



# Law Enforcement

NOVEMBER 2005

# Digest

**584<sup>th</sup> Basic Law Enforcement Academy – May 10, 2005 through September 15, 2005**

President: Jesse Rojas, Jr. – Yakima County Sheriff's Office  
 Best Overall: Elizabeth Consalvi – Seattle Police Department  
 Best Academic: Elizabeth Consalvi – Seattle Police Department  
 Best Firearms : Michael Baker – Mercer Island Police Department  
 Tac Officer: Deputy Seth Grant – King County Sheriff's Office

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**BRIEF NOTE FROM THE SEVENTH CIRCUIT, U.S. COURT OF APPEALS**

**[LED INTRODUCTORY EDITORIAL NOTE: Ordinarily, the LED does not digest federal court decisions other than those of the Ninth Circuit of the U.S. Court of Appeals (in whose territorial jurisdiction Washington is located) and of the United States Supreme Court. We make an exception here because of the importance of the issue addressed in the Jogi decision of the Seventh Circuit.]**

**“VIENNA CONVENTION ON CONSULAR RIGHTS” – CIVIL LIABILITY HELD TO BE POSSIBLE FOR POLICE VIOLATION OF THIS TREATY** – In Jogi v. Voges, \_\_\_ F.3d \_\_\_, 2005 WL 2347846 (7<sup>th</sup> Cir. 2005), the U.S. Court of Appeals, Seventh Circuit, holds that an alien (citizen of another nation) has a right to sue in the U.S. Courts for a civil rights violation (42 U.S.C. section 1983) for a violation of the person’s rights under the multi-country treaty known as the “Vienna Convention on Consular Relations.” Most countries are parties to the Vienna Convention treaty. Citizens of some countries (for example, Mexico and Canada) are entitled under the treaty to a warning, following a custodial arrest, of their right to contact their foreign consul. As to custodially arrested citizens of some other countries (for example, Russia, China, Great Britain and the Ukraine), a contact must be made on their behalf to their foreign consul.

Jogi was a citizen of India who was arrested, tried, convicted and incarcerated for several years in Illinois for aggravated battery with a firearm. He never was advised of his right to contact the consul of the nation of India. He filed a civil lawsuit seeking damages after he was released from prison.

The Seventh Circuit notes that almost all courts have rejected the idea that individual rights (as opposed to rights only of nations) are created by the Vienna Convention. The Jogi Court notes, however, that most of these other cases involve Exclusionary Rule determinations in criminal cases. The Jogi Court states that it is not necessarily inconsistent to not provide exclusionary relief for a violation of the treaty in a criminal case, but to allow a civil rights lawsuit for a violation.

**LED EDITORIAL NOTE RE OTHER SELECT READING ON POINT:** The May 99 **LED** included a relatively comprehensive article at 18-21 discussing rights of foreign nationals under Vienna Convention on Consular Relations. We explained that special warnings must be given relatively contemporaneously following custodial arrest (but not where there is only a Terry seizure or routine traffic stop) of a foreign national. In addition, the Federal Department of State's WEBPAGE link can be found on the CJTC **LED** WEBPAGE, and also on the CJTC **LED** WEBPAGE is an outline by Pam Loginsky of the Washington Association of Prosecuting Attorneys, containing a detailed discussion of the Vienna Convention treaty (the article is titled "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors" (May 2005) and the Vienna Convention treaty discussion begins at page 19).

Other **LED** entries addressing the treaty have included: Medellin v. Dretke, 125 S.Ct. 2088 (2005) **Aug 05 LED:05**, where U.S. Supreme Court decided not to decide to decide yet whether the treaty covers individually enforceable rights; U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9<sup>th</sup> Cir. 2000) May 00 **LED:12**, where Ninth Circuit ruled that a violation, while it may be enforceable in some other way, does not trigger exclusion. Two divisions of the Washington Court of Appeals have ruled the same: see State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000) Aug. 00 **LED:13**; State v. Jamison, State v. Acosta, 105 Wn. App. 572 (Div. I, 2001) Aug. 01 **LED: 18**. One judge in another jurisdiction has held that civil liability under the federal civil rights act can result from a law enforcement agency's failure to adhere to this treaty. See Standt v. City of New York, 153 F.Supp.2d 417 (S.D.N.Y. 2001) Dec. 01 **LED:20**.

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### **WASHINGTON STATE SUPREME COURT**

**CHRISMAN RULE IS APPLIED TO ENTRY WITH A NON-ARRESTEE – TRIAL COURT FAILED TO MAKE SUFFICIENT FINDINGS OF OFFICER-SAFETY NEEDS WHERE OFFICER ENTERED APARTMENT TO FOLLOW A NON-ARRESTEE APARTMENT RESIDENT WHO WAS GOING TO A BEDROOM TO RETRIEVE A PURSE FOR A FELLOW APARTMENT RESIDENT WHO HAD BEEN ARRESTED OUTSIDE**

State v. Kull, 155 Wn.2d 80 (2005)

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

On July 13, 2000, two undercover police officers, (Officers A and B), entered the apartment building where Leslie Kull resided to arrest her on a misdemeanor traffic warrant. As they approached Kull's apartment the officers passed a laundry room located approximately 20 to 25 feet from Kull's unit. Because the officers had obtained a picture of Kull they recognized that the woman doing laundry was Kull. The officers arrested Kull and placed her in handcuffs. After some discussion about the warrant, the officers informed Kull that she could post \$500, the amount of the warrant, and avoid being booked into jail. Norman Miller, an acquaintance of Kull's, was inside Kull's apartment waiting to give her a ride. Kull asked Miller to retrieve her purse from her bedroom so she could get the money necessary for bail. Officer [A] followed Miller into Kull's bedroom and observed a baggie of white substance he recognized as cocaine on the top of a dresser. [*Court's footnote: At some point the officers determined that Miller had no warrants and he was allowed to leave.*] The officer seized the cocaine as well as Kull's purse. The officers asked Kull if there were any other drugs or weapons

in the apartment. She told them there was a gun and where it could be located. The officers searched Kull's purse and found methamphetamine.

Kull was charged with possession of cocaine, methamphetamine, and a firearm. Prior to trial, Kull moved to suppress the evidence relating to these charges based on an illegal entry into her apartment and on the failure of the officers to advise her of her Miranda rights. The trial court granted Kull's motion to suppress the gun and the methamphetamine but denied suppression of the cocaine.

In its written findings the trial court listed the disputed and the undisputed facts and then concluded that the disputed facts were "immaterial to the issues" in the case. Significantly, in its list of disputed facts, the trial court included the statement, "Officer [A] testified that he followed Miller to the bedroom door because he was concerned about officer safety and did not know what Miller might be recovering from the bedroom. He testified that he did not enter the bedroom, but could see the cocaine in plain view from outside the bedroom door." The trial court also entered legal conclusions, including a conclusion that "the officers had legitimate officer safety concerns in following Miller to the bedroom door after the defendant asked him to retrieve her purse from inside the bedroom. Once in the bedroom door, the officer was in a lawful vantage point, the cocaine was in plain view, and properly seized."

Following the suppression hearing, Kull proceeded to a bench trial and was convicted of possession of cocaine. Kull appealed arguing, among other things, that the State had failed to prove that Officer [A] was lawfully present at her bedroom door and therefore failed to establish the requirements of the plain view exception to the warrant requirement. The Court of Appeals affirmed [in an unpublished opinion], holding that officer safety concerns justified the officer's warrantless intrusion.

**ISSUE AND RULING:** Where the trial court failed to make a finding of any officer-safety need for the officer to follow Mr. Miller into the apartment, do the findings support the trial court's conclusion of law that there was an officer-safety need for entry that meets the requirement of the independent grounds ruling under article 1, section 7 of the Washington constitution in the Washington Supreme Court's 1984 ruling in Chrisman II? (**ANSWER:** No, rules a unanimous Supreme Court).

**Result:** Reversal of King County Superior Court conviction of Leslie Anne Kull for possession of cocaine.

**ANALYSIS:** (Excerpted from Supreme Court opinion)

In this case the trial court ruled, and the Court of Appeals agreed, that Officer Dornay's seizure of cocaine from Kull's bedroom was justified under the plain view exception to the warrant requirement. Kull claims that the State failed to establish the requirements for application of that exception and that the seizure of cocaine violated the privacy protections of article I, section 7 of the Washington Constitution. Thus, she contends that the cocaine seized from her bedroom should have been suppressed and her conviction must be reversed.

Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The constitution thus protects both a person's home and his or her private affairs from warrantless searches. However, this court has held that the home receives heightened constitutional protection. Generally, a person's home is a highly private place. In no area is a citizen more entitled to privacy than in his or her home. For this reason, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." State v. Chrisman, 100 Wn.2d 814 (1984) (Chrisman II). The "heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement." Chrisman II.

Under article I, section 7, warrantless searches are per se unreasonable. Chrisman II. There are exceptions to the warrant requirement, but the State bears the burden of showing a warrantless search falls within one of these exceptions. "Plain view" is one such exception. The requirements for plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him. State v. Chrisman, 94 Wn.2d 711 (1980) (Chrisman I). [*Court's footnote: The second prong, inadvertent discovery, is no longer a requirement to establish the plain view exception under the Fourth Amendment. State v. O'Neill, 148 Wn.2d 564 (2003).*] The trial court here concluded that the "plain view" exception to the warrant requirement was satisfied, ruling that "[o]nce in the bedroom door, the officer was in a lawful vantage point, the cocaine was in plain view, and properly seized."

Kull claims that the trial court's findings of fact do not support the trial court's conclusion that the officers were at a lawful vantage point when they observed the cocaine and therefore the State has failed to establish the first requirement of the plain view exception. We agree.

The State's theory at the suppression hearing was that Kull agreed to Officer [A's] suggestion that they step into her apartment following Kull's arrest in the laundry room. The State argued that once in the apartment safety concerns led Officer [A] to follow Miller to Kull's bedroom door. Although the Court of Appeals ruled that the State failed to establish that Kull consented to the officer's entry, it nevertheless found that the entry was justified by officer safety concerns. [*Court's footnote: Kull disputed the facts surrounding Officer [A's] entry, and the trial court declined to make a finding that Kull consented to the entry. In reviewing the findings from a suppression hearing, the appellate court will presume that the State has failed to prove a factual issue if the trial court fails to make a finding on that issue. Accordingly, the Court of Appeals ruled that Kull did not consent to the entry and the State has not appealed that issue.*]

This court has held that concerns for safety present legitimate and often compelling reasons for an officer to keep an arrestee in custody. Chrisman II. Concern for safety might also allow warrantless entry into a dwelling. In Chrisman II, a campus police officer arrested an underage college student for the offense of minor in possession of alcohol. The arrestee told the officer that he had identification in his dorm room and the officer accompanied him to retrieve it. The officer remained in the open doorway of the dorm room and observed the

student's roommate, Chrisman, placing a small box in the medicine cabinet. Chrisman appeared nervous at the sight of the officer. The officer noticed what he believed to be marijuana seeds and a hashish pipe. The officer then entered the room to investigate and found a pipe and marijuana seeds. A subsequent search netted additional drugs. Relying on article I, section 7, the court held that a warrantless entry is justified only if there is evidence of (1) a threat to the officer's safety, or (2) the possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape. Chrisman II.

Applying its rule to the facts, the court noted that Chrisman was arrested for a misdemeanor crime. It also found no evidence that either the officer or the evidence was threatened. Further, the court observed that there was no escape route from the dorm room, which was located on the 11th floor. The court also attached significance to the fact that the officer initially remained in the hallway, abandoning any reasonable argument of safety concerns. Thus, the court concluded that "[i]n cases of minor violations, where no danger exists, and where there is no threat of destruction of the evidence, we can find no compelling need to enter a private residence." Chrisman II.

Kull argues that this case is controlled by Chrisman II. Kull was under arrest on a misdemeanor traffic warrant. She was in handcuffs and, according to Officer [A's] testimony, Kull was cooperative. The officers offered no testimony showing that they objectively believed Miller or Kull to be armed or that either of them threatened the officers. And, although the record was not developed on this point, there is nothing in the record that suggests Kull could have escaped or that she attempted to do so.

The State contends that Chrisman II is factually distinguishable. There the court concluded that the officer entered the defendant's dorm room "for the purpose of a search and nothing more." Chrisman II. In contrast, the trial court here concluded that "legitimate officer safety concerns" motivated the officer to follow Miller.

Although Kull concedes that officer safety concerns may, in some circumstances, provide justification for a warrantless entry, she argues that the trial court's findings of fact do not support the entry in this case. As noted earlier, among the disputed facts that the trial court declined to resolve was the fact that Officer [A] followed Miller to the bedroom door because he was concerned about officer safety and did not know what Miller might be recovering from the bedroom." Additionally, Kull argues that the officers' claim of safety concerns is undercut by other undisputed evidence. At the suppression hearing Miller testified that he is five feet, three inches tall and weighs 135 pounds. Officer [A] also testified that he thought Miller was "sketchy" and that he believed Miller was at the apartment to buy drugs. Finally, there was conflicting testimony from Officer [A] regarding whether he ran a warrants check for Miller before or after he followed Miller to Kull's bedroom. Kull contends that these facts undercut the trial court's conclusion that Officer [A] followed Miller out of concern for his safety.

Although the Court of Appeals recognized the absence of written factual findings, it ruled that the trial court's oral ruling, coupled with its written conclusion that the officers had legitimate safety concerns when they followed Miller to the bedroom

door, provided a separate justification for the officers' presence at Kull's bedroom door. In its oral ruling the trial court stated:

I think it's part and parcel of the arrest that they would allow her to go into her apartment and pick up some things to go to the station, and I think at that point they have a right to accompany her, and that's--I appreciate it may be a stretch to get from the front doorway into the bedroom, but that's in fact where she was sending people to get stuff for her, so I think it's only logical and reasonable that the officers would at least track around there to be sure nothing was going on behind their backs, so finding the cocaine in plain view on the top of the dresser I think is something that doesn't violate any search and seizure type of issues.

An appellate court may consider a trial court's oral decision so long as it is not inconsistent with the trial court's written findings and conclusions. Although the trial court's oral ruling does not contradict its written conclusion that the officers had legitimate officer safety concerns, the oral decision does contradict the trial court's written finding that the issue of officer safety was disputed. The oral decision cannot be considered to override the trial court's determination that concern about officer safety was a disputed fact that the court found immaterial to its decision. Thus, the State has failed to establish, as a factual matter, that (officer A) was concerned about officer safety. Accordingly, the trial court's conclusion of law regarding officer safety is factually unsupported. In the absence of justification for the officers' presence at Kull's bedroom door, the warrantless intrusion constitutes a violation of article I, section 7 of the Washington Constitution and the cocaine was obtained illegally.

We hold that because the trial court's findings of fact do not support its conclusion that the plain view exception to the warrant requirement justified seizure of the cocaine from Kull's bedroom, the court erred in failing to suppress the evidence obtained in the unlawful search and seizure. Accordingly, we reverse Kull's conviction for possession of cocaine.

[Some citations and footnotes omitted]

**LED EDITORIAL COMMENT: Officers who follow either arrestees or non-arrestees into their residences under circumstances such as those here should either: 1) carefully justify any officer-safety concerns by detailing their case-specific, factual reasons for entry in their written report; or 2) obtain consent to enter before going inside. The former may have been done here, but the Supreme Court holds that the trial court findings of fact were insufficient to support the trial court's officer-safety-need conclusion of law.**

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### **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

**(1) FOURTH AMENDMENT HELD TO REQUIRE EXPRESS STATUTORY AUTHORITY OR COURT RULE AUTHORITY FOR ADMINISTRATIVE SEARCH WARRANT -- IN CIVIL CASE ARISING FROM A WARRANT SEARCH BY RENTON CODE COMPLIANCE ENFORCEMENT TEAM, SUPREME COURT SAYS THERE WAS NO SUCH AUTHORITY FOR ISSUANCE OF ADMINISTRATIVE WARRANT -- In Bosteder v. City of Renton, 155 Wn.2d 18 (2005), in appeal related to a state court civil rights action under 42 United States**

Code, section 1983, the Washington Supreme Court rules that a Washington court that issued an administrative search warrant had no authority to issue the warrant because no Washington statute or court rule authorizes the issuance of such a warrant under the circumstances of this case. Accordingly, the Supreme Court rules that a search conducted under the administrative search warrant was unlawful.

The Bosteder Court rules, however, that, while the City of Renton can be held liable for a civil rights violation at trial on remand, the individual governmental employees involved in the search cannot be held liable because they are entitled to qualified immunity, in that they could not have been reasonably expected to anticipate the Washington Supreme Court's ruling. The case is remanded for trial on the issue of whether the City of Renton is liable on the unlawful search issue (as well as for trial on a "trespass" issue not addressed in this LED entry).

Part of the lead Supreme Court opinion in Bosteder describes the facts and lower court procedural background in part as follows:

The Renton Police Department formed a Community Patrol Resource Team (CPR Team) to work in conjunction with the Renton Code Compliance Enforcement Team in an effort to clean up or abate properties constituting a nuisance. The CPR Team initiated an investigation of the Heritage House Apartment Building in Renton on April 3, 1999, after receiving several complaints from neighbors regarding drug activity and the condition of the building. At the time, appellant Darwin L. Bosteder owned this property. The CPR Team visited the property on April 9, 1999, taking several pictures and entering individual apartments with the tenants' permission. The CPR Team used the information gathered on this visit to obtain a search warrant from Renton District Court Judge Charles J. Delaurenti on April 21, 1999. The warrant was issued based upon a finding of probable cause that "violations of the Uniform Housing Code and of the Uniform Code for the Abatement of Dangerous Building[s had] been committed and that evidence of those violations [was] located at certain premises."

Pursuant to that warrant, the CPR Team conducted a search of the property on April 27, 1999. The search revealed several violations of the 1997 Uniform Code for the Abatement of Dangerous Buildings (Int'l Conference of Bldg. Officials) (adopted by ordinance in Renton) and the owner and tenants were ordered to vacate the premises within three days. Bosteder claims that the CPR Team searched his property without authority of law under an invalid warrant, entered private areas without his permission, and "broke locks and pried open doors as part of their search."

[Footnote and one bracketed phrase omitted]

As noted above, Mr. Bosteder subsequently filed a lawsuit that eventually led to the Washington Supreme Court's decision that is briefly summarized above as to the Fourth Amendment issue.

Justice Sanders writes an opinion concurring with the ruling relating to the City's potential liability, but dissenting from the majority's ruling on qualified immunity for the individual government employees. Justices Alexander, Owens, and Chambers join in Sanders' opinion that would have held the government employees subject to individually liability for Fourth Amendment violations.

Result: King County Superior Court summary judgment rulings reversed in part and affirmed in part; case remanded to Superior Court for trial on Mr. Bosteder's Fourth Amendment claim

against the City of Renton and on Mr. Bosteder's trespass claims against certain individual government employees involved in the warrant search (Note: The Bosteder Court's analysis of the trespass cause of action is not addressed in this LED entry.)

**(2) ARMED-WITH-A-DEADLY-WEAPON SENTENCE ENHANCEMENT NOT JUSTIFIED WHERE DRIVER IN CONSTRUCTIVE POSSESSION OF METHAMPHETAMINE AND GUN COULD NOT REACH THE GUN WITHOUT MOVING FROM DRIVER'S SEAT TO PASSENGER SEAT** – In State v. Gurske, 155 Wn.2d 134 (2005), the Washington Supreme Court rules that a person driving with a suspended license was not armed with a deadly weapon at the time of commission of the crime (see RCW 9.94A.602) where a handgun was found in a zipped backpack that had been located behind the driver's seat at the time of arrest.

The Washington Supreme Court has struggled in recent years with trying to define what constitutes being "armed with a deadly weapon at the time of the crime" under RCW 9.94A.602. The most recent previous Washington Supreme Court decision interpreting the statute was in State v. Schelin, 147 Wn.2d 562 (2002) **Feb 03 LED:07**. In Schelin, the Court explained that a person is "armed" within the meaning of the statute if: 1) a deadly weapon is easily accessible, 2) the weapon is readily available for use, and 3) there is a nexus (connection or link) between the defendant, the crime, and the weapon. The Schelin Court did not fully explain what "nexus" means in this context, though the Court did explain that mere proximity to the weapon or constructive possession is insufficient alone.

The Schelin Court held that, where police executing a search warrant for a marijuana grow operation found a loaded handgun hanging on a basement wall about 6 to 10 feet from the grow operator arrested near his basement grow operation, there was a sufficient "nexus" between the defendant, the gun and crime.

The facts in Gurske are described in the Court's lead opinion as follows:

On August 2, 2001, a Pullman, Washington, police officer stopped Gurske for making an illegal left turn. The officer asked Gurske for his driver's license, vehicle registration, and insurance information. Mr. Gurske said he did not have his wallet with him, but he provided the vehicle registration for his pickup truck. He also gave his name, address, and date of birth. The officer conducted a driver's check through the local police database and learned that Gurske's Idaho driver's license had been suspended. The officer arrested Gurske for driving while his license was suspended, handcuffed him, searched him, and placed him in the back of his patrol car.

A second officer arrived. Pursuant to city police procedure, the officers conducted an inventory search before impounding Gurske's truck. One of the officers began the inventory on the driver side, seeing nothing on the driver's seat, he pulled the front seat forward and saw a black backpack sitting directly behind the driver's seat. The backpack was within arm's reach from the driver's position. However, the backpack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat location. [The Officer] unzipped the top, main portion of the backpack and saw a Coleman torch. Upon moving the torch the Officer saw what appeared to be a gun holster. [The Officer] removed this object from the backpack and found a black 9mm pistol in the holster. The pistol was unloaded, but a fully loaded magazine for the pistol was found in the backpack.

After removing the backpack from the truck, the officer also found three grams of methamphetamine and Mr. Gurske's wallet in the backpack.

These particular facts do not meet the nexus test, the Gurske Court holds. Justice Sanders writes a separate opinion in which he essentially agrees only with the result reached in the lead opinion. Justice Sanders argues that the Court should abandon its “nexus” test as being too vague. Along the way, Justice Sanders argues that the Court’s rule should instead be that a person only in “constructive” possession (as opposed to actual possession) of a deadly weapon can never be deemed to be “armed” under RCW 9.94A.602.

Justice Chambers also writes a separate concurring opinion. He asserts that the Supreme Court should tighten up its “nexus” test in order to provide greater consistency and uniformity of rulings, and to make it more difficult for the government to prove “armed” status at the time of arrest.

Result: Reversal of Court of Appeals decision that affirmed the Whitman County Superior Court’s application of an “armed” sentence enhancement for Samuel William Gurske following his conviction for possession of a controlled substance.

**(3) ALL JUVENILE PARTICIPANTS IN JOYRIDING CRIME ARE JOINTLY AND SEVERALLY LIABLE UNDER JUVENILE ACT FOR ALL RESTITUTION** – In State v. Hiett, 154 Wn.2d 560 (2005), the Supreme Court rules, 6-3, the juvenile passengers in a stolen car, who were all found guilty of taking a vehicle without permission, were equally responsible with the driver for all restitution to the victim.

The Hiett majority rules that this “joint and several” responsibility of the passengers extended to damage to property that occurred after the passengers jumped from the vehicle during a police pursuit. The Hiett majority also rules that the driver’s actions of driving recklessly were not unforeseeable and therefore his actions did not break the causal connection between the passengers’ participation in the joyriding crime.

Justice Sanders dissents in an opinion that is joined by Justices Madsen and Alexander.

Result: Affirmance of King County Superior Court restitution orders in joyriding prosecutions of Ferguson Hiett and Ian Freilinger.

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### **WASHINGTON STATE COURT OF APPEALS**

#### **RANKIN RULE DOES NOT PROHIBIT OFFICERS FROM REQUESTING ID OR REQUESTING IDENTIFYING INFORMATION FROM A PERSON WHO IS INSIDE A PARKED CAR THAT IS NOT THE SUBJECT OF A STOP OR OTHER SEIZURE**

State v. Mote, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2005 WL 213007 (Div. I, 2005)

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

At about 11:45 pm on June 14, 2003, King County Sheriff’s Office Deputy Steve Cox was patrolling the White Center neighborhood, which was experiencing drug activity problems. Cox was wearing a standard police uniform. He wore his badge and gun belt, which held his gun and handcuffs. He was driving a marked police vehicle that had push bumpers, official markings, an overhead red, white, and blue light bar, and two spotlights, one on each side.

Near an intersection, Cox drove by a legally parked car. There were two people seated inside, and the car's rear and dome lights were on. Concerned about drug activity and frequent vehicle prowls in the area, Cox turned his police car around and parked behind the other vehicle. He testified that the fact that it was late at night in a residential area with no traffic or people around made two people in a car with tail and dome lights on stand out.

Cox had not pulled the car over for a traffic infraction or noticed any expired tabs or other infraction. Mote testified that he and the driver had entered the car just "two seconds" before Cox pulled up behind them, and the car was still parked. Although Cox agreed that the situation was not consistent with criminal activity, Cox found criminal activity about half the time in such circumstances, so he had a "hunch" and was suspicious. Making a social contact in such circumstances was routine practice for Cox.

Cox had on his headlights, but not his overhead lights. Mote testified that he was certain that the spotlight was on the car when Cox drove up, although Cox was not sure about this. Cox approached the driver's side of the car and asked the occupants "what they were up to." He noticed that they seemed nervous and startled by his presence. Cox testified that at that point, the contact was merely social and the occupants were free to go, because he had no "Terry stop material" or reason to stop them.

Cox asked the driver for his identification, and the driver gave Cox his license. Cox wrote down his name. Cox then asked Mote "What is your name and date of birth?" Mote gave Cox this information, which Cox also wrote down. Cox testified that he spoke to the occupants politely and respectfully, that the encounter was fairly casual, that he was not being hostile, and that he did not demand any information. Mote agreed that Cox did not demand but only asked him for the identifying information. The court found that Cox was not harsh and did not suggest that Mote or the driver were under arrest or in custody.

Cox did not tell Mote that he did not have to answer the question, or that he was free to leave and not under arrest. Mote knew Cox was a policeman because of his police car, his uniform, and the spotlight. Mote knew there was a warrant out for his arrest and that he would be arrested after Cox found the warrant. Mote did not think he was free to leave when Cox approached the car, and did not consider opening the door and walking away. He thought it was general practice to give the police identifying information on request, and that compliance was required. He had a prior contact with police during which he alleged he was beaten for failing to comply with a police request.

Cox returned to his patrol car to check the driver's driving status and both the occupants for warrants. Cox testified that prior to the check, the occupants were still free to leave and the contact remained social. While Cox was running the check, he noticed that the occupants were moving around in the car and became concerned that they were trying to hide drugs or a weapon. The warrant check disclosed Mote's outstanding warrant. After calling for backup, Cox went up to the passenger side, asked Mote to step out of the car, and arrested him on the outstanding warrant. Cox then searched Mote and found a plastic baggie in his

pocket that had "a little bit" of white powder. At that point Mote said "Oh, I found it." The powder field tested positive for methamphetamine. Cox subsequently arrested Mote for possession in addition to the outstanding warrant and read Mote his Miranda rights.

Mote moved to suppress the evidence seized during the search. He argued that he was unlawfully seized when Cox asked him for his name and birth date. The court held that Mote was free to leave and was seized only after Cox found the outstanding warrant. Mote was convicted as charged and appeals the trial court's denial of his suppression motion.

**ISSUE AND RULING:** In State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**, the Washington Supreme Court held in an "independent grounds" interpretation of article 1, section 7 of the Washington constitution that police may not ask for ID or identifying information from a non-violator passenger in a vehicle after police stop the vehicle for a traffic violation. Does the rule of Rankin prohibit police from asking for ID or identifying information from occupants of parked vehicles when police come upon the parked vehicle and police do not make any show or exercise of authority that would constitute a stop of the car or a seizure of the occupants in the car? (**ANSWER:** No)

**Result:** Affirmance of King County Superior Court conviction of Curtis Eugene Mote for possession of methamphetamine.

#### **ANALYSIS:**

In State v. Rankin, 151 Wn.2d 89 (2004) **Aug 04 LED:07**, the Washington Supreme Court held in an "independent grounds" constitutional ruling that article 1, section 7 of the Washington constitution generally prohibits law enforcement officers from requesting ID documents from non-violator passengers in vehicles that have been stopped for traffic violations. In In re Brown, 154 Wn.2d 787 (2005) **Sept 05 LED:17**, the Washington Supreme Court held that the Rankin rule also prohibits officers from asking for identification information from non-violator passengers during traffic stops.

In Mote, the Court of Appeals engages in a lengthy discussion of Rankin and other Washington case law in explaining the Court's view that defendant Mote's circumstances as an occupant of a parked car in a non-seizure situation was materially different from that of the non-violator passenger in the Rankin case.

Among other cases that the Mote Court discusses are: State v. Young, 135 Wn.2d 510 (1998) **Aug 98 LED:02** (holding that it is not a "seizure" for a uniformed officer to contact and ask a pedestrian to voluntarily show ID, nor is it a "seizure" for an officer to shine a police vehicle spotlight on such a pedestrian); State v. Thorn, 129 Wn.2d 347 (1996) **Aug 96 LED:13** (holding that it is not a "seizure" for a uniformed officer to walk up to a parked vehicle and ask the occupants: "where's the pipe?"); State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** (holding that it is not a seizure for a uniformed police officer to shine a spotlight on a parked vehicle, and to get out of his vehicle, contact the occupant of the parked vehicle, and to ask for voluntary production of ID).

The Mote Court then concludes its analysis by explaining as follows that any shining of a spotlight and the requesting of ID in this case are closest to the O'Neill case, do not fall under the Rankin rule, and do not constitute a "seizure" that would require reasonable suspicion of a violation of the law:

Occupants in vehicles parked in public places are like pedestrians for purposes of article I, section 7 seizure analysis. As the O'Neill court held, the distinction between a pedestrian and the occupant of a vehicle dissipates when a vehicle is parked in a public place. The reasoning of Rankin and similar cases is centered on the fact that a driver's traffic infraction gives an officer cause to pull a vehicle over and get the driver's, but not the passenger's, identification. This reasoning does not apply to distinguish occupants in cars parked in public places from pedestrians.

The broad statement in Rankin that passengers cannot be asked for identification absent independent cause does not reach occupants in cars parked in public places who happen not to be in the driver's seat. When an officer makes a social contact with occupants of a car parked in a public place, the officer has no cause to seek identification from either the driver or other occupants. It is irrelevant to the officer the position in which a particular occupant is seated. Rather the officer is seeking to talk with all the occupants and find out what is going on. The basis for making a social contact with occupants of a parked vehicle is the same basis for making a social contact with a pedestrian: that police officers may engage citizens in conversation in public places even when there is not enough suspicion to justify a Terry stop. Such social contact is permitted under article I, section 7 and is not an investigative detention. It is likely for this reason that the O'Neill court used the term "occupant" rather than "driver" or "passenger" to describe persons in a parked vehicle.

The Rankin decision quotes extensively from O'Neill. Nowhere does Rankin express disapproval with O'Neill, let alone suggest O'Neill is being overruled. In each case a passenger in the vehicle was asked for identification. O'Neill found no constitutional violation; Rankin did. The distinction factually between the cases is that the Rankin vehicle was stopped while driving and the O'Neill vehicle was parked in a public place. The O'Neill decision itself pointed out this distinction. O'Neill . . . [T]he Rankin court did not create a bright line rule that no person sitting in a passenger seat in a car could be asked for personal identification under any circumstances. Rather, Rankin is limited to circumstances where the police have stopped a moving car by show of force with cause to detain and question the driver, but without cause to detain and question the passengers. Thus O'Neill, not Rankin, applies here.

Under O'Neill, the article I, section 7 analysis used to determine when a pedestrian has been seized applies to determine whether an occupant in a parked vehicle (whether seated in the driver's or any other seat) has been seized. Looking objectively at the officer's actions, the court must determine whether an individual's freedom of movement is restrained and the individual would not believe that she is free to leave, or decline a request, due to an officer's use of physical force or display of authority. Examples of a show of authority include the following: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Without such circumstances, inoffensive contact between the police and a private citizen cannot amount to a seizure of that person as a matter of law.

Here, Mote was not seized. Cox testified that he may have used a spotlight, and Mote testified that Cox definitely used a spotlight. "The shining of the spotlight ... does not rise to the level of intrusiveness discussed in [the prior U.S. Supreme Court decision in the Mendenhall case]." Therefore, even if we assume Cox did use a spotlight, that fact alone would not constitute a per se violation of article I, section 7. Cox did not turn on his siren or overhead lights. He did not display his weapon or make any physical contact with Mote, and he was alone. Mote was in a car parked in a public place, and an "occupant of a car does not have the same expectation of privacy in a vehicle in a public place as he or she might have in a vehicle parked in a private location - - he or she is visible and accessible to anyone approaching." O'Neill. And, as both Cox and Mote testified, Cox requested and did not demand Mote's identification. Thus his use of language and tone of voice did not change this encounter from a social contact into a seizure. Cox's actions in their entirety, viewed objectively, did not create such a show of authority that there would be a seizure. See O'Neill . . . Mote's subjective understanding of the situation is not relevant in determining whether or not there was a seizure.

**MIDNIGHT, CAMOUFLAGED ENTRY ONTO AND SEARCH OF BACK PORTION OF MARIJUANA GROWER'S ISOLATED, TWO-ACRE PARCEL OF RURAL PROPERTY, WHERE THE APPROACHING FRONT DRIVE HAD "NO TRESPASSING" AND "PRIVATE PROPERTY" SIGNS, HELD TO VIOLATE GROWER'S PRIVACY RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS, EVEN THOUGH THE PORTION OF THE PROPERTY ENTERED WAS NOT MARKED WITH SUCH SIGNS**

State v. Littlefair, \_\_\_ Wn. App. \_\_\_, 119 P.3d 359 (Div. II, 2005)

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

[A detective] conducted surveillance on January 23, January 24, March 23, May 12, June 13, and December 27, 1995. While conducting the surveillance on December 27, [the detective] and [a reserve officer] smelled a strong odor of green growing marijuana emanating from a venting system in some unknown type of underground container. [The detective] was 20 feet away from the underground container hidden by barrels when he smelled the marijuana.

The officers obtained a search warrant on December 28, to search Littlefair's property. When the officers executed the search, they discovered a 40-amp breaker located inside the breaker box in the back bedroom of the main residence. The breaker was the power source for the underground container. The officers also observed that someone had tampered with the electrical meter and power was being bypassed.

Also located on the property were outbuildings and a camper trailer. Inside of these buildings police found 21 marijuana starter plants, dried marijuana, two firearms, paperwork addressed to Littlefair, and Littlefair's identification.

Inside the buried container, officers found four marijuana plants along with a homemade lightshield, a transformer, a 1000-watt halide light bulb, a heater, fans, timers, scales, packing material, water drums, a marijuana smoking pipe, an SKS 7.62 assault rifle, and several thousand rounds of ammunition. The officers also found a Stuart Hall Executive notebook containing notes pertaining

to the grow operation. Those notes discussed watering, fertilizing, and insecticide for the plants.

[After he was charged], Littlefair moved to suppress and dismiss the action . . . .

At the hearing, Littlefair testified that in 1983 he had purchased two acres of property at the end of Gordon Road in Stabler, Washington. At the end of the intersection of Foster and Gordon Road there was a sign that stated "Gordon Road Private." Littlefair also stated that Gordon Road was posted with "Private Property" and "No Trespassing" signs and that his residence was not visible from Foster Road. . . .

The trial court admitted a map of Littlefair's property. Littlefair testified that red metal stakes about four feet high with white tops and little markers that had a "PL" on them which stood for "property line" demarcated his south property line. The markers were roughly 50 to 60 feet apart all the way down the road. On the southeast corner of Littlefair's property was a two-inch steel pipe cemented in concrete along with two metal red stakes with white tops on them that stood three to four feet high. The southeast corner also had two tree lines that Littlefair used to mark his property. Littlefair stated that the property east of his belonged to Longview Fiber.

On cross-examination, the State asked Littlefair whether the map adequately depicted his driveway. Littlefair responded that a revision to the map in 1988 failed to include the driveway and "just put in the road." The State also asked whether Littlefair had any signs posted on the east or south sides of his property. Littlefair answered that he did not have any signs. He also conceded that he did not have any barrier to prevent people from crossing over his property line in the area that bordered the Longview Fiber property.

Littlefair called [the detective]. The detective was a member of the Clark/Skamania Drug Task Force and was familiar with the appearance and smell of controlled substances. The detective testified that he obtained a map from the assessor's office before going to Littlefair's property and called Longview Fiber to ask permission to go onto its property. He stated that he was acting on a tip from an informant that Littlefair had a couple of burn barrels with a bunch of stacked wood on top of them and that inside of the burn barrels police would find an underground marijuana grow.

[The detective] went down to the end of Foster Road where the road turned into a gravel road. There was a spur road off of the gravel road that took the detective onto Longview Fiber land. The detective testified that his location was south of Gordon Road. From that location, on two occasions, the detective and different officers walked north across the Longview Fiber land toward Gordon Road and Littlefair's property.

Littlefair asked the detective if he saw any corner stakes. The detective responded that he did not see any corner stakes so he used the assessor's map to help him in his investigation. [The detective] also testified that on all occasions while doing surveillance, it was after dark, he wore camouflage, and he approached Littlefair's property from the south in order to avoid detection. The detective stated he did not observe the tree line on either January 23 or

December 27. The detective stated that on December 27, he was 20 feet west of the barrels when he smelled marijuana.

Littlefair asked the detective whether he had located the underground marijuana grow on January 23. The detective answered that he came across the area described by the informant and found two barrels. He then conducted a quick search of the area. [The detective] also testified that he sent a letter to the Skamania County Public Utilities District requesting Littlefair's usage records.

After [the detective's] testimony, Littlefair concluded his case. The State presented no witnesses. The court took a recess and viewed a videotape that Littlefair had made of his property. The court then made its oral ruling.

It first noted the undisputed facts of the case. It then stated that the disputed fact was whether or not [the detective] had reason to believe that he was on Littlefair's property and not Longview Fiber property. The court found that [the detective] did believe he was on Longview Fiber property. The court based its ruling on the fact that the assessor map the detective used did not show the extension of Gordon Road. It also relied on the videotape it had viewed of Littlefair's property. The court further stated that the corner post located in the southeast corner was well hidden by foliage.

. . . The court . . . found that Littlefair did not have a reasonable expectation of privacy over the southeast corner of his property. The court denied the motion to suppress.

Littlefair pleaded guilty to manufacture of marijuana . . .

ISSUE AND RULING: Where the detective went onto Littlefair's isolated, two-acre parcel of rural property around midnight in camouflage to search for evidence, where there were "no trespassing" and "private property" signs near the front drive, and where there was no evidence that the property was open to the public or that there was an open route onto the property from the adjoining property, was the search lawful under the Washington and federal constitutions? (ANSWER: No)

Result: Reversal of Skamania County Superior Court convictions of Peter T. Littlefair for manufacture of marijuana and for possession of marijuana with intent to deliver.

Status: The State did not seek reconsideration of Washington Supreme Court review, so this decision is final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The open-view doctrine holds that contraband that is viewed when an officer is standing in a lawful vantage point is not protected. No search has occurred where an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses. State v. Seagull, 95 Wn.2d 898 (1981), is the definitive case that addresses open view.

Under the open view doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization of one or more of

his senses does not constitute a search within the meaning of the Fourth Amendment. Seagull. Seagull concerned a search at a farmhouse in rural Clallam County. The principles set forth in it that are pertinent to this case are as follows: "[i]t is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." Seagull. An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house.

Our Supreme Court in State v. Ross, 141 Wn.2d 304 (2000) **Sept 2000 LED:02** instructed us that, "[b]efore reaching the Seagull inquiry, however, the first requirement of the 'open view' doctrine must be satisfied. That is: the officer must be conducting legitimate business when he enters the impliedly open areas of the curtilage." Ross. The Supreme Court pointed out in Ross that the officers came onto the property in the early morning, in the dark to obtain evidence of a marijuana grow operation to obtain a search warrant. The officers in Ross had no intention of contacting the resident. Thus, they were not on the property legitimately and the Supreme Court suppressed the evidence. This case is similar. Here, the entry that produced the information for the search warrant took place in the dark with the officers in camouflage gear when they approached the property from the south to avoid detection.

As a general rule, warrantless searches are per se unreasonable. Warrantless searches and seizures may, however, be reasonable under "a few "jealously and carefully drawn" exceptions." The State bears the burden of showing that a warrantless search falls under an established exception. There is no doubt that the officers in this case were on the curtilage of Littlefair's property when they discovered the buried container. Fourth Amendment protection of a citizen's house extends to its curtilage.

We are to determine whether an officer has invaded a defendant's privacy based on the facts and circumstances of each case. Littlefair relies on State v. Thorson, 98 Wn. App. 528 (1999) **Feb 2000 LED:02** to support his proposition that he had a reasonable expectation of privacy on the southeast corner of his property. In Thorson, while executing a search warrant on the Gordon property located on Waldron Island in the San Juan Islands, a Seattle police officer walked across the property onto Thorson's property. The officer reached a clearing and realized he was no longer on the Gordon property. From the edge of the clearing, the officer saw a single marijuana plant growing out of a large barrel next to a greenhouse.

The area at issue in Thorson was heavily wooded. The barrel was not visible from any road, his driveway, or the boundary between the Thorson property and that of any of his neighbors. Division One held that the nature of Thorson's property was such that he had no reason to expect intrusion by strangers. The court further held that because Thorson had a legitimate expectation of privacy, the nature of the officers' presence depended on whether the footpath was impliedly a public access way. If so, and if it took the officers to the point where they viewed the barrel, then the officers had a right to be at the clearing when they made their observation. The court found that the evidence did not support

that the island footpaths were for public use. Thorson. Our case is analogous to Thorson.

Here, [the detective] received permission from Longview Fiber to be on its property. From Longview Fiber's land, the detective saw the barrels which hid the underground container. On December 27, when he smelled green growing marijuana, he was wrongfully on Littlefair's property. Specifically, he had no legitimate purpose to be there. He was unaware of his trespass because it was at night, he did not see any property markers, there was snow on the ground, and he had obtained an incorrect assessor's map.

The trial court found it was easy to mistake Littlefair's property for that of Longview Fiber. Additionally, the property markers on the southeast corner of Littlefair's property were subtle and not readily apparent during the day but especially at night. Further, the southeast corner of Littlefair's property did not contain signage intended to alert the public of his desire for privacy. The relevant question is whether Littlefair had an expectation of privacy.

We reiterate that Littlefair's parcel was only two acres. The boundary line of his property was a forest that Longview Fiber had harvested and replanted, but his parcel remained wooded. The State argued that somehow if the land was rural, there was a lesser expectation of privacy than if the property was in an urban setting because it is more difficult to ascertain property lines. But this rationale is counterintuitive; people move to rural areas to obtain more privacy. There is no diminution of expectation of privacy because a person chooses to live in a rural area. Seagull itself dealt with a rural setting.

The State has the burden to demonstrate an exception to the requirement that it can search someone's property without a warrant. The exception claimed was that of "open view." Whether the officer had difficulty in ascertaining the property lines is of no importance to the burden of the State to demonstrate an exception to the warrant requirement. The finding of the trial court would place the burden on the homeowner to demonstrate that they had given enough notice to deny the public access to their land. That would turn the Fourth Amendment on its head. The State is required to demonstrate a reason as to why it was on the defendant's property. There is no evidence that Littlefair's property was open to the public or that there was an open route from Longview Fiber's land onto Littlefair's property.

The court in Thorson held that the lack of clear boundary markers does not change the analysis. The question is not whether [the detective] made a mistake in good faith, but rather whether the detective "had a lawful basis for his presence in the specific location from which he spied something incriminating." Thorson. The trial court essentially found that the officer had a good faith belief that he was not on Littlefair's property. We do not recognize a good faith exception to the exclusionary rule. State v. White, 97 Wn.2d 92 (1982).

"Only where there is some implied public access to private property does a police officer without a warrant have the right to intrude." Thorson. Littlefair's property was located in a rural area, although there were no signs in the southeast corner of his property, there were other signs located on the property that made it clear

that uninvited guests were not welcome. The sole purpose for [the detective] being on Littlefair's property was to look for marijuana. Additionally, the officers did not proceed on any public access through Littlefair's property, and the officers did not act in the same manner as a reasonably respectful citizen. There was not a legitimate purpose under the "open view" doctrine for the officers to have been on Littlefair's land; they were searching for information to support a search warrant. This constituted an unreasonable intrusion into Littlefair's privacy. We hold that the search was invalid under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution.

[Some citations omitted]

### **LED EDITORIAL COMMENTS:**

1) **Is "open view" an exception to the search warrant requirement under article 1, section 7 of the Washington constitution?**

The Littlefair Court indicates that "open view" is an exception to the search warrant requirement under the Washington and federal constitutions and, as an exception to the warrant requirement, is to be narrowly construed. Several other Court of Appeals decisions have said the same. However, we do not believe that the Washington Supreme Court has ever said this, and we think the Littlefair Court is wrong in its theoretical approach in this regard. In his article regarding Washington and federal search and seizure rules, Justice Johnson notes that determining whether a "search" or "seizure" has occurred is a "threshold inquiry," noting: "Unless a true search or seizure has occurred within the meaning of the federal or state constitution, constitutional protections are not triggered." Justice Charles W. Johnson, "Survey of Washington Search and Seizure Law: 2005 Update," 28 Seattle U. L. Rev. 467, 179 (2005) (28 SEAULR 467). (He seems to miss this point later in his article, however, referring at page 579 to "open view" as an exception to the search warrant requirement.)

While it might not make a difference in most cases addressing the "threshold inquiry" whether a "search" or "seizure" has occurred, we think that Washington prosecutors should not concede that "open view" is an exception to the warrant requirement. Narrowly construing the law on police authority when making this "threshold inquiry" makes no sense to us.

2) **Was the area of Littlefair's property that the officer entered part of the "curtilage" of the property?**

The Littlefair Court declares, without much explanation why it says so, that it believes the officer was in the "curtilage" of Littlefair's property. We don't think the Court gave enough information in its opinion for this unsupported conclusory statement to the analyzed. "Curtilage" has been defined as the area, such as a garden in a fenced and gated backyard, immediately adjacent to one's home, extending the intimate activity associated with the sanctity of one's home and privacy. It is an open questions whether a marijuana grow located some distance from one's home at the far end of a large, unfenced backyard is within the curtilage. Assuming such facts here, we would not agree with the "curtilage" label. However, that would not be the end of the privacy analysis under article 1, section 7 of the Washington constitution, because privacy

protection can extend beyond curtilage (how far, unfortunately, no one knows) under the Washington constitution.

3) Did a federal Fourth Amendment violation occur under the Littlefair facts:

While the Littlefair opinion indicates that both the federal and Washington search restrictions were violated, unless there are more facts that indicate that “curtilage” was entered, we strongly doubt that federal courts would find a Fourth Amendment violation under the Littlefair facts. But, of course, Washington officers must follow Washington appellate court interpretations of the Washington constitution as well as controlling court interpretations of the federal constitution.

4) When, if ever, can Washington law enforcement officers justify non-exigent, non-consenting warrantless, secret after-dark investigative entries onto private property?

Despite our academic criticisms of theoretical aspects of the Littlefair decision above, we think the decision is largely consistent with Washington case law on non-exigent, non-consenting, secret, investigative entries onto private property where police are not engaging in an effort to contact occupants of the property. See State v. Ross, 141 Wn.2d 304 (2000) LED:02 (holding that, while an officer with “legitimate police business,” when acting “in the same manner as a reasonably respectful citizen” is permitted to enter the curtilage areas of a private residence that is impliedly open to the public, such as access routes to the house, police may not secretly go to the house at midnight to sniff at an area of a home abutting a back driveway).

While in Littlefair the area entered may not have technically qualified as “curtilage” in our view, the message of the Washington Supreme Court’s Ross decision probably is that even some non-curtilage areas of private property may be protected from after-dark snooping. Unfortunately for law enforcement officers in Washington, it is difficult to know the breadth of this proscriptive rule.

**IN A RULING THAT MAY EVENTUALLY BE REVIEWED BY THE WASHINGTON SUPREME COURT, THE COURT OF APPEALS HOLDS THAT AN AMBIGUOUS MIRANDA “INVOCATION” BY A CUSTODIAL SUSPECT DID NOT REQUIRE POLICE TO INTERRUPT THEIR INTERROGATION TO ASK CLARIFYING QUESTIONS**

State v. Walker, State v. Garrison, \_\_\_ Wn. App. \_\_\_, 118 P.3d 935 (Div. I, 2005)

Facts:

Police began their investigation of Richard Lee Garrison after they received a report that Garrison, grandfather to an 11-year-old-girl, had molested her while she was visiting him. Garrison was also reported to have subsequently broken into the girl’s home, tried to take her out of the house, and threatened occupants with a knife before they chased him off. The Court of Appeals opinion in this case summarizes as follows what occurred during a custodial interrogation of Garrison:

Before the interview, [the detective] advised Garrison of his Miranda rights and Garrison signed a form waiving those rights. During the four and one half hour interview Garrison never stopped talking and never said that he did not want to talk to the police anymore. However, he did say many times that he did not want

to say anything that would make him look guilty or anything that would incriminate him. During the interview, Garrison issued a statement admitting that he had reached under [the victim's] pajama bottoms and rubbed her pubic area. He also admitted that he had taken a knife over to his daughter's house in an attempt to remove [the victim] from the house.

Proceedings below:

Garrison was charged with attempted kidnapping in the first degree, child molestation in the first degree and burglary in the first degree with a deadly weapon. He lost a motion to suppress his interrogation statements, and a jury convicted him on the molestation and burglary charges.

**ISSUE AND RULING:** Where Garrison had waived his Miranda rights, but he then made ambiguous statements that might have suggested that he had changed his mind, were police required to interrupt the interrogation to clarify whether Garrison wished to assert his Miranda rights? (**ANSWER:** No, police may continue interrogating in this circumstance unless the suspect makes a clear and unequivocal assertion of his right to silence or his right to counsel)

**Result:** Affirmance of King County Superior Court convictions of Richard Lee Garrison for child molestation in the first degree and burglary in the first degree.

**Status:** As of the November **LED** deadline, a motion for reconsideration was pending in the Court of Appeals. We would guess that the defendant will lose that motion and will then seek discretionary review in the Washington Supreme Court.

**LED editorial note regarding right-of-confrontation issue:** In the Garrison case and a consolidated matter (State v. Walker), the Court of Appeals also addresses Sixth Amendment right-of-confrontation issues. We plan to address the issue in a future **LED** article addressing a number of Washington appellate court rulings interpreting Crawford v. Washington, 541 U.S. 36 (2004) May 04 **LED:20**, the decision in which the U.S. Supreme Court broadened the restrictions on the admission of evidence under the Sixth Amendment confrontation clause in relation to hearsay testimony.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under Miranda, the police must cease questioning a suspect if that individual in any manner and at any time prior or during questioning indicates he or she wishes to invoke the right to remain silent. Furthermore, the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored." Here, Garrison did not tell the police that he wished to remain silent, but instead said that he did not want to say anything that would make him look guilty or incriminate him. He then continued to speak with police for several hours and signed a highly incriminating statement. At no time during the police interview did Garrison stop talking or say that he did not want to talk to the police anymore.

At best, Garrison's statements to [the detective] were equivocal as to whether he wanted to invoke his right to remain silent. This raises the issue of whether the police were obligated to stop and clarify whether Garrison was invoking his right to remain silent before proceeding with the interview. As this is a case of first

impression in Washington, both parties look to case law addressing the officer's obligations during an interrogation when a suspect is equivocal in invoking his right to counsel.

In 1982, the Washington Supreme Court adopted a rule requiring that "[a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request." **[LED Note: Here, the Garrison Court cites State v. Robtoy, 98 Wn.2d 30 (1982) in a footnote]** In doing so our Supreme Court cited the United States Supreme Court's apparent approval of this rule as outlined in a Fifth Circuit case.

However, in Davis v. United States, the United States Supreme Court has since addressed this issue directly and concluded that after a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. **[LED Note: Here, the Garrison Court cites Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** in a footnote]** The Davis Court explicitly declined to adopt a rule requiring officers to ask clarifying questions when presented with an ambiguous or equivocal request for an attorney. While the Davis Court recognized that requiring a clear assertion of the right to counsel might disadvantage some suspects who for a variety of reasons will not clearly articulate their right to counsel although they actually want a lawyer present, the Court reasoned that "the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves." **[Court's footnote: Davis, 512 U.S. at 460. Robtoy has continued to appear in Washington case law in spite of the Davis Court's clear directive. In one post-Davis case, State v. Aten, our supreme court acknowledged that under Robtoy a police investigator could have asked a suspect clarifying questions after her equivocal request for an attorney, but because the officer ceased questioning completely, there was no constitutional error. See Aten, 130 Wn.2d 640 (1996) **March 97 LED:08**. Subsequent court of appeals decisions have interpreted Aten as Washington's official rejection of the Davis rule. See State v. Jones, 102 Wn. App. 89 (2000) **Oct 00 LED:16** ("Washington follows Edwards but not Davis."); State v. Aronhalt, 99 Wn. App. 302 (2000) **May 00 LED:14**. However, our supreme court made no mention at all of Davis in Aten. As it seems unlikely that our supreme court would reject a directive from the United States Supreme Court without explanation (if that is indeed what it intended to do), we look to Davis for guidance here.]**

Very recently, this court has addressed the issue of whether the Davis rule extends to a suspect's right to remain silent in so far as it requires a suspect to clearly articulate his or her invocation of the remain silent. **[LED Note: Here, the Garrison Court cites State v. Hodges, 118 Wn. App. 668 (Div I, 2003) **Dec 03 LED:16** in a footnote]** In Hodges, this court held that "[t]he right to remain silent need not be articulated so long as it is clear and unequivocal." The Hodges court therefore departed from Davis in so far as whether the invocation of the right to remain silent must be articulated, but was consistent with Davis' requirement that the invocation be "clear and unequivocal."

Thus, following the directive of the United States Supreme Court in Davis and our own lead in Hodges, we hold that where a suspect has received Miranda warnings the invocation of the right to remain silent must be clear and

unequivocal (whether through silence or articulation) in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview. Applying this rule to the facts before us, the authorities were under no obligation to ask Garrison clarifying questions before proceeding with the interview. Garrison's statement that he did not want to say anything incriminating coupled with his willingness to continue speaking with the police for several hours was not a clear and unequivocal invocation of his right to remain silent and his statements are thus admissible.

[Some footnotes and citations omitted]

**LED EDITORIAL COMMENT:** As an academic matter, we agree with Division One's analysis in Garrison. However, until the Washington Supreme Court clarifies its position on the ambiguous-or-equivocal invocation question, as a practical matter, Washington law enforcement officers would be acting at a significant risk of suppression of statements in relying on Division One's analysis, which conflicts with language in two Washington Supreme Court decisions and with decisions from other divisions of the Court of Appeals. The legally safer approach at this point in time is for officers to stop the interrogation and to clarify whenever the custodial interrogatee says something that could reasonably be construed as an invocation of the right to counsel or to silence. As always, we urge officers to consult their legal advisers and local prosecutors.

**WASHINGTON SUPREME COURT RULING LAST YEAR IN GREEN BARRING CUSTODIAL ARREST FOR FAILURE TO TRANSFER TITLE IS EXTENDED BY COURT OF APPEALS TO TERRY STOP TO INVESTIGATE ON REASONABLE SUSPICION**

State v. Walker, \_\_\_ Wn. App. \_\_\_, 119 P.3d 399 (Div. III, 2005)

Facts and Proceedings below:

On September 20, 2003, [a] Spokane police officer ran a registration check as Ms. Walker's car drove by him. By conducting the check, he obtained information the car was sold on May 15, 2003, but title had not been transferred. Believing he was authorized to issue a warning or a citation or make a custodial arrest for failure to transfer title, the officer stopped the vehicle to investigate the offense of failure to transfer title.

[The officer] approached the car and asked for Ms. Walker's license, registration, and proof of insurance. When Ms. Walker told him she did not have any of them, he asked her name and if her license was suspended. Ms. Walker gave the officer her name and acknowledged her license was indeed suspended. [The officer] again asked her for identification, which she then pulled out and gave it to him.

Ms. Walker was arrested for driving with a suspended license. During the search incident to her arrest, [the officer] looked inside her purse and discovered methamphetamine. Ms. Walker was charged with possession of a controlled substance, methamphetamine.

At the CrR 3.6 suppression hearing, the court excluded evidence of the methamphetamine because it was discovered as a result of an unlawful search and seizure. A different judge later ruled the practical effect of the order of suppression was to terminate the case and the charge was dismissed.

ISSUE AND RULING: Does the Washington Supreme Court ruling in State v. Green, which generally precludes custodial arrest for the offense of failure to transfer title, also preclude making a Terry stop for this offense based on reasonable suspicion? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Spokane County Superior Court order suppressing evidence of methamphetamine possession and dismissing possession charges against Jacqueline C. Walker.

Status: The Spokane County Prosecutor's Office has filed a petition seeking discretionary review in the Washington Supreme Court.

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

The State contends the court erred by granting Ms. Walker's motion to suppress. It argues [the officer] lawfully stopped her car to investigate the offense of failure to transfer title. As the initial stop was lawful, the State reasons that the subsequent arrest of Ms. Walker and the search incident to her arrest leading to the discovery of methamphetamine were also properly conducted.

The only issue is whether the officer could conduct a stop to investigate the misdemeanor of failure to transfer title. If the initial stop was unlawful, the subsequent search and evidence discovered during that search are inadmissible as fruits of the poisonous tree. The same corollary applies to an arrest subsequent to an unlawful stop. If an officer finds grounds for an arrest as a result of an unlawful stop, the arrest is tainted and any evidence discovered during a search incident to the arrest cannot be admitted.

[The officer] stopped Ms. Walker's car when he found the car was sold on May 15, 2003, but title had not been transferred as of September 20, 2003. A person operating a vehicle is seized when a police officer conducts a traffic stop. Since Terry v. Ohio, a traffic stop is considered an investigative detention and such detention, no matter how brief, must be justified at its inception. [The officer's] only reason for the initial stop of Ms. Walker was for failure to transfer title. If a purchaser or transferee of a motor vehicle fails "to make application to transfer the certificate of ownership and license registration within forty-five days after the date of delivery of the vehicle," she is guilty of a misdemeanor offense under RCW 46.12.101(6)(d). The initial seizure of Ms. Walker can be valid if and only if the officer had the authority to conduct a stop for violation of the title transfer statute.

RCW 10.31.100 codifies the common law warrant requirement for arrest with exceptions for permissible warrantless arrests. It provides in pertinent part:

A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the

offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

The statute authorizes a warrantless arrest for committing a misdemeanor "only when the offense is committed in the presence of the officer," subject to the exceptions provided in the statute. Failure to transfer title does not appear in the statutory exemptions from the warrant requirement for arrest under RCW 10.31.100. Therefore, without a warrant, the seizure of Ms. Walker for failure to transfer title was lawful only if the offense was committed in [the officer's] presence.

In State v. Green, 150 Wn.2d 740 (2004) **March 04 LED:06**, the Washington Supreme Court held that the misdemeanor of failure to transfer title under RCW 46.12.101(6)(d) was not an ongoing misdemeanor offense because it is committed only when 45 days have passed since the date of delivery of the vehicle and is completed at that point. Consequently, the court held that deputies lacked the authority to arrest the defendant for the misdemeanor of failure to transfer title as it was not committed in their presence and thus suppressed evidence of cocaine discovered during the search incident to her arrest. As in Green, the warrantless seizure of Ms. Walker here was unlawful because the misdemeanor offense of failure to transfer title was not committed in [the officer's] presence.

The State nonetheless argues the court should have limited the application of Green because it dealt only with construction of the failure to transfer title statute and an investigative stop of a vehicle for failure to transfer title is instead governed by Kennedy. There, the Washington Supreme Court held a traffic stop was lawful under the Terry standard if the investigating officer had "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Kennedy. It also noted that a stop, although less intrusive than an arrest, was a seizure and thus must be reasonable under the circumstances.

The problem with applying the Terry stop standard here is that the misdemeanor of failure to transfer title is not one of the offenses an officer can investigate. There was simply nothing to investigate. Before stopping Ms. Walker's car, [the officer] was already aware the car had been sold more than four months earlier and title to it had not been transferred. This knowledge eliminated the possibility the officer stopped the car to investigate the offense.

Moreover, Green established the proposition that the failure to transfer title is not a misdemeanor committed in the presence of the officer. If it is not an ongoing offense, the officer can neither arrest nor cite and release the operator of the vehicle because the same authority of law required for making an arrest for a misdemeanor offense applies to the detention for the issuance of a citation.

RCW 46.64.015 provides authority for a police officer to issue a citation for a violation of traffic laws. But it states "[a]n officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be

arrested pursuant to RCW 10.31.100." The misdemeanor of failure to transfer title meets neither of the exceptions in RCW 46.64.015.

Because [the officer] did not have the authority to make an arrest or issue a citation for failure to transfer title, an investigative Terry stop cannot be justified under these circumstances.

There was no crime afoot to justify the detention. [The officer] lacked the authority to conduct a traffic stop of Ms. Walker's vehicle for failure to transfer title. Since the initial stop was unlawful, the subsequent arrest of Ms. Walker for driving with a suspended license and the search incident to her arrest were tainted by the unlawful stop. Evidence of methamphetamine, as fruit of the poisonous tree, must be excluded.

[Some citations omitted]

**DISSENT BY JUDGE BROWN:** (Excerpted from his dissent)

An investigative stop was permitted here under State v. Kennedy, 107 Wn.2d 1 (1986), because [the officer] articulated reasonable suspicion to believe Jacqueline C. Walker was involved in a title transfer crime. Although this investigative stop was a seizure, it was not, under our facts, a full arrest.

While this title transfer crime would have been a misdemeanor not committed in [the officer's] presence, which would preclude an arrest without a warrant, the facts show [the officer] did not arrest Ms. Walker for a title transfer crime. Instead, she was arrested for driving with a suspended license, a separate matter that surfaced during his investigative stop. The search incident to the ensuing arrest for driving with suspended license was lawful. Thus, Ms. Walker's emphasis on State v. Green, 150 Wn.2d 740 (2004), is misplaced. Further, no issue of pretext is presented in our facts. Therefore, State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**, has no application here.

[Some citations omitted]

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**INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

Many United States Supreme Court opinions can be accessed at [\[http://supct.law.cornell.edu/supct\]](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 [\[http://www.supremecourtus.gov/opinions/02slipopinion.html\]](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 [\[http://www.ca9.uscourts.gov/\]](http://www.ca9.uscourts.gov/) and clicking on "Opinions." Federal statutes can be accessed at [\[http://www.law.cornell.edu/uscode/\]](http://www.law.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 2005, is at [\[http://slc.leg.wa.gov/\]](http://slc.leg.wa.gov/). Information about bills filed since 1997 in the 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 [\[http://slc.leg.wa.gov/wsr/register.htm\]](http://slc.leg.wa.gov/wsr/register.htm). In addition, a wide range of state government information can be accessed at [\[http://access.wa.gov\]](http://access.wa.gov). The address for the Criminal Justice Training Commission's home page is [\[http://www.cjtc.state.wa.us\]](http://www.cjtc.state.wa.us), while the address for the Attorney General's Office home page is [\[http://www/wa/ago\]](http://www/wa/ago).

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