



Law Enforcement

March 2007

Digest

602nd Basic Law Enforcement Academy – September 9th, 2006 through January 18th, 2007

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PART ONE OF THE 2007 WASHINGTON LEGISLATIVE UPDATE

LED EDITORIAL INTRODUCTORY NOTE: This is Part One of what will likely be a several-part compilation of 2007 Washington State legislative enactments of interest to law enforcement. Only one such bill has been passed, signed into law and gone into effect. Part Two will appear next month only if that occurs again as to another bill prior to next month’s **LED** deadline. Information about the status of bills can be found at <http://apps.leg.wa.gov/billinfo/>

PROHIBITING DISORDERLY CONDUCT: FUNERAL, BURIAL, VIEWING, MEMORIAL

Chapter 2 (HB 1168) Effective Date: February 2, 2007

Amends RCW 9A.84.030, to add an alternative way by which “disorderly conduct” can be committed. This misdemeanor is committed if a person:

- (d)(i) Intentionally engages in fighting or in tumultuous conduct or makes unreasonable noise, within five hundred feet of:
 - (A) The location where a funeral or burial is being performed;
 - (B) A funeral home during the viewing of a deceased person;
 - (C) A funeral procession, if the person described in this subsection (1)(d) knows that a funeral procession is taking place; or
 - (D) A building in which a funeral or memorial service is being conducted; and
- (ii) Knows that the activity adversely affects the funeral, burial, viewing, funeral procession, or memorial service.

NINTH CIRCUIT, U.S. COURT OF APPEALS

NO QUALIFIED IMMUNITY FROM FEDERAL CIVIL RIGHTS LIABILITY FOR CALIFORNIA HP OFFICER WHO VIOLATED SEVERAL CHP RULES IN CAR CHASE AND ULTIMATELY SHOT AND KILLED THE CHASED DRIVER WITHOUT SUFFICIENT JUSTIFICATION

Adams v. Speers, 473 F.3d 989 (9th Cir. 2007) (Decision issued January 10, 2007)

Facts: (Excerpted from Ninth Circuit opinion)

Preliminary to statement of the facts, we note that Officer Speers can make an

interlocutory appeal from the ruling on immunity only if he accepts as undisputed the facts presented by the appellees. As Speers' briefs show, he is familiar with this maxim governing such appeals, but at times his briefs lapse into disputing the Adamses' version of the facts and even into offering his own version of the facts. We regret these lapses and, as they are made by the Attorney General of the State of California defending Speers, we take this occasion to advise the Attorney General that such practice could jeopardize our jurisdiction to hear the interlocutory appeal. This exceptional remedy is available only if the issue of immunity is presented as a question of law.

As an appellate court, we are in no position to adjudicate disputed facts that have not gone through the crucible of trial. Still less are we in a position to accept as true something asserted to be a fact by the appellant that has not been tested in any judicial process. The exception to the normal rule prohibiting an appeal before a trial works only if the appellant concedes the facts and seeks judgment on the law.

The facts as presented by the Adamses are as follows:

Alan Adams, eighteen years of age, the youngest son of John and Cathy Adams, lived with his parents at their home in Hilmar, California. Early in the afternoon of June 26, 2001, Alan borrowed his mother's 1998 Ford Expedition to go to look for work at a nearby dairy. At about 1:30 p.m., a detective from the Merced County Sheriff's Department observed Alan run several stop signs. He put on a light to signal Alan that he should pull over. Alan did not, and a second Sheriff's deputy joined in the pursuit of his car. Two more county officers entered the chase, followed by two CHP vehicles. Alan continued on his course, driving largely within the speed limit, stopping at some stop signs and rolling slowly through others. His driving was "nonchalant" or that of a "rapid Sunday drive." He waved as he passed acquaintances.

Paul Speers had been assigned by the CHP to sit in his patrol car, parked on the road, to serve as a visible deterrent to speeders. On his radio he picked up news of the chase. Shortly after 2:00 p.m. and before his assignment had ended, he decided to join it, first picking up as a spectator a county probation officer who was his occasional partner in apprehending probation violators. Speers drove north and parked at a spot he guessed Alan would pass if he continued his present route.

The Ford Expedition with Alan at the wheel reached the point where Speers was waiting. Without advising the pursuing law enforcement vehicles of his identity or his intentions, Speers put his patrol car into gear, pulled out, and tried to ram Alan's vehicle. He missed. He continued in the procession of police, putting his patrol car at the head of the chase, which was now aided by a police helicopter that hung over the procession.

At 2:51 p.m., Alan's Expedition exited the off-ramp and made a left turn back over the freeway. It then entered the on-ramp to go north. Speers used his patrol car to ram the Expedition. The two cars became entangled. What the CHP report termed "a significant hazard" to both vehicles was created. The adjoining embankment was "very steep." Speers had not taken into consideration where

his patrol car would end up. In fact, the patrol car was dragged down the on-ramp for some distance. Then the vehicles separated, and Alan and Speers went on.

At 3:00 p.m., Alan encountered traffic stopped by a collision. He entered the center divider to make a U-turn and change direction. Speers accelerated, leaving the other police cars behind. He cut through the divider and rammed the left rear of Alan's vehicle with sufficient force to knock it off the shoulder of the road and down into a sandy embankment or ditch where it came to rest. The impact was such that Speers' own car spun down the shoulder, its bumper entangled with the Expedition. As the two cars came to rest, they separated.

After the crash, as the CHP report continues, "additional units positioned their patrol vehicles to prevent the suspect vehicle's escape." A CHP unit was stopped on the shoulder of the road about 35 feet from Alan's right rear. Another CHP unit stationed itself 25 feet away from the left rear. A Sheriff's unit came into position about 30 feet away from the Expedition and "slightly off-set to the left rear" of the Expedition. The patrol cars completely surrounded the Expedition, cutting off any possible avenue of escape.

Alan began to inch the Expedition backwards, at no more than 4 to 5 miles per hour, turning slowly to the left and letting the front of the Expedition swing to the right towards Speers' patrol vehicle. Speers pushed his door open and hit the Expedition. At the same time, Officer Marcos Rivera approached the Expedition and stood next to the window on Alan's side. He raised his baton, struck the window and broke it. He reached into Alan's car with the intention of pepper-spraying him.

Before Rivera could act, Speers exited his patrol car, moved away from it, and stood in front of the Expedition as it rolled backwards away from him. He drew his service weapon and trained it on Alan. Without warning that he would use it, he fired six rounds. Alan was killed.

A CHP investigation of the incident found, *inter alia*, that Speers, contrary to regulations, was not wearing body armor that would "reduc[e] or minimiz[e] the possibility of injury in the event of an accident or shooting." Speers did not obtain permission for the probation officer to ride as his passenger in the chase; the probation officer was untrained in CHP procedure as to pursuits; he was, in the words of the CHP, "an unauthorized passenger." At no time did Speers request or receive permission to enter the pursuit. He failed to communicate with any of the other units engaged in the chase. He was unfamiliar with the area he entered. In his failures to obtain permission and to communicate, he violated CHP policy.

Speers was also found by the CHP to have twice "rammed the suspect vehicle without obtaining permission" and to not have given "consideration to the final resting place of the involved vehicles after the ramming." In each instance, Speers violated CHP rules on ramming. In each instance, Speers disregarded CHP policy that "consideration should be given to the final resting place of the patrol car and its proximity to the violator's vehicle." Speers failed to follow CHP policy in making a stop by the use of force without authorization. In each instance, Speers acted without communication with the other units. The result of the second ramming, in the CHP's words, "left Officer Speers in a vulnerable and

hazardous position. Officer Speers had difficulty in exiting the patrol car due to very little room to open the patrol car door.” The CHP report concluded, “Based on the previously mentioned violations, it is recommended that Adverse Action be initiated against Officer Paul E. Speers.”

When Speers fired the six rounds, as the CHP report also stated, he “did not have a completely clear background for discharging his weapon.” Two of the officers on the scene saw no reason why Speers should shoot Alan. According to Speers' own deposition, he did not fire to protect other officers.

[Some citations omitted]

Proceedings below: (Excerpted from Ninth Circuit opinion)

On August 28, 2002, the Adamses, parents of Alan, filed their first amended complaint seeking damages under 42 U.S.C. § 1983 and the Fourth Amendment to the Constitution and under California law governing wrongful death. Other officers besides Speers were named, but were ultimately dismissed by stipulation. Speers moved for summary judgment, contending that he was entitled to qualified immunity. In a written opinion the court denied his motion.

Following the steps set out in Saucier v. Katz, 533 U.S. 194 (2001), the court first determined that, if all the facts were viewed in favor of the Adamses, Speers had violated the Fourth Amendment. The court stated that it is unreasonable for a police officer to “seize an unarmed, non-dangerous suspect by shooting him dead.” Tennessee v. Garner, 471 U.S. 1 (1985). Serious questions, unresolvable by summary judgment, existed “as to the objective reasonableness of Officer Speers [firing] six rounds into Alan's vehicle in the absence of warning.”

The second Saucier step was for the court to ask if Speers could have reasonably believed that his conduct did not violate the Constitution. Speers is off the hook if, on the facts before us, he had the reasonable belief that his conduct was lawful. In short, Speers is not held to a correct constitutional reading, only to a reasonable one. The district court concluded that Speers was unreasonable in believing that the law permitted him to fire six rounds at Alan's vehicle. Accordingly, the district court denied him qualified immunity.

[Some citations omitted]

ISSUE AND RULING: Under the facts as alleged by the Adamses (including the lack of a warning by CHP Officer Speers prior to his application deadly force, and the absence of imminent danger to the shooting officer or others), could a reasonable officer in the position of CHP Officer Speers have believed that he could lawfully use deadly force to apprehend Mr. Allen? (**ANSWER:** No, and therefore the officer is not entitled to qualified immunity)

Result: Affirmance of federal district court ruling denying qualified immunity to CHP officer Speers. Case remanded for trial.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

On the facts presented by the Adamses and the disciplinary report of the CHP itself, a jury could find Speers to be an officer off on a mission of his own creation, abandoning his assignment, picking up a buddy for no apparent reason except the excitement of the chase, barging in ahead of the police already

engaged in pursuit, once attempting to use force against Alan and twice doing so, creating each time a serious hazard for himself as well as Alan, and finally stepping out of his patrol car and, without warning and without the need to defend himself or the other officers, killing Alan. Shooting of this sort was established as unconstitutional by Tennessee v. Garner almost twenty years ago. No officer acting reasonably in these circumstances could have believed that he could use deadly force to apprehend Alan.

The Supreme Court recently stated the governing law in Brosseau v. Haugen, 543 U.S. 194 (2004) **Feb 05 LED:06**. Two decisions of circuit courts were there cited by the Supreme Court as examples of cases where it was reasonable for an officer to shoot: Cole v. Bone, 993 F.2d 1328 (8th Cir.1993); Smith v. Freland, 954 F.2d 343 (6th Cir.1992). In Cole the officer had probable cause to believe that the suspect's truck "posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves." In Smith, the suspect was cornered at the back of a street, but freed his car and began speeding down the street. The Sixth Circuit noted that the suspect "had proven that he would do almost anything to avoid capture" and that he posed a major threat to officers at the end of the street. In Brosseau itself, the officer twice ordered the suspect to get out of his car and then broke the window on the driver's side with her handgun. The officer then tried to grab the car keys and struck the suspect with the barrel and butt of her gun. Undeterred, the suspect put the key in the ignition and started his car. The officer fired because she was fearful for the safety of the other officers. The suspect survived the single shot but subsequently pleaded guilty to driving in willful or wanton disregard for the lives of others. The Supreme Court held that Brosseau was entitled to qualified immunity because her actions fell in the " 'hazy border between excessive and acceptable force.' "

At the same time the Supreme Court reaffirmed the rule of Tennessee v. Garner that the shooting of an unarmed, non-dangerous suspect to prevent the suspect's flight is a violation of the Fourth Amendment and that cases would occur where such a violation was "obvious."

Accepting the Adamses' facts as true, this case falls within the obvious: the absence of warning and the lack of danger to the shooter or others distinguish the case from Cole, Smith, and Brosseau. On these facts, Officer Speers was not entitled to qualified immunity.

[Some citations omitted]

CIVIL RIGHTS LAWSUIT – SEATTLE PD DID NOT VIOLATE FEDERAL CONSTITUTION'S DUE PROCESS CLAUSE BY ENHANCING DANGER IN RELATION TO THE FEBRUARY 27, 2001 SEATTLE PIONEER SQUARE MARDI GRAS RIOT

Johnson v. City of Seattle, ___ F.3d ___, 2007 WL 113956 (9th Cir. 2007) (Decision filed January 18, 2007)

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

The undisputed facts reveal that private businesses annually sponsor a Mardi Gras celebration in Seattle's Pioneer Square District. The 2001 celebration was scheduled to run from Friday, February 23, 2001 through Tuesday, February 27, 2001. Seattle's prior Mardi Gras celebrations have had a generally peaceful

history, and, with the exception of a minor skirmish in 2000, there had been no unusual civil disturbances surrounding the Mardi Gras celebrations since the late 1970s.

On Friday, February 23, 2001, however, unexpected problems arose at Pioneer Square. Drunken crowds began engaging in raucous behavior at approximately 8:00 p.m. At midnight, some members of the crowd became increasingly belligerent and aggressive. They assaulted police officers and destroyed property. By 2:00 a.m., the situation evolved into a significant public safety threat. Seattle police officers twice ordered the crowd to disperse. Some members of the crowd ignored both orders. Seattle police officers then used chemical agents to clear the crowd. Police officers secured the area after the crowd was dispersed.

Based on Friday's experience, the Seattle Police Department revised its operations plan for the remaining evenings. Staffing for Saturday was expanded to 132 sworn officers.

On Saturday, February 24, 2001, officers again faced riotous behavior from some members of the crowd, including assaults with rocks and bottles. [Command officer A] alleged in his declaration in support of Defendant's motion for summary judgment that:

At approximately 1 a.m. [on] Sunday, officers apprehended an individual reported to have a handgun. An officer believed the suspect had dropped his gun in the crowd and ordered a large group of people to move back. The group ignored the order. He then deployed a burst of pepper spray to move the crowd so he could secure the weapon. Rather than disperse, the crowd pelted officers with rocks and bottles.

[Command officer A] ordered the use of chemical agents because he concluded that the crowd presented a significant public safety threat. In response, the crowd split into two parts and surrounded the police officers. Part of the crowd moved north along 1st Avenue, breaking windows and looting retail establishments. One officer broke his arm while attempting to apprehend a suspect.

On Sunday, February 25, 2001, the Seattle Police Department developed a new operational plan for Tuesday. The operational plan anticipated large crowd disturbances, because in prior years, a large number of participants attended the Mardi Gras celebration on Tuesday and a significant quantity of alcohol was consumed. The plan provided that the Seattle Police Department would deter unlawful activity by maintaining a strong presence of uniformed officers. All police personnel were instructed to conduct highly visible patrols throughout Pioneer Square and to focus on any behavior or criminal activity, which if not addressed, could lead to large scale disturbances.

Sunday and Monday evenings were relatively "quiet" and "trouble-free." Officers were released early on Monday evening.

Some members of the crowd again became violent on Tuesday evening. Starting at around 9:00 p.m., [Command officer B], the field commander on that date, ordered Seattle police officers to don protective crowd control equipment one or

two squads at a time. Police officers were then redeployed around the perimeter of Pioneer Square.

The crowd swelled to an estimated 5,000 to 7,000 people. Given the crowd's size, density, and the hostile attitude of some of its members, [Command officer C], the incident commander, ordered the officers not to insert themselves into the crowd. [Commander officer C] determined that ordering police officers to enter into the crowd, or any attempts by the police to disperse it would incite greater panic and violence, making the situation worse. [Command officer C] based his determination on the fact that the majority of the property damage on Friday and Saturday, as well as the assaults against police officers, occurred after dispersal efforts were initiated. Instead, he attempted to thin the crowd by directing officers to contact the local bars and request that they close early, which several did.

A marked increase in violence occurred between midnight and 12:30 a.m. The Seattle Police Department's radio communications described small groups of individuals randomly assaulting members of the crowd, and victims in need of medical care. Additionally, some members of the crowd threw rocks and bottles at the officers standing around the perimeter of Pioneer Square. Despite the continuing violence, police officers were ordered to remain on the periphery of Pioneer Square. The radio communications included the following orders to officers over the course of the night: "evacuate," "move to the perimeter," "keep your backs to the wall," and "no one go in to First and Yesler," where the majority of the crowd was congregated. When some police officers and Fire Department paramedics entered the crowd to respond to fights and reported injuries, they were forced to withdraw because of the crowd's violent conduct. [The Chief of Police], however, did not know the details of the violence at the time it occurred. He observed several fights and one act of vandalism, but only learned later, after viewing videotapes, that some individuals were roaming the crowd and attacking others at random.

The Pioneer Square Plaintiffs were assaulted and injured by members of the crowd at various times between 9:45 p.m. and 1:45 a.m. in Pioneer Square. At 1:30 a.m., [Command officer C] ordered the use of chemical agents to disperse the Pioneer Square crowd because of the increasing violence. By 2:30 a.m., the crowd was cleared and police officers began conducting mobile patrols throughout the Pioneer Square area. During the rioting on Tuesday, more than six dozen people were injured, including the Pioneer Square Plaintiffs, and one member of the crowd was killed.

The Pioneer Square Plaintiffs filed an action in King County Superior Court on June 25, 2003, seeking redress for the injuries they suffered during the Mardi Gras celebration on Tuesday, February 27, 2001. In their state court complaint, they alleged three causes of actions: (1) a claim pursuant to § 1983, (2) a state law outrage claim, and (3) a state law negligence cause of action. On July 29, 2003, the case was removed by the Defendants to the United States District Court for the Western District of Washington. [Ultimately the U.S. District Court dismissed all of the causes of action.]

ISSUE AND RULING: The general rule is that under the "due process" clause of the U.S. Constitution, governmental agencies are not liable for their failure to protect members of the public from harm inflicted by third parties. The Ninth Circuit Court of Appeals (but not yet the U.S. Supreme Court) has recognized an exception to this general rule where the governmental agency

has taken some action that has enhanced the danger to the particular plaintiff who was victimized by a third party. Under the totality of the evidence in the 2001 Seattle Pioneer Square Mardi Gras case, did the Seattle Police Department act in a way that brings it within the enhanced-danger exception to due process liability? (ANSWER: No)

ANALYSIS: (Excerpted from Ninth Circuit opinion)

The Pioneer Square Plaintiffs contend that the district court erred in concluding that the Defendants are not liable. Under Monell v. Dep't of Soc. Serv. of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), they argue that the policy employed by the Seattle Police Department over a period of years to control large crowd disturbances was substandard and resulted in a deprivation of their Fourteenth Amendment liberty interest in personal security. Alternatively, the Pioneer Square Plaintiffs maintain that the Defendants are liable for enhancing their danger and proximately causing their injuries by abandoning the operational plan for crowd control, adopted on Sunday, February 5, 2005, that called for a large, highly visible police presence and aggressive law enforcement, and, instead, implementing a more passive plan of staying on the perimeter of the crowd in Pioneer Square.

Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

Like individual state officials, municipalities are only liable under Section 1983 if there is, at minimum, an underlying constitutional tort. We agree with the district court that the Pioneer Square Plaintiffs have failed to demonstrate any violation of their constitutional rights caused by either the City's policy, or any action by the individual defendants regarding the change in the Mardi Gras operational plan.

In DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989), the Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." The Court reasoned as follows:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Because the City of Seattle had no constitutional duty to protect the Pioneer

Square Plaintiffs against violence from members of the riotous crowd, “its failure to do so-though calamitous in hindsight-simply does not constitute a violation of the Due Process Clause.”

The general rule announced in DeShaney that members of the public have no constitutional right to sue state actors who fail to protect them from harm inflicted by third parties “is modified by two exceptions: (1) the ‘special relationship’ exception; and (2) the ‘danger creation exception.’ “ The Pioneer Square Plaintiffs have not argued that their § 1983 claim comes within the “special relationship” exception. Instead, they argue that they amply demonstrated a violation of their constitutional rights under the “danger creation” exception to the DeShaney rule.

To prevail under the danger creation exception, a plaintiff must first show that “the state action ‘affirmatively place[s] the plaintiff in a position of danger,’ that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced.” Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir.2006) **April 06 LED:02** (quoting DeShaney, 489 U.S. at 197). We first considered the danger creation exception in Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990). We have subsequently found that the plaintiff alleged a triable danger creation claim in L.W. v. Grubbs, 974 F.2d 119 (9th Cir.1992), Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir.1997) (per curiam), Munger v. City of Glasgow Police Dep't, 227 F.3d 1082 (9th Cir.2000), and Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir.2006).

In Wood, we held that a police officer's conduct that affirmatively places a plaintiff in a position of danger deprives him or her of a substantive due process right. The record in Wood contained evidence that a police officer arrested the driver of a vehicle for drunk driving. He ordered the plaintiff, a female passenger, out of the vehicle. The vehicle was impounded. The police officer then drove away, leaving the passenger alone in an area with a high violent crime rate. The temperature outside was only fifty degrees. The passenger was wearing only a blouse and jeans, and her home was five miles away. She accepted a ride from a stranger who took her to a secluded area and raped her.

We reversed the district court's order granting summary judgment in favor of the officer. We held that “Wood [had] raised a genuine factual dispute regarding whether [the officer] deprived her of a liberty interest protected by the Constitution by affirmatively placing her in danger and then abandoning her.” In the instant case, unlike the circumstances in Wood, the Defendants and the Seattle police officers did not create the dangerous conditions in Pioneer Square. The Pioneer Square Plaintiffs voluntarily placed themselves in the midst of the crowd that subsequently became unruly.

In Grubbs, we held that the district court erred in dismissing the plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. The plaintiff, a nurse, alleged in her complaint that her supervisors at a medium security custodial institution assigned her to work in the medical clinic, after assuring her that she would not be required to work alone with violent sex offenders. A violent sex offender, who had failed all treatment programs at the institution, was assigned to work with her. He assaulted, battered,

kidnapped, and raped her. We held that the plaintiff had alleged sufficient facts to state a claim under the danger creation exception because “the Defendants took affirmative steps to place her at significant risk, and that they knew of the risks.” Here, unlike the facts alleged in Grubbs, the officers did not knowingly take affirmative steps that placed the Pioneer Square Plaintiffs at risk.

In Penilla, we held that police officers violated substantive due process under the danger creation exception to DeShaney by locking a seriously ill person in his house and canceling a neighbor's 911 request for emergency services. Family members found him dead the next day as the result of respiratory failure. We held in Penilla that “when a state officer's conduct places a person in peril in deliberate indifference to their safety, that conduct creates a constitutional claim.” In this case, the state actors did not confine the Pioneer Square Plaintiffs to a place where they would be exposed to a risk of harm by private persons.

In Munger, we applied the danger creation exception where the plaintiffs alleged that, in response to a bartender's request for assistance, police officers ordered a belligerent patron, who had consumed a substantial amount of alcohol, to leave a bar, and not to drive a vehicle. The outside temperature was eleven degrees, with a windchill factor of minus 20-25 degrees. The bar patron was wearing a T-shirt and jeans. The next day, his body was found in an alleyway two blocks from the bar. He had died from hypothermia. The decedent's involuntary exposure to harm, as a result of a state actor's command, is readily distinguishable from the absence in this case of any affirmative conduct by the Defendants that increased the risk of harm to the Pioneer Square Plaintiffs.

In Kennedy, the plaintiff offered evidence that a police officer placed her in a position of danger by notifying a neighbor that she had reported that he molested her nine-year-old daughter. The officer assured the plaintiff that he would notify her prior to contacting the neighbor's family about her allegations. Instead, the police officer informed the neighbor and his mother of the plaintiff's allegations without first notifying her. When the officer informed the plaintiff that he had informed the neighbor of her accusations, he promised the plaintiff that the police would patrol her neighborhood that night. The following morning, the neighbor shot the plaintiff and her husband while they slept. We held in Kennedy that the danger creation exception to DeShaney was applicable because the state actor exposed the plaintiff to a danger which she otherwise would not have faced.

In contrast to the plaintiffs in Wood, Penilla, Munger, Grubbs and Kennedy, the Pioneer Square Plaintiffs have failed to offer evidence that the Defendants engaged in affirmative conduct that enhanced the dangers the Pioneer Square Plaintiffs exposed themselves to by participating in the Mardi Gras celebration. The decision to switch from a more aggressive operation plan to a more passive one was not affirmative conduct that placed the Pioneer Square Plaintiffs in danger, because it did not place them in any worse position than they would have been in had the police not come up with any operational plan whatsoever.

The change of plans is analogous to the decision by Joshua DeShaney's “Child Protection Team” to transfer him from state custody to the custody of his father, whom they had reason to believe was abusive. The Supreme Court explained why this transfer was not a substantive due process violation as follows:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Similarly, in this case, the fact that the police at one point had an operational plan that might have more effectively controlled the crowds at Pioneer Square does not mean that an alteration to this plan was affirmative conduct that placed the Pioneer Square Plaintiffs in danger. The police did not communicate anything about their plans to the Pioneer Square Plaintiffs prior to the incident. Even if proved not the most effective means to combat the violent conduct of private parties, the more passive operational plan that the police ultimately implemented did not violate substantive due process because it "placed [the Pioneer Square Plaintiffs] in no worse position than that in which [they] would have been had [the Defendants] not acted at all."

[Some citations omitted]

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

(1) **PAYTON RULE REQUIRING WARRANT BEFORE OFFICERS MAKE FORCIBLE ARREST FROM RESIDENCE IN NON-EXIGENT CIRCUMSTANCES IS APPLIED TO 12-HOUR STANDOFF THAT ENDED WITH THE BARRICADED HOME OCCUPANT EXITING HIS HOME** – In Fisher v. City of San Jose, ___ F.3d ___, 2007 WL 92689 (9th Cir. 2007) (Decision filed January 16, 2007), a Ninth Circuit 3-judge panel rules 2-1 in a Federal civil rights lawsuit that City of San Jose police officers violated the Fourth Amendment rights of a man with whom they were involved in a 12-hour standoff, because officer did not obtain a warrant at some point before the man surrendered to police.

The dissenting opinion summarizes the facts in the case as follows:

The following facts emerge from the record. Fisher was drinking and cleaning 18 guns in his apartment. A security guard at his apartment complex called the police when Fisher's behavior became menacing. The police arrived shortly after midnight. Fisher was unresponsive for the most part, but insisted on talking about his Second Amendment rights. At approximately 3:00-4:00 a.m., Officer Jan Males, a tactical negotiator, arrived. Fisher told her that he had a right to bear arms. He also invited her into his apartment, but threatened to shoot her if she came in. Officer Males considered this to be a criminal threat-a felony.

Throughout the night, officers observed Fisher through the windows of his apartment walking around with a rifle in his hand, and more than once, aiming the rifle out of the apartment in the general direction of the officers. Officer Boler testified that he saw Fisher point one of his rifles toward Sergeant Ryan and Officer Males twice between 2:45 a.m. and 4:00 a.m., and that he was moving his rifles around his apartment. At 6:23 a.m., Fisher was seen again with a rifle,

apparently loading it.

At 7:00 a.m., the department's Mobile Emergency Response Group (MERGE) took control of the scene, and the officers who originally responded to the scene left. By 7:30 a.m., the police had evacuated all of the apartments in Fisher's building. One occupant, whose front door was near Fisher's residence, was evacuated by cutting a hole in her apartment wall that allowed her to leave through a neighboring apartment instead of walking across the front of Fisher's apartment. At 8:48 a.m., the police turned off the power in Fisher's apartment in an attempt to force him out. They also broke his sliding glass door and tossed in a "throw phone" so that they could communicate with Fisher because his phone line was busy. At 10:52 a.m., the police set off a "flash-bang" device to get Fisher's attention and briefly disorient him. At 1:00 p.m., police began throwing gas canisters into the apartment, to no avail. Finally, at 2:13 p.m., police established telephone contact with Fisher via the throw phone and he agreed to leave the apartment unarmed. The police then took him into custody.

The majority opinion in the Fisher case relies upon the Fourth Amendment precedent of Payton v. New York, 445 U.S. 573 (1980). Under Payton and cases interpreting Payton, absent voluntary consent of the arrestee-resident or exigent circumstances, officers without a warrant may not: a) forcibly enter a residence to make an arrest, or b) order the arrestee to come outside.

The City of San Jose argued essentially that circumstances were exigent throughout the standoff. The majority judges in Fisher reject that argument.

The Fisher majority judges conclude that there were a series of instances during the standoff where officers were in effect ordering Mr. Fisher out of his residence; that each instance constituted a warrantless Payton seizure; and that time would have permitted first seeking an arrest warrant before these various Payton seizures of Fisher occurred.

Result: Affirmance of U.S. District Court ruling granting \$1 in nominal damages to the Fishers plus an injunction regarding future police training (not withstanding a jury verdict for the City of San Jose); the Ninth Circuit opinion does not mention attorney fees but no doubt the fees will be much more than nominal.

LED EDITORIAL COMMENT: In California, a warrant for arrest can be obtained without the filing of charges. Washington law does not so provide as to arrest warrants. But a search warrant can be issued under CrR 2.3 and CrRLJ 2.3 to search for and seize a person for whose arrest there is probable cause. And a search warrant satisfies the Fourth Amendment rule of Payton that officers must have a warrant before entering to arrest in non-consenting, non-exigent circumstances. See LaFave Search and Seizure, A Treatise on the Fourth Amendment section 6.1, footnote 80.

(2) CHILD PORN DEFENDANT STILL LOSES, BUT NINTH CIRCUIT PANEL REVISES ITS FOURTH AMENDMENT RATIONALE – HE HAD REASONABLE PRIVACY EXPECTATION IN CONTENTS OF HIS OFFICE COMPUTER, BUT HIS EMPLOYER OWNED AND ACTIVELY CONTROLLED USE OF THE COMPUTER, SO EMPLOYER COULD AND DID CONSENT TO FBI-INSTIGATED SEARCH OF CONTENTS OF COMPUTER – In U.S. v. Ziegler, ___ F.3d ___ 2007 WL 222167 (9th Cir. 2007), in a January 30, 2007 decision, a three-judge panel of the Ninth Circuit significantly revises its Fourth Amendment reasoning from a decision that the panel issued August 8, 2006 (see **October 2006 LED:02**). But the child pornography defendant, Jeffrey Ziegler, loses under the revised opinion, just as he lost under the earlier Ninth Circuit opinion addressing an FBI-instigated search of his office computer for

child pornography (the FBI was following up on a tip from an identified informant).

In the August 8, 2006 opinion (now withdrawn), the three-judge Ninth Circuit panel ruled that, because Ziegler's private employer exerted extensive active control over his and other employees' use of company computers, Ziegler did not have a privacy protection against the government-instigated search of his office computer by his employer. See **October 2006 LED:02**.

In its January 30, 2007 opinion that replaces the withdrawn August 8, 2006 opinion, the panel concedes that, because Ziegler had a personal password on his computer and had a personal key to the lock on his office door, he had a reasonable expectation of privacy such that the government could not search his computer without a search warrant or voluntary consent from a person or entity with authority to give that consent. The panel also concludes that the search of Ziegler's computer by his employer was FBI-instigated, and therefore was a government search subject to Fourth Amendment restrictions. The panel further concludes under the following analysis, however, that Ziegler's employer had authority to consent to the search of his computer:

The remaining question is whether the search of Ziegler's office and the copying of his hard drive were "unreasonable" within the meaning of the Fourth Amendment. As in Mancusi v. DeForte, 392 U.S. 364 (1968), the government does not deny that the search and seizure were without a warrant, and "it is settled for purposes of the Amendment that 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.' " Mancusi.

One well-settled exception is where valid consent is obtained by the government. In proving voluntary consent, the government "is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164 (1974). Common authority to authorize a search rests upon the premise that one "[has] assumed the risk that one of [his] number might permit the common area to be searched." Matlock.

We first consider whether Frontline exercised common authority over the office and the workplace computer such that it could validly consent to a search. Mancusi is . . . instructive. In Mancusi, the Supreme Court recognized that in his office, DeForte retained an expectation "that records would not be taken [by the police] except with his permission or that of his union superiors." The Court continued: "It is, of course, irrelevant that the Union or some of its officials might validly have consented to a search of the area where the records were kept, regardless of DeForte's wishes, for it is not claimed that any such consent was given, either expressly or by implication." Mancusi thus establishes that even where a private employee retains an expectation that his private office will not be the subject of an unreasonable government search, such interest may be subject to the possibility of an employer's consent to a search of the premises which it owns.

We are also convinced that Frontline could give valid consent to a search of the contents of the hard drive of Ziegler's workplace computer because the computer

is the type of workplace property that remains within the control of the employer "even if the employee has placed personal items in [it]." Ortega v. O'Connor, 480 U.S. 709 (1987). In Ortega, the Supreme Court offered an analogy that is helpful to our resolution of this question. The Court posited a situation where an employee brings a piece of personal luggage to work and places it within his office. The Court noted that "[w]hile ... the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the contents of the luggage is not affected in the same way." The [Ortega] Court further explained that "[t]he appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address."

The workplace computer, however, is quite different from the piece of personal luggage which the Court described in Ortega. Although use of each Frontline computer was subject to an individual log-in, Schneider and other IT-department employees "had complete administrative access to anybody's machine." The company had also installed a firewall, which, according to Schneider, is "a program that monitors Internet traffic ... from within the organization to make sure nobody is visiting any sites that might be unprofessional." Monitoring was routine, and the IT department reviewed the log created by the firewall "[o]n a regular basis," sometimes daily if Internet traffic was high enough to warrant it.

Finally, upon their hiring, Frontline employees were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature.

In this context, Ziegler could not reasonably have expected that the computer was his personal property, free from any type of control by his employer. The contents of his hard drive, like the files in Mancusi, were work-related items that contained business information and which were provided to, or created by, the employee in the context of the business relationship. Ziegler's downloading of personal items to the computer did not destroy the employer's common authority. Ortega. Thus, Frontline, as the employer, could consent to a search of the office and the computer that it provided to Ziegler for his work.

[Some citations omitted]

The panel goes on in its January 30, 2007 opinion to hold that the evidence shows that the employer voluntarily granted consent to search the computer.

Result: Affirmance of U.S. District Court (Montana) conviction of Jeffrey Brian Ziegler for knowing receipt of obscene material.

LED EDITORIAL COMMENT: The Ninth Circuit panel's change of rationale in Ziegler means that if a law enforcement agency, as happened here, gets a tip about pornography or other evidence of criminality on a worker's office computer, the agency should either apply for a search warrant (assuming probable cause can be developed), obtain a valid consent from the employee (a tactic that has a number of risks), or consult the employer's representatives to determine if: 1) the employer exercises active and extensive control over the worker's use of the computer, and 2) if so, the employer will voluntarily consent to providing the contents of the computer to the law enforcement agency. As always, the LED Editors urge law enforcement officers to consult their local

prosecutors and/or in-house legal advisors on these and other search-and-seizure and other legal questions.

WASHINGTON STATE SUPREME COURT

COURT HOLDS DEFENDANT’S DENIAL OF OWNERSHIP OF LOCKED BRIEFCASE THAT POLICE SEIZED – (A) WITHOUT A WARRANT, CONSENT, OR EXIGENT CIRCUMSTANCES; AND (B) IN AN AREA WHERE DEFENDANT HAD A PRIVACY INTEREST – DID NOT CONSTITUTE VOLUNTARY ABANDONMENT OF THE BRIEFCASE (COURT ALSO EXPLAINS WASHINGTON’S INDEPENDENT GROUNDS “AUTOMATIC STANDING” RULE UNDER ARTICLE 1, SECTION 7 OF STATE CONSTITUTION)

State v. Evans, ___ Wn.2d ___, 150 P.3d 105 (2007)

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

Danny Evans owned a house and a converted garage in Cowlitz County, Washington. The house was rented to another person, but only Evans had access to the garage. The Cowlitz-Wahkiakum Narcotics Task Force executed a warrant, which authorized a search of the house and garage.

Evans was present during the search of the garage. After the police officers found materials consistent with the production of methamphetamine in the garage, they arrested Evans and placed him in a patrol car. Evans remained in the patrol car while the search continued. One of the police officers . . . contacted Evans in the car and read him his “Miranda warnings.” Evans indicated that he understood his rights and told [the officer] that he “didn’t want to talk about any details.”

[The officer] then asked Evans for permission to search Evans’s truck, which was parked in a driveway leading to the house. Evans agreed to permit the search after [the officer] made it clear that the warrant did not cover the truck and that it, therefore, could not be searched without Evans’s permission. Evans indicated that his agreement was contingent upon being allowed to observe the search and object to any part of it.

During a search of the truck, [the officer] located a silver briefcase in the backseat. Because it was locked, [the officer] asked Evans if he had a key. Evans did not respond. [The officer] then asked if the briefcase belonged to Evans. Evans denied owning it and said that he could not give [the officer] permission to open the briefcase and that he objected to it being seized. Despite Evans’s objection, [the officer] seized the briefcase. Several days later, the briefcase was searched pursuant to a warrant. It contained additional materials consistent with the production of methamphetamine.

Evans was thereafter charged with one count of manufacture of a controlled substance and one count of possession of a controlled substance with intent to deliver. He was found guilty of both charges. On appeal to the Court of Appeals, Evans argued, as he had at trial, that the briefcase was illegally seized. He contended, therefore, that any evidence found in it should have been suppressed. The Court of Appeals disagreed with Evans, holding that his denial

of ownership of the briefcase amounted to a voluntary abandonment of it. It affirmed the convictions. [See **Jan 06 LED:18.**]

ISSUES AND RULINGS: 1) Did Evans have “automatic standing” to challenge the seizure of the briefcase regardless of whether he had a privacy interest in it? (**ANSWER:** Yes, because a) possession was an essential element of the charged offense, and b) he was in possession of the briefcase when police seized it)

2) Where Evans had a privacy interest in the area (his truck) where the briefcase was seized without a warrant, did Evans’s denial of ownership of the briefcase constitute voluntary abandonment of the briefcase? (**ANSWER:** No)

Result: Reversal of Division Two Court of Appeals decision that affirmed the Cowlitz County Superior Court conviction of Danny Wayne Evans for manufacturing methamphetamine and possession of methamphetamine; case remanded for re-trial.

ANALYSIS: (Excerpted from Supreme Court decision)

1 Automatic standing

Initially we note that we agree with the Court of Appeals that Evans has standing to challenge the seizure of the briefcase. Evans meets both parts of the test for automatic standing [under article 1, section 7 of the Washington constitution as applied in independent grounds rulings of the Washington appellate courts]: (1) possession was an “essential” element of the offense,” and (2) he “was in possession of the contraband at the time of the contested search or seizure.”

2) Abandonment

One of the exceptions to the warrant requirement is for voluntarily abandoned property. State v. Reynolds, 144 Wn.2d 282 (2001) **Oct 01 LED:08**. As we explained in Reynolds, “Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.”

A defendant’s privacy interest in property may be abandoned voluntarily or involuntarily. Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior. See, e.g., State v. Reichenbach, 153 Wn.2d 126 (2004) **Jan 06 LED:02**. Because neither party has argued that Evans involuntarily abandoned the briefcase, we assume that whatever actions he took in regard to the briefcase were voluntary and that other aspects of the search and seizure were proper. Thus, we must determine if Evans abandoned the briefcase voluntarily.

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed.1996). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” State v. Dugas, 109 Wn. App. 592 (2001) **March 02 LED:02**. The issue is not abandonment in the strict property right sense but, rather, “ ‘whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.’ “ Dugas. Thus, Evans must show a reasonable expectation of privacy

in the briefcase and that he did not voluntarily abandon it.

a. Did Evans have an expectation of privacy in the briefcase prior to its seizure?

To establish that he had a reasonable expectation of privacy in the contents of the briefcase, Evans must satisfy a two fold test: (1) Did he “exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?” and (2) “[d]oes society recognize that expectation as reasonable?” State v. Kealey, 80 Wn. App. 162 (1995) **May 96 LED:05**. Evans satisfies both parts of this test. Although the burden is on the defendant to establish a subjective expectation of privacy, he easily meets that burden. He kept the briefcase in his truck, it was closed and locked, and he objected to its seizure. Compare State v. Hepton, 113 Wn. App. 673 (2002) **Feb 03 LED:15** (leaving garbage at an abandoned house did not show a subjective expectation of privacy). Evans satisfies the second part of the test because society recognizes a general expectation of privacy in briefcases.

b. Did Evans relinquish or abandon his expectation of privacy?

The status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. That is so because courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area. See, e.g., Dugas, 109 Wn. App. at 596, 36 P.3d 577 (holding defendant did not voluntarily abandon his jacket by placing it on the hood of his car after being arrested). The opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest. See, e.g., Reynolds, 144 Wn.2d 282, 27 P.3d 200 (seizure of a jacket containing contraband found underneath vehicle stopped for traffic infraction was reasonable after defendant denied ownership); State v. Young, 86 Wn. App. 194 (1997) (seizure of drugs thrown in bushes by defendant prior to his arrest was proper because it amounted to abandonment), *aff'd*, 135 Wn.2d 498, 957 P.2d 681 (1998) **Aug 98 LED:02**. When considering the effect of a denial of ownership, Washington courts have only directly addressed the latter scenario when a defendant has no privacy interest in the searched area. Evans, however, falls into the former.

Washington's case law related to situations like we have here is somewhat limited. There are, however, two cases that help guide our analysis. In State v. Goodman, 42 Wn. App. 331 (1985), the defendant, Goodman, disclaimed ownership of a suitcase found by officers in the trunk of his car after he was stopped while driving. The court held there that the evidence found in the suitcase was inadmissible on other grounds, so its treatment of the abandonment issue is arguably dicta. Nonetheless, the court noted that denial of ownership did not amount to abandonment . . . Furthermore, in Zakel, Justice Robert F. Utter noted in his majority opinion that “disclaimer of ownership would not be sufficient by itself to justify saying Zakel was not in possession of the [car] at the time of the search.” Zakel.

The Goodman and Zakel decisions suggest to us that a denial of ownership, by itself, did not divest Evans of his privacy interest in the briefcase. But as the Court of Appeals noted, “our courts have not analyzed whether one can disclaim property but still challenge a later search, where the disclaimed property

remained in an area where one has a reasonable expectation of privacy.” Evans, 129 Wn. App. at 222. As a result, we consider the guidance offered by Goodman and Zakel in the context of how courts in other jurisdictions have approached a disclaimer of ownership.

A survey of decisions from these other jurisdictions supports a recognition that Evans retained a privacy interest in the briefcase. These courts have concluded that a defendant's denial of ownership does not divest him or her of a privacy interest in that property, provided the search takes place in an area where the defendant had a privacy interest. [Court's discussion here of other-jurisdiction decisions omitted from LED entry.]

The language in the Washington cases cited above and the decisions cited in other jurisdictions is consistent with the privacy protections guaranteed by Washington's constitution. As we have observed in other cases, article I, section 7 of our state constitution provides a strong privacy interest, exceeding that provided by the federal constitution. Consequently, in State v. Boland, 115 Wn.2d 571 (1990), we held that garbage in a curbside garbage container is not abandoned and police, therefore, needed a warrant to search it. Even under federal law, mere denial of ownership does not necessarily constitute abandonment.

We are persuaded by the language found in the Goodman and Zakel cases and confirmed in the decisions of courts in other jurisdictions that disclaiming ownership is not sufficient, by itself, to constitute abandonment. The circumstances surrounding the disclaimer of ownership dictate whether a defendant has abandoned his or her property. In the circumstances here, Evans had a privacy interest in the area searched, the item that was seized - - the briefcase - - was locked, and he objected to its seizure. The fact that Evans denied ownership of the briefcase is not, by itself, sufficient to exhibit the combination of act and intent of abandonment in light of those circumstances.

[Some citations omitted]

WASHINGTON STATE COURT OF APPEALS

SOCIAL GUEST WITH SPECIAL-GUEST BENEFITS HAS STANDING TO CHALLENGE OFFICER'S WARRANTLESS ENTRY OF METH HOUSE; ALSO, "COMMUNITY CARETAKING" AND "PLAIN VIEW" EXCEPTIONS TO CONSTITUTIONAL SEARCH WARRANT REQUIREMENT NOT MET

State v. Link, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 102737 (Div. II, 2007)

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

The following facts are undisputed on appeal. Link and Woolsey had been high school sweethearts and had known each other for 15 years. Although the couple had drifted apart over the years, on June 6, 2004, the two were romantically involved. Link had spent the night at Woolsey's house once or twice before.

On this particular date, Link was at Woolsey's apartment to help her pack and move out of a purportedly abusive relationship. Link kept an extra jacket, hat, and pair of shoes at Woolsey's apartment. He did not live in the apartment, was

not on the lease, and did not receive mail there. But he had his own key and Woolsey had once allowed him to stay in the apartment alone while she did laundry.

On June 6, about an hour after Link arrived at Woolsey's apartment, [Officer A] arrived to investigate whether a methamphetamine laboratory was being operated inside. [Officer A] knew that young children lived in the apartment. Near the apartment, he smelled a strong odor of acetone, saw a sheet drawn across a window, and heard a fan running inside. [Officer A] believed, based on his training and experience, that the acetone smell was a sign of methamphetamine manufacturing. [Officer A] did not have a warrant and did not seek to obtain a warrant to search Woolsey's apartment at that time.

[Officer A] knocked on the front door. No one inside responded, but Woolsey's two children ran up behind [Officer A]. [Officer A] spoke with the children, who told him that they were four and seven years old, they lived in the apartment, and their mother was inside. The oldest child then opened the door, kept the door open, ran into the house, and then yelled "mom."

[Officer A] stepped inside the doorway, near the threshold, and announced that he was there and that he was a police officer. [Officer A] testified that he was concerned for the children's safety because acetone is highly flammable, but he acknowledged that his primary intention when he entered Woolsey's home was to investigate the possible methamphetamine laboratory. *[Court's footnote: [Officer A] testified that his primary concern was for the children's safety. But the trial court ruled that "[Officer A] was concerned about the safety of children when he went to the apartment on 6/6/2004, but his primary purpose was investigating a possible meth lab." This finding is a credibility determination that is not subject to review . . .]* [Officer A] went further into the apartment, and Woolsey walked into the home's eight- to ten-foot-long hallway where she met [Officer A].

When Woolsey said, "Rick, the cops are here," Link opened a bedroom door and looked out. Link had just taken a shower and was only partially dressed. He held a baby bottle with a discolored glass pipe stuck in it, which [Officer A] immediately recognized as a device for smoking methamphetamine.

[Officer A] arrested Link on suspicion of using unlawful drug paraphernalia. While arresting Link, [Officer A] saw equipment used to manufacture methamphetamine in the bedroom. [Officer A] did not immediately seize the evidence, but he called for another unit to assist him. While [Officer A] was waiting, he took Woolsey, Link, and the two children into the kitchen; there he saw additional methamphetamine manufacturing devices. They then evacuated the apartment.

[Officer A] advised Link and Woolsey of their Miranda rights, after which the two voluntarily made statements acknowledging that methamphetamine was being manufactured in the home. According to [Officer A], Woolsey told him that Link came to her apartment with another man and set up a laboratory in her bedroom to manufacture methamphetamine; in exchange, Link would give Woolsey some methamphetamine.

[Officer A] then called for the assistance of the Clandestine Lab Team (Lab Team). The Lab Team got a search warrant, executed it, and seized evidence of

the methamphetamine lab.

Link does not challenge the warrant and it is not part of the appellate record.

The State charged Link with manufacturing methamphetamine in violation of former RCW 69.50.401(a)(1)(ii) (1998) and endangerment with a controlled substance in violation of former RCW 9A.42.100 (2002). The State further alleged that the manufacturing was done in the presence of a minor, contrary to RCW 9.94A.605.

Link did not challenge the search warrant; instead he moved to suppress the evidence found in Woolsey's house under CrR 3.5 and 3.6. The trial court held that Link had standing to challenge the search because he was more than a casual guest in Woolsey's apartment, as evidenced by Link's (1) romantic relationship with Woolsey; (2) having a key to the apartment; and (3) being in a state of semi-undress when he was apprehended.

But the trial court denied Link's motion to suppress. It concluded that [Officer A] was "legitimately situated when he observed [Link] apparently committing a crime in plain view." . . .

A jury found Link guilty as charged. The trial court sentenced Link to 134 months on count one and 51 months on count two, to be served concurrently.

ISSUES AND RULINGS: 1) This case did not involve a charge of crime that had possession as an element, and therefore Link could not invoke the "automatic standing" rule of article 1, section 7 of the Washington constitution (compare the Evans entry immediately above in this LED). But did Link have Fourth Amendment standing to challenge the search of the residence where he was a social guest: a) who had a 15-year, sometimes-"romantic" relationship with the host; b) who was present to help the host move and he came out of the bathroom half-dressed at the time of police entry; c) who sometimes stayed overnight and had his own key to the residence; and d) who kept some clothes at the residence? (ANSWER: Yes);

2) Does the "community caretaking" function exception to the constitutional search warrant requirement justify the officer's warrantless entry into the premises? (ANSWER: No);

3) Does the "plain view" exception to the search warrant requirement justify the officer's discovery of evidence in the residence? (ANSWER: No)

Result: Reversal of Pierce County Superior Court conviction of Richard Allen Link for unlawful methamphetamine manufacture and endangerment of minor with controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Standing to challenge entry and search

Standing is a "party's right to make a legal claim or seek judicial enforcement of a duty or right." When a defendant seeks to suppress evidence on privacy grounds and the State contests the defendant's standing, the defendant has the burden to establish that the search violated his *own* privacy rights. A claimant who has a legitimate expectation of privacy in the invaded place has standing to claim a privacy violation. A two-part inquiry resolves a question of standing: (1) did the claimant manifest a subjective expectation of privacy in the object of the challenged search; and (2) does society recognize the expectation as

reasonable?

An overnight guest has standing to challenge a warrantless search. But a defendant who merely establishes that he was casually and legitimately on the premises does not satisfy his burden to show a legitimate expectation of privacy. The middle ground, where the defendant was more than a casual guest but less than an overnight guest, requires a more fact-specific standing analysis.

No published Washington case has analyzed whether a defendant who was a social guest but was not an overnight guest has standing to contest the warrantless search of a home. But the U.S. Supreme Court . . . answered this question in the affirmative under a certain set of circumstances. And, in dicta, our court interpreted the Supreme Court as holding that “ ‘almost all social guests’ have a reasonable expectation of privacy.”

Federal and state courts that analyzed whether a social guest had standing found importance in the following factors: (1) the defendant's relationship with the homeowner or tenant; (2) the context and duration of the visit during which the search took place; (3) the frequency and duration of the defendant's previous visits to the home; and (4) whether the defendant kept personal effects in the home. Relating to the second factor, courts typically have found no standing when the defendant was merely the guest attending a large party or the defendant failed to prove that he was the legal occupant's guest. We adopt these four factors as relevant, but not exhaustive, guidelines for the ultimate question of whether the defendant manifested a subjective expectation of privacy that society recognizes as reasonable.

Looking at these four factors, we conclude that Link had a legitimate expectation of privacy in Woolsey's home and thus has standing. [[Link](#) Court's analysis of the four standing factors omitted from this [LED](#) entry.]

2) Community caretaking function

[T]he State argues that the trial court incorrectly held that the community caretaking exception did not apply. The community caretaking exception allows for warrantless searches when police (1) make a routine check on health and safety or (2) respond to an emergency in order to render aid or assistance. The community caretaking function must be divorced from a criminal investigation. Broadly stated, a law enforcement officer's job is always to serve and protect the community. But where an officer's primary motivation is to search for evidence or make an arrest, this broader purpose does not create an exception to the search warrant requirement.

The State does not challenge the trial court's finding that “[Officer A] was concerned about the safety of children when he went to the apartment on 6/6/2004, but his primary purpose was investigating a possible meth lab.” This finding is a verity on appeal. Because [Officer A]'s primary motivation was to investigate a possible methamphetamine lab and not to immediately render aid, the trial court did not err when it concluded that the community caretaking exception did not apply.

3) Plain view

[The State argues] that the plain view exception to the warrant requirement justifies the search. But the plain view exception to the warrant requirement only applies when the law enforcement officer is lawfully standing in the place when the officer sees something that he immediately knew was incriminating evidence. The trial court here held that “[Officer A] was legitimately situated when he observed defendant Link apparently committing a crime in plain view.” But the record does not support this conclusion. Woolsey did not consent to [Officer A] entering her apartment and, although [Officer A] was investigating a crime that could endanger the children, he was not rendering immediate aid to protect their well-being. The State failed to prove that any other warrant exception applied. Thus, [Officer A] was not standing in a place that he had a right to be when he saw Link walk into Woolsey's hallway holding drug paraphernalia. The trial court erred when it held that the plain view exception applied.

[Some citations, footnotes omitted]

OFFICER’S CONTINUATION OF DETENTION AFTER HIS ORIGINAL SUSPICIONS WERE DISPELLED HELD UNLAWFUL; “ABANDONED’ PROPERTY THEORY OF STATE ALSO REJECTED

State v. Veltri, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 177879 (Div. III, 2007)

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

Officer [A] noticed a truck with mismatched license plates and decided to investigate to see if it was stolen. He saw the driver lawfully park and get out with two passengers. One passenger ran, and although Officer [A] followed, he got away. When Officer [A] returned to the truck, he saw the driver and the other passenger walking away. He contacted the driver and identified her as Carla Veltri. The other passenger was arrested on a warrant, but the later questioning and search of the truck was not incident to that arrest.

Officer [A] asked Ms. Veltri if she owned the truck. At first Ms. Veltri said she did not, and later explained she had borrowed it. Ms. Veltri possessed solely a Washington identity card and she did not have the vehicle registration or proof of insurance. Officer [A] learned the rear license plate belonged to the vehicle. The truck had not been reported stolen. Officer [A] turned his attention elsewhere after he decided not to issue an infraction.

Officer [A] decided Ms. Veltri was not free to leave because he wanted to search further for “possible contraband or weapons” even though he knew “the vehicle had not been reported stolen.” Without advising her of her consent rights, Officer [A] asked Ms. Veltri if he could look inside the truck. Ms. Veltri did not care, and nothing suspicious was found. Officer [A] then asked Ms. Veltri for permission to search two suitcases in the truck bed. Ms. Veltri told Officer [A] the suitcases were not hers and she did not care if he searched them. Controlled substance contraband was found in one suitcase.

Officer [A] arrested Ms. Veltri. The State charged her with possessing a controlled substance, methamphetamine, with intent to deliver. Ms. Veltri

successfully moved to suppress the evidence over the State's argument that the suitcases were abandoned. The court concluded the officer's search exceeded the scope of the initial stop and Ms. Veltri's consent was involuntary. After suppressing the evidence, the court dismissed the case. The State appealed.

ISSUES AND RULINGS: 1) Where Ms. Veltri denied ownership of the suitcase before the officer searched it, did she waive any challenge to the officer searching it as "abandoned" property? (ANSWER: No);

2) Did the officer violate Veltri's Fourth Amendment rights by continuing to detain and investigate her after the officer dispelled his original suspicion that the truck was stolen? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court suppression order in case where Carla Rae Veltri is charged with possessing methamphetamine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State relies on State v. Evans, 129 Wn. App. 211 [(2005) **Jan 06 LED:18**], for the proposition that an individual's denial of ownership of a specific item in response to police questioning is an abandonment and waiver of any privacy rights in that property. On the other hand, police questioning must fall within the scope of the circumstances that initially justify an interference or detention.

If a traffic stop is initially justified, the detention length and scope must be reasonably related to the circumstances justifying the stop. Once the initial stop purpose is accomplished, any further detention must be based on " 'articulable facts giving rise to a reasonable suspicion of criminal activity.' " In other words, "police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches."

Here, the trial court found Officer [A] stopped Ms. Veltri to investigate the mismatched license plates and a possibly stolen truck. The rear license plate was valid. The truck was not reported stolen. Officer [A] decided not to issue an infraction. The stop was extended by securing uninformed consent to search the truck-cab, where nothing suspicious was found, and later, two suitcases in the truck-bed. Ms. Veltri denied suitcase ownership and declared her lack of care about the extended searches. From this, the court concluded Officer [A] switched his investigatory focus to looking for contraband and weapons.

First, the State argued solely abandonment in its opening brief, not mentioning its other assignments of error. Thus, we do not analyze the State's other assignments of error. Even so, given the facts, substantial evidence supports the court's findings.

Second, our focus is whether the facts support the trial court's conclusions. Officer [A] dispelled his stolen truck suspicions and decided not to issue an infraction, resolving the initial stop purposes. Given the trial court's findings, it correctly concluded Officer [A] lacked further reasonable articulable suspicion of criminal activity. Thus, the trial court correctly decided an impermissible general exploratory search occurred. Therefore, abandonment is not the issue; the continued detention, questioning, and search were unlawful. Moreover, our Supreme Court has decided State v. Evans, since argument of this case,

rejecting the State's abandonment argument. **LED EDITORIAL NOTE: See the Evans decision entry in this LED above beginning at page 15]**

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

WHEN LANDLORD INVOKES WRIT OF RESTITUTION PROCESS TO EVICT TENANT FROM RESIDENCE, LANDLORD MUST ARRANGE FOR STORAGE OF TENANT'S PERSONAL PROPERTY UNLESS TENANT OBJECTS TO STORAGE – In Parker v. Taylor, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 14900 (Div. III, 2007), the Court of Appeals holds under the Residential Landlord-Tenant Act, chapter 59.18 RCW, that when a landlord evicts a tenant from residential rental property through execution of a writ of restitution, the landlord generally has a duty (presumably at the direction of the sheriff's office personnel executing the writ") to make arrangements for storage of the tenant's property, unless the tenant objects to such storage.

Result: Reversal of Spokane County Superior Court order that dismissed the tenant-complaint of Irene Parker who allegedly incurred property damages (alleging that some of the property went "missing") when her landlords put her property out on the curb during the execution of a writ of restitution.

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 do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]