



Law Enforcement

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Digest

607th Basic Law Enforcement Academy – March 14, 2007 through July 19, 2007

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UNITED STATES SUPREME COURT

OFFICER SAFETY CONCERNS DURING SEARCH WARRANT EXECUTION JUSTIFIED HOLDING TWO UNKNOWN, UNCLOTHED ADULT RESIDENTS STANDING AT GUNPOINT FOR A FEW MINUTES

L.A. County v. Rettele, 127 S.Ct. 1989 (2007)

Facts and Proceedings below (Excerpted from introductory paragraph of U.S. Supreme Court opinion)

Deputies of the Los Angeles County Sheriff's Department obtained a valid warrant to search a house, but they were unaware that the suspects being sought had moved out three months earlier. **[LED EDITORIAL NOTE: The suspects were four African-Americans, one of whom was known to own a 9 millimeter Glock handgun.]** When the deputies searched the house, they found in a bedroom two residents [Mr. Rettele and Ms. Sadler] who were of a different race than the suspects. The deputies ordered these innocent residents, who had been sleeping unclothed, out of bed. The deputies required them to stand for a few minutes before allowing them to dress.

The residents brought suit under [the federal civil rights act], naming the deputies and other parties and accusing them of violating the Fourth Amendment right to be free from unreasonable searches and seizures. The District Court granted summary judgment to all named defendants. The Court of Appeals for the Ninth Circuit reversed, concluding both that the deputies violated the Fourth Amendment and that they were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects and because a reasonable deputy would not have ordered respondents from their bed.

ISSUE AND RULING: Did officer safety concerns objectively justify the officers' detentions of the two Caucasian adults naked and standing at gunpoint for a few minutes? **(ANSWER:** Yes, rules a U.S. Supreme Court in an opinion signed by eight Justices; Justice Stevens does not join the other eight Justices, stating that he would have denied review of the Ninth Circuit decision).

Result: Reversal of decision of the Ninth Circuit, U.S. Court of Appeals, and reinstatement of U.S. District Court ruling granting summary judgment to the government defendants.

ANALYSIS: (Excerpted from Supreme Court opinion)

Because [Mr. Rettele and Ms. Sadler] were of a different race than the suspects the deputies were seeking, the Court of Appeals held that “[a]fter taking one look at [Mr. Rettele and Ms. Sadler], the deputies should have realized that [Mr. Rettele and Ms. Sadler] were not the subjects of the search warrant and did not pose a threat to the deputies' safety.” We need not pause long in rejecting this unsound proposition. When the deputies ordered Mr. Rettele and Ms. Sadler from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house. The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity. The deputies, who were searching a house where they believed a suspect might be armed, possessed authority to secure the premises before deciding whether to continue with the search.

In Michigan v. Summers, 452 U.S. 692 (1981), this Court held that officers executing a search warrant for contraband may “detain the occupants of the premises while a proper search is conducted.” In weighing whether the search in Summers was reasonable the Court first found that “detention represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant.” Against that interest, it balanced “preventing flight in the event that incriminating evidence is found”; “minimizing the risk of harm to the officers”; and facilitating “the orderly completion of the search.” See Muehler v. Mena, 544 U.S. 93 (2005) [**May 05 LED:02**].

In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. The test of reasonableness under the Fourth Amendment is an objective one. Graham v. Connor, 490 U.S. 386 (1989). Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.

The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons.

The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets. Rather, “[t]he risk of harm to both the police

and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.”

This is not to say, of course, that the deputies were free to force Rettele and Sadler to remain motionless and standing for any longer than necessary. We have recognized that “special circumstances, or possibly a prolonged detention” might render a search unreasonable. There is no accusation that the detention here was prolonged. The deputies left the home less than 15 minutes after arriving. The detention was shorter and less restrictive than the 2- to 3-hour handcuff detention upheld in Mena. And there is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that. Sadler testified that once the police were satisfied that no immediate threat was presented, “they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on.”

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

As respondents' constitutional rights were not violated, “there is no necessity for further inquiries concerning qualified immunity.” The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Some citations omitted]

WASHINGTON STATE SUPREME COURT

WASHINGTON CONSTITUTIONAL STANDARD FOR CHALLENGES TO AFFIANT MISSTATEMENTS OR OMISSIONS IS SAME AS FEDERAL STANDARD; ALSO, PROBABLE CAUSE AFFIDAVIT HELD TO ESTABLISH CREDIBILITY OF INFORMANT WHO WAS NAMED AND WHO GAVE STATEMENT AGAINST HIS PENAL INTEREST

State v. Chenoweth, 160 Wn.2d 454 (2007)

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

On February 5, 2003, Nicholas Parker called the Lynden Police Department and reported that Randy Chenoweth was operating a methamphetamine lab at a specific address in Lynden. The tip was relayed to Whatcom Interagency Narcotic Detective [A] of the Blaine Police Department, who then contacted Parker. Parker gave [Detective A] his full name and address and agreed to come to the police department for an interview. Based on the information Parker gave

during the interview, [Detective A] sought and obtained a telephonic search warrant with the assistance of [a] Whatcom County [deputy] prosecutor.

After the magistrate placed [Detective A] under oath, the prosecutor elicited information from him through a series of questions. The [deputy] prosecutor asked [Detective A] to relate what he knew of Parker's criminal history. [Detective A] said that Parker told him he had spent a year and a day in prison for unlawful possession of cocaine and delivery of a controlled substance. The [deputy] prosecutor then asked [Detective A] whether he had verified the information through a criminal records check. [Detective A] replied that he had not.

[Detective A] also told the magistrate that Parker said he went to Chenoweth's property earlier that day to try to get his car back. Chenoweth refused to return the car and ordered Parker off the premises. During the visit, Parker went inside the garage and saw various chemicals and equipment that he recognized as components of a methamphetamine lab, including glass flasks containing liquids, ephedrine, canning jars, red phosphorous, tincture of iodine, acetone, coffee filters, Red Devil lye, Drano, a gas generator, a bottle with a hose, coffee filters, and kerosene.

Parker said that during earlier visits to the property Chenoweth admitted to making methamphetamine in the garage, that he had watched Chenoweth make methamphetamine and actually assisted him by handing him chemicals and equipment, and that Chenoweth gave him and Wood some methamphetamine while he was at the house three or four days earlier.

In concluding, the [deputy] prosecutor said, "Your Honor, the only thing I would add is that as far as Mr. Parker's criminal history, although [Detective A] hasn't verified what he said, I can tell the court that I was the prosecutor on that prior criminal case and so I know that to be accurate that he was convicted of a delivery of a drug." The magistrate asked her to swear to the accuracy of that information, and she replied, "I do, I don't remember the time he served, although I do remember that he went to prison for it."

The commissioner issued the search warrant. The next day, the [deputy] prosecutor sought and obtained an addendum to the search warrant. She stated, "I would just like to put on the record that I had confirmed Nicholas Parker's criminal history from what I recalled yesterday and further thought I would like to ask if the Commissioner would have found probable cause in the absence of that statement." The [deputy] prosecutor explained that she wanted to avoid being a witness in a proceeding to challenge the warrant. The commissioner replied that Parker's admission of a criminal conviction was somewhat "self-authenticated" because "there is no reason to say that you have a criminal record unless you do," making the prosecutor's confirmation of that record superfluous.

Based on evidence obtained during the searches, the State charged Chenoweth and Wood with possession of precursor materials with intent to manufacture methamphetamine and unlawful manufacture of methamphetamine. The State

also charged Chenoweth with two counts of possession of a controlled substance and Wood with one count possession of a controlled substance.

Chenoweth and Wood moved to suppress the evidence, arguing that [Detective A] and [the deputy prosecutor] recklessly and/or intentionally omitted facts about Parker's background that would have precluded the magistrate's determination of probable cause, including: (1) Parker's criminal history included several crimes of dishonesty, (2) Parker had been a paid informant for the Bellingham police department, but his contract was terminated because of concerns about his reliability, (3) four years previously, [the deputy prosecutor] charged Parker with intimidating a witness, (4) two years previously, [the deputy prosecutor] was aware that Parker made unsubstantiated allegations that his attorney accepted cocaine as payment for his defense, (5) Parker was motivated by revenge in that he was angry with Chenoweth for failing to return his car, (6) Parker was motivated by self-interest in that he expected the police to help him retrieve his car, (7) Parker provided the information in the expectation that the police would pay him. In the alternative, Wood argued that the search warrant is invalid under our state constitution even if the omissions resulted from negligent rather than reckless or intentional conduct.

The trial court held several hearings to explore the defendants' allegations. Following these hearings, the trial court concluded that the omitted facts would have negated probable cause. However, the trial court concluded that the defendants failed to carry their burden of proving that [Detective A] or [the deputy prosecutor] recklessly failed to disclose the full extent of Parker's criminal history or his unsuccessful career as a paid informant to the issuing magistrate. The trial court also concluded that Parker was acting as a citizen informant when he informed the police about the methamphetamine lab. Accordingly, the trial court denied the suppression motion.

Chenoweth and Wood appealed, and the Court of Appeals affirmed the convictions in all respects pertinent here. State v. Chenoweth, 127 Wn. App. 444, 111 P.3d 1217 (2005) **Oct 05 LED:13**.

ISSUES AND RULINGS: 1) Does article 1, section 7 of the Washington constitution have a mere negligence standard for challenges to material misstatements or omissions - - regarding the informant or other facts - - by an affiant in a search warrant application? (**ANSWER:** No, rules an 8-1 majority (Justice Richard Sanders dissenting), the Washington constitution's standard is the same as the federal recklessness standard, i.e., the affiant's deliberate misstatement or recklessness in describing the facts);

2) Was the credibility (veracity) of the informant established in the affidavit where, among other things, the informant was identified in the affidavit and the informant was giving information against his penal interest? (**ANSWER:** Yes)

Result: Affirmance of Court of Appeals decisions that affirmed the convictions and sentences of Randal Lee Chenoweth and Barbara Joyce Wood for manufacturing methamphetamine and for other drug crimes.

ANALYSIS:

1) Proof standard for challenge to material misstatements or omissions by search warrant affiant

The Supreme Court majority opinion engages in extensive analysis in support of the majority conclusion that the proof standard under article 1, section 7 of the Washington constitution for challenges to material misstatements or omissions is the same as under the federal constitution's Fourth Amendment. That Fourth Amendment standard is deliberate misstatement or recklessness by the affiant. The Chenoweth majority opinion rejects the argument by the Chenoweth defendants that the Court should adopt a mere negligence standard as an independent grounds interpretation of article 1, section 7 of the Washington constitution. The Court then analyzes the facts and concludes that the affiant deputy prosecutor in this case did not make a deliberate or reckless misstatement. We will not address the Chenoweth Court's analysis of this issue further in this LED entry.

2) Credibility of named informant

The Supreme Court majority's analysis of the informant credibility/veracity is as follows:

Wood claims that the search warrant is invalid on its face even assuming the State did not recklessly or intentionally omit material information. Wood argues that Parker's criminal drug conviction precludes an inference that he is a reliable citizen informant. In her view, the magistrate could not reasonably credit the tip in the absence of independent police corroboration. Wood relies primarily on State v. Bittner, 66 Wn. App. 541 (1992) **Jan 93 LED:13** for her contention. In Bittner, a police affiant characterized a confidential informant as a " 'concerned citizen' " who had never previously contacted the police department. The officer further stated that a "thorough criminal records check" yielded negative results, failing to inform the magistrate that the informant was recently under investigation for impersonating a police officer. After concluding the warrant affidavit was facially insufficient, the Court of Appeals reversed the conviction without determining whether the officer's omission invalidated the warrant. Nevertheless, the court expressed its disapproval of the officer's conduct, noting that he should have disclosed that the informant was under suspicion of a crime since such information is pertinent to assessing the informant's reliability. Bittner. Wood asserts that Bittner stands for the proposition that the mere suspicion of an informant's past criminal activity negates an inference that the informant is a reliable citizen.

Wood's reliance on Bittner is misplaced. Unlike in Bittner, here there is no showing that the police affiant knew more about Parker's criminal involvement than was disclosed during the warrant application. Also, here the police affiant did not gloss over the informant's identity by characterizing him as a "concerned citizen" but disclosed his name and known criminal history. Further, Bittner states only that an informant's suspected criminal activity should be disclosed because it is pertinent to a veracity determination; it does not suggest that an informant's criminal history is dispositive or necessarily precludes an inference of reliability that may be raised by the nature of the tip and the disclosure of the informant's identity. Here, Parker's criminal conviction was a factor that the magistrate could take into account in determining whether to credit his information.

More significantly, whether Parker fits neatly in the category of “citizen informant” is beside the point in this case because the probable cause determination did not rest solely on the presumed inherent reliability of a citizen informant. Even when an informant is not shown to be inherently reliable, other indicia of reliability may establish that the informant was reliable on the particular occasion. State v. Lair, 95 Wn.2d 706 (1981).

Here, several facts and circumstances are relevant to Parker's veracity. An informant's willingness to come forward and identify himself is a strong indicator of reliability. Such a person may be held accountable for false accusations. Although merely providing a name to police is not sufficient to credit an informant (since a person could easily give a false name), in this case Parker not only provided a name and address but also agreed to come to the police station for an interview.

Parker made statements against his penal interest when he told [Detective A] that he helped Chenoweth make methamphetamine and used the drug with him during earlier visits to the house. Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true. Lair, (“Since one who admits criminal activity to a police officer faces possible prosecution, it is generally held to be a reasonable inference that a statement raising such a possibility is a credible one.”)

[Detective A] supplied the magistrate with additional facts and circumstances relevant to the commissioner's assessment of Parker's veracity. The fact that Parker had a dispute with Chenoweth over his car provides a plausible explanation for why he had gone to the property that morning and why he decided to contact the police afterward. When read as a whole, the telephonic warrant affidavit provides sufficient information to support the commissioner's decision to credit Parker's tip. Parker's willingness to identify himself and to appear at the police station for an interview, his statements against penal interest, together with the detailed nature of his tip and other facts and circumstances that explain his reasons for being at the scene and for contacting the police, provide an adequate basis for crediting his information. Accordingly, we hold that the search warrant is valid on its face.

[Some citations omitted]

JUDGE WHO ISSUED SEARCH WARRANT LAWFULLY REVIEWED WARRANT IN SUPPRESSION HEARING; ALSO, INFORMATION GIVEN AGAINST PENAL INTEREST HELPS ESTABLISH CREDIBILITY OF INFORMANT IN PROBABLE CAUSE AFFIDAVIT

State v. Chamberlin, ___ Wn.2d ___, 162 P.3d 389 (2007)

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

Randall Paxton, the informant, was arrested for driving while under the influence, attempting to elude a pursuing police vehicle, and reckless driving. Paxton told the arresting officer he was under the influence of methamphetamine and marijuana. He stated that he got the drugs from Chamberlin and offered to provide a statement and testify against Chamberlin. Police told him that they

would not make any deal regarding his criminal charges. Nonetheless, Paxton gave a tape-recorded statement in which he described the transaction with Chamberlin. Based primarily on that statement, the Island County sheriff's office presented an affidavit for a search warrant to Judge Hancock.

The affidavit for the search warrant identified Paxton by name and relayed Paxton's claim that he purchased the drugs at Chamberlin's home, Chamberlin's address, and Paxton's description of the home's location. The affidavit described how Chamberlin retrieved the methamphetamine from a black duffel bag on a coffee table. Inside the duffel bag was a plastic "ziplock" bag containing roughly three to four ounces of methamphetamine. Paxton said that Chamberlin weighed out 1.75 grams of methamphetamine on a digital scale and Paxton paid \$45 for it. The affidavit relayed Paxton's statement that he left the home and injected the methamphetamine. Paxton said he returned that day and was given marijuana from the same black bag from which Chamberlin had retrieved the methamphetamine. Paxton believed there was at least three-quarters of an ounce of marijuana in the duffel bag. He indicated he had been buying drugs from Chamberlin for around four months and that each time the drugs were kept either in the black duffel bag or a black metal lockbox. The affidavit contains the averment that Paxton was not threatened with or promised anything in regard to his pending charges. The affiant averred, "Paxton states that he had been doing well until CHAMBERLAIN [sic] provided him with methamphetamine approximately 4 months ago."

Judge Hancock issued a search warrant for Chamberlin's home. Based largely on evidence uncovered in that search, Chamberlin was charged with one count of possession with intent to manufacture or deliver marijuana. He was also charged with possession with intent to manufacture or deliver methamphetamine.

At a readiness hearing, defense counsel expressed concern about whether Judge Hancock could be impartial in hearing the suppression motion. Judge Hancock then said: "If, indeed, I issued the warrant in this case, I'm sure that I did read carefully the application for the warrant, sworn testimony in support of the warrant, issued the warrant." Judge Hancock indicated he did not remember issuing the warrant. He then said, "[I] also believe I would be capable of fairly and impartially hearing any motion to suppress despite the fact that I issued the warrant." Concluding, he said he would review the warrant for issues he might have missed and, if wrong, suppress the evidence.

At a suppression hearing the defense asked Judge Hancock to recuse himself. Chamberlin said he did not want to use his statutory right to file an affidavit of prejudice. Judge Hancock denied the request. He stated that he did not know why he would not be fair and impartial.

Judge Hancock denied the suppression motion. He determined that the affidavit established Paxton's basis of knowledge. Judge Hancock also determined Paxton had the requisite veracity, finding he was a named citizen informant, he had given a statement against penal interest, and he gave a detailed description that established Paxton's credibility. After a bench trial, Chamberlin was found guilty of count II, possession of methamphetamine with intent to deliver in

violation of RCW 69.50.401(2)(b), not guilty of count I, and sentenced to a standard range sentence of 16 months.

ISSUES AND RULINGS: 1) May the judge who issued a search warrant review the warrant's lawfulness in a suppression hearing? (ANSWER: Yes, rules a unanimous Court);

2) Where the informant was named in the affidavit, and his statement was against his penal interest, and no express promises were made by the government to obtain the statement, was he credible for purposes of constitutional assessment of informant-based probable cause? (ANSWER: Yes, rules a unanimous Court)

Result: Affirmance of Island County Superior Court conviction and sentence of Scott Chamberlin for possession of methamphetamine with intent to deliver.

ANALYSIS:

1) Review of warrant by judge who issued it

The Supreme Court engages in extended analysis in support of its conclusion that there is no inherent bar to a superior court judge reviewing a search warrant that the judge issued. We will not address that analysis in this LED entry.

2) Credibility of named informant

The Supreme Court analyzes the probable cause issue as follows:

Chamberlin challenges the sufficiency of the affidavit in support of the search and whether the veracity prong of the Aguilar-Spinelli test was satisfied. A search warrant may issue only on a determination of probable cause. Affidavits for search warrants are tested in a commonsense, non-hyper technical manner. When a search warrant is based on an informant's tip the constitutional criteria for determining probable cause is measured by the two-pronged Aguilar-Spinelli test. The second prong seeks to evaluate the truthfulness of the informant. It may be satisfied if the credibility of the informant is established. Or, even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth. State v. Lair, 95 Wn.2d 706 (1981).

The trial court found that "Mr. Paxton is a named citizen informant not a paid or professional informant. As such he is presumed to be a reliable informant." The trial court also noted that Paxton made statements against his penal interest, and he provided very detailed information about the drug buys in question.

We agree that Paxton was reliable. Paxton made a statement against his penal interest when he admitted to driving under the influence of narcotics. An admission against penal interest is "*one factor*," "[p]articularly where [it] is not the only indication of reliability." Lair. Paxton's statement against penal interest is buttressed by his willingness to publicly stand by his information. Paxton's identity was revealed in the affidavit; he was not a confidential informant. Paxton was willing to repeat his statement in court and provided a tape recorded statement. Lair ("stoolie" may perceive that he can admit to criminality without significant risk). The police made no promises in exchange for Paxton's

statement. *[Court's footnote: This is consistent with our analysis in State v. Chenoweth, 160 Wn.2d 454 (2007). There we said that “[a]n informant's willingness to come forward and identify himself is a strong indicator of reliability.” We explained that the ability to hold the informant accountable for false accusations supported the informant's veracity. We also noted the informant's statements against his penal interest.]*

This particular set of considerations need not be met in every case, but in this case these factors are sufficient. We affirm the trial court's finding of probable cause to issue the warrant.

[Some citations omitted]

PRETEXT STOP ARGUMENT IS REJECTED BY UNANIMOUS COURT

State v. Nichols, ___ Wn.2d ___, ___ P.3d ___, 2007 WL 2051542 (2007)

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

The parties stipulated to the facts set out in police reports describing the events occurring just after midnight on November 17, 2003. Deputy Sheriff Shawn Hause was parked in a parking lot at about Francis Avenue and Haven Street in North Spokane when he saw a vehicle going westbound on Francis Avenue from Market Street. He saw the vehicle pull into another parking lot, drive slowly around the lot, and exit the same way it entered, back onto Francis Avenue. He wrote in his report:

As it exited the parking lot, it crossed a double yellow line and pulled immediately into the far right lane in the EB [eastbound] lane. It appeared to me that the vehicle (driver) was trying to avoid driving in front of me.

I pulled out and the vehicle turned SB [southbound] on Market. I caught up to the vehicle and activated my lights north of Central.

The vehicle did not immediately stop, but instead drove slowly another couple of blocks and then turned left onto Joseph and pulled into a car wash parking lot. As Deputy Hause followed the vehicle, he saw a large “For Sale” sign in the back window that blocked his view of the driver. While the vehicle was slowly traveling southbound, the driver started waving his hand in the rear window. Hause said it appeared the driver was delaying the stop.

Once the vehicle stopped, Deputy Hause approached the driver's side and asked for the driver's license and paperwork for the vehicle. The driver, who was identified as Jacob Potter, told Hause that he did not have a license and was “ ‘Driving on a suspended license.’ “ Hause confirmed with dispatch that Potter's license was suspended and also learned that Potter was “on active DOC [Department of Corrections] status” as a result of a felony conviction for a violent offense. Hause had Potter leave the vehicle, handcuffed him near its left rear tire, and searched him. Hause called for backup, in part because of Potter's violent offense history.

In the meantime, Hause had identified the passenger in the vehicle as Nichols. Nichols was not wearing a seat belt. After Deputies Brett Hubbell and Daniel Dutton arrived as backup, Hause had Nichols step out of the car. Dutton then took Nichols to the backup patrol car while Hause searched the vehicle incident to Potter's arrest. The search of Potter and that of the vehicle did not yield any drugs, weapons, or contraband. Hubbell conducted a pat down search of Nichols for weapons.

Hause reported that Nichols appeared intoxicated or under the influence but did not smell of intoxicants. Hause asked Nichols if he had been using drugs and Nichols responded, "No." After searching the vehicle, Hause walked around the rear of it and noticed a plastic bindle that looked like part of a baggie on the ground near where he had handcuffed Potter. The bindle contained a substance that subsequently field-tested positive for methamphetamine. Hause asked Nichols if the bindle was his, and Nichols said, "No way." Dutton said that he had been watching Nichols and Nichols had not thrown or tossed anything. Hause believed that the baggie had come from Potter.

Hause again asked Nichols if he had been using drugs and Nichols said, "No." Hause asked Nichols if he minded if Hause searched him for drugs. Nichols replied that he had already been searched. Hause explained that search had been a pat down for weapons only. Hause asked Nichols again if he could search him. Nichol said, "Sure-I don't mind." Hause searched Nichols and found a baggie in his sock that contained material that also field tested positive for methamphetamine. Nichols said, "That's not mine," and explained that about the time Hause activated his lights Potter had given it to him and told him to get rid of it. Hause read both Potter and Nichols their Miranda rights and arrested them for possession of a controlled substance.

Nichols moved to suppress the evidence of the drugs, arguing that he was merely a passenger who was not suspected of any criminal activity and that he should have been detained only so long as it took to cite him for the seat belt violation. Because he was unlawfully detained, he contended, his consent to search was invalid. The parties agreed to the facts as stated in the police reports for purposes of the suppression motion. The court denied the motion, finding, among other things, that the stop was valid because the vehicle improperly crossed a double yellow line and made an improper lane change. The court also concluded that an infraction resulted because the vehicle failed to drive as nearly as practicable within a single lane.

A bench trial followed on stipulated facts - those in the police and lab reports - and Nichols was convicted of possession of a controlled substance.

Court of Appeals proceedings:

Nichols appealed his conviction to the Court of Appeals, which affirmed the superior court conviction by an unpublished opinion that did not address the pretext stop issue that is the sole focus of the Supreme Court opinion.

ISSUE AND RULING: Did Nichols' trial attorney render ineffective assistance of counsel by not raising a pretext stop argument in his pre-trial suppression motion? (**ANSWER:** No, rules a unanimous Supreme Court, because the evidence showing that the officer made the stop to enforce the traffic code does not support a pretext stop challenge)

Result: Affirmance of unpublished Court of Appeals decision that affirmed the Spokane County Superior Court conviction of Caleb George Nichols for possession of methamphetamine.

ANALYSIS: (Excerpted from Supreme Court opinion)

Nichols maintains that counsel was ineffective in failing to move to suppress the evidence of the drugs on the ground that the stop was invalid. In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice.

Here, the claimed deficiency is that counsel failed to move to suppress evidence obtained during a pretextual stop. A pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. " 'Pretext is, by definition, a false reason used to disguise a real motive.' " The reasonable articulable suspicion that a traffic infraction has occurred, which justifies an ordinary warrantless traffic stop, does not justify a stop for criminal investigation. Ladson. Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest.

To determine whether a stop is pretextual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's behavior. If the court finds the stop is pretextual, all subsequently obtained evidence flowing from the stop must be suppressed as derivative of the unconstitutional seizure.

...

Turning to the first prong of the Strickland test, Nichols must show that counsel's representation was deficient. He says that State v. Meckelson, 133 Wn. App. 431 (2006) **Aug 06 LED:12**, is analogous and compels a determination that the stop here was pretextual. In Meckelson, an officer in his car pulled alongside another car that was traveling between 25 and 30 miles an hour and being driven normally. The officer testified that it was his job to be observant and so he watched other drivers and their reactions. When his car pulled alongside the other car he "thought the driver looked alarmed, with a 'deer-in-the-headlight' look" and wondered if the driver was nervous because the car was stolen. He dropped back "to check the registration to see if the driver had a suspended license." As he did so, the driver turned onto another road. Because the officer did not see a turn signal, he pulled the car over for failing to properly signal. As he did so, he saw the passenger, Meckelson, reaching toward the floor. As events unfolded, he removed Meckelson from the car, discovered drugs, and arrested Meckelson for possession of methamphetamine.

Although Meckelson's trial counsel did move to suppress on the basis of a pretextual stop, he evidently misunderstood what was required to establish a pretextual stop and failed to challenge the grounds that the officer gave to justify the traffic stop. The Court of Appeals found that counsel was ineffective because he "walked away" from the true inquiry-whether the officer stopped the vehicle for the failure to signal or was the purpose, as the officer candidly suggested, to look for evidence of another crime. Instead, counsel explained that he recognized the officer and because of his knowledge of the officer did not challenge the representations that a traffic infraction occurred justifying the stop. Counsel said he was not asking the court to enter a finding that the officer lied. The Court of Appeals said that counsel's job was to challenge the officer's subjective reason for the stop.

Nichols contends that nothing distinguishes Meckelson from this case. He says that just as in Meckelson, the pretextual nature of the stop is plain from the record. He says the officer included the real reason in his narrative, i.e., "[i]t appeared to me that the vehicle (driver) was trying to avoid driving in front of me." He argues that the officer here was alerted because the occupants appeared to be avoiding him, just as the officer in Meckelson was alerted because the driver there looked alarmed to see him.

It is true that the officers in both cases noted that the drivers appeared to respond to them in a negative way, suggesting they wanted to avoid the officers. But this case is not like Meckelson. In Meckelson, the officer admitted that he was dropping back to start investigating the driver of the vehicle in that case because his suspicions were aroused. Here, Deputy Hause never said he began investigating the vehicle or its driver, or even that he thought of doing so, prior to seeing what he believed were several traffic infractions. There is no evidence in the record that Hause followed the vehicle *because* he suspected the driver was trying to avoid him. Although he noted his observation that it "appeared to [him] that the vehicle (driver) was trying to avoid driving in front of [him]," he did not say that this is why he pursued the vehicle. Rather, he reported that nearly concurrently with this observation the vehicle crossed the double yellow line and right away moved into the far right lane. Hause immediately pursued the vehicle and activated his lights as soon as he caught up with it. Even though, as Hause reported, it appeared that the driver tried to delay the stop, it still occurred just a few blocks from when Hause first noticed the vehicle.

"Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop." State v. Hoang, 101 Wn. App. 732 (2000) **Nov 2000 LED:08**.

This case is also unlike other cases where pretext has been found. For example, in Ladson officers on gang patrol admitted they followed a vehicle for several blocks looking for a legal justification to stop it so they could investigate suspicions that the occupants were involved in narcotics trafficking. They eventually pulled the vehicle over because it had expired license tabs.

In State v. DeSantiago, 97 Wn. App. 446 (1999) **Nov 99 LED:12**, the Court of Appeals held that the stop was invalid as a pretextual stop under Ladson. The

trial court's findings show why DeSantiago is distinguishable. The officer saw the defendant exit an apartment complex that was a narcotics hot spot and followed the defendant as he left in his automobile because the officer wanted to identify the license plate and because he was looking for a reason to stop the vehicle. After following for several blocks, the officer saw the defendant make an improper left hand turn and stopped him. The Court of Appeals held the stop was a pretextual stop.

In State v. Myers, 117 Wn. App. 93 (2003) **Aug 03 LED:18**, the defendant drove past the officer, who was in the area on business other than routine patrol and who recognized the defendant as having had a suspended license about one year earlier. The officer began following the car because he suspected that the defendant was driving with a suspended license; he ran a license check as he followed, and waited for the results, but stopped the defendant's vehicle for a traffic infraction before the results were back. The court concluded the stop was pretextual because the officer's real purpose was to investigate the defendant for driving with a suspended license.

In each of these cases officers suspected criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped. Here Deputy Hause immediately pursued the vehicle after he saw what he believed to be several infractions and activated his lights as soon as he caught up with it. Also, there is no evidence that Hause was engaged in gang, drug, or another specific kind of investigation rather than on routine patrol.

[Some citations omitted]

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SEVENTEEN-YEAR-OLD QUESTIONED ABOUT HER INFANT SON'S DEATH IN INTERROGATION ROOM FOR OVER 90 MINUTES WITH FATHER EXCLUDED FROM ROOM WAS IN "CUSTODY" FOR MIRANDA PURPOSES – In State v. Daniels, 160 Wn.2d 256 (2007), in a unanimous decision under an opinion authored by Justice Richard Sanders, the Washington Supreme Court addresses, among other issues in the case, an issue of Miranda custody involving police questioning of a 17-year-old suspected of criminal homicide in the death of her nine-week-old son.

The Supreme Court affirms the determination by the Court of Appeals that during 90 minutes of police questioning in a police interrogation room of the 17-year-old mother, the suspect was in "custody" such that Miranda warnings should have been given. (Note: the Court of Appeals decision was digested in the March 2005 **LED** beginning at page 12).

The Supreme Court very briefly describes the undisputed facts in the case as follows:

Seventeen-year-old Carissa Daniels was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room. She was not given any Miranda warnings until near the end of the interrogation. This questioning took place the day after her son's funeral while she was under stress. The detectives refused to allow her father to accompany her. Shortly after the

detectives belatedly gave her Miranda warnings, Daniels refused to answer any more questions, and she was placed in a holding cell.

The Supreme Court's very brief analysis of the law applicable to these facts is as follows:

The State argues Daniels was not in custody and Miranda warnings were not required based on the United States Supreme Court's decision in Berkemer v. McCarty, 468 U.S. 420 (1984). There the Court reiterated the familiar rule that the police must give Miranda warnings when a suspect is taken into custody and interrogated:

“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

The Court continued: “It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a ‘degree associated with formal arrest.’” The State reads this language to almost suggest a suspect is entitled to Miranda warnings only when she is indeed formally arrested. Rather we must determine whether, **given this factual setting**, a “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112 (1995). If not, she must be given Miranda warnings before the police ask any question likely to provoke an incriminating response.

The Court of Appeals, citing Berkemer and Thompson, correctly found Daniels was subjected to a custodial interrogation because a reasonable person in Daniels's position would not feel free to terminate the interrogation and voluntarily leave. Therefore, any statements Daniels made prior to being given Miranda warnings were properly excluded.

[Some citations omitted, bolding added]

Result: Reversal in part (on double jeopardy issues) and affirmance in part (on Miranda custody issue), of the Court of Appeals decision; case is remanded to the Pierce County Superior Court for retrial of Carissa Marie Daniels for second degree felony murder (with criminal mistreatment as the predicate felony).

LED EDITORIAL COMMENT: The discussion of the Miranda custody issue in the Supreme Court's Daniels opinion, like the discussion of the issue two years ago in the Court of Appeals opinion (see our commentary in the March 2005 LED at 14-15) is very short, both in its factual description and in its analysis. In the March 2005 LED, our commentary (with one minor updating edit) was as follows:

Whether a person is in Miranda “custody” is determined under the totality of the circumstances. Age of the suspect is probably a factor, though the Washington Supreme Court has not expressly ruled on that factor, and, in our view, the United States Supreme Court has not definitively resolved the age-as-custody-factor question either (though a majority apparently lean against age as a factor), at least in our assessment of the cases. See the extensive discussion regarding age and other factors as custody factors in

the August 2004 LED entry regarding the U.S. Supreme Court decision in the Yarborough case, and in the September 2004 LED regarding the Washington Supreme Court decision in the Heritage case.

The Court of Appeals does not explain whether or not the officers told Daniels before questioning: 1) that she did not have to answer their questions, or 2) that she was free to go at any time. If the officers told her both of these things before questioning, then these circumstances arguably present a non-custodial situation, although placing Daniels in a holding cell after questioning, even though only temporarily, tends to push the balance toward a “custodial” finding. Generally, if officers wish to make stationhouse questioning non-custodial, they should give the above-referenced admonitions and should be prepared, as to any such suspect, to allow the suspect to leave when he or she wishes. We do not think, however, that merely excluding a parent or other person from the room during questioning makes the circumstances custodial, though it probably depends on what the officers say and, of course, upon all other attendant circumstances.

The above commentary regarding the Court of Appeals opinion is equally apt regarding the Washington Supreme Court’s Daniels opinion. We add the following comments.

We don’t think that the Washington Supreme Court (at least a majority of those who signed on to Justice Sanders’ opinion with its very brief discussion of the facts and its truncated and arguably misleading analysis of the Miranda custody question) intended to blur the clear line of demarcation in prior case law between 1) investigative stop/temporary seizure questioning (which is not subject to a warnings requirement), and 2) arrest-equivalent questioning (which requires warnings). In Daniels, both the Supreme Court and the Court of Appeals’ opinions are guilty, in our view, of not being careful and qualified enough in their discussion of the United States Supreme Court decision of Thompson v. Keohane, 516 U.S. 457 (1995).

It is true that the United States Supreme Court’s test for what constitutes Miranda custody sets the standard for Washington officers because the related provision of the Washington constitution has been held by the Washington Supreme Court, so far, to set the same standard as the Fifth Amendment of the federal constitution. But in our view Thompson v. Keohane is not really a guiding Miranda custody decision.

The Thompson Court was focused on federal habeas corpus review standard (as it is applied to a state court’s Miranda custody determination). The Thompson Court discussed precedents of the Court on the Miranda custody standard, but the Court did not try to clarify that standard. The Thompson Court did not ultimately even make a determination or give helpful guidance on whether there was Miranda custody on the facts before it. And, as often maddeningly occurs (seemingly in court cases at all levels in all jurisdictions) when discussing what constitutes Miranda custody, the Thompson Court used interchangeably, without clarifying how the two facially inconsistent statements of the test could be deemed to be alternative descriptions of the same test, 1) the “liberty to terminate the interrogation and leave” test, and 2) the “restraint on freedom of movement of the degree associated with a formal arrest” test.

Ultimately, each Miranda custody case is decided on the totality of its own special facts. This case involved 1) questioning a 17-year-old mother, 2) in police interrogation room, 3) about her role in the suspicious death of her baby, where 4) her father had been excluded from the room and where (as far as we know), 5) the minor suspect had not been told that she could terminate the questioning at any time and leave, and where 6) she was placed in a holding cell after she asserted her right to silence, the scales probably do tip to the arrest-equivalent determination made here, first by the Court of Appeals, and now by a unanimous Supreme Court under the federal constitutional standard.

Determining whether a person is in Miranda custody often is not an easy question to resolve. It turns on such factors as: the location of the questioning (street corner questioning is less likely to be held custodial than interrogation room questioning); the duration of the questioning (again, questioning during a brief Terry investigatory stop is ordinarily not deemed to be Miranda custody, while 90 minutes of interrogation room questioning is more likely to be deemed to be custodial); the words used by the police (including communication of probable cause, communication regarding the length of time that the interrogation might be expected to last, and any express communication that the suspect need not answer questions or is free to leave at any time); the intensity and manner of questioning; the use of restraints or a show of force prior to or at the time of the questioning; the incarceration of the suspect at the end of the questioning; and perhaps (under the Washington Supreme Court decision in State v. Heritage, 152 Wn.2d 210 (2004) Sept 04 LED:12) the youth of the suspect.

The bottom line is that, because the test of custody is so multi-factored and fact-based, many prosecutors and police legal advisors will tell officers that the better course of action, whenever in doubt as to Miranda applicability, is to Mirandize. We suppose that this is yet another case that illustrates that point.

But, if officers, in their best judgment regarding the particular case and particular suspect, decide that their best chance of obtaining a statement is to conduct purely voluntary, non-Mirandized questioning of a suspect in an interrogation room, they will generally want to do the following, regardless of the age of the suspect - - they will want to have procured the suspect's presence in the room voluntarily, and they will want to make clear before any questioning that the suspect is free not to answer any questions, is not under arrest, and indeed is free to leave at any time. And (despite the illogic of including the following final factor), they should be prepared to release the suspect once the questioning is completed.

WASHINGTON STATE COURT OF APPEALS

BICYCLING AT NIGHT REQUIRES LIGHT AND REFLECTOR EVEN IF RIDING ON SIDEWALK; RESIDUE OF METHAMPHETAMINE SUPPORTS POSSESSION CONVICTION

State v. Rowell, ___ Wn. App. ___, 158 P.3d 1248 (Div. III, 2007)

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

The police spotted Benjamin Rowell riding his bicycle on a sidewalk a little after 2:00 a.m. Officer Trevor Davis stopped Mr. Rowell because he did not have a light on the front of the bicycle or a reflector on the back.

The police asked for identification. Mr. Rowell had an outstanding warrant. The police arrested him. Mr. Rowell wore a backpack underneath his coat. The police removed it and placed Mr. Rowell in the patrol car. They searched the backpack incident to arrest. Officer Davis found a small glass smoking device with residue in it. The residue was methamphetamine.

Mr. Rowell moved to suppress the methamphetamine. He argued that Washington law does not require a headlamp or reflector on a bicycle ridden at night on a sidewalk. The trial judge disagreed and denied his motion.

A jury convicted Mr. Rowell of possession of a controlled substance and bail jumping.

ISSUES AND RULINGS: 1) Does the statute that requires a front light and a rear reflector on a bicycle ridden at night apply when the bicycle is being ridden on a sidewalk? (ANSWER: Yes);

2) Where residue of illegal drugs found in the possession of defendant is enough to test but not to weigh, can the defendant be convicted of illegal possession? (ANSWER: Yes)

Result: Affirmance of Benton County Superior Court conviction of Benjamin Howard Rowell for possession of methamphetamine and bail jumping (Note: Rowell appealed only the possession conviction).

ANALYSIS:

1) Bicycle light and reflector at night

Mr. Rowell argues that the law that requires lights and reflectors (RCW 46.61.780) only applies to bicycles on highways or bike paths. He notes that he was riding his bike on a sidewalk. And so he concludes that he was not required to have a front light or a rear reflector. He argues that the traffic stop was therefore illegal. And the drugs found from the illegal stop should have been suppressed.

...

The statute at issue here says: “ [e]very bicycle when in use during the hours of darkness . . . shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least five hundred feet . . . and with a red reflector on the rear.” RCW 46.61.780 (emphasis added). So every bicycle ridden at night should have the proper equipment: specifically a light on the front and a reflector on the back. RCW 46.61.780.

Mr. Rowell argues that this statute only applies to bicycles ridden at night on a highway or bicycle pathway. He argues from RCW 46.61.750(2) that “regulations applicable to bicycles apply whenever a bicycle is operated upon any highway or upon any bicycle path, subject to those exceptions stated herein.” And RCW 46.61.780 has an exception: “[e]very bicycle when in use during the hours of

darkness . . . shall be equipped with a lamp on the front . . . and . . . a red reflector on the rear.”

Mr. Rowell did not have the required front lamp and rear red reflector when the police stopped him a little after 2:00 a.m. RCW 46.61.780. And the court properly refused to suppress the drug evidence here since the police stop for the traffic citation was valid.

2) Residue possession

Finally, Mr. Rowell contends that he received ineffective assistance of counsel . . . Mr. Rowell also asserts that the amount of methamphetamine found was so small it could not be weighed. It could only be tested.

We have held that the charge of possession with intent to deliver requires enough of the drug to deliver. State v. McPherson, 111 Wn. App. 747 (2002) **Aug 02 LED:22**. So residue only is not enough to support a conviction of possession with intent to deliver. But the charge and conviction here is for simple possession. And since neither the statute nor case law sets a minimum amount, we are hard pressed to conclude there is a minimum amount required for bare possession. RCW 69.50.401(1). We accordingly conclude that residue is sufficient to support a conviction for simple possession.

[Some citations omitted]

RESERVE UNDERCOVER OFFICER’S EXTRATERRITORIAL TAPING OF CONVERSATION IN DRUG DEALER’S HOME HELD OK AGAINST CHALLENGES BASED ON (1) WASHINGTON CONSTITUTIONAL PRIVACY PROTECTION, (2) CHAPTER 9.73 RCW, AND (3) CHAPTER 10.93 RCW

State v. Barron, ___ Wn. App. ___, 160 P.3d 1077 (Div. I, 2007)

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

OHPD received information from a confidential informant that Barron was selling marijuana from his residence. OHPD believed the residence was located within Oak Harbor city limits, but it is actually located in unincorporated Island County. An OHPD reserve officer was assigned to make undercover marijuana purchases from Barron. After being introduced to Barron by two confidential informants, the reserve officer purchased marijuana from Barron at his residence on three separate occasions. Each time, the reserve officer wore a body wire transmitter and OHPD recorded their conversations under separate one-party-consent authorizations signed by Captain Wallace of OHPD. On November 19, 2003, OHPD arrested Barron within Oak Harbor city limits for delivery of marijuana.

Barron moved to suppress all the evidence collected by OHPD in connection with the undercover marijuana purchases. He argued his home was outside OHPD’s jurisdiction and Captain Wallace lacked authority to approve the recording outside his jurisdiction. In response, the State argued OHPD had jurisdiction and produced a letter from ICSO granting consent for OHPD to enforce criminal laws

within the county in accordance with the Washington Mutual Aid Peace Officers Powers Act of 1985 (WMAPOPA), chapter 10.93 RCW. The consent letter states in relevant part:

Advance notice should be given to our agency prior to the exercise of these powers by your officers when operating within Island County, with particular attention to RCW 10.93.030 through .60

Barron then argued that OHPD lacked jurisdiction because it failed to provide advance notification of its activities to ICSO or timely notification after the fact as required by RCW 10.93.030. The trial court decided the reporting requirements were not mandatory and denied the motion to suppress. The prosecution introduced the tape recordings of the second and third marijuana sales into evidence. The OHPD reserve officer testified about all three marijuana sales. Barron also testified and admitted to selling the marijuana on all three occasions. A jury convicted Barron of three counts of delivery of a controlled substance. He appeals.

ISSUES AND RULINGS: 1) Assuming for the sake of argument that the police officers from Oak Harbor were acting outside the scope of the extraterritorial consent given by the Island County Sheriff's Office under chapter 10.93. RCW (Mutual Aid Peace Officer Powers Act – MAPOPA), did the officers' actions violate article I, section 7 of the Washington constitution? (**ANSWER:** No, because there is no constitutional right of privacy against undercover, one-party consent recording, even if that occurs in the non-consenting suspect's home);

2) Where the Oak Harbor Police Department Captain who authorized the tape recording of the undercover police purchase of marijuana, and where Oak Harbor PD had a consent letter from the Island County Sheriff under chapter 10.93 RCW, does the fact that Oak Harbor PD did not contemporaneously notify the Island County Sheriff's Office of the undercover purchases and recordings the officers made in unincorporated Island County require suppression of the tape recordings? (**ANSWER:** No; while the Sheriff's consent letter stated that the City officers "should" notify the Sheriff, the word "should" is not a word of mandate and does not require suppression where the requested notice was not given; the Court also notes its disagreement with State v. Knight, 79 Wn. App. 670 (Div. II, 1995) **April 96 LED:07**, which held that the officer signing a RCW 9.73.230 drug-wire authorization must have enforcement authority in the jurisdiction where the interception or recording occurs);

3) Where the officer wearing the wire per RCW 9.73.230 was a reserve officer and therefore not authorized to act extraterritorially as an officer except in fresh pursuit or acting under a mutual aid agreement (circumstances not present here), did the defendant's attorney render ineffective assistance of counsel in not moving at the time of trial to suppress the tape recording based on the wire-wearing officer's reserve status? (**ANSWER:** No, because: A) to act undercover and wear a wire does not require that one even be a law enforcement officer; and B) it is unlikely that the courts would hold that evidence is required to be suppressed for exceeding one's extraterritorial authority granted under chapter 10.93 RCW);

4) Where there was no probable cause to support the Oak Harbor PD Captain's authorization of the initial one-party consent recording under RCW 9.73.230, should all evidence seized after that be excluded? (**ANSWER:** No, because: A) the only unlawfully obtained evidence was the first recording, and that evidence was not used to obtain the subsequent authorizations under

RCW 9.73.230; and B) where law enforcement had made a good faith effort to comply with RCW 9.73.230, that statute does not mandate suppression of testimony that is unaided by evidence obtained in violation of RCW 9.73.230)

Result: Affirmance of Island County Superior Court conviction of Sylvester Louis Barron, III, for delivery of marijuana (three counts).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Article I, section 7 of Washington Constitution

There is no expectation of privacy in selling illegal drugs to an undercover police officer, even if the sale occurs in the defendant's home. And recording a conversation with the consent of only one party does not implicate article I, section 7's privacy concerns. Thus, OHPD's actions in this case do not give rise to a violation of article I, section 7, even if the officers were found to be acting outside the scope of the consent letter.

2) MAPOPA Consent Letter and RCW 9.73.230

Washington's privacy act, chapter 9.73 RCW, generally prohibits recording private conversations without the consent of all the parties to the conversation. There is an exception, however, for conversations concerning controlled substances, provided the conditions set forth in RCW 9.73.230 are met. RCW 9.73.230(1) states that a police officer seeking to record a drug transaction must first obtain authorization from "the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor." RCW 9.73.230(3) provides in relevant part:

An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction.

In State v. Knight, Division II of this court interpreted RCW 9.73.230(3) to mean that "an authorization to intercept and record is invalid outside the jurisdiction of the issuing supervisor," unless the nonconsenting party invites the consenting party to enter another jurisdiction.

Barron relies on Knight to argue that the recording authorization issued by Captain Wallace did not comply with RCW 9.73.230 because the recording took place outside of OHPD's jurisdiction. The Knight court held that a Vancouver Police Department Captain lacked jurisdiction to authorize a one-party-consent recording in Stevenson, an incorporated municipality in Skamania County, under RCW 9.73.230. In Knight, as here, there was also a notice of consent issued to the Vancouver Police Department by the Skamania County Sheriff's Office based on RCW 10.93.070(1). There was, however, a problem with the language of the consent letter because it purported to grant jurisdiction only in unincorporated Skamania County, which would not have included Stevenson. But, without

explanation, Division II concluded the consent letter was not material. It focused instead on the fact that the officer whose authority was contested was not a member of an interlocal task force under RCW 39.34.

Here, the trial court admitted the recordings because it found the consent letter from ICSO granted Captain Wallace jurisdiction to authorize the recordings. Although the consent letter specifies that “[a]dvance notice should be given” to ICSO before OHPD officers exercise jurisdiction in Island County, the trial court found the “reporting requirement is not mandatory and the lack of reporting is a matter to be taken care of between the agencies.”

We agree with the trial court. Clearly, “should” is not “shall.” The consent letter uses both terms and could have used “shall” had the parties intended the notice requirement to be mandatory rather than merely directive. In Tennant v. Roys, we stated that when both “should” and “shall” appear in the same statute, we presume the terms were meant to be distinguished. We also explained that “should,” unlike shall, can be used to express a “desire or request in a polite or unemphatic manner.” The same principles apply here.

It is also appropriate to consider a consent letter in the context of the statute on which it is based. RCW 10.93.001(2) states that WMAPOPA should be liberally construed to effectuate the legislature's intent to modify “current artificial barriers to mutual aid and cooperative enforcement of the laws.” A consent letter can take shelter in the statute that authorizes it. Given the intent of the statute, it makes sense to liberally construe “should” to mean that ICSO, while requesting notification of any actions taken within its jurisdiction, never intended notice to be a prerequisite for jurisdiction to undertake those actions. We hold that suppression of the recordings was not required under RCW 9.73.230(8) because the ICSO consent letter conferred jurisdiction on Captain Wallace to authorize the one-party-consent recordings.

...

Barron argues his counsel's performance was defective and prejudicial because counsel did not argue that the undercover reserve officer who bought the marijuana lacked jurisdiction under WMAPOPA. RCW 10.93.020(5) states that a reserve officer is a “[s]pecially commissioned Washington peace officer” and “does not qualify under this chapter as a general authority Washington peace officer.” RCW 10.93.090 delineates only two situations where a specially commissioned peace officer may act outside of his primary territorial jurisdiction: (1) when in fresh pursuit and (2) under a mutual law enforcement assistance agreement. Because neither of those exceptions applies here, Barron argues that the consent letter was insufficient to confer jurisdiction on the reserve officer.

At oral argument, the State conceded that a reserve officer is not a general authority peace officer for purposes of WMAPOPA jurisdiction. Instead, the State argued that WMAPOPA should not apply because an undercover drug buy is not encompassed in the definition of the officer's official duties. We agree. One need not be a police officer to assist law enforcement with an undercover marijuana purchase. Unlike a search, seizure, or arrest, the buy could have been made by a citizen or a confidential informant.

Further, we are not convinced that, had counsel successfully challenged jurisdiction under RCW 10.93.090 based on the reserve officer's status, suppression would have been justified. The only Washington court to consider the issue held that suppression is not an appropriate remedy for a violation of RCW 10.93.090, although that decision was overruled by the Supreme Court on other grounds. Since there is no case law to support suppression as a remedy for violation of RCW 10.93.090, we hold that Barron's counsel was not ineffective for failing to move for suppression on that basis.

3) Suppression Issue Under RCW 9.73.230 Where PC Absent For First One-Party Consent Recording

At oral argument, the State conceded that the initial one-party-consent authorization lacked probable cause, but argued that, because the first recording was not submitted to the jury, Barron cannot show prejudice . . . We agree. Only the first authorization is at issue because the later authorizations are supported by the first meeting between Barron and the reserve officer and are therefore based on more than a mere informant's tip. Although RCW 9.73.230(8) mandates suppression of one-party-consent recordings obtained in violations of the statute, here, the only recording so obtained was not submitted to the jury.

Barron relies on State v. Bean, 89 Wn.2d 467 (1978) to argue that the absence of probable cause for the first recording authorization taints the later recordings, requiring suppression of all the evidence obtained from the undercover buys as fruit of the poisonous tree. But this case is distinguishable from Bean. There, the Supreme Court held that a “subsequently obtained search warrant was not curative of the original illegal entry” when probable cause for the warrant was based on the illegally obtained evidence. Here, the only illegally obtained evidence was the recording itself. The later consent authorizations were based on the success of the initial controlled buy, not on the contents of the initial recording. Because there was probable cause for the later one-party-consent authorizations, suppression of evidence from the later buys was not required.

Further, a probable cause argument would not have resulted in suppression of the physical and testimonial evidence of the first buy presented at trial. Although RCW 9.73.230(8) mandates suppression of recordings obtained in violation of the statute, it allows the admission of any testimony that is “unaided by information obtained solely by violation of RCW 9.73.030.” In State v. Jimenez, 128 Wn.2d 720 (1996) **May 96 LED:03**, the Washington Supreme Court held that when law enforcement officers make a genuine effort to comply with RCW 9.73.230, the invalidly recorded conversation must be suppressed but other evidence, unaided by the recording, remains admissible. The reserve officer testified at trial about the first time Barron sold him marijuana, and that marijuana was introduced at trial through his supervisor. Clearly, the physical evidence was admissible, and nothing in the record suggests that Barron's testimony was aided by the first illegally obtained recording.

Because Barron was not prejudiced by his counsel's failure to challenge the probable cause determination for the first one-party-consent authorization, we hold that he did not receive ineffective assistance of counsel.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **CONSENT DEFENSE IS NOT ALLOWED FOR ASSAULT OCCURRING IN PRISON** – In State v. Weber, 137 Wn. App. 852 (Div. III, 2007), the Court of Appeals rejects an assault defendant’s argument on appeal that his trial attorney was unconstitutionally ineffective by not interviewing certain witnesses who allegedly would have supported his consent defense to charge of assault against a fellow inmate at the Washington State Penitentiary. The Court of Appeals rules that consent is not a defense to an assault against a fellow inmate, explaining as follows:

Traditionally, consent was considered a defense to assault. However, courts are now more hesitant to permit a defense of consent for some forms of assault because “society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace.” State v. Shelley, 85 Wn. App. 24 (1997) **June 97 LED:14**.

Currently, “the great weight of authority disfavors the defense of consent in assault cases.” State v. Baxter, 134 Wn. App. 587 (2006) **Oct 06 LED:17**. In determining whether consent is a defense to a criminal charge, this court considers the nature of the act that forms the basis of the charge, the surrounding circumstances, and public policy regarding the activity involved. Consent is not a defense to a crime if the activity that was consented to is against public policy. State v. Hiott, 97 Wn. App. 825 (1999) **Feb 00 LED:09**.

Public policy strongly disfavors permitting prison violence. Most correctional facilities are “fraught with serious security dangers.” Prisons are “populated by persons who have chosen to violate the criminal law, many of whom have employed violence to achieve their ends.” In such a volatile environment, public policy demands that violence between inmates be eliminated where possible.

Moreover, public policy also imposes a nondelegable duty on those operating correctional facilities to maintain the health and safety of the prisoners incarcerated there. The execution of this duty would be rendered impossible were this court to permit inmates to engage in physical violence under the rationale that both inmates agreed to fight. There is nothing redeeming or valuable in permitting fighting and every reason to dissuade it. Therefore, this court holds that consent is not a defense to the charge of second degree assault between two incarcerated persons. [*Court’s footnote: This conclusion is in accord with numerous other jurisdictions that have also limited the application of the defense of consent to the charge of assault. [Citing cases].*]

Because consent is not a defense to the charge of second degree assault when the assault occurs in the context of a prison fight, Mr. Weber has demonstrated no prejudice by his counsel failing to interview additional witnesses to establish consent. Thus, his claim of ineffective assistance of counsel fails.

[Some citations omitted]

(2) WHERE DEFENDANT OBTAINED DOCTOR’S DOCUMENTATION ONE DAY AFTER POLICE SEIZED HIS MARIJUANA PLANTS, BUT BEFORE HE TALKED TO POLICE, HE HAD VALID DEFENSE UNDER MEDICAL MARIJUANA ACT – In State v. Hanson, ___ Wn. App. ___, 157 P.3d 438 (Div. III, 2007), the Court of Appeals addresses the question of whether, under Washington’s Medical Use of Marijuana Act, a doctor’s written authorization is valid when it is obtained one day after police have seized one’s marijuana plants, but before there is police contact or questioning.

Defendant Hanson was not present when police executed a search warrant on his marijuana grow. The next day, he went to talk to the police, but not until after he obtained a doctor’s written authorization to use marijuana for medical purposes. The Court of Appeals holds that this authorization satisfies the statute, which provides that a person must 1) be a qualifying patient; 2) possess no more marijuana than necessary for his or her personal, medical use not exceeding a 60-day supply; and 3) present valid documentation “to any law enforcement official who questions that patient regarding his or her medical use of marijuana.” RCW 69.50(2)(a), (b), (c). The third element was met here on the plain words of the statute, the Hanson Court holds, even though the documentation was obtained only after police seized the marijuana plants.

Result: Reversal of Whitman County Superior Court conviction of Loren Ronald Hanson for manufacturing marijuana.

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>]
