



Law Enforcement

May 2007

Digest

604th Basic Law Enforcement Academy – November 8, 2006 through March 27, 2007

President: Nicolas Meyst – Seattle Police Department
Best Overall: Kyle Nelson – Bellingham Police Department
Best Academic: Kyle Nelson – Bellingham Police Department
Best Firearms: Todd Bridgman – Mill Creek Police Department
Tac Officer: Officer Ron Tennyson – Tacoma Police Department

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LAW ENFORCEMENT MEDAL OF HONOR CEREMONY IS SET FOR FRIDAY MAY 4, 2007 IN OLYMPIA AT 1:00 P.M.

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year’s ceremony will take place Friday, May 4, 2007, commencing at 1:00 PM, at the Peace Officers Memorial site in Olympia on the Capitol Campus, which is adjacent to the Supreme Court Temple of Justice. This is the first year that the Medal of Honor and Peace Officers Memorial ceremonies will be a combined program. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

BRIEF NOTE FROM THE SEVENTH CIRCUIT, U.S. COURT OF APPEALS

LED INTRODUCTORY EDITORIAL NOTE: Ordinarily, the LED does not digest federal court decisions other than those from the Ninth Circuit of the U.S. Court of Appeals (in whose territorial jurisdiction Washington is located) and of the United States Supreme Court. In the November 2005 LED, we made an exception and addressed the decision of the Seventh Circuit in the Jogi civil rights liability case, because of the importance of the issue addressed. The Seventh Circuit recently issued a replacement opinion that has revised the Court’s analysis in the Jogi case, so we are revisiting that Seventh Circuit case. The Court did not change its ultimate determination that a law enforcement agency can be held civilly liable for not complying with the multinational treaty (of which the United States is a signatory) that provides rights to arrested foreign nationals to contact their foreign consul.

“VIENNA CONVENTION ON CONSULAR RIGHTS” – CIVIL RIGHTS ACT LIABILITY HELD TO BE POSSIBLE FOR POLICE VIOLATION OF THIS TREATY – In Jogi v. Voges, ___ F.3d

_____, 2007 WL 730550 (7th Cir. 2007), the U.S. Court of Appeals, Seventh Circuit, holds that an alien (citizen of another nation) has a right to sue in the U.S. Courts for a civil rights violation (under 42 U.S.C., section 1983) based on a violation of the person's rights under the multi-country treaty known as the "Vienna Convention on Consular Relations." Most countries, including the United States, are parties to the Vienna Convention treaty. Citizens of some countries (for example, Mexico, Canada, and India) are entitled under the treaty to a warning from law enforcement or other government officers, following a custodial arrest, of their right to contact their foreign consul. As to custodially arrested citizens of some other countries (for example, Russia, China, Great Britain and the Ukraine), law enforcement or other government officers must make the contact on the foreign nationals' behalf to their foreign consul.

Jogi was a citizen of India who was arrested, tried, convicted and incarcerated for several years in Illinois for aggravated battery with a firearm. He was never advised of his right to contact the American consul of the nation of India. After he was released from prison many years after his arrest, prosecution and conviction, he filed a civil lawsuit seeking damages for the violation.

The Seventh Circuit notes that almost all federal circuit courts have addressed the Vienna Convention, but only in the context of criminal cases. Those circuit courts have rejected the idea in those criminal cases that evidence should be suppressed or cases dismissed based on violations of the treaty. Most of those federal circuit courts have not yet taken a stand on whether the treaty creates enforceable individual rights, instead relying on narrower grounds to reject an exclusionary or a dismissal remedy in those criminal cases.

Similarly, the U.S. Supreme Court declined to address whether the treaty creates civilly enforceable individual rights when the Court held in two consolidated criminal cases that the Vienna Convention itself does not require suppression of arrestee statements taken by officers under circumstances where the treaty has not been complied with. See Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 165 L.Ed.2d 56 (2006) **Sept 06 LED:02**. But in Sanchez-Llamas the U.S. Supreme Court left room for an argument, even in criminal cases, that such non-compliance could be a factor to consider in determining whether a confession was not voluntary.

The Jogi Court concludes that it is not illogical to interpret the treaty as not providing an exclusionary or dismissal remedy, but as providing an individually enforceable civil rights remedy.

LED EDITORIAL NOTE REGARDING OTHER SELECT READING ADDRESSING THE VIENNA CONVENTION TREATY: The May 99 LED included a relatively comprehensive article at 18-21 discussing rights of foreign nationals under Vienna Convention on Consular Relations. We explained that, where officers learn that an arrestee is a foreign national, the warnings or contact requirements must be satisfied relatively soon following custodial arrest. We also noted that the treaty does not apply where there is only a Terry seizure or routine traffic stop. We explained that the treaty extends to all foreign nationals arrested in a foreign country covered by the treaty regardless of the legality of their presence in the country where they are arrested.

In addition, the Federal Department of State's WEBPAGE link can be found on the CJTC LED WEBPAGE. The Department of State provides excellent materials that can be downloaded for use by law enforcement agencies. Also on the CJTC LED WEBPAGE is an outline by Pam Loginsky, Staff Attorney with the Washington Association of Prosecuting Attorneys. Her article contains, among discussions of other topics, a detailed discussion of the Vienna Convention treaty (the outline is titled "Confessions, Search, Seizure and Arrest:

A Guide for Police Officers and Prosecutors” and is updated by Ms. Loginsky annually around the month of May).

Other LED entries addressing the treaty are: the Sanchez-Llamas U.S. Supreme Court decision (Sept 06 LED:02) noted in the next-to-last paragraph of our summary of Jogi above; Medellin v. Dretke, 125 S.Ct. 2088 (2005) Aug 05 LED:05 (U.S. Supreme Court decides not to decide yet whether the treaty covers individually enforceable rights); U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) May 00 LED:12 (Ninth Circuit rules that a violation, while it may be enforceable in some other way, does not trigger exclusion of statements); State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000) Aug. 00 LED:13 (Washington Court of Appeals declines to suppress statements); State v. Jamison, State v. Acosta, 105 Wn. App. 572 (Div. I, 2001) Aug. 01 LED: 18 (same); Standt v. City of New York, 153 F.Supp.2d 417 (S.D.N.Y. 2001) Dec. 01 LED:20 (federal district court judge in New York rules that civil liability under the federal Civil Rights Act, 42 U.S.C. section 1983, can result from a law enforcement agency’s failure to comply with the treaty).

NINTH CIRCUIT, U.S. COURT OF APPEALS

AFFIDAVIT DESCRIBING SUSPECT’S RECEIPT OF 9 E MAILS WITH MANY ATTACHMENTS ALL WITH CHILD-PORN CONTENT ESTABLISHED PROBABLE CAUSE TO SEARCH SUSPECT’S COMPUTER FOR CHILD PORN

U.S. v. Kelley, 478 F.3d 1068 (9th Cir. 2007)

Facts and Proceedings below:

Federal agents originally obtained evidence under a warrant that, for reasons not disclosed in the Ninth Circuit’s decision in this case, all parties now agree was not lawful. Next, the federal agents prepared a second search warrant and an affidavit that, among other things, described the evidence that had been seized under the first warrant. The remainder of the affidavit is described in the majority opinion for the Ninth Circuit in this case:

This appeal concerns the February, 2005 search of his computer, but Kelley’s problems stem from an investigation by German police officers into the activities of a German citizen, Herman Mumenthaler, in 2002. Executing a search warrant on November 11 of that year, they found 25 outgoing, and 450 incoming, e-mails on Mumenthaler’s computers that contained child pornographic attachments. “Gay1dude” was listed as a recipient on four of these e-mails that had attachments depicting images of boys between the ages of 8 and 14, including images of masturbation and oral copulation between two minor males. It was confirmed that “Gay1dude” was a screen name that Kenneth Michael Kelley used for his e-mail account on AOL. He also used other screen names, including “KKEL924,” “Mickeydice,” “Rockenwry,” “Sirfreeanlalot,” “Coppalozoeetrope,” “HIGH5JIVELIVE,” and “K MICHAEL KELLEY.”

The affidavit . . . relates details of a . . . child pornography trafficking investigation that originated in Wichita, Kansas, involving Ronald D. Hutchings. According to the affidavit, on September 10, 2004, ICE agents served a search warrant on AOL for Hutchings’s e-mail accounts which turned up evidence that Kelley, using the screen name “K MICHAEL KELLEY,” and Hutchings, using the screen name “Youngbottom16,” each received five e-mails with 38 attachments from an individual using the screen name “Badatt178” on August 10 and 15, 2004. Of the

38 attachments, 36 were image files (JPEGs) and two were movie files (MPEGs). The JPEGs included images of boys approximately 10-15 years of age in sexually explicit positions, including erect penises, masturbation, oral copulation between young males and anal intercourse between young and adult males. One MPEG depicts a young boy about four years old engaged in intercourse with an adult male while the other depicts a young girl about six being forced to perform oral sex on an adult male. In addition, the affidavit generally describes how computer connections to the Internet, and e-mail, work. Based on his training and experience, the affiant avers that persons whose sexual objects are minors collect sexually explicit material for their own sexual gratification and fantasy; that they tend to possess and trade this material in a clandestine manner; and that they often assemble lists or addresses of persons with similar sexual interests that may have been generated by personal contact or through advertisements in various publications. The affidavit further states that such persons almost always maintain their material at home or some other secure location where it is readily available, and rarely, if ever, dispose of the collection. Finally, the affidavit explains that the computer has become one of the preferred methods of distribution of pornographic materials.

Emphasis added by LED Eds.

The execution of the warrant and the subsequent events in the case below are described by the Ninth Circuit majority as follows:

A magistrate judge authorized the warrant on February 19, 2005. Forensic examination of Kelley's computer turned up numerous images of child pornography, in both picture and movie formats, depicting young boys engaged in sexual acts with adult males.

Kelley . . . moved to suppress, maintaining that the affidavit accompanying the February 9, 2005 application [with the evidence that was previously illegally seized] failed to establish probable cause. Although finding it a close call, the district court agreed. The court reasoned that the excised affidavit did not explain how or where the e-mails, originating from unidentified sources, ended up on the computers of two traffickers. It observed that no volitional act is required by the owner of an e-mail account for that account to receive e-mails, and conversely that it is almost impossible to prevent someone else from sending unwanted e-mail. Therefore, the court held, something more than proof of receipt or opening an e-mail is required to establish probable cause that the recipient is in actual possession of contraband contained in an e-mail attachment. As it was unable to conclude that there was a direct connection between Kelley and known traffickers, and evidence of his intent, or solicitation, or actual opening of the attachments was critical, but missing, the court granted Kelley's motion to suppress.

ISSUE AND RULING: In its totality, does the information set forth in the affidavit - - including the facts regarding the suspect's receipt of 9 email messages with multiple attachments, all with child pornography content - - establish probable cause to search Kelley's home computer for child pornography? (ANSWER: Yes, rules a 2-1 majority).

Result: Reversal of California U.S. District Court ruling that suppressed the evidence seized under the challenged second warrant; case remanded for trial.

ANALYSIS BY NINTH CIRCUIT MAJORITY:

Initially, the majority opinion for the Court explains that where, as here, some evidence has been stricken from a search warrant affidavit, the Court does not grant deference to the probable cause determination by the judge who issued the warrant. The Ninth Circuit majority opinion goes on from there to determine, under the following analysis, that the excised affidavit established probable cause:

Kelley argues, and the government does not seriously dispute, that unwitting receipt of e-mail containing contraband will not support probable cause. The disagreement centers on whether the affidavit is sufficient even though it lacks direct evidence that Kelley actually solicited the offending attachments.

The government maintains that the totality of the circumstances allows the reasonable inference that Kelley wanted the offending e-mails, even though there was no direct evidence that he solicited them, because he was sent multiple e-mails with sexually explicit images of children, he was linked to two individuals known to possess or receive child pornography, the child pornography was of the same type and this shows Kelley's interest, the type of child pornography Kelley was sent is not the kind of material likely to be received by unwitting recipients, and he received the contraband on different occasions at two different screen names. Kelley, on the other hand, points out that there was no evidence about who sent the small number of e-mails or when some of them were sent; or that he solicited, desired, opened, or even received them as the e-mails could have been bounced back by a spam blocker; or that connects him to the offender typology; or that corroborates any interest or intent on his part to obtain or possess child pornography. Therefore, he submits, the inferences drawn by the district court about personal e-mail are reasonable, whereas the inferences urged by the government are both unsupported in the affidavit and contrary to other reasonable inferences that the court could draw based on its practical experience and common sense.

. . .

[T]he salient facts are that Kelley, using two different screen names, received nine different e-mails with numerous attachments containing the same type of illicit child pornography (depicting sexually graphic conduct by young boys) that two other, unrelated individuals also had on their computers. There is no question that at least one of these individuals, Mumenthaler, also distributes child pornography, and that Hutchings collects it. As the affidavit explains, those who collect child pornography often collect addresses of persons with similar interests as a means of referral, exchange, and profit. The reasonable inference from receipt of e-mails in care of different screen names that pertain to a discrete type of pornography-young boys in sexually explicit poses and that also ended up on the computers of two unrelated people who were also receiving or distributing the same type of material, is that Kelley was part of network of persons interested in child pornography primarily involving young boys. As a matter of practical, common sense, this is unlikely to occur without prior communication or connection. From these circumstances it is reasonable to infer a "fair probability" that attachments depicting child pornography were addressed to Kelley's screen names because he wanted them to be.

We are mindful of the possibility that these e-mails could have been spam, as Kelley suggests. The affidavit does not specifically discount this possibility, and Kelley relies heavily on the fact that distribution of inappropriate and unsolicited material has become a reality of Internet life.

...

Forceful though the spam argument might be in different circumstances, we are not persuaded by Kelley's view in the circumstances of this case where . . . it is reasonable to infer that receipt of transmissions with a particular type of illicit child pornography was neither unsolicited nor accidental. Kelley did not receive an e-mail containing illicit pornographic images, or even two or three, but nine such e-mails sent to more than one of his screen names. That he received the same kind of attachments on multiple occasions and in different screen names makes it more probable that the transmissions were not accidental. The attachments were not a varied, random assortment of inappropriate subjects; they were, with one exception, of young boys in graphic sexual poses. Further, the images were not just of pornography, which can be perfectly legal, but were of a plainly unlawful sort. And others apparently interested in receiving or sending the same genre of pornography received (and kept) the same attachments.

We are also unpersuaded that the lack of further evidence such as who sent the e-mails to Kelley or how some of them ended up on Mumenthaler's computer and others on Hutchings's, undermines the "fair probability" of willing receipt shown by the totality of the circumstances. [Fourth Amendment case law] does not compel the government to provide more facts than necessary to show a "fair probability." Consequently, it does not matter whether additional facts could have been obtained or recited if the totality of the circumstances that are set forth adds up to a "fair probability" that Kelley willingly received child pornography which will be found on his computer. The affidavit establishes that Mumenthaler had copies of offending e-mails sent to Kelley, and that Hutchings and Kelley were jointly copied on e-mails. The logical inference is that Mumenthaler, who was a trader, had copies of the e-mails sent to Kelley because Mumenthaler was copied on them, or received a forwarded copy with Kelley's screen name in the "header" (sender/recipient information), or sent them to Kelley himself. Whoever the sources may have been, they were including Kelley in their distribution of contraband along with a known trafficker. Likewise, regardless of who "Badatt178" was, he sent Hutchings and Kelley five e-mails on two different days with attachments containing explicit sexual images of young children. It is reasonable to infer that the communications, given these connections, are not purely coincidental.

Relying on United States v. Weber, 923 F.2d 1338, 1344 (9th Cir.1991), Kelley faults the affidavit on the additional ground that it provided an "offender typology" but failed to connect him to the profile. In Weber, the defendant placed an order for four pictures of child pornography and, anticipating a planned delivery, officers obtained a warrant to search his house for other similar items. We found inadequate the affiant's boilerplate recitation of how child molesters, pedophiles, and child pornography collectors behave because, absent evidence indicating that Weber was any of these things, probable cause did not exist that Weber would have material other than the four pictures at his house. However, the

affidavit in this case provides evidence that Kelley's screen names appear on multiple e-mails with attachments containing child pornography of young boys in sexually explicit positions. The typology reports that persons who collect this type of sexually explicit material rarely dispose of it. While the affidavit offers no external corroboration of Kelley's interest in young boys, it can be inferred from the fact that nine separate e-mails with the same type of attachments were received on different occasions spanning at least ten months that those images and others would be found on Kelley's computer.

Finally, Kelley disputes the inference that spammers are not likely to send out contraband. He suggests that prescription drugs are often marketed through e-mails, even though it is illegal to do so without a prescription, and that sexually-charged offers to join hotlines or subscribe to pornography websites are common. The receipt of such unwanted or illegal invitations, he posits, does not fairly imply anything about the recipient. We have no occasion to comment on this, for the emails Kelley received are more than an invitation; they consist of hardcore child pornography that it is illegal to distribute as well as to receive or possess. The affidavit also indicates that this particular kind of pornography is exchanged clandestinely. Given this practice and the patent illegality of the material received by Kelley, we cannot say that it is insensible to infer, as part of the mix that informs the totality of the circumstances, that indiscriminate distribution was unlikely.

...

[W]e are not asked to decide whether Kelley could be arrested, or convicted on the basis of the evidence in the affidavit. We must simply decide whether there is a "fair probability" that, based upon the facts set forth and inferences from them, his computer would house child pornography which he willingly received. We are not required to decide, and we do not decide, whether receipt of e-mail in any circumstances other than those present in this case would support a finding of probable cause. We conclude only that the totality of the circumstances described in the affidavit for the search of Kelley's computer makes it fairly probable that images of child pornography, which he received willingly, would be found on his computer. The affidavit does not fall short of probable cause solely because it contained no concrete evidence that Kelley actually solicited the nine e-mails he received. Rather, reasonable inferences from the facts averred can, and in this case do, supply the missing links. The reasonable inference here is that Kelley would not have received so many e-mails on different occasions, addressed to different screen names, containing attachments that depict the same genre of illicit child pornography, that were also on the computers of other collectors of the same genre of child pornography, unless he wanted to receive them. For these reasons, the excised warrant was supported by probable cause, and evidence obtained pursuant to it should not have been suppressed.

[Some citations omitted]

DISSENT: Judge Sydney Thomas dissents. The conclusion of his dissent argues:

The paucity of the evidence that the government offered in support of the warrant is quite evident. The only evidence upon which the government relied at the time of the search was that Mr. Kelley had been sent nine emails containing child pornography over a period of at least nine months, quite possibly longer. There

was no evidence that Mr. Kelley requested the emails, viewed the emails, or actually received the emails in his "Inbox." There was no evidence refuting the possibility that Mr. Kelley's email program routed the emails to his spam folder, or that Mr. Kelley deleted the emails upon receipt. Nor was there evidence that Mr. Kelley at any point made any affirmative attempt to obtain child pornography or that he collected child pornography or had any affinity for it. In short, there was no evidence that these nine emails were anything more than unsolicited spam.

Holding that the evidence the government submitted in this case constituted probable cause for an extensive residential search cannot be reconciled with the principles we adopted in Weber, Gourde, and Hay.

I can well understand the government's motivation. Child pornography is a scourge on our nation. But every hour, millions of unsolicited and deceptively disguised emails are sent to innocent computer users. Lowering our standards of probable cause to permit government intrusion into private residences based solely on proof of mere transmittal of unsolicited email constitutes an unwarranted erosion of the Fourth Amendment.

WASHINGTON STATE COURT OF APPEALS

VIDEOTAPE OF CONFESSION NOT ADMISSIBLE UNDER RCW 9.73.090(1) BECAUSE MIRANDA WARNINGS, THOUGH GIVEN OFF-TAPE EARLIER, WERE NOT REPEATED ON THE TAPE; PHOTO MONTAGE PROCEDURE ALSO ARGUABLY FLAWED BECAUSE, AFTER THE 2 VICTIM-WITNESSES ID'D DEFENDANT, OFFICERS TOLD THEM THAT THEY HAD PICKED SAME PERSON, AND AN OFFICER TOLD ONE OF THEM THAT THE PERSON PICKED WAS IN CUSTODY - - BUT MURDER CONVICTION UPHELD ANYWAY

State v. Courtney, ___ Wn. App. ___, 153 P.3d 238 (Div. III, 2007)

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

On October 19, 2004, Marvin Moyer, Clifton Brown, and Martin Doerring were sharing a room at the Apple Tree Inn. The three men were construction workers from out of state. After work that day, Mr. Moyer and Mr. Brown returned to their hotel room while Mr. Doerring stopped by a local bar. Late that evening, Mr. Moyer and Mr. Brown heard a knock at their hotel room door. Mr. Moyer opened the door and was confronted by a man later identified as Devennyon Courtney. Mr. Courtney was armed with a gun.

Mr. Courtney told Mr. Moyer and Mr. Brown to hand over their wallets. The two men complied. Mr. Courtney then asked the men if they had any money hidden in the hotel room and he began to rifle through the drawers of the hotel nightstand. Mr. Courtney also asked if there were any other people returning to the hotel room. He was told that Mr. Moyer and Mr. Brown were waiting for Mr. Doerring to return.

Mr. Courtney ordered Mr. Brown and Mr. Moyer into a back bedroom. After about half an hour, Mr. Doerring returned from the bar and knocked on the hotel room door. Mr. Courtney answered the door and demanded that Mr. Doerring turn over all of his money.

Mr. Doerring refused to turn over his possessions and the two men began to fight. Mr. Doerring fell backwards and grabbed Mr. Courtney as he went down. Mr. Courtney shot Mr. Doerring in the stomach to break free from his grip. Mr. Doerring died from the gunshot wound to his abdomen.

Two informants told police that Mr. Courtney had committed the robbery and shooting. Law enforcement placed Mr. Courtney under arrest. Mr. Courtney waived his right to remain silent and his right to an attorney. The police videotaped his confession, but they did not record Mr. Courtney's Miranda waiver as part of the taped confession. There was a 20 minute delay between Mr. Courtney's waiver and the time that his confession was recorded.

During Mr. Courtney's confession, he told law enforcement the location of the gun that was used in the shooting. Police recovered the gun in the place where Mr. Courtney had indicated that he had hidden it. Forensic experts confirmed that this gun was used to kill Mr. Doerring.

Law enforcement generated a photographic montage that included Mr. Courtney and presented it to Mr. Moyer and Mr. Brown. Each made separate identifications of Mr. Courtney from the photographic lineup. After Mr. Moyer identified Mr. Courtney, police told him that they had the person he identified in custody. An officer also told Mr. Brown and Mr. Moyer that they had picked the same man.

The State charged Mr. Courtney with first degree murder, first degree burglary, two counts of first degree robbery, attempted first degree robbery, two counts of first degree kidnapping, and first degree unlawful possession of a firearm.

Mr. Courtney pleaded guilty to the charge of unlawful possession of a firearm, and proceeded to a jury trial on the remaining counts. Through trial counsel, Mr. Courtney sought to suppress the witness identification, asserting that the photomontage was impermissibly suggestive. He also asked the court to disallow any in-court identification of Mr. Courtney as tainted by the prior suggestive identification procedures. Mr. Courtney moved to suppress all evidence uncovered because of his confession. He contended that he asked repeatedly for a lawyer before signing the waiver, but that law enforcement persisted in questioning him after his request for counsel. The trial court admitted Mr. Courtney's taped confession and the witness identifications.

The jury found Mr. Courtney guilty of first degree murder, first degree burglary, two counts of first degree robbery, and attempted first degree robbery. The jury also found by special verdict that Mr. Courtney was armed with a deadly weapon when he committed these crimes. The jury was unable to reach a verdict on the kidnapping charges.

After the verdict, Mr. Courtney sought a new trial based on his assertion of a violation of the Washington privacy act (privacy act), chapter 9.73 RCW. Mr. Courtney contends that law enforcement failed to inform him during the videotape recording of his constitutional rights to remain silent and to counsel. Trial counsel admitted that he did not discover this statute until after the videotaped confession was admitted and shown to the jurors at trial. The trial court denied this motion. This appeal followed.

ISSUES AND RULINGS: 1) Did the interrogating officer(s) violate RCW 9.73.090(1)(b) by failing to inform Mr. Courtney of his Miranda rights at the start of the videotaped part of the interrogation? (ANSWER: Yes);

2) If the defense attorney had timely raised an objection at trial under RCW 9.73.090, would the violation of RCW 9.73.090(1)(b) have required suppression of both the videotape of the confession and any evidence derived from the taped confession, and, if only the tape was required to be suppressed, was the admission of the tape prejudicial? (ANSWER: Under RCW 9.73.090, only the videotape would have been suppressed, and there would have been no prejudice in the admitting of the tape because the other evidence of guilt was overwhelming); and

3) Did the officers potentially taint the in-court IDs provided by the witnesses by: a) telling both witnesses just after the photo montage ID procedures that they had both picked the same person, and b) telling one of the witnesses that the person picked was in custody; and, if so, did this make the witnesses' in-court identifications unreliable? (ANSWER: Regardless of any impropriety of the officers' statements to the witnesses following the photo montage procedures, the in-court identifications were reliable considering the totality of the circumstances)

Result: Affirmance of Spokane County Superior Court convictions of Devennyon Marquise Courtney for first degree murder, first degree robbery (two counts), attempted first degree robbery and first degree unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) RCW 9.73.090(1)(b) violation

Mr. Courtney asserts that his videotaped confession and all evidence derived therefrom should have been excluded from trial based on police violations of the privacy act.

Generally, the privacy act applies only to private communications. There is no reasonable expectation of privacy for persons in custody undergoing custodial interrogations. Lewis v. Dep't of Licensing, 157 Wn.2d 446 (2006) **Sept 06 LED:09**. But the legislature has enacted provisions in the privacy act that govern the conditions under which police may make recordings of suspects during custodial interrogations. RCW 9.73.090. Such recordings must strictly comply with statutory provisions to ensure that consent to the interrogation is capable of proof and to avoid a "swearing contest" regarding whether such consent actually occurred. State v. Cunningham, 93 Wn.2d 823 (1980).

RCW 9.73.090(1)(b) requires that an arrested person must be fully informed of his or her constitutional rights at the beginning of the recording, and that this statement must be included in the recording. In order to satisfy this statutory requirement, a recorded statement must include a complete statement of the accused's Miranda rights. State v. Mazzante, 86 Wn. App. 425 (1997) **Aug 97 LED:20**. Here, Mr. Courtney was never informed of his rights on the recording of his custodial interrogation, even though he had signed a Miranda waiver of his rights prior to the recording. This recording violated the privacy act.

2) Limited suppression under RCW 9.73.090(1)(b)

Mr. Courtney asserts that the officers' violation of the privacy act required the suppression of not only the videotaped confession, but all of the evidence

derived from it. He bases his argument largely on RCW 9.73.050, which requires suppression of any information obtained in violation of provisions of the privacy act. The derivative evidence Mr. Courtney asks this court to suppress includes the murder weapon that was located as a result of Mr. Courtney's confession.

But a violation of section .090 of the privacy act does not require suppression of derivative evidence. The portion of the act requiring suppression of derivative evidence only applies to private conversations; and, as previously noted, custodial interrogations are not private conversations. Instead, it is only the recordings themselves that are inadmissible.

Admission of evidence in violation of the privacy act is a statutory, and not a constitutional violation. This error is not prejudicial unless the erroneous admission of the evidence materially affected the outcome of the trial. Here, Mr. Courtney's conviction should be reversed only if there is a reasonable probability that the outcome of the trial would have been different had the taped confession been excluded.

In this case, the remaining evidence of guilt was overwhelming. Two separate eyewitnesses identified Mr. Courtney as the individual who held them at gunpoint, robbed them, and killed Mr. Doerring. Mr. Courtney led police to a gun that was hidden in some bushes. This gun was identified as the weapon that was used to shoot Mr. Doerring. Based on the strength of this evidence, there is no reasonable probability that the outcome of the trial would have been different if Mr. Courtney's taped confession had been excluded.

3) Improper photo montage ID procedure and reliability of in-court IDs

Photographic identification procedures violate due process if the procedures give rise to a substantial likelihood of irreparable misidentification. The defendant must establish both that the identification procedures were impermissibly suggestive and the substantial likelihood of misidentification as a result. Minor differences between the individuals in a photomontage are not sufficient to establish impermissibly suggestive procedures. But statements reinforcing an identification made by police may be impermissibly suggestive, even if the reinforcement occurs after the identification is made.

Here, police made statements to both eyewitnesses after their identifications. Police told Mr. Moyer that the person he identified was already in custody. Mr. Brown and Mr. Moyer were informed that they had picked the same person. These statements may have reinforced Mr. Moyer's and Mr. Brown's identifications.

Even if the statements made by law enforcement were impermissibly suggestive, there also must be a substantial likelihood of misidentification resulting from that suggestiveness. Courts evaluate the reliability of an identification by looking at the totality of the circumstances. Factors influencing this determination may include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the criminal, the level of certainty of the identification, and the amount of time between the crime and the identification.

The trial court considered Mr. Courtney's assertion that the reinforcement provided after the identification tainted Mr. Moyer's and Mr. Brown's in-court

identifications. The court found that there was a significant independent opportunity for the witnesses to observe Mr. Courtney, and therefore it was unlikely that any statements made after the identification had any influence on the in-court identification. The record supports the trial court's determination of reliability.

LED EDITORIAL NOTE REGARDING ID PROCEDURES GENERALLY: See the article by AAG Wasberg on identification procedures on the CJTC internet LED page. Officers should be careful before, during, and after, ID procedures (showups, photo montages, and lineups) not to do or say things that may taint later in-court IDs, such as to either: 1) make the in-court identification inadmissible, or 2) give the defense attorney a "reasonable doubt" argument to present the jury.

OBJECTIVE STANDARD FOR TRIGGERING MIRANDA WARNINGS – A LOSS OF FREEDOM EQUAL TO THAT ASSOCIATED WITH A FORMAL ARREST – NOT MET, AND THUS WARNINGS WERE NOT REQUIRED

State v. Ustimenko, ___ Wn. App. ___, 151 P.3d 256 (Div. III, 2007)

Facts: (Excerpted from Court of Appeals opinion)

In late July 2004, Mr. Ustimenko drove around south Spokane one evening while under the influence of alcohol. As he drove rapidly down Cliff Drive, a pedestrian yelled to him to slow down. Mr. Ustimenko stopped his car, he and his passenger jumped out, and the two young men confronted the pedestrian. After an exchange of profanities, Mr. Ustimenko head-butted the pedestrian and the two began fighting. Another car, carrying Mr. Ustimenko's friends, stopped and four young males jumped out to join in the fray. All of the young men began assaulting the pedestrian. Mr. Ustimenko got back in his car, attempted to hit another pedestrian who observed the scene, and sped away.

A few minutes later, Mr. Ustimenko ran a red light in downtown Spokane and slammed broadside into a vehicle driven by Robyn Twitty. She and her baby were injured. Mr. Ustimenko's car came to rest against a sign post owned by a local tavern. As soon as Mr. Ustimenko got out of his car, he ran to another vehicle driven by friends, and he left the scene at a high rate of speed. Officers who arrived at the scene of the accident found a car registered to Mr. Ustimenko's father and a wallet lying on the ground nearby containing a driver's license and social security card issued to Mr. Ustimenko.

Officers then went to the Spokane County address on the vehicle registration and parked at the bottom of a long driveway. As the officers walked up the driveway, they met Mr. Ustimenko walking toward them. He smelled of alcohol, had slurred speech, was swaying, and had fresh injuries on his hands and head. The officers asked him to sit down. When they asked him where his car was, he said it had been stolen earlier that night. He explained that his injuries were caused by a fall a couple of days earlier. As the officers began handcuffing him and advising him of his constitutional rights, he stated, "I tell you what happened. I was driving." The officers continued reading the Miranda rights as Mr. Ustimenko stated, without prompting, "I was in an accident."

Mr. Ustimenko was taken to the public safety building for the testing of a breath sample and was advised again of his constitutional rights. Before he took the breath analysis test, an officer advised him of his rights a third time. Each time,

he indicated that he understood his rights. The breath analysis showed that he was intoxicated.

Proceedings below: Mr. Ustimenko was charged with several crimes. Prior to trial, claiming a Miranda violation, he moved to suppress statements he made to the officers. The trial court ruled that the officers should have Mirandized Mr. Ustimenko as soon as they approached him because, at that point they believed they had probable cause to arrest him. The trial court therefore suppressed statements Mr. Ustimenko made before he was Mirandized, but the trial court admitted statements that he made after being Mirandized. The trial court convicted Mr. Ustimenko of second degree assault, DUI, reckless driving (two counts), and failing to remain at the scene of an accident (three counts).

ISSUE AND RULING: Where the record shows that - - 1) the officers believed that they had probable cause to arrest Mr. Ustimenko as soon as they encountered him in his driveway; 2) they asked, but did not order, the intoxicated, swaying Mr. Ustimenko to sit down; 3) the officers did not tell him that he was under arrest or even being detained; and 4) he made no request to leave or be left alone - - does that record establish that the objective custody trigger to the Miranda warnings requirement (i.e., custody that is equivalent to arrest) was met? (ANSWER: No)

Result: Affirmance of Spokane County Superior Court conviction of Vasiliy Ustimenko of second degree assault, DUI, reckless driving (two counts), and failure to remain at the scene of an accident (three counts).

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Ustimenko contends the trial court erred in denying his CrR 3.5 motion to suppress statements made after he was advised of his Miranda rights. He argues that he let the “cat out of the bag” when he made custodial statements pre-Miranda, and that this poisoned all statements made post-Miranda.

CrR 3.5 requires that when the State will offer a statement of the accused as evidence, the court must hold a hearing to determine whether the statement is admissible. Generally, statements made while an accused is in custodial interrogation are not admissible unless the accused was first advised of his constitutional right to counsel and his privilege against self-incrimination (Miranda rights). State v. Lavaris, 99 Wn.2d 851, (1983) (citing Miranda, 384 U.S. at 444, 86 S.Ct. 1602). While in custody, an accused's pre-Miranda statements are presumed involuntary due to the coercive nature of custodial interrogations. Oregon v. Elstad, 470 U.S. 298 (1985). Once warned, however, the accused is “free to exercise his own volition in deciding whether or not to make a statement to the authorities.” Absent “deliberately coercive or improper tactics” used to obtain the pre-Miranda statement, advisement of the Miranda rights will allow the accused to make a rational choice whether to invoke those rights or to waive them.

Miranda warnings protect an accused's right not to make incriminating statements while in police custody. State v. Lorenz, 152 Wn.2d 22 (2004) **Sept 04 LED:10**. This court reviews the trial court's custodial determination de novo. In determining whether an accused was in custody at the time of questioning, we use an objective test: “whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.” [Lorenz]. Here, the trial court concluded that Mr. Ustimenko was in

custody as soon as the police approached and asked him to sit down. The court based this conclusion on the fact that the officers testified that they already thought they had probable cause to arrest Mr. Ustimenko when they encountered him. But a police officer's subjective intent has no relevance to the determination of custody. [Lorenz]. Not only is it irrelevant whether Mr. Ustimenko was the focus of the police investigation, but it is also irrelevant whether he was in a coercive environment when he was questioned. [Lorenz]. **The only relevant question is whether a reasonable person in his position would believe his freedom of action was curtailed [in the degree associated with formal arrest. *Bolding added by LED Eds.*] State v. Short, 113 Wn.2d 35 (1989).**

Under these circumstances, we find that Mr. Ustimenko was not actually in custody when the officers asked him where his car was and how he got his injuries. The officers met him on the long driveway, noticed he was swaying on his feet, and asked him to sit down. He did not claim that he was ordered to obey. The officers did not tell him he was being detained and he did not ask to leave. A reasonable person in Mr. Ustimenko's position would not believe he was in police custody with a loss of freedom associated with formal arrest. [Lorenz]. Accordingly, the questioning was not custodial, and his statements during that initial encounter should have been admitted into evidence. [Lorenz].

Even if the pre- Miranda statements were not admissible, however, the post-Miranda statements were properly admitted. Unless a prior unwarned statement was actually coerced, subsequent Miranda warnings provide the accused a choice whether to exercise the privilege to remain silent. Elstad. Mr. Ustimenko's response to the officers' questions regarding the whereabouts of his car and the nature of his injuries was not coerced. There is no evidence that the officers attempted to undermine his ability to exercise free will. That he may have let "the cat out of the bag" in his responses is irrelevant to the admissibility of his post-Miranda statements. State v. Allenby, 68 Wn. App. 657 (1992) **Oct 93 LED:18** (citing Elstad, 470 U.S. at 311, 105 S.Ct. 1285).

[Some citations omitted]

WDFW OFFICER'S STOP OF PICKUP TRUCK CONTAINING WARMLY DRESSED DRIVER AND PASSENGER AS TRUCK WAS EXITING ONE-LANE DIRT ROAD ON OPENING DAY OF ELK SEASON HELD REASONABLE UNDER RCW 77.15.080(1) AS A JUSTIFIED WDFW OFFICER STOP TO CHECK POSSIBLE HUNTERS

Schlegel v. DOL, ___ Wn. App. ___, 153 P.3d 244 (Div. III, 2007)

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

On October 30, 2004, the opening day of elk hunting season, Officer Fulton stopped Mr. Schlegel and a passenger in a truck exiting the L.T. Murray Wildlife Area on Hutchins road (a one-lane, dirt road near an entrance gate). Officer Fulton described Hutchins road as a not well maintained "hunting road." Officer Fulton testified he was contacting vehicles "[t]o check for wildlife, check for licenses." Officer Fulton believed he had "articulable facts" under RCW 77.15.080 to stop some vehicles.

Officer Fulton did not "contact everybody [he] saw." Officer Fulton was stopping solely those vehicles containing people he believed "were engaged in hunting." Officer Fulton saw the occupants of Mr. Schlegel's vehicle were "dressed in

hunting clothing.” Officer Fulton described the hunting clothing as “warm type clothing” and “consistent with what hunters type-typically wear.” Officer Fulton testified Mr. Schlegel “was driving a vehicle consistent with elk hunters in that area.” Officer Fulton stepped into the road and signaled Mr. Schlegel to stop.

Officer Fulton spoke first with the passenger who said “he and the driver had been elk hunting.” “They both had elk rifles sitting in the cab of the truck with them.” When Officer Fulton contacted Mr. Schlegel to verify his hunting license and tag, he smelled alcohol on Mr. Schlegel's breath. Mr. Schlegel was referred to the Washington State Patrol for investigation of DUI and arrested.

Mr. Schlegel challenged the basis of the stop in a hearing for the administrative suspension of his driver's license. In findings of fact and conclusions of law, the hearing officer concluded the officer was authorized by RCW 77.15.080(1) to stop Mr. Schlegel and ordered that the administrative action to suspend his driver's license be sustained.

Mr. Schlegel successfully appealed to the superior court, where the court held the stop constituted an unlawful roadblock.

At his DUI trial, Mr. Schlegel unsuccessfully requested to suppress the evidence. The court concluded:

[T]he checkpoint was established on the opening day of the general elk-hunting season and placed on an isolated road where hunting activity was to be expected. Only those vehicles that appeared consistent with “hunting activity” were stopped. The contact was brief in the governmental interest of enforcement of laws for the preservation of wildlife.

Mr. Schlegel was subsequently convicted. He appealed to the superior court. He then moved for res judicata application of the superior court's licensing decision to the appeal of the district court's suppression ruling. The motion was granted and his DUI charge was dismissed with prejudice.

[Record citations omitted]

ISSUE AND RULING: Upon observing the pickup truck that was occupied by two warmly dressed men and that was about to exit a one-lane dirt road on the opening day of elk season in an area where elk hunting might occur, was the WDFW officer justified in stopping the truck, based on RCW 77.15.080(1), which provides that: “Based upon articulable facts that a person is engaged in fishing, harvesting, or hunting activities, fish and wildlife officers have the authority to temporarily stop the person and check for valid license, tags, permits, stamps, or catch record cards”? (ANSWER: Yes, rules a 2-1 majority)

Result: Reversal of Kittitas County Superior Court decisions 1) that reversed a DOL license suspension decision, and 2) that reversed a Kittitas County District Court DUI conviction.

Status: Mr. Schlegel has petitioned for discretionary review by the Washington Supreme Court; his petition likely will not be acted on by the Supreme Court before late fall of 2007.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

The issue is whether, under these facts, the district court and DOL erred in concluding Officer Fulton legally stopped Mr. Schlegel under RCW 77.15.080. Mr. Schlegel contends the stop was

unconstitutional because it constituted an illegal roadblock under *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) and, thus, the derived evidence should have been excluded.

We first examine the statutory grounds that the DOL hearing officer and district court found to justify the stop. “Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.”

RCW 77.15.080(1) provides:

Based upon articulable facts that a person is engaged in fishing, harvesting, or hunting activities, fish and wildlife officers have the authority to temporarily stop the person and check for valid licenses, tags, permits, stamps, or catch record cards.

For the wildlife officer's authority to be valid, the officer must have “articulable facts” that a person is engaged in hunting activities. RCW 77.15.080(1). Articulable means “a substantial possibility.”

Hunting is defined as “an effort to kill [or] injure” a “wild animal or wild bird.” RCW 77.08.010(7). Washington authority has generally held that hunting involves more than the actual shooting of an animal. “Hunters begin to ‘hunt big game’ not when they actually encounter big game, but rather when they make an effort to kill or injure big game in an area where such animals may reasonably be expected.” In *Goodell v. Northwestern Mutual Accident Association*, 130 Wash. 55 (1924), the court held that an insured decedent was “engaged in hunting” as a joint enterprise when he rowed a boat while his companion was shooting. We now turn to the unchallenged facts, verities on appeal.

First, Officer Fulton observed Mr. Schlegel's vehicle on the opening day of elk hunting season inside an elk hunting area. The truck's occupants wore hunting clothing, clothes of a type that hunters typically wear. Mr. Schlegel was driving a vehicle consistent with the type that hunters use on a poorly maintained dirt hunting road when Officer Fulton first observed him. Based on his observations, a substantial possibility existed that he was engaged in hunting. Thus, articulable facts justified an initial, brief inquiry stop.

Second, while Officer Fulton approached the vehicle, he saw the occupants possessed elk rifles in the truck-cab. Thus, Officer Fulton's initial suspicions justifiably increased justifying time for further inquiry.

Third, Officer Fulton was immediately told by the passenger that the pair had been elk hunting, confirming his articulable suspicions and justifying contact with Mr. Schlegel, the driver. At this point, other facts were collected that ultimately led to the loss of Mr. Schlegel's license and his DUI conviction that are not now contested.

The DOL hearing examiner and the district court judge found the above facts, mainly from the testimony of Officer Fulton. A review court looks to the record to determine if the facts are supported by the record. They are. Thus, the question becomes whether the facts, as found, support the legal conclusions. They do. Therefore, the superior court erred in disregarding the unchallenged fact-finding accomplished by the DOL hearing examiner and the district court judge. Articulable facts existed indicating Mr. Schlegel was engaged in hunting activities when first observed by Officer Fulton, permitting a brief investigatory stop under

authority of law, RCW 77.15.080(1). Hence, we decline to engage in a constitutional analysis.

In sum, hunting is a highly regulated activity. RCW 77.15.080 applied to the facts found by the DOL hearing examiner and the district court judge show the wildlife officer's authority to stop Mr. Schlegel. The district court and DOL correctly interpreted and applied RCW 77.15.080 when considering Mr. Schlegel's roadblock challenge. Further, the record shows Officer Fulton did not stop every passing vehicle, but restricted his brief investigatory stops to situations where he had articulable facts that the passersby were engaged in hunting activities. Therefore, this is not a roadblock case like Mesiani.

Reversed. We affirm the hearing officer and district court.

[Some citations omitted]

DISSENT: Judge Schultheis strenuously dissents, arguing in vain that 1) the facts do not support the majority's result even under its analysis (two men dressed warmly in 20 degree weather are not necessarily on a hunting expedition); 2) the particular statute as compared to RCW 77.12.620 (checkpoint stations), does not authorize stopping vehicles because people do not actually hunt from their vehicles; and 3) the majority should have addressed the constitutionality of RCW 77.15.080(1) and should have ruled it unconstitutional under article 1, section 7 of the Washington constitution.

LED EDITORIAL NOTE: Subsection 1 of RCW 77.15.080, which was the focus of this case, grants authority to "fish and wildlife officers" but does not, as do a number of other statutes in Title 77 RCW, mention "ex officio wildlife officers." This means that "ex officio fish and wildlife officers" such as city, county and state agency law enforcement officers do not have authority under subsection 1.

OFFICER TELLING CUSTODIAL INTERROGATION SUSPECT THAT THE OFFICER WOULD NOT CHARGE THE SUSPECT FOR WRITING GRAFFITI IN A STOLEN CAR DID NOT MAKE INVOLUNTARY THE SUSPECT'S CONFESSION TO 1) TAKING VEHICLE WITHOUT PERMISSION AND 2) VEHICLE PROWLING

State v. L.U., ___ Wn. App. ___, 153 P.3d 894 (Div. I, 2007)

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

On February 7, 2005, someone stole Jean Layer's Honda Civic. When police recovered it two days later, the steering column and ignition were damaged. Someone had written on the dashboard: "Fuck Officer [sic] [A] [sic] 4rm C-loc, Bear, Bam Bam, Don't trip."

Three months later, [Officer A] arrested L.U. on an outstanding warrant. [Officer A], who had been the target of threats made in other graffiti similar to that found in Layer's car, had information that L.U. and some of his friends were involved in gang activity that included graffiti. [Officer A] asked [Detective B] to talk to L.U. about the graffiti and the threats toward [Officer A]. [Detective B] had known L.U. since L.U. was in middle school, and the two were friendly. [Detective B], unarmed and wearing plain clothes, brought L.U. to a 4 x 4 foot interview room and read him his rights.

L.U. denied writing the graffiti, but [Detective B] thought that L.U.'s handwriting was similar to the writing in Layer's car. When [Detective B] asked L.U. what "4rm" meant, L.U. said that was how he writes "from."

[Detective B] told L.U. that he would not charge L.U. for writing the graffiti in the car if L.U. gave him information about another incident involving graffiti. L.U. thought the detective meant that he would not be charged with any crime related to the car. He then confessed to writing the graffiti on the dashboard:

I was in a Honda Civic that was stolen. I was in the passenger seat and I cannot remember who was driving. I have been in many stolen cars and I know this one was stolen because the ignition was damaged. I used a marker and wrote on the dashboard "Fuck [Officer A] [sic] 4rm c-loc, bear bam bam, don't trip." I have not written anything else about [Officer A] and have never written anything threatening. This is the only thing I have written about him. I hope it wasn't taken as a threat or the wrong way.

The State charged L.U. by second amended information with one count of second degree taking a motor vehicle without permission and one count of second degree vehicle prowling. Before trial, L.U. asked the court to suppress his confession. He argued that [Detective B] coerced him into confessing by promising not to charge him with a crime. Both L.U. and [Detective B] testified at the suppression hearing. Afterward, the court admitted L.U.'s confession and found him guilty as charged.

ISSUE AND RULING: By telling L.U. that L.U. would not be charged for writing graffiti in a stolen car, did the officer make involuntary L.U.'s confession that supported L.U.'s convictions, in relation to the same incident and same car, for second degree taking motor vehicle without permission and second degree vehicle prowling? **ANSWER:** No, it was unreasonable for L.U. to draw the conclusion that his confession as to the graffiti in the car would not be used against him as to the other crimes relating to the car)

Result: Affirmance of King County Superior Court conviction of L.U. for taking a motor vehicle without permission and for vehicle prowling, both in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

L.U. first argues that the trial court erred when it denied the motion to suppress his confession. A confession is involuntary or coerced if, based on the totality of the circumstances, the defendant's will was overborne. State v. Broadaway, 133 Wn.2d 118 (1997); State v. Burkins, 94 Wn. App. 677 (1999) **June 99 LED:10**. Some of the factors we consider when deciding whether a statement was voluntary include the defendant's age, mental condition, physical condition, and experience. The court must also consider the conduct of the interrogating officers and any promises or misrepresentations they made. Even if a police officer deceived the defendant to obtain a confession, however, the statement is voluntary unless the officer's behavior overcame the defendant's will to resist. "The inquiry is whether the Defendant's will was overborne."

If there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary, we will not disturb the trial court's determination of voluntariness on appeal.

After L.U.'s CrR 3.5 hearing, the trial court found that although L.U. first denied having written the graffiti on the dashboard, he admitted writing it after [Detective B] said he would not be charged “with the graffiti to the dashboard.” Because L.U. does not challenge that finding, it is a verity. L.U. argues that his confession was the direct result of [Detective B]'s promise of immunity. But, as the court found, the detective promised immunity only for the graffiti. He did not promise immunity for any other crimes relating to Layer's car.

L.U. contends it was reasonable for him to believe that the offer of immunity applied to all charges relating the car. He cites a federal case from the Seventh Circuit for the rule that “[a] defendant's perception that he is providing testimony under a grant of immunity does not make his statement involuntary, unless the perception was reasonable.” But L.U.'s perception was not reasonable. [Detective B] interviewed L.U. only to find out about threats made toward [Officer A]. The detective testified that he and L.U. did not talk about car theft or any other crimes. Even when L.U.'s attorney asked him whether the detective told him he was investigating a stolen car, L.U. responded, “He said-he just asked me about this car, and then he just asked me about some other graffiti[sic] and (inaudible) I don't know.” L.U. then said he could not remember whether [Detective B] told him the car was stolen.

L.U. may have believed that he would not be charged with any crimes relating to Layer's car if he confessed to writing the graffiti. But his mistaken belief was unreasonable and he did not confess because [Detective B] misrepresented his intentions. Considering the totality of circumstances, L.U.'s confession was voluntary. The trial court properly admitted it.

[Some citations omitted]

LED EDITORIAL COMMENT: Despite the pro-State outcome in this case, we continue to agree with the conventional wisdom that officers should not make “charging deals” during interrogations without involvement of the office of the prosecuting attorney. Law enforcement agencies may wish to consult their local prosecutors on this subject.

LOOK-ALIKE BROTHER OF PERSON WANTED UNDER FELONY ARREST WARRANT LOSES CHALLENGE TO FRISK BECAUSE 1) OFFICER OBSERVED LARGE POCKET BULGE, 2) OFFICER THEN FELT HARD OBJECT, AND 3) SUSPECT THEN PULLED AWAY TO TRY TO AVOID CONTINUATION OF THE FRISK PROCEDURE

State v. Bee Xiong, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 898152 (Div. III, 2007)

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

Task forces assembled to execute felony arrest warrants for persons in the Spokane area, including Kheng Xiong. Using Kheng Xiong's photo, the officers went to his listed home address and found a van parked there. A deputy marshal misidentified the van's passenger, Bee Xiong, Kheng's brother, as Kheng. When approached, Bee Xiong gave his name to a federal agent but he did not have any identification. Bee Xiong explained Kheng Xiong was his older brother.

The agent handcuffed Bee Xiong, noticing a large bulge in his pocket. Concerned the bulge was a weapon, the agent touched the bulge and felt a hard object. Bee Xiong pulled away so the agent could not feel the object any further and said he did not have any weapons, but did not want to be searched. At this

point, the agent was still uncertain of identification. Apparently, the photo used by the officers was similar in appearance to Bee Xiong. The officers attempted to obtain a photo of Bee Xiong in the computer system in an effort to identify their suspect.

During this time, the officers decided to investigate the hard object, suspecting it could be a weapon. Bee Xiong was arrested for possessing a controlled substance when a pipe with drug residue was found. About 10 minutes later, Bee Xiong's mother arrived and identified him. A search incident to Bee Xiong's arrest developed evidence leading to a charge of possession of methamphetamine with intent to deliver.

Bee Xiong moved to suppress the evidence. The court decided the officers should have first identified Bee Xiong, and "that once confirmed he was Bee Xiong, he [should] have been released uncuffed and not patted." The court concluded the officers lacked facts, specific and detailed, that Bee Xiong was armed and dangerous. The court ordered suppression.

ISSUE AND RULING: Under all of the circumstances known to the officers, was there justification for 1) the seizure of the suspect, 2) the frisk of the bulging pocket, and 3) the seizure of the hard item? **ANSWER:** Yes, rules a 2-1 majority)

Result: Reversal of Spokane County Superior Court suppression order; case remanded for trial of Bee Xiong for possession of methamphetamine with intent to deliver.

ANALYSIS BY MAJORITY: (Excerpted from Court of Appeals majority opinion)

Warrantless searches are per se unreasonable but defined exceptions exist. Our focus is the Terry investigative stop exception. The State has the burden of showing the particular search or seizure in question falls within the exception asserted.

In Terry v. Ohio, 392 U.S. 1 (1968), the court held if an initial stop is justified a police officer may make a reasonable search for weapons without violating the Fourth Amendment, regardless of whether he or she has probable cause to arrest the individual, if the circumstances lead the officer to reasonably believe that his or her safety or the safety of others is at risk. The Washington Constitution affords greater privacy protection than the Fourth Amendment.

In Washington, the State must show "(1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes." Here, it is a verity that the stop was appropriate. The sole issue is if a reasonable safety concern exists justifying the frisk. The court apparently determined the officers conducted a general search rather than a frisk for articulable suspicion of a weapon.

Here, agents were trying to make a felony warrant arrest of Kheng Xiong. While Bee Xiong informed the agents he was not Kheng Xiong, he lacked identification. An agent handcuffing Bee Xiong saw a large bulge in Bee Xiong's pocket. Concerned the bulge was a weapon, the officer touched the bulge and felt a hard object. Bee Xiong suspiciously pulled away so the agent could not feel the object any further. At this point, the agent did not know if his suspect was Bee or Kheng Xiong. Agents testified they feared for their safety, and explained that even a

handcuffed suspect is a risk if armed. Further, the handcuffs would eventually have to come off, whether he was ultimately arrested or not.

Given the similarity in appearance between Kheng Xiong and Bee Xiong, the time necessary to clarify their initial identification, Bee Xiong's location at Kheng Xiong's home, the bulge in Bee Xiong's pocket, his reaction when an agent tried to touch it, and the officer's stated safety concerns, the agent was justified in frisking Bee Xiong's pocket. Based on the hardness and shape of the object, the agent was justified in pulling the object out.

In sum, given the propriety of the initial stop and the stated need to dispel the agent's safety concerns during the ensuing investigation, the evidence seized incident to Bee Xiong's arrest was incorrectly suppressed under well established principles governing frisks during investigatory stops.

[Some citations omitted]

DISSENT BY JUDGE SCHULTHEIS: (Excerpted from Judge Schultheis' dissent)

The trial court found that [Officer A] "wondered if" the bulge in Bee Xiong's pants was a weapon and "assumed" it was. The trial court also found a lack of evidence from which [Officer A] could reasonably infer that Mr. Xiong was armed and dangerous. The State does not challenge either finding. The court concluded that these were insufficient articulable facts upon which to base a reasonable belief that Mr. Xiong was armed and dangerous.

The State's appeal is based on a superfluous finding that essentially sets forth the trial court's opinion as to what the officers should have done under the circumstances presented-refrain from searching Mr. Xiong (because the officers were not justified in believing that Mr. Xiong was armed and presently dangerous to the officer or to others), and complete the process of identifying Mr. Xiong, which would have resulted in his release once his identity was confirmed. Because I believe this unnecessary finding is not a legitimate ground for appeal and it has no bearing on the court's ultimate conclusion that there were insufficient articulable facts upon which to base a reasonable belief that Mr. Xiong was armed and dangerous, I must respectfully dissent.

[Officer A] never testified that he was fearful or that he believed that Mr. Xiong posed a threat; only that he *justified* the search for officer safety reasons. He stated that, based on his experience, it is possible for *someone* to get a weapon while handcuffed-even when the person is handcuffed in the back as Mr. Xiong was restrained. But he did not associate that concern to Mr. Xiong under these circumstances. [Officer B] testified that he was *not "immediately concerned"* because Mr. Xiong was handcuffed. But he told [Officer A] to take the object out of Mr. Xiong's pocket if he felt "anything that could have been a weapon" because he knew that eventually Mr. Xiong would be uncuffed and he did not want Mr. Xiong to have access to any weapons *in the future*. [Officer A]'s lack of true concern is highlighted by his leisurely response to the bulge in Mr. Xiong's pocket.

[Officer A] testified that Mr. Xiong was immediately handcuffed when he could not produce identification to prove that he was not Kheng Xiong. It was later, when [Officer A] and four other officers were deciding how to identify Mr. Xiong, that he saw the "fairly large" bulge that made Mr. Xiong's right front pocket "a little bit

bulky.” [Officer A] asked Mr. Xiong what was in his pocket (although he does not recall Mr. Xiong's response); he touched the bulge and noted that it was hard. After Mr. Xiong pulled away to prevent further contact, [Officer A] asked Mr. Xiong whether the pocket contained anything that could hurt [Officer A] and whether he could reach into Mr. Xiong's pocket. Mr. Xiong responded that he did not have any weapons and he did not want to be searched. [Officer A] then again felt the object in Mr. Xiong's pocket, squeezing a bit harder. He noted it was “definitely a hard object” and concluded it was a “potential weapon.” He conferred with the other officers and decided to search Mr. Xiong for weapons.

Thus, [Officer A] saw the bulkiness, asked about it, felt it, asked if it was a weapon, asked Mr. Xiong if he could search, felt it again, and discussed it with the other officers on the scene before it was determined that Mr. Xiong would be searched. But he never expressed fear. And his attempts to persuade Mr. Xiong to consent to a search and to reveal the contents of his pockets are also indicative of some uncertainty in the officer's justification to proceed with a search.

Further, the record shows that 10 or 15 minutes after the contraband was found, Mr. Xiong's mother arrived and identified him as Bee Xiong, not Kheng Xiong. [Officer A] testified that if Mr. Xiong's mother arrived to identify her son at any time prior to the search, he probably *would not have continued the search* because, in his words, “my concern partially with the weapon is that he had a *felony warrant*.”

The trial court correctly ruled that [Officer A]'s generalized suspicion of wondering if Mr. Xiong had a weapon was insufficient to meet the legal test for a limited weapons search. A weapons frisk may be undertaken if the officer can point to particular facts from which he reasonably inferred that the specific individual to be searched was armed and presently dangerous under the circumstances.

In its oral opinion, the trial court relied on State v. Galbert, 70 Wn. App. 721 (1993) **March 94 LED:17**. In Galbert, an officer handcuffed and frisked Mr. Galbert for officer safety reasons while police executed a search warrant. Once the officers had the residence secured, the officer returned to frisk Mr. Galbert again. As in this case, a lump was detected, which the officer testified could have been an “ ‘extremely small’ “ gun or some other weapon. Also as in this case, the officer testified that some persons have been able to reach their pockets when handcuffed.

Division One of this court held that because Mr. Galbert was restrained and there was no indication that he made any gestures or threats, the State could not show that he was presently dangerous. Significantly the trial court made no finding that Mr. Galbert posed a threat to the officer. The same is true here. Since there was no evidence that Mr. Galbert could reach his pocket, or that he made any attempt to do so, any safety concern based on the fear that he would attempt to access a weapon in his pocket lacked an objective basis and was therefore unreasonable. Moreover, here, even if a safety concern were justifiable, the only evidence dealt with the future, not with present dangerousness.

[Some citations omitted]

ARREST AND SEARCH-INCIDENT OF MV PASSENGER NOT WEARING SEATBELT HELD JUSTIFIED BASED ON HIS GIVING THE OFFICER A FALSE NAME AND FALSE DOB

State v. Malone, 136 Wn. App. 545 (Div. III, 2007)

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

A state patrol trooper followed a car for several miles. He pulled it over for failing to keep right except to pass. Mr. Malone sat in the backseat of the car. The trooper noticed that Mr. Malone was not wearing a seat belt. He asked Mr. Malone for identification. Mr. Malone gave a false name and date of birth. The trooper discovered the name Mr. Malone gave was false. Mr. Malone admitted as much and said he had done so because he had a warrant out for his arrest. The trooper arrested Mr. Malone for obstructing him in the performance of his duty and searched the car incident to the arrest. He found prescription pills and drug paraphernalia. The trooper then arrested Mr. Malone for possession and took him to jail. The booking officers searched him and found a small amount of methamphetamine in the coin pocket of his jeans.

The State charged Mr. Malone with possession of methamphetamine.

He moved pretrial to suppress the drug evidence for the possession charge on the grounds the seat belt infraction was bogus and the detention and search exceeded the lawful scope of the stop. The State defended the stop and argued to admit the drugs based on the search incident to arrest. The court denied the motion to suppress.

A jury found Mr. Malone guilty as charged.

ISSUE AND RULING: Where defendant, a vehicle passenger who had violated the seat belt law, gave a false name and birth date in response to the officer's inquiry, was the officer authorized to arrest defendant and search him incident to that arrest? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction of Michael E. Malone for possession of methamphetamine (under the facts arising from the stop at issue here) and delivery (under the facts arising from other incidents not described in this LED entry).

ANALYSIS: (Excerpted from Court of Appeals opinion)

A seat belt violation is a civil infraction, not a criminal offense. RCW 46.61.688. Certain traffic violations may be grounds for arrest. But Mr. Malone is correct that a seat belt infraction is not one of them. RCW 10.31.100. Mr. Malone had to identify himself, however, and give a current address when asked by this trooper investigating a misdemeanor. RCW 46.61.021(3), .022; State v. Chelly, 94 Wn. App. 254 (Div. I, 1999) **April 99 LED:03**. Mr. Malone, as a passenger, may not have had to carry a license or any other identification. State v. Cole, 73 Wn. App. 844 (1994). He did, however, have to give his real name and current address when asked to do so and sign a receipt for the notice of infraction. RCW 46.61.021(3). "The requirement that one identify himself pursuant to an investigation of a traffic offense includes passengers of a vehicle stopped for a traffic infraction where the officer has an independent basis, such as a safety belt violation, for requesting a passenger's identification." Chelly. Police may detain

a person for a seat belt traffic infraction for a reasonable period of time to identify the person, check for outstanding warrants, and to issue a notice of infraction. RCW 46.61.021(2). But a lawful custodial arrest must be supported by probable cause.

Mr. Malone gave a false name and birth date in response to the trooper's lawful inquiry. This hinders the police in the discharge of their duties. State v. Contreras, 92 Wn. App. 307 (1998) **March 99 LED:10**. This is the offense of obstructing and provides probable cause for arrest. RCW 9A.76.020(1). The trooper lawfully arrested Mr. Malone for obstructing. He was, accordingly, lawfully searched incident to the arrest.

Judge Schultheis dissents on the procedural issue not related to the search-and-seizure issue described in this **LED** entry.

LED EDITORIAL COMMENT: We believe that in this circumstance of a suspect lying to an officer, instead of charging obstructing under RCW 9A.76.020, it would have been more appropriate to charge under RCW 9A.76.175 ("Providing a false or misleading statement to a public servant") - - see State v. Williamson, 84 Wn. App. 37 (Div. II, 1996) April 97 **LED:19**.

NEXT MONTH

The June 2007 **LED** will include Part Two of our 2007 Washington Legislative Update, and, if space permits, entries on recent appellate court decisions. Part One of our 2007 Washington Legislative Update appeared in the March 2007 **LED**.

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>]