



Law Enforcement

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Digest

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

LED INTRODUCTORY EDITORIAL NOTE: In the May 2007 LED, we digested the Seventh Circuit U.S. Court of Appeals decision in Joggi v. Voges, 480 F.3d 822 (7th Cir. 2007) in which that Court ruled that a local government law enforcement agency can be civilly liable under the Federal Civil Rights Act 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. The Ninth Circuit has now issued the decision digested below that disagrees with the Seventh Circuit and holds against application of civil liability under the Federal Civil Rights Act based on violation of the treaty.

(1) **“VIENNA CONVENTION ON CONSULAR RIGHTS” – CIVIL RIGHTS ACT LIABILITY HELD NOT TO BE POSSIBLE FOR POLICE VIOLATION OF THIS TREATY** – In Cornejo v. County of San Diego, __ F.3d __, 2007 WL 2756964 (9th Cir. 2007) (decision filed September 24, 2007), the U.S. Court of Appeals for the Ninth Circuit holds that an alien (citizen of another nation) may not 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. With respect to consular notification, there are two groups of nations. Citizens of countries of one group (including 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 from the other group of countries (including 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.

The Ninth Circuit explains that almost all federal circuit courts have addressed the Vienna Convention, but most of them 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 remedy or a dismissal remedy in those criminal cases.

Last year, the U.S. Supreme Court avoided deciding 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 (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 can be a factor in determining whether a confession was voluntary.

Currently pending review in the U.S. Supreme Court (oral argument presented October 10, 2007) is the case of Medellin v. Texas, involving a rapist murderer sentenced to death in Texas. Mr. Medellin’s right to consular notice was violated by the arresting-interrogating officers who did comply with Miranda in obtaining a voluntary confession. The highest appellate court in Texas ruled in that case that a decree from President Bush, directing the 50 states to comply with a U.N. International Court ruling need not be complied with by the courts of the states. The

International Court case (Mexico v. U.S.) involved numerous Texas death row inmates who are citizens of Mexico. In a ruling that appears to be as much (or more) about the death penalty as about consular contact rights, the International Court ruled that the United States must provide a remedy to the death row inmates whose treaty rights were violated. No American court has yet ruled that the ruling of the International Court (or the decree by President Bush) must be followed.

The Cornejo Court in effect concludes that the treaty is enforceable only between nations participating under the treaty, but it is not individually enforceable, in either a civil or criminal context, by aliens of those nations in state or federal courts in the United States.

Result: Affirmance of U.S. District Court (Southern District of California) dismissal order.

LED EDITORIAL NOTES 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).

In addition to the May 2007 LED digesting the Seventh Circuit Joggi decision, 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 Joggi 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).

(2) **FBI AGENT'S UNDERCOVER INVESTIGATION OF NAMBLA FOUND LAWFUL** – In U.S. v. Mayer, ___ F.3d ___ 2007 WL 2694846 (second amended decision filed September 17, 2007) (9th Cir. 2007), the Ninth Circuit holds, under the particular facts of the case before the Court, that the investigative methods used by an undercover FBI agent did not violate the law or otherwise provide a basis for setting aside the federal conviction of Jeffrey T. Miller for international travel with intent to engage in illegal sexual conduct (with underage boys).

An FBI agent infiltrated the North American Man/Boy Love Association (NAMBLA). The agent's investigation led to the U.S. attorney charging and convicting defendant for arranging to travel to Mexico to engage in sex with underage boys. In extensive analysis not excerpted or summarized in this **LED** entry, the Ninth Circuit opinion rejects the defendant's arguments that: 1) the FBI agent's investigation violated the defendant's First Amendment right of association as a member of an association; 2) the Fourth Amendment required the FBI to have reasonable suspicion before investigating and organization whose members oppose sexual age-of-consent laws; 3) the FBI agent exceeded the scope of consent in his "invited informer" role in infiltrating NAMBLA; and 4) the nature of the FBI agent's relationship with the defendant constituted outrageous governmental misconduct.

Result: Affirmance of U.S. District Court conviction of David Cary Mayer of travel with intent to engage in illicit sexual conduct.

WASHINGTON STATE SUPREME COURT

FOURTH AMENDMENT PARTICULARITY REQUIREMENT NOT MET BY WARRANT TO SEARCH FOR EVIDENCE OF CRIMINAL ACTIVITY RELATING TO "CHILD SEX"

State v. Reep, ___ Wn.2d ___, ___ P.3d ___, 2007 WL 2793170 (2007)

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

On June 11, 2004, emergency personnel responded to an explosion and fire in the backyard of the Reep residence. The residence is home to Irvin and Charlotte Reep and their adult son, David Reep. David Reep was present and had severe burns on his hands that required treatment at the hospital. The police noted items associated with the manufacture of methamphetamine in the backyard of the residence. The area was sealed off pending application for a search warrant and arrival of a methamphetamine cleanup team.

On the evening of June 11, 2004, Detective [A] spoke to Mr. Reep's parents. The Reeps were informed the fire had appeared to result from a methamphetamine manufacturing process. They told Detective [A] that upon their return from dinner they smelled a strong chemical odor throughout the residence. Detective [A] asked the Reeps if they would show him David Reep's bedroom; he said he planned to do a cursory search for methamphetamine-related items for safety purposes. The Reeps walked Detective [A] through the residence, and Detective [A] said he would include David Reep's bedroom in the search warrant. During his cursory search on the evening of June 11, Detective [A] did not inspect the computer in David Reep's bedroom.

Detective [B] applied for and obtained a telephonic search warrant for the backyard of the residence and David Reep's bedroom from Judge Carolyn Brown. On June 12, 2004, a team of officers arrived to execute the search warrant and clean up the methamphetamine lab. While executing the search warrant in David Reep's bedroom, Detective [A] found a "collage" of cut-out magazine pictures of young girl models, including a "naked picture of a young female." Detective [A] proceeded to look at items saved on the computer in David Reep's room, initially looking for a methamphetamine recipe or other items

relating to violations of the Uniform Controlled Substances Act, chapter 69.50 RCW. After seeing several images *[Court's Footnote: Detective [A] described the pictures on David Reep's computer as "what appeared to be illicit photo's [sic] of young children with out their knowledge" and "pornographic pictures of young girls conducting sex acts that also appeared to be graphically simulated."]* on the computer he considered suspicious of criminal activity unrelated to violations of the Uniform Controlled Substances Act, Detective [A] decided to shut down his search and apply for another telephonic search warrant.

Detective [A] prepared a script for his telephonic search warrant application. He then recontacted Judge Brown by phone and applied for another telephonic search warrant by reading from his prepared script. Judge Brown orally authorized a second search warrant. Pursuant to that authorization, Detective [A] prepared a telephonic search warrant form.

Due to technical difficulties, the conversation between Detective [A] and Judge Brown never recorded. Detective [A] saved the script he read to Judge Brown in applying for the warrant. The State has stipulated Judge Brown has no current recollection of the contents of Detective [A]'s telephonic search warrant application.

David Reep was charged with one count of unlawful possession of controlled substance with intent to deliver. He pleaded guilty and was sentenced for that charge. Subsequent to his guilty plea and sentencing, David Reep was charged with four counts of voyeurism in violation of RCW 9A.44.115(2)(a). Such charges resulted from several photographs of four young girls taken by David Reep and saved on his computer. The copies of the photographs from the record are of poor quality so the images are blurry and undefined. They appear to depict young children, fully clothed and engaging in unremarkable activities such as sitting on trampolines or walking near basketball hoops in the fenced backyards of Mr. Reep's neighbors' homes. The photographs were taken from a distance so the images of the children themselves are quite small.

All of the photographs were taken without the knowledge and consent of the persons photographed. David Reep admitted the photographs were taken for the purpose of arousing or gratifying his sexual desire. He took all of the photographs from the premises of his parents' residence, where he was living at the time. Three were taken from his parents' driveway, three were taken from his parents' garage, and one was taken from the Reeps' second floor bedroom window. The children photographed were located in the backyards behind the three residences immediately north of the Reep residence on the same side of the street. The backyards of the three residences are enclosed by one six-foot-high, solid wood fence. The middle yard is separated from the two adjoining yards by chain link fencing, such that the three yards are visible to one another and resemble a single enclosed "compound."

Following a bench trial on stipulated facts, the trial judge found David Reep guilty of all four counts of voyeurism.

Wording of the Warrant's Search Authorization: (Excerpted from the lead opinion of the Supreme Court)

The search warrant at issue authorized seizure of any evidence supporting the suspected criminal activity of "Narcotics/Child Sex." Specifically, the warrant provides:

Detective [A] of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: **Narcotics/Child Sex**, namely:

Muratic Acid, Tulane, Metal Bowls, Burners, Glassware, And Other Precursors Consist [sic] With The Production Of Meth; And Any Data Storage Devices to Include A Computer And Its Hardware, Compact Discs, Floppy Discs, Portable Storage Units Such As USB [universal serial bus] Accessible Devices, Digital Cameras, Video Cameras, Photographs, Any Documentation of Criminal Activity By the Suspect And Other Evidence Not Listed that Support the Suspected Criminal Activity.

(Emphasis added)

ISSUE AND RULING: Does the authorization in the warrant to search for suspected criminal activity of "child sex" meet the particularity requirement of the Fourth Amendment of the U.S. Constitution? (**ANSWER:** No)

Result: Reversal of Franklin County Superior Court convictions of David Garrett Reep for four counts of voyeurism in violation of RCW 9A.44.115(1) for taking pictures of children playing in the fenced backyards of his neighbors.

ANALYSIS: (Excerpted from Supreme Court lead opinion)

"The Fourth Amendment mandates that warrants describe with particularity the things to be seized." State v. Riley, 121 Wn.2d 22 (1993) **July 93 LED:10**. Specifically, the Fourth Amendment provides, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Conformance with the particularity requirement "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." State v. Perrone, 119 Wn.2d 538 (1992) **Nov 92 LED:04**. "The underlying measure of adequacy in the description is whether given the specificity in the warrant, a violation of personal rights is likely."

In Perrone, the defendant was charged with one count of dealing in depictions of minors engaged in sexually explicit conduct, RCW 9.68A.050(2), and one count of possession of depictions of minors engaged in sexually explicit conduct, RCW 9.68A.070. The defendant challenged the validity of the search warrant authorizing seizure of " '[c]hild or adult pornography.' "

The Perrone court struck down the warrant for insufficient particularity, noting "child pornography, like obscenity, is expression *presumptively protected* by the First Amendment." And "[w]here a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater than in the case where the materials sought are not protected by the First Amendment." Stated another way, such warrants must

follow the Fourth Amendment's particularity requirement with " 'scrupulous exactitude.' "

Per the United States Constitution's demand for increased particularity, this court pronounced the term " 'child . . . pornography' " invalid for insufficient particularity as it left the officer with too much discretion in deciding what to seize under the warrant. The court observed the term "is an 'omnibus legal description' and is not defined in the statutes." Furthermore, reasoned the court, " 'child . . . pornography' " is analogous to " 'obscenity,' " a term insufficiently particular to satisfy Fourth Amendment standards.

Turning to the search warrant in the present case, the fictitious crime of "child sex" is even broader and more ambiguous than the term "child . . . pornography." Consequently, the warrant allows the officer unbridled discretion to decide what things to seize and most critically, permits the seizure of items which may be constitutionally protected, such as pornographic drawings of children. As such, the warrant at issue fails for insufficient particularity.

The State contends that even if the second warrant is invalid for particularity, the evidence should not be suppressed because "[a]s a practical matter, the second warrant did not expand the scope of the search" and that the "first search warrant . . . authorized the search of everything in Mr. Reep's bedroom, including his personal computer." The State continues, "[i]t is not . . . necessary for officers to discontinue a search and apply for another warrant when they encounter evidence of a crime other than the one originally being investigated." State v. Olson, 32 Wn. App. 555 (1982).

In Olson, the Court of Appeals concluded that because officers were authorized to search for marijuana pursuant to a valid search warrant, they "were authorized to inspect virtually every aspect of the premises" and "[a]ny other contraband inadvertently found in the course of such lawful search would clearly be subject to seizure pursuant to the 'plain view' doctrine." The "plain view" doctrine is an exception to the warrant requirement. "The requirements for plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him." "The second prong, inadvertent discovery, is no longer a requirement to establish the plain view exception under the Fourth Amendment."

The State's argument that the evidence was properly seized pursuant to the "plain view" exception is unpersuasive. First, this court has not addressed the question of "what constitutes 'plain view' in the context of computer files," United States v. Carey, 172 F.3d 1268, 1273 (10th Cir.1999), and since the parties have not briefed the issue, this is not an opportune case in which to resolve it. Second, the evidence supporting Mr. Reep's convictions for voyeurism was *not* seized by Detective [A] pursuant to the "plain view" exception while he searched the premises pursuant to the first search warrant. Instead, the evidence was seized while Detective [A] was operating under the invalid *second* search warrant authorizing seizure of all items related to "child sex."

[Some citations omitted]

CONCURRING OPINION: Justice James Johnson files a concurring opinion, not joined by any other justice, in which he asserts that the Court should have suppressed the evidence because the tape recording failed on the detective's application for the second search warrant, and that the Court should not have reached the Fourth Amendment particularity issue on the second warrant. But Justice Johnson also asserts that he agrees with the lead opinion's particularity analysis.

LED EDITORIAL NOTE: Other challenges raised by defendant but not addressed in the Supreme Court's lead opinion are (1) the State's first search warrant violated the Fourth Amendment's requirement for particularity, (2) RCW 9A.44.115 is unconstitutionally vague as applied to Mr. Reep's conduct; (3) RCW 9A.44.115 is unconstitutionally overbroad; (4) the trial court erroneously concluded the photographed children were located in a place where they had a "reasonable expectation of privacy" within the meaning of RCW 9A.44.115(1)(c)(ii).

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

USE OF ADMINISTRATIVE SUBPOENA TO OBTAIN SUBJECT'S BANK RECORDS VIOLATES ARTICLE 1, SECTION 7, OF WASHINGTON CONSTITUTION - In State v. Miles, 160 Wn.2d 236 (2007), the Washington State Supreme Court holds that an agency's use of an administrative subpoena pursuant to chapter 21.20 RCW (Securities Act of Washington), rather than a search warrant or judicially issued subpoena, violates the subject's privacy rights under article I, section 7, of the Washington State Constitution.

Result: Reversal of King County Superior Court order denying motion of Michael M. Miles to suppress evidence obtained from a bank by administrative agency subpoena. Case remanded for trial or other action consistent with the Supreme Court's decision.

LED EDITORIAL COMMENT: The Miles decision will probably not have a direct impact on Washington law enforcement officers because in our opinion Washington law enforcement officers may not obtain administrative subpoenas. Rather they must seek a warrant from a court. Washington law enforcement agencies do, however, often receive information from other agencies that has been obtained through administrative subpoenas. Such instances may create problems in light of Miles, but the occurrence of such instances should decrease over time given the Miles decision.

WASHINGTON STATE COURT OF APPEALS

CAR FRISK UPHOLD WHERE OFFICER-SAFETY CONCERNS WERE BASED ON A 7-YEAR-OLD CHILD'S REPORT THAT A CAR'S DRIVER HAD POINTED A GUN AT THE CHILD; COURT ALSO RULES THAT SEARCH WAS CONDUCTED "INCIDENT TO ARREST" (BUT THIS ALTERNATIVE RULING IS QUESTIONABLE UNDER THE DEFINITION OF "ARREST" INDICATED IN STATE v. RADKA AND STATE v. O'NEILL PRECEDENTS)

State v. Glenn, ___ Wn. App. ___, 166 P.3d 1235 (Div. I, 2007)

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

J.K., a seven-year-old boy, told his mother that a man in a passing car had pointed a gun at him from the car window, while he was playing outside. His mother called the police. She saw a car matching J.K.'s description, copied the license plate number, and reported the incident along with the license plate number to the police. King County Sheriff's Officers Minshull and Graf responded to the call. While they interviewed J.K., he pointed at a passing car, and said without any questioning that it was the same as the one from which the man had pointed a gun. When Minshull then asked him if it was the car, J.K. replied, "Yes." The officers chased the car down in separate patrol cars, stopping it within three blocks of the boy's home. They found that the plates matched the plates reported by J.K.'s mother. Both deputies testified that they were certain that they had stopped the same car identified by J.K.

Officers Minshull and Graf drew their weapons and ordered the driver, Glenn, out of the car. The officers testified that Glenn made no furtive or threatening movements as he exited the car, and that he got down on his knees as ordered. Glenn was handcuffed, read his Miranda rights, and placed in the patrol car. He waived his Miranda rights, and said that he was the only person who operated the car. Officer Minshull remained with Glenn while Officer Graf went back to J.K.'s residence to find the eyewitness for identification. Officer Minshull searched Glenn and found over \$1,100 cash in his wallet. He did not find a gun on Glenn's person.

King County Sheriff Officers Conner and Paul arrived at the scene as Glenn was being removed from his car. The officers testified that as they approached the open driver-side door of the car, they smelled marijuana. Officers Conner and Paul searched the unlocked portions of the passenger compartment, testifying that the primary purpose of their search was to ensure officer safety. They also testified that a warrantless search is routine where there is a credible allegation that a suspect may have a firearm. Officer Conner testified that it was his subjective belief, based on the eyewitness report, that this was a high-risk weapons stop. They wanted to search for the gun before they returned Glenn to his car. They did not find a gun in his car or in the vicinity. However, the search did reveal 250 grams of marijuana under a sweatshirt, on the floor behind the passenger seat. Officer Paul testified that it took about thirty seconds to find the marijuana, and that before that discovery, Glenn had only been in custody for two to three minutes. The officers testified that they would have returned Glenn to his car if they had not found the marijuana.

Glenn was arrested for possession of marijuana with intent to distribute. He was charged with one count of Violation of the Uniform Controlled Substances Act under RCW 69.50.401(a)(1)(iii), and one count of Unlawful Display of a Weapon, under RCW 9A.41.270. Glenn filed a motion to suppress the marijuana, claiming that it was illegally obtained evidence from a warrantless search. At the suppression hearing, the trial court issued an oral ruling denying Glenn's motion, finding that the officers made a "minimally intrusive effort of searching the car to establish whether or not there was a weapon and the marijuana was discovered in the course of that search. It was in a place and location that was necessary to review to see if a weapon was present." Following this hearing, a bench trial was

held in which Glenn was acquitted of the firearm charge and convicted of unlawful possession of more than 40 grams of marijuana.

ISSUES AND RULINGS: 1) Did the child's report that a car's driver pointed a gun at the child justify a frisk of the passenger area of the car for the gun? (**ANSWER:** Yes);

2) Where the officers had probable cause to arrest Glenn for unlawful display of a weapon and at gunpoint ordered him out of his car onto his knees, searched his person and wallet, and frisked his car's passenger area for weapons, was Glenn under custodial arrest such that the car frisk could be justified as a search incident to arrest? (**ANSWER:** Yes – but see **LED** Editorial Comment below)

Result: Affirmance of King County Superior Court conviction of Adam George Glenn for unlawful possession of over 40 grams of marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Car frisk for safety reasons

"[A] court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns." State v. Glossbrener, 146 Wn.2d 670 (2002) **Sept 02 LED:07**. A search for a weapon was held lawful under the officer safety exception when the police stopped a vehicle based on a report of drug related activities, and an officer witnessed the driver lean forward in a way that looked like he was hiding something in the front seat of the car. There, the officer safety exception applied so long as the search was limited to the areas within the suspect's immediate control. The same concerns also justified a similarly limited search when a suspect was pulled over for a mangled license plate, and leaned forward as if to place something under the seat. State v. Watkins, 76 Wn. App. 726 (1995) **April 95 LED:02**.

Similar furtive movements also justified a search, when an officer, in pursuit of a speeding driver, witnessed the suspect lean forward and make movements towards the floorboard of his truck. State v. Larson, 88 Wn. App. 849 (2007) **Feb 98 LED:05**. Once the vehicle was pulled over, the driver was ordered out of his truck. However, in order to facilitate the traffic stop investigation, the driver needed to return to his vehicle to obtain his registration. To ensure that there were no accessible weapons in the vehicle, the officer "stuck his head in the cab of the truck through the open door to visually inspect the area around the driver's seat," and found drug paraphernalia. Based on the officer's observations of the driver's furtive movement and the need for him to return to his vehicle, this court held that the officer's concerns for his safety were objectively reasonable. As such, his search was lawful under the officer safety exception and proper in scope.

In contrast, a search is not lawful under the officer safety exception if there are no reasons to believe that a suspect is armed and dangerous and no need for the suspect to return to the car to facilitate the investigation for a traffic stop. Glossbrener (disallowing an officer safety exception when the suspect was pulled over for a headlight infraction and intervening actions rendered a search unreasonable). Further, we concluded that the officer safety exception does not apply when gunshots were heard in a location other than the suspect's vehicle,

he had no companions in the vehicle, he was detained in a police van and there was no need for him to reenter his vehicle to facilitate the investigation. State v. Bradley, 105 Wn. App. 30 (2001) **June 01 LED:10**.

Importantly, in each case, a “determination of the reasonableness of an officer's intrusion depends in some degree on the seriousness of the apprehended criminal conduct. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not.” Additionally, “[t]here is no constitutional violation in allowing a police officer to assume a citizen's report has some basis when he is conducting an initial investigation of that complaint.”

A stop based on a report of a weapon sighting is markedly different from investigative stops based on reports of drug-related activities or traffic infractions. The latter were held lawful based on the suspects' furtive movements and the presence of a passenger or the need to return to the vehicle to facilitate the investigation. But here, because the police received a legitimate citizen's report that a driver had pointed a gun from his vehicle, no furtive movements were necessary to justify the belief that Glenn's suspected misconduct endangered the safety of the officers. Pointing a gun at a victim is serious criminal conduct - the officers testified that they considered this a high-risk weapon stop. Although the police testified that they were not concerned for their safety at the time of the search because Glenn was handcuffed in the police car, they knew they had to return Glenn to his car when they found no weapon on his person. This was a cause for legitimate concern, because of the report that a gun had been pointed *from the car from which they retrieved Glenn*. Based on these circumstances, the officers were reasonable in their belief that a return to his car would have provided Glenn with access to a weapon thereby raising officer safety concerns anew.

This scenario also differs from Bradley, in which the defendant ran from the scene of the crime to his car. Here, the “scene of the crime” was Glenn's car, which reportedly carried him as he pointed a gun out the window. Further, the eyewitness here reported an actual gun sighting, whereas in Bradley, the only report involved hearing gunshots. Securing this scene required searching the car to ensure that no weapon was available to Glenn upon his return to the “scene.” Had the officers returned him to his car with a weapon inside, they would not have been ensuring their own safety, or that of the surrounding community. We conclude that a credible report that a gun has been displayed from a vehicle justifies a search of that vehicle under the officer safety exception to article I, section 7 of our constitution.

2) Search incident to arrest (alternative holding)

“[A] search incident to arrest is valid if there is probable cause to arrest a suspect for the relevant offense at the time of the search, even if the officer does not subjectively consider the suspect formally under arrest but merely detained.” Bradley. Probable cause exists where the facts and circumstances known to the arresting officer are sufficiently trustworthy to cause a reasonable person to believe that an offense has been committed. Division Three of this court, has noted that “[a]ppellate court examinations of the issue of custodial arrest following McKenna have retreated from the consideration of the arresting officer's

intent.” State v. Radka, 120 Wn. App. 43 (2004) **March 04 LED:11** (citing State v. McKenna, 91 Wn. App. 554 (1998) **Oct 98 LED:05**). While the test for probable cause remains the same, Division Three looks to the perception of the detainee to determine whether an arrest is custodial:

rather than the subjective intent of the officer, *the test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest*. Typical manifestations of intent indicating custodial arrest are the *handcuffing of the suspect and placement of the suspect in a patrol vehicle*, presumably for transport.... Telling the suspect that he or she is under arrest also suggests custodial arrest.

Radka. (citing State v. Craig, 115 Wn. App. 191 (2002) **March 03 LED:12** (finding custodial arrest when a detainee is told that he is under arrest and handcuffed)); (citing State v. Clausen, 113 Wn. App. 657 (2002) **Dec 02 LED:17** (finding custodial arrest when a detainee is told he is under arrest and will be released *after* booking). In Radka, the defendant was told he was under arrest and placed in the patrol car, but *without* handcuffs. He was allowed to make numerous cell phone calls while he remained in the car. The court concluded that such circumstances would lead a reasonable detainee to believe that he was *not* under custodial arrest. Consequently, although the officer had probable cause for a custodial arrest of the defendant, the lack of actual custodial arrest rendered the subsequent search of Radka's car unconstitutional. See also State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** (holding that a lawful custodial arrest is a prerequisite to a search since the arrest is the authority of law justifying the search). [*Court's footnote: The O'Neill Court did not engage in analysis of whether the suspect believed he was under custodial arrest. Instead, the court focused on whether he was "seized" for purposes of a Terry stop, concluded that once the officer asked the suspect to step out of his car, a reasonable person would believe that he was not free to leave, and that in fact, a seizure had occurred. The court then turned its attention to the timing of the search, concluding that it was invalid because it occurred before the officer made the arrest. State v. O'Neill, 149 Wn.2d 564 (2003).*]

The circumstances surrounding Glenn's detention are distinguishable from Radka. The citizen's report, combined with the facts and circumstances known to the arresting officers, were sufficiently trustworthy to cause a reasonable person to believe that Glenn had pointed a weapon from his car, and that the same weapon may still be on his person or in the vehicle. It was not found on his person, which suggested the weapon remained in the vehicle. Further, although the officer did not tell him that he was under arrest, and testified that his intent was only to detain him in order to investigate, a reasonable person in Glenn's circumstances would consider himself under custodial arrest and not free to leave. The officers' subjective, unspoken perception that he was not under formal arrest is irrelevant.

The officers had probable cause to arrest Glenn for unlawful display of a weapon and took actions that would lead a reasonable person [in Glenn's circumstances] to believe that he was under custodial arrest. Because the officers had probable cause to search for a weapon, because Glenn would have believed himself to be under custodial arrest, and because they did not unlock and search any locked

containers or a locked glove compartment, we conclude that the search of Glenn's vehicle was a valid search incident to arrest.

[Some citations omitted]

LED EDITORIAL COMMENT: We think that the Court of Appeals is wrong (or at least oversimplified in its analysis) in its alternative holding that Glenn was under custodial arrest when the search occurred. We agree with the Court that the test is a reasonableness test – would a reasonable person believe he was under custodial arrest. We think that the Court is wrong, however, in taking probable cause into account in the abstract. We think that where Glenn was not told that he was under arrest or handcuffed prior to the search, there was no custodial arrest for purposes of the search incident to arrest rule delineated by the Washington Supreme Court in State v. O'Neill (April 2003 LED) and by the Washington Court of Appeals in State v. Radka (March 2004 LED).

One problem with the Glenn Court's ruling that a custodial arrest occurred here is that a ruling will lead to defense attorneys arguing that officers must have probable cause to arrest in order to conduct guns-drawn high risk stops. Case law supports making such stops based on reasonable suspicion, see State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March 96 LED:09, but we predict confusion in the courts because of the Glenn Court's alternative holding.

PARENTS OF ADULT SON LOSE VEHICLE DRUG-FORFEITURE CASE WHERE THEY RAISED INNOCENT OWNER DEFENSE AS TO TWO FAMILY CARS

In re the Forfeiture of One 1970 Chevrolet Chevelle, ___ Wn. App. ___, 167 P.3d 599 (Div. I, 2007)

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

On June 10, 2005, a Lynnwood police officer observed 24-year-old Thomas Roos unconscious in the driver's seat of a 2004 Nissan Sentra parked in a carwash parking lot. The Nissan was registered to Alan and Stephne Roos. The officer roused Thomas and arrested him on suspicion of driving while under the influence. A search of the Nissan incident to that arrest uncovered various controlled substances, including methamphetamine and oxycodone pills, as well as drug paraphernalia, \$21,406 in cash, and a notebook containing a list of names and corresponding sums of money. Thomas was booked into the Snohomish County Jail on the charge of manufacture, delivery, or possession with intent to deliver a controlled substance. A friend of Thomas's posted bail for him and secured his release. *[Court's footnote: The Nissan was impounded when Thomas was arrested. A notice of impound was mailed to Alan and Stephne's home address, and a voicemail message regarding the impound was left on their home voicemail system. After Thomas was released from jail, however, he retrieved the Nissan from the impound yard and intercepted the notices of impound before they reached Alan and Stephne.]*

On July 3, 2005, a police officer pulled Thomas over while he was driving a friend's vehicle, and arrested him for driving with a suspended license. A subsequent search of the vehicle pursuant to a search warrant uncovered a large quantity of controlled substances including methamphetamine, cocaine, and oxycodone pills. The search also uncovered drug paraphernalia, \$5,266 in cash,

a drug ledger, and a licensing renewal notice for the Nissan which bore the handwritten notation, "For Tom." Thomas was booked into the Snohomish County Jail for felony possession of methamphetamine. Stephne was notified of Thomas's arrest, and arranged to have bail posted for his release. Stephne testified that she also learned of Thomas's prior arrest at that time, and that some drugs were involved. The bail bond documents signed by Stephne did not list the offenses with which Thomas was being charged.

On August 16, 2005, a police officer observed Thomas again unconscious in the driver's seat of the Nissan. The vehicle was parked in a convenience store parking lot with the engine running. The police officer roused Thomas and arrested him on suspicion of driving while under the influence. The police officer conducted a search of Thomas and the vehicle incident to that arrest, which uncovered a large quantity of controlled substances, including a baggie containing 77 oxycodone pills and a 110-gram brick of cocaine. The search also uncovered \$6,600 in cash and a large quantity of various personal items belonging to Thomas, which filled between five and eight large trash bags. Thomas's brother drove by the scene of the arrest while it was underway, and subsequently notified Alan of the unfolding events. Alan then proceeded to the scene where police officers informed him that Thomas was being placed under arrest and showed him the items uncovered during the search of the Nissan.

The SRDTF then seized the Nissan pursuant to RCW 69.50.505, the seizure and forfeiture provision of the Uniform Controlled Substances Act. Thomas was booked into the Snohomish County Jail for possession of a controlled substance. Stephne subsequently posted bail for Thomas and secured his release. The bail bond documents signed by Stephne identify the charge against Thomas as "poss of cont sub x2."

On September 9, 2005, a police officer observed Thomas unconscious in the driver's seat of a 1970 Chevrolet Chevelle, registered to Stephne, while the vehicle was parked in a convenience store parking lot. After rousing Thomas, the police officer ran a check on Thomas's name and learned of the existence of an outstanding warrant for his arrest. The police officer arrested Thomas and conducted a search incident to that arrest. The search of Thomas uncovered several controlled substances, including 38 oxycodone pills, as well as drug paraphernalia and \$1,530 in cash. A subsequent search of the vehicle pursuant to a search warrant uncovered additional controlled substances, including several more oxycodone pills, 4.8 grams of cocaine, additional drug paraphernalia, and a large quantity of various personal items belonging to Thomas, which filled between five and eight large trash bags. The SRDTF then seized the Chevrolet pursuant to RCW 69.50.505.

The SRDTF subsequently sought forfeiture of both the Nissan and the Chevrolet. Alan and Stephne filed claims for return of the vehicles, asserting that they were subject to the "innocent owner" exception to the vehicle forfeiture provision. RCW 69.50.505(1)(d)(ii). Alan and Stephne claimed that they gave Thomas permission to use both vehicles temporarily, but that they did not know that Thomas was using the vehicles for illegal purposes.

A hearing was held before a designated hearing officer for the Snohomish County Sheriff. Alan, Stephne, and Thomas all testified. The hearing officer

found that the SRDTF had proved by a preponderance of the evidence that both vehicles were used to facilitate drug trafficking, subjecting the vehicles to forfeiture pursuant to RCW 69.50.505. The hearing officer further found that Alan and Stephne had failed to prove that they were entitled to the benefit of the “innocent owner” exception to the vehicle forfeiture provision of the statute. Accordingly, the hearing officer ordered the vehicles forfeited.

Alan and Stephne petitioned for judicial review by the Snohomish County Superior Court, which affirmed the order of forfeiture. The superior court noted that a vehicle is subject to forfeiture pursuant to RCW 69.50.505 when the vehicle is used to facilitate the “receipt” of drugs. *[Court’s footnote: As herein discussed, the forfeiture statute states that vehicles “which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt” of drugs are subject to forfeiture. RCW 69.50.505(1)(d) (emphasis added).]* Accordingly, the trial court interpreted the statute to require only that such a vehicle be used to acquire possession of drugs, rather than to facilitate the sale or delivery of drugs. The trial court concluded that substantial evidence supported a finding that Alan and Stephne knew or should have known that Thomas was using the vehicles to acquire possession of drugs.

ISSUE AND RULING: Does substantial evidence support the hearing officer’s finding of fact that Allen and Stephne Roos knew or should have known that their adult son was using their cars to facilitate the receipt of controlled substances? (**ANSWER:** Yes)

Result: Affirmance of Snohomish County Superior Court decision affirming the hearing officer’s forfeiture ruling.

ANALYSIS: A vehicle is subject to forfeiture under RCW 69.50.505 of the Uniform Controlled Substances Act if it is used “to facilitate the sale, delivery, or receipt of controlled substances” except under certain circumstances. One exception is known as the “innocent owner” exception, where the vehicle is so used “without the owner’s knowledge or consent.” The Court of Appeals explains its view (under analysis not excerpted or discussed in this **LED** entry) 1) that the “knowledge” standard for the innocent-owner affirmative defense is met only if the person asserting it can show that a reasonable person making reasonable inquiry would not have known of the illegal use of the vehicle; and 2) that using a vehicle to facilitate the “receipt” of controlled substances subjects the vehicle to forfeiture regardless of the purpose for which the controlled substances are acquired (the Court distinguishes mere possession of controlled substances while in a vehicle - - which does not justify forfeiture - - from the use of a vehicle to receive or sell or deliver controlled substances - - which does justify forfeiture).

The Court’s analysis of whether substantial evidence supports the hearing officer’s findings on the “innocent owner” defense is as follows:

In finding that Alan and Stephne knew or should have known that Thomas was using their vehicles for illegal purposes, the hearing officer elaborated as follows:

The Hearing Officer is left with the belief that Alan and Stephen Roos learned of Thomas’ June 10, 2005 arrest and incarceration on or about July 3, 2005, when he was arrested for the second time. From that point on, they knew of his involvement with drugs. How many specifics they learned from the bail bond company is

not at all clear, although it does stretch credibility to say that the bonding agent would not tell Stephne what her son had been arrested for.

The hearing officer further found:

If you know that your son was convicted of delivering a controlled substance as a juvenile, your son is being very secretive, your son is not living at home, your son has been stealing mail and erasing voice mail messages for over two years, your son is unemployed, and as of July 3, 2005, your son has been arrested twice since June 10th with drugs and large sums of cash on his person, how can you ignore the reality and claim to be an innocent owner when he is later arrested and your property is seized? The Roos should have wondered whether and may well have actually feared that Thomas was using their family cars to traffic in drugs. That they failed to effectively stop that use does not make them innocent owners.

These findings are supported by substantial evidence.

Significant testimony presented at the hearing supports the hearing officer's finding that, before the date of the Nissan's seizure, Alan and Stephne knew or should have known that Thomas was using the Nissan for the sale, delivery, or receipt of controlled substances.

Initially, the testimony presented at the hearing established that Alan and Stephne knew, before the Nissan's seizure, that Thomas was using the vehicle as a primary or significant form of transportation. Alan testified that he gave Thomas permission to use the vehicle. Thomas testified that he used the Nissan on a daily basis, and sometimes kept the vehicle for several weeks at a time. Such testimony is also supported by the fact that a large quantity of Thomas's personal possessions were recovered from the Nissan pursuant to a search of the vehicle after its seizure, as well the fact that a registration renewal form for the Nissan, bearing the handwritten notation, "For Tom," was recovered pursuant to a prior search.

The testimony presented at the hearing further established that Alan and Stephne should have known, at the very least, that Thomas was using the Nissan to acquire controlled substances. Initially, Stephne testified that she learned of both Thomas's June 10, 2005, and July 3, 2005, drug-related arrests on July 3, before the events giving rise to the Nissan's forfeiture. Furthermore, as the hearing officer noted, the testimony presented at the hearing established that Alan and Stephne were aware that Thomas was convicted of delivery of a controlled substance when he was a juvenile, that he had been unemployed since 2002, that he was leading a "secretive" life during the summer of 2005, and that "someone" in their household had been intercepting mail and voicemail between 2002 and 2005.

Based on this evidence, Alan and Stephne failed to demonstrate that they did not know, or should not have known, that Thomas was using the Nissan to facilitate the sale, delivery, or acquisition of controlled substances. At a minimum, the information Alan and Stephne did possess, including Thomas's past and present problems with drugs and his unemployed status, would have led a reasonable person to further inquire into the Nissan's use in order to ensure that the vehicle was not being used for an illegal purpose. As herein discussed, Alan and

Stephne's failure to make such an inquiry does not entitle them to benefit from the innocent owner exception.

Accordingly, substantial evidence supports the hearing officer's finding that Alan and Stephne are not innocent owners in regard to Thomas's use of the Nissan. In turn, that finding supports the hearing officer's order forfeiting Alan and Stephne's ownership of the vehicle.

Significant testimony presented at the hearing also supports the hearing officer's finding that, before the date of the Chevrolet's forfeiture, Alan and Stephne knew or should have known that Thomas was using the Chevrolet for the sale, delivery, or receipt of controlled substances.

Stephne testified that, before the date of the Chevrolet's forfeiture, she had twice arranged for bail to be posted for Thomas after he was arrested on drug-related charges. Furthermore, Alan testified that he was present at the scene of Thomas's August 16, 2005 arrest, where police officers both informed him that Thomas was being arrested on drug-related charges and showed him the large quantity of drugs and drug paraphernalia they had discovered in the Nissan. Based on this evidence, at the very least Alan and Stephne knew or should have known that Thomas was using those vehicles to which he had access to acquire possession of controlled substances.

The evidence presented at the hearing also establishes that Stephne knew that Thomas had access to the Chevrolet on September 9, 2005, the date of its seizure. Initially, while Stephne stated that she believed the vehicle to be in a vehicle repair shop as of September 9, 2005, in her claim letter she stated that she had given Thomas permission to use the vehicle for the first time on September 8, 2005. In contrast to both of these statements, Thomas testified that he had retrieved the Chevrolet from the repair shop approximately one and a half weeks before September 9, and had been using the vehicle since that time. He further testified that he kept the vehicle at the Bothell home at which Stephne resided.

Additionally, other evidence presented at the hearing indicated that Thomas made a layaway purchase of custom wheels for the Chevrolet on June 30, 2005, and that the store from which the tires were purchased installed them on the vehicle within six weeks from that purchase. The Chevrolet was equipped with the wheels at the time of the vehicle's seizure on September 9, 2005. Additionally, after the vehicle was seized, police retrieved numerous personal items belonging to Thomas, which filled between five and eight large trash bags. Such evidence indicates that, despite Stephne's claims to the contrary, Thomas was likely using the Chevrolet for several days or weeks before the September 9, 2005 seizure of the vehicle.

Based on this evidence, Stephne has failed to demonstrate that she did not know or should not have known both that Thomas was using the Chevrolet on September 9, 2005, and that he used the vehicle, at a minimum, to acquire possession of controlled substances.

Accordingly, substantial evidence supports the hearing officer's finding that Stephne was not an innocent owner in regard to Thomas's use of the Chevrolet. In turn, that finding supports the hearing officer's order forfeiting Stephne's ownership of the vehicle.

DIVISION THREE ADDRESSES ISSUES REGARDING: 1) RECONSTRUCTION OF TELEPHONIC SEARCH WARRANT AFFIDAVIT; 2) CITIZEN-INFORMANT VERACITY; 3) "ANY AND ALL PERSONS PRESENT" CLAUSE IN SEARCH WARRANT; 4) PLAIN VIEW; AND 5) CONSENT TO SEARCH GIVEN BY UNMIRANDIZED, IN-CUSTODY, SLEEP-DEPRIVED SUSPECT WHOSE INTELLIGENCE AND EDUCATION WERE NOT ADDRESSED IN SUPPRESSION HEARING

State v. Garcia, ___ Wn. App. ___, 166 P.3d 848 (Div. III, 2007)

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

Officer [A] of the Brewster Police Department was contacted by a confidential informant regarding possible illegal activity. According to his affidavit for the search warrant, Officer [A] was told by the confidential informant that the informant observed drugs and underage drinking in one of the rooms at a local motel. The informant told Officer [A] that the room was being rented to Pedro Munoz Garcia. The owner of the motel confirmed this information.

Officer [A] applied for a telephonic warrant to search the motel room that was identified by the informant. Officer [A] did not reveal the identity of the informant to the issuing magistrate. In applying for the warrant, Officer [A] asserted that he read the affidavit to the magistrate "[v]erbatim." Although Officer [A] testified that the magistrate asked him questions regarding the affidavit, Officer [A] could not recall specifically what questions were asked.

The magistrate then requested more information regarding the confidential informant who provided the tip to Officer [A]. In the affidavit in support of the search warrant, Officer [A] attested to the informant's reliability because (1) the informant provided a signed, written statement; (2) the informant was familiar with methamphetamine and cocaine based on personal experience; (3) Officer [A] knew the informant for eight years; and (4) the informant did not have a criminal history. The signed, written statement was never provided to Mr. Munoz Garcia.

The conversation between Officer [A] and the magistrate was supposed to be recorded. But the recording of the conversation failed. Therefore, no transcript of the conversation could be made. Additionally, the magistrate did not make any notes regarding this conversation. The magistrate issued the warrant. Officer [A] prepared the warrant and signed on the magistrate's behalf. The warrant authorized the search of "any and all persons present" at the motel room.

Police officers went to the motel to execute the search warrant. Upon entering the motel room, the officers observed that minors were present in the room, and several smelled of alcohol. Police searched the individuals present in the room based on concerns for officer safety. Officer [A] was also investigating a burglary of the El Campesino jewelry store at the time. They discovered some of the stolen jewelry on the people present in the motel room.

When they searched Mr. Munoz Garcia, police discovered a glass pipe in his pocket that contained marijuana residue. Mr. Munoz Garcia was also wearing gold jewelry that was similar to the jewelry stolen from El Campesino. Officer [A] testified that the jewelry that was taken and the items he observed in the store were all of a similar style. Some of the rings that Mr. Munoz Garcia was wearing still had price tags on them.

Mr. Munoz Garcia was charged with first degree possession of stolen property, possession of a controlled substance, use of drug paraphernalia, and furnishing liquor to minors. He was taken into custody, but was not initially informed of his Miranda rights. Police decided to impound Mr. Munoz Garcia's vehicle.

Without informing Mr. Munoz Garcia of his rights, police asked his permission to search his vehicle. According to Mr. Munoz Garcia, he was up all night during the police search and had no sleep prior to being asked for consent to search. He agreed to allow the search and signed a consent form. Police found a small amount of burnt marijuana in between the driver's and front passenger's seats of the car, small rocks of cocaine on the dashboard, and a ring that was one of the items taken in the El Campesino burglary. The ring was valued at \$52. Mr. Munoz Garcia was read his rights the following day.

The magistrate who issued the warrant testified at the suppression hearing. Although the magistrate testified that he recalled some of the facts from the affidavit, the magistrate had no recollection of whether he asked Officer [A] any additional questions or received any additional information.

The magistrate testified that Officer [A] read the affidavit in support of the search warrant over the phone. During cross-examination, the magistrate admitted that he did not have personal knowledge of whether Officer [A] read the affidavit verbatim. The magistrate did recall that he thought there was probable cause to issue the warrant and that he told Officer [A] to sign the warrant on his behalf.

The State stipulated that the recording failed and that there was not enough information on the recording, as made, to determine whether there was probable cause to issue the warrant. Instead, the State asked the trial court to rely on the testimony of Officer [A] and the magistrate who authorized the search warrant.

The trial court found that the magistrate who issued the search warrant was a disinterested party who could provide evidence regarding the basis for the search warrant. The court also considered the testimony of Officer [A]. The trial court concluded that there was "no doubt, whatsoever that the affidavit was read verbatim" to the magistrate who issued the search warrant. The trial court concluded that there was probable cause to support the issuance of the warrant based upon the contents of Officer [A]'s affidavit.

The trial court further found that several items of stolen jewelry were in plain view on Mr. Munoz Garcia when police executed the search warrant. It found that the jewelry was visibly consistent with the jewelry observed in El Campesino and the items described to Officer [A]. Under those circumstances, the trial court concluded that the items observed were immediately recognizable to the officers as evidence of a crime.

Finally, the trial court found that Mr. Munoz Garcia consented to the search of his vehicle. Although the trial court expressed concern about the fact that Mr. Munoz

Garcia was not read his rights, the court relied on the signed consent form as determinative of the issue.

ISSUES AND RULINGS: 1) Was citizen–CI status and hence presumed veracity established where the affiant-officer’s application for a search warrant established that the affiant-officer had known the confidential informant for eight years, the CI had no criminal record, the CI gave community concern as the reason for coming forward, and the affiant-officer swore that the CI had given him a sworn statement (though the statement was not filed with the issuing court)? (ANSWER: Yes);

2) Where the audio tape recording of the telephonic search warrant application mechanically failed, did the warrant-issuing judge provide sufficient testimony in the subsequent suppression hearing regarding his recollection of the contents of the officer’s application to allow the trial court to reconstruct the telephonic affidavit of the officer? (ANSWER: Yes);

3) Did the affiant-officer provide sufficient information in his sworn statement to support the “any and all persons present” provision in the search warrant? (ANSWER: No, the constitutional particularity requirement for search warrants was not met because probable cause did not support the all-encompassing clause in the search warrant, but the plain view doctrine supports admission of the evidence seized - - see Issue 4 below);

4) Does the plain view doctrine support the officer’s seizure of rings that the officer saw in Garcia’s possession, several of which still had price tags on them? (ANSWER: Yes);

5) Where no evidence was presented at the suppression hearing relating to Garcia’s education and intelligence, and where Garcia was (a) in custody at the jail, (b) had not been Mirandized, and (c) was sleep deprived, was his signed written consent voluntary, and, if not, was the trial court’s error in finding voluntary consent harmless error? (ANSWER: The consent was not voluntary, but the trial court’s error was harmless)

Result: Affirmance of Okanogan County Superior Court conviction of Pedro Munoz Garcia for first degree possession of stolen property and furnishing liquor to minors.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Confidential citizen informant

This court employs the two-part Aguilar-Spinelli test when a confidential informant’s tip is used as part of the basis to establish probable cause. Under this test, the affidavit in support of the search warrant must demonstrate both the informant’s basis of knowledge and the informant’s veracity.

Here, Mr. Munoz Garcia does not challenge that the knowledge prong of the Aguilar-Spinelli test has been met. The issue for this court is whether Officer [A]’s affidavit established the credibility of the confidential informant.

“The veracity prong is satisfied by showing the credibility of the informant or by establishing that the facts and circumstances surrounding the furnishing of the information support an inference the informant is telling the truth.” Washington requires a heightened showing of credibility for a citizen informant whose identity is known to police but not revealed to the magistrate.

Here, there was sufficient evidence of the confidential informant’s veracity to support a finding of probable cause. Officer [A] had known the informant for

eight years. A background check revealed that the informant did not have a criminal record. The informant expressed concern for the community as the basis for coming forward. And, according to Officer [A]'s affidavit and testimony, the informant signed a written statement. **[LED EDITORIAL NOTE: For a more comprehensive discussion of establishing that a source is a confidential citizen informant, see the LED entry regarding State v. Bauer, 98 Wn. App. 870 (Div. II, 2000) March 2000 LED:08 and April 2000 LED: 20.]**

2) Reconstruction of telephonic affidavit

The issuance of telephonic warrants is constitutionally permissible. See CrR 2.3(c). But CrR 2.3 requires some form of recording of the telephonic hearing as evidence in support of the finding of probable cause.

The contents of a telephonic hearing may be reconstructed under CrR 2.3, so long as the reconstruction does not impair the reviewing court's ability to determine what was considered by the magistrate in issuing the warrant. [State v. Myers, 117 Wn.2d 332 (1991)]. If there is not a sufficient record to reveal the basis of the magistrate's probable cause determination, the proper remedy is suppression of all of the evidence seized pursuant to the search.

A reconstructed record is not sufficient if the only evidence of what the magistrate considered comes from the testimony of a law enforcement officer. A sworn statement may only be reconstructed by detailed and specific evidence from a disinterested party, such as the issuing magistrate.

Myers and State v. Smith, 87 Wn. App. 254 (1997) **Nov 97 LED:14** are the primary cases in Washington that deal with the reconstruction of a telephonic probable cause hearing where the recording of the hearing has failed. In the leading case, Myers, the officer who sought and received a telephonic warrant learned the day after that the recording of the conversation with the issuing magistrate had failed. The officer made a written record of his personal recollections at that time. But the magistrate testified that he could not personally recall the details of the conversation beyond the fact that he issued the warrant.

In Smith, the officer seeking the warrant had made detailed notes prior to his conversation with the magistrate. The officer discovered a few days after the warrant was issued that the recording of the conversation failed.

At the reconstruction hearing, the officer testified that he read verbatim from his notes, and the content of the notes was admitted into evidence. The magistrate who issued the warrant could not remember many details of the conversation, but recalled the officer reading the notes verbatim over the phone. The magistrate also recalled asking the officer questions, but could not remember what questions were asked or how the officer responded.

Both Myers and Smith concluded that the attempted reconstructions were insufficient because they were based primarily on the testimony of law enforcement officers regarding the basis for probable cause. Here, this court must determine whether the testimony of the issuing magistrate was sufficient to reconstruct the record.

Despite the shortcomings in the record, the magistrate testified that the affidavit presented and read by Officer [A] matched his recollection of what was read to him. As such, the magistrate established with sufficient certainty that the contents of the affidavit were the basis of his finding of probable cause. While the absence of a complete record is certainly troubling, taken as a whole, the trial court nonetheless was presented with a sufficient record to reveal the basis of the magistrate's probable cause determination. **LED EDITORIAL COMMENT: Based on our own reading of Myers and Smith, we have some doubt regarding the ruling on reconstruction of the search warrant application. Officers are well advised to double check tapes after making a telephonic warrant application.]**

3) “Any and all persons present” clause in warrant

A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause. To avoid overbreadth, there must be “a sufficient nexus between the targets of the search and the suspected criminal activity.”

A generalized belief that all persons present in a location are involved in criminal activity is insufficient to establish the required nexus. The State must demonstrate individualized probable cause. State v. Rivera, 76 Wn. App. 519 (1995) **April 95 LED:05**. A sufficient nexus is not established merely through evidence that some of the persons gathered in a particular location are engaged in criminal activity.

Here, there is nothing to establish individualized probable cause for “any and all” of the persons who may have been present in the motel room where drug activity was suspected to occur. While the police may have had generalized suspicions regarding the presence of other persons and their possible involvement, this is not sufficient to create the required nexus. The “any and all persons present” warrant in this case violated the Fourth Amendment's requirement of particularity.

The State argues that, even if the warrant for all persons present is invalid, the police nonetheless had the lawful authority to be present based on the search warrant. Upon discovering criminal activity inside the motel room, the police then had independent probable cause to arrest Mr. Munoz Garcia.

A warrant that authorizes the search of both a person and a place may be severed, and a court may uphold one portion of the warrant even if the other is later determined to be defective. Where the portion of a warrant permitting the search of a specific location remains valid, the police are properly on the premises in the execution of the warrant. Once inside, a search of the persons present is justified if there is independent probable cause based upon the observations of the officers.

In this case, Mr. Munoz Garcia was the individual who rented the motel room where illegal activity was observed. One of the officers executing the search warrant for the motel room observed Mr. Munoz Garcia wearing jewelry that the officer recognized as stolen from El Campesino. Police officers also observed intoxicated minors in the motel room. Because Mr. Munoz Garcia had dominion

and control of the motel room where minors were consuming intoxicants and was seen in possession of stolen property, police had independent probable cause to arrest and search Mr. Munoz Garcia.

Generally, warrantless searches are considered per se unreasonable. But there are a few narrow exceptions to the warrant requirement. Here, the trial court found that two such exceptions applied to the facts and circumstances of this case: plain view and consent. Mr. Munoz Garcia challenges the trial court's conclusion that these exceptions apply.

4) Plain view

The plain view doctrine has three main elements: (1) prior justification for police intrusion; (2) inadvertent discovery; and (3) immediate knowledge by police that the material in plain view is evidence of a crime. Here, Mr. Munoz Garcia challenges only the first and third elements. He asserts that police lacked prior justification because the search warrant was defective. Mr. Munoz Garcia also claims that police did not have immediate knowledge that the jewelry in his possession was evidence of a crime. Because the warrant was valid as to the place to be searched and, therefore, the officers had the right to enter the motel room, the remaining issue for this court is whether the jewelry in Mr. Munoz Garcia's possession was immediately recognized by police as evidence.

Immediate knowledge is required under the plain view exception in order to prevent police from engaging in a generalized search for incriminating material. "Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them." In other words, police have immediate knowledge if the officers have a reasonable belief that evidence is present. This court considers both the prior information known to police and the surrounding circumstances when evaluating whether items were immediately apparent as evidence.

In this case, one of the officers present for the search, Officer [A], was also investigating the El Campesino burglary. As part of that investigation, Officer [A] was familiar with the particular style and descriptions of the jewelry that was taken. He recognized this jewelry on Mr. Munoz Garcia. His knowledge that this jewelry was evidence of a crime was further bolstered by the fact that at least one of the items observed on Mr. Munoz Garcia still had a price tag on it. The items in Mr. Munoz Garcia's possession were immediately apparent to Officer [A] as evidence, considering the totality of the circumstances.

5) Consent and harmless error

Mr. Munoz Garcia asserts that his consent to the search of his vehicle was not voluntary because he was not informed of his Miranda rights at the time and it is not clear that he understood the consent form that he signed.

The State bears the burden of proving that consent was voluntary. The voluntariness of consent is a question of fact based on the totality of the circumstances. Among the factors for the voluntariness of consent are whether

Miranda warnings were given, the degree of education and intelligence of the person giving consent, and whether the consenting person was advised of the right not to consent. This court may also consider the conduct of police as part of the factual analysis.

Other factors may also be relevant depending on the totality of the circumstances. While consent may be given while an individual is under arrest, any restraint on an individual is a factor to consider. Courts may also consider whether the individual signed a consent-to-search form, and whether any language was included within the consent form that indicated the right to refuse consent.

Here, there is no evidence that would indicate the degree of Mr. Munoz Garcia's education or intelligence. Mr. Munoz Garcia was not informed of his Miranda rights at the time he consented to the search. According to Mr. Munoz Garcia, he was deprived of sleep at the time he was asked for consent and was further being held in jail. All of these factors bring the voluntariness of the consent into doubt.

The trial court based its conclusion that consent was voluntary largely on the fact that Mr. Munoz Garcia signed a consent-to-search form. However, no single factor is dispositive in the analysis of the voluntariness of consent. Based on the totality of the circumstances in this case, the State has not met its burden of proving by clear and convincing evidence that consent was voluntary. As a result, the trial court should have suppressed the evidence obtained from the vehicle search.

[LED EDITORIAL COMMENT ON CONSENT SEARCH RULING: We are troubled by the Garcia Court's ruling that the trial court erred in finding consent to be voluntary. This will no doubt breed similar challenges to consent searches by defendants claiming that they were tired, stupid, etc. Officers, particularly when they are seeking consent from suspects in custody, probably will want to throw in Miranda warnings, along with the consent search form warnings, and they will want to document in their reports that the persons signing consents were alert, cogent, etc. And prosecutors may want to seek out and put on some additional evidence at suppression hearings to address the voluntariness factors (intelligence, education) addressed by the Garcia Court.]

But this court applies the harmless error test to the erroneous admission of evidence. Under this test, a constitutional error in admitting evidence is harmless if the remaining untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.

In this case, police found one ring in the trunk of Mr. Munoz Garcia's car. This is the only evidence that resulted from the search of the vehicle that was relevant to the charges Mr. Munoz Garcia faced at the stipulated Facts: trial. The value of this ring was \$52. The total value of the stolen items in Mr. Munoz Garcia's possession was \$2,729. The total value required to establish guilt of first degree possession of stolen property is \$1,500. RCW 9A.56.150(1). Under the facts of this case, the remaining untainted evidence overwhelmingly established Mr. Munoz Garcia's guilt of first degree possession of stolen property.

NEXT MONTH

The December 2007 **LED** will include, among other entries, our annual subject matter index, as well as an entry regarding the October 11, 2007 decisions of the Washington Supreme Court in:

1) **State v. Day**, reversing a Court of Appeals decision (digested in the March 2006 **LED**), and holding by 6-3 vote that the stop-and-frisk authority of **Terry v. Ohio**, as applied under the tight constraints of article 1, section 7 of the Washington constitution, does not authorize a law enforcement officer with reasonable suspicion of a civil parking infraction to detain or frisk the driver of the motor vehicle; and

2) **State v. Moore**, reversing an unpublished Court of Appeals decision, and holding by 6-3 vote, grounded in the tight constraints of article 1, section 7 of the Washington constitution, that a search could not be justified as a search incident to arrest for the crime of failing to correctly identify oneself per RCW 46.61.021(3) where - - 1) the arrest of the suspect was originally made for other reasons (later found to be unjustified); 2) the officer requested identification from the suspect, but not in relation to investigation of any suspected traffic infraction; 3) the officer did not even mention the infraction (a seatbelt violation) until noting the infraction in a supplemental report; and 4) the prosecutor brought up RCW 46.61.021(3) as an after-the-fact justification for the arrest

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://www.atg.wa>].

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>]