



# Law Enforcement

January 2006

# Digest

586<sup>th</sup> Basic Law Enforcement Academy – August 4, 2005 through December 13, 2005

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### **STATUTE UPDATE**

#### **INITIATIVE MEASURE 901, PROHIBITING SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT, EFFECTIVE DECEMBER 8, 2005**

Initiative Measure 901 amends chapter 70.160 RCW, the Washington Clean Indoor Air Act and became effective December 8, 2005.

Section 2 amends RCW 70.160.020 to expand the definition of “public place” to include a presumptively reasonable distance of twenty-five feet from entrances, exits, windows, and ventilation intakes. It also adds bars, taverns, bowling alleys, skating rinks, casinos, reception areas, and no less than seventy five percent of the sleeping quarters of hotels or motels to the list of public places. Finally, it adds a definition of “place of employment” that includes “any area under the control of a public or private employer which employees are required to pass through during the course of employment” and includes the twenty-five foot “buffer” in this definition.

Section 3 amends RCW 70.160.030 to prohibit smoking in any place of employment (in addition to the already-prohibited, no smoking in a public place).

Section 4 amends RCW 70.160.050 to require owners and persons in charge of places regulated by the chapter, to prohibit smoking and post signs.

Section 5 amends RCW 70.160.070 provides for enforcement against smokers only for intentional violations and adds language providing that “[a]ny person passing by or through a public place while on a public sidewalk or public right of way has not intentionally violated this chapter.” Enforcement against owners and persons in charge of places regulated by the chapter is by the health department.

Initiative 901's text can be found on the Secretary of State's internet pages for 2005 initiatives: [<http://www.secstate.wa.gov/elections/initiatives/people.aspx>]

The enforcement provisions existed in the original Washington Clean Indoor Air Act, so officers should follow existing department policies and procedures on smoking enforcement, or should check with their department chain-of-command as to any revisions in enforcement.

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### **WASHINGTON STATE SUPREME COURT**

#### **ROBBERY CONVICTION MAY NOT BE BASED ON FORCE THAT A THIEF USED TO ESCAPE AFTER THE THIEF HAD ABANDONED THE STOLEN PROPERTY**

State v. Johnson, \_\_\_ Wn.2d \_\_\_, 121 P.3d 91 (2005)

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

Johnson walked into Wal-Mart, loaded a \$179 television-video cassette recorder combo into a shopping cart, removed the security tag, and pushed the cart out the front door. Two security guards observed him, followed him into the parking lot, and confronted him. Johnson abandoned the shopping cart and started to run away, but suddenly turned back. One of the guards grabbed Johnson's arm. Johnson punched the guard in the nose and ran away. The guards were unable to catch him, but a police officer positioned his car in Johnson's path and arrested him.

The State charged Johnson with first degree robbery. Following a bench trial, the superior court found Johnson guilty as charged. The court entered findings of fact stating that Johnson walked away from the shopping cart and was attempting to escape the guards when he punched one of them in the nose, causing bleeding. In its conclusions of law, the court said that Washington has adopted the transactional view of robbery: "[t]herefore, even though the Defendant did not use force to obtain or retain property, he used force in an attempt to escape and inflicted bodily harm."

Johnson appealed, arguing the evidence was insufficient to support his conviction because he did not use force to obtain or retain property, but rather used force while attempting to escape after abandoning the property. The Court of Appeals affirmed his conviction, concluding robbery includes the use of force while attempting to escape or resist apprehension following a theft. We disagree with the Court of Appeals attempt to broaden the transactional view of robbery beyond the statutory elements of the crime.

**ISSUE AND RULING:** May a robbery conviction be based upon force used to escape after peaceably-taken property was abandoned; or does the force have to relate to the taking or retention of property? (**ANSWER:** Using force after abandoning the stolen property is not robbery)

Result: Reversal of Court of Appeals decision that affirmed the Spokane County Superior Court conviction of Richard Stephen Johnson, Jr. for first degree robbery.

ANALYSIS: (Excerpted from Supreme Court opinion)

A person commits robbery by unlawfully taking personal property from another against his will by the use or threatened use of force to take or retain the property. "Such force or fear must be used *to obtain or retain possession of the property, or to prevent or overcome resistance to the taking*; in either of which cases the degree of force is immaterial." RCW 9A.56.190 (emphasis added). And a person commits first degree robbery if during the commission of a robbery, or in flight therefrom, the person inflicts bodily injury. RCW 9A.56.200(1)(a)(iii).

This court in State v. Handburgh, 119 Wn.2d 284 (1992) **Sept 92 LED:10**, rejected the common law view of robbery that the force used during a robbery must be contemporaneous with the taking and found the modern transactional view properly reflected Washington's robbery statute. In Handburgh, the defendant took a girl's bicycle while she was in a recreation center. When the girl saw the defendant riding her bicycle, she demanded he return it and a fistfight ensued. This court affirmed the defendant's robbery conviction, holding that the plain language of the robbery statute says the taking can take place outside the presence of the victim, and the necessary force to constitute robbery can be found in the forceful retention of stolen property that was peaceably taken. The transactional view of robbery as defined in Washington's robbery statute requires that the force be used to either obtain or retain property or to overcome resistance to the taking.

The trial court's unchallenged findings of fact state that Johnson was trying to escape when he punched the security guard in the nose. And the trial court concluded that even though Johnson did not use force to obtain or retain the property, he was guilty of the crime because the transactional view of robbery includes force used during an escape. But as noted above, the force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance "to the taking." Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.

We reverse Johnson's robbery conviction.

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**WASHINGTON STATE COURT OF APPEALS**

**OFFICERS' ENTRY OF SUSPECT'S RURAL PROPERTY VIA DRIVEWAY HELD NOT A "SEARCH"; ALSO, SUSPECT'S CONSENT TO SUBSEQUENT SEARCH IS HELD VALID, AND EVIDENCE OF METHAMPHETAMINE MANUFACTURING SUPPORTS CONVICTION**

State v. Poling, 128 Wn. App. 659 (Div. II, 2005)

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

On November 14, 2000, at approximately 9:00 P.M., Deputies Elwin and Hamilton, Lieutenant Watkins, and Detective Snaza arrived at Poling's remote rural property in response to an anonymous citizen tip that Poling had "some sort

of manufacturing activity in and around his residence." Poling resided there with Konsuello Vaughn, his girl friend, and the couple's two minor children, ages nine and six.

Elwin and Snaza parked next to a detached shop, left their vehicles, and stood outside where they could observe the shop and the residence. Hamilton and Watkins contacted Poling and advised him of the reason for their visit.

During their conversation, Poling admitted that he used methamphetamine occasionally. Hamilton then asked Poling for consent to search his property. Poling agreed and signed a consent to search form.

While Hamilton and Watkins talked with Poling, Snaza, who stood near the shop, saw two propane tanks next to the shop door. The tanks sat underneath the bed of a white van parked near the shop. Snaza saw aqua blue staining around both propane tank valves. Through his training and experience, Snaza concluded that the staining comported with that of a tank storing anhydrous ammonia or being used as a hydrochloric acid gas generator.

After signing the consent form, Poling took Hamilton and Watkins through the shop and pointed out numerous items related to methamphetamine manufacturing. Also, Poling told the officers that he had manufactured methamphetamine on the property approximately five times during the preceding six weeks.

Hamilton advised Poling of his constitutional rights but did not arrest him. Poling stated that he understood his rights but that he wanted to explain what he was doing on the property.

Poling then pointed out a white van that had a powdery substance on the front passenger seat floorboard. He also showed Snaza a 125-gallon anhydrous ammonia tank near the van and a chicken coop containing coffee filters, tubing, and a coffee carafe holding a clear substance that smelled strongly of solvents.

A deputy obtained a telephonic search warrant for the property. Law enforcement officers executed the warrant on November 15. They found numerous items used in the manufacture of methamphetamine.

By first amended information, the State charged Poling with unlawful manufacture of a controlled substance (methamphetamine). The State also alleged that Poling committed the crime while a minor was present or while a minor was on the manufacturing premises.

Poling moved to suppress the evidence seized in the search. He argued that the police unlawfully entered his property on November 14, rendering the evidence seized under a search warrant based on the unlawful entry fruits of the poisonous tree. He also moved to suppress his statements on similar grounds.

Poling's and the officers' testimony differed as to whether the officers knocked on the porch door and were invited to come in, or whether they entered the screened porch before Poling knew of their arrival. Also, it was unclear whether the police could have seen the "No Trespassing" sign posted at the entry to

Poling's property. Finally, Poling's, Vaughn's, and the officers' testimony conflicted as to whether the officers read the contents of the consent to search form to Poling and whether Poling understood it.

The trial court found the officers' testimony credible and accepted it in its entirety. It then determined that the police entered Poling's property as any reasonably respectful citizen would. It also determined that Poling freely and voluntarily consented to a search of the premises after being fully advised. Finally, it decided that the police properly advised Poling of his constitutional rights before he waived them and made his incriminating statements. The trial court denied Poling's motions to suppress.

At trial, Hamilton and Snaza testified as described above. Also, over defense objection, Snaza testified about the street value of one gram and one ounce of methamphetamine.

Kimberly Hefton, a forensic scientist of the Washington State Patrol Crime Laboratory, explained methamphetamine manufacturing to the jury. According to her, the items seized at the scene were consistent with that activity.

The jury found Poling guilty as charged, including finding the enhancement based on minors being present. The trial court imposed a Special Drug Offender Sentencing Alternative (DOSA) sentence and an additional 24 months based on the special verdict enhancement.

[Footnotes omitted]

ISSUES AND RULINGS: 1) Did the officers lawfully enter Poling's remote rural property? (ANSWER: Yes); 2) Does the evidence support the trial court's ruling that Poling voluntarily consented to a search of his property? (ANSWER: Yes); 3) Is there sufficient evidence in the record to support Poling's conviction for manufacturing methamphetamine? (ANSWER: Yes)

Result: Affirmance of Thurston County Superior Court conviction of Lonny Charles Poling for manufacturing methamphetamine; sentence enhancement (on issue not addressed in this LED entry) is reversed and case is remanded for possible re-trial on sentencing enhancement issue.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) 2) Lawful entry and voluntary consent

As a prerequisite to asserting an unconstitutional invasion of rights, a person must demonstrate that he had a legitimate expectation of privacy in the area or item searched. The courts view a person's home as the area most strongly protected by the constitution. Although residents maintain an expectation of privacy in the curtilage, or area contiguous with a home, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house," so long as they do so as would a "reasonably respectful citizen."

The court heard varying accounts of the November 14 events. It found the officers' testimony credible and accepted it in its entirety. We defer to the fact

finder on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.

Engaged in proper police activity, the officers arrived at the residence to investigate a tip that Poling manufactured methamphetamine on his property. Although the police officers arrived at 9:00 P.M., Poling left the gate open because he expected a visit from his friend at the same hour and the police officers entered Poling's property through that open gate. The trial court found that this arrival did not differ from an arrival of Poling's friend or another reasonably respectful citizen.

Based on the officers' testimony and Poling's signed consent to search form, the court further determined that Poling consented to the search of his property and that he gave his statement after being fully advised. Because the police entry onto Poling's property was proper, the evidence, including Poling's statements, was lawfully obtained.

3) Sufficiency of the evidence

RCW 69.50.101(p) defines the manufacture of controlled substance, in part:

" 'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis."

Because manufacturing is often an ongoing process involving many steps, a defendant need not possess the final product in order to meet the statutory requirements of RCW 69.50.101(p). Thus, "a person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process."

The search of the shop, the van, and the chicken coop resulted in seizure of devices and items consistent with the manufacture of methamphetamine and byproducts of its production. This evidence showed not only past, but also active methamphetamine manufacture.

Moreover, Poling also admitted to the police that he had manufactured methamphetamine five times before the police discovered the lab on his property. Thus, the State presented sufficient evidence from which a rational fact finder could find beyond a reasonable doubt that Poling manufactured methamphetamine.

[Footnotes and citations omitted]

**OFFICER'S WARRANTLESS STOP OF CAR REGISTERED TO PERSON LISTED AS "MISSING/ENDANGERED" WAS REASONABLE UNDER "COMMUNITY CARETAKING FUNCTION" EXCEPTION TO WARRANT REQUIREMENT; ALSO, EXAMINATION OF SUSPECT'S FOREARM DID NOT EXCEED LAWFUL SCOPE OF DETENTION**

State v. Moore, \_\_\_ Wn. App. \_\_\_, 120 P.3d 635 (Div. I, 2005)

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

Sergeant Kate Hamilton of the Mill Creek Police Department was exiting a parking lot in her marked patrol car when she was nearly struck by another car entering the lot. She ran the license plate number of the car through her computer and learned that Robert Morris, the registered owner, was listed as "missing/endangered" from the Seattle area. The listing neither provided a physical description of Morris nor explained anything more about his status or the reasons for it.

Hamilton caught up to and stopped the car to determine if Morris was inside. The driver was a woman. It was dark and Hamilton was initially unable to determine how many passengers were inside the car.

Sergeant Hamilton informed the occupants why she had stopped the car and asked the passengers if any of them was Morris. Each passenger said he was not. The front passenger, later identified as Moore, stated that they had borrowed the car from Morris. Moore also said that Morris was at his house waiting for them.

Sergeant Hamilton asked the passengers for identification. The driver, Moore, and the second passenger each provided only verbal identification--a name and a date of birth. Moore gave the name "Kenneth Black" and a false birth date. The third passenger produced a Washington State identification card.

Sergeant Hamilton asked Moore how she could reach Morris. Moore told her that Morris had no telephone at his home.

Sergeant Hamilton then ran the information from the three passengers through her computer and determined that the information provided by Moore and the woman driver was inaccurate. The female driver was also listed as "missing/endangered," and had two outstanding arrest warrants.

The search results for the name Moore had provided, "Kenneth Black," showed that this was an alias for "Alex Moore." The results also showed that he had an outstanding felony warrant and included information about identifying tattoos on Alex Moore's forearms.

Sergeant Hamilton called for backup. She asked Moore and the other passengers to step out of the car and sit on the curb, which they did. A responding officer arrived and demanded that Moore, as the subject of the outstanding warrant, roll up his long sleeves to verify his identity through tattoos on his forearms. The officers checked the tattoos, confirming Moore's identity, and placed him under arrest on the basis of the outstanding felony warrant. Moore then gave his true name and birth date. In a search incident to arrest, the officers discovered a bottle containing Diazepam pills.

Based on the results of the computer search, police also arrested the driver on her outstanding warrants.

The State charged Moore with one count of possession of a controlled substance. At a bench trial, Moore moved to suppress the pills on the grounds that the search and seizure of Moore exceeded the scope of permissible action

under the community caretaking exception to the warrant requirement. The trial court denied the motion to suppress and convicted Moore based on stipulated facts. The court sentenced him to a standard range sentence of 13 months.

ISSUES AND RULINGS: 1) After stopping a car registered to a person listed as "missing/endangered," did the officer validly exercise her authority under the "community caretaking exception" to the warrant requirement up to the point that she received information that suggested a criminal investigation relating to an arrest warrant was necessary (i.e., was the initial stop and detention "community caretaking," taking into account that the officer was initially involved in a non-criminal investigation, that she had no physical description of the vehicle's owner and no way of confirming that the owner was not present and did not need assistance)? (ANSWER: Yes, the officer lawfully acted under the community caretaking exception up to the point that she learned of the arrest warrant);

2) Under all of the circumstances, did the officers' non-consenting examination of a car passenger's forearms for tattoos exceed the lawful scope of the five- to ten-minute Terry detention that was initiated when it was learned that one passenger might be the subject of an arrest warrant involving a suspect with tattoos on his forearms? (ANSWER: No, the officers acted lawfully)

Result: Affirmance of Snohomish County Superior Court conviction of Alex Undrae Paul Moore for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Community caretaking function exception

Moore argues that the officer's request for his identification exceeded the scope of the community caretaking exception to the warrant requirement. We disagree.

Generally, under both the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Washington constitution, a police officer's seizure of a criminal suspect must be supported by a judicial warrant based on probable cause. A warrantless seizure is presumed unreasonable, and therefore in violation of both the federal and state constitutions, unless the State shows that it falls within one of the exceptions to the warrant requirement.

A well-recognized exception to the Fourth Amendment requirement for a warrant is "community caretaking." In Washington, the " 'community caretaking function' exception to the warrant requirement encompasses the 'search and seizure' of automobiles, emergency aid, and routine checks on health and safety." In the case of routine checks on health and safety, the proper determination is whether an officer's encounter with a person is reasonable, a determination based on balancing the " 'individual's interest in freedom from police interference against the public's interest in having the police officers perform a community caretaking function.' " "Even a routine stop for a safety check, if it involves a "seizure" by detaining, must be necessary and strictly relevant to performance of the noncriminal investigation." "The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled." Courts must "cautiously apply the community caretaking function exception because of 'a real risk of abuse in allowing even well-intentioned stops to assist' "

Community caretaking is totally divorced from a criminal investigation. Whether community caretaking is also an exception to article 1, section 7 has not been explicitly addressed by our supreme court. Whether a stop incident to "community caretaking" is "reasonable" requires balancing "the competing interests involved in light of all the surrounding facts and circumstances," particularly the "individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.' "

To avoid potential abuse, courts cautiously apply this exception. Accordingly, a routine safety check must (1) be necessary and strictly relevant to the community caretaking function, and (2) end when reasons for initiating an encounter are fully dispelled.

We begin our consideration whether police action was reasonable in this case by applying the proper balancing test. To determine the reasonableness of the police intrusion here, we consider the totality of the circumstances.

Moore does not dispute that there is a significant public interest in having police perform the community caretaking function of locating a person listed in an official database as "missing/endangered." Indeed, this court has previously observed that when "an officer believes in good faith that someone's health or safety may be endangered ... public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer assistance while a warrant is obtained." This court further stated that "the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help."

Here, Sergeant Hamilton ran a computer check on the license plate number of a vehicle that had almost collided with her vehicle. She learned from the database that the car was registered to Robert Morris, who was listed as a missing/endangered person. The data did not include any physical description of Morris. Based on the information she then had, she stopped the vehicle registered to Morris. Sergeant Hamilton testified at the suppression hearing that she stopped the vehicle to determine whether Morris was in the car, to notify him that he was reported missing/endangered, and to check on his well-being.

The stop of the car was necessary and strictly relevant to a noncriminal investigation to determine whether Morris, a person reported as missing/endangered, was in the car. The State has a significant interest in conducting a routine health and safety check, a noncriminal investigation. We weigh that interest against Moore's interest in freedom from police interference. In striking that balance, we hold that the police action in stopping the car was reasonable.

At the suppression hearing, Sergeant Hamilton further testified that after stopping the vehicle she identified herself and "explained [to the occupants] the reason for the stop." She asked the passengers if any of them was Robert Morris, the person reported as missing/endangered. They said they were not. Moore stated that they had borrowed the car from Morris, who was at his house waiting for them.

Because she did not have a physical description for Morris, she asked for identification. Everyone except one of the male passengers provided a verbal response to the request. The front passenger, who was later identified as Alex Moore, said that his name was "Kenneth Black" and gave a false date of birth. Another male passenger provided a Washington State ID.

Based on State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**, Moore argues that the request for his identification constituted a seizure. We agree.

He further argues that Sergeant Hamilton could have determined whether or not Morris was in the car by obtaining a physical description of Morris from Department of Licensing records. He claims that obtaining identification from him was neither necessary nor strictly relevant to fulfilling the community caretaking function and therefore unreasonable. We disagree.

This record does not show whether DOL records would have revealed any information about Morris. Nevertheless, Sergeant Hamilton's choice to ask for identification of those in a car registered to Morris was reasonable under the circumstances. She testified that she had hoped that if Morris was in the car, he would have identification on him. She could have then advised him of his reported missing/endangered status and could have asked him to contact his family. A brief detention to determine whether Morris was in his car, rather than a more lengthy detention while Sergeant Hamilton checked for what information about him *might* be in DOL records, was a reasonable choice.

Moore also challenges on appeal Sergeant Hamilton's decision to continue with her investigation although neither Moore nor any of the other passengers appeared to be distressed or endangered. Sergeant Hamilton alluded to the case of Elizabeth Smart. She indicated that Smart, a 15 year old kidnapping victim, appeared in public with her kidnappers and did not appear to be missing and endangered before her rescue. Sergeant Hamilton made the analogy here that Morris could have been in the car with the other occupants, being held against his will. She also testified that, having learned that she had no way to contact Morris, she was concerned by the explanation that Morris was "back at the house" because "I didn't know if he was in a shallow grave someplace." Continuation of the noncriminal investigation to check on the health and safety of Morris was reasonable.

However, the seizure raises another important issue. A seizure during a routine check on health and safety does not, by itself, determine whether police intrusion on an individual's liberty interest is unreasonable. But it does require that we apply the proper balancing test because of a change in the interest in freedom from police intrusion of the person seized. As the Kinzy court observed, "[Moore's] interest in being free from police intrusion was no longer minimal."

At the suppression hearing, Sergeant Hamilton testified that she asked how she might contact Morris based on Moore's response that Morris was back at his house. Moore replied that Morris had no telephone.

Sergeant Hamilton testified that at that point she wanted to determine whether the information Moore and the others had given her could be verified. She returned to her vehicle to run the names and dates of birth she had been given. She expressly testified that her purpose in doing so was noncriminal. Sergeant Hamilton also expressly testified that had she obtained information that Morris was white, she would not have continued her encounter with the occupants of the car, all of whom were black.

When she ran the names and birth dates, the search results for Kenneth Black, the name Moore gave her, revealed that it was an alias for Alex Moore, the subject of an outstanding felony warrant.

While still at her vehicle, Sergeant Hamilton also contacted the Seattle detective division that issued the missing/endangered persons report to obtain further information about Morris and the reason for his reported status. She was unable to obtain further information.

At this point, Sergeant Hamilton called for backup, returned to the vehicle registered to Morris, and asked the occupants to step out of the car. We describe later in this opinion the events that followed.

After applying the appropriate balancing tests to the stages of the encounter between the police and Moore, we conclude that Sergeant Hamilton properly conducted a routine check on health and safety under the community caretaking function. Sergeant Hamilton testified extensively that she believed Morris needed assistance, based on his reported missing/endangered status. The stop of the vehicle registered to him was proper.

The subsequent seizure and continuation of the noncriminal investigation were also proper. While the interest of Moore was substantial after he was seized, that interest did not outweigh the State's substantial interest in properly performing the community caretaking function.

This case is distinguishable from State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07**. There, police stopped a 16 year old girl after seeing her walking on a downtown Seattle sidewalk at about 10 p.m. on a weeknight with an adult male the officer knew from previous contacts to be involved with narcotics. When Kinzy tried to walk away, the officer physically detained her and a later search revealed cocaine. The supreme court held that, under the community caretaking exception, police could approach Kinzy and ask if she needed help. But without articulable suspicion that she had committed a criminal offense, they could not physically detain her when she chose to walk away. The police's legitimate reason for stopping Kinzy ended once they determined she was not in need of assistance.

The court noted that, having stopped Kinzy in order to determine if she needed assistance, the police officer's action in grabbing Kinzy's arm made the community caretaking function appear to be pretextual -- it was "suggestive of enforcement of a juvenile curfew law. But Seattle does not have such a law."

Here, the status of Morris -- a reported missing/endangered person -- was unclear throughout the encounter between police and Moore. Sergeant Hamilton

had no way of confirming that Morris did not need assistance. Significantly, there was no suggestion here of enforcement of any law like the Kinzy case. Rather, the actions of the police to the point of obtaining search results indicating that Moore was the subject of an outstanding felony warrant were "necessary and strictly relevant to performance of the noncriminal investigation." The police were entitled to attempt to fully dispel the concerns about Morris before ceasing the noncriminal investigation into Morris' whereabouts and safety.

In State v. Acrey, 148 Wn.2d 738 (2000) **May 03 LED:04**, police responded to a citizen's weeknight 911 call reporting fighting, and found five young boys, including 12 year old Acrey, out after midnight in an isolated area with no adult supervision. Police contacted Acrey's mother, who asked police to give the boy a ride home. Before transporting the boy in the police car, police conducted a pat-down frisk for safety purposes and found drugs.

The supreme court affirmed the appellate court's holding that there was reason for heightened concern that the boys may be engaging in conduct that could bring harm to themselves or others, and that the police acted reasonably. The court distinguished Kinzy, pointing to the most important factor in the reasonableness determination: the fact that a 911 call had been placed raised at least some degree of concern for Acrey's well-being, regardless of whether there was any criminal activity.

Similarly here, Sergeant Hamilton stopped the car because its registered owner was listed as missing/endangered. She pursued her noncriminal investigation to the point of receiving information that she was likely talking to someone who had given false information in response to her questions and who was likely the subject of an outstanding felony warrant.

We conclude that the police validly exercised the community caretaking function to the point of receiving information that suggested a criminal investigation was necessary. The valid exercise of the function is a proper exception to the general requirement for a warrant.

2) Examination of Moore's forearms for tattoos

Moore next argues that the officers' demand that he expose his forearms, so that they could verify his identity using his tattoos, violated the Fourth Amendment to the U.S. Constitution and art. 1, section 7 of the Washington State Constitution. We disagree.

When analyzing police-citizen interactions, this court determines whether a warrantless search has taken place, and if it has, whether the action was justified by an exception to the warrant requirement.

A Terry stop is among the exceptions to the constitutional warrant requirement. Such stops permit a police officer to conduct an investigative detention based upon less evidence than is needed for probable cause to make an arrest. "A brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime."

In State v. Acrey, the supreme court analyzed whether the police encounter with the child in that case was reasonable. While conducting the community caretaking function, police conducted a pat-down search of the child prior to placing him in the patrol car to return him to his mother, as she requested. The court noted that such a search was reasonable, citing State v. Wheeler, 108 Wn.2d 230 (1987).

Taking our lead from the supreme court, we too look to Wheeler for guidance. There, the supreme court identified three factors courts use in determining whether police intrusion on an individual is reasonable under Terry: "(1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained." "A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop." In State v. Smith, 102 Wn.2d 449, our supreme court stated that "when doubt as to the correct identity of the subject of [a valid arrest] warrant arises, the arresting officer [must] **make immediate reasonable efforts** to confirm or deny the applicability of the warrant to the detained individual."

For purposes of our analysis we assume, without deciding, that Moore had a privacy interest in his forearms, and that exposing the tattoos was therefore a search. We have already held in this opinion that the police demanded that he show his forearms after receiving information that an Alex Moore, the subject of a felony warrant, had tattoos there.

We have already decided that police were validly exercising a community caretaking function to the point when the noncriminal purpose of the investigation changed to a criminal one: verification whether Moore was the person named in the outstanding felony warrant.

State v. Wheeler dealt with the permissibility of transporting a suspect to a "show-up" for identification purposes. In Wheeler, the challenge to the procedures was also based on the Fourth Amendment and article I, section 7. Police were investigating a suspected burglary and found Wheeler nearby. His clothing matched the description given by a witness. The police asked Wheeler no questions except his name. They told him he was being held in custody on suspicion of burglary, frisked and handcuffed him, and placed him in the patrol car. They then drove him two blocks back to the crime scene in order to permit a witness to identify him. The time from detention to identification was from five to ten minutes.

The Wheeler court found that the "amount of physical intrusion in [that] case was 'significant.'" Nonetheless, the court found it permissible under Terry. The court found two factors to be determinative: the fact that the police knew a crime had been committed and that the detention was brief.

As in Wheeler, the police in this case knew, by virtue of the outstanding felony warrant, that a crime had been committed. The detention and search of Moore was aimed, as was the transport in Wheeler at confirming the detained individual's identity. And the investigatory detention of Moore took no more than five to ten minutes. Moreover, in comparison with the handcuffing, frisking and transporting of Wheeler, the level of intrusion here, detaining Moore to examine the tattoos on his forearms, was less than in that case. While tattoos may

appear on more private areas of the body, that is not the case here. Thus, we are not required to decide in this case what limits exist for a more invasive search.

We hold that, under the circumstances of this case, the scope of a permissible Terry stop was not exceeded. The examination of Moore's forearms violated neither the Fourth Amendment nor art. 1, section 7.

[Some citations and footnotes omitted]

**TERRY SEIZURE OF RECKLESS DRIVING SUSPECT HELD JUSTIFIED BY REASONABLE SUSPICION; ALSO, MIRANDA WARNINGS HELD NOT REQUIRED IN TERRY STOP QUESTIONING**

State v. N.M.K., 129 Wn. App. 155 (Div. I, 2005)

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

In September 2003, Rodger Miller, a resident of Jewell Street in Enumclaw, Washington observed N.M.K. driving a black Honda over a sidewalk and the front lawn of a home on Jewell Street. Minutes later, another Jewell Street resident, Rocky Johnson, also saw N.M.K. driving at a high rate of speed around Jewell Street.

Miller and Johnson reported the incident to police, and an officer arrived at the scene to interview them. After the interviews, Officer Osterdahl located a black Honda that matched the description given to the interviewing officer by Miller and Johnson parked at a nearby McDonalds. Officer Osterdahl parked behind the Honda, leaving a way for the car to exit. Two young men were standing next to the vehicle, N.M.K. was in the passenger seat, and another young man was in the backseat.

Officer Osterdahl asked the two people in the vehicle if they would step out of the vehicle. They did. The officer advised them of the complaints by Miller and Johnson. Officer Osterdahl asked each for his legal name and date of birth. N.M.K. stated his full name and date of birth. He also admitted that he did not have a drivers license and had been driving the Honda on Jewell Street. Officer Osterdahl arrested him.

The State charged N.M.K. with reckless driving and driving without a valid operators license. During the fact-finding hearing, the juvenile court held a CrR 3.5 hearing to determine the admissibility of N.M.K.s statements to Officer Osterdahl prior to arrest. The court determined N.M.K.s statements were admissible.

...

Thereafter, the court found N.M.K. guilty of driving without a valid operators license and reckless driving.

**ISSUES AND RULINGS:** 1) In directing N.M.K. and the other car occupants to get out of the car, the officer seized them. Did the officer have reasonable suspicion justifying the seizure? (ANSWER: Yes); 2) Miranda warnings are required prior to any questioning where police have seized a person in a manner that is the functional equivalent of a custodial arrest. Was N.M.K.

subjected to such a seizure, and were Miranda warnings therefore required prior to the questioning that occurred here? (ANSWER: No, the seizure was not the functional equivalent of arrest).

Result: Affirmance of King County Superior Court (juvenile court) convictions of N.M.K. for driving without a valid operator's license and for reckless driving.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Seizure – reasonable suspicion

N.M.K. first argues that he was illegally seized by Officer Osterdahl because the officer did not have reasonable suspicion to stop and ask him, as a passenger in the car, to identify himself. According to N.M.K., because the seizure was not valid, the admissions that followed must be suppressed. We hold there was no seizure at that point in the encounter between the two. Thus, suppression of the statements was not required on this ground.

N.M.K. relies on State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**, contending that the officer's request for identification violated article I, section 7 of the Washington Constitution that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." In Rankin, passengers were stopped, searched, and found with drugs. There, the officer requested and retained identification or driver's licenses from the passengers. The court pointed out that the police officers had no independent basis for requesting identification from the passengers in each case and that requesting and holding the passengers' identification constituted a seizure. The evidence obtained post-seizure was ruled inadmissible.

However, "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification." Under article I, section 7, passengers are unconstitutionally detained when an officer requests identification "unless other circumstances give the police independent cause to question [the] passengers."

Here, other circumstances gave Officer Osterdahl independent cause to ask N.M.K. to identify himself. Officer Osterdahl knew that a black Honda had been seen speeding on Jewell Street. N.M.K. was seated in a car that matched the description of the car involved in the reckless driving incident. The car was parked in a parking lot near Jewell Street. No one was in the driver's seat of the parked car. Officer Osterdahl stopped, but did not place N.M.K. and the other three men in custody while he investigated the incident. Officer Osterdahl had a reasonable, articulable suspicion to ask N.M.K. to identify himself.

Because there was an independent cause to question N.M.K., his state constitutional rights were not violated when Officer Osterdahl asked him to identify himself.

2) Seizure not arrest – Miranda warnings not required

N.M.K. also appears to argue that his statements to Officer Osterdahl should have been suppressed because he was not read his Miranda rights before being questioned. We disagree.

In order to trigger Miranda protections, "[a] suspect must be in custody or 'otherwise deprived of his freedom of action in a significant way sub[ . sub] ' " The question is not whether a reasonable person would believe that he was free to leave but rather whether he would believe that "he was in police custody of the degree associated with formal arrest." This determination is made by objectively looking at the actions of the law enforcement officer. Incriminating statements and admissions that are not in response to an officer's questions are "freely admissible."

Here, it is clear that N.M.K. was not seized. Nothing in the words or actions of Officer Osterdahl indicated that N.M.K. was in custody. He did not handcuff N.M.K., nor did he tell him he could not leave the scene. There was no arrest until after the confession. In short, Miranda warnings were not required as N.M.K.s freedom of action was not curtailed to a degree associated with formal arrest.

[Footnotes, some citations omitted]

**LED EDITORIAL COMMENT:** While the Court of Appeals' decision here discusses State v. Rankin, 151 Wn.2d 689 (2004) Aug 04 LED:07, we believe that the Rankin case is not applicable because N.M.K. was not a non-violator passenger in a vehicle stopped for a routine traffic stop. More close to on point is State v. Mote, 129 Wn. App. 276 (Div. I, 2005) Nov 05 LED:10, where the Court of Appeals held that occupants in a parked vehicle not stopped for a traffic violation are not seized when an officer asks them to voluntarily produce identifying documents or ID information. Here, however, the officer seized the two occupants of the parked car when he directed them to step out of the car. But the seizure was justified by reasonable suspicion, as the N.M.K. Court explains.

#### **APARTMENT COMPLEX DRIVEWAY INCLUDED UNDER TRESPASS NOTICE EVEN IF DRIVEWAY "IMPLIEDLY OPEN TO THE PUBLIC" FOR SOME PURPOSES**

State v. Bellerouche, \_\_\_ Wn. App. \_\_\_, 120 P.3d 971 (Div. I, 2005)

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

The Village at the Lake apartment complex is located across the street from Federal Way High School. The complex has an arrangement with the Federal Way Police Department for assistance in contacting trespassers. On March 5, 2004, Federal Way police officer Terry Wilson served Bernard Bellerouche with a permanent notice of trespass that ordered him to stay away from the apartment complex.

On June 9, Officer Wilson was on duty as a school resource officer at the high school. He received a call from the manager of the Village at the Lake, who reported that three people, believed to be high school students, were on the property. Officer Wilson walked through the complex, and saw three students on the apartment complex driveway, one of whom was Bernard Bellerouche. Officer Wilson escorted them back to school.

The King County Prosecutor's Office charged Bellerouche with second degree trespassing. At the juvenile bench trial, the court admitted an exhibit consisting of photocopies of two separate notices to Bellerouche entitled "Permanent Notice

of Trespass," each of which specifically forbade Bellerouche from entering the "Village at the Lakes" property. The notices stated, in pertinent part:

The below named person has been informed that *he/she* is forbidden to enter the above listed property. To *enter* such property may result in prosecution under RCW 9A.52 and related municipal code section(s). A violation by entry upon the listed property may result in a fine, imprisonment, or both. **THIS NOTICE IS VALID PERMANENTLY.**

Both notices are signed by Bellerouche.

One of the notices was that served by Officer Wilson on March 5. Officer Wilson testified that, in his capacity as a Federal Way police officer, he keeps blank trespass notices which he fills out as needed, and that his procedure is to give one copy to the individual being excluded, one copy to the relevant property owner, and the "main ... white sheet gets turned in to the police department." Officer Wilson further testified that trespass notices are routinely kept on file at the police department and that the notices in the exhibit were kept according to the normal standards of the police department.

The second notice was filled in and served by another officer on April 13, 2004. That officer did not testify, and defense counsel objected to the admission of the April notice on foundation and hearsay grounds. The court overruled the objections and admitted the document as a business record.

The court found that Bellerouche had trespassed on two prior occasions, and that the March notice alone was sufficient to establish that Bellerouche was barred from the premises. The court found Bellerouche guilty of criminal trespass in the second degree.

ISSUE AND RULING: Was there sufficient evidence to convict Bellerouche of trespass where he had entered only a driveway that was "impliedly open to the public" for some purposes? (ANSWER: Yes, because the trespass notice put the driveway off limits to Bellerouche.)

Result: Affirmance of King County Superior Court conviction of Bernard Bellerouche for criminal trespass in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A person is guilty of second degree criminal trespass if "he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." A person enters or remains unlawfully in or upon premises when "he is not then licensed, invited or otherwise privileged to so enter or remain." Bellerouche contends the evidence was insufficient to establish trespass because he was on the complex driveway, which he describes as "impliedly open to the public.

This argument fails. A private property owner may restrict the use of its property so long as the restrictions are not discriminatory. A person's presence may be rendered unlawful by a revocation of the privilege to be there. This right to exclude exists even if the property is otherwise open to the public. In State v. Kutch, 90 Wn. App. 244 (Div. III, 1998) **May 98 LED:09**, for example, violation of

a notice banning defendant from a shopping mall for one year satisfied the unlawful entry element for a subsequent burglary charge.

Bellerouche bases his argument on search and seizure cases. He points out that police officers approaching a residence to investigate suspected criminal activity may look for evidence in areas that are impliedly open to the public, such as driveways.

But these cases have no application here. Bellerouche was not a police officer on official business, and unlike the officers in these cases, Bellerouche had been served with a notice to stay off the property in question.

The trespass notices served on Bellerouche clearly excluded him from the Village at the Lake property. Whether or not its driveway may be impliedly open to the public for some other purpose, it was not open to Bellerouche. There was ample evidence for a rational trier of fact to find Bellerouche guilty of criminal trespass in the second degree.

[Some citations, footnotes omitted]

**OMISSION FROM AFFIDAVIT OF FACTS REGARDING NAMED INFORMANT'S CRIMINAL HISTORY AND PENDING MATTER ON WHICH INFORMANT WAS SEEKING LENIENCY DID NOT INVALIDATE WARRANT SEARCH; ALSO, THE SUSPECT'S DENIAL OF ANY OWNERSHIP OR CONNECTION TO A BRIEFCASE JUSTIFIED SEIZING THE BRIEFCASE AND SEEKING A WARRANT TO SEARCH IT BASED ON PROBABLE CAUSE**

State v. Evans, 129 Wn. App. 211 (Div. II, 2005)

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

On October 23, 2002, police officers arrested Gary Lindsey for second degree attempted burglary. In exchange for leniency, Lindsey offered information about Evans, his methamphetamine dealer.

Detective Michael Cowan filed an affidavit, requesting a search warrant for a home and detached structure at 1101 Cowlitz Way. He also requested a search warrant for Evans, the property's owner.

The affidavit described Lindsey's interactions with Evans:

Lindsey told me he has purchased crystal methamphetamine from a Dan Evans and "Scott" [an accomplice] who "cook", manufacture methamphetamine using the "red-P" method in a small ... dwelling/structure located behind Evans' residence at 1101 Cowlitz Way... Lindsey told me that on the evening of 10/21/2002 he went to this dwelling/structure behind 1101 Cowlitz Way to purchase methamphetamine. He contacted Scott at the dwelling and purchased \$20 worth of methamphetamine. During this contact Lindsey asked to use the bathroom. Scott let Lindsey into the dwelling/structure to use the bathroom. Lindsey said he observed 4-5 metal cans he thought contained "Acetone", 3-4 off green in color "Ball" Mason jars of the quart size. He said he had supplied these jars to Evans earlier. Lindsey described the jars as

having a clear to yellowish liquid into [sic] them. Lindsey said one of the jars had [two] separate layers of an unknown liquid inside. Lindsey stated Scott was boiling an unknown substance that "looked like water" in [a] Corning cook ware [sic] sauce pan "breaking pills down" which he pulled out of the stove. Lindsey stated he saw a dark red in color substance in coffee filters and a jar.

Further, Cowan explained that "Lindsey is aware that if the information provided is not correct, he will not receive leniency for his pending felony charge." He also indicated that Lindsey's information corroborated his investigation on other charges. But he did not list Lindsey's prior convictions for six counts of forgery and two counts of second degree theft.

Task Force members executed the warrants at 1101 Cowlitz Way, where they observed a residence and a detached, converted garage.

When entering the residence, the police detected a noticeable chemical odor. The police arrested Evans as he left the residence and then placed him in a patrol car. Cowan read him the Miranda advisements.

Officers discovered evidence of methamphetamine production in the garage. They found a hot plate, gas mask, filters, Red Devil lye, butane, a bag of flares, and a condenser tube hose. Testing revealed Evans's fingerprints on two flasks and a condenser tube. The officers also recovered a container with layers of clear, colorless liquids. Later tests confirmed that the item contained methamphetamine base.

Bryan Kerr was present during the search. Officers learned that Kerr rented the residence. In his interview with Sergeant Kevin Tate, Kerr explained that Evans generally carried a briefcase. Tate "had the impression that this [briefcase] was part of the business that Dan Evans was involved in," specifically, the "[m]ethamphetamine drug dealing business."

Tate observed a truck parked in the driveway. Inside, he saw the briefcase Kerr described. Evans was the truck's registered owner. After confirming that Evans had been given Miranda warnings, Tate began interviewing him. Evans stated that "[I don't] want to talk about any details... [T]he police are gonna do what the police are gonna do, and I don't want to talk about it."

Tate then asked permission to search the truck. He explained that the truck was not included in the search warrant but that Evans could give consent. Evans asked what Tate wanted to search. Tate stated that he wanted to "search the passenger compartment of the car." Evans gave Tate consent to perform a "limited search" of the truck, provided that he could be present.

In the back seat of the truck, Tate saw the briefcase. It was locked. He asked whether the briefcase belonged to Evans and whether he had a key. Evans stated that he did not own the briefcase, that he did not know the owner, and that he could not give permission to open the briefcase because it did not belong to him.

Tate seized the briefcase, telling Evans that he would apply for a search warrant. Evans objected, saying, "I don't want you to do that. I didn't give you permission for that." Tate then stopped searching the truck.

After a drug-sniffing dog gave a positive "hit" on the briefcase, Tate obtained a search warrant. Inside, he found a bank foreclosure notice for the residence at 1101 Cowlitz Way, red phosphorous, and scales. The briefcase also contained a white crystal substance, later identified as methamphetamine hydrochloride.

The State charged Evans with manufacture of methamphetamine (count I) and unlawful possession of methamphetamine with intent to deliver (count II).

Evans moved to suppress the evidence found in the briefcase. He also filed a motion to suppress all evidence obtained through the search warrant, arguing that the supporting affidavit did not meet the Aguilar-Spinelli reliability prong. He then moved for a Franks hearing, claiming that the affiant deliberately omitted material facts regarding Lindsey's prior convictions for crimes of dishonesty. The court denied the motions.

At trial, Tate testified that Evans received Miranda warnings. Then the prosecutor and Tate discussed Evans's further questioning and his responses.

Outside the jury's presence, Evans moved for dismissal without prejudice or a mistrial, claiming that the prosecutor solicited a comment on Evans's exercise of his right to remain silent. The trial court denied the motion.

The jury convicted Evans of manufacturing methamphetamine "as charged in Count I" and of unlawful possession of methamphetamine with intent to deliver "as charged in Count II." Count I charged him with manufacturing methamphetamine "contrary to [former] RCW 69.50.401(a)(1)," and count II charged him with possession of methamphetamine with intent to deliver "contrary to [former] RCW 69.50.401(a)."

In a posttrial motion, Evans (1) renewed his two motions to suppress, (2) asked the court to treat the two counts as the same criminal conduct in sentencing, and (3) argued that the court could not sentence him under former RCW 69.50.401(a)(1)(ii) because the jury verdict did not specifically identify the unlawful substance.

The trial court denied the renewed motions to suppress. It then determined that the two counts were the same criminal conduct. It sentenced Evans to 60 months, a term within his standard range.

ISSUES AND RULINGS: 1) Where the search warrant affidavit omitted some of the named informant's criminal history and also omitted the material fact that the informant was providing information in exchange for leniency from the State, was there evidence of intentional or reckless action by the officer-affiant that would justify suppressing evidence seized under the warrant? (Answer: No); 2) Where the suspect denied ownership or connection to a briefcase, did he "abandon" any claim of ownership of the briefcase for Fourth Amendment purposes? (Answer: Yes).

Result: Affirmance of Cowlitz County Superior Court conviction of Danny Wayne Evans for manufacturing methamphetamine and unlawful possession of methamphetamine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. Franks hearing

At the defendant's request, the court must hold a Franks hearing [under Franks v. Delaware, 438 U.S. 154 (1978)] if the defendant makes a preliminary showing that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to a finding of probable cause. The Franks rule extends to material omissions.

"[A]llegations of negligence or innocent mistake are insufficient.' " Rather, the defendant must support the allegations with an offer of proof. If the defendant makes the requisite preliminary showing and establishes the allegations at the hearing by a preponderance of the evidence, the trial court includes the omitted material in the affidavit to determine whether it supports a finding of probable cause. If the modified affidavit fails to support probable cause, the search warrant is invalid and all evidence obtained through the warrant is excluded.

In his motion for a Franks hearing, Evans asserted that Cowan "chose to omit" Lindsey's prior convictions for six counts of forgery and two counts of second degree theft. Additionally, he claimed the following:

Herein we have established that specific omissions of fact have been made by the police in the application for this search warrant. Lindsey at the same time that he was being vouched for to the magistrate as a credible and reliable source was known to the police and the Prosecuting Attorney of this county as a repeatedly convicted thief. He was known to the police and the prosecuting attorney to be actively stained by findings of criminal falsehood.

The trial court denied this motion, explaining that Evans failed to make the requisite preliminary showing:

Some of the matters raised by the defense might negate probable cause. Both the informant's criminal history and pending CCSO investigation (by Deputy Merkle) are relevant to the probable cause inquiry. However, while counsel presents a persuasive argument that Officer [sic] Cowan ... could have known and maybe should have known of these matters, the offers of proof do not rise to the level of intentional or reckless disregard. While a defendant's criminal history is always available to the police and prosecutors, it is not per se reckless not to run that criminal history (NCIC) and to fail to present it to the magistrate.

Further, the trial court ruled that even if Evans had met the preliminary showing, his argument would still fail:

[T]his Court does not find that any of the omitted information was "necessary" to probable cause [sic]. Stated differently, even had the information been included in the affidavit, the affidavit information would have been sufficient to establish probable cause. The magistrate was aware that the informant had been involved in criminal activity and was seeking leniency. In addition, any informant who personally observed and even assisted in the manufacturing of methamphetamine would have had close ties to the drug world and would most likely have a criminal history. The informant's criminal history cuts both ways and cannot be said to vitiate probable cause.

Here, Evans argues that Cowan "chose to omit" information regarding Lindsey's reliability. As the trial court correctly noted, while Cowan "could have known and maybe should have known" of Lindsey's criminal history, "the offers of proof do not rise to the level of intentional or reckless disregard." At most, Evans's assertions support a finding of negligence. But allegations of negligence fail to meet the preliminary showing.

Accordingly, the trial court properly denied Evans's motion for a Franks hearing.

## 2. Abandonment of briefcase

Evans next contends that the trial court improperly denied his motion to suppress the evidence found in the briefcase.

...

Constitutional protections do not extend to abandoned property unless the abandonment is the product of police coercion or other unlawful police action. 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2 .6(b), at 670, 683 (4th ed.2004); see also State v. Reynolds, 144 Wn.2d 282 (2001) **Oct 01 LED:08**.

Washington courts have examined the abandonment doctrine. See e.g. Reynolds (officers may search voluntarily abandoned property without raising constitutional concerns). But our courts have not analyzed whether one can disclaim property but still challenge a later search, where the disclaimed property remained in an area where one has a reasonable expectation of privacy.

Other jurisdictions are split on this issue. The majority of courts have held that a person abandons the property with a disclaimer of ownership made in response to a police inquiry.

For example, in State v. Huffman, 169 Ariz. 465, 820 P.2d 329, 331 (1991), the Arizona Supreme Court held that "denial of ownership, when questioned [by police], constitutes abandonment." A police officer recognized Huffman, who had an outstanding arrest warrant, as Huffman rode in a car. After obtaining the driver's consent to search the car, an officer found a key to the Willow Motel. Both Huffman and the driver denied ownership of the key. In the motel room, the police found cocaine and other drug paraphernalia.

The Arizona Supreme Court held that Huffman "denied any interest in the key to the motel room, thereby relinquishing any expectation of privacy." It noted that denial of ownership, coupled with police inquiry, constitutes abandonment. Huffman, 820 P.2d at 331.

In contrast, other jurisdictions have determined that denial of ownership, in response to police inquiry, is not abandonment. **[LED NOTE: Here, in analysis not provided in this LED entry, the Evans Court discusses a North Dakota decision, followed by discussion of a Washington appellate decision that the Evans Court finds to be inapplicable.]**

We are persuaded by the [national] majority view. When a defendant disavows ownership of an item in response to police questioning, he abandons any privacy interest in that item. Here, when Evans denied (1) ownership of the briefcase, (2) knowledge of the owner, and (3) ability to authorize its opening, he relinquished any expectation of privacy. This constitutes abandonment, regardless of any expectation of privacy in the truck, for which he consented to a limited search.

[Some citations and footnotes omitted]

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### **BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS**

**REDMOND V. MOORE DOES NOT MEAN THAT PRE-2005 ARRESTS FOR DWLS THIRD DEGREE WERE UNLAWFUL ARRESTS** – In five separate decisions – State v. Carnahan, \_\_\_ Wn. App. \_\_\_, 122 P.3d 187 (Div. II, 2005); State v. Potter, \_\_\_ Wn. App. \_\_\_, 119 P.3d 877 (Div. III, 2005); State v. Olinger, \_\_\_ Wn. App. \_\_\_, 121 P.3d 724 (Div. III, 2005); State v. Holmes, 129 Wn. App. 24 (Div. I, 2005); and State v. Pacas, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Div. III, 2005) – the three divisions of the Court of Appeals have held under similar analysis that probable cause arrests (and searches incident to those arrests) were not unlawful even though the arrests were made under the version of the DWLS third degree statutes that were held unconstitutional as applied in certain respects in City of Redmond v. Moore, 151 Wn.2d 664 (2004) **July 04 LED:06; Aug 04 LED:22; Oct 04 LED:22; Oct 04 LED:22.**

The Carnahan Court explains as follows the general rule that an arrest based on probable cause that a statute has been violated is lawful even if the statute is held to be unconstitutional:

An arrest based on probable cause is generally valid even if it is predicated on a statute subsequently ruled unconstitutional. . . . "Police are charged to enforce laws until and unless they are declared unconstitutional." DeFillippo, 443 U.S. at 39. The arrest is invalid only if the statute at issue is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."

The Moore court did not hold that RCW 46.20.342 (1)(c) was unconstitutional; it merely held unconstitutional two means of suspending a driver's license. And as evidenced by the four dissenting judges in Moore, the provisions of RCW 46.20.289 and .324(1) were not so grossly and flagrantly unconstitutional that a person of reasonable prudence would be bound to see it.

**Result in Carnahan:** Reversal of Cowlitz County Superior Court conviction of Jack Carnahan for driving while license suspended, third degree; and (on grounds not addressed in this **LED** entry)

for unlawful possession of a controlled substance; remanded for re-trial on unlawful possession charge.

Result in Potter: Reversal of Spokane County Superior Court suppression order; remanded for prosecution of Jacob James Potter for unlawful possession of a controlled substance.

Results for Holmes: Reversal of Snohomish County Superior Court suppression ruling; remanded for prosecution of Wayne H. Holmes for unlawful possession of a controlled substance.

Result in Olinger: Affirmance of Spokane County Superior Court conviction of Jerry S. Olinger for unlawful possession of a controlled substance.

Result in Pacas: Affirmance of Benton County Superior Court conviction of Edwin Perez Pacas for unlawful possession of a controlled substance.

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### **NEXT MONTH**

The January 2006 LED will address, among other recent appellate court decisions, the December 1, 2005 Washington Supreme Court decision in State v. Morse, a decision holding that officers did not have valid consent when they searched an apartment for a suspect after getting permission from a houseguest who was a temporary resident in the apartment. The Court holds in Morse that article 1, section 7 of the Washington Constitution does not recognize the "apparent authority" doctrine that applies under the federal constitution's Fourth Amendment. The Morse Court also declares that: 1) there was no evidence that the mere houseguest had authority to consent to a search of the bedroom of Mr. Morse, who was the sole signatory on the apartment lease; and 2) for purposes of the Court's Leach rule - - which requires that officers who are seeking consent must ask all co-habitants presently on the premises for consent - - a co-habitant is generally deemed to be "present" if the co-habitant is anywhere on the property when officers are asking for consent, and therefore the officers here were not excused under the Leach rule where Mr. Morse was in a back room at the point when the officers were asking for consent at the entry door to the apartment.

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

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

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/>]. 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.law.cornell.edu/uscode/>].

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

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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>].

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