



# Law Enforcement

June 2007

# Digest

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**PART TWO OF THE 2007 WASHINGTON LEGISLATIVE UPDATE**

**LED INTRODUCTORY EDITORIAL NOTE:** This is Part Two of what likely will be a three-part compilation of 2007 State of Washington legislative enactments of interest to law enforcement. Part One appeared in the February 2007 LED. Part Three will appear next month and will include an index to the three-part LED legislative update.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2007 regular session take effect on July 22, 2007 (90 days after the end of the legislative session). For some acts, different sections have different effective dates. We have generally indicated the effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits.

Text of each of the 2007 Washington acts is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the bill number for access to the enactment.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing helpful information.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED regarding either legislation or court decisions do not constitute legal advice, express only the views of the editors, and do not necessarily reflect the views of the Attorney General’s Office or of the Criminal Justice Training Commission.

**MODIFYING MISSING PERSONS’ PROCEDURES RELATING TO DNA LAB SUBMITTALS**  
Chapter 10 (SSB 5191) Effective Date: July 22, 2007

Modifies some statutes relating to missing persons, including amendment of RCW 43.43.751 to authorize local law enforcement officers to submit missing person DNA to any “appropriate laboratory” instead of exclusively to either the FBI or WSP crime lab.

**AUTHORIZING WASHINGTON CITIES AND COUNTIES TO ENTER INTO JAIL SERVICES CONTRACTS WITH CITIES AND COUNTIES IN ADJACENT STATES**  
Chapter 13 (SSB 5625) Effective Date: July 22, 2007

Adds a subsection to RCW 70.48.090 providing:

(2) A city or county may contract for jail services with an adjacent county, or city in an adjacent county, in a neighboring state. A person convicted in the courts of this state and sentenced to a term of confinement in a city or county jail may be transported to a jail the adjacent county to be confined until: (a) the term of confinement is completed; or (b) that person is returned to be confined in a city or county jail in this state.

**AUTHORIZING POLYGRAPHING OF BREAK-IN-SERVICE APPLICANTS FOR LAW ENFORCEMENT AND JUVENILE COURT SERVICE JOBS**

Chapter 14 (SB 5635)

Effective Date: July 22, 2007

Amends RCW 49.44.120(1) so that the law enforcement-related portion of that subsection now provides:

(1) It shall be unlawful for any person, firm, corporation or the state of Washington, its political subdivisions or municipal corporations to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment or continued employment: PROVIDED, That this section shall not apply to persons making application for employment with any law enforcement agency or with the juvenile court services agency of any county, or to persons returning after a break of more than twenty-four consecutive months in service as a fully commissioned law enforcement officer . . .

**PROTECTING FRAIL ELDERLY AND VULNERABLE ADULTS UNDER CRIMINAL LAWS**

Chapter 20 (SHB 1097)

Effective Date: April 10, 2007

Amends RCW 9A.44.010, 9A.44.050 and 9A.44.100. Persons providing transportation for frail elders, vulnerable adults, or persons with developmental disabilities within the course of their employment are now subject to criminal liability for second degree rape (non-forcible sexual intercourse) and indecent liberties (non-forcible sexual contact).

**MODIFYING PROCEDURES FOR SHERIFF'S OFFICE DISTRRAINT OF PERSONAL PROPERTY**

Chapter 37 (SSB 5405)

Effective Date: July 22, 2007

Amends RCW 6.17.160 by modifying subsection (2) so that it now provides:

(2) Personal property, capable of manual delivery, shall be levied on by taking into custody. If the property or any part of it may be concealed in a building or enclosure, the sheriff may publicly demand delivery of the property. If the property is not delivered and if the order of execution so directs, the sheriff may cause the building or enclosure to be broken open and take possession of the property.

**PRECLUDING FEES FOR SEXUAL ASSAULT PROTECTION ORDERS**

Chapter 55 (HB 1437)

Effective Date: July 22, 2007

Amends chapter 7.90 RCW to provide that no filing fee and no fees for service of process (or for certified copies) may be charged to petitioners for sexual assault protection papers.

**STRENGTHENING WSDA ENFORCEMENT OF ANIMAL HEALTH LAWS**

Chapter 71 (ESB 5204)

Effective Date: July 22, 2007

Amends provisions related to health of livestock and other animals to increase the authority of the Washington State Department of Agriculture (the WSDA enforces by civil penalty authority the laws relating to animal health as well as those relating to ensuring safety of agricultural products for humans.)

**SPECIALLY CLASSIFYING AND PUNISHING ASSAULT BY STRANGULATION**

Chapter 79 (SB 5953)

Effective Date: July 22, 2007

Amends RCW 9A.04.110 to add a definition of "strangulation" providing:

(26) "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

Amends RCW 9A.36.021 to make assault by strangulation second degree assault.

**PROTECTING STATIONARY EMERGENCY, ROADSIDE ASSISTANCE AND POLICE VEHICLES**

Chapter 83 (SSB 5078)

Effective Date: July 22, 2007

Amends RCW 46.61.212 so that it now provides:

The driver of any motor vehicle, upon approaching a stationary authorized emergency vehicle that is making use of audible and/or visual signals meeting the requirements of RCW 46.37.190, a tow truck that is making use of visual red lights meeting the requirements of RCW 46.37.196, other vehicles providing roadside assistance that are making use of warning lights with three hundred sixty degree visibility, or ((of)) a police vehicle properly and lawfully displaying a flashing, blinking, or alternating emergency light or lights, shall:

(1) On a highway having four or more lanes, at least two of which are intended for traffic proceeding in the same direction as the approaching vehicle, proceed with caution and, if reasonable, with due regard for safety and traffic conditions, yield the right-of-way by making a lane change or moving away from the lane or shoulder occupied by the stationary authorized emergency vehicle or police vehicle;

(2) On a highway having less than four lanes, proceed with caution, reduce the speed of the vehicle, and, if reasonable, with due regard for safety and traffic conditions, and under the rules of this chapter, yield the right-of-way by passing to the left at a safe distance and simultaneously yield the right-of-way to all vehicles traveling in the proper direction upon the highway; or

(3) If changing lanes or moving away would be unreasonable or unsafe, proceed with due caution and reduce the speed of the vehicle.

Also amends RCW 46.61.100 to add an exception to the requirement that vehicles be driven upon the right half of the roadway. The new exception is for vehicles: "(e) Upon a highway having three lanes or less, when approaching a stationary authorized emergency vehicle, tow truck or other vehicle providing roadside assistance while operating warning lights with three hundred sixty degree visibility, or police vehicle as described under RCW 46.61.212(2)."

**REGULATING CHECK CASHERS AND SELLERS**

Chapter 81 (SB 5199)

Effective Date: July 22, 2007

The business of check cashing and selling is a form of small loan business regulated civilly by the Washington State Department of Financial Institutions (DFI). This enactment adds civil violations of fraud, deception, misrepresentation, and unlicensed small-loan lending to persons in Washington through internet, facsimile, telephone, kiosk or other means. These civil violations render the related transactions uncollectible and unenforceable.

**MODIFYING LAW ENFORCEMENT IMPOUNDMENT PROVISION**

Chapter 86 (SB 5134)

Effective Date: July 22, 2007

Amends RCW 46.55.113 to add, as a circumstance authorizing motor vehicle impoundment by law enforcement, the operation of a motor vehicle without a special driver's license endorsement required for the type of vehicle operated.

**MODIFYING PROVISIONS REGARDING PHOTO ENFORCEMENT OF TRAFFIC LAWS**

Chapter 101 (SSB 5391)

Effective Date: July 22, 2007

Amends RCW 46.63.030 and 46.63.160. The Legislature's Final Bill Report summarizes this enactment as follows:

The photo enforcement system statute for toll violations is changed to conform with the administrative provisions found in ESSB 5060, enacted in 2005. Toll violations detected through the use of photo enforcement systems must be processed in the same manner as parking infractions and the penalty is set at \$40 plus three times the toll. The \$40 penalty remains with the local jurisdiction processing the violation, and the "three times the toll" penalty must be deposited into the statewide account in which tolls are deposited for the respective tolling facility.

**REQUIRING THAT STATE AGENCIES ALLOW VOLUNTEER FIREFIGHTERS TO RESPOND TO EMERGENCIES**

Chapter 112 (SSB 5511)

Effective Date: July 22, 2007

Adds a new section to chapter 41.06 RCW (relating to state agencies), consistent with a statute imposing the same requirement on private employers, providing:

An agency must allow an employee who is a volunteer firefighter to respond, without pay, to a fire, natural disaster, or medical emergency when called to duty. The agency may choose to grant leave with pay.

**ADDRESSING FALSE REPORTING OF CHILD ABUSE OR NEGLECT**

Chapter 118 (SSB 5839)

Effective Date: July 22, 2007

Adds a new section to chapter 26.44 RCW providing:

(1) The child protective services section shall prepare a statement warning against false reporting of alleged child abuse or neglect for inclusion in any instructions, informational brochures, educational forms, and handbooks developed or prepared for or by the department and relating to the reporting of abuse or neglect of children. Such statement shall include information on the criminal penalties that apply to false reports of alleged child abuse or neglect

under RCW 26.44.060(4). It shall not be necessary to reprint existing materials if any other less expensive technique can be used. Materials shall be revised when reproduced.

(2) The child protective services section shall send a letter by certified mail to any person determined by the section to have made a false report of child abuse or neglect informing the person that such a determination has been made and that a second or subsequent false report will be referred to the proper law enforcement agency for investigation.

### **AUTHORIZING TIRES WITH RETRACTABLE STUDS**

Chapter 140 (SB 5206)

Effective Date: July 22, 2007

Amends RCW 46.37.420 to provide "that a vehicle may be equipped year-round with tires that have retractable studs if: (a) The studs retract pneumatically or mechanically to below the wear bar of the tire when not in use; and (b) the retractable studs are engaged only between November 1<sup>st</sup> and April 1<sup>st</sup>. Retractable studs may be made of metal or other material and are not subject to the lightweight stud weight requirements under RCW 46.04.272."

Also amends RCW 46.04.272, 46.37.4215 and 46.37.4216 to reflect this amendment to RCW 46.37.420.

### **EXEMPTING LAW ENFORCEMENT VEHICLES FROM WINDOW TINTING RESTRICTIONS**

Chapter 168 (HB 1344)

Effective Date: July 22, 2007

Adds a subsection (8) to RCW 46.37.430 providing:

(8) The side and rear windows of law enforcement vehicles are exempt from the requirements of subsection (5) of this section. However, when law enforcement vehicles are sold to private individuals the film sunscreening or coloring material must comply with the requirements of subsection (5) of this section or documentation must be provided to the buyer stating that the vehicle windows must comply with the requirements of subsection (5) of this section before operation of the vehicle.

### **ESTABLISHING A STATUTORY EVIDENTIARY PRIVILEGE FOR MEMBERS OF MEDIA**

Chapter 196 (HB 1366)

Effective Date: July 22, 2007

Adds a section to Title 5 RCW creating a statutory privilege for members of the news media from compelled testimony in certain circumstances. [LED EDITORIAL NOTE: The statutory text in this enactment is extensive and not easily reduced to a short summary; interested LED readers are referred to the Internet legislative site noted above on page 2 in the Introduction to this update.]

### **ADJUSTING THE PUBLIC RECORDS ACT**

Chapter 197 (SHB 1445)

Effective Date: July 22, 2007 (Generally)

Makes some minor adjustments in the Public Records Act, including moving subsection (6) of RCW 42.56.330 (regarding law enforcement reasonable-belief requests to public utilities for usage and other records of customers) into a new section in chapter 42.56 RCW.

### **PROTECTING CORRECTIONAL PERSONNEL FROM STALKING**

Chapter 201 (SHB 1319)

Effective Date: July 22, 2007

Amends RCW 9A.46.110 to broadly define "correctional agency" and to include employees, contract staff and volunteers of state and local correctional agencies in the list of victims that aggravate the crime of stalking from a gross misdemeanor to a Class C felony.

**PRECLUDING POLYGRAPHING OF SEXUAL ASSAULT VICTIMS**

Chapter 202 (HB 1520)

Effective Date: July 22, 2007

Adds a new section to chapter 10.58 RCW providing:

A law enforcement officer, prosecuting attorney, or other government official may not ask or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense. For the purposes of this section, "sex offense" is any offense under chapter 9A.44 RCW.

**CLARIFYING SEXUAL ASSAULT PROTECTION ORDER PROVISIONS**

Chapter 212 (HB 1555)

Effective Date: July 22, 2007

Amends provisions in chapter 7.90 RCW to clarify that remedy of a sexual assault protection order is a remedy only for those victims who do not qualify for a domestic violence protection order under chapter 26.50 RCW.

**MODIFYING LAW ENFORCEMENT IMPOUNDMENT PROVISIONS**

Chapter 242 (SHB 1892)

Effective Date: July 22, 2007

Amends 46.55.113 to add that law enforcement officers may impound a vehicle "when a vehicle with an expired registration of more than forty-five days is parked on a public street." Similar language is added to RCW 46.16.010.

**PROTECTING VULNERABLE ADULTS**

Chapter 312 (ESHB 1008)

Effective Date: July 22, 2007

Modifies provisions in chapter 74.34 RCW relating to court orders for protection of vulnerable adults.

**PROHIBITING HOLDING WIRELESS COMMUNICATIONS DEVICE TO EAR WHILE DRIVING  
- - LEGISLATION DOES NOT TAKE EFFECT UNTIL JULY 1, 2008**

Chapter 416 (EHB 1214)

Effective Date: July 1, 2008

Adds a new section to chapter 46.61 RCW providing:

(1) Except as provided in subsection (2) of this section, a person operating a moving motor vehicle while holding a wireless communications device to his or her ear is guilty of a traffic infraction.

(2) Subsection (1) of this section does not apply to a person operating: (a) An authorized emergency vehicle, or a tow truck responding to a disabled vehicle; (b) A moving motor vehicle using a wireless communications device in hands-free mode; (c) A moving motor vehicle using a hand-held wireless communications device to: (i) Report illegal activity; (ii) Summon medical or other emergency help; (iii) Prevent injury to a person or property; (d) A moving motor vehicle while using a hearing aid.

(3) Subsection (1) of this section does not restrict the operation of an amateur radio station by a person who holds a valid amateur radio operator license issued by the federal communications commission.

(4) For purposes of this section, "hand-free mode" means the use of a wireless communications device with a speaker phone, headset, or earpiece.

(5) The state preempts the field of regulating the use of wireless communications devices in motor vehicle, and this section supersedes any local laws, ordinances, orders, rule, or regulations enacted by a political subdivision or municipality to regulate the use of wireless communications devices by the operator of a motor vehicle.

(6) Enforcement of this section by law enforcement officers may be accomplished only as a secondary action when a driver of a motor vehicle has been detained for a suspected violation of this title or an equivalent local ordinance or some other offense.

(7) Infractions that result from the use of a wireless communications device while operating a motor vehicle under this section shall not become part of the driver's record under RCW 46.52.101 or 46.52.120. Additionally, a finding that a person has committed a traffic infraction under this section shall not be made available to insurance companies or employers.

**PROHIBITING TEXT MESSAGING WHILE DRIVING - - LEGISLATION DOES NOT TAKE EFFECT UNTIL JANUARY 1, 2008**

Chapter 417 (ESSB 5037)

Effective Date: January 1, 2008

Adds a new section to chapter 46.61 RCW providing:

(1) Except as provided in subsection (2) of this section, a person operating a moving motor vehicle who, by means of an electronic wireless communications device, other than a voice-activated global positioning or navigation system that is permanently affixed to the vehicle, sends, reads, or writes a text message, is guilty of a traffic infraction. A person does not send, read, or write text message when he or she reads, selects, or enters a phone number or name in a wireless communications device for the purpose of making a phone call.

(2) Subsection (1) of this section does not apply to a person operating: (a) An authorized emergency vehicle; or (b) A moving motor vehicle while using an electronic wireless communications device to: (i) Report illegal activity; (ii) Summon medical or other emergency help; (iii) Prevent injury to a person or property; or (iv) Relay information between a transit or for-hire operator and that operator's dispatcher, in which the device is permanently affixed to the vehicle.

(3) Enforcement of this section by law enforcement officers may be accomplished only as a secondary action when a driver of a motor vehicle has been detained for a suspected violation of this title or an equivalent local ordinance or some other offense.

(4) Infractions that result from the use of a wireless communications device while operating a motor vehicle under this section shall not become part of the driver's record under RCW 46.52.101 or 46.52.120. Additionally, a finding that a person

has committed a traffic infraction under this section shall not be made available to insurance companies or employers.

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## **BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**QUALIFIED IMMUNITY GRANTED IN CIVIL RIGHTS LAWSUIT – OFFICER WAS REASONABLE IN ENDING EXTENDED, DANGEROUS HIGH SPEED CHASE BY RAMMING ELUDER’S CAR FROM BEHIND** – In Scott v. Harris, \_\_\_ S.Ct. \_\_\_ (2007), the United States Supreme Court rules, 8-1, that an officer’s actions to terminate a dangerous, high-speed car chase that threatened the lives of innocent persons on and along the roadway did not violate the reasonableness clause of the federal constitution’s Fourth Amendment even though the officer’s actions placed the fleeing driver at risk of serious injury or death.

The lead opinion for the Supreme Court describes the facts of the case as follows:

In March 2001, a Georgia county deputy clocked [Mr. Harris’s vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that [Mr. Harris] should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, [Mr. Harris] pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. [The fleeing Mr. Harris] evaded the trap by making a sharp turn, colliding with [Deputy] Scott’s police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following [the fleeing Mr. Harris’s] shopping center maneuvering, which resulted in slight damage to [Deputy] Scott’s police car, [Deputy] Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, [Deputy] Scott decided to attempt to terminate the episode by employing a “Precision Intervention Technique (‘PIT’) maneuver, which causes the fleeing vehicle to spin to a stop.” Having radioed his supervisor for permission, [Deputy] Scott was told to “ ‘[g]o ahead and take him out.’ ” Instead, Scott applied his push bumper to the rear of [Mr. Harris’s] vehicle.

*[Court’s footnote: [Deputy] Scott says he decided not to employ the PIT maneuver because he was “concerned that the vehicles were moving too quickly to safely execute the maneuver.” [Mr. Harris] agrees that the PIT maneuver could not have been safely employed. It is irrelevant to our analysis whether [Deputy Scott had permission to take the precise actions he took.*

As a result [of the bumper-to-bumper maneuver], [Mr. Harris] lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. [Mr. Harris] was badly injured and was rendered a quadriplegic.

On the above-described facts, the Scott opinion concludes that, balancing the interests of innocent persons on and along the roadway against the interests of the fleeing driver, the officer’s action of ramming the fleeing driver’s car from behind was reasonable under the Fourth Amendment despite the risk of serious injury or death to that fleeing driver.

This was an unusual civil rights lawsuit in regard to the record relating to the qualified immunity issue. An officer has qualified immunity from civil rights liability if a reasonable officer would have believed his actions to be reasonable. Ordinarily, in trying to get the case dismissed on qualified immunity grounds, the defendant officer in the civil rights suit generally must allow the court to take the plaintiff's word for everything the plaintiff alleges. This case was different than most cases involving the qualified immunity question because, according to the majority opinion in Scott v. Harris, the government was able to establish the key facts of the prolonged high speed car chase via the indisputable evidence on the videotape of the chase. Despite this procedural peculiarity of the case, however, it appears that the lead opinion of the Supreme Court (joined without limitation by five other justices) sets a broad Fourth Amendment standard that will make it very difficult, if not impossible, for motorists who flee the police driving recklessly at high speed to recover damages in a civil rights lawsuit alleging a Fourth Amendment violation.

The ruling is, however, based exclusively on the Fourth Amendment in the context of a federal civil rights lawsuit relating to legal liability to a recklessly fleeing driver. The ruling does not provide guidance regarding state torts law civil liability considerations relating to high speed chases by law enforcement personnel. And of course, in relation to possible agency disciplinary action, agency policies may be more restrictive than the boundaries of the Fourth Amendment or common law torts standards.

Result: Reversal of Eleventh Circuit Federal Court of Appeals decision that had affirmed a federal district court decision denying qualified immunity to the officer who rammed the fleeing driver's car off the road.

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### **BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS**

**WILLFULLY SPITTING ON A PERSON AT A VA MEDICAL CENTER HELD TO BE AN ASSAULT UNDER FEDERAL CRIMINAL LAW** – In U.S. v. Llewellyn, 481 F.3d 695 (9<sup>th</sup> Cir. 2007), the Ninth Circuit: 1) explains that, because federal statutes do not define the word “assault,” the common law definitions of assault are used under federal criminal statutes; and 2) holds that Mr. Llewellyn's action of intentionally spitting in anger on a patient at the VA Medical Center in Walla Walla was simple assault under federal law.

Result: Affirmance of U.S. District Court (Eastern District) conviction of Jeffrey Paul Llewellyn.

**LED EDITORIAL NOTE:** The Washington Court of Appeals 1978 decision in State v. Humphries, 21 Wn. App. 405 (Div. I, 1978) likewise held that intentionally spitting on another person is assault (fourth degree under current Washington law) under Washington's criminal statutes (see chapter 9A.36 RCW), which statutes likewise do not define the word “assault” and use the common law concepts of battery and assault to define criminal “assault.”

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### **WASHINGTON STATE COURT OF APPEALS**

**SUSPECTS' TANDEM PURCHASE OF MULTIPLE METH PRECURSOR ITEMS, PLUS A HISTORY OF SUCH PURCHASES FOR ONE OF THE SUSPECTS, HELD TO BE REASONABLE SUSPICION FOR TERRY STOP**

State v. Keller-Deen, \_\_\_ Wn. App. \_\_\_, 153 P.3d 888 (Div. III, 2007)

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

In December 2004, a Home Depot loss prevention officer contacted Detective Doug Stanley to advise him that a “suspicious male,” later identified as Ron Fowler, was purchasing Xylene, an organic solvent, and plastic tubing. The loss prevention officer told Detective Stanley he believed Mr. Fowler had previously purchased items used to manufacture methamphetamine.

Detective Stanley and Detective Larry Smith arrived and watched Mr. Fowler walk to a vehicle in the parking lot where he soon met Lanette Keller-Deen. Detective Stanley contacted the loss prevention officer and learned Ms. Keller-Deen had purchased a screen and acetone. Detective Stanley saw Mr. Fowler place his items in the car trunk. Mr. Fowler “scan[ned] the parking lot” as Ms. Keller-Deen placed her items in the trunk. The “[d]etectives were able to identify [Mr.] Fowler by appearance as an individual that they had seen on other surveillance cameras making prior purchases of pseudoephedrine, dry ice, and other solvents.”

Detective Stanley determined the car in the parking lot was registered to Ms. Keller-Deen and Dale A. Deen. He learned Mr. Deen had two outstanding warrants. “Both names were familiar to Detective Stanley as being associated with purchases of pseudoephedrine tablets, [r]ed [d]evil lye, toluene and dry ice, dating back to March of 2004.” Ms. Keller-Deen “had been involved in approximately 15 prior suspicious purchases, the most recent being on October 7, 2004.” Detective Stanley knew from training and experience how each of the items purchased could be used to manufacture methamphetamine.

When Ms. Keller-Deen and Mr. Fowler drove away, the detectives followed them to a parking lot where Ms. Keller-Deen parked. The detectives approached the car and learned Mr. Fowler's identity. The detectives asked Ms. Keller-Deen to get out of the car, handcuffed her, and advised her of her Miranda rights. She voluntarily answered the detectives' questions. The detectives did not arrest Ms. Keller-Deen or Mr. Fowler based on the immediate incidents, but did arrest Mr. Fowler on two outstanding arrest warrants. They impounded and searched the car, and found items consistent with the manufacture of methamphetamine.

The State charged Ms. Keller-Deen by amended information with manufacturing methamphetamine, or in the alternative, possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine. Ms. Keller-Deen unsuccessfully sought to suppress evidence obtained from the detectives' stop. A jury found her guilty of manufacturing methamphetamine.

ISSUE AND RULING: Did the information about the two suspects' current tandem purchases of methamphetamine precursors, plus the history of past such purchases by one of the suspects add up to articulable reasonable suspicion for a Terry stop of the suspects? (ANSWER: Yes)

Result: Affirmance of Benton County Superior Court conviction of Lanette Christine Keller-Deen for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The issue is whether the trial court erred in denying Ms. Keller-Deen's motion to suppress evidence and concluding the police had reasonable and articulable suspicion to conduct a Terry stop. Ms. Keller-Deen contends the police unlawfully seized her based upon a lawful purchase and impermissible profiling resulting from prior legal purchases of items that could be associated with the manufacture of methamphetamine.

...

A police officer may briefly detain an individual under circumstances that satisfy the Terry reasonable suspicion standard. State v. Carlson, 130 Wn. App. 589 (2005) (Div. III, 2005) **March 06 LED:13**. The officer must have a well-founded suspicion that the individual is engaged in criminal activity and must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’ ”

“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.” The reasonableness of an officer's suspicion is determined from “the totality of the circumstances known by the officer at the inception of the stop.” “[C]ircumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience.”

In Carlson, two “rough dressed, unkempt and dirty” men walked into a drug store, split up, refused assistance, each made separate purchases of one methamphetamine precursor item, and returned to the same vehicle. This court decided personal appearance and shopping activities showing separate single purchases of a methamphetamine precursor were inadequate to establish reasonable suspicion to support a Terry stop.

Here, the facts show much more than those found in Carlson. Ms. Keller-Deen and Mr. Fowler each made separate purchases of two methamphetamine precursor items. The loss prevention officer believed Mr. Fowler made previous precursor purchases. Detective Stanley saw Mr. Fowler and Ms. Keller-Deen meet at a vehicle in the store parking lot and he watched Mr. Fowler “scan the parking lot” as they placed their items in the trunk. The detectives recognized “[Mr.] Fowler by appearance as an individual that they had seen on other surveillance cameras making prior purchases of pseudoephedrine, dry ice, and other solvents.” Detective Stanley learned the car was registered to Ms. Keller-Deen and Mr. Deen. He recognized their names as being associated with several methamphetamine precursor purchases. Ms. Keller-Deen had made “15 prior suspicious [precursor] purchases” within the past several months. Mr. Deen had two outstanding warrants. They did not learn the man in the car was not Mr. Deen until after they approached the car.

Thus the facts are distinguishable from those found in Carlson where single isolated purchases of precursors were before the court. Therefore, the facts support the court's conclusion that reasonable suspicion existed to conduct a Terry stop. We hold the court did not err in denying Ms. Keller-Deen's motion to suppress evidence.

[Some case citations omitted]

## **EVIDENCE OF INTENT ELEMENT HELD SUFFICIENT IN ASSAULT CASE WHERE DEFENDANT DROVE HIS CAR INTO TWO POLICE VEHICLES**

State v. Baker, 136 Wn. App. 878 (Div. III, 2007)

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

A uniformed Spokane police officer came looking for Shappa J. Baker to investigate a reported protection order violation. Mr. Baker took off at high speed in his sports utility vehicle (SUV). Officer [A] and Officer [B] pursued in a marked police car with activated lights and sirens.

They chased Mr. Baker through the streets of Spokane. He drove at high speeds and ran stop signs and red lights. Officer [A] tried nudging the SUV into a spin, which sometimes stops the engine. Mr. Baker's engine did not stall. Mr. Baker then reversed, accelerated, and slammed into Officer [A]'s car. The police car's front driver's and passenger's windows shattered, the side was dented, and the front tire and rim were damaged. The impact pushed the car up over a deep curb and into a yard. Officer [A] was thrown sideways to the center of the front seat. His body and gun hit the radio hard enough to disable it.

Mr. Baker then accelerated toward Officer [B]'s car and forced her to take evasive action. Mr. Baker then "flipped off" the officer, laughed, and sped off.

A third officer joined in and an extended chase ensued at speeds up to 80 mph in posted 30-mph zones. Mr. Baker crossed into the oncoming lanes and again ran stop signs and red lights. Police placed spike strips in Mr. Baker's path. He turned into a small empty lot to avoid the spikes.

Officer [C] was parked at the far end of the lot on his police motorcycle. Mr. Baker accelerated across the lot directly toward the motorcycle. Officer [C] jumped off the bike and ran with seconds to spare. Mr. Baker veered away from the motorcycle at the last second, but he, nonetheless, struck the front end of the bike.

The judge found that Mr. Baker intentionally assaulted Officer [A] with a deadly weapon, a motor vehicle capable of causing death or substantial bodily harm under the circumstances. And the court found that he intended to inflict great bodily harm. The court concluded these findings satisfied the elements of first degree assault. The court also concluded that Mr. Baker intentionally assaulted Officer [C] with a deadly weapon, a vehicle, and concluded that this was second degree assault.

ISSUE AND RULING: Is there sufficient evidence in the trial record to establish the intent element of assault? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court convictions of Shappa Jay Baker for first degree and second degree assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

[A] question before us is whether a reasonable trier of fact could have inferred from Mr. Baker's conduct that he intended to strike these officers or the vehicles

they were in or near. To ask the question here is to answer it. Of course the judge could.

Mr. Baker saw police in uniforms and clearly marked police vehicles (a squad car and a police motorcycle). He appeared to deliberately try to strike the police vehicles. He “flipped off” an officer and laughed. These historical facts easily support a factual inference that Mr. Baker intended to strike these officers. These essential, elemental facts include the “critical question” of state of mind. When findings of fact are mislabeled as conclusions of law, we review them for substantial evidence, not de novo as conclusions of law.

Mr. Baker also argues that the court's unchallenged findings do not support the court's legal conclusion - assault.

“A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with ... any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.36.011(1). “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... (c) Assaults another with a deadly weapon.” RCW 9A.36.021(1).

Washington recognizes three definitions of assault derived from the common law: (1) an attempt to inflict bodily injury upon another with unlawful force; (2) an unlawful touching with criminal intent; and (3) putting a person in apprehension of harm with or without the intent or present ability to inflict harm.

To prove assault based solely on an attempt to injure, the State must show that the defendant specifically intended to cause bodily injury. But the State need not prove specific intent-either to inflict substantial bodily harm or to cause apprehension-if unlawful physical contact occurs. That is an actual battery. Assault by actual battery consists of an intentional touching or striking, whether or not any physical injury results. Therefore, the State need show only the intention to touch or strike, not the intent to injure.

And, contrary to Mr. Baker's assertion, the statutory definition of “deadly weapon” includes a vehicle that “under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). The facts here and the inferences drawn by the court from those facts easily support the court's conclusions that Mr. Baker intentionally assaulted Officer [C] and Officer [A] with a deadly weapon.

Moreover, the State only needed to show that the physical act constituting the assault was intentional, not the infliction of injury or apprehension. In sum, whether we view Mr. Baker's challenge as a challenge to the factual inferences drawn from the historical facts of this case, or as a challenge to the legal sufficiency of those facts and the court's inferences from those facts to support the essential legal elements of assault, we conclude that the court's decision is easily supported.

[Some case citations omitted]

**EVIDENCE THAT DEFENDANT ASSAULTED CHILD AND THEN ORDERED HER INTO LIVING ROOM HELD SUFFICIENT TO SUPPORT UNLAWFUL IMPRISONMENT CONVICTION; PHONE CALL BY OFFICER TO SUSPECT HELD NOT CUSTODIAL QUESTIONING, AND HENCE MIRANDA HELD NOT APPLICABLE**

State v. Davis, 133 Wn. App. 415 (Div. III, 2007)

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

Mr. Davis lived with his girl friend, Bobbi Dewey, and her seven-year-old daughter, T.B. On May 7, 2004, the couple had argued throughout the day in a series of telephone calls and e-mails.

Ms. Dewey and Mr. Davis arrived home that evening at the same time. T.B. went to her room. Mr. Davis undressed and got into bed, where he ate some dinner. Ms. Dewey was doing laundry. She needed to run a quick errand and asked Mr. Davis if he could watch T.B. while she was out. He refused. Ms. Dewey told him their relationship was not working and he had to move out in two weeks.

Mr. Davis called Ms. Dewey back to the bedroom, where he grabbed her neck and threw her across the room into a nightstand. Mr. Davis grabbed her throat and banged her head into the wall. He threw her into the frame of their iron rod bed and banged her head against the bars.

T.B. heard the commotion and came into the bedroom. Ms. Dewey told her to go for help, but Mr. Davis told her not to go anywhere. T.B. asked Mr. Davis not to hurt her mom. T.B. grabbed Mr. Davis's arm and as he pulled her down, she hit the wall. He threatened them and ordered them to go in the living room. There, he broke a picture frame and threatened to hurt Ms. Dewey.

Mr. Davis and Ms. Dewey went back to their bedroom, where he broke a light. While picking up some glass, Ms. Dewey cut her hand. Mr. Davis realized she was hurt and helped her clean her wound. He got dressed and left.

Ms. Dewey called 911. Officers Tramell Taylor and Gordon Ennis responded to the apartment. Officer Taylor called Mr. Davis on his cell phone. Mr. Davis said he and Ms. Dewey had argued, but there was nothing wrong with her.

The State charged Mr. Davis by amended information with harassment, second degree assault, and unlawful imprisonment of Ms. Dewey as the victim. It also charged him with second degree assault and unlawful imprisonment of T.B. as the victim. Mr. Davis was charged with third degree malicious mischief and violation of a domestic violence criminal protection order as well. He was convicted of harassment, unlawful imprisonment, third degree malicious mischief, two counts of fourth degree assault (the lesser included offense to second degree assault), and violation of a domestic violence criminal protection order.

ISSUES AND RULINGS: 1) Is there sufficient evidence in the record to support the unlawful imprisonment conviction as to the seven-year-old child that Mr. Davis assaulted and then ordered to go to the living room with him and her mother? (ANSWER: Yes); 2) Was the officer required to Mirandize Mr. Davis before questioning him after contacting Mr. Davis via Mr. Davis's cell phone? (ANSWER: No, because a phone conversation is not custodial for Miranda purposes)

Result: Affirmance of Spokane County Superior Court convictions of Anthony Davis for harassment, unlawful imprisonment, third degree malicious mischief, fourth degree assault (two counts), and violation of a domestic violence restraining order.

Status: On April 4, 2007 the Washington Supreme Court granted review in this case. Oral argument likely will not be held before the fall of 2007.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Unlawful imprisonment of a child

“A person is guilty of unlawful imprisonment if he knowingly restrains another person.” RCW 9A.40.040(1). Restrain means:

[t]o restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is without consent if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

RCW 9A.40.010(1).

The evidence showed that, upon hearing the commotion in her mother's bedroom, T.B. went to see what was happening. Ms. Dewey told her to go get help. Mr. Davis grabbed T.B.'s arm and pulled her to the ground. He then told her to go sit in the living room. T.B. testified she was scared and did not leave. This satisfies the definition of restraint.

Mr. Davis claims T.B. was not restrained because she was free to move around the apartment. He relies on State v. Kinchen, 92 Wn. App. 442 (1998) **March 99 LED:17**. Kinchen involved a parent who was charged with unlawful imprisonment for locking his two sons in an apartment while he was at work. The court found there was insufficient evidence to support an unlawful imprisonment conviction because the children had alternative ways to safely leave the apartment.

Here, there were no alternative ways for T.B. to escape. She was able to move about the apartment after the initial altercation, but she was unable to leave and get help. Kinchen is inapplicable. The evidence was sufficient to support the conviction.

2) Miranda and phone call

Mr. Davis . . . argues his Fifth Amendment right to remain silent was violated because he was not given Miranda warnings prior to a phone conversation with a police officer. Officers must advise defendants of their right to counsel and their right against self-incrimination when “custodial interrogation” begins. “Custodial interrogation” is questioning initiated by police officers when a reasonable person would not feel at liberty to terminate the conversation. The relevant inquiry is whether, under an objective standard, a reasonable person would believe he was

in police custody based on the restriction of the suspect's freedom of movement at the time of questioning.

Mr. Davis's conversation with the officer took place over a cell phone. He was not in the same location as the officer. He could have ended the call at any time. Because he was not in custody, Miranda warnings were not required.

Mr. Davis also asserts his right to counsel was violated when the officer continued to question him on the phone after being told he would not make any other statements without an attorney. "The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation." Mr. Davis was not in custody. His Fifth Amendment right to counsel had not attached.

Without explanation, Mr. Davis claims the court's admission of his statements to the officer led to an unfair trial. He argues that because he challenged the officer's testimony and the prosecutor then improperly asked him to state whether the officer had lied under oath, his right to a fair trial was violated. Although the prosecutor's actions were improper, Mr. Davis does not show he was so prejudiced as to require reversal. Mr. Davis did not state the officer had lied; rather, he stood by his version of the conversation. This is no basis for reversal.

[Some case citations omitted]

**WHERE OFFICER HEARD SNORTING SOUND AND THEN SAW DEFENDANT IN TOILET STALL WITH TWO MEN, ONE OF WHOM HAD WHAT APPEARED TO BE COCAINE IN HIS HAND, OFFICER LACKED PROBABLE CAUSE TO ARREST DEFENDANT**

State v. Chavez, \_\_\_ Wn. App. \_\_\_, 156 P.3d 246 (Div. III, 2007)

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

The facts are undisputed. Late in the evening on April 2, 2005, Grandview police officers were conducting a routine check at the El Pueblito nightclub. As [one of the officers] entered the nightclub's restroom from a back alley entrance, he heard a loud snorting sound coming from a bathroom stall that was concealed by a partition. When he walked around the partition, he saw three men standing together in an open bathroom stall. Upon seeing the officer, one of the men abruptly left. The remaining two, later identified as Mr. Chavez and Mr. Ramirez, did not attempt to leave. [The officer] noticed that Mr. Ramirez was holding a partially folded dollar bill. In view of the officer, Mr. Ramirez quickly tried to hand the bill to Mr. Chavez, who refused to take it. The officer then noticed a white powdery substance on the dollar bill, and suspecting it was cocaine, seized the bill and called for backup officers.

[The officer] asked officers to handcuff Mr. Chavez and Mr. Ramirez, suspecting they were "in constructive possession of what [he] believed to be [a] controlled substance." Officers then removed the two men to a back alley where one of them removed Mr. Chavez's wallet, purportedly for identification. The officer noticed a white powdery substance inside the wallet. Field tests confirmed that the substances in the wallet and dollar bill were cocaine.

Mr. Chavez was formally arrested and charged with possession of cocaine in violation of the Uniform Controlled Substances Act, RCW 69.50.4013(1).

Pursuant to CrR 3.6, he moved to suppress the cocaine seized from his wallet, arguing the search was unlawful because inadequate probable cause supported his arrest.

The court denied the motion, finding the removal of the wallet a valid search incident to arrest, reasoning:

The officers have been able to point to specific and articulable facts giving rise to a reasonable suspicion that there was criminal activity afoot. I think that as soon as they handcuff Mr. Chavez, he was under arrest at that point, and there was probable cause at that point to believe he was involved in some kind of drug transaction.

The case proceeded to a stipulated facts trial where Mr. Chavez was found guilty as charged.

**ISSUE AND RULING:** Where the officer heard the snorting sound coming from the toilet stall and then saw defendant in the stall with two other men, one of whom had what appeared to be cocaine in his hand, did the officer have probable cause to arrest defendant for constructive possession of the cocaine? (**ANSWER:** No)

**Result:** Reversal of Yakima County Superior Court conviction of Rafael C. Chavez, Jr. for possession of cocaine.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

To arrest a person, the officer must have probable cause to believe that an offense has been or is being committed. A search incident to arrest can occur prior to the arrest, so long as a sufficient basis for the arrest existed before the search commenced.

#### **Probable Cause for Arrest**

Mr. Chavez contends that the State is required to establish that he had either constructive possession or joint constructive possession of the dollar bill in order to satisfy the probable cause requirement of the Fourth Amendment. He argues that because Mr. Ramirez was in exclusive possession of the dollar bill, the police lacked probable cause to arrest him. The State responds that probable cause to suspect Mr. Chavez of constructive possession of cocaine was established by his proximity to Mr. Ramirez and his “placement and posture within the stall.”

Probable cause for arrest exists when the facts and circumstances known to an officer are sufficient to warrant a prudent or cautious man to believe that a crime has been committed. In narcotics cases, the court considers “ ‘the totality of the facts and circumstances within the officer’s knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer.’ ” An officer need not have knowledge of facts sufficient to establish guilt beyond a reasonable doubt, but a mere suspicion of criminal activity does not give an officer probable cause to arrest.

#### **Constructive Possession**

Actual possession exists where goods are in the personal custody of the person charged with possession. Constructive possession exists where a person not in actual possession still has dominion and control over the object or place where the object was found. Dominion and control need not be exclusive and can be established by circumstantial evidence.

To determine whether a defendant was in constructive possession of an object, we look to the totality of the circumstances. One aspect of dominion and control is that the defendant may reduce the object to actual possession immediately. While proximity alone is not sufficient to establish constructive possession, proximity coupled with other circumstances from which the trier of fact can infer dominion and control is sufficient to show constructive possession.

The court's unchallenged findings of fact show: (1) [The arresting officer] heard a snorting noise coming from a bathroom stall; (2) three men, including Mr. Chavez, were standing in the bathroom stall; (3) one of the men quickly left the restroom upon seeing the officer; (4) Mr. Ramirez was holding a dollar bill with a white powdery substance on it; (5) upon seeing the officer, Mr. Ramirez attempted to hand the bill to Mr. Chavez; and (6) Mr. Chavez refused to take the bill.

These facts are insufficient to support a finding that Mr. Chavez was in constructive possession of cocaine. [The arresting officer] did not know what occurred in the bathroom stall. He did not see Mr. Chavez holding the cocaine or using it. Nothing indicates that Mr. Chavez was involved in criminal activity other than his proximity to Mr. Ramirez; in fact, the evidence points to Mr. Ramirez as the sole owner of the cocaine. See State v. Callahan, 77 Wn.2d (1969) (defendant's proximity to the drugs and his admission that he had handled the drugs earlier in the day, was not sufficient to show constructive possession where there was evidence that another person had exclusive ownership of the drugs).

While an aspect of dominion and control is that the defendant may immediately reduce the object to actual possession, Mr. Chavez refused an opportunity to take the cocaine from Mr. Ramirez. During the suppression hearing, [the arresting officer] testified that he had a "strong suspicion" based on Mr. Chavez's proximity to Mr. Ramirez that criminal activity was occurring. But mere suspicion is not enough to support probable cause. While a well founded suspicion supports a Terry stop, it does not create probable cause for arrest.

[Some case citations omitted]

**EVIDENCE OF VOYEURISM HELD SUFFICIENT TO SUPPORT CONVICTION - - PEEPING OVER TOP OF TOILET STALL HELD TO HAVE OCCURRED "FOR MORE THAN A BRIEF PERIOD OF TIME, IN OTHER THAN A CASUAL OR CURSORY MANNER"**

State v. Fleming, \_\_\_ Wn. App. \_\_\_, 154 P.3d 304 (Div. III, 2007)

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

On the night of April 5, 2005, Mr. Fleming and his ex-girlfriend, Tammy, went out drinking. They ended up at Cyrus O'Leary's Restaurant in downtown Spokane,

Washington. Because Mr. Fleming appeared intoxicated, the bartender refused to serve him. The couple was, however, allowed to order some appetizers.

After they had eaten, Tammy stood up and headed to the restroom. Mr. Fleming left a few minutes later. The bartender saw him outside the ladies' restroom, either using or pretending to use the pay telephone. Suspicious that the two may skip out on their tab, the bartender went to get her manager.

Rose Marie Hone and her husband were also at Cyrus O'Leary's that night, celebrating their anniversary. About to leave, she went to use the restroom. While using the toilet, she noticed someone had entered the stall to her left. Strangely, the shoes, looking like a man's, faced the toilet. Then the shoes disappeared. The next thing she knew, she heard a sound above her. Ms. Hone saw Mr. Fleming looking over the stall at her. He stared and stuck his tongue out at Ms. Hone. She yelled at him to leave her alone and pulled up her pants. She told Mr. Fleming she had a cell phone and was going to call 911. Ms. Hone kept yelling for help and ran out of the stall. Mr. Fleming also ran out of the restroom just ahead of Ms. Hone. He tried to leave the restaurant, but employees kept him there until police arrived.

Mr. Fleming was charged with one count of voyeurism under RCW 9A.44.115. Based on that statute, the court gave this instruction:

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

The jury convicted Mr. Fleming as charged.

**ISSUE AND RULING:** Is the evidence sufficient to support Fleming's conviction of voyeurism despite the relatively brief duration of his encounter with the victim - - in other words did the intentional toilet stall peeping qualify as behavior that occurred "for more than a brief period of time, in other than a casual or cursory manner"? (**ANSWER:** Yes, rules a 2-1 majority)

**Result:** Affirmance of Spokane County Superior Court conviction of Michael Burke Fleming for voyeurism.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

RCW 9A.44.115(1)(e) required the State to prove that Mr. Fleming intentionally viewed Ms. Hone "for more than a brief period of time, in other than a casual or cursory manner." The language of the statute is plain and unambiguous.

Ms. Hone testified that, while she was using the restroom, Mr. Fleming entered the stall next to her. She noticed his shoes facing the toilet and then saw the shoes were gone. She looked up and saw Mr. Fleming looking directly down at her. He stuck his tongue out at Ms. Hone. She started yelling and told him she had a cell phone to call 911. Ms. Hone got up, grabbed her purse, and got out of the bathroom stall. The encounter did not last long only because Ms. Hone spotted Mr. Fleming quickly. In these circumstances, the jury could reasonably

infer that Mr. Fleming intentionally viewed Ms. Hone “in other than a casual or cursory manner.” RCW 9A.44.115(1)(e). And the jury could find as well that he viewed her for “more than a brief period of time.” Ms. Hone had enough time to see Mr. Fleming looking at her, to yell at him, to tell him she had a cell phone, and to run out of the stall. He in turn had enough time to stare and stick his tongue out at her. The evidence was indeed sufficient to support the conviction.

[Some case citations omitted]

**LED EDITORIAL COMMENT REGARDING THE DISSENT: Judge Schultheis appears to carry the principle of strict construction of criminal statutes a bit far with a dissent that disagrees with the majority’s analysis. He argues in vain that the encounter here was too brief to satisfy the statutory requirement that a viewing be “for more than a brief period of time, in other than a casual or cursory manner.”**

**EVIDENCE HELD INSUFFICIENT TO SUPPORT CONVICTION FOR INTIMIDATING A JUDGE – DEFENDANT MADE NO THREAT OF FUTURE ACTIONS**

State v. Brown, \_\_\_ Wn. App. \_\_\_, 154 P.3d 302 (Div. II, 2007)

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

On April 27, 2004, a Centralia municipal court judge sentenced Brown for driving under the influence (DUI). The Department of Licensing later suspended Brown's license because of outstanding fines associated with this conviction.

On May 12, 2005, Brown called a collection agency to discuss how he could pay his outstanding fines and reinstate his suspended driver's license. While speaking with a collections officer, he said he was upset about his DUI conviction and believed that the sentencing judge “was hard on him” and was the reason “why he was in this mess.”

Brown told the collections officer that he recently tried to shoot himself “but the bullet didn't go off” and then he shot “four bullet holes” in the wall. He also said “he could see [the sentencing judge's] door from his front porch and that the judge could see his door, and that he had seen not only the judge but also his wife and his kids out in the front lawn, and had thought about shooting them before.” The collections officer reported the incident to her supervisor, who in turn notified the police.

On May 13, the State charged Brown with one count of intimidating a judge. *[Court's footnote: A violation of RCW 9A.72.160, which states in part: (1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding. (2) "Threat" as used in this section means: (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or (b) Threats as defined in RCW 9A.04.110(26)].* During a jury trial on the charge, the collections officer related Brown's statements. She said that based on his tone, she believed that his statements were not something “he was just shouting out because he was angry or upset at that time” but, rather, “something that he had thought about

before [she] had spoken with him.” Nothing in the record indicates that Brown intended for his comments to be relayed to the judge.

The trial court instructed the jury, “Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.” Brown did not submit an additional instruction defining “true threat.” The jury found Brown guilty as charged. He appeals.

**ISSUE AND RULING:** Is there sufficient evidence of a threat of future actions to support Brown’s conviction for intimidating a judge? (**ANSWER:** No)

**Result:** Reversal of Lewis County Superior Court conviction of Eric Joseph Brown for intimidating a judge.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

In order to convict Brown of intimidating a judge, the State had to prove that he (1) directed a threat to a judge and (2) made the threat because of a ruling or decision of the judge in any official proceeding. RCW 9A.72.160(1). Although the First Amendment generally prohibits government interference with speech or expressive conduct, it does not protect certain types of speech, such as “true threats.” State v. Knowles, 91 Wn. App. 367 (1998) **April 99 LED:18**.

A “true threat” is a statement made “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].” State v. Johnston, 156 Wn.2d 355 (2006) **March 06 LED:04**. “Threat” for purposes of Brown’s conviction meant “to communicate, directly or indirectly the intent ... [t]o cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.04.110(26)(a).

Brown claims that his statements about harming the judge and his family were only past thoughts of violence, which could not establish “any intent to cause bodily injury in the future.” Whether he intended to carry out the threat is irrelevant, as our Supreme Court has said that in order to show a “true threat” for First Amendment purposes, the State need not prove a defendant actually intended to carry out the threat. State v. Kilburn, 151 Wn.2d 36 (2004) **Oct 04 LED:05**. Instead, the relevant constitutional question is “whether there is sufficient evidence that a reasonable person in [the defendant’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.”

Although Brown’s statements alarmed the collections officer, he expressed only past thoughts about harming the judge and the judge’s family and the ability to see them from his house. He did not express thoughts of harming the judge or the judge’s family in the future or about having a plan to do so. These facts suggest that a reasonable person in Brown’s position would not foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death. An opposite finding would ostensibly criminalize his previous thoughts, which we will not do. The State has presented insufficient evidence to establish his statements amounted to a “threat” as defined in RCW 9A.04.110(26)(a). Accordingly, we reverse Brown’s conviction and remand to dismiss the case with prejudice.

[Some case citations omitted]

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### NEXT MONTH

The July 2007 LED will include Part Three of our 2007 Washington Legislative Update, and, as space permits, entries regarding the following recent court decisions:

(1) On April 26, 2007, the Washington Supreme Court ruled, 7-2, in State v. Jordan, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 1218677 (2007) that, absent a valid exception (for instance, consent or exigent circumstances) to the constitutional search warrant requirement, warrantless random viewing by law enforcement officers of a motel registry violates article 1, section 7 of the Washington constitution. Justice James Johnson wrote a concurring opinion asserting that motel owners could lawfully choose to require that patrons consent at registration to waiver of their registry privacy, but that was not the factual circumstance of this case. Justices Barbara Madsen and Charles Johnson dissented and argued that there was no right to privacy in motel registry information.

(2) On April 26, 2007, the Washington Supreme Court ruled unanimously in State v. Miles, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 1218195 (2007) that a person's banking records are generally protected against non-consenting, non-exigent, warrantless searches by law enforcement. The Court ruled that, even though the Securities Act of Washington, chapter 21.20 RCW, authorizes the Director of the State Division of Financial Institutions to issue subpoenas to banks in the investigation of possible violations of chapter 21.20 RCW, such subpoena power violates the constitutional protections of article 1, section 7 of the Washington constitution, which generally requires a search warrant, rather than a subpoena, for government agencies to obtain bank records.

(3) On May 10, 2007, the Washington Supreme Court ruled, 6-3, in State v. Athan, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 1365301 (2007) that when detectives, fictitiously posing as a law firm, induced a murder suspect to send the fictitious firm a letter, from which the suspect's DNA sample was extracted (from his saliva), the detectives did not violate article 1, section 7 of the Washington constitution or engage in such outrageous behavior that the evidence should be suppressed or the case dismissed. Justices Fairhurst, Chambers and Sanders dissented.

(4) On May 8, 2007, Division Three of the Court of Appeals held in a controversial 2-1 decision in State v. Allen, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 1328925 (Div. III, 2007) (Judge Hunt dissenting) that where a law enforcement officer lawfully stopped a car for a license plate light violation, and then learned from a records check that the female driver was protected against a male (Ryan Weston Allen) by a no-contact order, the officer violated search and seizure protections of the Washington constitution, article 1, section 7, in two ways in the officer's ensuing actions that led to the officer's arrest (and fruitful search incident to arrest) of the male passenger Allen:

(A) the officer violated the State constitutional privacy rights of the male passenger Allen in asking him for identification information without reasonable suspicion in trying to determine if Allen was the male named as respondent on the no-contact order; and

(B) the officer violated the State constitutional privacy rights of the female driver when he had her exit the car so he could question her about the identity of the male passenger Allen after

having determined in a records check that the information that she and the male passenger had given the officer did not check out.

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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 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>].

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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](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the **LED** should be directed to [[ledemail@cjtc.state.wa.us](mailto:ledemail@cjtc.state.wa.us)]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LEDs**

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