



Law Enforcement

April 2007

Digest

603rd Basic Law Enforcement Academy – October 5th 2006 through February 15, 2007

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APRIL 2007 LED TABLE OF CONTENTS

NINTH CIRCUIT, U.S. COURT OF APPEALS.....	2
NINTH CIRCUIT PANEL REVERSES ITSELF – BECAUSE THE POLICE QUESTIONING OF A TRAFFIC VIOLATOR ABOUT HIS GANG AFFILIATION AND PRIOR PRISON SENTENCE FOR A FIREARM CRIME DID NOT EXTEND DURATION OF TRAFFIC STOP BEYOND THE TIME REQUIRED FOR A RECORD CHECK, NO FOURTH AMENDMENT VIOLATION OCCURRED	
U.S. v. Mendez, ___ F.3d ___, 2007 WL 548793 (9th Cir. 2007)	2
WASHINGTON STATE SUPREME COURT.....	4
IN DEFENDANT’S APPEAL FROM AGGRAVATED FIRST DEGREE MURDER CONVICTION, EVIDENCE HELD SUFFICIENT TO SUPPORT JURY VERDICT AS TO PREMEDITATION ELEMENT AND ROBBERY AGGRAVATOR	
State v. Allen, 159 Wn.2d 1 (2006)	4
WASHINGTON STATE COURT OF APPEALS	8
DELAYED FOLLOW-UP K-9 SNIFF OF VAN FOLLOWING SUSPECT’S ARREST FROM VAN HELD TO BE IMPERMISSIBLE SECOND SEARCH UNDER ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION; ALSO, CORPUS DELICTI RULE IS APPLIED BASED ON THE SUPPRESSION OF THE EVIDENCE SEIZED IN THE SEARCH	
State v. Valdez, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 448847 (Div. II, 2007)	8
THE PRESENCE OUTSIDE A HOUSE OF TWO STOLEN 1000 GALLON TANKS OF AMMONIA, PLUS THE PRESENCE INSIDE OF SUSPECTS AND THE LIKELIHOOD OF A GUN INSIDE, JUSTIFY WARRANTLESS SEARCH OF HOUSE ON ALTERNATIVE RATIONALES OF PROTECTIVE SWEEP, EXIGENT CIRCUMSTANCES AND COMMUNITY CARETAKING	
State v. Smith, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 446941 (Div. III, 2007)	13
FOR A CHECK WITH A FORGED ENDORSEMENT, THE FACE AMOUNT IS THE “VALUE” OF THE STOLEN CHECK FOR PURPOSES OF THE POSSESSING STOLEN PROPERTY STATUTE EVEN THOUGH A REPLACEMENT CHECK HAS BEEN ISSUED	
State v. Lampley, ___ Wn. App. ___, 151 P.3d 1001 (Div. II, 2007)	16
BECAUSE A NO-CONTACT ORDER DID NOT BAR THE DEFENDANT FROM LIVING AT A PARTICULAR ADDRESS, HIS ENTRY OF THE RESIDENCE THAT HE SHARED WITH THE PERSON PROTECTED BY THE ORDER WAS NOT A PER SE UNLAWFUL ENTRY OF THE HOUSE UNDER THE BURGLARY STATUTE	
State v. Wilson, ___ Wn. App. ___, 150 P.3d 144 (Div. II, 2007)	17

NINTH CIRCUIT, U.S. COURT OF APPEALS

NINTH CIRCUIT PANEL REVERSES ITSELF – BECAUSE THE POLICE QUESTIONING OF A TRAFFIC VIOLATOR ABOUT HIS GANG AFFILIATION AND PRIOR PRISON SENTENCE FOR A FIREARM CRIME DID NOT EXTEND DURATION OF TRAFFIC STOP BEYOND THE TIME REQUIRED FOR A RECORD CHECK, NO FOURTH AMENDMENT VIOLATION OCCURRED

U.S. v. Mendez, ___ F.3d ___, 2007 WL 548793 (9th Cir. 2007)

INTRODUCTORY LED EDITORIAL NOTE: In the January 2007 LED at pages 2-5, we digested the 2-1 decision of a Ninth Circuit 3-judge panel in which the majority held that officers violated the Fourth Amendment by unlawfully expanding the scope of their investigation during a traffic stop. On reconsideration, that same panel has now withdrawn the earlier majority and dissenting opinions, and the panel has unanimously ruled that, because the investigating officers did not extend the duration of the stop beyond the time required for their records check, the questioning of the traffic violator by the officers did not violate the Fourth Amendment, even if the questioning did expand the scope of the investigation.

Facts and Proceedings below: (Excerpted from latest Ninth Circuit opinion)

At approximately 9:18 p.m. on December 21, 2003, two Phoenix gang enforcement officers pulled over a car driven by Mendez because it did not appear to have a license plate or temporary registration tag. Both officers testified that the sole purpose of the stop was “no registration.” The officers, Detectives Jaensson and Bracke, approached the car. Det. Jaensson told Mendez why they had stopped him and asked for “his identification or license.” Mendez presented a California identification card. Det. Jaensson then instructed him to get out of the vehicle and interlock his hands behind his head. He proceeded to pat him down for weapons, during which time he noticed a tattoo on Mendez's left hand. The pat-down produced no weapons. Det. Jaensson then instructed Mendez to sit on the curb behind his car.

Det. Jaensson stayed with Mendez at the curb while Det. Bracke took the identification card to the patrol car to conduct a records check. While waiting for Det. Bracke to complete the records check, Det. Jaensson again noticed the tattoo on Mendez's left hand and recognized it as a gang-affiliated insignia. Prompted by the gang tattoo, he asked Mendez several questions, beginning with “Where are you from?” According to Det. Jaensson, Mendez responded that he was “from the Latin Kings,” a gang located in Chicago. Det. Jaensson testified that he next asked Mendez about his other tattoos. In response to one of Det. Jaensson's questions, Mendez said that he had left the Latin Kings “in good standing,” and had moved to Arizona “to get away from all that, to turn his life around.”

While Det. Jaensson was questioning Mendez, Det. Bracke was at the patrol car conducting a records check, using the car's Mobile Data Terminal ("MDT"). At this time, he noticed in the rear window of Mendez's vehicle a temporary registration plate that had expired eight days earlier on December 13th.

After completing the records check, which revealed that Mendez had a valid driver's license and no outstanding warrants, Det. Bracke returned to the curb with the intention of informing him that the temporary registration plate in his rear window had expired. While returning, Bracke overheard Mendez telling Det. Jaensson that he had come to Arizona "trying to get away from the gang life." Det. Bracke also overheard him say that he had spent time in prison in Illinois. Upon approaching the curb, Det. Bracke asked Mendez why he had been imprisoned. Mendez replied that he had been convicted of a weapons violation. Det. Bracke then asked whether he had any weapons in the car. According to the two detectives, Mendez became agitated, told them that he was a good father and was trying to make a good life for himself in Arizona. He then added that there was a firearm in the driver's door handle. At this point, the officers arrested him. Det. Bracke then searched the vehicle and found a loaded, small caliber, semi-automatic pistol in the driver's side armrest. The entire encounter up to the time of the arrest and search took approximately eight minutes.

Mendez was indicted on charges of violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (felon in possession of a firearm). He moved to suppress the handgun, arguing that the officers improperly interrogated him about matters unrelated to the traffic stop and failed to diligently investigate the purpose of the stop. The district court denied the motion, finding that the detectives "identified specific, objective factors sufficient to permit them to expand the scope of questioning" and did not unreasonably prolong the stop. Mendez subsequently entered a conditional guilty plea, preserving his right to appeal the court's ruling on the suppression motion. The district court sentenced him to fifty-seven months in prison.

ISSUE AND RULING: Where the duration of the traffic stop and incidental records check was not extended by the officers' questioning of the driver about his gang affiliation and prison record, was the expansion of the scope of the inquiry (from traffic to other things) a Fourth Amendment violation? (**ANSWER:** No)

Result: Affirmance of Arizona U.S. District Court conviction of Lionel Mendez for being a felon in possession of a firearm.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Mendez does not contest the legality of the initial traffic stop. Instead, he argues that the officers' unrelated questioning and the purported extended detention violated his Fourth Amendment rights because (1) the officers did not observe additional particularized, objective factors sufficient to create reasonable suspicion to justify interrogating him about matters beyond the purpose of the stop, and (2) the officers unreasonably prolonged the stop.

We agree with the district court that the stop was not unnecessarily prolonged. Det. Jaensson's questioning occurred while Det. Bracke was running a check on Mendez's identification. It could not have expanded the duration of the stop since the stop would, in any event, have lasted until after the check had been

completed. See Berkemer v. McCarty, 468 U.S. 420 (1984) (stating that a records check is an expected part of a traffic stop). Having overheard Mendez's answer to Det. Jaensson as he was returning to his vehicle, Det. Bracke immediately asked his two questions. The arrest occurred only eight minutes after the stop.

Mendez further argues that the officers were not diligently investigating the traffic violation because the officers did not run a check on his car's vehicle identification or its registration until after he had been arrested. However, the district court's factual determination that the officers were diligently pursuing the purpose of the traffic stop was not clearly erroneous. The record suggests that, until Mendez told the officers about his prison record and his possession of a weapon, Det. Bracke may have intended to let him go with a warning about his expired temporary registration plate and, thus, may have seen no need to check his registration or vehicle registration number further.

Mendez's primary argument, that the officers lacked reasonable suspicion to support their questioning, is "premised on the assumption that the officers were required to have independent reasonable suspicion in order to question [him] ... because the questioning constituted a discrete Fourth Amendment event." Muehler v. Mena, 544 U.S. 93 (2005) **May 05 LED:02**. In making this claim, Mendez understandably relied on our precedent holding that, during a traffic stop, a police officer may only "ask questions that are reasonably related in scope to the justification for his initiation of contact" and may expand the scope of questioning beyond the initial purpose of the stop only if he "articulate[s] suspicious factors that are particularized and objective." United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001); see also United States v. Chavez-Valenzuela, 268 F.3d 719, 724 (9th Cir. 2001) ("An officer must initially restrict the questions he asks during a stop to those that are reasonably related to the justification for the stop."); United States v. Perez, 37 F.3d 510, 513 (9th Cir. 1994). The Supreme Court, however, recently decided in Muehler, that "mere police questioning does not constitute a seizure" unless it prolongs the detention of the individual, and, thus, no reasonable suspicion is required to justify questioning that does not prolong the stop. Although Muehler involved an interrogation during a search of a building, and made no mention of our precedent regarding questioning during traffic stops, its reasoning is equally applicable in the traffic stop context. See Muehler (noting that in Illinois v. Caballes, 543 U.S. 405, 408 (2005) **March 05 LED:03**; **April 05 LED:02**, it "rejected the notion that the shift in purpose from a lawful traffic stop into a drug investigation was unlawful because it was not supported by any reasonable suspicion." (internal quotation marks omitted)). To the extent that Chavez-Valenzuela, Murillo, and Perez hold that such questioning must be supported by separate reasonable suspicion, they have been overruled by Muehler. . . . Thus, because we conclude that the officers' questioning did not prolong the stop, we are compelled to hold that the expanded questioning need not have been supported by separate reasonable suspicion.

[Some citations omitted]

LED EDITORIAL COMMENT: In the April 2005 LED, in an article at pages 2-6, we discussed questions relating to expanding the scope of investigation during a traffic stop even if the duration of the stop is not extended by the inquiry. Washington appellate courts (but not

the Washington Supreme Court, so far) have previously addressed this question as a Fourth Amendment issue and have sometimes held stops unlawful based on reasoning consistent with the original (now withdrawn) Mendez majority opinion digested in the January 2007 LED, i.e., finding a Fourth Amendment violation based solely on expansion of the scope of the investigation, without addressing whether the duration of the stop was extended. See, for example State v. Henry, 80 Wn. App. 544 (Div. III, 1996) and State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct 93 LED:21 discussed in our April 2005 LED article.

We will have to wait and see whether Washington appellate courts will adopt as an “independent grounds” rationale under article 1, section 7 of the Washington constitution their reasoning in those prior decisions that were grounded in the Fourth Amendment.

WASHINGTON STATE SUPREME COURT

IN DEFENDANT’S APPEAL FROM AGGRAVATED FIRST DEGREE MURDER CONVICTION, EVIDENCE HELD SUFFICIENT TO SUPPORT JURY VERDICT AS TO PREMEDITATION ELEMENT AND ROBBERY AGGRAVATOR

State v. Allen, 159 Wn.2d 1 (2006)

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

About a month after Sharon Cox was killed in her Longview home, her son Allen told a police detective that he had attacked and killed his mother. Because he challenges the sufficiency of the evidence, we will recount some of that evidence in detail. He told the police:

Detective Davis: Can you tell me what happened when you got to her house?

Mr. Allen: We just started arguing about me getting to work on time, how I could lose my job, and me and my kids be [sic] on the street. We started arguing about that and it just blew up.

He told the police it began as an argument and became physical. He recounted that:

We wrestled a little bit. She pushed me back. She kept pushing and pushing and pushing. Into the bedroom. Argued more. She pushed me back. (Inaudible) me and fell against the bed. I stand back up and (inaudible) and lost it. I totally went blank and went ballistic and I had no control.

....

We wrestled. And I was using my [telephone] cord against my mother.

....

I strangled her with it.

He continued:

It snapped.

....

Then we fought a little more. She was still alive. She tried to take off again.

....

I just turned around and went in the gun cabinet.

....

I just grabbed my rifle.

....

I swung it twice.

Detective Jacobs: Where did you swing that rifle at?

Mr. Allen: Her head.

....

It flew out of my hands when the rifle connected, the stock broke.

....

I took the rifle, cleaned it up.

....

It had a little bit of blood on the stock.

Detective Davis: And then what did you do next?

...

Mr. Allen: Went back in the house.

....

Detective Davis: And what did you do after you went back into the bedroom?

Mr. Allen: Found the cash box.

....

Picked it up.

....

I left with it.

I walked out of my mom's house. I went (inaudible) to Washington Way going to the slough. Then I realized what I had done, and I

threw the cash box as hard as I could at the slough, and then ran like hell back.

....

I sat at the fireplace and then started (inaudible) what happened and ran to my mom.

....

I checked for a pulse... I don't know whether she was alive or not.

Allen was charged with aggravated first degree murder, with robbery as the aggravator.

. . .

[T]he jury heard a taped interview where Allen admitted killing his mother in a rage. Bonnie Walker, the mother of Allen's child, also testified that Allen had reacted violently to his own mother in the past. Walker said he once "had blown up at somethin' that his mother said to him, and destroyed our apartment . . . He was throwin' stuff around . . . [H]e punched holes in the wall and kicked a couple holes in the wall."

On direct examination of Smith, the following exchange took place:

State: And was there one point after [Allen] talked with the police where he made a statement to you about killing?

Smith: Uh-huh.

State: What did he say?

Smith: That he had killed before and he could kill again.

Allen moved for a mistrial based on that exchange, arguing that it violated the exclusion order. After reviewing the trial court's oral exclusion order, the State acknowledged it had inadvertently violated the exclusion order but argued that the "killed before" statement was nevertheless admissible as a declaration against penal interest and therefore Allen was not prejudiced. The trial court agreed. The jury convicted Allen of aggravated first degree murder.

Allen was sentenced to life in prison without parole. The Court of Appeals affirmed

ISSUES AND RULINGS: 1) Where the victim was struck from behind, and she then suffered multiple and apparently serial injuries by various means and weapons, was there sufficient evidence of defendant's premeditation to support the jury verdict of aggravated first degree murder? (ANSWER: Yes); 2) Where there was evidence that - - a) shortly before defendant murdered his mother, he had money troubles and argued with her over her refusing to give him money; b) he had previously told a friend about this mother's cashbox; and c) after the murder, he took the cashbox containing at least \$1000 - - was there sufficient evidence that the murder was part of a robbery such as to support robbery as an aggravator for purposes of the aggravated first degree murder charge? (ANSWER: Yes, rules a 5-4 majority)

Result: Affirmance of Cowlitz County Superior Court conviction of Donovan Ben Patrick Allen for aggravated first degree murder.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

1. Premeditation

Premeditation is “ ‘ “the deliberate formation of and reflection upon the intent to take a human life” ’ ” and involves “ ‘ “thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” ’ ” It must span more than a moment in time. RCW 9A.32.020(1). Allen argues here that he lacked premeditation because he never expressed a preconceived intent to kill, he did not take weapons to his mother's home, and he himself was shocked at how their heated argument escalated into violence.

We find sufficient evidence of premeditation to uphold the jury's verdict. First, a physical struggle over “an appreciable period of time” prior to strangulation is sufficient evidence of premeditation. Allen's altercation with his mother went from the kitchen to the bedroom and involved pushing and wrestling before escalating to strangulation.

Second, injuries inflicted by various means over a period of time can support a finding of premeditation. The record shows that Allen used such “various means” of injury-first wrestling, then strangling with a phone cord, and finally beating with a rifle. Sufficient evidence of premeditation may also be found where the weapon used was not readily available, where multiple wounds are inflicted, or where the victim was struck from behind. Here, the rifle used to beat Cox was not readily available. Allen retrieved it from a cabinet after the telephone cord snapped. Also, Cox's strangulation marks and fractured skull may be viewed as “multiple wounds.” Finally, the fact that Cox was struck from behind is evidence of Allen's premeditation.

A rational jury could find beyond a reasonable doubt that Allen had the premeditated intent required for first degree murder. Therefore, we affirm the Court of Appeals conclusion that evidence of premeditation was sufficient to support the jury's verdict.

2. Robbery aggravator

A person is guilty of aggravated first degree murder if he commits first degree murder “in the course of, in furtherance of, or in immediate flight from” robbery in the first or second degree. RCW 10.95.020(11)(a). A person commits robbery when he “unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person.” RCW 9A.56.190. “ Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.” Thus, to establish the aggravating factor of robbery in this case, the State had to prove beyond a reasonable doubt that Allen: (1) took the cashbox from his mother's person or in her presence, (2) against her will, and (3) used force or fear to take the cashbox or to prevent his mother from resisting the taking.

We find considerable circumstantial evidence that Allen used force, at least in part, to obtain the cashbox. In addition to the argument between Allen and Cox

regarding Allen's financial difficulties shortly before the murder and the testimony of Cox's husband regarding Cox's concerns over Allen's financial difficulties, another witness testified that Allen went through his money quickly and was often broke a week before payday. Cox's husband also testified that Allen had asked Cox for \$400 to buy a car, but she refused. Allen, before the murder, had told a friend that his mother had a cashbox. Further, the cashbox was taken shortly after the murder and found near by. In addition, after the murder, Allen told a cell mate that he took the cashbox after killing Cox, that it had about \$1,100 in it, and that he had spent the money. Cox's husband testified that on the day of the murder the cashbox held approximately \$1,500. There is sufficient evidence to affirm the jury's verdict. *[Court's footnote: We largely agree with the dissent. "Merely demonstrating that the use of force preceded the theft does not amount to robbery." But as surveyed above, there was sufficient evidence presented for a reasonable jury to find that robbery was one of Allen's purposes for killing. A reasonable jury could also have found, as the dissent would, that taking the cash box was an afterthought. This one did not.]*

[Some citations and footnotes omitted]

Judge Alexander (joined by Justices Charles Johnson, Richard Sanders and Susan Owens) dissents, arguing that there is insufficient evidence of a robbery motive to support that aggravator element of the aggravated first degree murder charge.

WASHINGTON STATE COURT OF APPEALS

DELAYED FOLLOW-UP K-9 SNIFF OF VAN FOLLOWING SUSPECT'S ARREST FROM VAN HELD TO BE IMPERMISSIBLE SECOND SEARCH UNDER ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION; ALSO, CORPUS DELICTI RULE IS APPLIED BASED ON THE SUPPRESSION OF THE EVIDENCE SEIZED IN THE SEARCH

State v. Valdez, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 448847 (Div. II, 2007)

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

Factual background:

On May 10, 2005, at approximately 7:45 PM, [Officer A] observed a Chevrolet Lumina minivan turning north onto N.E. 15th Avenue from an apartment complex parking lot in the Hazel Dell area of Clark County, Washington. [Officer A] stopped the vehicle because one of its headlights was not working. Valdez was driving and Ruiz was sitting in the front passenger seat. The vehicle stopped no more than 100 to 200 feet from a Vancouver School District school bus route stop.

Valdez presented his Washington State identification card in lieu of a driver's license. When [Officer A] conducted a records check, he discovered that Valdez had an outstanding felony warrant for his arrest. At 7:53 PM, [Officer B] arrived to assist [Officer A]. [Officer A] arrested Valdez on the warrant, handcuffed him, and placed him in the back of the patrol car.

[Officer A] ordered Ruiz to step out of the vehicle and [Officer B] watched Ruiz while [Officer A] searched the interior of the vehicle. [Officer A] noticed that there were loose interior panels that appeared to have been tampered with. After hearing Valdez's statements and knowing that drugs are sometimes hidden behind plastic panels in vehicles and that panels are sometimes loose from being removed, the officers decided to call in [Officer C] and his certified narcotics detection dog. [Officer C] and the dog arrived at 8:20 PM.

[Officer C] directed the dog to search. The dog alerted to an interior vent in a driver's-side panel near the middle row of seats. [Officer C] traced the vent to the third row of seats. There, he found a molded plastic cup holder. [Officer C] popped the cup holder out and removed the underlying insulation. He found two packages containing a granular or crystalline substance under the insulation. [Officer A] then placed Ruiz under arrest. The result of a field test on the packages was positive for methamphetamine. The Washington State Patrol Lab found that the crystalline substance in each package was methamphetamine hydrochloride.

Procedural facts:

The prosecutor charged Valdez and Ruiz with one count of unlawful possession of a controlled substance-methamphetamine hydrochloride-with intent to deliver within 1,000 feet of a school bus stop. Valdez and Ruiz filed unsuccessful motions to suppress the seized methamphetamine. They waived a jury trial and were both found guilty in a bench trial of the charged crimes.

ISSUES AND RULINGS: 1) Was the delayed dog sniff that detected illegal drugs lawful under the search incident to arrest exception to the search warrant requirement of the Washington constitution, article 1, section 7? (ANSWER: No, rules a 2-1 majority, it was an unlawfully delayed second search); 2) In light of Division Two's suppression ruling excluding from trial the only physical evidence of the crime of possession by Ruiz, was the confession of Ruiz, standing alone, sufficient evidence to support his conviction under the corpus delicti rule? (ANSWER: No)

Result: Reversal of Clark County Superior Court convictions of Jesus David Buelna Valdez and Reyes Rios Ruiz for possession of methamphetamine within 1000 feet of a school bus stop with intent to deliver the drugs.

Status of Court of Appeals decision: The prosecutor has filed a motion for reconsideration (docket number 33647-2-II). At LED deadline, the matter was awaiting action on the motion by the Court of Appeals.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Search incident to arrest

A search incident to arrest is a well-recognized exception to the warrant requirement. State v. Vrieling, 144 Wn.2d 489 (2001) **Oct 01 LED:02**; State v. Stroud, 106 Wn.2d 144 (1986). But in Washington the exception to the warrant requirement is narrowly and jealously guarded. A valid search incident to arrest requires that a lawful arrest is made and that a search is conducted of the area within the immediate control of the individual arrested.

The United States Supreme Court has established a bright line rule that if a lawful arrest is made of an occupant in a vehicle, an officer may search the passenger compartment of the vehicle because the arrestee might grab a weapon or destroy evidence located within the compartment. New York v. Belton, 453 U.S. 454 (1981); State v. Johnson, 128 Wn.2d 431 (1996) **March 96 LED:06**. Our Supreme Court has drawn this exception more narrowly and has held that, incident to the driver's arrest, police may search any area of the interior of a vehicle that the driver may reach without leaving the vehicle. Johnson, 128 Wn.2d at 450-56.

Washington's exception focuses on officer safety and prevention of destruction of evidence. Vrieling, 144 Wn.2d at 494. "[B]ecause of [Washington's] heightened privacy protection [under article 1, section 7] ... these exigencies [do not] always allow a search." Stroud, 106 Wn.2d. at 151. As our Supreme Court explained in Stroud:

During the arrest process, including the time immediately subsequent to the suspect[] being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant. The rationale for this is twofold. First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private. Second[], the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

In addition to determining whether a search incident to arrest was properly limited to the area within the arrestee's immediate control, we must consider whether the search "was roughly contemporaneous with the arrest." A contemporaneous warrantless search may be conducted shortly after the arrestee has been removed from the area. United States v. McLaughlin, 170 F.3d 889, 893 (9th Cir. 1999). The arrest and search should not be separated in time or by intervening acts. The actions following the arrest must be one continuous series of events closely connected in time. "At some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest." State v. Smith, 119 Wn.2d 675 (1992) **Nov 92 LED:04**.

Assuming, without deciding, that the searched area here was accessible from the passenger area without the vehicle occupants needing to leave the vehicle, even though they were both seated in the front seats of the three rows of seats, and, further, assuming that the search was timely, we address the key issue of whether the officers exceeded the scope of a proper search incident to Valdez's arrest when they called for a drug-sniffing dog when (1) two officers were already on the scene; (2) both the driver and the passenger had been removed from the vehicle; and (3) the initial search of the vehicle was complete and did not reveal

evidence of weapons or drugs. The State relies on State v. Boursaw, 94 Wn. App. 629, (1999) **May 99 LED:07**, as blanket authority allowing officers to call for a K-9 search after a driver's arrest and removal from the vehicle and following the initial vehicle search.

In Boursaw, the defendant was stopped for a traffic infraction and was arrested because he was driving with a suspended license. The arresting officer handcuffed the defendant and placed him in the back of the patrol car. When the officer searched the defendant's car incident to his arrest he "found plastic ziplock bags and several needles" in an unlocked glove box. The officer then called for a K-9 unit that arrived at the scene within 10 minutes. The dog alerted to an area under the front ashtray. The officer removed the ashtray and discovered a plastic bag containing a substance that tested positive for methamphetamine. Division One of this court upheld the search, holding that the delay was reasonable and "the area behind the ashtray is within the reach of the occupants of the automobile." But Boursaw turned "on what constitutes activities related to 'the securing of the suspect and the scene,' and at what point is the scene sufficiently secured." Moreover, Division One limited Boursaw "to the facts of this case." And the original search of the vehicle in Boursaw revealed evidence of illegal drug possession.

"Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." In Boursaw the officers had, in addition to a brief interlude between the arresting officer finding drug paraphernalia and the K-9 search of the front passenger area, probable cause that evidence of illegal activity could be found in the vehicle.

Here, the State argues that the K-9 search was justified because (1) the driver had been arrested; (2) "the dashboard was missing screws and plastic fasteners, and that it had appeared to be tampered with," and (3) Valdez inconsistently told the officer that he had just come from Fourth Plain and from Las Vegas. In addition, the officer knew that a headlight was out on the minivan.

But before [Officer A] called for a K-9 unit he had placed Valdez in the patrol car; there was another officer on the scene; and he had completed his search of the passenger compartment of the vehicle for weapons or destructible evidence. Unlike the officer in Boursaw, he found no weapons, destructible evidence, or evidence of drugs or illegal activity other than loose plastic paneling under the dash. At that point, concerns about officer safety and destruction of evidence did not provide on-going exigent circumstances allowing another warrantless search.

Furthermore, it was not until the drug dog alerted while searching the vehicle that probable cause existed to search for the presence of a controlled substance. "Generally, an 'alert' by a trained dog is sufficient to establish probable cause for the presence of a controlled substance." But here, the drug dog alerted during a second search following [Officer A's] initial search after both the driver and passenger were removed from the vehicle; the scene had been secured by two officers; and the initial search only revealed missing screws and loose front seat-area paneling.

The officers could have applied for a warrant to conduct a second search of the vehicle based on the facts the State relies on to justify the K-9 search after Valdez's arrest and the impoundment of the vehicle. But the record before us does not show probable cause sufficient to warrant a second search for drugs based on the presence of loose paneling and screws and a perceived inconsistent statement about the origin of Valdez and Ruiz's travels. Without the K-9 unit's alert, the officers would not have removed the cup holder and insulation, revealing the presence of drugs. Although it turned out that the officer's suspicion was justified, it was not proper under these circumstances to commence an independent second search, focused solely on the presence of illegal substances, by calling in a K-9 unit without some evidence of the presence of drugs.

The dissent would remove Washington's greater protection of an individual's right to be free of warrantless searches and adopt the United States Supreme Court's broad investiture of police power to thoroughly search a vehicle without evidence of a crime following the driver's arrest. The dissent's focus ignores the legal basis of allowing warrantless searches of unlocked items in a vehicle, i.e., the destruction of evidence, and officer safety. The dissent argues that even if there is no concern on either issue-when the driver is handcuffed and in a patrol car, there is another officer on the scene, and there is loose paneling and no other evidence of a crime being committed-the police may rely on their experience that some drug couriers put drugs behind car paneling in order to justify a K-9 unit search of the vehicle. This erosion of protections afforded by our Washington Constitution against warrantless searches is not dictated by Smith or Boursaw and we refuse to abandon those protections in favor of the federal rule.

2) Corpus delicti

Ruiz argues that if the methamphetamine is suppressed, the only evidence that he possessed the methamphetamine with the intent to distribute was his confession. We agree that under Washington's *corpus delicti* rule, Ruiz's confession, standing alone, was insufficient evidence for conviction.

"Washington's version of the *corpus delicti* rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone." State v. Bernal, 109 Wn. App. 150 (Div. II, 2001) **Feb 02 LED:05**. "A confession or admission, standing alone, is insufficient to establish the *corpus delicti* of a crime."

[Footnotes and some citations omitted]

DISSENT: Judge Hunt dissents, arguing, among other things: 1) that the 1999 Boursaw decision by Division One of the Court of Appeals (**May 99 LED:07**) is not distinguishable factually from this case; and 2) that the Boursaw ruling of non-suppression should have been applied in this case.

LED EDITORIAL COMMENT: We agree with the dissenting opinion, and we believe that there are now two conflicting opinions on search incident to arrest where K-9s are brought quickly to the scene of arrest to follow up initial car searches by arresting officers. The sooner the dog is there and searching, the better, it would appear. Beyond that, we do not know what to say. As always, we suggest that officers check with their local prosecutors and agency legal advisors for advice.

THE PRESENCE OUTSIDE A HOUSE OF TWO STOLEN 1000 GALLON TANKS OF AMMONIA, PLUS THE PRESENCE INSIDE OF SUSPECTS AND THE LIKELIHOOD OF A GUN INSIDE, JUSTIFY WARRANTLESS SEARCH OF HOUSE ON ALTERNATIVE RATIONALES OF PROTECTIVE SWEEP, EXIGENT CIRCUMSTANCES AND COMMUNITY CARETAKING

State v. Smith, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 446941 (Div. III, 2007)

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

Patrol Sergeant Rick Welch received an anonymous tip that a stolen semi truck filled with anhydrous ammonia was located at a specific address in Benton County. This vehicle was stolen from the Spokane area, where both police and the Federal Bureau of Investigation were attempting to locate it. The semi contained two 1,000 gallon tanks that were filled with anhydrous ammonia.

When Sergeant Welch arrived at the address, he could see a semi truck partially concealed by a chain link fence. He verified that this truck was the stolen truck. Sergeant Welch radioed the Tri-Cities drug task force and fire department, and the Washington State Patrol for assistance.

Sergeant Welch testified that he required extensive police back-up because of the volatile nature of anhydrous ammonia. When liquid anhydrous ammonia comes into contact with air, it turns into a gas that can be fatal if inhaled. Another officer testified that they typically find anhydrous ammonia in much smaller amounts, normally between 5 and 20 gallons. Several houses were located nearby. The officers were concerned that the stolen tanks may have been altered and could be leaking anhydrous ammonia. And the tanks presented a danger of explosion due to internal pressure from the evaporating anhydrous ammonia.

Before checking the anhydrous ammonia tanks, police attempted to secure the home and surrounding outbuildings that were near the truck. The primary purpose of this check was officer safety. Sergeant Welch knocked and announced his presence at the house, but no one responded. Two individuals were seen in an upstairs window and a dog was barking inside the house. Police also observed a gun case through one of the windows.

Some time later, a man and woman came out of the house. The man was later identified as Mr. Smith. The gun case that had been near the window was gone. Police were uncertain as to whether there were additional people inside the house. Based on these facts, police did a protective sweep of the house to check for the gun and any other persons who may have been inside.

Police smelled a strong chemical odor immediately upon entering the home. As they were searching, they found the gun case they had seen in the window in a crawl space. Law enforcement secured the residence and obtained a search warrant. Later, police opened what appeared to be a footlocker in the bathroom and found a portable methamphetamine lab.

Mr. Smith was charged with manufacture of methamphetamine.

Mr. Smith made a motion under CrR 3.6 to exclude any evidence obtained during the warrantless search of his residence. The trial court entered findings of fact and conclusions of law denying the motion. The court concluded that the officers' sweep of the home fell within the emergency exception to the warrant requirement.

The jury found Mr. Smith guilty of the crime of manufacturing methamphetamine.

ISSUE AND RULING: Under the totality of the circumstances, does the protective sweep rule justify the search of the house for suspects, and do the exigent circumstances and community caretaking exceptions to the search warrant requirement justify the search of the house for the suspects and a gun? (**ANSWER:** Yes)

Result: Affirmance of Benton County Superior Court conviction of Brent Richard Smith for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Protective sweep exception

Police may make a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect. State v. Hopkins, 113 Wn. App (2002) **Jan 03 LED:06**. But the scope of the sweep is limited to a visual inspection of only those places where a person may be hiding. In addition, a general desire to make sure that there are no other individuals present alone is not sufficient to justify a protective sweep.

Here, police were responding to theft of a large amount of anhydrous ammonia. They did not know if individuals were present in the home or adjacent buildings. They observed a gun case through one of the windows in the home. While no one answered the knock on the door, 10 minutes later Mr. Smith and his companion came out of the house. And the gun case was gone from near the window.

Then police searched the house but only areas that could have concealed a person. They limited their search to a visual inspection of those areas. The search was within the protective sweep exception to the warrant requirement.

2) Exigent circumstances exception

Exigent circumstances are also an exception to the warrant requirement. Exigent circumstances may include those that present a threat to officer safety.

This court looks to six factors in determining whether exigent circumstances justify a warrantless entry and search: (1) the seriousness or violence of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry was made peaceably. Each of the six factors need not be present in every case. All that

must be shown is that, in light of these factors, officers needed to react quickly to the situation.

In order to find that exigent circumstances exist, this court must also be satisfied that the asserted emergency was not merely a pretext for the search and that the search was “actually motivated by a perceived need to render aid or assistance .” This inquiry involves a determination of both the subjective and objective reasonableness of the belief that an emergency existed.

One of the recognized situations in which a warrantless search may be justified under the exigency exception is where police reasonably believe that persons are in danger of imminent death or harm, or where there are objects present that are likely to burn or explode.

Here, there is little likelihood that the asserted emergency was merely a pretext. Unlike the cases cited by Mr. Smith, law enforcement was not on the premises searching for a particular suspect. From the beginning, police were responding to an emergency. A potentially lethal chemical was present in large amounts near residences. The tankers held approximately 2,000 gallons of anhydrous ammonia, an amount significantly greater than the amount typically found in the manufacture of methamphetamine. And there was also a danger of the tanker exploding.

The search for suspects was secondary to the need to secure the tanker. While police were concerned for their own safety in light of the gun case they observed, they were also concerned that a person might discharge the weapon at the tank, causing a dangerous chemical spill. Under the facts here, police were acting under exigent circumstances. A swift response was appropriate to protect the officers and the community.

3) Community caretaking exception

Another exception to the warrant requirement that may arise when police confront emergency situations is the community caretaking exception. This exception may apply if (1) the law enforcement officer subjectively believed that an individual or individuals needed assistance for health or safety reasons; (2) a reasonable person in the same or a similar situation would also believe that there was a need for assistance; and (3) that there was a reasonable basis to associate the need for assistance with the place to be searched. As with the exigent circumstances exception, this court must also be satisfied that the claimed emergency was not merely a pretext for a search for evidence.

As previously noted, police were responding to a dangerous situation that posed a threat to the health and safety of the community. Testimony showed that inhaling anhydrous ammonia could be lethal and that a large amount of anhydrous ammonia was present immediately next to the home that was searched. Police were uncertain as to how many individuals were present at this location. They observed a gun case in the home that was no longer visible after Mr. Smith and his companion left. Given the volatile nature of anhydrous ammonia, the presence of nearby homes, and the possibility that a firearm might puncture the anhydrous ammonia tanks, it was subjectively and objectively

reasonable for the officers to enter the home and conduct a limited search to secure the weapon and any individuals who were present within the home.

[Some citations omitted]

FOR A CHECK WITH A FORGED ENDORSEMENT, THE FACE AMOUNT IS THE “VALUE” OF THE STOLEN CHECK FOR PURPOSES OF THE POSSESSING STOLEN PROPERTY STATUTE EVEN THOUGH A REPLACEMENT CHECK HAS BEEN ISSUED

State v. Lampley, __ Wn. App. __, 151 P.3d 1001 (Div. II, 2006)

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

Washington State paid Juliaetta Holt monthly for her work as a home care provider. Holt expected to receive a \$621.10 check in her mailbox in early September 2004, but she never got it. After she signed an affidavit reporting the check “lost or destroyed” and signed an “affidavit of forged indorsement,” Washington issued her a new check, which she received in January or February 2005. Holt did not know Lampley, did not indorse the stolen check, and did not give it to anyone.

The police found the check in Lampley's wallet [*Court's footnote: The police did so after arresting him on an unrelated warrant. Lampley does not challenge the validity of the arrest or search*] approximately six months later, on March 1, 2005. Someone had forged Holt's indorsement on the back of the check. The police found a single phone number and a partly illegible reference to a car written on the back of the associated check stub.

Lampley told the officer he did not know whether the check was stolen. But he admitted he did not know Holt. He thought someone at a casino gave it to him. Lampley said he was keeping the check because he planned to use several phone numbers written on its back to find his father.

The State charged Lampley in Grays Harbor County Superior Court with second degree possession of stolen property, alleging the check had a value of \$621.10 . . . In his closing argument, Lampley told the jury the original stolen check had no value because Washington satisfied the debt by reissuing Holt's check.

The jury convicted Lampley.

ISSUE AND RULING: For a check with a forged endorsement, is the face amount on the check its “value” for purposes of the possessing stolen property statute, even though the check has been re-issued to the original owner of the check by the drawer of the check? (**ANSWER:** Yes)

Result: Affirmance of Grays Harbor County Superior Court conviction of Jerry Ronald Lampley for knowing possession of a stolen check with a value greater than \$250.00.

ANALYSIS: (Excerpted from Court of Appeals opinion)

To convict Lampley of second degree possession of stolen property, the State had to prove Lampley possessed stolen property worth more than \$250. RCW 9A.56.160(1)(a). The value of a stolen check is defined in RCW 9A.56.010(18)(b)(i):

The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

In defining value, the statute focuses on what the face of the instrument proclaims.

Interpreting a previous but similar statutory definition of value, our Supreme Court held the value of a stolen genuine check is the face value, even when the check drawer has stopped payment because of the theft. [Easton, 69 Wn.2d 965 (1966).] In Easton, the U.S. Treasury issued the check; when the owner reported the theft, the government stopped payment and issued a new check. These actions, not reflected on the face of the check, did not reduce its value.

But a stolen check bearing the forged signature of the purported drawer does not actually evidence a debt and its value is zero, not the amount declared on its face. State v. Skorpen, 57 Wn. App. 144, 148-49, 787 P.2d 54 (1990). Skorpen distinguished stolen forged checks from genuine checks signed by the drawer but later stolen.

One indorses a check to negotiate it, not to create it. RCW 62A.3-104, .3-201(b), -204. By definition, an indorsement is not the signature of the drawer. RCW 62A.3-204(a). By endorsing the check, the indorser creates a separate contract and potential liability separate from the drawer or drawee. RCW 62A.3-204, -415.

Lampley possessed a stolen genuine check drawn by Washington State. It evidenced an actual debt Washington owed Holt. The forged indorsement suggests fraudulent transfer of the check but does not alter the genuine nature of the check itself for purposes of establishing value. Because the drawer actually signed it, the check itself is genuine. Skorpen is thus distinguishable. Under both RCW 9A.56.010(18)(b)(i) and Easton, the check's value is therefore its face amount.

[Some citations omitted]

BECAUSE A NO-CONTACT ORDER DID NOT BAR THE DEFENDANT FROM LIVING AT A PARTICULAR ADDRESS, HIS ENTRY OF THE RESIDENCE THAT HE SHARED WITH THE PERSON PROTECTED BY THE ORDER WAS NOT A PER SE UNLAWFUL ENTRY OF THE HOUSE UNDER THE BURGLARY STATUTE

State v. Wilson, ___ Wn. App. ___, 150 P.3d 144 (Div. II, 2007)

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

On April 16, 2005, the Clallam County District Court issued a no-contact order prohibiting Gregory Wilson from contacting Charlene Sanders, his girlfriend of six years, in person, by telephone, or through any intermediary except an attorney, a police officer, or an officer of the court. The no-contact order listed Sanders' address as 1123 East Park Avenue in Port Angeles, but it did not prohibit

Wilson's presence at that address, where he and Sanders had been living together.

Shortly thereafter, Sanders and Wilson co-signed a lease for the 1123 East Park residence and resumed living together. Their automobiles and all Wilson's clothing remained at this residence. Wilson had keys to the residence, to which Sanders referred as "[o]ur house."

On August 22, 2005, Wilson and Sanders argued, and Wilson left the house angry around 11:00 P.M. Sanders "knew he'd be back." Wilson returned home around 2:30 A.M. Unable to open the door without his key, which he had left behind, Wilson angrily forced open the kitchen door, splintering some of the wood, went to the bedroom, grabbed Sanders by her hair, and pulled her out of bed. Sanders asked Wilson to go into the kitchen with her so they would not wake her sleeping grandson.

At some point, Wilson kicked Sanders once, left the house to speak with friends outside, immediately returned and re-entered the house, picked up a piece of the splintered wood from the kitchen door, and used it to threaten to kill Sanders.

Using her cellular phone to call 911, Sanders told the police that Wilson was living at the home, but "he wasn't supposed to be there." Wilson left the home and traveled by car to a friend's house. When the police arrived at the residence, Sanders refused medical attention because she "hadn't been hurt in any way."

Later that evening, the police arrested Wilson at his friend's house and took him to the police station to be interviewed. Wilson voluntarily admitted that he was aware of the no-contact order, but said that he had moved in because he was "trying to do the right things [sic] to assist Sanders in taking care of her kids, providing for them and such."

II. PROCEDURE

The State charged Wilson with first degree burglary, assault in violation of a protection order, and felony harassment.

A. TRIAL

At Wilson's jury trial, the State presented the following evidence: (1) photographs of the kitchen door that Wilson broke when he entered the house; (2) the 911 tape, which included Sanders' panic-stricken plea for the police come to the house because Wilson was assaulting and threatening her; and (3) the testimonies of the arresting officers and Sanders, who testified somewhat reluctantly. Wilson presented no defense case.

After both sides rested, Wilson moved to dismiss the burglary charge. He argued that all the evidence established that he lived in the home with Sanders and, thus, he could not have entered unlawfully. The State countered that the no-contact order made Wilson's presence unlawful regardless of the parties' rental agreement or Sanders' consent to Wilson's presence in the home. Expressing its skepticism of the burglary charge's validity, the trial court denied the motion and allowed it to go the jury with the other two counts. The jury convicted Wilson of all three charges.

After the jury returned its verdict, the trial court noted that the critical question under the burglary statute is whether the defendant is licensed or privileged to be in the home at the time of the allegedly unlawful entry, and it dismissed the burglary conviction, for the following reasons: (1) the no-contact order did not prohibit Wilson's presence in this house; (2) Sanders had authorized Wilson to be in the home, he had keys to the home, and he had been living there for several months; (3) Sanders had never revoked Wilson's right to be in the house; and (4) Sanders told 911 dispatch that Wilson lived at the residence even at the time of her call for help. The trial court also expressed concern that, if it adopted the State's reasoning, Wilson would have committed a burglary every day for four months before his arrest, each time he entered the residence with intent to have contact with Wilson. [The trial court dismissed the burglary conviction.]

ISSUE AND RULING: When the no-contact order did not bar a defendant from living at a particular address, and where the defendant was residing at the particular address with the consent of the person protected by the no-contact order, may the defendant (despite the fact that he was violating the no-contact order whenever the two were in contact in the house) lawfully be convicted of burglary based on his entry of the jointly occupied residence with the intent to assault or harass the protected person? (**ANSWER:** No)

Result: Affirmance of Clallam County Superior Court order dismissing a jury verdict convicting Gregory Wilson, Jr., of first degree burglary; the Court of Appeals also concludes, an addressing issues not digested in this **LED** entry, that Wilson's convictions for felony harassment and assault in violation of a protection order were not "the same criminal conduct" and should be deemed separate offenses for sentencing purposes.

ANALYSIS: (Excerpted from Court of Appeals decision)

It is undisputed that (1) Wilson entered the residence he shared with Sanders, (2) intending to assault and to harass Sanders inside, and (3) his contact with her violated a no-contact order. The State argues that, because Wilson entered and remained with intent to commit a crime, namely to contact Sanders in violation of the no-contact order, the trial court erroneously dismissed Wilson's burglary conviction. Thus, we address a legal issue of first impression-whether entry or remaining in a jointly shared residence, from which neither party has been lawfully excluded, is unlawful for purposes of establishing this essential element of the crime of burglary.

1. Elements

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime ... assaults any person.

RCW 9A.52.020(1)(b). A person unlawfully enters a building when he is not then licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(3).

For purposes of this opinion, we assume that Wilson entered the residence with intent to commit a crime, namely contacting, assaulting, and harassing Sanders in violation of the no-contact order, a misdemeanor under RCW 26.50.110(1). Accordingly, we focus on whether the record supports a separate burglary

element, namely “unlawfully entering or remaining” in a building. We find instructive the common law, a previous decision from our court, and an Ohio case addressing a similar issue.

At common law, courts viewed burglary as an offense against habitation and occupancy. Thus, a court could not convict a defendant of burglary for entering his own home with felonious intent. This rule applied to joint occupants as well as to sole owners of homes.

Similarly, modern burglary statutes remain an offense “against the security of habitation or occupancy, rather than against ownership or property.” Thus, in determining whether an offender's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises.

2. Domestic violence context

In domestic violence cases, determining possession of a residence presents a murky area of law. Although Washington case law is clear that an offender can burglarize the residence of his or her spouse or partner despite legal ownership of the property, these cases generally apply to situations where the couples are estranged and living separately. See e.g., State v. Stinton, 121 Wn. App. 569 (2004) **July 04 LED:20** ; State v. Schneider, 36 Wn. App. 237 (1983) (holding that wife was an accomplice to burglary when she arranged for two teenagers to enter her estranged husband's residence to commit a crime). We have not found any Washington cases, however, addressing the issue here—whether an offender can burglarize his own residence that he co-possesses and co-habits with his spouse or partner.

a. *Lawfulness of entry and remaining*

We must decide here whether the record supports the trial court's finding that Wilson and Sanders remained joint occupants of the residence at 1123 East Park and, if so, whether Wilson's entry itself was lawful, regardless of what he intended to do once inside.

The testimony at trial demonstrated that (1) before Wilson and Sanders co-signed the lease for the residence at 1123 East Park, Sanders allowed Wilson to live there; (2) Wilson had keys to the residence; (3) all of Wilson's clothing as well as his automobiles remained at this residence up to and after the incident at issue here; (4) the State presented no evidence that Wilson had a separate primary residence; and (5) even at trial, Sanders referred to the residence as “[o]ur house.” Thus, it is uncontroverted that Sanders gave Wilson permission to reside at 1123 East Park and that he continued to live there with her consent at the time of the assault.

The State argues, however, that the no-contact order made Wilson's presence inside the residence unlawful, regardless of Sanders' consent and Wilson's other claims on this residence. As the State correctly points out, Sanders could not waive the court's no-contact order. [*Court's footnote: State v. Dejarlais*, 88 Wn. App. 297, 299, 944 P.2d 1110 (1997) **March 98 LED:17**, *affirmed*, 136 Wn.2d 939 (1998) **March 99 LED:09**.] The State then argues that, therefore, Sanders could not consent to Wilson's presence in their home. That Sanders could not

override the no-contact order by allowing Wilson to be in contact with her, whether inside the residence or elsewhere, does not thereby make his entry into the residence unlawful for purposes of the burglary statute.

At oral argument, the State acknowledged that Wilson's entry into the residence he shared with Sanders would not have been unlawful within the meaning of the burglary statute (1) if Sanders had not been home at the time, or (2) if she had been at home in a separate room that Wilson did not enter. The State also conceded that if Sanders had been at the residence of a friend who had also invited Wilson, Wilson's act of entry into the friend's house, even with the same purpose to assault Sanders as here, would not transform that entry into a burglary because he would have entered with the friend's consent.

As we note above, the purpose of a burglary statute is to protect the occupancy and habitation of a residence. Here, with Sanders' assent, Wilson was a co-occupant and co-lessee of the residence, from which the no-contact order had not excluded him. Although the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome from entering the premises. It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building. RCW 9A.52.010(3). Here, Sanders and Wilson, not the State, occupied the 1123 East Park residence.

b. *Case law- Stinton*

In Stinton, a no-contact order prevented the defendant from harassing contact with the mother of their children with whom he previously resided. The order expressly barred him from their former joint residence. Thus, at the time of the incident, Stinton and the victim were living in separate residences. When Stinton went to the victim's residence, she let him in. But when he began taking some of her personal property, they engaged in a heated exchange and she asked him to leave. Stinton left, but he immediately returned, kicking in the door and resuming arguing with the victim. When she called 911, Stinton twice said to her, "Thanks a lot . . . this is a felony."

The State charged Stinton with burglary, on the theory that (1) his intended contact and harassment was a crime, in violation of the no-contact order; and (2) the crime he intended to commit when he unlawfully entered the victim's home was in violation of a separate provision of the no-contact order specifically excluding him from their former joint residence. The trial court dismissed the burglary charge because the facts did not establish prima facie proof of all the elements of the crime. The State appealed, and we reversed.

Unlike the situation here, it was undisputed that Stinton "entered or remained unlawfully in [their former] residence." Moreover, Stinton even conceded that his entry was unlawful. We reasoned that Stinton committed burglary when he unlawfully entered the residence without permission and with the intent to commit the crime of harassing the victim in violation of the court order expressly excluding him from her residence. We held that "the violation of a provision of a protection order can serve as the predicate crime for residential burglary."

In rejecting Stinton's argument that "the State's theory would improperly "elevate all violation of protection orders to burglaries," we noted:

The court may specifically tailor a protection order to the petitioner's circumstances by including multiple provisions forbidding the respondent from a variety of misconduct toward the petitioner. RCW 26.50.060 . . . Thus, the respondent may violate a protection order by disobeying one or several of multiple provisions. See RCW 26.50.110(1) ("a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location") (emphasis added).

Stinton's protection order contained two provisions prohibiting separate and distinct conduct toward McNeill. And the evidence of Stinton's harassing and threatening McNeill was separate and distinct from the evidence supporting his unlawful entry.

Here, in contrast, the court that issued the no-contact order did not specifically tailor the order to exclude Wilson from Sanders' residence or workplace. And, although it could easily have excluded Wilson from the residence simply by checking the box on the form and filling in the prohibited addresses, it did not do so. Thus, the no-contact order provision prohibiting Wilson's contact with Sanders criminalized only personal contact between them; but it did not thereby criminalize, or transform into a burglary, Wilson's entry into his own home, even though he entered with criminal intent to assault and to harass Sanders.

. . .

Although, as we said in Stinton, "residential burglary can be a crime of domestic violence," the crime of domestic violence that Wilson committed here was not burglary. Unlike in Stinton, here, the State did not present evidence of all legislatively required elements of burglary, namely unlawful entry or remaining in the residence. RCW 9A.52.020(1)(b); RCW 9A.52.010(3).

c. *Revocation of consent*

The State further argues that when Sanders dialed 911, she implicitly revoked any permission she may have given Wilson to be in the residence. But the cases the State cite involve a home owned, possessed, or controlled by the victim, who, therefore, could unilaterally revoke consent for the abuser to remain present.

But here, as we note above, it is uncontroverted that Sanders did not have exclusive control over the home. On the contrary, it was Wilson's home, too. And although it was clearly criminal for him to assault her anywhere, his act in entering or remaining in his own home was not itself a criminal act. Thus, we reject the State's argument that once Sanders called the police, Wilson remained unlawfully for the purposes of the burglary statute.

Based on the facts on the record before us, we hold as a matter of law that Wilson could not have burglarized the 1123 East Park resident by entering and remaining unlawfully because it was his residence and neither a court order nor Sanders had lawfully excluded him from it. Thus, unlike in Stinton, here we affirm the trial court's dismissal of the burglary charge and conviction.

[Some footnotes and citations omitted]

PUBLIC DUTY DOCTRINE PRECLUDES LAWSUIT FOR “NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS” BASED ON OFFICERS’ DELAYED DISCOVERY DURING MVA RESPONSE OF INJURED PERSON IN REAR OF SUV; ALSO, “BYSTANDER” NEGLIGENCE RULE DOES NOT APPLY

Timson v. Pierce County Fire District 15 and WSP, 136 Wn. App. 376 (Div. II, 2006)

Facts and Proceedings below:

In the mid-afternoon of a July day in 2001, a serious, multiple-injury motor vehicle collision occurred at an intersection. WSP and Fire District emergency-personnel extricated the injured driver of an SUV and attended to two other injured persons (one from each of the two involved vehicles), but were not immediately told and did not immediately find an unbelted girl passenger, who, it turned out later, had been thrown into the back of the SUV. Twenty five minutes after the collision occurred, a woman arrived. She had not been present at the time of the MVA but had heard about the accident and rushed to the scene. She asked the on-scene emergency personnel about her daughter, who the mother believed had been in one of the cars at the time of the collision.

Later testimony in the case differed somewhat as to exact details on what happened next, but shortly after the mother arrived, the mother found her daughter, very badly injured, in the back of the SUV.

The mother later sued the WSP and the Fire District for negligent infliction of emotional distress for the trauma she suffered upon being the first to discover her injured daughter. The Superior Court dismissed the lawsuit, ruling that the lawsuit was precluded under the public duty doctrine.

ISSUE AND RULING: Is there a basis under the facts of this case for the mother to sue WSP and the Fire District for negligent infliction of emotional distress? (ANSWER: No, the public duty doctrine bars the suit, and the “bystander” rule does not apply)

Result: Affirmance of Pierce County Superior Court summary judgment dismissal of lawsuit by Joyce Timson.

ANALYSIS: (Excerpted from Court of Appeals opinion)

PUBLIC DUTY DOCTRINE

The public duty doctrine is a framework for determining when a government entity owes a duty to a plaintiff suing for negligence. It allows a suit against a government entity for negligent conduct only if there is a duty owed to the individual, separate and apart from a duty to the public in general. The threshold determination in any negligence action is whether a duty of care is owed to the plaintiff. If there is no actionable duty, a negligence action may not proceed. The public duty doctrine is a tool courts use to determine if a municipality owes a duty.

In RCW 4.96.010, the Legislature removed the defense of sovereign immunity for local governmental entities being sued in tort. Local governmental entities are not immune if the entity acts in a governmental or in a propriety capacity “to the same extent as if they were a private person or corporation.” RCW 4.96.010(1).

In Donohoe v. State, 135 Wn. App. 824, 142 P.3d 654 (2006), we recognized that the doctrine remains good law in Washington and explained that there is no Washington case that extends a special relationship and creates a duty in regard to a governmental entity exercising a regulatory function. We are not persuaded by Timson's argument to abandon the public duty doctrine or that the public duty doctrine is only meant to apply to regulatory functions.

In this case, the duty owed to Timson was the duty that the Fire District and State Patrol owe to the public in general. Timson was not injured in the accident, the Fire District and State Patrol did not render aid to her. Any duty owed to Timson was the same as that owed to the public in general. Thus, the public duty doctrine bars her action. Therefore, we affirm, unless an exception to the public duty doctrine exists.

“EXCEPTIONS” TO THE PUBLIC DUTY DOCTRINE

There are four so-called “exceptions” to the public duty doctrine, (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. If an “exception” applies, then an action may proceed against a governmental entity.

Relying on the legislative intent expressed in RCW 18.71.210, Timson argues that the legislative intent exception applies to her claims and that her action may proceed. We disagree.

RCW 18.71.210 applies to emergency medical service personnel allowing them immunity from liability for actions or omissions done in good faith while rendering emergency medical service. This statute does not create a duty owed to family members of injured persons. See RCW 18.71.210. Timson did not receive emergency lifesaving services from the Fire District and the State Patrol, and this statute does not apply to her. Therefore, no exception to the public duty doctrine applies to Timson, and her action is barred.

BYSTANDER NEGLIGENCE

Timson relies on Hunsley v. Giard, 87 Wn.2d 424 (1976) for the proposition that rescue workers owed a duty to her under the “bystander negligence” doctrine because the duty owed to AT transferred to her. The State Patrol and the Fire District respond that the driver of the vehicle inflicted the injuries, not the rescue workers, and the driver of the vehicle caused any emotional distress, not the rescue workers.

Hunsley was the first Washington case to recognize a cause of action for bystander negligent infliction of emotional distress. However, Timson's reliance on Hunsley is misplaced because she was not a bystander to the accident. A bystander is one who is present when an event takes place, but who does not become directly involved in it. BLACK'S LAW DICTIONARY 214 (8th ed. 2004). She cites no authority for the proposition that a duty to AT is a duty to her. The

Fire District argues that we need not consider unsupported legal arguments. It is true that we will not review an issue that was addressed by an inadequate argument or that is given only passing treatment. Therefore, we need not address Timson's unsupported argument that a duty to AT is a duty to Timson.

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

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

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://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://insideago>].

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

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