



Law Enforcement

June 2005

Digest

578th Basic Law Enforcement Academy – December 9, 2004 through April 19, 2005

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JUNE 2005 LED TABLE OF CONTENTS

2005 WASHINGTON LEGISLATIVE UPDATE – PART ONE	2
BRIEF NOTES FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS.....	3
NINTH CIRCUIT EXPANDS ITS “DEADLY FORCE” DEFINITION TO INCLUDE FORCE THAT CREATES “SUBSTANTIAL RISK OF SERIOUS BODILY INJURY;” COURT STATES THAT OTHER FEDERAL CIRCUIT COURTS APPLY THE SAME “DEADLY FORCE” DEFINITION Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005).....	3
“SEARCH INCIDENT TO ARREST” RULE IS STILL A “BRIGHT LINE” RULE UNDER THE FOURTH AMENDMENT (THE RULE IS THE SAME UNDER ARTICLE ONE SECTION SEVEN OF THE WASHINGTON STATE CONSTITUTION) U.S. v. Osife, 398 F.3d 1143 (9th Cir. 2005)	4
WASHINGTON STATE COURT OF APPEALS	5
AREA NEAR DEFENDANT’S GARAGE WAS A PROTECTED PRIVATE AREA UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION State v. Boethin, ___ Wn. App. ___, 109 P.3d 461 (Div. II, 2005).....	5
VEHICLE STOP UPHELD BASED SOLELY ON REGISTERED OWNER’S SUSPENDED DRIVER’S LICENSE STATUS – PRE-STOP CORROBORATION OF THE STATUTORILY RECOGNIZED REASONABLE SUSPICION THAT THE DRIVER IS THE SUSPENDED REGISTERED OWNER ORDINARILY IS NOT REQUIRED State v. Phillips, ___ Wn. App. ___, 109 P.3d 470 (Div. III, 2005)	7
DEFENDANT DID NOT MAKE SUFFICIENT SHOWING TO TRIGGER A <u>FRANKS</u> HEARING TO CHECK OFFICER’S INFORMANT-BASED REPRESENTATIONS IN SEARCH WARRANT AFFIDAVIT State v. O’Neal, ___ Wn. App. ___, 109 P.3d 429 (Div. II, 2005).....	8
29-MONTH-OLD CHILD’S STATEMENT TO DOCTOR HELD ADMISSIBLE UNDER “MEDICAL DIAGNOSIS” HEARSAY EXCEPTION AND NOT “TESTIMONIAL” UNDER <u>CRAWFORD’S</u> SIXTH AMENDMENT CONFRONTATION CLAUSE INTERPRETATION State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (Div. II, 2005).....	10
EVIDENCE SUPPORTS METHAMPHETAMINE-MANUFACTURING CONVICTION State v. Keena, 121 Wn. App. 143 (Div. II, 2004).....	14

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS..... 16

“FRYE TEST” NOT MET FOR PHYSICIAN ASSISTANT’S EXPERT TESTIMONY THAT CHILD VICTIM’S STATEMENT ALONE SHOWED THAT SEXUAL ABUSE OCCURRED
State v. Dunn, 125 Wn. App. 582 (Div. III, 2005)..... 16

“INDEPENDENT SOURCE” RULE APPLIED: EVIDENCE SEIZED UNDER A SEARCH WARRANT IS HELD ADMISSIBLE DESPITE AN UNLAWFUL POLICE ENTRY INTO A MOTEL ROOM AFTER POLICE HAD PC TO SEARCH BUT BEFORE THEY APPLIED FOR A SEARCH WARRANT
State v. Spring, ___ Wn. App. ___, 107 P.3d 118 (Div. I, 2005) 17

SUPERIOR COURT ORDER THAT EXTENDED THE PERIOD OF “COMMUNITY PLACEMENT” FOR A SEX OFFENDER WAS INVALID – THEREFORE, A WARRANTLESS “GOOD FAITH” CCO SEARCH BASED ON THAT ERRONEOUS COMMUNITY PLACEMENT WAS UNLAWFUL, AND THE “GOOD FAITH” OF POLICE OFFICERS FOLLOWING UP THE CCO SEARCH WITH SEARCHES UNDER WARRANTS IS LIKEWISE IRRELEVANT
State v. Wallin, 125 Wn. App. 648 (Div. I, 2005)..... 18

PROSECUTOR SHOULD NOT HAVE ELICITED TESTIMONY OF DETECTIVE AND OF DOCTOR REGARDING THEIR ASSESSMENT OF THE CREDIBILITY OF ALLEGED VICTIM OF CHILD SEX ABUSE
State v. Kirkman, ___ Wn. App. ___, 107 P.3d 133 (Div. II, 2005)..... 18

POLICE OFFICERS’ TESTIMONY REGARDING JAIL BOOKING RECORDS WAS PROPERLY ADMITTED UNDER STATUTORY “BUSINESS RECORDS” EXCEPTION TO HEARSAY RULE
State v. Iverson, ___ Wn. App. ___, 108 P.3d 799 (Div. I, 2005) 20

“CONSTRUCTIVE POSSESSION” -- FINGERPRINTS ON MASON JAR PLUS PROXIMITY TO ITEM ARE NOT ENOUGH TO SUPPORT CONVICTION BASED ON THE STATE’S THEORY OF “CONSTRUCTION POSSESSION” OF ILLEGAL DRUGS IN THE JAR
State v. Cote, 123 Wn. App. 546 (Div. III, 2004)..... 21

VEHICULAR HOMICIDE JURY INSTRUCTIONS UPHELD – STATE NOT REQUIRED TO CAUSALLY CONNECT DEFENDANT’S INTOXICATION AND VICTIM’S DEATH
State v. Morgan, 123 Wn. App. 810 (Div. I, 2004) 21

EDITORS’ INTRODUCTORY NOTE: This is Part One of what will likely be a three-part compilation of 2005 Washington State legislative enactments of interest to law enforcement. Part Two will appear next month and Part Three the following month. Part One will address the enactments of interest that have an “immediate” effective date. Beware: some of those bills had not yet been signed by the Governor as of the LED deadline, and it is always possible that the Governor could veto all or part of any of the bills not yet signed. If that happens, we will report on any such developments next month. Note also that, unless a different effective date is specified in the legislation, enactments adopted during the 2005 regular session take effect on July 24, 2005, i.e., 90 days after the end of the regular session.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing us with helpful information.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. We will include in Part Three in the August 2005 LED (which will appear on the CJTC internet LED page in

the middle of July] a cumulative index of enactments covered in the 2005 LED legislative updates.

Text of each of the 2005 Washington enactments is available on the Internet at [<http://www.leg.wa.gov/wsladm/billinfo1/bills.cfm>]. We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED are the views of the editors and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

REVISING LAW ON POST-CONVICTION DNA TESTING ON DEFENDANT REQUEST

Chapter 5 (SHB1014)

Effective Date: March 9, 2005

Amends RCW 10.73.170 to revise provisions relating to post-conviction requests by convicted persons for DNA testing.

REVISING SENTENCING LAWS TO COMPLY WITH BLAKELY DECISION

Chapter 68 (SB 5477)

Effective Date: April 15, 2005

Amends sentencing laws to meet requirements of the U.S. Supreme Court decision last year in the Blakely case. The amendments provide for giving the defendant notice prior to plea or trial of the State's intent to seek an aggravated sentence. Absent waiver, the jury will determine the aggravating fact, and then the court will decide if the fact is a substantial and compelling reason to depart from the presumptive sentence and for how long. The act also requires a Sentencing Guidelines Commission study of judicial sentencing discretion lost due to Blakely.

CONSIDERING AGE, GENDER, AND OTHER DEMOGRAPHIC FACTORS IN REVIEWING SEXUALLY VIOLENT PREDATOR STATUS

Chapter __ (SB 5582)

Effective Date: Immediate if and when Governor signs

Amends chapter 71.09 RCW to clarify how demographic factors such as age, gender, and marital status are to be used and not used in determining whether a civilly committed violent predator has changed.

ADDRESSING FIREARMS POSSESSION BY PERSONS PREVIOUSLY FOUND NOT GUILTY BY REASON OF INSANITY AND PREVIOUSLY INVOLUNTARILY COMMITTED

Chapter __ (SHB 1687)

Effective Date: Immediate if and when Governor signs

Amends RCW 9.41.040 and RCW 9.41.047 to address firearms possession by persons found not guilty by reason of insanity. The House Bill Report summarizes these changes as follows:

A verdict of not guilty by reason of insanity is to be considered the same as a verdict of guilty for purpose of a person's right to possess a firearm. For restoration of the right to possess a firearm, such a person must meet the eligibility requirements that would have applied had he or she been convicted of the crime.

An additional requirement is placed on a person who has been involuntarily committed for mental health treatment and is applying for restoration of his or her right to possess a firearm. If the record shows by a preponderance of the

evidence that the person has been violent and is likely to be violent again, the person must show by clear, cogent, and convincing evidence that he or she does not present a substantial danger to the safety of others.

BRIEF NOTES FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

(1) NINTH CIRCUIT EXPANDS ITS “DEADLY FORCE” DEFINITION TO INCLUDE FORCE THAT CREATES “SUBSTANTIAL RISK OF SERIOUS BODILY INJURY;” COURT STATES THAT OTHER FEDERAL CIRCUIT COURTS APPLY THE SAME “DEADLY FORCE” DEFINITION – In Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals, in an en banc 8-3 decision in a Federal Civil Rights civil liability case under 42 U.S.C. section 1983, expands the Ninth Circuit’s definition of “deadly force” to include use of a police canine under some circumstances, though the majority opinion offers little guidance as to what circumstances will constitute “deadly force” under the revised definition.

In the City of Hemet case, a police canine was used to help subdue a DV suspect who was resisting arrest. The dog bit the arrestee in the right shoulder and neck area. In reviewing a district court decision in the ensuing Civil Rights lawsuit, the Ninth Circuit overrules the Ninth Circuit’s prior decision in Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1998) **Jan 99 LED:03**, a case also involving use of a police canine. In Vera Cruz, the Ninth Circuit had defined “deadly force” under the Fourth Amendment rule of Tennessee v. Garner, 471 U.S. 1 (1985) as “force reasonably likely to kill.” The majority opinion in City of Hemet expands that definition to read: “force that creates a substantial risk of death or serious bodily injury.”

The majority opinion in City of Hemet asserts that the latter, revised definition is the same definition that has been applied in the seven other federal circuit courts that have addressed the definitional issue. There are 12 federal circuit courts altogether, so apparently the other four federal circuit courts have not yet addressed the issue. **[LED Editorial Note: While it does appear that the seven other federal circuit courts have used the broader definition of “deadly force,” it is not so clear that those other courts would have directed that a police dog bite case like this one be submitted to a jury as a possible “deadly force” case.]**

Result: Reversal of a California federal district court ruling that granted summary judgment to the City of Hemet and the officers being sued; case remanded for trial on the “deadly force” and other use of force issues in the case.

Status: On April 11, 2005, the City of Hemet and the officers petitioned for discretionary review in the United States Supreme Court. A U.S. Supreme Court decision on whether to grant review likely will not be made for at least several months.

(2) “SEARCH INCIDENT TO ARREST” RULE IS STILL A “BRIGHT LINE” RULE UNDER THE FOURTH AMENDMENT (THE RULE IS THE SAME UNDER ARTICLE ONE SECTION SEVEN OF THE WASHINGTON STATE CONSTITUTION) – In U.S. v. Osife, 398 F.3d 1143 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals rejects a defendant’s argument that the “search incident to arrest” rule for car searches requires that the government show either that the particular crime for which arrest was made or other circumstances give the arresting officer cause to believe that the car is likely to contain weapons or evidence. The Osife Court notes that, while the “bright line” Fourth Amendment “search incident” rule for cars was criticized in a concurring opinion in the United States Supreme Court decision in Thornton v. U.S., 541 U.S. 615 (2004) **July 04 LED:02**, a majority of the Justices in that decision continued to stick with the “bright line” Fourth Amendment rule. Thus, per Thornton, the rule continues to be a per se rule that, so long

as a custodial arrest of a person is lawful, and so long as circumstances sufficiently connect the person and the arrest to the car, a search of the passenger areas of the vehicle for evidence or weapons is permitted regardless of the nature of the crime for which arrest is being made.

Result: Affirmance of Arizona federal district court conviction of Dale Juan Osife for being a felon in possession of a firearm.

LED EDITORIAL NOTE: This decision is consistent with Washington case law on the “search incident to arrest” rule. See State v. Stroud, 106 Wn.2d 144 (1986). Washington’s “search incident” rule for car searches under article 1, section 7 of the Washington constitution is slightly more restrictive than the Fourth Amendment rule, in that Washington officers are not allowed to automatically search: 1) locked containers (see State v. Stroud); or 2) containers and items known to belong to passengers not under arrest (See State v. Parker, 139 Wn.2d 486 (1999), Dec 99 LED:13). However, no Washington decision imposes the kind of restriction that Mr. Osife sought in this case.

WASHINGTON STATE COURT OF APPEALS

AREA NEAR DEFENDANT’S GARAGE WAS A PROTECTED PRIVATE AREA UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION

State v. Boethin, ___ Wn. App. ___, 109 P.3d 461 (Div. II, 2005)

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

In February 2003, Boethin owned a home at 2610 NW 199th Street. The home is in a rural area about 125 yards from the public street. The neighbors' homes are 70 to 75 yards away and not visible through the trees. The property is secluded, and it was uncommon to have visitors.

One accesses the property by turning north from the public street and traveling along a gravel driveway. As one approaches the home itself, the driveway becomes paved and gradually widens to encompass much of the front of the house.

The home's front door faces south. So do its two garage doors. The west edge of the west garage door is a little less than 20 feet east of the front door. The front door is above ground level and is reached by ascending several stairs. The front door and the garage doors were closed at all times material here.

At the times pertinent here, a woodpile existed in front of the east side of the west garage door. A BMW vehicle was parked in the paved driveway area, just southwest of the woodpile. A boat was parked in front of the easterly part of the garage doors, and a pickup truck was parked just south of the boat.

At 2:30 p.m. on February 27, 2003, [Detectives A and B] arrived at the home to investigate a suspected indoor marijuana grow operation. Although they did not have probable cause or a warrant, they planned to knock, talk with whoever came to the door, and, while doing that, try to smell marijuana. They parked in the southerly part of the driveway's pavement and approached the front steps by

walking diagonally and to their left (in a northwesterly direction). When they reached the steps, [Detective B] ascended to the front door, knocked, and waited for a response.

While [Detective B] was waiting at the front door, Detective A] left the area of the stairs and walked more than 20 feet to the east edge of the western garage door. His purpose was to see if he could smell marijuana in the garage. Having walked between the house and the BMW, and between the house and the woodpile, he put his nose within two inches of the garage door seam, sniffed, and smelled marijuana.

Meanwhile, [Detective B] was still waiting for a response at the front door. When [Detective A] said that he had smelled marijuana, [Detective B] walked to where [Detective A] had sniffed, put his nose "a couple of inches" from the crack, and also smelled marijuana. No one ever did come to the front door.

Based on the smell emanating from the garage, the officers obtained a search warrant. When they served it, they found that the garage contained 22 growing marijuana plants and 11 pounds of cut marijuana.

The State charged Boethin with manufacturing marijuana. He moved to suppress, but the trial court denied his motion. Following a bench trial on stipulated facts, he was convicted and sentenced to 30 days in jail, with work release if he qualified.

ISSUE AND RULING: Did defendant Boethin have a reasonable expectation of privacy in the area near his garage where the detectives made their warrantless detection of the smell of marijuana? (**ANSWER:** Yes, and the officers violated that right)

Result: Reversal of Clark County Superior Court conviction of Walter James Boethin for unlawfully manufacturing marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Boethin argues on appeal that he was "disturbed in his private affairs ... without authority of law." He cites and relies on Washington Constitution, Art. I, § 7, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A police officer may enter areas around a home that are impliedly open to the public, such as an access route or walkway leading up to the home. [*Court's footnote: State v. Ross, 91 Wn. App. 814 (1998), aff'd, 141 Wn.2d 304 (2000) Sept 00 LED:02*] If while in those areas he or she "is able to detect something by utilization of one or more senses," he or she does not conduct an unlawful search. [*Court's footnote: State v. Seagull, 95 Wn.2d 898 (1981). Although [Seagull] interprets the Fourth Amendment to the United States Constitution, the Washington State Supreme Court has applied its holding to cases interpreting Article I, § 7. State v. Vonhof, 51 Wn. App. 33 (1988).*] But if he or she substantially and unreasonably departs from such areas, he or she does conduct an unlawful search. [*Court's footnote: State v. Myers, 117 Wn.2d 332 (1991); Seagull, 95 Wn.2d at 903.*] He or she may intrude to the same extent as a reasonably respectful citizen, but not to a greater extent, and the extent to which

a reasonably respectful citizen may intrude depends on the facts and circumstances of each case.

In State v. Seagull, an officer approached a house in daylight. His purpose was to ask the occupants about a vehicle abandoned in their neighborhood. After initially going to the south door, he went around the house to its north door. On his way, he walked within ten feet of a greenhouse and saw a marijuana plant. He did not conduct an unlawful search because he deviated only slightly from the most direct route between the two doors, he was engaged in an honest attempt to talk to the home's occupants, and he observed the marijuana inadvertently.

In State v. Vonhof, a tax appraiser smelled marijuana while inspecting a shop building that was not on the tax rolls and had never been appraised. He did not conduct an unlawful search because he had a statutory right to enter and inspect the property, he entered in the daytime, he did not intrude into the building, and he smelled the marijuana inadvertently.

In State v. Rose, [*Court's footnote: 128 Wn.2d 388 (1996) March 96 LED:27*] an officer saw marijuana while standing on the front porch of a home and shining his flashlight through a front window. He did not conduct an unlawful search because the front porch was impliedly open to the public and, like any other member of the public, the officer was free to keep his eyes open while there.

In this case, by way of contrast, [Detectives A and B] went to the house for the purpose of detecting marijuana. After approaching the front door as any reasonably respectful citizen would have done, and even though they had not yet observed any criminal activity, they traversed the distance from the stairs to the garage doors, put their noses against the crack between those doors and the wall, and smelled marijuana. In doing that, they deviated substantially from what a reasonably respectful citizen would have done, and they intruded into "private affairs" without authority of law within the meaning of Article I, § 7.

Having held that the officers' olfactory observations of marijuana were unlawful, we next inquire whether the remainder of the information in the search warrant affidavit shows probable cause. It clearly does not. Accordingly, the marijuana must be suppressed, and the case must be dismissed.

[Some citations, footnotes omitted]

VEHICLE STOP UPHELD BASED SOLELY ON REGISTERED OWNER'S SUSPENDED DRIVER'S LICENSE STATUS – PRE-STOP CORROBORATION OF THE STATUTORILY RECOGNIZED REASONABLE SUSPICION THAT THE DRIVER IS THE SUSPENDED REGISTERED OWNER ORDINARILY IS NOT REQUIRED

State v. Phillips, ___ Wn. App. ___, 109 P.3d 470 (Div. III, 2005)

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

A Spokane sheriff's deputy conducted a random Department of Licensing (DOL) records check on the vehicle Alexander Phillips was driving. The DOL reported that the registered owner's license had been suspended. The deputy pulled Mr. Phillips over and asked to see his driver's license, vehicle registration, and proof of insurance. Mr. Phillips was the registered owner of the vehicle, and his license

was indeed suspended. He was arrested for driving with a suspended license. The deputy also cited Mr. Phillips for driving with expired vehicle tabs and without proof of insurance.

Mr. Phillips moved in district court to dismiss the charges. The judge accepted his argument that fresh information that the owner of a vehicle has a suspended license does not constitute probable cause to stop the vehicle and identify the driver. The judge ruled that failure of the officer to document that the appearance of the driver matched the DOL description of the vehicle owner rendered the stop unlawful.

The State appealed to the superior court. The superior court affirmed. The court ruled that an officer must establish that "the person driving at least fit[s] a minimum identification of the registered owner before the stop."

ISSUE AND RULING: Where a police officer learns of the suspended status of the driver's license of the registered owner of a vehicle, may the officer stop the vehicle based on this information alone if the officer is not aware of information that the current operator of the vehicle is not the registered owner? (**ANSWER:** Yes, the information constitutes "reasonable suspicion" justifying a stop)

Result: Reversal of Spokane County District Court and Superior Court suppression rulings; case remanded for prosecution of Alexander Phillips for driving with a suspended license, driving with expired tabs and driving without proof of insurance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The question here is whether an officer must corroborate, by information independent of the DOL, the identity of a driver as the registered vehicle owner whose license has been suspended.

An officer may stop a vehicle registered to a person whose driver's license has been suspended. RCW 46.20.349. A DOL report of suspension supports articulable suspicion of criminal conduct sufficient to justify a brief investigatory stop. State v. Penfield, 106 Wn. App. 157 (Div. III, 2001) **Aug 01 LED:12**. Our holding in Penfield is in accord with City of Seattle v. Yeager, 67 Wn. App. 41 (Div. I, 1992) **Feb 01 LED:10**. There, Division One of this court held that an officer may stop and investigate a vehicle bearing a license plate tab indicating that the vehicle owner's driving privileges are suspended. Additional investigation is not required to stop. This is the import of RCW 46.20.349:

Any police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked. The driver of such vehicle shall display his [or her] driver's license upon request of the police officer.

Mr. Phillips contends that information about the registered owner is not, by itself, sufficient to justify a stop. He argues, based on our decision in Penfield, that the officer must compare a description of the registered owner to the driver before proceeding. We disagree.

The DOL's disclosure of licensing records violates neither a subjective nor objective expectation of privacy. State v. McKinney, 148 Wn.2d 20 (2002) **Jan 03 LED:05**. Indeed, vehicle registration numbers must be displayed front and back to enable law enforcement to obtain DOL information and to act on a reasonable suspicion arising from that information.

A law enforcement officer may conduct a limited seizure to investigate an articulable suspicion of wrongdoing. An officer who has notice from the DOL that a person's driver's license is suspended may stop any vehicle registered to that person and ask to see the driver's license. RCW 46.20.349. Evidence that the driver's license of the registered owner of a vehicle is revoked or suspended is individualized suspicion sufficient to establish cause for a Terry stop. RCW 46.20.349; State v. Lyons, 85 Wn. App. 268 (Div. III, 1997) **Aug 97 LED:18**. It is, then, appropriate and permissible for the officer to dispel his or her suspicion by identifying the driver.

Our decision in Penfield is an exception. There, we held that an officer may not, without additional grounds for suspicion, proceed with a stop based on a registration check once it is manifestly clear that the driver of the vehicle is *not* the registered owner. In Penfield, the driver and registered owner were of the opposite sex.

But here, there was no apparent reason to suppose that this driver might not be the owner. Penfield required the officer to respond to the obvious. The law encourages officers to proceed on the reasonable suspicion that the registered owner of a vehicle is driving, absent some manifest reason to believe otherwise.

[Some citations omitted]

DEFENDANT DID NOT MAKE SUFFICIENT SHOWING TO TRIGGER A FRANKS HEARING TO CHECK OFFICER'S INFORMANT-BASED REPRESENTATIONS IN SEARCH WARRANT AFFIDAVIT

State v. O'Neal, ___ Wn. App. ___, 109 P.3d 429 (Div. II, 2005)

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

On December 4, 2001, the Thurston County SWAT team and other agencies executed a search warrant at a mobile home owned by Michelle O'Neal. Michelle is Harry's ex-wife and Jesse and Greg's mother. At the time of the search, Greg lived in the home with his friend, Jason Shero. Testimony differed as to whether Jesse and Harry lived in the mobile home. But Shero testified that he and the O'Neal men lived together in the mobile home.

Officers obtained the search warrant based on information from two informants, one named and one confidential. When the warrant was executed, Jesse, Harry, and Greg were in the mobile home, but Shero was not.

During the search, [a detective] found a loaded AR-15 with a chambered round in the open closet of the master bedroom. In a second bedroom, officers located a "suspected marijuana smoking device" and found a knife and a semiautomatic

pistol under the mattress. Officers also discovered a gun safe in the second bedroom. A note taped to the safe was addressed to Shero and signed "G." The safe contained rifles, scopes, and half rifles.

In the laundry room, officers also found a locked gun safe containing "a large number" of weapons, ammunition, and related items. Finally, the officers found instructions for making methamphetamine.

On July 8, 2002, the State charged Greg with one count of manufacturing methamphetamine with a firearm enhancement, one count of manufacturing marijuana with a firearm enhancement, twenty counts of first degree unlawful firearm possession, and one count of machine gun possession. . . .

Greg sought discovery about the confidential and named informants, which the State declined to provide. Greg moved to compel discovery and requested a Franks [*Court's footnote: Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (stating that the court must hold an evidentiary hearing when the defendant makes a substantial preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included in his affidavit a false statement that was necessary to the finding of probable cause)*] hearing to determine the search warrant's validity. The court declined to hold a Franks hearing [*Court's footnote: Jesse and Harry joined in the request, but Jesse does not raise the trial court's denial as an assignment of error on appeal. Like Greg, Harry contends that the trial court erred when it denied the request for a Franks hearing*] or to compel discovery.

The jury convicted Greg of all counts, finding that he was armed with a firearm during the commission of the two manufacturing counts. The jury convicted Jesse and Harry of manufacturing methamphetamine and found that either they or their accomplices were armed with a firearm.

ISSUE AND RULING: Should the trial court have held a Franks hearing to determine if the affiant-officer intentionally misstated what the CI told him or reckless relied on a materially false statement from the informant? (**ANSWER:** No)

Result: Affirmance of Thurston County Superior Court manufacturing marijuana convictions of Harry William O'Neal, Jesse Jack O'Neal, and Gregory William O'Neal; also affirmance of Greg's conviction for first degree unlawful possession of a firearm; reversal, on grounds not addressed in this **LED** entry, of Gregory O'Neal's conviction for possessing a machine gun.

ANALYSIS: (Excerpted from Court of Appeals opinion)

[W]e address whether the trial court erred when it denied Greg's motion for a Franks hearing to determine the search warrant's validity. Greg asserts that he "made a preliminary showing that the affiant officer omitted or misrepresented facts in his application for the search warrant, and the facts were material." By reference, Harry incorporates the arguments and authorities set forth by Greg. [*Court's footnote: In support of his argument, Harry cites State v. Casal, 103 Wn.2d 812 (1985) (holding that where a defendant offers information that casts reasonable doubt as to the veracity of material representations by the affiant and the challenged statements are the only basis for probable cause, the court should exercise its discretion to conduct an in camera examination.)*]

We give great deference to a magistrate's determination of probable cause. At the defendant's request, the court must hold a Franks hearing if the defendant makes a preliminary showing that the affiant included a false statement

knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to a finding of probable cause. Franks, 438 U.S. at 155-56.

Here, [the detective's] affidavit for the warrant read, in relevant part:

This [confidential] informant has since been proven to be reliable as well as knowledgeable. Since my conversation with this informant I have executed two search warrants based on information that he/she provided. Both of these warrants were successful in the location and seizure of suspected methamphetamine labs.... The following portion of this affidavit will show that this confidential informant was at the O Neal [sic] residence on Lawrence Lake [R]oad on 11-07-01 with witness Roger Gore. The informant[']s statement is consistant [sic] with Mr. Gore's statement as to the events that occurred on the 7th day of November 2001. To my knowledge Mr. Gore does not know that confidential informant # 116 provided me with a statement as to what occurred on 11-07-2001 at the O Neal [sic] residence. To my knowledge, confidential informant # 116 is not aware that Mr. Gore has made a statement in reference to what he observed at the O Neal [sic] residence on 11-07-01. I believe that this information was developed from each person without the other knowing.

Greg claims that the confidential informant was Carmen Robinson, the girl friend of Roger Gore, the named informant. [The detective's] affidavit indicates that the confidential informant and Gore were present at the O'Neal residence at the same time, so it is certainly possible that they knew one another. The only potential misstatement, then, is [the detective's] assertion that the two informants were not aware of each other's statements.

These bare facts do not constitute a preliminary showing that [the detective] knowingly or intentionally made false statements in his search warrant application, or that he acted with reckless disregard for the truth. Hence, the trial court did not err when it denied the motion for a Franks hearing.

[Some citations omitted]

29-MONTH-OLD CHILD'S STATEMENT TO DOCTOR HELD ADMISSIBLE UNDER "MEDICAL DIAGNOSIS" HEARSAY EXCEPTION AND NOT "TESTIMONIAL" UNDER CRAWFORD'S SIXTH AMENDMENT CONFRONTATION CLAUSE INTERPRETATION

State v. Fisher, ___ Wn. App. ___, 108 P.3d 1262 (Div. II, 2005)

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

Dr. Susan Klenk, a family practice physician, saw Ty [a 29-month-old child with serious head injuries] at approximately 10:00 the [morning after the evening of the alleged assault]. Toews [the child's mother] was the only other person in Ty's room, and Klenk spoke with her first. Klenk then asked Ty what had happened, and he pointed to his forehead and said, "Stacey hit me right here."

Investigators examined the farmhouse where Toews lived with her children and found no blood within four feet of the base of the stairs, although they did find a few drops of blood on the stairs. They also found blood on Ty's clothing, streaks of blood on the living room floor, and a pool of blood containing blond hairs in the toy corner of the living room. Ty has blond hair.

Two days after the incident, Toews found a broken easel with blood on it hidden in the toy corner. [Defendant Stacey Russell Fisher, Toews' boyfriend and housemate] told her that he had stepped on it. He [told her that he] then took the pieces and threw them into a nearby ravine.

The State charged Fisher with one count of second degree child assault. Before trial, the court conducted a hearing to determine the admissibility of Ty's hearsay statement to Klenk.

Klenk testified that Ty was admitted to the hospital for head trauma and he remained hospitalized for six days. Klenk described Ty's injuries as a scrape on the bridge of his nose, bruising on his left ear and the left side of his scalp that extended to the right side, a swollen area on the back of his head, bruising and a large hematoma on his forehead, bruising and scraping on his neck and the upper part of his back, and a small bruise on his right buttock. She said that she reviewed Ford's handwritten notes before examining Ty and knew that, although they described a fall down the stairs as the reported cause of his injuries, they also disclosed the possibility of abuse. Ford's notes indicated further, however, that Ty did not exhibit fear toward Fisher while in the emergency department.

Klenk also reported that although Ty's injuries seemed consistent with a fall down the stairs, she could not determine their cause from mere observation. She added that a child's abuse disclosure would be relevant to his treatment and length of stay. She also said that although she probably introduced herself as a doctor to Ty's mother, she was not sure whether she introduced herself to Ty. She also was not sure whether she wore a white jacket or stethoscope, although she did wear her name tag identifying her as a doctor.

The State argued that Ty's statement to Klenk was admissible under ER 803(a)(4) as a statement made for the purpose of medical diagnosis, noting that Klenk asked Ty about the cause of his injuries so that she could make a diagnosis and offer him the best care. The court found the statement admissible under ER 803(a)(4) . . .

ISSUES AND RULINGS: 1) Was the child's statement to the doctor "testimonial" under the Sixth Amendment confrontation clause ruling of the U.S. Supreme Court in Crawford v. Washington? (**ANSWER:** No, and the trial court did not violate the confrontation clause when it admitted into evidence hearsay testimony regarding the child's statement); 2) Was the doctor's hearsay testimony regarding the child's statement admissible under the medical diagnosis hearsay rule, ER 803(a)(4)? (**ANSWER:** Yes)

Result: Affirmance of second degree assault conviction of Stacey Russell Fisher for second degree child assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Confrontation Clause

Fisher first contends that the trial court erred in admitting hearsay statements. He asserts that the United States Supreme Court's recent ruling in Crawford precludes the treating doctor from testifying that Ty identified Fisher as his assailant. Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**. More specifically, he argues that Crawford renders inadmissible Klenk's statement that when she asked Ty what had happened, he pointed to his forehead and said, "Stacey hit me right here."

In Crawford, the Court held that the Confrontation Clause bars introducing a testimonial hearsay statement unless the hearsay declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford thus distinguishes between testimonial and nontestimonial out-of-court statements. When testimonial hearsay is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination. But when the admissibility of nontestimonial hearsay is at issue, the individual states are entitled to determine what statements should be admitted and what statements should be excluded.

Although the Crawford court declined to provide a comprehensive definition of testimonial statements, it did describe three "formulations of [the] core class" of such statements. This description is as follows:

In the first, testimonial statements consist of "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."

The second formulation described testimonial statements as consisting of "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The Court declined to settle on a single formulation but noted that whatever else the term "testimonial" covers, it applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

. . . Here, a family practice physician examined Ty the morning after his admission to the hospital. After talking to his mother, the doctor asked him what had happened. She was not a government employee, and Fisher was not then under suspicion. And the doctor testified that she questioned Ty as part of her efforts to provide him with proper treatment. Here, there was no indication of a purpose to prepare testimony for trial and no government involvement. Nor was the statement given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer. Because the hearsay statement was not testimonial, Crawford does not apply, and we need only examine its admissibility under the hearsay rules or Washington's child hearsay statute, RCW 9A.44.120.

2) Medical Diagnosis Hearsay Exception

Under ER 803(a)(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible. To be admissible, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis. State v. Lopez, 95 Wn. App. 842 (1999) **Jan 00 LED:15**.

The circumstances surrounding Klenk's initial interview of Ty indicate that Ty would understand that he was being questioned for purposes of medical treatment. Before Klenk spoke with Ty, he had been transported in an ambulance, x-rayed, scanned, examined, sutured and had received IV therapy. When he spoke with Klenk, he was in a hospital bed in a hospital room where he had spent the night. Given these facts, Ty's statement was made in the context where a declarant knows that his comments relate to medical treatment. Ty's statement was properly admitted through Klenk under ER 803(a)(4).

Fisher contends, however, that Klenk's question to Ty was for forensic rather than treatment purposes and thus not admissible under ER 803(a)(4). As support, he cites Division Three's refusal to admit hearsay statements made to a forensic interviewer for sexually abused children under ER 803(a)(4) where the State conceded that the interviews were for trial preparation rather than medical diagnosis or treatment.

There is no such concession here. Although Klenk initially testified that her care would not have depended on Ty's answer to her question, she added that a child's abuse disclosure relates to his or her hospital care. She testified that she went to Ty's room to evaluate what additional action to take on his behalf.

As Division One has stated, "In determining whether an injury is intentional or accidental, to prevent further child abuse, a physician must attempt to get a history from the child and determine whether the history adequately explains the injury." In the Matter of the Dependency of S.S., 61 Wn. App. 488 (1991). Klenk's inquiries were made, not for trial preparation, but to determine the proper course and duration of medical care. The analysis in Lopez does not render Ty's statement inadmissible under ER 803(a)(4) [The Court of Appeals rejects this argument based on State v. C.J., 148 Wn.2d 672 (2003) **May 03 LED:09**].

[Footnotes, some citations omitted]

EVIDENCE SUPPORTS METHAMPHETAMINE-MANUFACTURING CONVICTION

State v. Keena, 121 Wn. App. 143 (Div. II, 2004)

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

On February 7, 2002, Detective Eugene Dupree and other officers went to Keena's residence. They were investigating an anonymous tip of "possible manufacturing methamphetamine." As they arrived, "[n]umerous people started scattering different directions." Dupree asked for Keena and was directed to the "gazebo" or "cabana" in which Keena lived.

Duprey went to the gazebo and spoke with Keena, who gave consent for Duprey to enter. On top of a wood stove, Duprey observed "a thermos, glass jar with a paper towel over the top of it, white film layer and then the blue liquid." He knew that these were materials used in the manufacture of methamphetamine -- "the blue liquid would be anhydrous ammonia, the white film would be pseudoephedrine and then possibly in the jar would probably be anhydrous ammonia or lithium, could be combined with kerosene." He sought and obtained a telephonic search warrant, and the ensuing search revealed numerous items commonly used to manufacture methamphetamine.

On February 12, 2002, the State charged Keena with manufacturing methamphetamine. A jury trial was held two months later. Jane Boysen, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that the "Nazi" method of manufacturing methamphetamine involves extracting ephedrine from over-the-counter cold medications, combining the ephedrine with lithium and anhydrous ammonia, and "salting out" the result. She said that she had tested or observed items taken from the scene, including a glass jar with residue, Xylol (an organic solvent), muriatic acid (usable to "salt out" the drug), tubing, rock salt, Heet, and aluminum foil, many of which were commonly used in manufacturing methamphetamine. Her findings were "consistent with the extraction of pseudoephedrine" during the methamphetamine manufacturing process, and with "the ongoing manufacture of methamphetamine."

[T]he jury convicted as charged.

[Footnotes omitted]

ISSUE AND RULING: Is the evidence in the record sufficient to support Keena's conviction for manufacturing methamphetamine? (**ANSWER:** Yes)

Result: Affirmance of Thurston County Superior Court conviction of Gary Dean Keena for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Keena argues that the evidence does not show that he succeeded in producing methamphetamine, and thus that the evidence is not sufficient to support his conviction for the crime of manufacturing methamphetamine. Evidence is sufficient if a rational trier of fact taking it in the light most favorable to the State could find beyond a reasonable doubt each element of the crime charged. Accordingly, the question is whether a rational trier taking the evidence in the light most favorable to the State could find beyond a reasonable doubt that Keena knowingly "manufactured" a controlled substance.

The statutes answer yes. RCW 69.50.101(p) defines "[m]anufacture" as "the production, *preparation*, propagation, compounding, conversion, or *processing* of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container." RCW 69.50.101(d) defines a "[c]ontrolled substance" as a "drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board rules." See also State v. Hepton, 113

Wn. App. 673 (Div. III 2002) **Feb 03 LED:15**. RCW 69.50.206(d)(2) places methamphetamine in Schedule II, and WAC 246-889-020 designates pseudoephedrine as a precursor if not incorporated in a "drug or cosmetic [that] can be lawfully sold ... over-the-counter ... or by a prescription." The evidence shows that Keena had in his house, in plain view, most of the objects and substances needed to "prepare" or "process" methamphetamine, and a rational trier applying RCW 69.50.101(p)'s broad definition of manufacture could find that he was "preparing" or "processing" that drug.

The cases also answer yes. In State v. Davis, 117 Wn. App. 702 (Div. I, 2003) for example, Division One said:

[T]he pivotal question is whether, under ... chapter 69.50 RCW, it is possible to manufacture a drug without possessing it. It is.

The Davis court quoted RCW 69.50.101(p), then continued:

As the evidence in this case demonstrates, one can make a number of drugs, including methamphetamine, from ingredients that are not in themselves controlled substances. And under [RCW 69.50.101(p)], a person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process. Thus, a person need not possess the final product in order to engage "indirectly" in the "production, preparation, propagation, compounding, conversion, or processing of a controlled substance." RCW 69.50.101(p). In fact, courts have found evidence sufficient to support convictions for manufacturing methamphetamine where the defendants possessed lab equipment and partially processed methamphetamine, but not the final product.

In State v. Todd, 101 Wn. App. 945 (Div. III, 2000) **Jan 01 LED:11**, for another example, the evidence was sufficient where the police found the defendant in possession of several items used only to make methamphetamine, even though they did not find the drug itself. See also State v. Zunker, 112 Wn. App. 130 (Div. III, 2002) **Aug 02 LED:23** (grinding pseudoephedrine powder "is a preparatory step to the meth 'cooking' process' ").

Based on all these authorities, we conclude that if the defendant had a combination of items that generally has no purpose other than the manufacture of methamphetamine, the evidence is sufficient to support reasonable inferences of "preparation" and "processing," and thus of manufacture, even if the evidence does not show that the defendant had the completed drug. As a result, the evidence is sufficient here.

[Some footnotes and citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **“FRYE TEST” NOT MET FOR PHYSICIAN ASSISTANT’S EXPERT TESTIMONY THAT CHILD VICTIM’S STATEMENT ALONE SHOWED THAT SEXUAL ABUSE OCCURRED** – In State v. Dunn, 125 Wn. App. 582 (Div. III, 2005), the Court of Appeals rejects, under the “Frye test” for scientific evidence, an expert’s opinion that he could determine from victim statements alone, with no physical evidence, that a child had suffered sexual abuse.

In order for expert scientific testimony to be admissible, it must, among other things, be based on scientific principles or scientific theories that have gained general acceptance in the relevant scientific community. See Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). The evidence in this case did not meet that test, the Dunn Court holds.

The Dunn Court reviews the testimony of a physician's assistant who opined that a child victim's statements standing alone, because of the specificity of the statements, indicated that sexual abuse was probable even in absence of physical evidence of abuse. The Dunn Court concludes that this opinion was based on a novel theory not generally accepted in scientific community. Although the expert referred to a hospital training manual describing his theory in some detail, he could cite no other literature supporting the theory, and the record and briefing on appeal did not include any supportive literature.

Result: Reversal of Spokane County Superior Court conviction of Larry E. Dunn for first degree child rape and first degree child molestation; case remanded for re-trial.

(2) "INDEPENDENT SOURCE" RULE APPLIED: EVIDENCE SEIZED UNDER A SEARCH WARRANT IS HELD ADMISSIBLE DESPITE AN UNLAWFUL POLICE ENTRY INTO A MOTEL ROOM AFTER POLICE HAD PC TO SEARCH BUT BEFORE THEY APPLIED FOR A SEARCH WARRANT – In State v. Spring, ___ Wn. App. ___, 107 P.3d 118 (Div. I, 2005), the Court of Appeals rules that an unlawful police entry into a motel room where police discovered evidence of the manufacturing of methamphetamine did not invalidate a subsequent search warrant. Police had lawfully obtained other evidence before they entered the motel room, and that pre-entry evidence provided probable cause supporting issuance of the warrant. Thus, the motel housekeepers' observations during their earlier lawful entry into the room, the officers' earlier observations of the defendant while they were outside the room, and defendant's pre-entry statements to police provided ample probable cause to search defendant's room, the Spring Court holds.

The Spring Court explains its reasoning as follows –

[T]he search warrant was valid if the lawfully obtained evidence in the warrant application supported probable cause to search [for evidence of methamphetamine manufacturing]. It did. The housekeepers' observations during their lawful entry, the officers' observations of Spring, and Spring's initial statements to police together provided ample probable cause to search Spring's room. Issuance of the warrant was proper.

[Murray v. U.S., 487 U.S. 533 (1988)] also requires the State to demonstrate that the officers' decision to seek the warrant was not prompted by the unlawful search. Courts generally have required the government to show that officers would have sought the warrant even in the absence of the unlawfully obtained evidence. Often, the result on appeal has been a remand for entry of findings on this point. In this case, however, a remand is unnecessary because the evidence clearly demonstrates that the officers would have sought the warrant even in the absence of the unlawful entry.

The supervisor of the investigation. . . testified that his initial inclination following the report from the motel was to get more information (i.e., what the employee had seen in the motel room, who had rented the room, and what they were driving). The plan was "to go speak with the employee of the motel and ascertain further what she had seen *and then attempt to apply for a search warrant for the room based on what she had seen and what her observations were.*" The plan changed when officers discovered Spring in the parking lot. At that point, an exigency existed, and Hester decided to contact Spring. After speaking with

Spring, the exigency increased because it appeared there was an active and potentially volatile lab in the room. The officers then decided to enter the room, and "did a quick sweep to check for other people and then exited the room." They were inside for 10 seconds.

Reasonable minds could reach only one conclusion on this record: the officers intended to obtain a warrant as soon as they spoke with the maids, and the initial entry was a response to exigencies, not an effort to gather additional evidence. The decision to seek the warrant, therefore, was not prompted by the unlawful search.

Result: Affirmance of Whatcom County Superior Court conviction of Frank Tyler Spring for manufacturing methamphetamine.

LED EDITORIAL COMMENT: The focus of this case was on whether the search warrant could be upheld where it was not sought until the officers had entered the target motel room to assess the potentially exigent circumstances (regarding the suspected meth lab in the room). The Spring Court does not analyze whether the trial court correctly ruled that "consent" was not valid or whether the trial court should have ruled the initial room entry lawful under the "exigent circumstances" or the "community caretaking function" exceptions to the search warrant requirement.

(3) SUPERIOR COURT ORDER THAT EXTENDED THE PERIOD OF "COMMUNITY PLACEMENT" FOR A SEX OFFENDER WAS INVALID – THEREFORE, A WARRANTLESS "GOOD FAITH" CCO SEARCH BASED ON THAT ERRONEOUS COMMUNITY PLACEMENT WAS UNLAWFUL, AND THE "GOOD FAITH" OF POLICE OFFICERS FOLLOWING UP THE CCO SEARCH WITH SEARCHES UNDER WARRANTS IS LIKEWISE IRRELEVANT – In State v. Wallin, 125 Wn. App. 648 (Div. I, 2005), the Court of Appeals rules that where a Superior Court judge had previously made a mistake in extending the period of community placement conditions on a sex offender, a warrantless search of the sex offender's premises by community corrections officers was unlawful, and therefore all evidence obtained as the fruit of that search (including evidence obtained by police in a subsequent warrant search) must be excluded.

The CCOs would have been justified in their warrantless house search if the judge's original order extending defendant's period of community placement had been valid. The CCO's acted in good faith on what they reasonably believed was a valid court placement ruling, which ruling the defendant had not challenged at the time of its issuance. However, Washington's exclusionary rule is narrower than the federal Fourth Amendment's exclusionary rule, the Wallin Court holds, and does not provide a "good faith" exception to application of the Exclusionary Rule. Therefore, the evidence the CCO's seized, along with all evidence that law enforcement officers seized under follow-up search warrants, was required to be excluded based on article 1, section 7 of the Washington constitution as it has been interpreted by the Washington Supreme Court. The Wallin Court notes that the U.S. Supreme Court has held that the Fourth Amendment of the U.S. Constitution provides a good faith exception to exclusion. While recognizing that it is "bound to follow . . . controlling [Washington Supreme Court] precedent," the Wallin Court suggests that "the facts of this case illustrate the need for such an exception."

Result: Reversal of Snohomish County Superior Court convictions of Jamie Lloyd Wallin for first degree rape of a child, first degree child molestation, sexual exploitation of a minor, and possession of depictions of a minor engaged in sexually explicit conduct.

(4) PROSECUTOR SHOULD NOT HAVE ELICITED TESTIMONY OF DETECTIVE AND OF DOCTOR REGARDING THEIR ASSESSMENT OF THE CREDIBILITY OF ALLEGED

VICTIM OF CHILD SEX ABUSE – In State v. Kirkman, ___ Wn. App. ___, 107 P.3d 133 (Div. II, 2005), the Court of Appeals rules, 2-1, that the trial judge in a rape prosecution improperly allowed the deputy prosecutor to elicit testimony from witnesses, including a pediatrician and a police detective, that in effect opined on the credibility of the alleged victim.

The Kirkman majority opinion describes the facts and analyzes the law as follows:

A. Dr. Stirling

Kirkman contends that the State asked Dr. Stirling to state an opinion based on his perception of the victim's truthfulness. He asserts that his case is similar to State v. Carlson, 80 Wn. App. 116 (1995). In Carlson, this court reversed a conviction because the State posed a similar question to the victim's treating physician. "Do you have an opinion within [a] reasonable degree of medical certainty whether the findings that you observed in [E] were consistent with the history of sexual abuse that you were given?" The State also asked the doctor about her final assessment of the sexual abuse allegation. The doctor responded that she "trusted the interview that [E] had been sexually abused by her father." Here, the State followed this question format when the prosecutor asked, "What was then your general assessment of this case?"

The State attempts to distinguish this case from Carlson because Dr. Stirling's response to the State's question was that she gave "a very clear history with ... lots of detail[,] ... a clear and consistent history of sexual touching ... with appropriate affect" and that "[t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent." But Carlson is exactly on point because the answer was in response to the State's question about whether the doctor found the physical exam consistent with the victim's explanation of the event. The State obviously knew about Carlson, for the prosecutor in Carlson was also the prosecutor here. The State argues that in Carlson, the doctor said she trusted the interview and that this did not occur here. We hold that this is a distinction without a difference; the physician testified that A.D.'s report of sexual touching was clear, consistent, with appropriate affect, and that she used appropriate vocabulary. The physician was clearly commenting on A.D.'s credibility.

B. [The detective]

Kirkman next asserts that the court allowed [the detective] to tell the jury that he believed the victim's allegations.

[The detective] explained the procedure he followed to conduct child abuse interviews. He also testified about the specifics of his interview with A.D. During his testimony, [the detective] often read the questions he asked A.D. and her responses. He never affirmatively stated that he believed A.D.'s allegations.

But, [the detective] testified in detail about a competency examination he gave to A.D. that related to her ability to tell the truth and he extracted her promise to tell the truth. [The detective] was asked if he did anything before he asked A.D. questions about what happened. His answer was, "Yes ... it's kind of a competency." The State then asked why he would ask A.D. to give an example of a lie or of truth. He responded, "[b]ecause I'm--I'm interested in--in this person being able to distinguish between truth and lies." The State also asked if A.D. understood the importance of telling the truth, and if A.D. was able to distinguish

between the truth and a lie and provide examples. [The detective] responded that she was, and then said that she promised to tell him the truth. At that time, he related what she said in her interview.

[The detective] did not offer his direct opinion on A.D.'s credibility, but he told the jury that he tested A.D.'s competency and her truthfulness. In essence, he told the jury that A.D. told the truth when she related the incriminating events to him. This is significant because a police officer's testimony may particularly affect a jury because of its "special aura of reliability." State v. Demery, 144 Wn.2d 753 (2001) **Dec 01 LED:15**; State v. Saunders, 120 Wn. App. 800 (2004) **March 05 LED:14**. And it is significant because a witness may not give an opinion on another witness's credibility. Carlson, 80 Wn. App. at 123.

In determining whether the statements by Dr. Stirling and [the detective] are improper opinion testimony, we consider the totality of circumstances in the case, including: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" [Demry] Here, A.D. was eight years old, she claimed Kirkman sexually assaulted her, the charged offense was first degree child rape, Kirkman denied the accusation, and his witnesses testified that they did not witness any sexual activity on his part because he was asleep, and there was no other evidence of guilt. Under these circumstances, the opinion testimony from Dr. Stirling and [the detective] was improper.

DISSENT: Judge Quinn-Brintnall writes a dissent, disagreeing with Judges Bridgewater and Houghton regarding some of the above analysis.

Result: Reversal of Clark County Superior Court conviction of Charles L. Kirkman for first degree rape of a child (an eight-year-old).

(5) POLICE OFFICERS' TESTIMONY REGARDING JAIL BOOKING RECORDS WAS PROPERLY ADMITTED UNDER STATUTORY "BUSINESS RECORDS" EXCEPTION TO HEARSAY RULE – In State v. Iverson, ___ Wn. App. ___, 108 P.3d 799 (Div. I, 2005), the Court of Appeals summarizes as follows its ruling under RCW 5.45.020, the statutory "business records" hearsay exception:

David J. Iverson appeals his conviction for felony violation of a protection order, claiming that the trial court improperly admitted hearsay evidence to prove the identity of the victim (who did not testify at the trial) and thus the corpus delicti of the crime was not established preliminary to the admission of Iverson's confession. The trial court did not rely upon the victim's self-identification to police to prove the identity of the victim. The officers, who were Everett police rather than jail employees or sheriff's deputies, were qualified to testify regarding the identity and mode of preparation of jail booking records, that such records are made in the regular course of business when persons are booked into jail, and that such records are routinely relied upon by police for identification of persons who have been booked into the jail. Thus, the victim's prior jail booking records, which contained her name, address, physical description, and booking photos, were properly admitted as business records under RCW 5.45.020, and the court did not err in relying on the records, paired with officer testimony regarding the victim, to hold that the victim was indeed the person identified in the protection order. The corpus delicti was thereby established, and as a result, the court properly admitted Iverson's incriminating statements to police.

Result: Affirmance of Snohomish County Superior Court conviction of David J. Iverson for felony violation of a protection order.

(6) “CONSTRUCTIVE POSSESSION” -- FINGERPRINTS ON MASON JAR PLUS PROXIMITY TO ITEM ARE NOT ENOUGH TO SUPPORT CONVICTION BASED ON THE STATE’S THEORY OF “CONSTRUCTION POSSESSION” OF ILLEGAL DRUGS IN THE JAR – In State v. Cote, 123 Wn. App. 546 (Div. III, 2004), the Court of Appeals holds that evidence that the defendant was previously a passenger in the stolen truck where contraband was found, coupled with his fingerprints on the contraband's container, was insufficient to support a conviction on a constructive possession rationale. The Cote Court explains that constructive possession requires dominion and control over the contraband or premises containing it. Determining whether there is constructive possession requires examination of the "totality of the situation" to ascertain if substantial evidence tending to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband exists. Exclusive control is not necessary to establish constructive possession, but a defendant’s proximity to the contraband and mere handling of it is insufficient to support a conviction.

Result: Reversal of Benton County Superior Court conviction of Timothy R. Cote for possession of ephedrine or pseudoephedrine with intent to manufacture.

LED EDITORIAL COMMENT: While the evidence here was not sufficient to convict Cote under the “reasonable doubt” standard for convictions, we believe that the evidence clearly supported his arrest under the probable cause standard for arrest. See, for example, Maryland v. Pringle, 124 S.Ct. 795 (2004) Feb 04 LED:02.

(7) VEHICULAR HOMICIDE JURY INSTRUCTIONS UPHELD – STATE NOT REQUIRED TO CAUSALLY CONNECT DEFENDANT’S INTOXICATION AND VICTIM’S DEATH – In State v. Morgan, 123 Wn. App. 810 (Div. I, 2004), the Court of Appeals rules that the State was not required to prove a causal connection between defendant's intoxication and the victim's death, despite the defendant's having introduced evidence regarding an alleged intervening cause (blinding sunlight).

In part, the Morgan Court analysis of the jury instruction issue raised by Morgan is as follows:

In State v. Rivas, the Supreme Court held that the only causal connection the State needs to prove in a vehicular homicide case "is the connection between the act of driving and the accident." In other words, "causation between intoxication and death is not an element of vehicular homicide." But Morgan argues that once a defendant introduces evidence of a superseding, intervening event, the State must prove a causal connection between the defendant's *intoxication* and the victim's death. Proof of a superseding, intervening event allows an intoxicated defendant to avoid responsibility for the death. It breaks the causal connection between the defendant's act of driving in violation of the statute and the victim's injury, and the intervening act becomes the superseding cause of injury. "[T]o be a superseding cause, the intervening act must have occurred after the defendant's act or omission." In this case, Morgan argued that the blinding sunlight was a superseding, intervening cause of the accident.

Morgan contends that because he submitted evidence about the sunlight, the State must prove that Morgan's intoxication, rather than his driving, caused Phillips' death. Morgan relies on several arguments. First, he argues that Rivas

does not apply here because it addressed a challenge to a charging document rather than a jury instruction. But this is a distinction without a difference: Rivas did not limit its holding to charging documents, but rather interpreted the vehicular homicide statute.

Second, Morgan distinguishes this case from State v. Salas, 127 Wn.2d 173 (1995) **Oct 95 LED:04**. The trial court in Salas gave vehicular homicide instructions that required the jury to find a causal connection between the defendant's driving and the death. The Supreme Court said that, under Rivas, the instructions were not error. But it went on to note that the defendant did not propose instructions of his own, nor did he object to the improper instruction, and thus, "*[e]ven if the instructions did contain an error of law, in this record there is no indication of manifest error affecting a constitutional right. We are limited by the record.*" Morgan argues that, unlike the defendant in Salas, he objected to the court's instruction, proposed a different instruction, and presented evidence of a superseding, intervening cause. But again, this is a distinction without a difference. Nothing changes the rule of law that Washington's vehicular homicide statute does not require a causal connection between intoxication and the victim's death.

Finally, Morgan points out that under Rivas, a superseding, intervening event may be a defense even if the defendant was driving while intoxicated. Indeed, the Rivas court noted that an intoxicated defendant could avoid responsibility for a death caused by superseding, intervening events. This is because the vehicular homicide statute requires the State to prove causation, and the causal chain is broken by a superseding, intervening event. But, contrary to Morgan's argument, Rivas did not hold or even suggest that evidence of a superseding, intervening event alters the causation requirement.

[Some citations omitted]

Result: Affirmance of Whatcom County Superior Court conviction of Daniel J. Morgan for vehicular homicide.

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>].