



Law Enforcement

May 2005

Digest

577th Basic Law Enforcement Academy – November 2, 2004 through March 16, 2005

President: Kelly Anderson – Clark County Sheriff’s Office
Best Overall: Jason Thomas – Vancouver Police Department
Best Academic: Jason Thomas – Vancouver Police Department
Best Firearms: Jason Thomas – Vancouver Police Department
Tac Officer: JoAnn Buettner – Washington State Patrol

MAY 2005 LED TABLE OF CONTENTS

2005 LAW ENFORCEMENT MEDAL OF HONOR CEREMONY 2

UNITED STATES SUPREME COURT 2

UNDER THE PARTICULAR FACTS OF THE CASE, SEARCH WARRANT FOR DEADLY WEAPONS AND EVIDENCE OF GANG MEMBERSHIP JUSTIFIED OFFICERS IN KEEPING OCCUPANTS OF TARGET RESIDENCE IN HANDCUFFS FOR DURATION OF SEARCH; ALSO, THE OFFICERS’ ASKING AN OCCUPANT QUESTIONS ABOUT IMMIGRATION STATUS DID NOT RENDER DETENTION UNLAWFUL UNDER THE FOURTH AMENDMENT

Muehler v. Mena, 125 S.Ct. 1465 (2005) 2

NINTH CIRCUIT OF THE U.S. COURT OF APPEALS..... 7

MIRANDA WAIVER DID NOT GO STALE IN FOURTEEN HOURS

U.S. v. Rodriguez-Preciado, 399 F.3d 1118 (9th Cir. 2005) 7

WASHINGTON STATE COURT OF APPEALS 9

CONFESSION HELD “VOLUNTARY” DESPITE ARGUABLY IMPROPER INTERROGATOR ASSERTION TO SUSPECT THAT “WHOEVER TALKS FIRST WILL GET THE BEST DEAL”; ALSO “ACCOMPLICE” STATUS ESTABLISHED BY EVIDENCE OF PRESENCE-PLUS

State v. Trout, ___ Wn. App. ___, 105 P.3d 69 (Div. III, 2005) 9

CITIZEN INFORMANTS, EVEN THOUGH NAMED IN SEARCH WARRANT AFFIDAVIT, HELD NOT SHOWN TO HAVE CREDIBILITY FOR PURPOSES OF INFORMANT-BASED PROBABLE CAUSE STANDARD UNDER AGUILAR-SPINELLI

State v. McCord, ___ Wn. App. ___, 106 P.3d 832 (Div. III, 2005) 11

NO VIOLATION OF STRIKER/GREENWOOD SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE WHERE DEFENDANT WAS OUT OF STATE AND NOT INCARCERATED THERE DURING RELEVANT PRE-ARRAIGNMENT PERIOD

State v. Hessler, 123 Wn. App. 200 (Div. III, 2004) 13

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR HARASSMENT AND FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES; SEARCH WARRANT WITHSTANDS CHALLENGES BASED ON TESTS FOR PROBABLE CAUSE, PARTICULARITY AND STALENESS

State v. Hosier, 124 Wn. App. 696 (Div. I, 2004) 15

**LAW ENFORCEMENT MEDAL OF HONOR CEREMONY IS SET FOR
FRIDAY MAY 6, 2005 IN LACEY AT 1:00 P.M.**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 6, 2005 at the St. Martin's College Pavilion, 5300 Pacific Avenue S.E. in Lacey, Washington, commencing at 1:00 PM. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend.

UNITED STATES SUPREME COURT

UNDER THE PARTICULAR FACTS OF THE CASE, SEARCH WARRANT FOR DEADLY WEAPONS AND EVIDENCE OF GANG MEMBERSHIP JUSTIFIED OFFICERS IN KEEPING OCCUPANTS OF TARGET RESIDENCE IN HANDCUFFS FOR DURATION OF SEARCH; ALSO, THE OFFICERS' ASKING AN OCCUPANT QUESTIONS ABOUT IMMIGRATION STATUS DID NOT RENDER DETENTION UNLAWFUL UNDER THE FOURTH AMENDMENT

Muehler v. Mena, 125 S.Ct. 1465 (2005)

Facts and Proceedings below:

Based on information gleaned from the investigation of a gang-related, driveby shooting, petitioners Muehler and Brill (police officers with the City of Simi Valley, California) had reason to believe at least one member of a gang--the West Side Locos--lived at 1363 Patricia Avenue. They also suspected that the individual was armed and dangerous, since he had recently been involved in the driveby shooting. As a result, Muehler obtained a search warrant for 1363 Patricia Avenue that authorized a broad search of the house and premises for, among other things, deadly weapons and evidence of gang membership. In light of the high degree of risk involved in searching a house suspected of housing at least one, and perhaps multiple, armed gang members, a Special Weapons and Tactics (SWAT) team was used to secure the residence and grounds before the search.

At 7 a.m. on February 3, 1998, petitioners, along with the SWAT team and other officers, executed the warrant. Mena was asleep in her bed when the SWAT team, clad in helmets and black vests adorned with badges and the word "POLICE," entered her bedroom and placed her in handcuffs at gunpoint. The SWAT team also handcuffed three other individuals found on the property. The SWAT team then took those individuals and Mena into a converted garage,

which contained several beds and some other bedroom furniture. While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs.

Aware that the West Side Locos gang was composed primarily of illegal immigrants, the officers had notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During their detention in the garage, an officer asked for each detainee's name, date of birth, place of birth, and immigration status. The INS officer later asked the detainees for their immigration documentation. Mena's status as a permanent resident was confirmed by her papers.

The search of the premises yielded a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber ammunition, several baseball bats with gang writing, various additional gang paraphernalia, and a bag of marijuana. Before the officers left the area, Mena was released.

In her § 1983 suit against the officers she alleged that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment. In addition, she claimed that the warrant and its execution were overbroad, that the officers failed to comply with the "knock and announce" rule, and that the officers had needlessly destroyed property during the search. The officers moved for summary judgment, asserting that they were entitled to qualified immunity, but the District Court denied their motion. The Court of Appeals affirmed that denial, *except* for Mena's claim that the warrant was overbroad; on this claim the Court of Appeals held that the officers were entitled to qualified immunity. Mena v. Simi Valley, 226 F.3d 1031 (C.A.9 2000). After a trial, a jury, pursuant to a special verdict form, found that Officers Muehler and Brill violated Mena's Fourth Amendment right to be free from unreasonable seizures by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable. The jury awarded Mena \$10,000 in actual damages and \$20,000 in punitive damages against each petitioner for a total of \$60,000.

The Court of Appeals affirmed the judgment on two grounds. 332 F.3d 1255 (C.A.9 2003). Reviewing the denial of qualified immunity *de novo*, it first held that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the search. In the Court of Appeals' view, the officers should have released Mena as soon as it became clear that she posed no immediate threat. The court additionally held that the questioning of Mena about her immigration status constituted an independent Fourth Amendment violation. The Court of Appeals went on to hold that those rights were clearly established at the time of Mena's questioning, and thus the officers were not entitled to qualified immunity.

[Some citations omitted]

ISSUES AND RULINGS: 1) Under the Fourth Amendment, given the fact that the search warrant authorized a search for deadly weapons and evidence of gang membership, and given the other attendant circumstances, did the officers act reasonably, as a matter of law, in detaining all adult

occupants of the target residence in handcuffs for the duration of the two-to-three-hour execution of the search warrant? (ANSWER: Yes, rules a 5-4 majority);

2) Under the Fourth Amendment, did the officers who were executing the search warrant need (and lack) independent reasonable suspicion to justify questioning an occupant of the target residence about her immigration status where the officers' questions did not prolong the duration of the search? (ANSWER: No, rules a unanimous Court; they did not need such independent suspicion because the duration of the search was not prolonged by their questions)

Result: Reversal of Ninth Circuit U.S. Court of Appeals decision that affirmed a jury verdict against the officers who executed the search warrant.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

1) Detaining in handcuffs for duration of search for deadly weapons and evidence of gang membership

In Michigan v. Summers, 452 U.S. 692 (1998) we held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." Such detentions are appropriate, we explained, because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial. We made clear that the detention of an occupant is "surely less intrusive than the search itself," and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home. Against this incremental intrusion, we posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search," as detainees' "self-interest may induce them to open locked doors or locked containers to avoid the use of force."

Mena's detention was, under Summers, plainly permissible. An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Thus, Mena's detention for the duration of the search was reasonable under Summers because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.

Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. See Graham v. Connor, 490 U.S. 386 (1989). Indeed, Summers itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation."

The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion. The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage. [Court's footnote: *In finding the officers should have released Mena from the handcuffs, the Court of Appeals improperly relied upon the fact that the warrant did not include Mena as a suspect. See Mena v. Simi Valley, 332 F.3d 1255, (C.A.9 2003). The warrant*

was concerned not with individuals but with locations and property. In particular, the warrant in this case authorized the search of 1363 Patricia Avenue and its surrounding grounds for, among other things, deadly weapons and evidence of street gang membership. In this respect, the warrant here resembles that at issue in Michigan v. Summers, which allowed the search of a residence for drugs without mentioning any individual, including the owner of the home whom police ultimately arrested. Summers makes clear that when a neutral magistrate has determined police have probable cause to believe contraband exists, "[t]he connection of an occupant to [a] home" alone "justifies a detention of that occupant." The detention was thus more intrusive than that which we upheld in Summers.]

But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. Cf. Summers, (recognizing the execution of a warrant to search for drugs "may give rise to sudden violence or frantic efforts to conceal or destroy evidence"). Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

Mena argues that, even if the use of handcuffs to detain her in the garage was reasonable as an initial matter, the duration of the use of handcuffs made the detention unreasonable. The duration of a detention can, of course, affect the balance of interests under Graham. However, the 2- to 3- hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.

[Footnotes, some citations omitted]

2) Asking questions about immigration status

The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure." Florida v. Bostick, 501 U.S. 429 (1991). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." Bostick. As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.

Our recent opinion in Illinois v. Caballes, 125 S.Ct. 834 (2005) [March 05 LED:03; April 05 LED:02], is instructive. There, we held that a dog sniff performed during a traffic stop does not violate the Fourth Amendment. We noted that a lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," but accepted the state court's determination that the duration of the stop was not extended by the dog sniff. Because we held that a dog sniff was not a search subject to the Fourth Amendment, we rejected the notion that "the shift in purpose" "from a lawful traffic stop into a drug investigation" was unlawful because it "was not supported by any reasonable suspicion." Likewise here, the initial Summers detention was lawful; the Court of Appeals did not find that the questioning extended the time Mena was detained. Thus no additional Fourth Amendment justification for inquiring about Mena's immigration status was required.

In summary, the officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment. Additionally, the officers' questioning of Mena did not constitute an independent Fourth Amendment violation. Mena has advanced in this Court, as she did before the Court of Appeals, an alternative argument for affirming the judgment below. She asserts that her detention extended beyond the time the police completed the tasks incident to the search. Because the Court of Appeals did not address this contention, we too decline to address it.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

[Footnotes, some citations omitted]

JUSTICE KENNEDY'S CONCURRENCE IN THE MAJORITY'S ANALYSIS:

Justice Kennedy, the fifth vote in a 5-4 majority on the handcuffing-duration question, writes a separate concurring opinion explaining his view that the duration of the handcuffing in this case was very close to crossing the Fourth Amendment reasonableness line:

I concur in the judgment and in the opinion of the Court. It does seem important to add this brief statement to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged.

The safety of the officers and the efficacy of the search are matters of first concern, but so too is it a matter of first concern that excessive force is not used on the persons detained, especially when these persons, though lawfully detained under Michigan v. Summers, are not themselves suspected of any involvement in criminal activity. The use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances, Graham v. Connor.

The reasonableness calculation under Graham is in part a function of the expected and actual duration of the search. If the search extends to the point when the handcuffs can cause real pain or serious discomfort, provision must be made to alter the conditions of detention at least long enough to attend to the needs of the detainee. This is so even if there is no question that the initial handcuffing was objectively reasonable. The restraint should also be removed if, at any point during the search, it would be readily apparent to any objectively

reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search. The time spent in the search here, some two to three hours, certainly approaches, and may well exceed, the time beyond which a detainee's Fourth Amendment interests require revisiting the necessity of handcuffing in order to ensure the restraint, even if permissible as an initial matter, has not become excessive.

That said, under these circumstances I do not think handcuffing the detainees for the duration of the search was objectively unreasonable. As I understand the record, during much of this search 2 armed officers were available to watch over the 4 unarmed detainees, while the other 16 officers on the scene conducted an extensive search of a suspected gang safe house. Even if we accept as true--as we must--the factual assertions that these detainees posed no readily apparent danger and that keeping them handcuffed deviated from standard police procedure, it does not follow that the handcuffs were unreasonable. Where the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified, subject to adjustments or temporary release under supervision to avoid pain or excessive physical discomfort. Because on this record it does not appear the restraints were excessive, I join the opinion of the Court.

CONCURRENCE IN REMAND BY FOUR OTHER JUSTICES

Justice Stevens writes a separate opinion joined by Justices Souter, Ginsburg and Breyer. The Stevens opinion concurs with the majority that the Ninth Circuit decision erred in some respects. Thus the four justices in the minority opine that questioning Mena about her immigration status without prolonging the search was not unlawful under the Fourth Amendment. However, the Stevens opinion argues that there was sufficient evidence to support the jury verdict that keeping her in handcuffs for two to three hours was unreasonable:

In short, under the factors listed in Graham and those validly presented to the jury in the jury instructions, a jury could have reasonably found from the evidence that there was no apparent need to handcuff Iris for the entire duration of the search and that she was detained for an unreasonably prolonged period. She posed no threat whatsoever to the officers at the scene. She was not suspected of any crime and was not a person targeted by the search warrant. She had no reason to flee the scene and gave no indication that she desired to do so. Viewing the facts in the light most favorable to the jury's verdict, as we are required to do, there is certainly no obvious factual basis for rejecting the jury's verdict that the officers acted unreasonably, and no obvious basis for rejecting the conclusion that, on these facts, the quantum of force used was unreasonable as a matter of law.

Police officers' legitimate concern for their own safety is always a factor that should weigh heavily in balancing the relevant Graham factors, but, as Officer Brill admitted at trial, if that justification were always sufficient, it would authorize the handcuffing of every occupant of the premises for the duration of every Summers detention. Nothing in either the Summers or the Graham opinion provides any support for such a result. Rather, the decision of what force to use must be made on a case-by-case basis. There is evidence in this record that may well support the conclusion that it was unreasonable to handcuff Iris Mena throughout the search. On remand, therefore, I would instruct the Ninth Circuit to consider that

evidence, as well as the possibility that Iris was detained after the search was completed, when deciding whether the evidence in the record is sufficient to support the jury's verdict.

NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

MIRANDA WAIVER DID NOT GO STALE IN FOURTEEN HOURS

U.S. v. Rodriguez-Preciado, 399 F.3d 1118 (9th Cir. 2005)

Facts and Proceedings below:

Oregon police officers arrested defendant at a motel for possessing illegal drugs with intent to distribute. Officer A Mirandized defendant at the motel, and defendant waived his rights. Officer A and Officer B questioned defendant at the motel, and later that evening at the station house. Defendant made some admissions. The questioning ended at 11 p.m. Defendant did not assert his right to silence or to an attorney at any point in the questioning that night.

The following day, at 1 p.m., Officer B and Officer C came to the jail where defendant had been since the night before. The officers did not re-Mirandize defendant, but Officer C: 1) asked defendant if he remembered being given his Miranda rights the night before, and 2) gave him a Miranda card to read. Defendant said he "thought he had" received Miranda warnings the night before, and, after appearing to read the card, said that "he understood his rights." Defendant made further admissions in this interrogation session.

Defendant was tried and convicted in federal court of three federal drug crimes.

ISSUE AND RULING: Did the defendant's Miranda waiver from the night before go stale, such that the officers were required to obtain a new waiver before they questioned him at 1 p.m. the next day? (ANSWER: No, rules a 2-1 majority)

Result: Affirmance of U.S. District Court convictions of Antonio Rodriguez-Preciado (aka Tony Rodriguez Preciado) on three federal drug crimes.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Rodriguez-Preciado contends that the officers were required to re-advise him of Miranda warnings before beginning the second day of questioning. But he does not cite a Supreme Court or Ninth Circuit decision--and we are aware of none--holding that statements made after Miranda warnings are administered are nonetheless inadmissible if the warnings become "stale."

The Supreme Court has eschewed per se rules mandating that a suspect be re-advise of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42 (1982) (rejecting per se rule requiring police to re-advise suspect of his rights before questioning him about results of polygraph examination). Consistent with Wyrick's admonition against "unjustifiable restriction[s] on reasonable police questioning," "[t]he courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners." United States v. Andaverde, 64 F.3d 1305 (9th Cir.1995). Indeed, in a decision upholding the admissibility of statements made nearly fifteen hours after Miranda warnings were administered, see Guam v. Dela Pena, 72 F.3d 767 (9th Cir.1995), we cited with approval earlier decisions involving intervals of two

days, citing Puplampu v. United States, 422 F.2d 870 (9th Cir.1970) (per curiam), and three days, citing Maquire v. United States, 396 F.2d 327, 331 (9th Cir.1968).

Here, the district court found that Rodriguez-Preciado's second day statements were "close in time to the original advice of rights," despite the interval of approximately sixteen hours, and that he "understood those rights as given to him in English." In light of our precedents approving delays of similar and greater length, it properly concluded that it was "not [necessary] that he be advised of his rights" again.

Nor has Rodriguez-Preciado pointed to any other circumstances which "suggest the effectiveness of the earlier Miranda warnings was diminished" on the second day of the interrogation. "A rewarning is not required simply because there is a break in questioning." Although [Officer C] took [Officer A's] place at the second interrogation, [Officer B] was present at both custodial interrogations and the questioning in the motel room. Nor is it determinative that there was a change of one interrogator in conjunction with the change of location (from the motel to the substation to the jail). It is also significant that Rodriguez-Preciado was in custody continually from the time warnings were first administered through the second day interview. Thus, there were no intervening events which might have given Rodriguez-Preciado the impression that his rights had changed in a material way.

Indeed, Rodriguez-Preciado's own statements indicate that he still understood his rights on the second day of questioning: when [Officer C] asked him whether he remembered being advised of his Miranda rights the night before, Rodriguez-Preciado replied that he "thought he had." Contrary to the dissent's suggestion, we do not hold that the "central issue" is "what [Rodriguez-Preciado] remembered concerning the earlier warnings." We agree that "the issue is whether Rodriguez-Preciado could have reasonably believed that the Miranda rights ... of which he was apprised the night before [were still effective], in light of the changed circumstances." That Rodriguez-Preciado appeared to remember having received warnings the night before indicates that he did, in fact, understand that his rights had not materially changed notwithstanding the change in circumstances.

[Some citations omitted]

LED EDITORIAL NOTE: The Analysis by the Ninth Circuit on durability of a Miranda waiver in Rodriguez-Preciado is consistent with that of the Washington Supreme Court in State v. Rowe, 77 Wn.2d 955 (1970).

WASHINGTON STATE COURT OF APPEALS

CONFESSION HELD "VOLUNTARY" DESPITE ARGUABLY IMPROPER INTERROGATOR ASSERTION TO SUSPECT THAT "WHOEVER TALKS FIRST WILL GET THE BEST DEAL"; ALSO "ACCOMPLICE" STATUS ESTABLISHED BY EVIDENCE OF PRESENCE-PLUS

State v. Trout, ___ Wn. App. ___, 105 P.3d. 69 (Div. III, 2005)

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

On Christmas Day 2001, Jason Fox broke into Nicholas Bunn's car and stole his car stereo system and a ceramic vase Nicholas intended for his mother for Christmas. Nicholas told Adam Trout that he wanted to beat Jason with a bat.

Nicholas and others gathered at Adam's apartment to hang out and drink alcohol the next evening, December 26. Nicholas called Jason from Adam's apartment. And they had a heated discussion about Jason's theft. Jason challenged Nicholas to come over and take the stereo out of his car. Adam Trout, his brother Jarom Trout, Jordon Connor, and Cole Spencer all agreed to accompany Nicholas to Jason's apartment. The group armed themselves before leaving. Nicholas took a bat. Jordon took a gun. And Jarom took a knife.

Jason left the apartment he shared with his girl friend, Jennifer Wilson, around midnight. Jason's cousin, Trina Brooks, also lived in the apartment. Trina's boyfriend, Jeremy Anderson, was also in the apartment. So Jennifer, Trina, and Jeremy remained in the apartment.

The five men (Adam, Jarom, Jordon, Cole, and Nicholas) arrived at Jason's apartment after midnight. Jennifer heard a knock on the door and saw a gloved finger over the peephole. She opened the door a crack to peek out. Jennifer saw at least five men; one with a gun, one with a baseball bat, and another with a knife. She tried to close the door. They forced their way in. She tried to hide. The intruders crowded into a bedroom where Trina and Jeremy were sleeping. They shouted, "where's Jason?"

Some of the intruders jumped Jeremy. Nicholas assaulted Jennifer, Trina, and Jeremy with the baseball bat. One of the intruders held a gun to Jeremy's head. Jeremy was knocked unconscious. One of the intruders (the one with the gun) instructed the others to assault the girls. Trina and Jennifer were then assaulted. The intruders took the money in Jennifer's pockets and her car keys. They took \$50 from Trina as well as her identification and debit card. They took a video game player from the apartment. Nicholas took the vase on his way out. And he took Jennifer's car. Adam drove Nicholas's car. The intruders tied everyone in the apartment up with telephone cords and Christmas lights. The apartment dwellers waited until there was no more noise or activity and then went for help.

At trial, Trina testified Adam Trout was in the bedroom the entire time. She recognized Adam as the "nice guy."

Police arrested Adam. The State charged him with two counts of first degree robbery for crimes against Jennifer and Trina and one count of second degree assault against Jeremy, all while armed with a deadly weapon.

Adam moved to suppress his written and oral statements to police because a detective promised lenient treatment to the first one to testify. The trial judge ultimately concluded there was no causal relationship between the implied promise and Adam's inculpatory statement and that the statement was voluntary. The jury was instructed on accomplice liability. Adam was found guilty.

ISSUES AND RULINGS: 1) Where the defendant confessed after the interrogating officer told him "whoever talks first will get the best deal," was the subsequent confession properly held to be "voluntary" by the trial court? (**ANSWER:** Yes, based on the totality of the circumstances); 2) Was the evidence of Trout's participation in the crimes sufficient to support his conviction as an accomplice in the commission of those crimes? (**ANSWER:** Yes, rules a 2-1 majority).

Result: Affirmance of Benton County Superior Court conviction of Adam Larsen Trout of first degree robbery (two counts) and second degree assault (one count).

1) Voluntary confession

The Court of Appeals analyzes this issue as follows:

Adam contends that the statement he gave to police was not voluntary. He [argues that he] and his father were cajoled by the police promise of preferential treatment if he talked first.

The court found that [a detective] did make the statement to Adam and Cole in the presence of Adam's father that "[w]e pretty much know who all was involved, and whoever talks first will get the best deal." The court concluded, nonetheless, that considering all the circumstances the confession was voluntary. Those circumstances support the trial court's finding that the confession was voluntary:

A period of time elapsed from the detective's representation until Adam was examined at the police department. He was interviewed for less than an hour. He was advised of his rights. He tried to call his lawyer. There was a further time lapse while Adam located his lawyer. He consulted with his attorney. And he signed the statement only after he consulted with his attorney.

All of this led the court to conclude:

Considering all of those matters the court concludes that, as the court discussed in the case of State v. Broadaway, 133 Wn.2d 118 (1997) the evidence does not establish a causal relationship between the inferred promise and the statements made by the defendant nor does it indicate that, in fact, the statement by Detective Weber, again using the language in the Broadaway case, resulted in the defendant's will being overborne.

We agree. The trial judge's conclusion that the confession was voluntary is supported by this record.

2) Accomplice liability

Trout argued on appeal that, while there was evidence that he had planned to help in the crime that the group originally planned to commit (forcibly taking back a stereo from Jason), he did nothing affirmative to help in commission of the different crimes that actually occurred when the group got to the apartment and learned that Jason had left. The Trout majority opinion declares that there was enough evidence to support the jury verdict. It is true that merely being present at a scene where others are engaged in crime does not make one an accomplice. Here, however, there was evidence that Trout acted as muscle (albeit in a low-key manner) or as a lookout.

CITIZEN INFORMANTS, EVEN THOUGH NAMED IN SEARCH WARRANT AFFIDAVIT, HELD NOT SHOWN TO HAVE CREDIBILITY FOR PURPOSES OF INFORMANT-BASED PROBABLE CAUSE STANDARD UNDER AGUILAR-SPINELLI

State v. McCord, ___ Wn. App. ___, 106 P.3d 832 (Div. III, 2005)

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

Daniel Runion Jr. was accused of stealing a gun. His wife and father tried to retrieve the gun in an effort to get leniency on the charges against him. On June 30, 2003, they went to see Mr. McCord, an individual they knew as "Cosmo," at 1318 Browne Ave. No. 6 in Yakima. Mr. McCord did not have the gun, but said he could get it.

On July 1, 2003, Ms. Runion and her father-in-law talked to the Yakima Police Department. A detective gave Ms. Runion \$200. She and her father-in-law returned to the apartment.

Ms. Runion gave the \$200 to Mr. McCord and he gave her a watch as collateral. He was then going to get the gun for her.

While the Runions were in the apartment, surveillance officers saw a white female enter the apartment. Daniel Runion Sr. later told detectives he saw a white female tell Mr. McCord she wanted "some shit." Mr. McCord gave her a clear plastic bag and she gave him some money.

After the Runions left, the surveillance officers saw Mr. McCord leave. After speaking with the Runions, the detective had Mr. McCord arrested. A warrant check revealed he was a convicted felon.

Upon the arrest, a detective read Mr. McCord his Miranda rights. He told the detective he was going to recover a gun for a friend. Mr. McCord also said there was a gun in the apartment under the mattress.

Later that day, the police applied for and obtained a search warrant for the apartment on Browne Avenue. The affidavit detailed what the Runions had seen: individuals smoking marijuana as well as other drug paraphernalia. The officer also noted that the term "shit" is commonly used to mean drugs. A warrant was issued and authorized a search for "Marijuana, Drug Paraphernalia, other Narcotics, and materials associated with the sale and distribution of narcotics." Upon execution of the warrant, officers found under the mattress in the bedroom, a revolver near a notebook bearing the name "Cosmo."

The State charged Mr. McCord with unlawful possession of a firearm. He challenged the warrant's validity and moved to suppress evidence discovered during the search as well as his statements. His motions were denied. The jury convicted him as charged.

ISSUES AND RULINGS: 1) Does the search warrant affidavit establish the veracity (credibility) of the named "citizen informants" for purposes of the two-pronged Aguilar-Spinelli test for informant-based probable cause? (ANSWER: No; even though the informants were named in the affidavit, the affidavit failed to show their veracity and failed to corroborate their story sufficiently to overcome the lack of showing on the "veracity prong");

2) Where McCord's arrest was based on the information that the Runions gave the police, was the arrest unsupported by probable cause, and, if so, must McCord's statements following his unlawful arrest be suppressed? (ANSWER: Yes and yes)

Result: Reversal of Yakima County Superior Court conviction of Bradley William McCord for unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Veracity of named citizen informants

The determination that probable cause exists is given great deference and the decision to issue a warrant is reviewed for abuse of discretion. Any doubts relating to the existence of probable cause will be resolved in favor of the warrant.

Here, the officers applied for a search warrant based in part on information given to them by the Runions. When the existence of probable cause depends on information supplied by an informant, the two-prong Aguilar-Spinelli test must be satisfied. The knowledge prong requires that the basis of the informant's information be established. The credibility prong requires that the reliability of the informant be established. Independent police investigation that corroborates more than public or innocuous facts in the informant's tip may cure a deficiency in either prong.

Information that the informant personally saw the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. State v. Duncan, 81 Wn. App. 70, 76 (1996) **Sept 96 LED:11**. The court here determined that the warrant was proper based only upon the Runions' description of the transaction between Mr. McCord and a female visitor. This description satisfies the basis of knowledge prong.

The veracity prong is satisfied by showing the credibility of the informant or by establishing that the facts and circumstances surrounding the furnishing of the information support an inference the informant is telling the truth. When the informant is an ordinary citizen rather than a criminal or professional informant and his identity is revealed to the issuing magistrate, intrinsic indicia of his reliability may be found in his detailed description of the underlying circumstances of what he observed. But merely naming a person is an insufficient basis to determine reliability; it is only one factor to be considered. Duncan, 81 Wn. App. at 78.

The Runions were named citizen informants. The requirements to establish their credibility are therefore relaxed. But there is nothing more than simply their identities that is listed in the affidavit supporting the warrant. This alone does not support a finding of reliability. The court improperly concluded the Runions were reliable based upon their status as named citizen informants.

If the affidavit fails to satisfy either prong, however, corroboration of the informant's tip with information discovered through an independent police investigation may cure the deficiency. State v. Taylor, 74 Wn. App. 111 (1994). In order for the police investigation to suffice, the information discovered must suggest " *'probative indications of criminal activity* along the lines suggested by the informant.' " The investigation must also verify more than innocuous facts.

The police here corroborated that a white female entered the apartment while the Runions were present. But this is an innocuous fact. The investigation did not cure the defect in showing the Runions' reliability. Because the warrant was improperly issued, the court should have suppressed the evidence.

2) Confession as fruit of unlawful search

Claiming his arrest was invalid, Mr. McCord also challenges the court's denial of the motion to suppress his statements to the police. The police arrested Mr. McCord based upon information given to them by the Runions. When an

informant supplies the information that gives rise to probable cause to arrest, however, the Aguilar-Spinelli test applies. As indicated before, the veracity prong of this test cannot be satisfied. Because the informants' veracity was not established, the police did not have the authority to arrest Mr. McCord. RCW 10.31.100.

A statement made after an illegal arrest is only admissible if it was obtained " 'by means sufficiently distinguishable to be purged of the primary taint' " and not through " 'exploitation of that illegality.' " State v. Gonzales, 46 Wn. App. 388 (1986) . To determine if the illegal arrest taints a statement, the court considers: (1) temporal proximity of the arrest, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of Miranda warnings.

Here, Mr. McCord's statements were made immediately after his arrest. Given the immediacy of his statements, the illegal arrest required suppression.

[Some citations omitted; headings added]

LED EDITORIAL COMMENT: From time to time, somewhat inconsistently it seems to us, Washington's appellate courts carefully scrutinize government claims that an informant source is a "citizen" informant who should be presumed to be credible. Officers preparing search warrant affidavits and trying to show that their confidential informants are indeed citizen informants, will want to consider the following checklist and to include as many of the items as the facts of the investigation will support: 1) that the informant identified him/her-self to the affiant; 2) that the police checked and found no criminal record and have no basis for believing the citizen-informant was involved in any criminal activity; 3) that the citizen-informant gave his/her address and telephone number to the affiant-officer; 4) that the citizen-informant is personally known to the affiant and/or has a reputation for trustworthiness in the community; 5) that the citizen-informant is a public-spirited citizen whose interest in this matter is in assisting law-enforcement with no known motive to make a false report; 6) that the citizen-informant has requested confidentiality because he/she fears physical, social, and emotional retribution if his/her identity is revealed; 7) that it has been the affiant's experience and training that revealing the identities of citizen-informants discourages other citizens from providing information to law enforcement officers; and 8) that the citizen-informant did not request monetary compensation for disclosure of the information.

NO VIOLATION OF STRIKER/GREENWOOD SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE WHERE DEFENDANT WAS OUT OF STATE AND NOT INCARCERATED THERE DURING RELEVANT PRE-ARRAIGNMENT PERIOD

State v. Hessler, 123 Wn. App. 200 (Div. III, 2004)

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

In 1996, Mr. Hessler allegedly accepted \$1,571.24 for a concrete job. He did not perform the work. He moved to Minnesota a few days later. In 1998, the State filed a complaint in the Spokane County District Court charging him with first degree theft. The court issued a warrant for his arrest. The State made no effort to contact Mr. Hessler to notify him of the complaint, even though its investigators had the telephone numbers of Mr. Hessler's mother and a friend.

Mr. Hessler was at liberty in Minnesota until 2000, when he served six months in jail on a conviction for incest. His Minnesota lawyer contacted the Spokane

County District Court about some outstanding traffic warrants. The court informed the lawyer about a couple of criminal warrants including the one at issue here. Mr. Hessler returned to Washington around September 2002.

The State arrested Mr. Hessler on June 29, 2003, and filed an information in the superior court on June 30. Mr. Hessler was arraigned July 10. And a trial date was set in August, well within 60 days, as required by CrR 3.3. On August 28, 2003, Mr. Hessler moved to dismiss under CrR 3.3. He alleged that the delay between the 1998 complaint and the 2003 arraignment was unnecessary and required dismissal.

Mr. Hessler charged the State with lack of good faith and due diligence in bringing him before the court. The State responded that no due diligence inquiry was called for until Mr. Hessler established that he had been amenable to process during the delay.

The court ruled that the State must first show that it exercised due diligence in an attempt to locate a defendant who has left the state without knowledge that a charge has been filed and to notify him of the charge; only then does the burden shift to the defendant to establish his amenability to process.

The court dismissed the prosecution based on the State's lack of effort to locate Mr. Hessler and notify him of the charge.

ISSUE AND RULING: Under the Striker/Greenwood application of the “speedy arraignment/speedy trial rule of CrR 3.3, must a criminal defendant first establish his amenability to process during a long delay between charging and arraignment *before* the State needs to show that it took reasonable steps to give notice that charges were filed? (**ANSWER:** Yes, and a person is never amenable to process under the rule when in another state and not incarcerated there.)

Result: Reversal of Spokane County Superior Court order dismissing first degree theft charge against Dale Arnold Hessler; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A criminal defendant must be arraigned within 14 days after the information is filed in the superior court. CrR 3.3(c)(1). Unless the defendant can be brought to trial within the time prescribed by CrR 3.3, the court has no discretion; it must dismiss the charge with prejudice. CrR 3.3(h). A judge must compute a speedy trial period using a constructive arraignment date when a "long and unnecessary delay" occurs between the filing of a criminal charge and the appearance before the court of a defendant amenable to process. State v. Greenwood, 120 Wn.2d 585, (1993); State v. Striker, 87 Wn.2d 870 (1976).

The charge against Mr. Hessler was filed in 1998. He was arraigned in 2003. The delay was long, but the length of the delay between the charge and arraignment is important only if the defendant was amenable to process during the delay. State v. Stewart, 130 Wn.2d 351 (1996) **Jan 97 LED:10**.

Here, the inquiry at the trial court proceeded as follows. First, the court asked whether any part of the delay was attributable to the fault or connivance of Mr. Hessler. Answer--no. The court then asked whether the State made any attempt to subject him to process. Again, no. Then the court asked whether Mr. Hessler

would have been amenable to process if the State had attempted to locate him. Then, based on its determination that the defendant did not cause the delay and that the State made no effort to notify him of the charge, the court concluded that any further inquiry was hypothetical and irrelevant: "If any steps had been taken, it probably would have been determined that he had moved to Minnesota, and maybe he would have been amenable to process, and maybe he wouldn't have. But we don't know that."

The court asked the questions in the wrong order. The first question in a delayed arraignment inquiry is whether the defendant was amenable to process. Unless the defendant was amenable to process, the Striker rule is not implicated. The State has no obligation to show that it did anything. [Stewart]. The defendant must first show he was amenable. City of Seattle v. Guay, 150 Wn.2d 288 (2003).

And a person in another state who is not incarcerated is not amenable to process. State v. Hudson, 130 Wn.2d 48 (1996) **Jan 97 LED:10**. This is so, even if the State knows where he is. State v. Treat, 109 Wn. App. 419 (Div. III, 2001) **March 02 LED:18** (citing Stewart). Due diligence requires the State to act on any leads it has regarding the whereabouts of a defendant who is amenable to process. State v. Vailencour, 81 Wn. App. 372 (1996) (citing Greenwood). The State is not required, however, to notify a person outside Washington that a charge has been filed – again, even if the person's address is known. Until and unless the defendant establishes his amenability to process, the question of good faith and due diligence by the State does not arise.

Accordingly, we reverse the order of dismissal.

[Some citations omitted]

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR HARASSMENT AND FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES; SEARCH WARRANT WITHSTANDS CHALLENGES BASED ON TESTS FOR PROBABLE CAUSE, PARTICULARITY AND STALENESS

State v. Hosier, 124 Wn. App. 696 (Div. I, 2004)

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

On May 2, 2002, several three- and four-year-old children notified staff at the Kids N Us Day Care (day care) that they had found a pair of girl's underwear on the chain link fence that encircled the day care's playground. The following message was written on the underwear:

I love baby sitting this little girl 7 yr old and already as nasty as most big girls ever get she does everything but f*** and real soon I'll be getting it all she is ready and willing just got to open up the gold mine to heaven ... daddy.

On June 24, 2002, Mr. Smith, whose house was across the street from Hosier's residence, was mowing his yard when he discovered two notes on the grass. One note read "I love to eat young fat girls p****s (sic)." The second note read: "Has your p**** ever played with by a stranger who just wanted to be as nasty as he could get. Baby I want to play with yours right now while I stick my tounge (sic) in and out of your tight a*****."

Smith notified the police. Based on a comparison of the notes with samples of Hosier's handwriting on file from his registration as a sex offender, a handwriting examiner opined that there was a 75 percent chance that Hosier had written the notes. Smith was worried that the notes were intended for his 13-year-old daughter, M.S., who frequently played on the lawn and had been playing on the lawn earlier that day.

On July 15, 2002, a teacher at the day care found a second pair of underwear in the day care parking lot. Written on them was the message, "She said she liked me to play with p**** and let me lick and suck on it to (sic) so nice and sweet."

On July 29, 2002, a student at the Everett School of Cosmetology (cosmetology school) found a note in the school's designated smoking area which read:

I want to catch some real young girls and take them someplace where I can do anything I want to them!!!! (At least 2)

First I would tie them up between eather (sic) trees or stakes cut all thier (sic) clothing off of them and play with thier (sic) p****s licking, sucking, maybe even finger f***** them.

Then I'd make them play with each other eating p****s. Just being real nasty with each other.

I'd get all kinds of kinky toys to play with and make movies of them useing (sic) them on each other I'd keep them for at least (sic) a week and do everything to them. Spankings all kinds of things in thier (sic) p****s a** holes, and mouthes (sic). When I had thier (sic) p****s stretched big enough to put my whole hand in side them open and close it

I'd let them go.

On July 31, 2002, an employee at a Bartell Drug Store in Everett (Bartells) found a note near a cash register which read, "I love licking the tight little a** hole of a young girl--slipping my tounge (sic) in and out while I finger f*** her p****." Ms. Swint, a student at the cosmetology school, who sometimes smoked in the designated smoking area, also worked at Bartells. She was the only student at the school who also worked at the store, which was approximately a twenty minute drive from the school.

On August 1, 2002, Hosier was arrested. Also on August 1, 2002, the police sought and received a warrant to search Hosier's residence. In a taped interview with the police, Hosier admitted to putting the notes on the Smith's lawn, and stated that the note about the fat girl was intended for M.S. On January 31, 2003, Hosier was charged by second amended information with three counts of CMIP and two counts of harassment. For each of the three CMIP counts, the State alleged that Hosier had a prior conviction for a felony sex offense, rendering the charged counts felonies. The two harassment charges were misdemeanors.

Prior to trial, Hosier filed a motion to suppress the evidence obtained in the search of his residence. The trial court denied his motion. Following a bench trial, Hosier was convicted of two counts of CMIP, one count of attempted CMIP and two counts of harassment. The trial court sentenced Hosier to 60 months in

prison and two years of probation for each of the three misdemeanors on his convictions.

[Some vulgarities deleted in part]

ISSUES AND RULINGS: 1) Is there sufficient evidence to support Hosier's convictions for communicating with a minor for immoral purposes under RCW 9.68A.090 (and attempt thereof) and for harassment under RCW 9A.46.020? (ANSWER: Yes); 2) Did the warrant and affidavit meet Fourth Amendment standards for probable cause and particularity, and was the PC information not stale? (ANSWER: Yes)

Result: Affirmance of Snohomish County Superior Court convictions of Richard Leon Hosier for CMIP (2 counts), attempted CMIP (one count), and harassment (two counts).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Communications with a minor for immoral purposes

RCW 9.68A.090 is part of a legislative effort to prohibit sexual misconduct. The statute states:

A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A., 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state, in which case the person is guilty of a class C felony punishable under chapter 9A.20 RCW.

Chapter 9.68A RCW provides ample notice of the Legislature's intent to prohibit sexual exploitation and misconduct with persons under the age of eighteen. It "prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." " 'Communicate,' [as the term is used] within RCW 9.68A.090, includes conduct as well as words, and 'immoral purpose' refers to sexual misconduct."

A. *Count I: M.S.*

Hosier placed two sexually explicit notes on the Smith's lawn, on which he knew M.S. played. Hosier admitted that he intended for M.S. to receive at least one of the notes. There is no doubt that the notes described sexual misconduct or that if M.S. had found and read the notes that the crime would have been completed. Hosier asserts that because Smith, rather than M.S., found the notes, M.S. was "never exposed to the words or conduct 'communicating' an immoral purpose." He further contends that the State therefore failed to prove the communication element of CMIP for Count I.

The Smith's lawn was visible from Hosier's residence. Hosier frequently observed M.S. playing on the lawn of her parent's home, had watched M.S. as she undressed in her bedroom, and had observed M.S. playing on the lawn on the day he left one of the sexually explicit notes on the Smith's fence. M.S.'s father found both notes while he was mowing the lawn. He testified that the notes were "very sexual", "seemingly threatening", and described M.S. Smith also testified that he told M.S. that:

I found some notes that were very sexual and they were seemingly threatening and that I didn't know who had written

them, but to be extra careful and don't be alone on the street and that I was going to take the notes to the police.

Smith also informed M.S. that the notes "kind of described her." He was sufficiently concerned about his daughter's safety that he cautioned her to be extra careful and instructed her not to go out onto the street alone. Based on these facts, the trial court found that Smith was a "conduit" between Hosier and M.S.

It was reasonably foreseeable that Smith would find the notes. It is highly foreseeable that, based on the contents of the notes, Smith would communicate to M.S. that she was at risk of being sexually exploited and that she should act with caution. Although Smith did not read the notes verbatim to M.S., it is clear that he conveyed the sexual and threatening nature of the content of the notes to her in an effort to caution and protect her. These facts are sufficient to fulfill the communication element of CMIP.

B. Count II: Day Care Playground

Count II was based on Hosier's act of leaving a pair of girl's underwear on the fence at the day care. Children at the day care discovered the underwear, poked them through the fence, and reported their find to staff at the day care. Hosier asserts that because the children who found the underwear were unable to read, there was no communication.

Hosier cites no authority requiring a victim to understand the sexual nature of a communication. Nor do we interpret RCW 9.68A.090 to mean that a victim must understand the prurient nature of a communication. This court assumes that the legislature did not intend an absurd result and will construe statutes accordingly to effect legislative intent. To require that a minor understand the explicitly prurient nature of a communication in order to fulfill the elements of the crime of CMIP, we would either need to restrict the statute's application to victims sexually mature beyond their years, or to omit from its reach the very victims it is intended to protect. There is no reasonable basis to presume that the Legislature intended such an absurd result. The children's exposure to the underwear with the sexually explicit message on it was sufficient to support the finding that Hosier completed his communication with the children for an immoral purpose.

C. Count III: Day Care Parking Lot

The third count of Hosier's conviction was for attempt to commit CMIP. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020. A substantial step is an act that is "strongly corroborative of the actor's criminal purpose." State v. Workman, 90 Wn.2d 443 (1978).

Hosier wrote the note on girl's underwear and placed it in the day care driveway. The driveway was directly in front of the main entrance to the day care, and thus easily visible to an individual entering the day care. An adult employee of the day care, not a child, found the second pair of underwear. Unlike M.S.'s father, the employee did not convey the threatening content of the note to the children. The children therefore neither received the underwear containing Hosier's

message, nor the message itself. Thus, Hosier's effort to communicate with the children was incomplete.

A reasonable trier of fact could find that he intended children to find the underwear. His act of placing a pair of underwear on the driveway of the day care was a substantial step towards the commission of the crime of CMIP. The record supports the trial court's finding that Hosier's act of leaving a second pair of underwear in the day care parking lot constituted attempted CMIP.

2) Harassment

Hosier also challenges his conviction for two counts of harassment. Based on notes Hosier left at the cosmetology school and at Bartells, where Swint, one student of the cosmetology school worked, the trial court found Hosier guilty of two counts of harassment under RCW 9A.46.020.

Hosier concedes that the statute prohibits "true threats," but claims that there is insufficient evidence that he made "true threats."

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual]."

Hosier contends that the note he left at the cosmetology school cannot be considered a true threat because, although it referenced confinement and restraint of young women, "Swint did not believe, that Hosier intended to kidnap her, tie her up and sexually assault her." The facts do not support Hosier's claim.

Hosier left one note at the cosmetology schools designated smoking area, an area frequented by Swint. He left a second note adjacent to a cash register, attended by Swint, at Bartells located about twenty minutes away from the school. Following the discovery of the second note at Bartells, Swint believed that Hosier had targeted her and that he might carry out his threat. Swint's actions corroborated her fear. Following the discovery of the second note at Bartells, she began carrying mace, stopped riding the bus, and stopped going places alone. The content of these notes and the context of their placement made it reasonable for Swint to fear that Hosier would carry out his threat. Swint testified that she was worried about the safety of her classmates as well as her own safety.

Hosier also maintains that the note he placed at Bartells did not physically threaten anyone, and therefore cannot be considered a true threat. Although the note Hosier left at Bartells did not explicitly threaten physical harm, the sexually graphic, aggressive content of the note would constitute physical harm if the acts they contemplated were completed. Hosier did not expressly identify a victim by name in the notes. Nevertheless, he knew the cosmetology school smoking area was frequented by female students. It was reasonable for Swint to infer that she was being targeted when she learned that a second note had been placed near her work station at Bartells. The content of Hosier's notes, in the context of his strategic placement of them, creates a reasonable inference of an explicit physical threat to Swint. Moreover, RCW 9A.46.020 "also prohibits threats to do any other act which is intended to substantially harm the person threatened ... with respect to his or her ... *mental health* or safety." Williams, 144 Wn.2d at 208. Even assuming *arguendo* that Swint reasonably did not fear for her physical safety, the record shows that Hosier's notes made Swint fearful and compromised her mental health.

Hosier also argues that under State v. Kilburn, 151 Wn.2d 36 (2004) **Oct 04 LED:05** his notes did not constitute "true threats" because the State did not prove that he intended to carry out his threats. Kilburn does not support Hosier's assertion that his notes were not "true threats."

In Kilburn, a juvenile challenged his conviction under RCW 9A .46.020 on the grounds that the State had not proved he intended to carry out the threat. Kilburn, 151 Wn.2d at 38. Explaining that intent need not be shown, the Washington Supreme Court stated:

To avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only "true threats."

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

[Kilburn] (Internal citations omitted.) Thus, although RCW 9A.46.020 does require a "mental element" because that statute states that the defendant "knowingly threatens," it "does not require that the State prove that the speaker intended to actually carry out the threat." [Kilburn]

Hosier does allege that his notes were in jest or were idle talk. However, a reasonable person would foresee Hosier's notes, taken in the context of each other, as serious expressions of intent to inflict bodily harm. The trial court had before it sufficient evidence to find that Hosier engaged in criminal harassment when he placed notes at the cosmetology school and at Bartells.

3) Probable cause, particularity, no staleness

Hosier first contends that the search warrant violated the particularity requirement. The fourth amendment's particularity requirement prevents general searches and " 'the issuance of warrants on loose, vague, or doubtful bases of fact.' "

The warrant issued for Hosier's residence authorized a search for:

- (a) Any and all handwriting examples, correspondence, notes, diaries, financial records, checks, journals or other items where HOSIER's handwriting is displayed.
- (b) Any and all writing materials to include but not limited by: notepads, scraps of paper, ledgers or like material.
- (c) Any and all writing utensils with dark colored ink and "felt tipped" type or similarly designed markers.
- (d) Any and all letters of occupancy identifying the occupant of the residence to be searched.

The following items were seized from Hosier's residence:

(1) briefcase containing papers, various blank papers, various ink pens & markers (some in containers)[,] (1) black vest containing rope, plastic ties, pens, etc., various pornographic magazines and photographs, childrens (sic) underwear, various notes and letters[,] wood board with writing[,], various notebooks, container of drug paraphernalia.

Hosier contends that there was no need for a warrant to locate samples of his handwriting because an expert had ascertained with sufficient accuracy that he was the author of the sexually explicit notes. Notwithstanding the expert's conclusion that Hosier authored the notes, the court had probable cause to issue an affidavit to obtain samples of Hosier's handwriting from his residence. The affidavit stated:

A court order may be requested to have HOSIER submit to handwriting exemplars, however suspects forced to display their handwriting in such a setting are prone to attempt to disguise their samples to avoid being named the author of the suspect script. Likewise, after a suspect was subjected to the exemplar process and knew that he was the focal point of the crime, he would likely destroy any/all evidence of the sought materials secreted in his home. Therefore, handwriting samples at Hosier's home are sought in order to provide the most authentic representation of his handwriting for forensic examination by an expert in the field.

Hosier also asserts that there existed "no basis for believing that forensic evidence could tie a particular marker" to the notes he had written. The record supports the trial court's conclusion that there was probable cause to issue the warrant. Hosier provides no authority or evidence to support his assertion that forensic science would be unable to link the materials found in a search of his residence to the notes found at the Smith residence, the day care, or Bartells.

Hosier also contends that because "[n]umerous items not constituting writing utensils (sic) or materials, and therefore clearly outside the scope of the warrant, were seized and later used as evidence at trial," his motion to suppress all physical evidence and his statements should have been granted. But even if the rope and other items were illegally seized, the proper remedy is to sever these items from evidence seized pursuant to valid parts of the search warrant. "Under the severability doctrine, infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant but does not require suppression of anything seized pursuant to valid parts of the warrant." The trial court did not err in refusing to suppress all evidence seized under the warrant.

Hosier also argues that the police's seizure of items that were not writing implements and materials violated the particularity requirement. Hosier appears to refer to the underwear and rope among the materials which the police seized. Hosier does not deny that he wrote some of his notes on underwear. The underwear therefore constituted writing materials.

The police also seized a "vest containing rope, plastic ties, pens, etc." "[E]vidence not described in a valid search warrant but having [a] nexus with [the] crime under investigation may be seized during [a] search." State v. Gonzales,

78 Wn. App. 976, 982, 900 P.2d 564 (1995). At least one of Hosier's notes explicitly referenced tying young girls up in order to engage in sexual acts with them. There thus was a nexus to the crime under investigation. The rope was legitimately seized as potential evidence that Hosier had intent to carry through with his threats.

Even if the seizure of the rope was invalid, and its admission therefore improper, its admission was harmless error. The record shows that the trial court relied upon the written notes and upon Hosier's oral statements, not the rope, to convict him. On this record, whether the rope is severed from other evidence obtained in the search, or offered as evidence, it is clear that it was harmless error because the remaining evidence and testimony standing alone supports Hosier's conviction.

Hosier also maintains that the search warrant was stale because there was a "5-week delay between the finding of the notes and the search of Hosier's home." Hosier's argument is merit less.

In State v. Smith, 60 Wn. App. 592, 602, 805 P.2d 256 (1991) this court explained in order for a warrant to be valid, there must be

[a] reasonable probability that criminal activity was occurring 'at or about the time the warrant was issued.' 'Tabulation of the intervening number of days' is one of the factors to be considered, but is not controlling. Other factors to be considered include the nature of the crime, the nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched.

...

In this case, the warrant to search Hosier's residence was issued on August 1, 2002, following the fifth, and final, incident leading to Hosier's arrest. The first of the five incidents occurred on May 2, 2002, when an employee at the day care found a pair of "little girl's panties," with Hosier's writing on them, stuck in the fence of the day care facility. On June 24, 2002, Mr. Smith, Hosier's neighbor, found two notes with sexual content written by Hosier on the grass in his yard. On July 15, 2002, the same teacher who had found the underwear on the fence of the day care facility on May 2, 2002, found a second pair of girl's underwear with sexual writing by Hosier on them on the day care's driveway. On July 29, 2002, a student at the cosmetology school found one of Hosier's notes in the school's designated smoking area. The final incident occurred on July 31, 2002, when an employee at Bartells found one of Hosier's notes near the cash register where one of the cosmetology school's female students worked. On August 1, 2002, the Everett police department obtained a search warrant for Hosier's residence. Thus, probable cause was not based on the incident occurring five weeks prior to the issuance of the search warrant, the two notes to M.S., as a single, isolated occurrence. Rather, the search warrant was based on five incidents over the course of approximately two months, and issued on the day after Hosier left a sexually explicit note at Bartells. Under these facts, Hosier's argument that the warrant was stale is baseless.

[Some citations omitted]

VIENNA CONVENTION ON CONSULAR RELATIONS REMAINS IN EFFECT

Officers may have learned through recent news media accounts that the United States has withdrawn from participation in a jurisdictional aspect of the Vienna Convention on Consular Relations. The State Department recently announced that the reported action by the United States does not in any way affect the obligation of American law enforcement personnel regarding consular notification and access for arrested foreign nationals (i.e., for all arrested non-U.S. citizens). An article regarding these obligations of law enforcement was provided in the May 1999 Law Enforcement Digest. The user-friendly U.S. State Department webpage regarding the Vienna Convention can be accessed via a link on the Criminal Justice Training Commission's **LED** webpage. Also, several cases addressing the Vienna Convention are noted at page 36 of AAG John Wasberg's "Law Enforcement Legal Update Outline," which is also accessible via a link on the CJTC's **LED** webpage.

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>].