



Law Enforcement

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Digest

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BRIEF NOTES FROM THE 9TH CIRCUIT, U.S. COURT OF APPEALS

(1) DELIBERATE TWO-STEP INTERROGATION – UNMIRANDIZED CUSTODIAL QUESTIONING FOLLOWED BY MIRANDIZED QUESTIONING – HELD TO VIOLATE MIRANDA – In U.S. v. Williams, 435 F.3d 1138 (9th Cir. 2006), the Ninth Circuit of the U.S. Court of Appeals rules that federal officers violated Miranda, as interpreted by the U.S. Supreme Court in Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**, when they deliberately used a two-step custodial interrogation scheme – un-Mirandized questioning followed by Mirandized questioning in the investigation of a person suspected of making a false statement in a passport application.

In light of the split of voting in that case, the U.S. Supreme Court’s decision in the Seibert case is not crystal clear. However, the Ninth Circuit concludes in Williams that Seibert’s effect is that whenever law enforcement officers have deliberately (rather than inadvertently) engaged in the two-step custodial interrogation process, as happened here, the Court is generally going to hold the defendant’s statements given during both steps of the interrogation to be the product of unlawful questioning.

The Court does note that it will look, on a case-by-case basis in these deliberate-two-step-questioning cases, at the following: 1) completeness and detail of the pre-warning custodial interrogation; 2) any overlapping content of pre- and post-warning custodial interrogations; 3) the timing and circumstances of both custodial interrogations; 4) the continuity of police personnel in the two sessions; 5) the extent to which the interrogator’s questions treated the second round of custodial interrogation as continuous with the first; and 6) whether any curative measures were taken, such as advising the suspect to the effect that none of the statements made in the first round of questioning will be admissible.

But again, the Williams Court indicates that the general rule under Seibert is that all of the statements from both sessions should be held to be the product of a Miranda violation.

Result: Reversal of California U.S. District Court convictions of Tashiri Wayne Williams for making a false statement in his passport application and for two other federal false-statement crimes.

(2) FAILURE-TO-PROTECT DECISION GROUNDED IN FEDERAL CONSTITUTION’S DUE PROCESS CLAUSE – ADVERSE TO LAW ENFORCEMENT OFFICER – IS RE-ISSUED in Kennedy v. City of Ridgefield, ___ F.3d ___, 2006 WL 539128 (2006).

The September 2005 LED reported on a Ninth Circuit U.S. Court of Appeals decision (a 2-1 decision by a 3-judge panel) in a section 1983 civil rights action against a law enforcement officer. We reported there that the Court of Appeals had upheld a failure-to-protect decision of the U.S. District Court for the Western District of Washington. The ruling was that the police officer was not entitled to qualified immunity for an alleged constitutional due process violation. The case was grounded in a claim that the officer increased the risk of assault by giving assault victims a “false sense of security.” Kennedy v. City of Ridgefield, 411 F.3d 1134 (9th Cir. 2005) **Sept 05 LED:12**.

On March 7, 2006, the three-judge panel of the Ninth Circuit withdrew its earlier opinion but issued a revised 2-1 decision, again ruling that the officer was not entitled to qualified immunity. Also on March 7, 2006, the Ninth Circuit denied the City of Ridgefield's request for further review of the decision by a full panel of Ninth Circuit judges. Eight of the Ninth Circuit judges strenuously dissented from the March 7, 2006 decision to deny full-panel review.

In the September 2005 LED entry, we summarized the majority opinion's description of the factual and procedural background of the case, we excerpted from the majority's analysis, and we briefly described the dissenting judge's opinion. We will not provide a summary or excerpts in this LED entry. For those who wish to read the latest opinions from the Ninth Circuit in this case, a website address for Ninth Circuit opinions (arranged by date of issuance of opinions) is provided at page 24 of this LED.

Status: Time remains for the City of Ridgefield to seek review by the U.S. Supreme Court.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

RCW 9A.42.100 PROHIBITION AGAINST ENDANGERING DEPENDENT CHILDREN DURING METHAMPHETAMINE MANUFACTURE IS NOT LIMITED TO PARENTS, CUSTODIANS OR CAREGIVERS OF SUCH CHILDREN – In State v. Cooper, ___ Wn. 2d ___, ___ P.3d ___ (2006), the Washington Supreme Court rules 8-1 (Justice Sanders dissenting) that RCW 9A.42.100 applies to any person – not just parents, custodians or caregivers of a dependent child or children – where such person knowingly or intentionally exposes such child or children to methamphetamine or its ingredients.

RCW 9A.42.100 provides as follows:

A person is guilty of the crime of endangerment with a controlled substance if the person knowingly or intentionally permits a dependent child or dependent adult to be exposed to, ingest, inhale, or have contact with methamphetamine or ephedrine, pseudoephedrine, or anhydrous ammonia, that are being used in the manufacture of methamphetamine.

The Supreme Court majority opinion in Cooper summarizes the case and the Supreme Court's ruling as follows:

In addition to various counts involving manufacture, possession, and delivery, a jury found Richard Cooper guilty of endangering his girl friend's children [ages 2 and 4] by operating a methamphetamine manufacturing operation in the children's residence. RCW 9A.42.100, the child endangerment statute, makes it a crime for a person to knowingly or intentionally expose a dependent child to methamphetamine. Cooper argues that the term "person" in RCW 9A.42.100 encompasses only a child's parent, custodian, or caregiver, not him. We disagree. We affirm the Court of Appeals and hold that by its plain language, RCW 9A.42.100 applies to any person who knowingly or intentionally exposes a child to methamphetamine or its ingredients. (Emphasis added)

Result: Affirmance of unpublished Court of Appeals decision and of Columbia County Superior Court convictions (two counts) of Richard L. Cooper for violating RCW 9A.42.100. (Cooper was also convicted of other drug crimes that were not the subject of his appeal. He did, however, get relief from the Supreme Court on a school zone sentencing enhancement issue that was conceded by the State and is not addressed in this LED entry.)

WASHINGTON STATE COURT OF APPEALS

**DUI ARRESTEE CHANGED HIS MIND ABOUT CONTACTING COUNSEL AND THEREFORE
CRRLJ 3.1 WAS NOT VIOLATED BY LAW ENFORCEMENT OFFICER**

State v. Kronich, ___ Wn. App. ___, 128 P.3d 119 (Div. III, 2006)

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

Deputy Sheriff Jeff Jenkins was behind Mr. Kronich's vehicle at a train crossing waiting for a train to pass. While waiting, Deputy Jenkins checked Mr. Kronich's license plate by radio and learned Mr. Kronich's license was suspended. Deputy Jenkins verified Mr. Kronich's description and then stopped the vehicle. Mr. Kronich exited the vehicle and appeared "lethargic." His eyes were half-closed and he appeared sleepy and very slow moving.

Deputy Jenkins smelled a strong odor of intoxicants on Mr. Kronich's breath. Mr. Kronich was arrested for driving with a suspended license. Deputy Jenkins saw numerous open beer containers in the car. Mr. Kronich refused a breath test, blood test, and field sobriety tests. Deputy Jenkins completed a DUI Arrest Report box showing, "Attorney Requested?" Deputy Jenkins checked "Yes." Then, the Deputy filled in "No" in the box, "Attorney Contacted?" Within the "Attorney's Name" box, the deputy noted, "Did not want to call."

Mr. Kronich was charged with driving under the influence of intoxicating liquor and/or drugs and third degree driving while license suspended. Before trial, Mr. Kronich unsuccessfully sought suppression of his breath test refusal, arguing denial of access to counsel. The court reasoned Mr. Kronich accepted the deputy's offer to contact an attorney, but "for some reason Mr. Kronich decided that he didn't want to call anybody." The court concluded he waived his right to access to counsel, noting, "All the State has to do or the law enforcement agency has to do is help provide access." Further, the court reasoned the defense failed to make "the case that total access to an attorney was denied."

During trial, the State admitted a DOL Order of Revocation of Mr. Kronich's driving privileges and a cover letter from the DOL custodian of records, certifying that DOL records indicated Mr. Kronich: "Had not reinstated his/her driving privilege. Was suspended/revoked."

Mr. Kronich was convicted as charged. On RALJ review, the superior court affirmed Mr. Kronich's convictions, finding the district court "applied the wrong standard regarding who has the burden of producing evidence in the suppression hearing." But, the superior court concluded, the error was harmless because even without the evidence of Mr. Kronich's refusal to submit to the breath test, substantial evidence existed to show intoxication.

ISSUE AND RULING: Where substantial evidence establishes that the DUI arrestee changed his mind about contacting an attorney, is there no basis for finding a violation of the right-to-counsel provisions of CrRLJ 3.1? (ANSWER: Yes, no violation occurred)

Result: Affirmance of Spokane County Superior Court conviction of Kyle K. Kronich for DUI and third degree DWLS.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The issue is whether the trial court erred in denying Mr. Kronich's suppression motion to exclude evidence of his refusal to perform the breath test on the grounds he was denied access to counsel.

...

An arrested driver subject to a breath test must be advised of the Miranda rights and right to access counsel under CrRLJ 3.1. State v. Staeheli, 102 Wn.2d 305 (1984). "If the defendant requests the assistance of counsel, access to counsel must be provided before administering the test." According to CrRLJ 3.1(c)(2): "At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer." The remedy for denying the right to counsel is suppression of the evidence acquired after the violation.

In denying Mr. Kronich's motion to suppress, the trial court reasoned under the facts Mr. Kronich accepted the deputy's offer to contact an attorney, but "for some reason Mr. Kronich decided that he didn't want to call anybody."

...

Here, Deputy Jenkins completed a DUI Arrest Report. On the report, it asks, "Attorney Requested?" Deputy Jenkins checked the box "Yes." Then, the report asks, "Attorney Contacted?" The deputy checked, "No." Within the "Attorney's Name" box, the deputy noted, "Did not want to call." The DUI report provides substantial evidence that Deputy Jenkins offered access to counsel and Mr. Kronich accepted, but then changed his mind. Mr. Kronich's indecisiveness is not a surprise given the deputy's observation that Mr. Kronich had been drinking, was lethargic, and very slow moving.

Accordingly, substantial evidence shows Mr. Kronich changed his mind about his desire for counsel. While CrRLJ 3.1 requires the State to offer access to counsel, it is not required to force the defendant to accept. See State v. Halbakken, 30 Wn. App. 834 (1981) (in DUI cases, the State has no duty to provide counsel in the absence of a request). The rule was not violated.

[Some citations omitted]

MINOR IN POSSESSION CONVICTION REVERSED ON GROUNDS THAT THE MINOR'S CONSTRUCTIVE POSSESSION OF ALCOHOL WAS NOT PROVEN

State v. Roth, ___ Wn. App. ___, 128 P.3d 114 (Div. III, 2006)

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

On January 31, 2004, David Roth went to a party with his friend, Mallory Bohn. Ms. Bohn testified that she knew Mr. Roth because the two went to school together. According to her testimony, there was alcohol in the refrigerator at the party that was available to anyone and there were no adults present at the party. Ms. Bohn claimed that she did not see Mr. Roth consume any alcohol while they were at the party together. She also did not see him carrying any alcohol that evening. She did observe him leaving with Mike Keeling.

After calling a cab, Mr. Roth left the party with Mr. Keeling in the early morning hours. Mr. Roth testified that Mr. Keeling was very intoxicated at that time. As the two were waiting for the cab, [police officer A] encountered them while on patrol.

[Officer A] testified Mr. Roth was swaying as he walked and further testified that he could smell alcohol coming from Mr. Roth's person. This odor became stronger when Mr. Roth was speaking to [Officer A]. It was [Officer A]'s belief that the smell of alcohol was coming from Mr. Roth and was not emanating just from Mr. Roth's clothing.

[Officer A] testified that he had asked for and received Mr. Roth's identification (I.D.) during the course of his investigative stop. Upon examining the birth date on the I.D. and smelling the odor of alcohol coming from Mr. Roth's person, [Officer A] issued Mr. Roth a citation for minor in possession of alcohol. [Officer A] never testified in court as to Mr. Roth's exact date of birth. He did, however, indicate that he had written Mr. Roth's date of birth down in his report. When [Officer A] issued the citation for minor in possession to Mr. Roth, Mr. Roth only replied that he did not think the citation was fair since he and Mr. Keeling had opted to take a cab rather than driving.

[Officer B] was present when [Officer A] was questioning Roth, and was asked to keep an eye on Mr. Roth while [Officer A] questioned Mr. Keeling. [Officer B] testified that he smelled alcohol on Mr. Roth's breath and his motions appeared to be slow. He further testified that Mr. Roth appeared to be intoxicated. Upon searching Mr. Keeling, the officers found approximately five or six cans of beer on his person. They did not find any beer on Mr. Roth's person.

Mr. Roth claimed that the odor of alcohol that the officers detected was the result of him taking care of Mr. Keeling, who was intoxicated, and from beer being spilled on him when the beers were poured out while talking to [Officer A]. He asserted that he had not been drinking at all that evening. He further suggested that his slow action and intoxicated appearance could have been the result of his being tired and needing sleep.

The trial court found Mr. Roth guilty of minor possessing, consuming, or acquiring liquor based on his constructive possession of alcohol. However, the court also found that there was insufficient evidence to find beyond a reasonable doubt that Mr. Roth had actually consumed alcohol. **[LED EDITOR'S NOTE: This underlined sentence means that Mr. Roth's conviction could be supported on appeal only on grounds that he had been in possession of alcohol.]**

ISSUE AND RULING: Is there sufficient evidence in the record to establish that Mr. Roth was in constructive possession of the nearby alcohol for purposes of the charge of MIP? (**ANSWER:** No, while the officer had probable cause that justified issuance of a citation, there was insufficient evidence in light of the trial court's ruling on another issue in this case, of constructive possession of the alcohol to support a conviction under the beyond-a-reasonable-doubt proof standard)

Result: Reversal of Grant County Superior Court MIP conviction of David Dean Roth.

MIP STATUTE

RCW 66.44.270 provides as follows:

(2)(a) It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

(b) It is unlawful for a person under the age of twenty-one years to be in a public place, or to be in a motor vehicle in a public place, while exhibiting the effects of having consumed liquor. For purposes of this subsection, exhibiting the effects of having consumed liquor means that a person has the odor of liquor, on his or her breath and either: (i) Is in possession of or close proximity to a container that has or recently had liquor in it; or (ii) by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibits that he or she is under the influence of liquor.

INTRODUCTORY LED EDITORIAL NOTE: This case did not involve a charge by the prosecutor under subsection (2)(b) (be[ing] in a public place...while exhibiting the effects of having consumed liquor.”). And the trial court ruled here as a matter of law that there was insufficient evidence of consumption of alcohol by the defendant. Thus, the only question on appeal was whether Mr. Booth was in possession of the alcohol.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A defendant possesses a controlled substance when he knows of the substance's presence, the substance is immediately accessible, and the defendant exercises dominion and control over the substance. State v. Hornaday, 105 Wn.2d 120 (1986). Possession may be either constructive or actual. State v. Dalton, 72 Wn. App. 674 (1994) **Sept 94 LED:14 [Evidence of prior presence at kegger plus beer-breath plus evidence of intoxication was sufficient to support MIP conviction – LED Ed.]**. Mere presence of alcohol in one's system is not enough on its own to support a conviction. Dalton. However, if evidence of prior consumption is combined with other corroborating evidence, this may be sufficient to prove possession beyond a reasonable doubt. No single factor is determinative of the existence of dominion and control.

Since there was no alcohol found on Mr. Roth's person, and therefore no actual possession, the State was required to show that Mr. Roth had constructive possession of alcohol. Mr. Roth challenges the trial court's finding that he was in constructive possession of alcohol based in part on his argument that the pertinent statute, RCW 66.44.270(2)(a), requires the possession to occur at the moment of inquiry by the officer. In support of this position, Mr. Roth cites to the language of the statute as being in the present tense, and to the case of Hornaday.

In Hornaday, the court found that possession must occur in the officer's presence for purposes of RCW 66.44.270 based on another statutory provision regarding warrantless misdemeanor arrests. At the time Hornaday was decided, RCW 10.31.100 provided that a police officer could arrest a person for a misdemeanor only when the offense was committed in the presence of the officer. In 1987, this provision was amended to permit warrantless misdemeanor arrests when the officer has probable cause to believe that a person has committed or is committing a misdemeanor involving the acquisition, possession, or consumption of alcohol by a minor. Because the legislature clearly altered the language of RCW 10.31.100 to permit misdemeanor arrests when the officer has probable cause to believe that the minor *has committed* the offense of minor in possession of alcohol, Mr. Roth's assertion that the possession must be in the presence of law enforcement lacks merit.

The citation was properly issued though the possession was not in the officer's presence. Nevertheless there is insufficient evidence to support the trial court's finding that Mr. Roth was in constructive possession of alcohol. There was testimony at trial that indicated that Mr. Roth appeared intoxicated. However, the trial court concluded that there was insufficient evidence presented to establish consumption beyond a reasonable doubt. In the absence of proof of actual consumption of alcohol by Mr. Roth, the State's evidence merely demonstrated Mr. Roth's proximity to alcohol. Mere proximity, without more, is insufficient to show the dominion and control necessary to establish constructive possession. **[LED EDITORIAL COMMENT: See our comments below suggesting that the above-underlined sentence may reflect flawed analysis and, in any event, does not undercut the relatively relaxed standard for proving MIP possession, under the analysis of several Court of Appeals decisions.]**

In making its determination that Mr. Roth was in constructive control of alcohol, the court relied on the testimony from Ms. Bohn and Mr. Roth. Ms. Bohn testified that Mr. Roth had been at a party where no adults were present. She also stated that alcohol was in the refrigerator. She testified that she did not see Mr. Roth drinking. Mr. Roth likewise testified that he had not been drinking. He also testified that he had the odor of alcohol on his person because he had been ordered to pour out the alcohol that his companion had on his person. (The officers testified that they smelled the odor, however, before he poured out the beer.) He also said that he was very tired at the time. Apparently the court believed Mr. Roth and Ms. Bohn's testimony as when asked to specifically rule on the matter by the prosecutor, the judge stated that the State had not proven Mr. Roth had been drinking beyond a reasonable doubt.

This court in previous cases has ruled that attending a party and being observed in the presence of other juveniles drinking alcohol and being stopped immediately after leaving the premises, exuding the odor of alcohol coupled with circumstantial evidence is sufficient to prove the charge of being in possession of alcohol. See Dalton. In Dalton, for example, there was no dispute regarding the actual consumption of alcohol. Here, however, that necessary nexus between circumstantial evidence of having consumed alcohol and constructive possession does not exist. Having been found not guilty of having consumed alcohol, the connection between having access to alcohol and having availed oneself of that access is not present. Merely being in a room with a refrigerator full of beer, in another person's house, with no proof that the minor brought the beer or exercised dominion or control over the beer will not support a finding of constructive possession.

In Dalton, the exercise of dominion and control was provided by the subsequent evidence of having consumed alcohol. No such evidence was proven here beyond a reasonable doubt.

Under the totality of these circumstances, and when the evidence is viewed in the light most favorable to the State, there was sufficient evidence to permit a rational trier of fact to find that on February 1, 2004, Mr. Roth was under the age of 21. However, the evidence presented by the State was insufficient to establish that Mr. Roth had exercised dominion and control over any alcohol. As such, the State lacked competent proof of constructive possession in this case.

The protection against double jeopardy prevents the retrial of a defendant whose conviction is overturned based on the insufficiency of the evidence. Therefore, we reverse Mr. Roth's conviction with prejudice.

[Some citations omitted]

LED EDITORIAL COMMENT: The Roth Court discusses State v. Dalton, where the appellate court ruled that there was sufficient evidence to prove possession of alcohol by the minor. Two other cases finding sufficient proof of possession of alcohol for purposes of MIP prosecution are: State v. Preston, 66 Wn. App. 494 (Div. II, 1992) Oct 92 LED:08 (defendant's admission to prior drinking and officer's observation of discarding of empty beer bottles was sufficient evidence to support conviction for MIP); and State v. Fager, 73 Wn. App. 617 (Div. III, 1994) Sept 94 LED:12 (beer breath plus signs of intoxication plus presence of closed beer bottles within reach was sufficient evidence to support conviction for MIP). Remember that LEDs from 1992 forward are available on the Criminal Justice Training Commission LED webpage.

Although the legal question is a difficult one, we believe that in analyzing the constructive possession issue the Court of Appeals in Roth probably gave erroneous spillover effect to the trial court's ruling that the defendant could not be convicted under the alternative, "exhibiting the effects/intoxication" variation of the MIP offense.

In any event, we believe that the Roth decision does not undercut prior Court of Appeals rulings in Preston, Fager, and Dalton to the effect that there is sufficient evidence to support arrest, citation and conviction if there is: 1) evidence that a minor has been drinking alcohol (e.g., beer breath, bloodshot eyes, unsteadiness); plus 2) evidence of the minor's contemporaneous close proximity to alcohol. As always, we suggest that officers consult their prosecutors and/or legal advisors.

ANIMAL CRUELTY – EVIDENCE THAT YOUNG MEN SHOT DOG SEVERAL TIMES WITH ARROWS HELD SUFFICIENT TO SUPPORT CONVICTIONS, DESPITE THEIR CLAIMS THAT THEY WERE JUST "PUTTING DOWN" A STRAY DOG

State v. Paulson, ___ Wn. App. ___, 128 P.3d 133 (Div. II, 2006)

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

Facts

On March 8, 2004, Anthony Flora, a substitute custodian at Wilkeson Elementary School, spotted Loney and Paulson walking a dog near the school. He watched as they tied the dog to a tree and shot it with an arrow. He then saw Loney shoot two arrows and then hand the bow to Paulson, who stepped back six or eight feet from the dog and shot at it. Flora and the school secretary called the police. After calling, Flora went back outside where he saw Loney, who again had the bow, shoot at the dog. Paulson then pulled the arrow out of the dog and handed it to Loney, who shot the dog again. Flora said he did not hear the dog bark or whimper, and he saw the dog go limp after the first shot.

Wilkeson Deputy Marshal Earl Greene responded to the school. At the scene, Flora identified Loney and Paulson as the men he saw shooting at the dog. When Marshal Greene questioned the two, they said that they had shot arrows at a bale of hay for shooting practice. They denied knowing anything about a dog.

Greene let Loney and Paulson leave but continued to investigate. When he found blood on a tree by the school, he went to Loney's and Paulson's home to further question them. At that point, Loney admitted that he and Paulson had tied the dog to the tree and shot it twice. He told Greene that they needed to put the dog down. Greene also questioned Paulson, who confessed that he and Loney shot the dog but that he did not know how many times they shot it.

Greene testified that at that point he did not know whether a crime had been committed, so he asked Loney and Paulson to fill out written statements. The following day Greene returned to retrieve the statements. He determined that the two had committed a crime, so he administered Miranda warnings and continued to talk to them. But he did not arrest them at that time.

Greene returned to Loney's and Paulson's house for a third time because the initial statements they had written were illegible. He asked them for additional statements, which they agreed to write. Greene read them their Miranda rights again. In Loney's second statement, he admitted to shooting the dog and stated that he shot it once or twice, but could not remember exactly how many times. In his written statement, Paulson also admitted shooting the dog. He admitted that he shot it two to three times and that he threw the dog into the river. The dog's body was never found.

Procedural background

On March 19, 2004, the State charged Loney and Paulson by information with one count each of first degree animal cruelty, asserting that they acted as accomplices on March 8, 2004, and unlawfully, feloniously, and intentionally inflicted substantial pain to, caused physical injury to, or killed an animal by means causing undue suffering, contrary to RCW 16.52.205(1)(b) and (c).

...

At trial, Loney testified that the dog, a Siberian Husky, showed up on their front porch about a week and a half before the incident. Paulson's father, their landlord, told them they could not have dogs in the house so Loney paid a friend to take care of the dog he already had. He said that they tried to get rid of the stray dog but they could not find anyone to take it. He and Paulson decided that they needed to put the stray down and decided to shoot it with a bow and arrow. He testified that Paulson shot it once and it went limp but, after Paulson's first shot, Loney was not sure the dog was dead so he shot it a second time. He said that together they only shot it twice and, although he admitted that they retrieved their only two arrows from its body, he denied shooting it multiple times.

The court found Loney and Paulson guilty of first degree animal cruelty, an unranked class C felony, and sentenced them to nine months in jail. The trial court converted 30 days' confinement to 240 hours' community service under RCW 9.94A.680 and required, under RCW 16.52.200(6), completion of an animal cruelty prevention program. It allowed them up to 24 months to complete the animal cruelty prevention program and the community service under court supervision.

ISSUE AND RULING: Does the evidence that the young men shot the dog several times with arrows support the convictions for animal cruelty under RCW 16.52.205, despite their claims that they were just "putting down" a stray dog? (**ANSWER:** Yes)

Result: Affirmance of Pierce County Superior Court convictions of Steven Lee Paulson and Troy Lee Loney for first degree animal cruelty.

STATUTORY DEFINITION OF "ANIMAL"

The term "animal" is defined at RCW 16.52.011 as "any nonhuman mammal, bird, reptile or amphibian."

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 16.52.205(1)(c) requires that the State prove that Loney and Paulson acted intentionally to inflict undue suffering and to kill the dog. It is not disputed that Loney and Paulson intentionally killed the dog. But they argue that (1) they did not intentionally cause undue suffering and (2) that they did not cause undue suffering. Their arguments are unpersuasive.

The statute does not define "undue suffering." Thus, this court must give the term its ordinary dictionary meaning. "Undue" means: "Excessive or unwarranted." BLACK'S LAW DICTIONARY 1563 (8th ed.2004). And "suffer" means: "To experience or sustain physical or emotional pain, distress, or injury." BLACK'S at 1474. Division One of this court has ruled that the phrase "undue suffering" in RCW 16.52.205 is not unconstitutionally vague. State v. Andree, 90 Wn. App. 917 (1998) **March 99 LED:16**.

The defendant's acts in Andree are remarkably similar to Loney's and Paulson's. Andree killed a kitten by stabbing it nine times. Andree argued that RCW 16.52.205 was unconstitutionally vague "because the statute does not proscribe due suffering, and because it does not indicate how much suffering would be either excessive or immoderate when causing ... death, a person of common intelligence must guess how much suffering would be unusual when committing one of the proscribed acts."

In rejecting Andree's challenge to the statute, Division One of this court stated:

As the phrase applies only to killing an animal, the question in this case, therefore, is whether a person of ordinary intelligence would understand that killing a kitten by stabbing it nine times with a hunting knife would cause undue suffering.

Here, the court heard eyewitness testimony that Loney and Paulson shot the dog multiple times, pulling out the arrows between shots. And Loney testified that they only had two arrows. The trial court determined that Flora's eyewitness testimony that Loney and Paulson repeatedly shot the dog was credible because (1) he had a definite memory of the incident; (2) he was at a reliable vantage point; (3) his view was not blocked and there was sufficient light; and (4) he was not biased against Loney and Paulson. Since decisions of credibility are not subject to review, we abide by the trial court's decision.

When confronting the issue of intent to cause undue suffering in Andree, the court concluded: "[W]hile specific intent cannot be presumed, a [factfinder] may infer Andree intended to cause the kitten undue suffering where his 'conduct plainly indicates the requisite intent as a matter of logical probability.'" Here, as the court found in Andree, the act of tying an animal to a tree and repeatedly shooting arrows into it " 'plainly indicates the requisite intent as a matter of logical probability.' "

It is difficult to imagine that any dog, especially one who had followed Loney and Paulson around for almost two weeks, would not suffer unduly with such a killing scheme. The means show an intent to cause undue suffering because they would not have continued to shoot at it if it had died with the first shot. Furthermore, pulling the arrows out of a living dog to shoot it repeatedly aggravated the suffering. It was certainly within Loney's and Paulson's ability to understand that these repeated actions intentionally inflicted suffering in the course of killing the dog. Thus, the trial court could reasonably conclude that they possessed the requisite intent.

Interpreting this evidence in a manner most favorable to the State, the record clearly establishes sufficient evidence of Loney's and Paulson's intent to cause undue suffering and their guilt under RCW 16.52.205(1).

[Some citations omitted]

BURGLARY CONVICTION IS HELD SUPPORTED BY TESTIMONY OF REAL ESTATE AGENT WHO HAD THE ONLY KEYS TO UNOCCUPIED HOME, AS SHOWING DEFENDANT'S LACK OF PERMISSION TO BE ON PROPERTY; ALSO, DEFENDANT'S "ABANDONED PROPERTY" DEFENSE IS REJECTED WHERE THE UNOCCUPIED HOME WAS BEING PREPARED FOR SALE AT THE TIME OF THE ALLEGED CRIME

State v. J. P., 130 Wn. App. 887 (Div. III, 2005)

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

Police were dispatched to a burglary-in-progress call at a residence at 1119 North Madelia in Spokane at 8 p.m. on February 9, 2004. Officers took three boys into custody who were seen leaving the residence through a window. Looking through an open window, officers detected the odor of fresh paint and saw paint running down the windows as well as on the walls, countertops, and refrigerator.

Police identified one of the boys as J.P. and interviewed him. J.P. waived his constitutional rights and gave a statement. He admitted that he painted a leaf-like design on one of the walls and the two other boys painted on the walls and windows with paint they found inside. When the officers concluded their investigation, they were unable to contact a responsible party to secure the residence. According to procedure, an officer called Spokane City Code Enforcement and reported that the house was "unsecured and abandoned."

At trial, Sue Melcher, an agent for Tomlinson-Black Realty, testified that in January 2004, she was contracted by Ocwen, a company for which she handles repossessed homes on behalf of the Department of Veterans Affairs, to serve as the listing agent for the residence at issue. Thereafter, she changed the locks on the residence and placed her personal lock box on the door. On the date of this incident, the only keys to the residence were in Ms. Melcher's possession, and she was the only person with the combination to the lock box. Ms. Melcher informed the court that she does not know J.P. and she did not give him permission to be inside the residence.

J.P. was found guilty of third degree malicious mischief and residential burglary. The court entered findings of fact and conclusions of law.

ISSUES AND RULINGS: 1) Where the State's only evidence to show that the defendant did not have permission to be on the property is the testimony of a real estate agent with the only keys to the residence, is there sufficient evidence in the record to support defendant's conviction for burglary? (ANSWER: Yes); 2) Does the evidence establish the defendant's "abandoned property" defense where the unoccupied home was being prepared for sale? (ANSWER: No)

Result: Affirmance of Spokane County Superior Court conviction of J.P. for residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

In order to establish that J.P. committed residential burglary, the State had to prove two elements: (1) that he entered or remained unlawfully in a dwelling, and (2) that he intended to commit a crime against a person or property therein. A person enters or remains unlawfully if he does so without license, invitation, or privilege. Only the person who resides in or otherwise has authority over the property may grant permission to enter or remain.

Unlawful entry/presence

J.P. essentially claims on appeal that the testimony of the listing agent was insufficient proof that he entered or remained in the residence unlawfully because the State failed to establish a connection between the listing agent (Ms. Melcher), her employer (Ocwen), and the owner of the residence (Washington Trust Bank).

At trial, the defense made an evidentiary objection to Ms. Melcher's testimony, arguing that she could not testify as a "legal guardian" of the property without foundation evidence from the owner of the property that she was hired as a real estate agent and had some authority over the property. The State argued that Ms. Melcher should be allowed to testify concerning her "relationship to the property." The court allowed Ms. Melcher to testify. When the State began to examine Ms. Melcher concerning her employment as a listing agent for the property, the defense objected on the basis of hearsay. That objection was overruled. Ms. Melcher also mentioned she had the listing contract with her, which she testified engaged her services as a listing agent for the property on January 15, 2004. Although the document had not yet been offered as an exhibit, the defense objected to it as hearsay. The trial court asked the parties to clarify the purpose of the testimony. The defense advised that the State was required to prove there was no permission to enter or remain on the property and the evidence it had provided was hearsay. The State argued that it merely had to prove that the person in control of the property did not grant permission, and it could establish that Ms. Melcher had control. The court ruled that the State would have to provide additional foundation to show that Ms. Melcher had sufficient control and authority for these purposes.

Ms. Melcher went on to testify that because the house was being repossessed and was unoccupied, once she got the listing contract for the residence, she had the residence re-keyed and she placed a combination lock box on the front door and it was up to her to decide who would have access to that lock box, if anyone. She stated that she held the only keys. Ms. Melcher further advised that because the house was not on the market until March 2004, there was no reason for anyone to enter it, and she gave nobody permission to enter the residence including J.P., whom she did not know. J.P. did not argue that his entry or presence was authorized by permission, only that the State failed to prove that he did not have permission.

The unlawful entry element of burglary may be proved by circumstantial evidence, as may any other element. Here, J.P. was found crawling out of a window of a locked residence after he admittedly spray-painted graffiti on a wall. The evidence concerning his activity inside and his manner of exit can support an inference that his entry and presence was not "licensed, invited, or otherwise privileged." RCW 9A.52.010(3).

The owner was not required to testify that J.P. did not have permission to enter or remain in the residence. State v. Schneider, 36 Wn. App. 237 (1983). In fact, the owner of property can herself be guilty of burglarizing her own property under certain circumstances, such as when a landlord burglarizes the premises of her tenant. We look to the person with possession or occupancy of the property over the alleged burglar to determine if the accused's presence or entry is lawful.

Here, when giving the oral opinion, the trial judge reviewed the evidence given by Ms. Melcher--that she was in charge of selling the house, placed her locked box on the door, and gave no one permission to be on the property--and specifically determined that "when Ms. Melcher testified she didn't give anyone permission, it was in her rights to do so." This decision was within the court's province after considering the evidence. Once the testimony concerning Ms. Melcher's possession or occupancy of the property over J.P. was admitted and no further objection was raised, the only matter that remained concerning Ms. Melcher's testimony was the weight the trial judge wished to afford it.

Because the State established that Ms. Melcher had authority over the premises, it proved unlawful presence or entry. The evidence was sufficient.

"Abandoned property" defense

J.P. asserts that the abandonment defense that applies to the first degree criminal trespass statute, RCW 9A.52.070, is also applicable as a defense to residential burglary.

RCW 9A.52.090(1) provides that it is a defense to criminal trespass if "[a] building involved in an offense under RCW 9A.52.070 was abandoned." The State properly points out that RCW 9A.52.090 is clearly limited to the crime of criminal trespass by its terms. **LED EDITORIAL NOTE: Here, the Court of Appeals engages in analysis of whether the abandonment defense that is express in the trespass statute impliedly applies also to the burglary statute. In analysis that we have omitted from this LED entry, the Court concludes that the "abandoned property" defense does apply under the burglary statute.**

...

The trial court allowed J.P. to assert the abandonment defense. It ruled, however, that the house was vacant but not abandoned at the time.

"Abandoned" is not defined by the statute. See RCW 9A.52.010, .070. Undefined statutory terms are given their usual and ordinary meaning as may be found in the dictionary. "Abandon" is defined as "to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it" and "to give up ... by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2

(1993). "Abandoned" is defined as "given up: DESERTED, FORSAKEN <an [abandoned] child> <an [abandoned] house>."

J.P. argues the State failed to meet its burden simply because police referred to the residence as abandoned for the purposes of notifying code enforcement when they were unable to immediately contact an owner to secure it as was required by police protocol. But the testimony that the home was being prepared for sale was sufficient to show that it was not abandoned in that the owner, Washington Trust Bank, obviously did not intend to surrender the property or its interest in the property due to its condition or for any other reason.

[Some citations omitted]

CORPUS DELICTI OF MURDER HELD ESTABLISHED BASED ON THE TOTALITY OF THE EVIDENCE DESPITE THE FACT THAT ADVANCED DECOMPOSITION OF BODY OF DEFENDANT'S EX-GIRLFRIEND PREVENTED MEDICAL EXAMINER'S DETERMINATION OF WHETHER STRANGULATION OR DRUG OVERDOSE WAS THE CAUSE OF DEATH

State v. Rooks, 130 Wn. App. 787 (Div. I, 2005)

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

According to the medical examiner, Amanda's body had been at the remote location for one to three months. Because her body was in an advanced state of decomposition, the medical examiner was unable to determine the manner and cause of death. The medical examiner could not rule out strangulation or drug overdose as the cause of death. The examiner found evidence that Amanda ingested cocaine within a few days of her death.

Relying on the medical examiner's findings, Rooks filed a pretrial motion to exclude his ninety-minute statement to the police under the corpus delicti rule. In response, the State made an offer of proof and presented evidence independent of Rooks' confession to show Amanda's death was related to a criminal act. The trial court ruled the State met its burden to establish the corpus delicti and denied Rooks' motion to exclude his taped confession.

...

At trial, the State introduced evidence about Amanda's sudden disappearance on July 11, testimony about the custody dispute and testimony that Rooks physically and psychologically abused Amanda throughout their relationship. Rooks did not testify, but his taped statement in which he confessed to strangling Amanda on July 11 and dumping her body in a remote location, was admitted and played to the jury. The defense theory was that Amanda died of a cocaine overdose. The defense relied on the medical examiner's findings and testimony [of Rooks' mother] that Amanda had a history of drug use, including using cocaine. Rooks argued the jury should discount Rooks' confession because he was distraught and confused. The jury convicted Rooks of murder in the second degree.

Rooks had a long history of domestic violence and abusing Amanda [his girlfriend and the mother of their young child, M.R.], both verbally and physically. Amanda's family and friends witnessed verbal and physical abuse and Rooks' controlling behavior. At the time of her sudden disappearance on July 11, Amanda and Rooks were involved in a custody dispute regarding M.R. Rooks had absconded with M.R. from Alaska. When Rooks returned to Seattle with M.R., he reported Amanda was an unfit mother to CPS. Amanda moved back to

Seattle to regain custody of her son. Amanda told friends and family she was looking forward to M.R.'s birthday on July 18, and wanted to be as involved with him as she could. The guardian ad litem, who was appointed in the custody dispute, testified that Rooks wanted sole custody of M.R. because he wanted control of the parenting role and all decisions about his son. The guardian ad litem also testified that Rooks appeared to be obsessed with Amanda and expressed a desire to get back together with her.

The day Amanda disappeared she was awake and saw her father [Steve Gurr] before he left for work early that morning. Steve left his cell phone with Amanda so she could call Rooks' mother, Diane Schomburg, to confirm the picnic she had planned with M.R. for that day. Amanda called Diane Schomburg at 9:38 a.m. to confirm getting together for the picnic later that day. Around 11:00 that morning, a mail carrier attempted to deliver a package to the apartment. He heard noises from inside the apartment, but no one answered the door. Amanda did not show up for the picnic with M.R. that afternoon. The guardian ad litem testified that it was extraordinarily unusual for Amanda to not show up for her visit with M.R. because she had never missed a visit.

When Steve Gurr arrived home on the evening of July 11, Amanda was not there. The front door was unlocked, which was unusual. The stereo was still on, and it was turned up much louder than usual. Although Amanda typically left Steve a note if she went out, there was no note. Steve found her keys, purse and cigarettes behind her dresser, though she never left without them. There were no clothes missing and no drugs or drug paraphernalia in the apartment. Although Steve's cell phone was never found, it was not used after Amanda called Diane Schomburg on the morning of July 11.

In September, Amanda's body was found in a remote location, seventy-five yards from a public road in a heavily vegetated area next to a creek that was twenty feet from the service road. Amanda was partially clothed in jeans and a shirt was nearby, but she was not wearing any shoes. The medical examiner testified Amanda's body had been at that location for one to three months.

ISSUE AND RULING: Where the medical examiner was unable to determine the cause of death, does the totality of the evidence – including a long history of domestic violence between the defendant and the victim – nonetheless establish the corpus delicti of murder such that Rooks' confession to police was admissible in support of his conviction of murder in the second degree for the killing of his ex-girlfriend? (**ANSWER:** Yes)

Result: Affirmance of King County Superior Court conviction of Mark A. Rooks, Sr. for murder in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Rooks contends the trial court erred in admitting his taped confession under the corpus delicti rule. Rooks claims the corpus delicti was not established because independent evidence supported reasonable and logical inferences of both a criminal and a non-criminal cause of Amanda's death. The medical examiner testified he was unable to determine the cause of Amanda's death. The examiner found evidence that Amanda ingested cocaine within a few days of her death, and was unable to exclude either strangulation or cocaine overdose as the cause of death.

Under the corpus delicti rule, a defendant's confession or admissions are not admissible unless independent corroborating evidence establishes the corpus delicti of the crime. State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED:06**. The purpose of the corpus delicti rule is to protect a defendant from an unjust conviction based on a false confession alone; it prevents the possibility that a false confession was obtained through police coercion or abuse and the possibility that a confession, though voluntary, is false.

In a homicide case, the corpus delicti rule requires the State to present evidence independent of the defendant's confession to prove (1) the fact of death and (2) a causal connection between the death and a criminal act. The State's independent evidence may be either direct or circumstantial. The evidence need not establish the necessary elements of the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence; it is sufficient if the evidence *prima facie* establishes the corpus delicti. "Prima facie" in this context of the corpus delicti rule means " 'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved."

In assessing the sufficiency of the State's corpus delicti evidence, a reviewing court must assume the truth of the State's evidence and view all reasonable inferences in the light most favorable to the State. The causal connection between the death and the defendant's acts cannot be based on mere conjecture and speculation.

Relying on Aten, Rooks argues that because the evidence supports reasonable and logical inferences of both criminal and non-criminal causes of Amanda's death, the corpus delicti was not established. Rooks cites the statement in Aten that, " '[t]he final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence.' "

In Aten, the defendant confessed to killing an infant by manually suffocating the baby. The independent evidence established the infant died of acute respiratory failure, but the medical examiner testified he could not determine whether the respiratory failure was caused by Sudden Infant Death Syndrome (SIDS) or suffocation. At trial, the medical examiner testified that he concluded the infant died from SIDS and described the similarity in the infant's death to a typical SIDS case. The Court held that the corpus delicti is not established where the independent evidence supports reasonable and logical inference of both criminal agency and non-criminal cause and under the facts presented in that case there was insufficient evidence to establish the corpus delicti. "The totality of independent evidence in this case does not lead to the conclusion there is a 'reasonable and logical' inference that the infant ... died as a result of criminal negligence and that that inference is not the result of 'mere conjecture and speculation.' "

Rooks assumes the Court in Aten concluded the corpus delicti was not established because there was more than one logical and reasonable explanation for the death. But Aten clearly states there was no reasonable inference of criminal conduct in that case. Because the Court concluded there was no reasonable and logical inference that the infant died as a result of criminal negligence, Aten does not hold that the corpus delicti cannot be established where there are reasonable and logical inferences of both criminal and non-criminal causes of death. The Court's opinion in Aten also suggests that

where there is more than one reasonable and logical inference as to the cause of death, if one inference is more consistent with the independent evidence than another, it might make the other inference less likely or reasonable.

Here, unlike Aten, the totality of the independent corroborating evidence leads to the conclusion that there is a causal connection between Amanda's death and a criminal act. Although there was evidence Amanda used cocaine within a few days of her death and Rooks' brother testified Amanda had a history of using crack cocaine and would "hold a hit," the State presented overwhelming independent evidence establishing Amanda's death was the result of a criminal act.

The inference that Amanda died from an overdose is supported by scant evidence and speculation. By contrast, the totality of the State's independent evidence leads to the unquestionable conclusion that there is a reasonable and logical inference that Amanda's death was the result of a criminal act. We conclude the corpus delicti was established and Rooks' confession and admissions were properly admitted.

[Some citations omitted]

“MANIFEST NECESSITY” JUSTIFIED OFFICERS’ IMPOUND-INVENTORY LOOK IN CAR’S TRUNK; IN FOLLOW-UP WARRANT APPLICATION, AFFIDAVIT FAILED TO SHOW SUFFICIENT BACKGROUND OF UNNAMED CITIZEN INFORMANTS; TO MEET AGUILAR-SPINELLI PC TEST BUT OTHER INFORMATION IN AFFIDAVIT RE OFFICER’S OBSERVING OF METH-RELATED MATERIALS IN CAR’S PASSENGER AREA GAVE PROBABLE CAUSE FOR CAR TRUNK SEARCH

State v. Ferguson, ___ Wn. App. ___, ___ P.3d ___ (Div. III, 2006)

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

On August 7, 2002 in Ferry County, Trooper Robert Young conducted a speed stop of a car with Idaho plates on Highway 29, about 150 miles from the Washington-Idaho border. Mr. Ferguson, the driver, stated he had borrowed the car from a friend. Because of the narrow highway shoulder, the stopped car blocked the Hadley road intersection. Mr. Ferguson did not have a driver's license on his person. While checking Mr. Ferguson's driving status, Trooper Young learned Mr. Ferguson had an outstanding Washington misdemeanor warrant and arrested him.

Trooper Young then contacted the passenger, 17-year-old Trisha Zuchowski. Ms. Zuchowski requested Trooper Young release the car to her. Although Ms. Zuchowski claimed to have a valid license, she did not have any identification with her and Trooper Young could not locate her driving record. The trooper did not attempt to contact the registered Idaho owner.

Trooper Young arranged to have the car towed and impounded because it was blocking an intersection and the registered owner was not present. Incident to Mr. Ferguson's arrest and to accomplish the impoundment inventory, Trooper Young began searching the car's passenger compartment.

In the unlocked glove box, he found a palm scale and a knife showing a reddish, thick, phosphorous-like residue. Under the front seat, he found a coffee pot with burnt residue on the bottom. In the back seat, Trooper Young found an open

grocery bag with cartons of about 100 match book covers neatly stacked, with the matches removed and the phosphorous strikers remaining, a bag of rock salt, and miscellaneous glassware. He saw a blue plastic tub with the lid ajar on the back seat containing a glass bottle with tubing extending from the top. In one of the jars was a substance that later tested as ephedrine. Trooper Young detected a chemical odor coming from the car. From his training, Trooper Young knew these items were components consistent with red phosphorous methamphetamine manufacturing in a rolling meth lab. At that point, Trooper Young attempted to get a warrant to search the trunk. Apparently, he could not obtain a warrant at that time, due to the large number of pending warrant applications.

According to Trooper Young, "the main worry is rolling meth labs and the fact that officers got hurt and killed in making contact with ... rolling meth labs." Having already called for a tow, Trooper Young testified he was concerned due to the items found in the passenger compartment:

After locating the components in the back seat, ... I'm aware that they have to have white gas and other ... and a burner and things like that, and I was worried about where those components were, and if they were stored in a manner that would be safe to transport, or whether or not I had to worry about getting somebody there to decontaminate the situation at the scene. Worried about an explosion.

Unable to obtain a warrant and concerned about volatile chemicals, he opened the trunk using the inside trunk latch to "see where the gas was and see if it was closed, and whether or not it would be safe to transport." Trooper Young saw a can of white gas, plastic containers and a Coleman stove, and then shut the trunk without touching anything to call a local task force for assistance. The car was towed after the task force responded and apparently addressed Trooper Young's concerns.

On August 9, Detective Jan Lewis applied for a search warrant to seize the items found in the car. The affidavit alleged the foregoing events and related that the vehicle had been seen by a "witness" at an address involved in an ongoing methamphetamine investigation in Inchelium, Washington. The affiant further stated that neighbors reported "lots of short stay traffic" and "several buckets going in and out of the residence."

The State charged Mr. Ferguson with manufacturing methamphetamine, unlawfully involving a person under 18 in a transaction to manufacture a controlled substance, and possessing ephedrine intending to manufacture methamphetamine.

In November 2002, Mr. Ferguson unsuccessfully moved to suppress the items seized from the car trunk as products of an illegal search and unlawfully issued warrant. The court held Trooper Young's observations "reasonably indicated a 'manifest necessity' to open the closed trunk to assure the vehicle could be safely impounded and towed." The court did agree to excise the witness and neighbor statement portions of the search warrant affidavit.

In March 2003, the trial court rejected Mr. Ferguson's reconsideration efforts based on new testimony. However, sua sponte (on its own), the court reversed

its earlier manifest necessity conclusion and suppressed the trunk evidence pursuant to State v. White, 135 Wn.2d 761 (1998) **Sept 98 LED:08**, and State v. Houser, 95 Wn.2d 143 (1980).

In April 2003, the trial court denied the State's motion to reconsider the March 2002 sua sponte ruling. The court explained the facts as previously found did not support a manifest necessity to look in the car's trunk without a warrant. Adhering to its March ruling, the court further rejected the State's additional argument that even without the trunk evidence, the passenger compartment evidence was sufficient to support probable cause for the search warrant. The court reasoned the items seen in the trunk were integral to the probable cause determination.

In July 2003, Mr. Ferguson received a ruling suppressing the ephedrine found in the passenger compartment, and the court dismissed the case for insufficient remaining evidence. The State appealed.

ISSUES AND RULINGS: 1) Where the officer at a traffic stop arrested the driver on an arrest warrant; the narrow shoulder made the car a hazard; where the officer reasonably determined that he could not verify whether a vehicle passenger had a valid driver's license; and where the registered owner lived in another state a considerable distance away; did the officer act reasonably in deciding to impound the car instead of seeking the out-of-state owner to come and move the car? (**ANSWER:** Yes, the officer acted reasonably in deciding to impound the car); 2) Did the officer's safety concerns regarding the volatility of possible meth-lab substances in the trunk meet the "manifest necessity" requirement of Houser-White for checking a locked car trunk during a vehicle impound-inventory: (**ANSWER:** Yes); 3) Alternatively, even if the pre-warrant "inventory" check of the car's trunk was not justified under the rule for warrantless impound-inventory, is the description in the search warrant affidavit of the information obtained from unnamed "citizens" sufficient to meet the two-pronged Aguilar-Spinelli probable cause test (credibility plus basis of information)? (**ANSWER:** No); 4) Also alternatively, even if the impound-inventory was unlawful, and therefore any information relating to what was observed in the pre-warrant trunk check must be excised from the affidavit, and even if the citizen-informant information must also be excised from the search warrant affidavit, does the officer's description of prior observation of suspicious items in the car's passenger area provide probable cause by itself, thus independently justifying the warrant to search the car's trunk? (**ANSWER:** Yes)

Result: Reversal of Ferry County Superior Court suppression order; remand for possible trial of Clarence S. Ferguson on charges of manufacturing methamphetamine, unlawfully involving a person under 18 in a transaction to manufacture a controlled substances and possessing ephedrine intending to manufacture methamphetamine.

ANALYSIS BY COURT OF APPEALS: (Excerpted from Court of Appeals opinion)

1) Basis for car impound and "manifest necessity" trunk check

Article I, section 7 of the Washington State Constitution provides, "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision has been interpreted to find warrantless searches unreasonable per se. However, a few " 'jealously and carefully drawn' exceptions" exist to the warrant requirement.

These exceptions include consent, exigent circumstances, search incident to a valid arrest, inventory searches, plain view, and Terry investigative stops.

...

Here, Trooper Young conducted an inventory search of Mr. Ferguson's car while impounding the vehicle. Generally, impoundment requires proper justification and must not be "a general exploratory search for the purpose of finding evidence of a crime." Appropriate reasons for conducting an inventory search include protecting the vehicle owner's property, protecting the police against false claims of theft by the owner, and protecting the police from potential danger. Houser.

Initially, Mr. Ferguson argues the car did not need to be towed, but this ignores Trooper Young's testimony that the car was blocking an intersection. Thus, the car needed to be moved because it threatened the flow of traffic and public safety.

Mr. Ferguson next argues the police could have let Ms. Zuchowski or the registered owner drive the car. "If a validly licensed driver is available to remove the vehicle, a reason to impound must be shown." But Ms. Zuchowski did not have either identification or evidence of a driving record. Thus, it was reasonable for Trooper Young to refuse to release the car to Ms. Zuchowski. Similarly, it was reasonable to impound the car and clear the intersection rather than seek an out-of-state resident to come and move the car. In sum, impoundment was properly justified under the circumstances.

Inventory searches after impoundment are limited in scope. Houser. It is reasonable to require "the State show that the search was conducted in good faith and not as a pretext for an investigatory search." In a locked-trunk inventory case, a "manifest necessity" is required. In Houser, our Supreme Court invalidated the inventory search of a locked trunk because no reason existed to believe items in the trunk presented a "great danger of theft," and thus, did not rise to the level of manifest necessity. Similarly, in White, the Court reaffirmed that the possibility of theft does not rise to the level of manifest necessity. White [Sept 98 LED:08].

Mr. Ferguson's facts are distinguishable from those found in White and Houser, where the asserted basis for the trunk search was to guard against theft. Here, the trial court actually found the search purpose to be officer and public safety. We consider this purpose properly supported by the facts as found by the court. Therefore, a manifest necessity existed for looking into the trunk before having the vehicle towed.

Trooper Young testified that the passenger compartment of the car contained numerous items he identified as consistent with a mobile methamphetamine laboratory, based on his training and experience. He smelled a strong chemical odor coming from the car. He believed he had found a rolling "meth" lab. He testified he knew the manufacturing process utilized gas and a heat source, which he did not locate in the passenger compartment. He was concerned about the chemical odors and the likelihood that highly combustible materials were being transported in the trunk that posed a risk to police, the public and the tow truck driver. He located the suspected hazardous materials inside the trunk, and then he closed the trunk and called a task force to remove the hazardous materials before permitting the vehicle to be towed.

Initially, the trial court correctly decided the facts supported a manifest necessity. The court, on its own, reversed itself as a matter of law. We conclude, as a

matter of law, that the facts found by the trial court do support its original manifest necessity conclusion. The State met its burden of demonstrating by a preponderance of the evidence that a valid manifest necessity existed for a warrantless limited search of the car trunk--to remove or insure the safeness of the suspected hazardous materials before towing. Thus, the trial court erred in reconsidering and reversing its manifest necessity conclusion. Accordingly, the court erred in suppressing the items found in the car trunk.

2) Probable Cause: Aguilar-Spinelli test for informants

[T]he State claims the court erred in excising certain information obtained by unnamed citizen informants. Washington courts use the Aguilar-Spinelli test when the existence of probable cause depends on an informant's tip. Under that test, "the affidavit in support of the warrant must establish the basis of the informant's information as well as the credibility of the informant." If one prong is not satisfied, independent police investigation that corroborates the tip can form the basis for probable cause.

The standard for determining credibility depends on whether the informant is named or unnamed in the affidavit. When an informant is unknown to the issuing magistrate, "there exists a concern that the information may be coming from an 'anonymous troublemaker.'" State v. Ibarra, 61 Wn. App. 695 (1991). The concern is decreased where information in the affidavit establishes that the informant is not involved in criminal activity or motivated by self-interest. "Consequently, if a citizen informant wishes to remain anonymous, the affidavit must contain background facts to support a reasonable inference that the information is credible and without motive to falsify."

In this case, the affidavit relates that the vehicle involved in the stop had been seen by a "witness" at the address involved in an ongoing methamphetamine investigation in Inchelium, Washington, and that "neighbors" have reported "lots of short stay traffic" and "several buckets going in and out of the residence." Without more, this information fails both prongs of the Aguilar-Spinelli test. The affidavit provides no basis for the credibility of the witnesses or the basis of their knowledge. Contrary to the State's assertion, the affidavit does not contain any independent police corroboration of these statements. Thus, the court did not err in excising these statements from the affidavit in support of the warrant application.

3) Probable Cause: Officer's observations

However, the remaining evidence, even without the car-trunk evidence, was sufficient to establish a reasonable inference that Mr. Ferguson was involved in criminal activity, and that other evidence of this criminal activity would be found in the car. In the affidavit, Trooper Young states he found a palm scale and a knife with residue, a box containing glassware he recognized from a methamphetamine awareness class, and a bag full of matches with covers stacked together, which is how methamphetamine cooks often obtain red phosphorous. He related he recognized these materials as indicative of methamphetamine manufacture using the red phosphorus method. This information alone is sufficient to establish probable cause.

Trooper Young's observations of white gas and burners in the trunk add additional reasonable inferences of criminal activity, but were unnecessary to

support probable cause for a search warrant. Thus, even without our above holding that a manifest necessity existed for a warrantless search of the car trunk, sufficient lawfully collected evidence exists in the affidavit to support probable cause to issue the search warrant. The trial court erred in deciding otherwise and suppressing the ephedrine on that basis.

LED EDITORIAL NOTE: For some tips on writing affidavits describing unnamed persons who the affiant seeks to qualify as citizen information sources, see the March 2000 LED (beginning at page 8) and the April 2000 LED (beginning at page 20) addressing the Division Two Court of Appeals' decision in State v. Bauer, 98 Wn. App. 870 (Div. II, 2000).

BRIEF NOTE FROM THE WASHINGTON COURT OF APPEALS

PRE-SENTENCE INTERVIEW OF CONVICTED MURDERER BY DOC EMPLOYEE HELD NOT SUBJECT TO FIFTH AMENDMENT MIRANDA WARNINGS REQUIREMENT OR SUBJECT TO SIXTH AMENDMENT COUNSEL PROTECTION – In State v. Everybodytalksabout, ___ Wn. App. ___, 126 P.3d 87 (Div. I, 2006), the Court of Appeals rules: 1) the defendant in a first degree murder case was not in custody during a presentence interview with an employee of the Department of Corrections (DOC) following his second trial, and thus Miranda warnings were not required; 2) the DOC employee did not interrogate the defendant in a manner that would require Miranda warnings; and 3) the State did not deliberately elicit incriminating statements during the DOC interview, and thus defendant's right to counsel under the Sixth Amendment was not violated by the absence of his attorney during the interview.

The Everybodytalksabout Court describes as follows the factual and procedural background in the case:

In February 1996, Rigel Jones was stabbed to death in the Pioneer Square area of Seattle. Darrell Everybodytalksabout and Phillip Lopez were charged jointly with first degree murder for Jones' death. The State argued that Everybodytalksabout and Lopez killed Jones while in the course of robbing him.

Everybodytalksabout's first trial ended in a mistrial because, after the State rested its case, the court discovered that the State's principal witness had committed perjury. Everybodytalksabout's second trial ended in a conviction. But our Supreme Court reversed his conviction after concluding that the superior court committed reversible error by admitting evidence that was inadmissible under ER 404(b).

This appeal stems from Everybodytalksabout's third trial. Early in the proceedings, Everybodytalksabout moved to dismiss based on an alleged discovery violation and destruction of evidence. The court denied his motion.

Everybodytalksabout did not testify at trial, but several witnesses related statements allegedly made by him. Diane Navicky, a DOC employee, testified to statements Everybodytalksabout made during a presentence interview after his second trial, but before his conviction was reversed on appeal. The purpose of the interview was to gather unbiased information to present to the sentencing judge. At the end of the interview, Navicky asked Everybodytalksabout to tell her his version of events. Everybodytalksabout said that he participated in the robbery, but did not kill Jones.

...

A jury found Everybodytalksabout guilty of first degree murder while armed with a deadly weapon.

Result: Affirmance of King County Superior Court first degree murder conviction of Darrell Everybodytalksabout.

LED EDITORIAL NOTE/COMMENT: In this LED entry, we did not set out (or even try to provide a meaningful summary of) the analysis of the Court of Appeals. That is because we were concerned that the analysis on the Fifth Amendment and Sixth Amendment issues would be confusing or misleading to law enforcement officers. The analysis explains that the DOC employee was not acting as a law enforcement officer and did nothing expressly coercive in the questioning. We will not speculate here as to whether and/or how that analysis bears on pre-sentencing questioning of convicted persons by law enforcement officers. For analysis that is more on point to the work of law enforcement officers, we suggest that officers may want to read the following article on the CJTC LED webpage under "Initiation of Contact Rules Fifth and Sixth Amendments." We must note, however, that the LED webpage article recognizes that the law is unclear regarding post-conviction contacts by law enforcement officers with continuous custody convicts.

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/court-rules/>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. 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/opinions.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." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [<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 2006, is at [<http://www.1.leg.wa.gov/coderevisor>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 proposed WAC amendments is

at this address too. In addition, a wide range of state government information can be accessed at [<http://insideago>]. The address for the Criminal Justice Training Commission's home page is [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], 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. **LEDs** from January 1992 forward are available via a link on the CJTC Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]