



Law Enforcement

OCTOBER 2005

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9TH CIRCUIT, U.S. COURT OF APPEALS

STARTING SEARCH BUT DELAYING HANDING OF SEARCH WARRANT TO SPANISH-ONLY-SPEAKING RESIDENT WHILE WAITING FOR INTERPRETER TO ARRIVE HELD OK ON TOTALITY OF CIRCUMSTANCES

U.S. v. Martinez-Garcia, 397 F.3d 1205 (9th Cir. 2005)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

On March 21, 2003, state law enforcement arrived at 12579 North Applegate Road with a search warrant for the house occupied by Salvador Martinez-Garcia and his family. The officers knocked, announced their presence, and entered. David Raymond, an officer of the Josephine County Sheriff's office and a detective on JOINT, advised Martinez-Garcia that he had a search warrant and showed him some "paperwork." Martinez-Garcia responded by indicating that he did not speak English, and the testimony conflicts as to whether he asked the officer "what was happening" in English. Raymond then stated "orden de registro," which his police manual stated means "search warrant" in Spanish, and telephoned to Bureau of Immigration and Customs Enforcement ("BICE") agent Fernando Lozano requesting that he come to the house to serve as a translator. Officers removed Martinez-Garcia, his wife, his son, and his sister, Alicia Garcia, from the residence. While waiting for Lozano to arrive and translate, the state officers began to search the house. They soon discovered a handgun in the master bedroom.

Lozano arrived at 12579 North Applegate Road about forty minutes to one hour after the search began, and he read the warrant to Martinez-Garcia, Perez-Zepeda, and Garcia in Spanish. He gave each warnings in compliance with Miranda v. Arizona. He interviewed each of the adults and asked Martinez-Garcia whether the residence contained any firearms. Martinez-Garcia replied that there was a .22 caliber handgun in the master bedroom. Lozano relayed this information to the searching officers, who said that they had already found the firearm.

After challenging the search that yielded his firearm in an unsuccessful motion to suppress, Salvador Martinez-Garcia entered a conditional plea of guilty pursuant to Federal Rule of Criminal Procedure 11(a)(2) to one count of possessing a firearm as an illegal alien in violation of 18 U.S.C. § 922(g)(5). On this appeal, he argues that the firearm used in securing his plea should have been suppressed pursuant to the Fourth Amendment.

ISSUE AND RULING: Under the totality of the circumstance, did the officers act unreasonably in violation of the Fourth Amendment, after telling the Spanish-only-speaking resident in Spanish that they had a search warrant, they began searching his home while waiting for a Spanish-speaking federal officer to arrive before serving him with the search warrant? (ANSWER: No, the officers did not act unreasonably).

Result: Affirmance of U.S. District Court (Oregon) conviction for possessing a firearm as an illegal alien in violation of federal law.

ANALYSIS: (Excerpted from 9th Circuit opinion)

In determining the contours of a reasonable search, courts have balanced the need to give notice to occupants with a sometimes competing need for flexibility that allows police to do their job effectively. Striking the appropriate balance requires a high order of practical wisdom and an open-ended inquiry on the circumstances of the search.

Martinez-Garcia argues that delayed service during the March 21, 2003 search of his residence fails this totality of the circumstances test and that JOINT officers conducted an unreasonable search for Fourth Amendment purposes. He contends that if officers are unprepared to describe the warrant in the language of the occupants, they should at least serve the occupants with the English-language copy because the mere presentation of documentation will provide some notice of authority.

We disagree and hold that the law enforcement officers did not act unreasonably in delaying service in light of the totality of the circumstances facing them on March 21, 2003. [*Court's footnote: We do not hold that an officer never violates the Fourth Amendment by not serving a warrant at the outset of a search; the totality of the circumstances in a different case might make delayed delivery of the warrant unreasonable.*] The officers tried to serve the warrant in good faith, were unable to do so on account of a language barrier, and promptly called for interpretive assistance. They served the warrant as soon as was practicable--while the search was ongoing and forty minutes to an hour after it began. [*Court's footnote: Of course, it may be presumptively unreasonable if officers fail entirely to serve a sufficient warrant at any time before, during or immediately after a search of a home.*]

We decline to give dispositive weight to the contention that a warrant had to be served at the outset when Martinez-Garcia explicitly advised the officers, who attempted to serve the warrant, that he did not speak English. The Fourth Amendment does not require futile and gratuitous actions that serve no purpose. Similarly, under the circumstances of this case, we see no valid reason to engraft upon Fourth Amendment reasonableness analysis a requirement that a document in English be given to a suspect who is unable to understand that language. It was reasonable for police at once to advise Martinez-Garcia in

Spanish that the document was a search warrant. It was reasonable for police at once to call for an interpreter who would help Martinez-Garcia understand the specifics of the warrant. It was reasonable for Lozano, as soon as he could be brought to the site, to interpret the warrant for Martinez-Garcia. After considering the totality of the circumstances, we cannot say that the police in executing the search acted unreasonably. The officers did not violate the Fourth Amendment, and suppression of the firearm is not required.

LED EDITORIAL COMMENT: There are no Washington appellate court decisions addressing the specific warrant execution issue addressed in Martinez-Garcia. It would seem that the better practice where the translator is on the way when officers arrive would be to hand the warrant to the non-English-speaking resident upon arrival at the premises, attempt to inform the resident that a translator is on the way, and then begin the search (even though the translator has not yet arrived).

WASHINGTON STATE SUPREME COURT

“INDEPENDENT SOURCE” EXCEPTION TO EXCLUSIONARY RULE APPLIES UNDER ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION

State v. Gaines, ___ Wn.2d ___, 116 P.3d 993 (2005)

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

Facts leading up to the unlawful vehicle trunk search

Jerry Hanson reported to police that he had been held against his will for two days by Norman, Devennice, and Leandre Gaines as they attempted to rob him. Hanson, a retired accountant, was addicted to crack cocaine and obtained his supply from the Gaineses. During Hanson's relationship with the Gaineses, Hanson began "loaning" them money. Over time, the Gaineses increased their demands. Hanson realized that he was rapidly running out of money and was leery of loaning more as they had not repaid earlier "loans."

On April 29, 2002, Norman and Devennice drove Hanson to his bank in downtown Seattle to withdraw money. As Norman and Devennice waited in the car, Hanson tried to escape them by turning into an alley rather than entering the bank. Devennice located Hanson, however, and forced him back into Norman's car, a white Chevy Caprice. They then drove to the house of Arletta Gaines. Once there, Hanson and Devennice went into the laundry room, whereupon Devennice began punching and beating Hanson with a steel rod.

Later that day, Hanson walked outside the house with Norman, Devennice, and Leandre. The Gaineses discussed getting more money from Hanson. Leandre pulled Hanson aside and showed Hanson a .357 magnum tucked into his waistband. Hanson testified that Leandre told him that "if he didn't get the money the following day, there was going to be a head shot, and he didn't care whether we were in the bank or out in the middle of the street." Norman and Devennice then forced Hanson into Norman's car and drove to a house in SeaTac where they locked Hanson in the basement for the night.

The next morning, Norman drove Hanson to a Merrill Lynch office in Federal Way in an attempt to get money from an account Hanson had there. While in the

Merrill Lynch office, Hanson locked himself inside a bathroom, hoping to escape. Norman came inside, obtained the bathroom key, and attempted to force Hanson back to the car. Hanson began yelling for help and was seen by a Merrill Lynch employee in the parking garage. Norman fled. The employee called the police, and Hanson was transported to a hospital in order to receive treatment for injuries incurred during the previous days. While in the hospital, Hanson was interviewed by Seattle and Federal Way police.

The warrantless MV trunk search later found to be unlawful

The next day, May 1, 2002, one of the officers who had interviewed Hanson was on patrol in West Seattle and spotted Norman's car. The officer called for backup, conducted a felony stop of the vehicle, and arrested Norman and Devennice. In a search incident to the arrests, the police found a loaded Glock pistol in the unlocked glove box and an extra clip for the Glock under the driver's seat. One of the officers then took the keys out of the ignition and unlocked the trunk. Inside, the officer saw what appeared to be the barrel of an assault rifle and numerous rounds of ammunition. The officer immediately closed the trunk without disturbing its contents. The car ultimately was impounded.

Search under a warrant obtained after the warrantless trunk search

The following day, a different Seattle police detective obtained a search warrant for Arletta's house, Norman's car, and the person of Leandre Gaines. The four-page affidavit in support of the warrant recited many of the above facts and included a single statement that the "Officer [] did observe the barrel of what he believed to be a rifle [in the trunk]." After obtaining the warrant and searching the house and car, the police recovered a military assault rifle and hundreds of rounds of ammunition from the trunk of Norman's car, as well as a pistol and crack cocaine.

The charges

The State charged Norman, Devennice and Leandre [*Court's footnote: Leandre accepted a plea bargain prior to trial, pleading guilty to drug possession charges. He is not a party to this appeal.*] with first degree kidnapping, first degree attempted robbery, and second degree assault. In addition, the State charged Norman with two counts of unlawful possession of a firearm in the second degree.

Suppression motion

At trial, both Norman and Devennice moved to suppress evidence of the assault rifle and ammunition, arguing that the officer's initial search of the locked trunk was unlawful, thereby mandating exclusion of the evidence. The State asserted that exigent circumstances justified the search; officers who were present at the scene testified that they thought another victim or another suspect might be in the trunk. Alternatively, the State argued that the inevitable discovery exception to the exclusionary rule applied.

Trial court's ruling on the suppression motion

The court rejected the State's exigent circumstances argument but admitted the evidence under the inevitable discovery exception. The court reasoned that discovery of the rifle inevitably would have occurred during the police

investigation following the Gaineses' arrests, given the prominent role that Norman's car had in the crimes reported by Hanson. The court found that, even if the initial, illegal search had not occurred, the police would have obtained the items in the trunk "through the course of predictable police procedures." The court also found that even if the unlawfully obtained information in the affidavit regarding the assault rifle were disregarded, the warrant was still valid because the affidavit included Hanson's allegations and other facts that established probable cause for the search.

Verdict and subsequent procedural developments

A jury convicted Norman of first degree attempted robbery with a firearm enhancement and both counts of unlawful possession of a firearm. The same jury convicted Devennice of first degree attempted robbery with a firearm enhancement and second degree assault with a deadly weapon enhancement. Norman and Devennice appealed, and the Court of Appeals affirmed [in an unpublished opinion].

[Subheadings added]

ISSUE AND RULING: Does the "independent source" exception to the Exclusionary Rule, as developed in case law interpreting the federal Fourth Amendment, also apply under article I, section 7 of the Washington constitution; and, if so, do the facts of this case qualify for application of the "independent source" exception? (**ANSWER:** Yes and yes)

Result: Affirmance of King County Superior Court convictions of: 1) Normal Leroy Gaines of first degree attempted robbery with a firearm enhancement and two counts of unlawful possession of a firearm; and 2) Devennice Antoine Gaines of first degree attempted robbery with a firearm enhancement and second degree assault with a deadly weapon enhancement.

ANALYSIS: (Excerpted from Supreme Court opinion)

Independent source exception generally

Here, all parties agree that the initial glance into Norman's locked trunk was unlawful. While a police officer may conduct a search of the passenger cabin of a vehicle incident to the arrest of the occupants, see State v. Stroud, 106 Wn.2d 144 (1986), it is well established that a warrant is required to search a locked trunk, see State v. White, 135 Wn.2d 761 (1998) **Sept 98 LED:08; Nov 98 LED:20**. In addition, the trial court explicitly found that exigent circumstances did not justify the initial search. The evidence challenged here, however, was not seized during the initial glance into Norman's trunk. Instead, the police seized the rifle and ammunition during a subsequent search conducted pursuant to a warrant based on information obtained independently from the glance.

The independent source exception to the exclusionary rule has long been accepted both in this court and the United States Supreme Court, see Murray v. United States, 487 U.S. 533 (1988). However, we have never explicitly answered the precise question posed by this case: whether the independent source exception complies with article I, section 7 of the Washington Constitution. *But see* State v. Coates, 107 Wn.2d 882 (1987) (impliedly approving of the exception under article I, section 7. . .

Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule,

provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.

This result is logical. According to the plain text of article I, section 7, a search or seizure is improper only if it is executed without "authority of law." But a lawfully issued search warrant provides such authority. Furthermore, the inclusion of illegally obtained information in a warrant affidavit does not render the warrant *per se* invalid, provided that the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause.

Application of independent source exception to the facts of this case

In this case, petitioners do not dispute that the search warrant was valid. Nor could they plausibly do so. The affidavit in support of the search warrant, is four pages long and contains only one sentence regarding what was seen during the glance inside the trunk. Given that the police ultimately seized the rifle and ammunition from Norman's trunk pursuant to a valid search warrant, it logically follows that the trial court did not err in admitting those items into evidence.

Our decision in Coates mandates this conclusion.

...

Coates controls the disposition of the present case. In both cases, persons made allegations of criminal activity sufficient to give rise to probable cause to search an automobile. In both cases, a constitutional violation occurred that revealed that a weapon was inside an automobile. In neither case was the evidence immediately seized. Instead, in both cases, the police sought search warrants based on information independent of the violation, although each recited the earlier unlawful disclosures. In both cases, the police seized the challenged evidence during a search conducted pursuant to the warrant. Finally, in both cases, the search warrants were valid because probable cause existed to search the respective automobiles absent the impermissibly obtained information.

...

Petitioners also argue that the State must prove the police would have sought the warrant for Norman's trunk absent the illegal search, citing Murray v. United States for support. In Murray, . . . [the U.S. Supreme Court] was concerned that the trial court had failed to find that the agents would have sought a warrant absent the prior entry into the warehouse. The Court reasoned that such a finding was integral in ensuring that the lawful seizure of the contents of the warehouse was "genuinely independent" of the earlier illegal search.

While Murray is controlling authority, it does not compel the result urged by petitioners. At the CrR 3.6 hearing in the present case, the trial court found that the police would have obtained the items in the trunk "through the course of predictable police procedures." This finding strongly, and we believe adequately, supports the conclusion that the police would have sought a search warrant for Norman's trunk based on facts gathered independently from the improper glance inside the trunk. Particularly noteworthy is the fact that the vehicle played a central role in the crimes reported by Hanson.

(Some citations omitted)

LED EDITORIAL NOTE: The Gaines Court also explains that – 1) while the trial court decided this case on the basis of the “inevitable discovery” exception to the Exclusionary Rule, and 2) the Supreme Court initially accepted review to address whether the “inevitable discovery” exception to the Exclusionary Rule applies under article I, section 7 of the Washington constitution – the “inevitable discovery” exception applies only to cases where evidence is deemed unlawfully seized. Here, the Supreme Court rules that, because the “independent source” exception applies, the evidence was lawfully seized under the search warrant. Therefore, whether the “inevitable discovery” exception to the Exclusionary Rule applies under the Washington constitution is not addressed in Gaines.

LED EDITORIAL COMMENT: From the limited facts set forth on the question of exigent circumstances (an issue not addressed by the Supreme Court here), we think it may have been a close question whether the officers had exigent circumstances when they searched the vehicle trunk without a warrant. When in any doubt about exigency, however, Washington officers should seek consent or get a search warrant before opening a vehicle trunk to search for evidence.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

DRIVERS’ LICENSE SUSPENSIONS BASED ON CONVICTION OF CERTAIN CRIMINAL OFFENSES ARE HELD CONSTITUTIONAL -- In City of Redmond v. Bagby, __ Wn.2d __, 117 P.3d 1126 (2005), and City of Bremerton v. Hawkins, __ Wn.2d __, 117 P.3d 1132 (2005), the Washington State Supreme Court distinguishes its opinion last year in City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004), **July 04 LED:06**, holding in Bagby and Hawkins that the statutory system under which the Department of Licensing (DOL) suspends drivers’ licenses automatically upon certain criminal convictions does not violate federal constitutional due process protections.

In Moore the Court held that the statutory system under which the DOL suspended drivers’ licenses automatically upon being notified by a court that a person “failed to respond to a notice of traffic infraction, failed to appear a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice or traffic infraction or citation, other than for a standing, stopping, or parking violation” violated federal constitutional due process protections because drivers were not afforded an administrative hearing prior to the suspension.

Bagby and Hawkins involve the statutory system that requires mandatory license suspension/revocation upon certain criminal convictions, without an opportunity for hearing before DOL. Applying the Mathews v. Eldridge, 424 U.S. 319 (1976) three part balancing test to determine whether due process requirements are satisfied, the Bagby Court explains, and distinguishes Moore, as follows:

First, in Moore we concluded that the defendants’ personal interest in their license was substantial, since a license could impact their ability to make a living. The case at hand is no different. A driver’s license is a substantial private interest.

Second, we held that since the defendants in Moore had no access to a hearing prior to notice of revocation by the Department, there was increased potential for prolonged erroneous deprivation of this private interest. We found that there was a risk of error when a license is revoked with no opportunity for an administrative hearing.

Here, conversely, there is minimal risk that a criminal defendant will be erroneously deprived of their driver's license. No errors exist in the records of the respondents in this case. For example, it is unlikely that a defendant, like the respondents in this case who were originally convicted of driving under the influence of alcohol, would have their license incorrectly suspended by a judge who is imposing a sentence upon conviction. As such, the likelihood of erroneous deprivation does not exist in this case, since a criminal proceeding which results in a conviction provides sufficient due process protections.

Also, we note that in these cases, RCW 46.20.270 provides additional safeguards that did not exist in Moore. In Moore, the defendants never appeared before a judge; they simply had their license suspended by the Department after not resolving traffic infractions. RCW 46.20.270 requires that anyone convicted of certain offenses must have his or her license forfeited to the court at the time of conviction.

(Emphasis added).

Defendants are required to personally appear in criminal proceedings. They are afforded all constitutional protections in those proceedings, including the right to appeal. Under RCW 46.20.285, the license suspension is stayed until the conviction becomes final. Perhaps, most importantly, under both RCW 46.20.265 and RCW 46.20.270, the suspension or revocation occurs as a result of the defendant's conviction, where every defendant personally appears for imposition of sentence. For driving violations that mandate a license suspension, RCW 46.20.270 requires the judge to physically take the defendant's license. For other juvenile convictions that mandate a license suspension under RCW 46.20.265, RCW 66.44.365(1), requires the judge to notify the Department within 24 hours of the suspension. Despite the submission that isolated administrative errors may have occurred in some situations, the risk of possible erroneous deprivation after the suspension is entered by the court and then administered by the Department is insignificant.

Third, we held that the government interest of public safety was limited in Moore. That is, the interest in the simple administration of justice by having people resolve minor ticket infractions “[d]oes not rise to the level of the State's compelling interest in keeping unsafe drivers off the roadways.” (Emphasis added). In this case, under this third Mathews factor, the government's interest is higher than existed in Moore.

In Moore, we implicitly recognized that governmental interest is significantly higher in cases involving criminal offenses. The legislature has determined that those who commit criminal driving violations are a threat to public safety, since suspended drivers are “more likely to be involved in causing traffic accidents, including fatal accidents, than properly licensed drivers, and pose a serious threat to the lives and property of Washington residents.” Laws of 1998, ch. 203, § 1. In fact, due to this apparent danger, the legislature has directed the courts to secure the immediate forfeiture of the driver's license of such a convicted person. RCW 46.20.270(1). We were careful in Moore to distinguish between drivers who had their license suspended in an effort to effectuate the resolution of traffic tickets and those who are “habitually unsafe.”

Some of the respondents in the case before us have been convicted of reckless driving, vehicular homicide, eluding police, and multiple DUIs (driving under the influence). Though the severity of crimes that trigger a mandatory suspension vary, a significantly greater government interest exists in keeping those convicted of crimes off the road, rather than those who have failed to resolve traffic infractions. Thus, a heightened government interest exists in cases where a driver's license is suspended based on a criminal conviction.

[Citations and footnote omitted.]

Justice Sanders dissents.

Result: Reversal of King County District and Superior Court dismissal of the Bagby defendants' driving while license suspended charges. Affirmance of Bremerton Municipal Court's denial of Hawkins' motion to dismiss driving while license suspended charge.

LED Editorial Comment: In response to Moore, the DOL removed from its system all license suspensions that were based solely on failure to appear, and the Legislature amended the statutory framework to provide for administrative hearings prior to license suspensions. Laws of 2005, ch. 288 (SHB 1854) (the legislative amendments apply to all license suspensions occurring after July 1, 2005). Based on these actions and the Bagby/Hawkins decisions, it is our understanding that officers in most jurisdictions are now stopping, citing, arresting, and charging individuals for all levels of driving while license suspension. However, given varying opinions on this issue, as always we strongly encourage officers to check with their legal advisors or local prosecutors.

WASHINGTON STATE COURT OF APPEALS

CITIZEN INFORMANT AND HIS REPORT OF A POSSIBLE CRIME (GUN POSSESSION BY A YOUTH) HELD NOT RELIABLE AND HENCE SEIZURE IS HELD UNLAWFUL WHERE OFFICERS MADE SEIZURE BASED ON DISPATCH REPORT OF A 911 PHONE CALLER WHO GAVE HIS NAME AND REPORTED THAT A PERSON HE BELIEVED TO BE 17 YEARS OLD WAS CARRYING A HANDGUN

State v. Hopkins, __ Wn. App. __, 117 P.3d 377 (Div. II, 2005)

Facts: (Excerpted from Court of Appeals decision)

The police dispatch system informed two officers of a citizen informant's 911 call that reported a minor might be carrying a gun. The dispatch reported that the informant described the person as a "[l]ight-skinned black male, 17 [years of age], 5' 9", thin, Afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack." [*Court's footnote: Hopkins is 21 years old, six-feet three inches tall, and weighs 200 pounds.*] The informant reported that the person was "scratching his leg w/what looked like a gun." Approximately seven minutes later, the informant called again and asserted that the person was now at a pay phone at a certain address and that he thought the person put the gun in his pocket.

The police dispatch informed the officers that the caller was a citizen, but the dispatch did not provide the officers with a name. A computer inside the officers' patrol car displayed an incident report indicating the informant's name and cell phone number and a different phone number for the second call. But the officers

testified that they did not know the informant, did not know anything about the informant, and did not know if the informant knew Hopkins. One officer testified that the informant requested no contact, so the officer did not think there was any reason to contact him. Consequently, the officers did not attempt to contact the informant.

The officers went to the public pay phone at the location the informant identified. The officers saw a black male who resembled the informant's description hanging up the phone. One officer testified the person had his back to them. Neither officer observed a gun or any illegal, dangerous, or suspicious activity.

Based on the informant's tip, the officers approached Hopkins at the pay phone and ordered him to put his hands up in the air and keep them in sight. They then asked him if he had a gun. Hopkins responded that he might have a gun in his pocket. After a frisk, the officers discovered a loaded revolver in Hopkins' front pants pocket. The officers handcuffed Hopkins, placed him in the patrol car, and read his Miranda rights. The officers asked Hopkins for identification and he provided a false name. The officers asked again for identification and discovered that Hopkins had several outstanding warrants and a prior felony conviction. The officers then arrested him.

The officers transported Hopkins to jail. Before booking him, an officer performed a search and discovered a small baggie containing a white powdered substance that was later tested to be approximately two-tenths of a gram of methamphetamine.

Proceedings below:

Hopkins was charged with one count each of unlawful possession of the methamphetamine, making a false or misleading statement to a public servant, and first degree unlawful possession of a firearm. He moved to suppress the evidence and the statements obtained by the police. His motion was denied and he was convicted in a jury trial on all three counts.

ISSUES AND RULINGS: (1) Where the informant's name and cell phone number appeared on the officers' patrol car computer as generated by the 911 dispatcher, but they did not know the informant or the circumstances relating to the call, and the officers did not attempt to call the informant back to obtain more information, was the informant's reliability established for purposes of making a Terry stop of the suspect? (ANSWER: No, rules a 2-1 majority); (2) Was the tip sufficiently reliable to justify the seizure of the suspect where: (A) the citizen-informant's tip was that a person who might be a minor was carrying a gun; (B) the tip was significantly inaccurate in its description of the height, weight and age of the suspect; (C) the tip accurately described the suspect's location, clothing, and the backpacks he was carrying; and (D) and police did not observe any suspicious behavior when they observed the suspect? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of Pierce County Superior Court conviction of Luis Gustavo Hopkins for one count each of unlawful possession of the methamphetamine, making a false or misleading statement to a public servant, and first degree unlawful possession of a firearm.

ANALYSIS BY MAJORITY: (Excerpted from Court of Appeals opinion)

1. Introduction

An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped

has committed or is about to commit a crime. An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave.

An informant's tip can provide police a reasonable suspicion to make an investigatory stop. State v. Sieler, 95 Wn.2d 43 (1980). But the informant's tip must be reliable. The State establishes a tip's reliability when the informant is reliable and (2) the informant's tip contains enough objective facts to justify the pursuit and detention of the suspect or the non-innocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion."

2. Informant's Reliability

Generally, we may presume the reliability of a tip from a citizen informant. State v. Wakeley, 29 Wn. App. 238 (1981). Here, the record demonstrates that at the time of the dispatch, the officers knew only that the informant was a citizen. Although the informant's name and cell phone number appeared on the officers' computer in their patrol car, they did not know the informant or the call's circumstances. The officers did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions. Indeed, one officer believed she should not contact the informant because "[t]he caller had requested no contact." We agree with the trial court that the officers "just assumed everything this guy told them, the tipster told them, was true."

The State emphasizes that a citizen informant is generally presumed reliable and that the informant called back a second time regarding the person's location. But as discussed above, the informant's name was meaningless to the officers and the mere fact that the informant called again to update the person's location is unpersuasive. It may mean that the informant is watching the person, but it tells the officers nothing more about the informant's reliability. Further, a named and unknown telephone informant is unreliable because "[s]uch an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." Sieler, 95 Wn.2d at 48.

We hold that the State failed to establish the informant's reliability, thus it was reversible error to deny Hopkins' suppression motion. But we also review whether the informant's tip included objective facts justifying the officers' investigative stop of Hopkins.

3. Reliability of Informant's Tip

The informant's tip contained inaccurate information about Hopkins' height, weight, and age, but the tip reasonably identified Hopkins' clothing, other physical features, and location. The informant's only allegation of criminal activity was that a minor was "scratching his leg" with "what appeared to be a gun," and that he "thinks" the gun is in Hopkins' right pocket. But these facts alone fail to reliably provide an officer with reasonable suspicion of criminal behavior. It is undisputed that Hopkins was not a minor and that neither officer observed a gun. The officers did not observe any criminal or suspicious behavior because they saw Hopkins merely standing at a pay phone. And the [United States] Supreme Court has held that an anonymous tip asserting a person is carrying a gun is, without more, insufficient to justify an investigatory stop. See Florida v. J.L., 529 U.S. 266 (2000) **May 00 LED:07** ("The reasonable suspicion here at issue

requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.").

Relying on Wakeley, the State emphasizes that the informant's tip involves the potentially dangerous situation of unlawful firearm possession. But in J.L., the Supreme Court rejected a similar argument, deciding that an automatic firearm exception to justify a stop "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." 529 U.S. at 272. Further, Wakeley is distinguishable. Wakeley involved three citizen reports of gun fire in a residential area and the informants provided more personal information than here. And unlike here, the initial responding officer observed the suspect acting suspiciously before the investigatory stop.

The trial court emphasized that it narrowly denied Hopkins' suppression motion. The trial court seriously questioned the reliability of the informant's tip and found that the officers did not observe illegal or suspicious behavior; however, it ultimately denied Hopkins' suppression motion based on his statement to police after the investigatory stop.

But the trial court erred in considering Hopkins' statement to police as justification of the investigatory stop because his statement occurred after the officers seized him. Before approaching Hopkins, the officers' suspicion was based solely on the informant's tip that described Hopkins' appearance and age inaccurately, but accurately described his location, clothing, and backpacks only. They relied on the informant's incorrect and vague assertion that Hopkins unlawfully possessed a gun as a minor and they did not observe any suspicious behavior. J.L. ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant.") (emphasis added). And immediately upon contact with the officers, Hopkins was not free to leave because the officers required Hopkins to put his hands in the air.

...

Under these circumstances, we hold that the informant's tip alone failed to provide the officers a reasonable suspicion to justify an investigatory stop of Hopkins. We agree with Hopkins that "Essentially, the trial court found that, even though the officers probably should not have presumed that the caller was reliable, and even though the information did not provide sufficient basis to stop Hopkins, they were justified in detaining and questioning Hopkins anyway."

Thus, we reverse the trial court's denial of Hopkins' suppression motion. Because the State's case rested exclusively on the improperly seized evidence and his statements after the illegal stop, we vacate Hopkins' convictions and dismiss the charges with prejudice.

[Footnotes and some citations omitted]

DISSENTING OPINION

Judge Quinn-Brintnall dissents, arguing that the 911 caller established sufficient credibility to justify a Terry seizure when he gave dispatch his name, phone number and location.

SEARCH WARRANT HOLDINGS – 1) CITIZEN INFORMANT STATUS ESTABLISHED FOR PC PURPOSES DESPITE INFORMANT’S CRIMINAL HISTORY; 2) AFFIANT’S OMISSION OF SOME MATERIAL FACTS ABOUT INFORMANT IN PRESENTING WARRANT REQUEST TO COMMISSIONER NOT BASIS FOR SUPPRESSION BECAUSE AFFIANT OMISSION WAS NOT INTENTIONAL OR RECKLESS; AND 3) WASHINGTON CONSTITUTION DOES NOT IMPOSE A DIFFERENT STANDARD FOR ASSESSING “MATERIAL OMISSIONS” CASES

State v. Chenoweth, 127 Wn. App. 444 (Div. I, 2005)

Facts and Proceedings below:

In February 2003, Nick Parker told Police Officer [A] that Randy Chenoweth was operating a methamphetamine laboratory at 1200 Aaron Drive in Lynden, where Chenoweth had Parker's car. [Officer A] passed the information to Whatcom Interagency Narcotic (WIN) Detective [B]. Parker then told [Detective B] that he had been to the residence, described equipment consistent with the manufacture of methamphetamine, and stated that both Chenoweth and Barbara Wood participated in the manufacture of methamphetamine. Parker also told [Detective B] that he wanted his car back.

Detective [B] and [a] Deputy Prosecutor then sought and obtained a search warrant for the residence. By means of questions posed by the deputy prosecutor and answered by the detective under oath, they informed the Court Commissioner that Parker had a prior conviction for possession and delivery of cocaine. During the presentation, [the deputy prosecutor] stated to the Commissioner that she had prosecuted Parker for the cocaine charges. The Commissioner asked the deputy prosecutor to swear to that, and she did so.

Following execution of the search warrant, [the deputy prosecutor] and Detective [C] sought and obtained a second warrant for a motor home outside the residence. During that transaction, the deputy prosecutor remarked that she had "confirmed Nicholas Parker's criminal history from what I recalled yesterday." And she asked the Commissioner whether the first warrant would have issued if she had not verified what she recalled about Parker's criminal history the previous day. The Commissioner responded that the warrant would have issued without the prosecutor's statement because Parker had already told Detective [B] about his criminal conviction and since there was no reason for him to have said that unless it were true, the statement was somewhat self-authenticating.

Based on the evidence found in the searches, the State charged Chenoweth and Wood each with one count of possession of precursor materials with intent to manufacture methamphetamine, one count of manufacturing methamphetamine, and one count of possession of methamphetamine. The State also charged Chenoweth with an additional count of possession of methamphetamine based on a white powder that he dropped during his arrest.

Chenoweth and Wood moved to suppress all evidence seized from the property, alleging that [the deputy prosecutor] willfully and recklessly omitted material facts regarding Parker's history from discussions with the Commissioner when seeking the search warrants and requested a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). In particular, Chenoweth and Wood contended that [the deputy prosecutor] omitted material facts including (1) that Parker had once been a paid informant for the Bellingham Police Department and had been terminated from that role based on concerns about his reliability; (2) that Parker had a much

more extensive criminal history than that revealed to the Commissioner; (3) that during her previous prosecution of Parker, [the deputy prosecutor] had known about Parker's relationship with the police and had questioned his truthfulness to the extent of threatening to bring charges of suborning perjury against him; (4) that Parker requested payment from the police after the warrant was obtained and the WIN department paid Parker after the search warrants were executed; (5) that Parker sought and received police assistance in retrieving his car from Chenoweth after the warrant was obtained but before it was executed; and (6) that Wood was a plaintiff in a civil suit against the Whatcom County Sheriff in his former capacity as Blaine Chief of Police.

After several hearings to consider the Franks issues, the trial court stated that the information regarding Parker's extensive criminal history, the Bellingham Police Department's decision not to use Parker based on concerns about his reliability, and [the deputy prosecutor]'s suspicion that Parker had suborned perjury, would have prevented a finding of probable cause to issue the warrant if it had been intentionally or recklessly, rather than negligently, omitted. Thus, the omissions were material. But because the trial court found that Detective [B] and Detective [C] did not know about, and [the deputy prosecutor] did not remember Parker's history or relationship with the Bellingham Police Department, none of the omissions was intentional or reckless. The evidence found in the execution of the warrant was ruled admissible under Franks, and the case proceeded to trial.

A jury found Chenoweth and Wood guilty as charged.

ISSUES AND RULINGS: 1) Under the totality of the circumstances, did the informant who was identified in the affidavit qualify as a citizen informant for probable cause purposes despite his criminal record, and, if so, did the affidavit establish probable cause? (ANSWERS: Yes and yes); 2) Where the affiant-deputy- prosecutor omitted several material facts from her affidavit in support of a search warrant, did the trial court that decided the suppression motion properly conclude that the omissions were not intentional or reckless, and therefore that suppression of evidence was not required? (ANSWER: Yes); 3) Does the Washington constitution, article 1, section 7, have the same standard as the federal constitution's Fourth Amendment for assessing the effect of "material omissions" from search warrant affidavits? (ANSWER: Yes)

Result: Affirmance of Whatcom County Supreme Court convictions of Randal Lee Chenoweth of one count each for: 1) possession of precursor materials with intent to manufacture methamphetamine; 2) manufacturing methamphetamine and 3) possession of methamphetamine (reversal – under double jeopardy analysis not addressed in this LED entry – of a conviction for an additional count of possession of methamphetamine).

ANALYSIS:

1) Informant reliability and probable cause

In key part, the Chenoweth Court's analysis of the informant's reliability is as follows:

Chenoweth first contends that the warrant affidavit was inadequate on its face because it did not contain sufficient facts to indicate Parker's reliability. In particular, Chenoweth argues that although Parker's identity was revealed to the Commissioner, when it was also revealed that he had been convicted of a drug crime, the Commissioner erred by considering Parker to be a citizen informant such that intrinsic indicia of his reliability could be found in "his detailed description of the underlying circumstances of the crime observed or about which he had knowledge."

Contrary to Chenoweth's claim, [there is not a strict] rule that an informant with a criminal conviction or suspected of criminal activity cannot be considered a citizen informant, rather than a criminal or professional informant, for the purposes of evaluating reliability. In fact . . . "the fact that an identified eyewitness informant may also be under suspicion in this case because of her initial contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant's identity."

Moreover, Chenoweth fails to demonstrate that other indicia of reliability here could not support a finding of probable cause. It is undisputed that Detective [B] informed the Commissioner that the informant's name was Nicholas Parker; that Parker had a prior conviction for delivery and possession of cocaine; that Parker went to the Chenoweth residence to get his car and was told to leave; that Parker had observed flasks, filters, chemicals and equipment consistent with methamphetamine manufacture and that Chenoweth told Parker that he was manufacturing methamphetamine; that Parker admitted to assisting Chenoweth and Wood with methamphetamine manufacture in the past; that Parker admitted to ingesting methamphetamine with Chenoweth and Wood at the residence in the past; and that Detective [B] verified that Wood's address was listed as that provided by Parker.

Because Detective [B] provided Parker's name to the Commissioner, because Parker made statements against his penal interest, and because the amount and kind of detail provided support an inference of reliability, the Commissioner did not abuse her discretion in finding that probable cause supported the search warrant.

. . .

We reject Chenoweth's assertion that Parker's tip must be subjected to the heightened scrutiny generally reserved for criminal unnamed informants, as well as his intimation that all other inferences are inapplicable. Reviewing courts are required to give great weight to a magistrate's determination related to probable cause and all doubts are to be resolved in favor of the warrant.

[Some citations omitted]

2) Material omissions and mental state of affiant in omitting facts

In key part, the Chenoweth Court's analysis of the Franks suppression issue is as follows:

Under the Fourth Amendment, an omission or false statement made in an affidavit in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made intentionally or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154 (1978). Where a defendant makes a substantial preliminary showing of such an omission or false statement, the trial court must hold a hearing. If the defendant then establishes his allegations by a preponderance of the evidence at that hearing, the material misrepresentations will be stricken from the affidavit and the material omissions will be added. If the modified affidavit then fails to support a finding of probable cause, the warrant is void and the evidence obtained will be excluded.

Here, the parties do not dispute the trial court's finding that information not provided to the Commissioner but later revealed at various Franks hearings was material. In particular, the police and deputy prosecutor did not tell the Commissioner about Parker's past work as a paid informant to the Bellingham Police Department, about Parker's full criminal history, about compensation paid to Parker by WIN, and about the prosecutor's prior dealings with Parker, including her suspicion that he had suborned perjury. The question is whether the trial court erred in concluding that these omissions were not intentional or reckless. Chenoweth contends that [the deputy prosecutor] and Detective [B] omitted material information with reckless disregard for the truth. By implication at least, he argues that on these facts, the omissions were reckless as a matter of law regardless of the court's findings regarding the veracity of the deputy prosecutor and detective.

. . .

Chenoweth contends that [the deputy prosecutor] acted with reckless disregard for the truth by swearing to the best of her knowledge to the Commissioner that Parker's criminal history included the drug charge she prosecuted and then, when asking for the second search warrant, telling the Commissioner that she had confirmed her previous recollection, despite the fact that she did not actually fully review her file regarding her 2000 prosecution of Parker. If she had thoroughly reviewed her file, she would have found a copy of Parker's confidential informant agreement with the Bellingham Police Department dating from 1999 and continuing until after the Franks hearing process had begun. But Chenoweth fails to identify any evidence in the record to show that [the deputy prosecutor] told the Commissioner that she had actually reviewed her file on Parker before swearing to her recollection of the fact of the conviction and fails to provide any support for an argument that she had an affirmative duty to review the file. Although a thorough review of the file would have undoubtedly reminded [the deputy prosecutor] of her earlier suspicions regarding Parker's reliability, Chenoweth fails to identify any deliberation on [the deputy prosecutor]'s part, or any obvious reasons from the circumstances of Parker's tip to Detective [B] to cause her to doubt Parker's veracity. Given the trial court's unchallenged finding that [the deputy prosecutor], who prosecutes over 200 cases per year, had no recollection of Parker's relationship with the Bellingham police, and Chenoweth's failure to demonstrate that [the deputy prosecutor] had serious doubts as to the truth of her statements regarding the fact of Parker's conviction in the case she prosecuted against him, the trial court did not err in concluding that Chenoweth's challenge to the warrant failed.

Chenoweth also contends that because the totality of the omissions-- including [the deputy prosecutor]'s prior knowledge of Parker and Detective [B]'s knowledge that Parker had asked for money--was material and would be fatal to probable cause if intentionally or recklessly omitted, the trial court may infer recklessness . . .

But as the court recognized in State v. Garrison, inferring recklessness from the omission of facts "clearly critical to the finding of probable cause," . . . is not proper because that "inference collapses into a single inquiry the two elements, 'intentionality' and 'materiality'--which Franks states are independently necessary." State v. Garrison, 118 Wn.2d 870 (1992) **Oct 02 LED:02**.

[Some citations omitted]

3) Independent grounds analysis under article 1, section 7

Finally, the Chenoweth Court rejects the defendant's argument for a different standard for Franks-type challenges under the Washington constitution, article 1, section 7. The Court rules that the Washington State Constitution's prohibition on unreasonable searches and seizures does not provide defendant with greater protection than Fourth Amendment such as would give him the right to challenge the search warrant based on negligent inclusion of false information or negligent omissions of material facts in affidavit in support of search warrant, rather than under federal constitutional standard that such omissions had to be made intentionally or with reckless disregard for the truth. The defendant failed to demonstrate that textual differences or that any constitutional history compelled different treatment of negligent omission of material facts under the Washington constitution, the Chenoweth Court holds.

UNDER MEDICAL USE OF MARIJUANA ACT, WHERE DEFENDANT IN MARIJUANA POSSESSION CASE WAS NOT PRESENTLY CARING FOR GLAUCOMA SUFFERER AND WAS DESIGNATED ONLY TO OBTAIN MARIJUANA FOR HIM, DEFENDANT DID NOT QUALIFY AS A "PRIMARY CAREGIVER"

State v. Mullins, ___ Wn. App. ___, 116 P.3d 441 (Div. II, 2005)

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

On September 26, 2003, Sergeant Kurt Reichert and Officer Tracy Murphy of the Centralia Police Department performed a traffic stop on Mullins. Upon contacting Mullins, the officers smelled a strong odor of unburned marijuana. Officer Murphy testified that he questioned Mullins regarding the odor, and Mullins responded that he and his passenger had "been around someone smoking marijuana."

Officer Murphy then searched Mullins's truck and discovered six baggies of marijuana. Additionally, Sergeant Reichert found printed information about the State Medical Use of Marijuana Act (Act). When questioned about the marijuana, Mullins stated that he was "holding" it for a friend who had gone to a concert and was concerned that someone might "break in his house" and steal the drugs. Mullins was also en route to a concert. Mullins further stated that he did not smoke marijuana frequently but that he had smoked it two weeks prior to the stop. Mullins did not tell the officers he was carrying the marijuana for a medical patient under the Act.

The State charged Mullins with possession of a controlled substance-- marijuana over 40 grams, and the matter was tried before a jury on July 6, 2004. At the close of its case, the State moved in limine to prevent Mullins from presenting evidence that he could lawfully possess marijuana as the designated primary caregiver for a medical marijuana patient, an affirmative defense under the Act.

In an offer of proof, Mullins's presented testimony by his uncle, Jeffrey Bauman. Bauman testified that he suffers from glaucoma and was authorized by a physician to use medical marijuana to treat this disease. He further testified that he prepared the marijuana by baking it into cookies and brownies.

Bauman further testified that on September 24, 2003, two days prior to Mullins's arrest, he designated Mullins as his caregiver to supply marijuana. Mullins

offered into evidence Bauman's handwritten notation on the bottom of his medical marijuana referral. The handwritten, signed notation reads:

WED, 24, SEPT, 2003
MATHEW [sic] MULLINS IS ACTING
AS CAREGIVER FOR ME (JEFF
BAUMAN) IN SECURING
MARIJUANA FOR MY PERSONAL
USE.

Bauman stated that at the time he designated Mullins as his caregiver, he was living with his now ex-wife, but "if [his] sight failed or [he] went blind," he knew that Mullins would assist him with physical activities and driving. Additionally, Bauman and Mullins had discussed the possibility of Mullins using the spare room at Bauman's home and learning Bauman's trade as a tile setter. Bauman testified that it was his intent that Mullins ultimately would physically assist him.

The court granted the State's motion, finding that Bauman designated Mullins as his caregiver solely to secure marijuana and that primary caregiver status contemplated something more than merely supplying marijuana. The court stated that it was required to strictly interpret RCW 69.51A.040, the affirmative defense statute, because the statute is contrary to the criminal code. The court refused to permit Mullins to present evidence and to instruct the jury on the affirmative defense.

Mullins was found guilty as charged.

ISSUE AND RULING: Where the marijuana-possession defendant was not presently caring for the glaucoma-suffering Mr. Bauman and where defendant's designation to care for Mr. Bauman was limited to providing him only with marijuana and did not specify that he was to provide any sort of "care", did defendant qualify under the Medical Use of Marijuana Act (chapter 69.51A RCW), as a "primary caregiver"? (**ANSWER:** No)

Result: Affirmance of Lewis County Superior Court conviction of Steven Matthew Mullins for possession of over 40 grams of marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

I. Burden of Proof

The Medical Use of Marijuana Act (Act) provides an affirmative defense for patients and caregivers charged with possessing marijuana. RCW 69.51A.005; State v. Phelps, 118 Wn. App. 740 (2003) **Dec 03 LED:18**. Under the Act, persons who act as primary caregivers to qualifying patients shall not be found guilty of a crime for assisting with the medical use of marijuana. RCW 69.51A.005.

Under RCW 69.51A.040(1):

If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements providing in this chapter.

In order to affirmatively defend a criminal prosecution for possessing marijuana, a defendant must show by a preponderance of evidence that he or she has met the requirements of the Act. Phelps, 118 Wn. App. 744. But here we are not asked to decide whether Mullins proved a medical use defense by a preponderance of the evidence. Rather, we are asked to decide whether he presented sufficient evidence to allow the jury to consider the defense.

II. "Primary Caregiver"

Mullins contends that the trial court erred in granting the State's motion in limine and precluding him from presenting a "primary caregiver" affirmative defense to the jury.

Under RCW 69.51A.010(2), a "[p]rimary caregiver" must be: (1) 18 years of age or older; (2) responsible for the *housing, health, or care* of the patient; and (3) designated in writing by the patient to perform the duties of primary caregiver. And to qualify for the affirmative defense, a "primary caregiver" must: (1) meet all criteria for status as a primary caregiver; (2) possess no more marijuana than necessary for the patient's personal, medical use, not exceeding the amount necessary for a 60-day supply; (3) present a copy of the qualifying patient's valid documentation, as well as evidence of designation to act as primary caregiver, to any law enforcement official requesting such information; (4) be prohibited from consuming marijuana obtained for the personal, medical use of the patient; and (5) be the primary caregiver to only one patient at any one time. RCW 69.51A.040(4).

...

Mullins first contends that the court erred in finding that Bauman had designated him as his caregiver solely to secure marijuana. Mullins argues that, although Bauman testified that his intent was for Mullins to physically assist him if his sight failed, Mullins nevertheless was responsible for such duties. He asserts: "[t]o be responsible does not require that the responsible person *presently* fulfill a duty when the duty is contingent on circumstances which may [sic] yet to occur." Mullins is in error.

RCW 69.51A.010(2)(b) requires a primary caregiver to be a person who "[i]s responsible for the housing, health, or care of the patient." The use of the term "is" clearly indicates that the person must be presently responsible for those duties. Further, the statute plainly does not provide that a primary caregiver is a person who *may* or *will* be responsible for the housing, health, or care of a patient, should a particular contingency occur. While Mullins may have been responsible *to Bauman* to physically care for him if his eyesight failed, Mullins was not presently responsible for Bauman's care under the statute.

Moreover, Bauman's handwritten designation stated that Mullins would "ACT [] AS CAREGIVER FOR [Bauman] *IN SECURING MARIJUANA FOR [his] PERSONAL USE.*" It did not state that Mullins was to care for Bauman. And Bauman's testimony that it was his intent for Mullins to physically assist him if his eyesight failed was insufficient to establish such a designation. Under RCW 69.51A.010(2)(c), a primary caregiver must have been "*designated in writing*" by the patient. Thus, Mullins failed to present sufficient evidence that he was designated to care for Bauman, and the trial court did not err in so finding.

Mullins next asserts that the trial court erred in strictly construing the Act and determining that primary caregiver status required more than merely supplying marijuana. He argues that the statute requires a primary caregiver to be responsible for a patient's housing, health, or care and that, in providing medical marijuana to Bauman, who requires the drug to treat a debilitating medical condition, he is responsible for Bauman's health or care. The State responds that Mullins was responsible for only an *aspect* of Bauman's health or care; and a determination that this was sufficient to meet RCW 69.51A.010's requirements would "ignore[] the terms 'primary' and 'responsible,' both of which denote something more than merely assisting in the procurement of marijuana." Whether an individual who is solely responsible for supplying marijuana to a qualifying patient is a "[p]rimary caregiver" under RCW 69.51A.010 is an issue of first impression before this court.

The terms "primary" and "responsible" are not defined in chapter 69.51A RCW; thus, we ascertain their meaning from a standard dictionary. The term "primary" means "first in rank or importance: CHIEF, PRINCIPAL" or ": BASIC FUNDAMENTAL." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (1969). And "responsible" means "involving responsibility: involving a degree of accountability." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1935 (1969).

These definitions are dispositive as the State suggests. A person could be a "primary" caregiver if he or she is the chief or principal individual caring for the patient or if he or she, as a caregiver, merely provides a basic or fundamental service to the patient. Here, while Mullins admittedly was not chiefly responsible for Bauman's health or care, he arguably was providing a basic service in so far as he supplied Bauman with the drugs necessary to treat his medical condition.

But the further requirement that a primary caregiver be "responsible" for the patient's housing, health, or care cures the ambiguity. That the caregiver must be accountable for one of these duties demonstrates that the first definition of "primary" was intended; it is axiomatic that the individual held accountable for the housing, health, or care of a patient is necessarily the chief or principal person fulfilling one of these duties. Thus, RCW 69.51A.010(2) is not ambiguous as to what duties a primary caregiver must fulfill: a "primary caregiver" is the individual chiefly or principally responsible for providing housing, health, or care to a qualifying patient. And here, Mullins was responsible for only one aspect of Bauman's health or care--his medication. At the time Bauman designated Mullins his caregiver to supply him with medical marijuana, Bauman physically cared for himself and even administered his own medication by cooking the marijuana into cookies or brownies. Accordingly, the trial court did not err in refusing to permit Mullins to argue this theory to the jury.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) AFFIRMATIVE DEFENSES UNDER MEDICAL USE OF MARIJUANA ACT INTERPRETED: MARIJUANA GROWER PRESENTED SUFFICIENT EVIDENCE FOR JURY TO CONSIDER WHETHER SHE WAS "QUALIFYING PATIENT" BUT NOT ENOUGH FOR JURY TO CONSIDER WHETHER SHE WAS "PRIMARY CAREGIVER" - - In State v. Ginn, ___

Wn. App. __, __ P.3d __, 2005 WL 186491 (Div. II, 2005), the Court of Appeals rules that the trial court erred in not allowing a marijuana grower to present to a jury her affirmative defense of “qualifying patient” under the Medical Use of Marijuana Act. The Ginn Court rejects, however, her argument that the jury should also have been allowed to consider her affirmative defense of “primary caregiver” under the Act.

The police had become aware of the marijuana grow when the defendant contacted them and asked whether it was lawful. On the issue of sufficiency of evidence to submit the “qualifying patient” defense to the jury, the Ginn Court relies on the testimony of defendant’s physician. The physician testified that the defendant stated that she had tried other medications and therapy to treat chronic back pain, but that such treatments were unsuccessful, and that she had been successful with marijuana. This testimony, together with the physician's opinion that medical marijuana was the appropriate therapy at time, supported the defendant's claim that she suffered from intractable pain "unrelieved by standard medical treatments," for purposes of establishing that defendant was a "qualifying patient" entitled to assert the affirmative defense to the jury. Further supporting evidence was the Physician's Medical Marijuana Release Form stating that the physician had advised defendant about potential risks and benefits of medical use of marijuana to treat chronic back pain.

On a question that apparently was not raised by the parties, the Ginn Court asserts that there was sufficient medical evidence to support the trial court’s ruling that the 23 growing plants did not exceed the amount necessary for a sixty day supply.

On the issue of sufficiency of evidence to submit the “primary caregiver” defense to the jury, the Ginn Court explains that defendant failed to meet her burden of proof because she did not provide "valid documentation" to establish that the terminally ill individual to whom she provided marijuana was herself a qualifying patient. Defendant did not provide documentation signed by the individual's physician, nor did she provide a copy of the individual's medical records stating that, in the physician's professional medical opinion, the potential benefits of medical use of marijuana would outweigh the health risks for the individual.

Result: Reversal of Thurston County Superior Court conviction of Monica Lorraine Ginn for manufacturing marijuana and possession of marijuana with intent to deliver; case remanded for re-trial.

(2) ONLY PHYSICIANS LICENSED IN WASHINGTON MAY PRESCRIBE MEDICAL USE OF MARIJUANA IN WASHINGTON – In State v. Tracy, 115 Wn. App. 381 (Div. II, 2005), the Court of Appeals holds under Washington’s Medical Use of Marijuana Act, chapter 69.51A RCW, only physicians licensed in Washington may prescribe medical marijuana to persons in Washington.

Defendant Sharon Tracy relied on out-of-state medical authorization to defend her possession of 114 grams of marijuana, drug paraphernalia, a small marijuana grow operation, and four juvenile marijuana plants. She did not have documentation from a licensed Washington physician for her possession and use of marijuana.

The Tracy Court describes and quotes from chapter 69.51A RCW as follows:

Washington voters passed Initiative Measure No. 692 in November 1998. RCW 69.51A.005. The statement of purpose explains the voters' rationale:

The people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana...

The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

RCW 69.51A.005. Codified at chapter 69.51A RCW, the Medical Use of Marijuana Act (the Act) ensures that "[q]ualifying patients with terminal or debilitating illnesses who ... would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana." RCW 69.51A.005.

To meet the definition of a "qualifying patient," the defendant must prove that he

- (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
- (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
- *3) (c) Is a resident of the state of Washington at the time of such diagnosis;
- (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana;
- and
- (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3).

"Qualifying patients" may then assert an affirmative defense to state prosecution, provided they meet the following criteria:

- (2) The qualifying patient ... shall:
 - (a) Meet all criteria for status as a qualifying patient;
 - (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
 - (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.

RCW 69.51A.040.

[Footnotes omitted]

The Tracy Court then analyzes the meaning of "physician licensed under chapter 18.71." After briefly discussing the language of chapter 18.71 RCW the Tracy Court concludes its analysis as follows:

Chapter 18.71 RCW details Washington's licensing procedures for physicians. RCW 18.71.021 requires that individuals obtain a valid license before practicing medicine within the state. Applicants for a license must (1) pay a fee, RCW 18.71.040; (2) meet eligibility requirements, RCW 18.71.050; (3) successfully complete an examination administered by the Washington state medical quality

assurance commission, RCW 18.71.070; and (4) periodically renew the license, RCW 18.71.080.

But RCW 18.71.030 provides exemptions to the licensing requirements, stating in relevant part:

[N]or shall anything in this chapter be construed to prohibit:

....

(6) The practice of medicine by any practitioner licensed by another state or territory in which he or she resides, provided that such practitioner shall not open an office or appoint a place of meeting patients or receiving calls within this state.

Given the language of chapter 18.71 RCW, there is only one reasonable interpretation of the term "licensed." Our licensing scheme differentiates between physicians who are licensed in the state and those who are licensed in another state but who are permitted to practice medicine in Washington. As used in chapter 18.71 RCW, then, the term "licensed" is not synonymous with "permitted" or "allowed." Rather, physicians "licensed" under chapter 18.71 RCW met the qualifications of our regulatory guidelines and received a license from the State of Washington.

Accordingly, we hold that only those physicians validly licensed in Washington may prescribe medical marijuana to persons in this state.

Result: Affirmance of Skamania County Superior Court conviction of Sharon Lee Tracy for manufacturing marijuana and possessing more than 40 grams of marijuana.

LED EDITORIAL COMMENTS:

1) The osteopath licensing statute would be analyzed in the same way

Because no physician in this case was an osteopath, the Court does not address chapter 18.57 RCW, the osteopath licensing statute. The analysis would be the same, we believe, under chapter 18.57 RCW.

2) Federal law noted by Tracy Court

In a footnote, the Tracy Court notes as follows the possibility of a prosecution under federal law notwithstanding a state's medical marijuana law:

Persons who "manufacture, distribute, dispense, or possess any controlled substance," including marijuana, may be subject to federal prosecution. See Gonzales v. Raich, 125 S.Ct. 2195 (2005) Aug 05 LED:03 (holding that the Controlled Substances Act, 21 U.S.C. § 801 et seq., constitutes a valid exercise of Congressional power under the commerce clause).

(3) FATHER'S VOYEURISM CONVICTION UPHELD AGAINST HIS CONSTITUTIONAL AND SUFFICIENCY-OF-THE-EVIDENCE CHALLENGES – In State v. Stevenson, 114 Wn. App. 699 (Div. II, 2005), the Court of Appeals rejects a voyeurism defendant's arguments that the voyeurism statute: 1) on its face unconstitutionally restricts freedom of thought; 2) is unconstitutionally vague and overbroad as applied to his conduct; and 3) does not apply to his conduct in this case.

The Stevenson Court describes the facts of the case as follows:

T.S. is Stevenson's 22-year-old daughter. At the time of the incident, she lived in her father's home.

On June 8, 2003, T.S. wore only underwear as she sunbathed in the back yard of the home. Her father saw her sunbathing, so she quickly covered herself. Stevenson then went into the house.

The next day, as T.S. rushed to leave for work, she walked to the shower in a t-shirt. She spoke with her father on her way to the shower, telling him her plans for the day.

The bathroom had two doors, one leading to the kitchen and the other leading to a utility room. The door to the utility room had a window. Obscuring blinds covered the window on the utility room side of the door.

Hanging from a steel rod, a shower curtain covered most of the shower. But the too-small curtain left a gap.

T.S. undressed and got into the shower. After showering for about nine minutes, she reached for the soap and saw a hand on the blinds. The blinds parted and she saw glare from eyeglasses. She recognized the eyeglasses as those of her father. Startled, she stepped into a portion of the shower where she could not be seen, but where she could look through the gap in the curtain. She watched until the hand disappeared, between 10 and 20 seconds later.

After she was certain that her father had left, she dried off, dressed, and called the police. She spoke with Sergeant Buettner, relating what had happened. Buettner advised T.S. to go to a friend's house. Buettner then went to the Stevenson home with Detective Robison.

Stevenson invited the officers inside. Buettner advised Stevenson that he was not under arrest, but he warned Stevenson of his Miranda rights.

Stevenson related the June 8 events to the officers. He stated that he walked into the back yard and was surprised to find T.S. sunbathing in a state of undress. Sexually aroused, he went into the house and into an office area. The office had a window from which he watched her sunbathe while he masturbated.

Stevenson also made a statement about the June 9 events. On the way to the shower, T.S. walked through the kitchen. Stevenson believed that she was not wearing a bra because he could see her breasts through the t-shirt. He became sexually aroused.

When T.S. went into the bathroom, he "felt drawn" to the utility room where he could watch her shower. Buettner asked whether Stevenson intended to masturbate in the utility room. Stevenson responded, "if I said I was back there for any other reason, I'd be lying."

Stevenson told Buettner that he looked between the blinds and the wall, trying to see T.S. in the shower. From this angle, he could only see her arm or shoulder.

Stevenson also re-enacted his actions for the officers, allowing them to photograph his re-enactment. Stevenson stated that he then moved to the

center of the blinds, separating them to see more of T.S.'s body. Once again, he re-enacted his actions and allowed police to take pictures.

Stevenson explained that once he looked into the shower, he realized his actions were wrong. He then left the utility room.

The voyeurism statute, RCW 9A.44.115 as amended in 2003, provides, in relevant part:

Subsection (1) defines the pertinent terms:

(1) As used in this section:

...

(c) "*Place where he or she would have a reasonable expectation of privacy* " means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

....

(e) "*Views* " means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly *views*, photographs, or films: (a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a *place where he or she would have a reasonable expectation of privacy*; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

[Emphasis added]

After extensive analysis (not addressed here) disposing of the defendant's constitutional challenges to application of the statute, the Stevenson Court rejects defendant's challenges to the sufficiency of the evidence, explaining as follows:

According to Buettner, Stevenson admitted that he became sexually aroused after T.S. walked through the kitchen in a t-shirt. Stevenson "'felt drawn'" to the utility room, intending to masturbate while watching T.S. shower. He admitted that he saw her arm or shoulder when looking between the blinds and the wall. He then moved to the center of the blinds, which he separated to see more of her body. T.S. testified that she saw Stevenson's hands on the blinds for 10 and 20 seconds. Further, Stevenson re-enacted these events, posing for photographs. At trial, T.S. testified that Stevenson acted without her consent. As such, substantial evidence supports the findings of fact.

Result: Affirmance of Skamania County Superior Court conviction of David Trent Stevenson for voyeurism committed against a family member contrary to RCW 9A.44.115 and RCW 10.99.020.

NEXT MONTH

The November 2005 LED will digest, among other recent appellate decisions, the August 29, 2005 decision by the Court of Appeals, Division One, in State v. Mote, a decision that factually distinguishes the Washington State Supreme Court decision in State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**. In Rankin, the Supreme Court held that article 1, section 7 of the Washington constitution generally prohibits officers from requesting voluntary production of ID (or requesting voluntary giving of identification information) from non-violator passengers in vehicles that have been stopped for traffic violations. Mote holds that the Rankin rule does not apply to circumstances where officers contact occupants of parked vehicles under non-seizure circumstances, and that it is not a seizure for officers to ask for voluntary production of ID or to ask for voluntary giving of identification information in such circumstances.

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://www.:/www4law.cornell.edu/uscode>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2005, is at [<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>]. 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>].
