to tell them, but first he wanted to speak with his girlfriend.

The detectives arranged for Nowinski to speak with his girlfriend. Then at about 11:30 p.m., Detectives B and A sat down with Nowinski in a conference room. [A deputy prosecutor] was also present. According to the testimony of Detective A, it was her idea to summon the prosecutor because she felt Nowinski was getting ready to disclose his involvement in the murder. "And basically, Simon said that he wanted to make a deal so he wouldn't have to go to jail for a long time period." Nowinski described the murder, implicating himself along with another person identified by Nowinski as the person who did the stabbing. He repeated his narrative in a tape-recorded statement. Afterwards, Nowinski took the police to the locations where he said clothing had been burned and where the knife used in the stabbing had been thrown into the Green River.

The State charged Nowinski with second degree murder while armed with a deadly weapon. Nowinski moved to suppress or exclude from evidence the statement he gave to the police, as well as the evidence from the burn site and the knife. The trial court denied the motion and found Nowinski guilty on stipulated facts.

[See also the discussion of additional facts in the "analysis" excerpts below]

ISSUE AND RULING: Under all of circumstances, did defendant have an objectively reasonable belief that he was involved in "plea negotiations" protected by ER 410 in that part of his interrogation that included the participation of a deputy prosecutor? (ANSWER: Yes)

Result: Reversal of King County Superior Court conviction of Simon Nowinski for second degree murder while armed with a deadly weapon.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Nowinski contends that he was engaged in plea negotiations when he described his participation in the murder, and therefore the trial court should have excluded the statement under ER 410. This rule states:

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

In deciding that Nowinski's statements were not made in the course of plea negotiations, the trial court applied a widely-used two-part test stated in United States v. Robertson, 582 F.2d 1356 (5th Cir.1978). The Robertson court considered the admissibility of statements made by a defendant under the corresponding federal evidence rule as it existed in 1978. The federal rule was amended in 1980 to limit its application to discussions with a prosecuting authority. This court achieved substantially the same result by judicial interpretation in State v. Pizzuto, 55 Wn. App. 421 (1989) (limiting the applicability of ER 410 to "plea negotiations with prosecuting attorneys, or with their agents who possess express authority to plea bargain, and defense counsel or the defendant.").

In Robertson, drug enforcement agents found methamphetamine in a residence, and arrested two men and two women. They took them to an office for processing, and then prepared to drive them to the courthouse for arraignment. While standing in the parking lot, the two men began a discussion with the agents about their involvement in the crime. One of them asked if he could "get his wife off" by co-operating. The arresting agents responded that they couldn't promise anything, but stated that "any cooperation he made would probably help him out in the long run." The two men proceeded to describe their involvement with the meth lab while emphasizing that the women were not involved in the operation. The trial court's refusal to exclude their statements was affirmed on appeal against an argument that the defendant believed the statements were plea negotiations and should have been excluded under Fed.R.Evid. 410. The court acknowledged "the accused's assertions concerning his state of mind are critical" in determining whether a discussion should be characterized as a plea negotiation. But an objective assessment is also critical because the defendant's subjective perceptions were the only consideration, every confession would be vulnerable to an ER 410 challenge:

The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Robertson, 582 F.2d at 1366.

Applying this analysis to the facts, the Robertson court concluded that the parking lot conversation was not a plea negotiation. The defendants admitted

their own complicity in order to exonerate the women. "They did not even contemplate pleading guilty."

The question for this court is whether the findings of fact support the [trial court's] conclusion that "objectively there were no plea negotiations." According to the court's findings, there was a three-hour period during which Nowinski was interrogated only by the detectives. During this phase of the interview, Nowinski "talked in circles, was evasive, and tried to channel the discussion and limit its scope." The detectives perceived that he wanted to make a deal. . .

At this point, the detectives acceded to Nowinski's request for some time to talk to his girlfriend, because they felt this would "further create in his mind a disposition to confess." Nowinski admitted to his girlfriend that he had been involved in the death of Dabalos. He told her that although he did not intend for Dabalos to die, "things did not happen the way they were supposed to." He said the prosecutor "was on his way to work a deal." He told her he "hoped that if he talked to the prosecutor about what happened, the charges would not be as serious, the sentence shorter, and he might even come home that night."

About an hour after Nowinski finished talking with his girlfriend, [the deputy prosecutor], along with Detectives A and B, sat down with Nowinski in a conference room. Again, Detective B read Nowinski his rights and then introduced [the deputy prosecutor] to Nowinski. The discussion began:

[The deputy prosecutor] told Nowinski that he was the prosecutor on the case, was there to listen, and would be making the filing decision on the case. When the defendant asked if charges had been filed yet, he was told no. The defendant then asked if a deal could be made now so he wouldn't have to go to jail for a long time. [The deputy prosecutor] told the defendant there were no deals being made that night and the information the defendant provided would be considered with all the evidence in the case and discussed with [the deputy prosecutor]'s supervisors. [The deputy prosecutor] acted in good faith. [The deputy prosecutor] made no offers to the defendant. Nowinski asked no further questions of [the deputy prosecutor]. He made no offers to plead guilty to any crime. Nowinski did not ask about what possible charges he faced and never established parameters for the statement before confessing. He did not ask for an attorney. The defendant instead described his involvement in the murder of Daniel Dabalos. By virtue of what he described, the defendant engaged in activity that was tantamount to a guilty plea. The defendant held such a strong hope that he would receive leniency that this hope ripened into an actual subjective expectation that he was negotiating a plea at the time of his confession to the prosecutor and detectives. [Trial court's findings]

Next, Nowinski agreed to give a tape recorded statement, a process that took about an hour. When the detectives asked him about the felony flight incident that occurred before the murder, he asked that the tape be stopped. He told them he did not want to talk about that incident, and they agreed not to ask about it. The tape was turned back on and the interview resumed. Nowinski acknowledged [the deputy prosecutor]'s disclaimer that there was not going to be a deal that night:

During the taped interview, the defendant acknowledged that [the deputy prosecutor] had told the defendant that [the deputy prosecutor] was the prosecutor who would make the charging decision in the case, that [the deputy prosecutor] wasn't able, at that time, to make any promises or plea bargains with the defendant in regard to that charging decision, that [the deputy prosecutor] would consider all the evidence that was put together by the investigators, including the defendant's statement, and that this was the defendant's opportunity to tell the police what happened. After the detectives had asked their questions of the defendant, [the deputy prosecutor] also asked the defendant questions. After the tape statement was completed, [the deputy prosecutor] had no further contact with the defendant. At no time, from the time of his initial arrest until his ultimate booking in the King County Jail, did the defendant ask for an attorney. [Trial court's findings]

Did these facts establish an objectively reasonable basis for Nowinski's perception that he was engaged in plea negotiations with [the deputy prosecutor]? In concluding they did not, the trial court relied in part on the fact that Nowinski "never offered to plead to any crime". The State contends that this is an important consideration in deciding whether plea negotiations occurred, citing State v. Pizzuto, 55 Wn. App. 421 (1989).

In Pizzuto, the defendant--in hopes of avoiding the death penalty--made inculpatory statements to police officers about two murders while he was being held in another state on unrelated charges. We held that ER 410 was inapplicable--because the statements were made to police officers, not to prosecutors--and thus they were properly admitted. The point of Pizzuto is that "plea bargaining is for counsel and investigation for officers. Plea bargaining between unauthorized officers and defendants should not be countenanced". After making this distinction, the court thoroughly reviewed the circumstances of the defendant's statements to assure he had not been misled into believing that the officers to whom he made his statements were authorized to speak for the prosecutor. Because the defendant had been told repeatedly that no promises would be made, the court concluded that when he offered his co-operation he was merely volunteering in the hope he would receive a benefit. The critical fact was that Pizzuto knew the officers had no authority to offer deals, not that he himself did not offer to plead guilty.

The State emphasizes the statement in Pizzuto that plea bargaining "involves a quid pro quo." The trial court in this case concluded there was "insufficient evidence of a quid pro quo." However, again, Pizzuto does not stand for the proposition that one side or the other must actually extend a specific offer.

In a pre-arraignment discussion such as this one where no charges have been filed, the analytical question is whether the negotiations contemplated a guilty plea. United States v. Melina, 868 F.Supp. 1178, 1181 (D.Minn.1994). In Pizzuto the defendant had been told unequivocally there would be no deals. Here, the prosecutor's qualified disclaimer that there were "no deals being made *that night*" is more consistent with negotiations conducted in contemplation of a guilty plea. As the trial court recognized, it was not objectively reasonable to believe an offer would be extended that night. Detective A testified, "when you

sit down with a suspect to negotiate a deal, you want to know what they have to say before you're going to make any offers". Before Nowinski made his statement, the State had only a theory of what happened the night of Dabalos' murder. After he made his statement, the State had concrete information, but as [the deputy prosecutor] himself stated, that information would need to be evaluated before a charging decision could be made. The deputy prosecutor's disclaimer was too equivocal to insulate the discussions from ER 410.

[T]he undisputed facts establish that Nowinski clearly manifested to the detectives his desire to seek a "deal." Objectively, there was no reason for the prosecutor to join the discussion unless he was going to initiate plea negotiations. It will not do to rationalize the prosecutor's presence as necessary to answer Nowinski's questions about charging possibilities. It would not have been objectively reasonable for Nowinski to believe the prosecutor was there to give him legal advice.

Nowinski manifested his desire to make a deal "so he wouldn't have to go to jail for a long time." The police called in the prosecutor. The prosecutor did not disabuse Nowinski of his expectation that a deal would be offered, but merely commented that no deal would be made "that night". From the perspective of an ordinary person, these circumstances made it objectively reasonable for Nowinski to believe that he was engaged in plea negotiations.

To summarize, the trial court correctly determined that the presence of Prosecutor [the deputy prosecutor] made ER 410 potentially applicable, and appropriately analyzed the issue by means of the two-tiered Robertson test. It is undisputed that Nowinski subjectively expected that he was engaging in plea negotiations. We reverse the court's conclusion that his expectation was not objectively reasonable. We conclude that the trial court erred when it determined that ER 410 was inapplicable. Nowinski's statement should have been suppressed.

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

FOR PURPOSES OF MEETING HEARSAY EXCEPTION FOR "EXCITED UTTERANCE," THE HEARSAY CAN BE USED TO ESTABLISH THAT THE STARTLING EVENT OCCURRED – In State v. Young, ___ Wn. App. ___, 99 P.3d 1244 (Div. I, 2004), the Court of Appeals holds that a trial court has discretion to admit hearsay as to a victim's statement that was allegedly uttered spontaneously in reaction to a startling event, even when the hearsay testimony itself is the exclusive evidence as to whether the startling event occurred. Accordingly, the Young Court upholds a conviction for attempted child molestation based on neighbors' hearsay testimony regarding an 11-year-old child-victim's "excited utterances," despite the fact that the child had recanted her accusation by the time of trial.

Result: Affirmance of King County Superior Court conviction of Henry Eugene Young for attempted child molestation.

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.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.cornell.edu/uscode>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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>].