Law Enforcement Digest

March 2006

588th Basic Law Enforcement Academy – September 20, 2005 through January 31, 2006

President: Matthew R. Paul – King County Sheriff's Office
Best Overall: Mikolaj T. Tempski – Seattle Police Department
Best Academic: Wade J. Jones – Seattle Police Department
Best Firearms: Matthew Bendickson – Seattle Police Department
Tac Officer: Officer Bradley Conway – Seattle Police Department

589th Basic Law Enforcement Academy – October 5, 2005 through February 15, 2006

President: Jason A. Catlett – Bellevue Police Department
Best Overall: Lisa L. de Wilde – Kent Police Department
Best Academic: Lisa L. de Wilde – Kent Police Department
Best Firearms: Chris R. Danninger – Tukwila Police Department
Tac Officer: Trooper JoAnn Buettner – Washington State Patrol

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9TH CIRCUIT, U.S. COURT OF APPEALS

SEARCH RULED TO BE CLOSE ENOUGH IN TIME TO ARREST TO BE DEEMED "INCIDENT TO ARREST" EVEN THOUGH FOR SAFETY REASONS OFFICERS – BEFORE STARTING – WAITED 10 TO 15 MINUTES FOR THIRD OFFICER TO ARRIVE

U.S. v. Weaver, 433 F.3d 1104 (9th Cir. 2006)

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

> On May 23, 2001, Sergeant Hignight ("Hignight") of the Riverside County Sheriff's Department was driving an unmarked sheriff's vehicle when he recognized Adam Herron ("Herron") in the passenger seat of a vehicle that had pulled up next to Hignight. The car was driven by an unknown female later identified as Hollie Lynn Weaver ("Weaver"). Herron's son Tyler was in the back seat. Hignight recognized Herron and knew that there were outstanding warrants for Herron's arrest. Hignight also knew that Herron was under investigation concerning a box of stolen checks. Hignight summoned another officer in a marked patrol car and asked him to make a traffic stop of the subject vehicle.
>
> After making the traffic stop, Hignight and the other officer ordered Herron from Weaver's car, arrested him, handcuffed him, and placed him in the back seat of the marked patrol car. Weaver and Tyler exited the vehicle at Hignight's direction and sat on the curb. Weaver refused to consent to a search of her car. Hignight informed Weaver that he would search the car over her protest, but said that he had to await the arrival of a third officer that he had called to the scene.

Hignight testified that it was his "typical procedure" to conduct a vehicle search with three officers on the scene: one to monitor the suspects, one to conduct the search, and one to observe the officer conducting the search. Ten to fifteen minutes elapsed before the third officer arrived, at which time Hignight searched the car. The parties agree that virtually nothing happened while waiting for the third officer.

On searching the vehicle, Hignight found forty-six blank personal checks in a black organizer on the floor behind the driver's seat. The checks had been reported stolen three days before by a postal customer in Rancho Mirage, California. Weaver, a part-time letter carrier, had been assigned to the postal delivery route in question around the time that the checks were stolen. Subsequent investigation revealed that Herron had been filmed at a bank cashing a forged check. Forensic analysis revealed that Weaver had forged thirty-five checks, including the check cashed by Herron, totaling $2,582.97.

After the district court denied Weaver's motion to suppress evidence, she entered a conditional guilty plea on June 10, 2004 to embezzlement of mail matter by a postal service employee in violation of 18 U.S.C. § 1709. The district court sentenced Weaver to three years of probation and ordered her to pay restitution in the amount of $2,582.97.

ISSUE AND RULING:

Two officers made a safety-based decision to wait 10 to 15 minutes for a third officer before starting an on-scene vehicle search following the arrest of a passenger. Was this delay an unreasonably long delay that disqualified the search from being considered a search conducted "incident to arrest"? (ANSWER: No, it was a reasonable safety step to wait this brief period for a third officer to arrive)

Result: Affirmance of California Central U.S. District Court conviction of Hollie Lynn Weaver a/k/a Hollie Lynn Brawner of embezzlement of postal matter by a postal employee.

ANALYSIS:

"[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454 (1981). Applying the Belton rule, we have held that a warrantless automobile search will be valid if it is "roughly contemporaneous with the arrest."

Although contemporaneity is important, we have made clear that it is not the sole inquiry. "The relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." Indeed, "[t]here is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search that is a contemporaneous incident of the arrest." *But see* United States v. Vasey, 834 F.2d 782 (9th Cir.1987) (holding that search conducted thirty to forty-five minutes after arrest was not contemporaneous to arrest and that officer's instigation of various conversations with handcuffed arrestee were intervening acts).

> It is undisputed in the instant matter that Hignight made a lawful custodial arrest of Weaver's passenger. The inquiry thus turns to whether the ensuing search of Weaver's automobile was roughly contemporaneous with the arrest, and not so separated in time or by intervening acts that the search was not incident to the arrest.
>
> Hignight testified that he delayed the search of the automobile for ten to fifteen minutes to summon a third officer to the scene to conduct a safe search. During that interval, Hignight testified that he "was standing on the curb just waiting for the additional unit." As Weaver indicated in her opening brief, "[t]ime froze" during the interval. Weaver does not suggest that any particular intervening act occurred between the arrest and the search.
>
> We must conclude that Hignight's search of Weaver's automobile was conducted as a contemporaneous incident to the arrest of Weaver's passenger. Unlike [U.S. v. Ramos-Osegura, 120 F.3d 1028 (9th Cir. 1997)] where police towed the arrestee's car before searching it, or Vasey where police repeatedly questioned the arrestee before conducting the search, no intervening act occurred in this case . . .

LED EDITORIAL COMMENT: While this is a federal case decided under the Fourth Amendment, there are no pertinent contrary "independent grounds" rulings by Washington appellate courts under article 1, section 7. We think the analysis and ruling would be the same by the Washington courts. See State v. Boursaw, 94 Wn. App. 629 (Div. I, 1999) May 99 LED:07 (holding that a delay of ten minutes for a drug-sniffing dog to arrive was not an unreasonably long delay prior to conducting an on-site search incident to arrest. See also State v. Boyce, 52 Wn. App. 274 (Div. I, 1988), holding that a search could no longer be deemed to be "incident to arrest" once an arrestee had been transported from the scene.

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WASHINGTON STATE SUPREME COURT

BOMB THREAT CONVICTION REVERSED – MAN WHO WAS DRUNK WHEN, DURING HIS DETENTION BY AIRPORT POLICE, HE THREATENED TO "BLOW THIS PLACE UP," IS ENTITLED TO A NEW TRIAL WITH JURY INSTRUCTIONS REFLECTING "TRUE THREAT" STANDARD CREATED TO PROTECT FREE SPEECH

State v. Johnston, __ Wn.2d __, __ P.3d __, 2006 WL 240599 (2006)

Facts and Proceedings below: (Excerpted from Supreme Court lead opinions)

> On May 2, 2001, Alaska Airlines flight attendant Jennifer Stellflug noticed two passengers, petitioner Tracey Johnston and another man, who appeared to be intoxicated. After seeing the men drinking alcoholic beverages, Stellflug told the men the use of personal alcohol was not permitted. Following a second warning about the use of alcohol, she confiscated an alcoholic beverage from the men. She and other flight attendants advised the pilots of the situation, who notified controllers at Sea-Tac, who in turn notified Port of Seattle police.

> Port of Seattle Officer Raymond Blackwell met the incoming flight. Blackwell testified that when Johnston got off the plane it was obvious he had been drinking -- '{t}here was a strong odor of alcohol and his eyes were watery and blood shot.' Blackwell detained Johnston, obtained his identification and ran a computer check, then arrested Johnston on two outstanding misdemeanor warrants. Blackwell took Johnston to the airport security office. Blackwell testified that Johnston was 'visibly upset' about the arrest, and that while Blackwell was booking Johnston and writing his report Johnston 'started vocalizing his unhappiness.' Johnston said that 'he would come back to the airport and . . . this place up' and that 'he was going to blow this place up.' Blackwell testified that Johnston said that 'he knew about the airport, and he knew what it would take . . . all he needed was a Ryder truck and some nitro diesel fuel . . . .' Johnston also said that 'he would fin{d} that bitch of a flight attendant . . . and get her and said he believed she lived in Mercer Island.'
>
> Johnston was charged with threats to bomb or injure property in violation of RCW 9.61.160. Over defense counsel's objection, the trial court instructed the jury that '{t}hreat means to communicate, directly or indirectly, the intent to wrongfully cause physical damage to the property of a person other than the actor,' and declined to give Johnston's proposed instruction defining a 'true threat.' In closing argument, Johnston's counsel described Johnston as drunk and suggested that the jury should not convict because Johnston's threat could not be taken seriously under these circumstances. The State's objection to this argument was sustained. The prosecuting attorney argued that intent to carry out the threat was not required. During jury deliberations, the jury asked, 'Are we suppose{d} to judge if defendant is guilty of only 'saying the words' or deciding if defendant 'actually has intent to carry out the threat{?}'' Over a defense objection, the trial court responded, 'Intent to carry out the threat is not an element of the crime.' Johnston was convicted and he appealed.
>
> The Court of Appeals affirmed the conviction in an unpublished opinion.

<u>ISSUES AND RULINGS</u>: 1) In light of constitutional “free speech” protections, must the jury in a bomb threat prosecution under RCW 9.61.160 be properly instructed regarding the concept of “true threat”? (ANSWER: Yes, rules a unanimous Court, and the trial court committed reversible error in its instructions) 2) Is there sufficient evidence in the record to justify re-trying the defendant under RCW 9.61.160? (ANSWER: Yes, rules an 8-1 majority)

<u>Result</u>: Reversal of unpublished Court of Appeals’ decision that affirmed a King County Superior Court conviction anal of Tracey Jade Johnston for violating RCW 9.61.160; case remanded for re-trial.

<u>ANALYSIS</u>:

RCW 9.61.160(1) provides in relevant part:

> It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy . . . .

The prosecutor apparently conceded in this case that the jury was not properly instructed under the constitutionally required “true threat” standard. The Supreme Court explains the basis and requirements of this standard in part as follows:

> The statute regulates pure speech and therefore 'must nevertheless be 'interpreted with the commands of the First Amendment clearly in mind.'' Certain categories of speech ''are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'' State v. Kilburn, 151 Wn.2d 36 (2004) **Oct 04 LED:05**. One of these categories of punishable words is 'true threats.' . . . Virginia v. Black, 123 S. Ct. 1536 (2003) **Aug 03 LED:04**; Kilburn, ('true threats' are unprotected speech).
>
> We have adopted an objective standard for determining what constitutes a true threat:
>
>> A 'true threat' is a statement 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily harm upon or to take the life of {another individual}.'
>
> '{W}hether a true threat has been made is determined under an objective standard that focuses on the speaker.' Kilburn. 'A true threat is a serious threat, not one said in jest, idle talk, or political argument.'
>
> The United States Supreme Court has said that ''{t}rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.' 'The speaker need not actually intend to carry out the threat.' Kilburn. The reasons that true threats of violence are unprotected speech are to protect individuals from the fear of violence, the disruption engendered by that fear, and the possibility that the threatened violence will occur. . . Kilburn.
>
> The constitutionality of the Washington bomb threat statute has been addressed in only a few cases. The Court of Appeals in the present case relied on two cases in support of its conclusion that RCW 9.61.160 is not overbroad, State v. Edwards, 84 Wn. App. 5 (1996) **April 98 LED18** and State v. Smith, 93 Wn. App. 45 (1998). Initially, as Johnston correctly points out, the analysis in Edwards is flawed because it conflates two categories of unprotected speech, fighting words and true threats, as the court in Smith explained. The court in Smith properly recognized that the statute must be construed to prohibit only unprotected speech in order to avoid overbreadth. But as Johnston contends, Edwards and Smith do not support the Court of Appeals' twin conclusions that the statute is neither overbroad nor limited to unprotected speech.
>
> As the parties here agree, unless the bomb threat statute is given a limiting instruction so that it proscribes only true threats, it is overbroad. A law criminalizing speech is unconstitutionally overbroad under the First Amendment ''if it sweeps within its prohibitions constitutionally protected free speech activities.'' The overbreadth doctrine will invalidate a statute only if the

"enactment reaches a substantial amount of constitutionally protected conduct," Further, '{a} statute will be invalidated only if the court is unable to limit sufficiently its standardless sweep by a limiting construction.'

Here, the statute reaches a substantial amount of protected speech. For example, threats made in jest, or that constitute political statements or advocacy, would be proscribed unless the statute is limited to true threats. Accordingly, the statute must be limited to apply to only true threats. See Kilburn.

We construe RCW 9.61.160 to avoid an overbreadth problem by limiting it to true threats.

The next question is whether the jury was properly instructed. Johnston proposed a jury instruction defining a true threat, although the instruction did so in terms of the reasonable listener-based standard rather than the speaker-based standard this court has adopted. The trial court refused to give the instruction and instead instructed the jury solely in terms of RCW 9A.04.110(25)(b). The parties agree that the jury instructions were erroneous because they did not define 'true threat.'

The Court of Appeals held, however, that the instruction of 'threat' provided to the jury 'was . . . not improper because it did not require the threat to rise to the level of a true threat,' reasoning that RCW 9.61.160 is not limited to unprotected speech. This holding conflicts with the United States Supreme Court decision in Black, our decisions in Williams, J.M., and Kilburn, and the body of federal case law. RCW 9.61.160 must be limited to true threats, as explained above, and the jury must be instructed accordingly.

While pointing out that instructional error involving the elements of a crime may be harmless error, the State nevertheless concedes that the error in this case cannot be deemed harmless beyond a reasonable doubt in light of the facts and the jury's inquiry. This concession is appropriate. The evidence presented at trial appears close on the question whether Johnston's statements constituted a true threat. Exacerbating the problem, the jury inquired whether it could convict based on the words alone, or whether it had to find that Johnston intended to carry out the threat. Because this inquiry was couched in the alternative, when the trial court responded that intent to carry out the threat was not an element of the crime, the jury could infer that the alternative was correct, i.e., that it could convict merely on the basis that Johnston said the words.

Finally, Johnston contends that the evidence was insufficient to convict him of violating RCW 9.61.160. He urges that an independent examination of the record shows that he did not make a true threat. He contends that because there was insufficient evidence that he made a true threat, his conviction must be reversed and the charge dismissed.

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. However, as explained in Kilburn, a rule of independent appellate review applies in First Amendment speech cases. An appellate court 'must 'make an independent examination of the whole record, . . .' so as to assure {itself} that the judgment does not constitute a forbidden intrusion on the field of free expression.' The appellate court is required to independently review

> only "crucial facts' -- those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts.' Kilburn. Thus, whether a statement constitutes a true threat is a matter subject to independent review. The rule of independent appellate review does not extend to factual determinations such as findings on credibility, however.
>
> If, however, the trial proceedings are tainted by error, an appellate court may be unable to conduct an independent review of the record – for example, where inadmissible evidence that was admitted may have influenced the jury. In Johnston's case, the jury was influenced by the erroneous jury instructions that governed the trial. Under these circumstances, independent appellate review is inappropriate. Instead, this case must be remanded for a new trial under proper instructions.

The Supreme Court rules that the case must be remanded for possible re-trial under proper jury instructions. Justice Sanders dissents from the remand order, urging dismissal of the charge. He argues that the Court should conclude from an "independent review" of the record that there is insufficient evidence of a "true threat."

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WASHINGTON STATE COURT OF APPEALS

ARRESTEE'S "VOLUNTEERED STATEMENT" AND HIS ARRESTING OFFICER'S REPLY TO THE "NEUTRAL" RESPONSE HELD ADMISSIBLE DESPITE LACK OF MIRANDA WARNINGS; HOWEVER, ARRESTEE'S STATEMENTS TO HOSPITAL PERSONNEL HELD MEDICALLY PRIVILEGED DESPITE PRESENCE OF OFFICERS WHEN THOSE STATEMENTS WERE MADE

State v. Godsey, __ Wn. App. __, __ P.3d __, 2006 WL 163608 (Div. III, 2006)

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

> On May 17, 2004, an undercover task force sought Ray Godsey on warrants. A person suspected to be Mr. Godsey was seen by [a] United States Deputy Marshall leaving a Spokane convenience store. [The Deputy U.S. Marshall] reported his observation to [a] Spokane County [Sheriff's Office Deputy who] exited his vehicle and yelled, "Police! Ray Godsey! Stop!" Mr. Godsey ran and climbed a nearby fence. [The deputy sheriff] followed and again ordered him to stop. Mr. Godsey stopped, turned around and faced [the deputy sheriff] with his fists up. He said, "Come on," and took a step toward [the deputy sheriff]. To keep Mr. Godsey at a distance, [the deputy sheriff] kicked Mr. Godsey twice in the midsection. Mr. Godsey resumed a defensive stance. [The Deputy U.S. Marshal] struck him in the face with his fist.
>
> Mr. Godsey was wrestled to the ground, struggling against the attempts to handcuff him. He was told he was under arrest for assaulting a police officer and for warrants. At that time, [the deputy sheriff] informed Mr. Godsey he had the right to remain silent and the right to an attorney. [The deputy sheriff] asked Mr. Godsey, "Are you Ray Godsey?"; Mr. Godsey responded, "I am not Ray, I have never been called that." In a search of Mr. Godsey's person subsequent to arrest, officers found two clear pipes with burn marks, a syringe, and two zip lock

baggies. Subsequent tests on the baggies revealed 1/10 gram of methamphetamine residue.

On the way to the Spokane County Jail, Mr. Godsey was belligerent and threatened the officers. Specifically, he stated, "[y]ou are going to pay for this," to [the deputy sheriff]. When [the deputy sheriff] asked if he was threatening him, Mr. Godsey reportedly responded, "[t]ake it for what you want, but I know where you and a lot of other cops live."

Prior to being booked into jail, Mr. Godsey was transported to Deaconess Hospital for injuries to his lip and chin. In the presence of law enforcement, medical personnel questioned Mr. Godsey about drug use. Mr. Godsey eventually admitted using methamphetamine regularly for the past year, including the day before.

The State charged Mr. Godsey with resisting arrest, third-degree assault with intent to prevent or resist lawful apprehension or detention, making a false or misleading statement, possession of drug paraphernalia, and possession of methamphetamine.

In a CrR 3.5 hearing, Mr. Godsey challenged certain post-arrest statements, including his denial he was Ray Godsey, statements allegedly threatening [the deputy sheriff], and questioning by medical personnel. He argued the statements were not voluntary and obtained in violation of his Miranda rights. The court held all statements were admissible. At trial, officers testified to Mr. Godsey's admissions of drug use made at the hospital without further objection.

At trial, Mr. Godsey requested the court instruct the jury on the lesser-included offense of attempted third-degree assault. The court refused to give the instruction and held, "there is no such thing ... as an attempted [assault.]"

Mr. Godsey was convicted of all counts. He appealed.

ISSUES AND RULINGS: 1) Were the arrestee's initial volunteered statement and his reply to the officer's response to that volunteered statement both admissible despite the absence of any post-arrest, pre-statements Miranda warnings? (ANSWER: Yes); 2) Were the arrestee's statements to medical personnel, in the presence of law enforcement officers, inadmissible under the physician-patient privilege at RCW 5.60.060(4)? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court convictions of Ray Allen Godsey for resisting arrest, third degree assault, and possession of methamphetamine; reversal of conviction for possession of drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Miranda questions re volunteered statements

Miranda warnings must be given before custodial interrogations by agents of the State; otherwise, the statements obtained are *presumed* to be involuntary." State v. Willis, 64 Wn. App. 634 (1992) (citing State v. Sargent, 111 Wn.2d 641 (1988)). "[T]he term 'interrogation' under Miranda refers not only to express

questioning, but also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." Sargent (quoting Rhode Island v. Innis, 446 U.S. 291 (1980)).

However, "[v]olunteered statements of any kind made to police are not barred by the Fifth Amendment." Further, "[a] voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer in the course of appellant's narration, asks the defendant to explain or clarify something he has already said voluntarily." Berna v. State, 282 Ark. 563 (1984) (relying on the definition of interrogation from Innis, 446 U.S. at 300-01).

Here, Mr. Godsey mainly contends [the deputy sheriff's] follow-up question asking what he meant by the statement, "[y]ou are going to pay for this," constituted interrogation because it was designed to solicit an incriminating response. However, Mr. Godsey was not charged for threatening [the deputy sheriff]. Thus, the prejudicial effect is unclear. Further, Mr. Godsey's original "threat" was a voluntary, unsolicited statement, not subject to Fifth Amendment protection. [The deputy sheriff]'s follow-up query asking Mr. Godsey if his statement was a threat should be interpreted as a neutral inquiry merely intended to clarify what had already been said. Mr. Godsey's response may be viewed as a continuation of his previously volunteered statement. *See* Stone v. Arkansas, 321 Ark. 46, 900 S.W.2d 515 (1995) (finding officer's request for clarification after a defendant's voluntary admission of guilt to not constitute interrogation for Miranda purposes). In sum, the trial court did not err.

2) Physician-Patient Privilege

But, the admission of Mr. Godsey's drug use confessions made during his hospital treatment and reported by the law enforcement officers at trial violated his right to physician-patient confidentiality under RCW 5.60.060(4). *See* State v. Gibson, 3 Wn. App. 596 (1970). Under the circumstances described at the hospital, the law officers were effectively hospital agents. The hospital personnel questioned Mr. Godsey about his drug usage for treatment purposes. The trial court erred at the CrR 3.5 hearing in allowing the evidence at trial.

Mr. Godsey's statements to physicians comprise the sole evidence of the "use" of the paraphernalia found in his possession. Although other evidence in the record would support bare possession of drug paraphernalia, RCW 69.50.412(1) proscribes the "use" of drug paraphernalia to inject, inhale or otherwise ingest a controlled substance. RCW 69.50.412(1). Bare possession is not unlawful. The conviction is wrongfully supported by the hospital evidence because the State argued at trial that the statements proved recent use of the drug paraphernalia. Because the remaining evidence is insufficient, the improper statements were not harmless error. We agree with Mr. Godsey that the taint of the hospital evidence violating his physician-patient privilege is strong enough to merit reversal of his conviction for possessing drug paraphernalia.

[Some citations omitted]

LED EDITOR'S COMMENTS:

1) Please don't push it. We think the officer-neutral-clarifying-reply-to-the-response question was a close Miranda question. We hope that officers will not intentionally "egg on" a ranting arrestee in reliance on the rationale of the Godsey decision.

2) Beware of CrR 3.1: Here, following the arrest and before saying anything to the arrestee, the arresting deputy properly advised the arrestee of his right to remain silent and his right to have an attorney consistent with Criminal Rule 3.1 (which requires such advisement immediately following a custodial arrest). This "3.1 warning" by the deputy sheriff precluded the defendant from arguing that his "volunteered" statements, while not subject to suppression under Miranda, were subject to suppression under CrR 3.1.

OFFICER CHECKING OCCUPIED CAR FOR POSSIBLE NON-TRAFFIC CIVIL INFRACTION WAS JUSTIFIED BY OFFICER-SAFETY CONCERNS IN SEARCHING CAR FOR HANDGUN AFTER SEEING OPEN HANDGUN CASE IN CAR

State v. Day, 130 Wn. App. 622 (Div. III, 2005)

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

> In late March 2003, Deputy Jeff Hayter noticed a vehicle backed into shrubbery under a tree in a public access area along the Yakima River. Deputy Hayter knew that migrant workers formerly camped in that area before it was designated public access. He also knew that vehicles parked in that area were required to have a permit tag attached to their rear bumper. The deputy approached the vehicle on foot to determine whether it had a proper permit and whether it was being used as a home for migrant workers.
>
> As Deputy Hayter approached, he saw that the vehicle was occupied with a man in the driver's seat and a woman in the front passenger seat. The vehicle was cluttered with garbage, including cigarette lighters and rubber gloves. While talking with the couple, who identified themselves as Charlie and Alice Day, Deputy Hayter noticed an empty handgun case on the floor of the car near Mr. Day's feet. The deputy asked Mr. Day if there was a gun in the car. When Mr. Day answered yes, Deputy Hayter asked him to step out of the car, patted him down, and handcuffed him. Mr. Day said the gun was under the passenger seat. Consequently, the deputy also asked Ms. Day to step out of the car, patted her down, and handcuffed her. He told the couple they were not under arrest.
>
> By this time, another officer had arrived. Deputy Hayter searched under the passenger seat, but eventually found the handgun--a .45-caliber Glock-- under the driver's seat. Dispatch reported that the handgun was stolen and that Ms. Day had a felony warrant for her arrest. Mr. and Ms. Day were arrested. The subsequent search of the vehicle incident to their arrest uncovered substantial evidence of the manufacture of methamphetamine.
>
> Mr. Day was charged with one count of manufacturing a controlled substance, former RCW 69.50.401(a)(1). His pretrial motion to suppress the evidence obtained during the pre-arrest warrantless search of the vehicle was denied and he was convicted on stipulated facts in a bench trial.

ISSUE AND RULING: Charlie Day and his wife were parked in a Benton County public access area. An officer who investigated to see if they had a proper parking permit observed an open handgun case near Mr. Day's feet. Did officer-safety concerns justify a limited search of the vehicle to find the handgun (which turned out to be stolen)? (ANSWER: Yes)

Result: Affirmance of Benton County Superior Court conviction of Charlie Bernnett Day for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Day asserts that, because Deputy Hayter was investigating a civil natural resource infraction rather than a traffic infraction, the deputy was not justified in detaining him and his wife and searching the vehicle for the handgun. He contends the deputy was not authorized to conduct a Terry investigation under the circumstances of a nontraffic violation.
>
> Generally, warrantless searches and seizures are unreasonable and violate the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166 (2002) **June 02 LED:19**. Courts recognize a few carefully drawn exceptions to the warrant requirement, including consent, exigent circumstances, inventory searches, plain view searches, searches incident to arrest, and Terry investigative stops. A Terry stop is a brief detention based on an officer's reasonable suspicion of criminal activity. If the initial stop is justified, the officer may make a limited search for weapons if he or she reasonably believes that his or her safety or the safety of others is endangered. To justify the initial stop for Terry purposes, the State must show that the officer had a reasonable, articulable suspicion, based on objective facts, that the person stopped had committed or was about to commit a crime.
>
> Mr. Day was not stopped because he was suspected of committing a crime. As he notes, certain civil infractions, such as the one investigated by Deputy Hayter here, have been decriminalized. *See* RCW 7.84.020 (a natural resource infraction is not a criminal offense); RCW 46.63.020 (a traffic infraction may not be classified as a criminal offense, subject to enumerated exceptions). Although the courts have extended application of the Terry stop exception to traffic infractions, Duncan declined to extend the exception to include all civil infractions. Mr. Day contends parking without a permit in a public access area is a civil infraction that does not justify a Terry stop.
>
> With a civil infraction, an officer may briefly detain a person only long enough to check his or her identification and to issue the notice. Duncan. Traffic infractions, due in part to the ready mobility of vehicles and safety concerns, justify a broader scope of detention. The person may be detained for the reasonable period of time required to identify him or her, check for outstanding warrants, check his or her license, insurance card, and vehicle registration, and complete the notice of the traffic infraction. Duncan (citing RCW 46.61.021(2)). A nontraffic civil infraction that did not occur in the presence of the officer does not justify a Terry investigative detention. Duncan.

The questions before this court are first, whether this civil parking violation constituted a traffic infraction; and second, whether additional circumstances justified the search for the handgun.

Both parties agree that the authorization for Mr. Day's parking infraction is under chapter 7.84 RCW, which describes the procedure for issuing infraction notices for violations of the natural resource laws. The administrative rule adopted pursuant to this statute provides that no vehicle shall be parked in a state park area without an appropriate permit or purpose. WAC 352-20-010. According to the general statute on natural resources, chapter 43.30 RCW, a violation of a rule pertaining to the use by the public of state-owned lands is an infraction under chapter 7.84 RCW. . . Specifically, "violation of a rule relating to traffic including parking, standing, stopping, and pedestrian offenses is a traffic infraction." Former RCW 43.30.310. Under the clear terms of the statutes relating to civil natural resource violations, parking in violation of the rules for use of state-owned land is a traffic infraction.

As noted above, a brief Terry investigative stop is justified by a reasonable suspicion of a traffic infraction. Duncan. During such a stop, an officer may make a limited search for weapons if he or she reasonably believes the search is necessary for officer safety. Here, the findings indicate that Mr. Day acted as though he were looking for something as Deputy Hayter approached. The deputy then noticed an open handgun case on the floor at Mr. Day's feet. When asked, Mr. Day said that there was a gun in the car behind the passenger seat. These facts support the deputy's reasonable safety concerns. As noted in State v. Kennedy, 107 Wn.2d 1 (1986), the scope of a search during a Terry stop based on a traffic infraction should be limited to the extent sufficient to assure the officer's safety:

> This means that the officer may search for weapons within the investigatee's immediate control. We also recognize that such a limited search applies to any companion in the car because that person presents a similar danger to the approaching officer. The front seat of the car is in the immediate control of a passenger seated next to the driver. Consequently, a search in that area to discover whether the suspect's furtive gesture hid a weapon under the front seat is similar to a Terry frisk where an officer may frisk a suspect to protect himself from danger.

Given Deputy Hayter's objectively reasonable concerns for his safety, his limited search for the handgun under the passenger seat (where Mr. Day said it was), and under the driver's seat was reasonable. "It would be unreasonable to limit an officer's ability to assure his own safety." Because the seizure of the handgun was lawful, Mr. Day's arrest for possession of the stolen gun was justified *[Court's footnote: Apparently Mr. Day admitted that he had possession of the handgun]*, as was the search of the vehicle incident to that arrest. The trial court did not err in denying his motion to suppress the evidence of methamphetamine manufacture that was revealed during that search.

[Some citations omitted]

SEPARATE PURCHASES BY TWO UNKEMPT MEN OF MURIATIC ACID AND DENATURED ALCOHOL DID NOT GIVE REASONABLE SUSPICION FOR TERRY STOP

State v. Carlson, 130 Wn. App. 589 (Div. III, 2005)

Facts and Proceedings below:

The Court of Appeals describes as follows the facts leading up to the vehicle stop of defendant Carlson:

> Robert Boyce, the manager of Potter Drug in Othello, Washington, saw two men, Mr. Carlson and Mr. Owens, enter the store on May 22, 2003. He was suspicious of them by their appearance and by the way they acted. The two men were "rough dressed, unkempt and dirty." Upon entering the store, one man went to the sundries section of the paint shop while the other went to another area. The man in the paint shop area declined Mr. Boyce's offer of assistance. As soon as the first man paid for his item and left the store, the other man bought his item and left the store. One man bought a container of muriatic acid and the other bought a container of denatured alcohol.
>
> Mr. Boyce testified that he knew from his training through a local law enforcement program that the items the men purchased were ingredients for the manufacture of methamphetamine and that those attempting to buy methamphetamine components tend to be elusive and decline help in locating the products in the store because they do not want to be noticed. He recorded the license plate number of the vehicle the men were driving and noted the vehicle description.
>
> Mr. Boyce then called police and identified himself to a police dispatcher and reported what he had observed. The call was dispatched to . . . a police officer with the Othello Police Department. [The officer] located the car bearing the reported license number, and noted the vehicle and its occupants matched the description provided by dispatch. He then stopped the car.

The Carlson Court does not describe what happened after the officer stopped the car, other than to state that the officer "ultimately discovered pseudoephedrine." No issue was raised in this appeal other than lawfulness of the Terry stop. Thus, one car only presume, that, if the vehicle stop had been supported by reasonable suspicion, the officer's discovery of pseudoephedrine would have been otherwise lawful under federal and state constitutional search and seizure rules.

ISSUE AND RULING: Did the merchant's report that two unkempt men had come in his store together, had then split up, and had separately purchased muriatic acid and denatured alcohol provide "reasonable suspicion" of criminal activity sufficient to justify a contemporaneous Terry stop of a car occupied by the two men? (ANSWER: No)

Result: Reversal of Adams County Superior Court conviction of Jeffrey Otto Carlson for possession of pseudoephedrine with intent to manufacture methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> An officer may briefly detain occupants of a vehicle for investigation if the circumstances satisfy the Terry stop reasonable suspicion standard. Our state and federal constitutions require officers making a valid Terry stop to be able to identify specific and articulable facts that, taken together with rational inferences

from those facts, reasonably warrant the intrusion. Articulable suspicion means "a substantial possibility that criminal conduct has occurred or is about to occur."

Reasonableness is determined from the totality of the circumstances known by the officer at the inception of the stop. The factual basis for an investigatory stop need not arise out of the officer's personal observation, but may be supplied by information acquired from another person. Police may rely on information known to its agency and relayed through dispatch.

Mr. Carlson argues that what was known to law enforcement was not enough to amount to reasonable articulable suspicion. We agree.

A number of courts [in other jurisdictions] have found that similar purchases of legitimate and innocuous items were an insufficient basis for reasonable suspicion of criminal activity. **[LED Ed. Note: The Carlson Court's discussion of a Minnesota Court decision is omitted from this LED entry to save space.]**

In this case, other than knowing that the innocuous items were purchased, police had some information about the shopping practices and current grooming of the occupants of the car. These matters, when coupled with the purchase of lawful goods, are inadequate to substantiate reasonable suspicion.

With respect to shopping practices, the act of entering a store with a companion and then splitting up to purchase pseudoephedrine products is a suspicious activity often seen in methamphetamine manufacture litigation, and it frequently serves to support investigative stops in published cases. . . But that activity has not been documented in cases involving the purchase of anything other than pseudoephedrine products.

Moreover, that Mr. Carlson and Mr. Owens entered this particular store together and then made separate selections and purchases of legitimate items was certainly not suspicious or even atypical. The store manager conceded that it was not unusual for two or more people to enter into the store and then separate to shop.

As for the suspects' appearance, while a person's appearance might be a legitimate factor in deciding whether police have reasonable suspicion of criminal activity to support an investigative stop, such in itself is not sufficient. . . Appearance is not used to stereotype physical characteristics with criminal conduct or propensity, but to assess suspicion in the context of the situation at hand. There was nothing compelling about the description of the men that is relevant to the context here. The store manager testified that it was not unusual to see customers that were "dressed rough" or not "dressed their best" in the store.

Courts in other jurisdictions have held that police lacked reasonable suspicion in similar innocuous item cases when they have insufficient additional facts to support the stop.

. . .

> Here, the store manager testified that muriatic acid was lawful to sell and no prescription was required for its purchase. Mr. Boyce testified that muriatic acid and denatured alcohol have some farming and industrial uses. While the substances in this case are not as ubiquitous as salt [one item involved in one of the other jurisdiction cases], nothing in the record indicates that the purchase of either of these products is inherently suspicious or that members of the public in general or Mr. Carlson specifically would be particularly unsuitable purchasers. We are not inclined to take judicial notice of this.
>
> The number of items purchased in this case is in contrast to those cases in which the items the defendants purchased constituted a nearly complete methamphetamine recipe.
>
> . . .
>
> The suppression record does not specify the quantity of the products purchased and there was no indication that information was related to the police. At oral argument, however, defense counsel used for illustrative purposes containers of an unremarkable size when discussing the modest quantity of product purchased.
>
> . . .
>
> This case also differs from others in which store employees called police when they believed customers were purchasing ingredients to manufacture methamphetamine where the purchases involved pseudoephedrine, a regulated substance, and/or police had an independent reason to stop the person such as a traffic infraction or suspicion of shoplifting.
>
> We cannot countenance an investigative stop on the purchase of these lawful products on this record.

[Citations omitted]

IN LIGHT OF THE ARRESTING OFFICER'S CONCESSION IN TESTIMONY THAT, AT THE TIME OF THE ARREST, THE VEHICLE WAS SAFELY OFF THE ROADWAY, PHYSICAL CONTROL CONVICTION IS HELD UNSUPPORTABLE

City of Spokane v. Beck, 130 Wn. App. 481 (Div. III, 2005)

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

> [A] Spokane Police Officer responded to a call of "a possible DUI [driving under the influence] parked in a parking lot" of a Zip Trip convenience store on the corner of Market and Euclid at 3 A.M. on March 21, 2003. The car was taking up two parking places on the north side of the parking lot about 20 to 30 yards from the roadway. The car was running and there was one occupant inside. The officer ultimately identified the occupant as Stacy Beck. The store was open and a clerk was on duty, but no other persons were present. [The officer] tried unsuccessfully to wake Ms. Beck by calling through the window and shaking the

car. Ms. Beck was slumped over to her right. He opened the door and shook Ms. Beck to wake her. Upon awakening, Ms. Beck told [the officer] she was not driving. After concluding that she was intoxicated, [the officer] arrested her for physical control. As she was being arrested, another person arrived to pick her up and asked if the vehicle could be released to her. The officer did not allow it. At trial [the officer] conceded that Ms. Beck was off the roadway and there was no danger.

Ms. Beck was convicted. She appealed the conviction to superior court. She challenged the denial of her motions to dismiss at the end of the State's case in chief and at the close of evidence asserting she had proven she was safely off the roadway. . . The superior court . . . held that [the safely-off-the-road] defense was proven and reversed the conviction.

ISSUE AND RULING: Is there sufficient evidence in the record to support the jury's rejection in this "physical control" prosecution of Ms Beck's affirmative defense of "safely off the roadway?" (ANSWER: No, not in light of the arresting officer's testimony that the vehicle had presented no danger)

Result: Affirmance of Spokane County Superior Court decision that reversed a District Court conviction of Stacy A. Beck for physical control under RCW 46.61.504.

ANALYSIS: (excerpted from Court of Appeals opinion)

In order to be found guilty of being in physical control of a motor vehicle while under the influence of alcohol, the State had to prove that Ms. Beck, within two hours after being in actual physical control of a vehicle, had an alcohol concentration of 0.08 or higher. RCW 46.61.504(1). That statute provides that "[n]o person may be convicted under this section if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2).

Ms. Beck argues that the jury verdict is not supported by substantial evidence because she established the defense that she was safely off the roadway. At trial, Ms. Beck was required to prove the affirmative defense by a preponderance of the evidence. State v. Votava, 149 Wn.2d 178 (2003) **Aug 03 LED:10**.

The two other divisions of this court have held that the determination of whether an accused is safely off the roadway is generally an issue of fact for the jury. State v. Reid, 98 Wn. App 153 (Div. II, 1999) **Feb 00 LED:11**, City of Edmonds v. Ostby, 48 Wn. App 867 (Div. I, 1987).

In Reid, Division Two explored the defense in the context of a suppression hearing where the defendant was charged with physical control, obstructing a police officer, and felony possession of a firearm. The defendant argued (among other things) that because the police lacked probable cause to arrest, the fruits of the search incident to that arrest should be suppressed. One such issue was whether the officer had probable cause to arrest the defendant if there were facts present to constitute the affirmative defense. The court decided that the officer may (constitutionally) arrest the suspect because "[a]t the time of arrest, the officer cannot know and it would be unreasonable to require him to estimate the likelihood of success of a potential affirmative defense." Accordingly, the court held that it would be premature for a trial court to rule on the merits of the

> defense in a suppression order unless "the evidence were susceptible of only one inference."
>
> The questions on review in Reid as well as the posture of the case make it distinguishable from the case before us. First, the issue before the superior court in Ms. Beck's case was sufficiency of evidence in light of an affirmative defense, not suppression. Second, because it was a pretrial hearing, the evidence was not yet fully developed in Reid. But here the entire matter had been heard and each party presented a case. It may be premature to consider the merits of an affirmative defense in the context of a motion to suppress. But here, the superior court was reviewing sufficiency in an appellate capacity.
>
> . . .
>
> In Ostby, the defendant was not safely off the roadway because the car was not in a parking stall and the defendant had passed out behind the wheel with the motor running and the transmission in drive. Here, Ms. Beck's car was running and parked in a lot 20 to 30 yards off of the roadway and she called for a ride before falling asleep in the driver's seat and slumped over onto the passenger side. The most compelling aspect of this case is [the officers]'s acknowledgment at trial that Ms. Beck's car was off the roadway and there was no danger. The city argues that the jury must have ignored the officer's testimony as it was within its province to do. But no reasonable trier of fact would disregard this plain admission that provided the factual basis for the elements of the defense from a trained police officer on the scene.
>
> . . .
>
> Viewed in the light most favorable to the city, the evidence was insufficient for a jury to conclude that Ms. Beck did not prove that she was, more probably than not, safely off the roadway.

[Emphasis added; some citations omitted]

LED EDITORIAL COMMENT: We believe that the Court of Appeals placed too much reliance on the officer's opinion testimony about whether the vehicle was a danger. That is a question ultimately for the fact-finder - - the jury here - - to decide on all of the evidence. We also question the idea that a car generally is "safely off the roadway" where the car is idling in a parking lot 20 to 30 yards from the roadway, and its operator is presently sleeping while seated behind the steering wheel. If here the arresting officer instead had testified at trial that the vehicle was not safely off the roadway because there was a significant risk that the driver would awaken and drive back onto the nearby roadway (and it seems to us that the officer could have reasonably so testified), the decision by the Court of Appeals may well have been different.

Also, some prosecutors might prosecute for DUI (rather than physical control) under similar facts if there were evidence in the case that would make it possible to prove that the drunk operator drove to that spot recently enough to support a DUI prosecution.

As always, we suggest that officers confer with their local prosecutors and legal advisors on such questions.

WOMAN COMMITTED IDENTITY THEFT WHEN: 1) SHE FOOLED OFFICER AT TRAFFIC STOP BY GIVING ACQUAINTANCE'S NAME, DOB, ADDRESS AND SSN; 2) THUS CAUSING MAJOR SUBSEQUENT PROBLEMS FOR HER UNFORTUNATE ACQUAINTANCE

State v. Presba, __ Wn. App. __, __ P.3d __, 2005 WL 3527165 (Div. I, 2005)

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

> In 2003, Shyla Dashiell received notice that her automobile insurance rates had significantly increased. Because she had received no tickets and been in no accidents, she inquired of her agent, who referred her to the Department of Licensing. To her surprise, the Department told her that its records indicated that she had been stopped by a state trooper on September 1, 2002, thereafter failed to appear for her court hearings, and, as a result, her driver's license had been suspended. There was also an outstanding warrant for her arrest.
>
> Dashiell contacted a number of people at the court that issued the warrant and eventually used a public disclosure request to obtain a videotape of the traffic stop. Upon viewing the videotape, she recognized the person using her maiden name, birth date, former address, and social security number as a former friend and neighbor, defendant Melissa Presba.
>
> Presba was charged with second degree identity theft, forgery, and third degree driving with a suspended license. Jonathan Lever, the state trooper who had conducted the traffic stop, testified that Presba had given Dashiell's maiden name, date of birth, and social security number with such assurance that he was inclined to believe her. Though the social security number was one digit off from what the Department of Licensing had for the license record, Presba explained that the Department had always had an incorrect number. Lever was also concerned because the physical appearance notations did not seem to match. But after a half hour of continued discussion he was sufficiently persuaded that Presba was who she said she was that he cited her for the infraction of driving without her license on her person and released her. Presba signed the notice of infraction using Dashiell's maiden name. Presba's actual driving record showed her license was suspended.
>
> Presba did not testify at trial. Her counsel conceded Presba had engaged in all the conduct alleged by the State, but argued that the purpose of the identity theft statute was limited to financial crimes. Counsel maintained Presba was guilty only of what she contended was the lesser included offense of criminal impersonation.
>
> The trial court compared the language of the identity theft statute to the criminal impersonation statute and distinguished the two, noting that one could assume a false identity and thus violate the criminal impersonation statute without using the means of identification of a real person that is required to violate the identity theft statute. The court also noted that while it appeared the general impetus for the identity theft statute seemed to be financial crimes, the Legislature had not limited the statute to such circumstances because it was not necessary to use another person's financial information or actually obtain anything of value to

violate the statute. The court concluded that a plain reading of the statute showed merely using a real person's means of identification to facilitate any other crime was sufficient, and that was what Presba had done.

ISSUE AND RULING: Did Ms Presba commit identity theft when she fooled the officer at the traffic stop by giving Ms Dashiell's name, DOB, address and SSN – thus causing major subsequent problems for Ms Dashiell? (ANSWER: Yes)

Result: Affirmance of Snohomish County Superior Court conviction of Melissa Presba for identity theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Presba also challenges sufficiency of the evidence. A person challenging the sufficiency of evidence admits the truth of the State's evidence and any reasonable inferences from it. All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. Circumstantial and direct evidence are considered equally reliable.
>
> The statutory means of identity theft applied here requires proof only that the defendant used "a means of identification ... of another person ... with the intent to commit, or to aid or abet, any crime." Presba was stopped for speeding while driving with a suspended license, offered Dashiell's name, social security number, former address and date of birth all in a temporarily successful effort to thwart the officer's attempt to ascertain her correct identity to enforce the traffic laws. The information Presba used constitutes a "means of identification" and the evidence supports an inference she did so to facilitate both the offense of RCW 9A.76.020, obstructing a police officer, and RCW 46.61.020, giving false information while in charge of a vehicle. The evidence was sufficient.
>
> In each of her arguments, Presba repeats a continuing theme that the State's charging decision creates an absurd result that offends common sense and violates the spirit of the identity theft law. In support of this claim, Presba cites the general statement of intent found in RCW 9.35.001: "The Legislature intends to penalize unscrupulous people for improperly obtaining financial information." But Washington cases "do not permit reliance on a statement of legislative intent to override the unambiguous elements section of a penal statute or to add an element not found there." The charging decision in this case neither created an absurd result nor offended common sense.
>
> Presba further contends the Legislature would not have intended the identity theft statute to turn the actions of defendants attempting to avoid prosecution for misdemeanors into felonies merely because they used another person's identity. The statute, however, expressly carves out a narrow exception for "any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting his or her age." This suggests that, apart from the specific situation described in the prior sentence, the Legislature did indeed mean for acts committed with intent to facilitate misdemeanors to now be treated as felonies when they satisfy the elements of identity theft even if such acts formerly would have been only misdemeanors.

> Our supreme court has recognized an "established principle of broad prosecutorial discretion" in determining what charges to bring when a defendant's acts violate more than one statute. Presba has cited no authority that when, as here, there is no violation of the concurrent statute rule or equal protection and the evidence is sufficient, a conviction should be reversed merely because the accused disagrees with the prosecutor's charging decision.
>
> At oral argument, Presba suggested scenarios involving slight culpability that might satisfy the State's reading of the statue. But we deal here only with the case before us, one which constituted a serious offense. Dashiell explained at a sentencing hearing that even after the many hours and multiple trips from Tacoma to Everett required to quash the arrest warrant and reinstate her driver's license, the consequences continued. She had to change her social security number, which in turn caused ongoing difficulties with her financial accounts and credit card files. And the Department of Licensing had flagged her driving record as having been used for fraudulent purposes, which meant she faced the prospect of additional problems any time her license was checked. These foreseeable consequences of Presba's acts were significant regardless of whether she had in mind only avoiding prosecution for a traffic offense rather than injuring Dashiell.
>
> We affirm the conviction of identity theft.

[Some footnotes and citations omitted]

SEX OFFENDER WAS NOT REQUIRED TO RE-REGISTER WHEN HE MOVED OUT OF HOUSE BUT OWNER ALLOWED HIM TO CONTINUE TO SLEEP NIGHTS IN HIS CAR IN THE DRIVEWAY AND TO GET MAIL AND PHONE SERVICE THERE

State v. Stratton, ___ Wn. App. ___, 124 P.3d 660 (Div. II, 2005)

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

> In October 2000, Michael Gilbert Stratton was convicted of luring with sexual motivation. Based on that conviction, he was required to register as a sex offender under RCW 9A.44.130.
>
> After his conviction, Stratton entered into a real estate contract to purchase the house and property at 121 Beacon Hill Drive in Longview. When he moved onto the property in mid-2002, he reported his new address to the Cowlitz County Sheriff's Office as the registration statute required.
>
> In Spring 2003, Stratton defaulted on the purchase. Unable to cure the default, he voluntarily moved out of the house and returned the keys on September 12, 2003. He testified that when he returned the keys to the real estate agency, he asked if he could be allowed to leave some items on the property for a while, use the telephone box, and be there "for a little bit." Accordingly, he continued his telephone service and his postal service.
>
> After returning the keys to the house, Stratton began living out of his vehicle, which he regularly parked in the driveway behind the 121 Beacon Hill Drive

house at night. He testified that he remained at the property because he had to use the telephone box there to receive phone messages related to his construction supply business. He conducted most of his business by telephone, and he had an internet long distance service that worked only if he plugged into the telephone box at the Beacon Hill Drive location. Stratton testified that he plugged in his phone to the telephone box every day to get his phone messages. He drove his car on and off the property during the day. He did not notify the sheriff about his situation because he had not moved off the property and still considered it his residence.

In February 2004, [two] Cowlitz County Sheriff's Deputies went to 121 Beacon Hill Drive to verify that Stratton still lived there. When the officers arrived, they noticed a "for sale" sign in front of the house, and they saw no furniture or belongings inside. They knocked twice, received no answer, and left. In March 2004, the State charged Stratton with failure to register as a sex offender, alleging in part:

> The defendant ... did knowingly fail to send his change of address to the Cowlitz County Sheriff ... after ceasing to have a fixed residence ... and/or lacking a fixed residence did knowingly fail to report weekly to the Cowlitz County Sheriff; contrary to RCW 9A.44.130(1), (4)(a), (5)(a), (6)(a) and (6)(b).

Several neighbors confirmed Stratton's testimony about his presence and activities at the residence. The trial court found that Stratton spent most nights in his car in the driveway, used the phone line outside the house to connect to the internet, and often left his car in the area.

Stratton waived his right to a jury trial, and the trial court convicted him, concluding that he was a "transient, living in his car outside his previous residence."

ISSUE AND RULING: Did Stratton have a fixed residence and did he not change his residence for purposes of RCW 9A.44.130? (ANSWER: Yes)

Result: Reversal of Cowlitz County Superior Court conviction of Michael Gilbert Stratton for failure to register as a sex offender under RCW 9A.44.130.

ANALYSIS: (Excerpted from Court of Appeals opinion)

If a convicted sex offender changes his residence address within the same county, he must give the county sheriff written notice of the change within 72 hours. RCW 9A.44.130(5)(a). In addition, a convicted sex offender who lacks a "fixed residence" is required to provide written notice to the sheriff of the county where he last registered within 48 hours. RCW 9A.44.130(6)(a). In addition, he must report weekly, in person, to the sheriff of the county where he is registered. RCW 9A.44.130(6)(b).

[If] a criminal statute is ambiguous, the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary.

Chapter 9A.44 RCW does not define the phrase "fixed residence." Accordingly, we look to a standard dictionary, which includes the following definitions for "residence":

> the act ... of abiding or dwelling in a *place* for some time: an act of making one's home in a *place ...;* the *place* where one actually lives or has his home distinguished from his technical domicile; ... a temporary or permanent dwelling *place,* abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit ...; a *building* used as a home.

"Fixed" can mean "securely placed or fastened," "permanently and definitely located," or "not subject to change or fluctuation," among other definitions.

"Residence" is ambiguous as applied here. It could simply indicate a *place* where one actually lives, not necessarily limited to a building, or it could be limited to a *building* used as a home. Accordingly, the rule of lenity requires that we interpret the statute in Stratton's favor absent legislative intent to the contrary. The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against sex offenders who re-offend. Specifically, registration provides law enforcement agencies with an address where they can *contact* a sex offender. The sheriff could have contacted Stratton at the 121 Beacon Hill Drive address by mail, by phone, or in person in the evenings.

The legislature added the phrase "fixed residence" to the registration statute in 1999 in response to State v. Pickett, 95 Wn. App. 475 (1999). LAWS OF 1999, 1st Sp. Sess., ch. 6, § 1. In Pickett, the defendant was fired from his job, and his possessions had been removed from the home of his former employer, where he had been registered as a sex offender. He spent a day or two with friends and then began living on the streets and in public parks. The court held that there was insufficient evidence to support Pickett's conviction for failure to register. The court recognized that Pickett did not know where he would sleep each night and, thus, he could not give the sheriff an address where he could be contacted; further, the registration statute did not provide a way for transients to register. Accordingly, the legislature amended the registration procedure and the language of the statute so that "all sex and kidnapping offenders whose history requires them to register shall do so regardless of whether the person has a fixed residence."

Unlike Pickett, Stratton was not moving from park to park and street to street each night. Instead, Stratton continued to sleep at the 121 Beacon Hill Drive address; he also got his mail there and continued to receive telephone service by an internet connection only accessible from there. He intended to return to the 121 Beacon Hill address daily and had no definite departure date. Stratton argues that for these reasons, 121 Beacon Hill Drive was still his fixed residence. We agree. Stratton's living situation fits the definition of residence as a "place" where he was abiding or dwelling, and it was "fixed" in that it was not subject to change or fluctuation. Accordingly, the State failed to prove that the statute required him to register as a sex offender who had no fixed residence.

[Some citations omitted]

DESPITE FACT THAT DEFENDANT ADMITTED THAT HE STOLE PSEUDOEPHEDRINE TO PAY OFF A DEBT TO A "METH COOK," CORPUS DELICTI IS HELD NOT ESTABLISHED FOR POSSESSING EPHEDRINE OR PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE; THUS, CONFESSION OF DEFENDANT IS HELD INADMISSIBLE

State v. Whalen, __ Wn. App. __, 126 P.3d 55 (Div. II, 2005)

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

> On October 24, 2003, Whalen entered a Target(R) store in Olympia. Store security observed him remove seven boxes of nasal decongestant containing pseudoephedrine from a shelf and place them in his cart. Whalen then walked to another section of the store, concealed the boxes of pseudoephedrine in another box containing an unrelated product, and exited the store. Approximately thirty minutes to one hour later, Whalen returned to the store and walked to the aisle where he had concealed the pseudoephedrine. He removed the pseudoephedrine from its hiding place, concealed it in his shirt, and walked toward the store's exit. After he passed the store's registers without paying for the items, store security asked him to stop. Whalen ran out of the store where he was tackled and eventually detained by store security.
>
> After handcuffing Whalen, store security escorted him to the store's security office and removed six of the seven boxes of pseudoephedrine from Whalen's shirt. The store's security manager photographed the pseudoephedrine and prepared a report on the incident.
>
> Store security contacted the Olympia Police Department regarding the incident and Officer Lyle Schaeffer responded. Schaeffer advised Whalen of his Miranda rights. Whalen indicated that he understood his rights and Schaeffer began questioning him. Specifically, Schaeffer said, "We both know why people take Sudafed(R)," and Whalen responded, "[Y]es." Schaeffer then asked Whalen if he was a "cook" and Whalen explained that he was not. Schaeffer then asked who the cook was and Whalen responded with the name of a third party. He further explained that he was obtaining the pseudoephedrine for the third party to satisfy a marijuana debt owed to the third party.
>
> At that point, Schaeffer patted Whalen down and discovered the seventh box of pseudoephedrine. All seven boxes of pseudoephedrine were returned to the store and were not taken into evidence by the Olympia Police Department.
>
> On October 29, 2003, the State charged Whalen with one count of unlawful possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, contrary to RCW 69.50.440, and one count of second degree robbery, contrary to RCW 9A.56.210. The State later amended the information eliminating the robbery charge.
>
> During a CrR 3.5 hearing, Whalen stipulated to his responses to Schaeffer's questions prior to being taken to the Olympia Police Department. A jury trial commenced that same day, resulting in a guilty verdict.

ISSUE AND RULING: Where defendant was caught stealing seven boxes of nasal decongestant from a store and subsequently confessed that he was stealing the boxes to pay off a debt to a meth cook, was the corpus delicti of possessing ephedrine or pseudoephedrine with the intent to manufacture methamphetamine established such that defendant's confession was admissible to prove his guilt? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of Thurston County Superior Court conviction of Victor A. L. Whalen for possessing ephedrine or pseudoephedrine with intent to manufacture methamphetamine; case dismissed with prejudice.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The confession or admission of a defendant charged with a crime cannot be used to prove the defendant's guilt in the absence of independent evidence corroborating that confession or admission. The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with the independent evidence to establish a defendant's guilt.
>
> To be sufficient, independent corroborative evidence need not establish the corpus delicti, or "body of the crime," beyond a reasonable doubt, or even by a preponderance of the evidence. Rather, independent corroborative evidence is sufficient if it *prima facie* establishes the corpus delicti. *Prima facie* in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. In determining whether the State has produced sufficient *prima facie* evidence, we must assume the truth of the State's evidence and all reasonable inferences drawn therefrom. But the independent evidence must support a logical and reasonable inference of criminal activity only. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti.
>
> Whalen concedes that he possessed pseudoephedrine, but he argues that possession alone is insufficient to show intent to manufacture methamphetamine without independent corroborative evidence. Whalen asserts that the State failed to establish his intent to manufacture and that the trial court unreasonably and erroneously inferred intent solely from his possession of pseudoephedrine.
>
> Whalen is correct that bare possession of pseudoephedrine is not enough to *prima facie* establish the corpus delicti for an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present. *See* State v. McPherson, 111 Wn. App. 747 (2002) **Aug 02 LED:02**. To satisfy the corpus *delicti* rule in this case, the State was required to present *prima facie* proof that Whalen (1) possessed pseudoephedrine; and (2) intended to manufacture methamphetamine. *See* State v. Cobelli, 56 Wn. App. 921 (1989). Because Whalen concedes possession of pseudoephedrine, the crucial inquiry is whether the State produced sufficient independent corroborative evidence suggesting Whalen's intent to manufacture methamphetamine.
>
> A person acts with intent when he acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a). The State

argues that (1) pseudoephedrine is a primary precursor to methamphetamine; (2) the amount of pseudoephedrine in Whalen's possession was indicative of an intent to manufacture; (3) his efforts to shoplift seven packages of cold remedies containing pseudoephedrine indicates an illicit use was intended; and (4) the fact that RCW 69.43.110 limits individuals to the purchase of three packages of pseudoephedrine in a 24 hour period implies an intent to manufacture if one buys or shoplifts more than the legal limit.

In determining whether the State's evidence is sufficient to meet its burden, we review the evidence in the light most favorable to the State. Here, absent Whalen's admissions to Schaeffer, the State's evidence indicates only that store security apprehended Whalen attempting to shoplift more pseudoephedrine than he could legally purchase at one time. But Whalen's mere possession of the amount of pseudoephedrine in the seven boxes may not have been illegal if acquired within the statutory timeframe. Nor were there other indications that Whalen was part of a manufacturing plan. The dissent emphasizes that Whalen's attempt to acquire more than three boxes of pseudoephedrine within the statutory 24- hour time period creates the reasonable inference in and of itself that Whalen intended to manufacture methamphetamine. But acquiring more than three packages of pseudoephedrine within a 24-hour period does not constitute possession of pseudoephedrine with intent to manufacture, a class B felony. RCW 69.50.440. Rather, it constitutes a violation of Washington's regulation of the acquisition of pseudoephedrine, a gross misdemeanor. RCW 69.43.110. RCW 69.50.440 and RCW 69.43.110 are distinct offenses punishable by highly disparate penalties. That there are two distinct offenses with disparate punishments indicates that the legislature did not intend to equate the acquisition of more than three boxes of cold medicine containing pseudoephedrine within a 24-hour period with intent to manufacture methamphetamine.

This case is similar to Cobelli. In Cobelli, officers observed Cobelli carry out a series of short conversations with several "clusters" of people in a parking lot near a convenience store. According to officer testimony, Cobelli made contact with a person or persons, talked briefly, and then walked away. Officers did not observe any actual exchanges, but testified that, "[t]he manner in which it was happening [was] real indicative of what I've seen before in the sales and purchase of drugs." After police arrested Cobelli, he removed baggies containing a total of 1.4 grams of marijuana and money from his pockets and admitted selling two baggies of marijuana for $10 each. Cobelli was found guilty of possession of marijuana with intent to deliver.

Reversing the conviction, Division One of this court held that in order for the State to satisfy the corpus delicti rule, it had to produce *prima facie* evidence that Cobelli (1) possessed marijuana; and (2) intended to deliver it. The court held that in the absence of Cobelli's admissions, there was insufficient independent corroborative evidence of intent to deliver. Cobelli. The court observed that while the manner in which Cobelli interacted with others in the parking lot was consistent with the sale of drugs, there was no actual observation of exchange of drugs for money. Furthermore, although Cobelli removed marijuana and money from his pockets, the amount of marijuana was relatively small and the record did not indicate exactly how much money Cobelli had in his possession.

> More recently, we addressed a similar issue in State v. Moles, 123 P.3d 132 (Div. II, 2005) **Feb 06 LED:18**. In Moles, the defendants shoplifted pseudoephedrine from three different stores within a short timeframe and had over 400 loose tablets in their stolen vehicle. We held that the short timeframe involving three purchases at three separate stores, the loose pills, and evidence of a coffee filter containing methamphetamine in a defendant's pocket constituted sufficient evidence of intent to manufacture. Here, the State had to prove more than mere possession of unopened boxes of pseudoephedrine to carry its burden of a *prima facie* showing of Whalen's intent to manufacture methamphetamine.
>
> Therefore, absent Whalen's statements and assuming the truth of the State's evidence and all reasonable inferences from it, the State failed to produce sufficient evidence that Whalen shoplifting cold tablets was the first step of a methamphetamine manufacturing process. Under these circumstances, the trial court erred when it refused to suppress Whalen's statements to Schaeffer.

[Some citations omitted]

DISSENT: Judge Quinn-Brintnall dissents.

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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 [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].

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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: [https://fortress.wa.gov/cjtc/www/led/ledpage.html]