



Law Enforcement

AUGUST 2008

Digest

625th Basic Law Enforcement Academy – February 11, 2008 through June 17, 2008

President: John D. Crane – Kent Police Department
Best Overall: Steven McNew – Seattle Police Department
Best Academic: Howard Hoffmann – Seattle Police Department
Best Firearms: Nathan Gibson – Ridgefield Police Department
Tac Officer: Seth Grant – King County Sheriff's Office

626th Session, Basic Law Enforcement Academy, Spokane Police Academy February 13, 2008 through June 18, 2008

Highest Scholarship: Terry Whitworth – Spokane Police Department
Pistol Marksmanship: Christopher Bode – Spokane Police Department
Best Tactical Firearms: Christopher Bode – Spokane Police Department
Best Overall Firearms: Christopher Bode – Spokane Police Department
Highest Achievement: 1) Timothy Mahnke – Lewis County Sheriff's Office
in Communications: 2) Patrick Barnett – Pasco Police Department

627th Basic Law Enforcement Academy – March 3, 2008 through July 8, 2008

President: Shane P. Stevenson – Jefferson County Sheriff's Office
Best Overall: Kevin Denney – Jefferson County Sheriff's Office
Best Academic: Kevin Denney – Jefferson County Sheriff's Office
Best Firearms: Sean Scott – Bonney Lake Police Department
Tac Officer: Dave Deffenbaugh – Bellevue Police Department

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SECOND AMENDMENT OF U.S. CONSTITUTION APPLIED TO STRIKE DOWN BROAD DISTRICT OF COLUMBIA BAN ON HANDGUN POSSESSION – In District of Columbia v. Heller, 128 S.Ct. 2783 (2008) (decision filed June 26, 2008), the U.S. Supreme Court rules 5-4 that a broad ban on possession of handguns and on possession of immediately operable firearms in the home violates the Second Amendment of the U.S. constitution. This is the first time that the U.S. Supreme Court has held that the Second Amendment grants an individual right to keep and bear arms. The majority opinion in Heller appears to leave intact reasonable legislative restrictions on firearms, such as restrictions on 1) sensitive places of possession, such as schools and government buildings; 2) possession by felons and the mentally ill; 3) types of firearms that may be possessed; 4) carrying firearms concealed; and 5) conditions and qualifications on commercial sale. But exactly what is “reasonable” in these and other regards is left unclear, and future litigation will be required to sort this out.

Result: Affirmance of decision of District of Columbia Circuit Court decision granting injunctive relief to Dick Anthony Heller against enforcement of certain elements of the District of Columbia’s law.

BRIEF NOTE FROM THE NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CHILD PORNOGRAPHY FOUND DURING SEARCH UNDER WARRANT TO SEARCH COMPUTER FOR EVIDENCE RELATING TO FAKE ID DOCUMENTS HELD ADMISSIBLE BECAUSE OFFICER WAS NOT INTENTIONALLY SEARCHING FOR THE PORNOGRAPHY, AND DID NOT CONDUCT INTENTIONAL SEARCH FOR THAT EVIDENCE UNTIL HE SUBSEQUENTLY OBTAINED A SEPARATE WARRANT – In United States v. Giberson, 527 F.3d 882 (9th Cir. 2008) (decision filed May 30, 2008), a three-judge panel of the Ninth Circuit rules that a federal agent did not exceed the scope of a search warrant. The case involved a federal agent who was searching a computer under a warrant that authorized a search for evidence of crimes relating to identification documents. The Giberson Court holds that the agent did not exceed the scope of the warrant by documenting, as he went along, his inadvertent discoveries of child pornography.

A Nevada law enforcement officer stopped Giberson because his license plate tabs were expired. During the traffic stop the officer discovered that Giberson had a fake ID card. Giberson told the officer that he used the fake ID for work and to avoid paying child support. Based on the fake ID, Agent David Kiesow, a United States Health and Human Services (HHS) agent, obtained a warrant to search Giberson’s residence in Nevada. After the search, Agent Kiesow sent Giberson’s laptop computer to Chicago to have a “mirror-image” copy of his hard drive made because Agent Kiesow believed Giberson used the laptop to make fake IDs. After

the copy of the hard drive was made, a second agent searched the copy for evidence indicating that Giberson used his computer to make false IDs. During that search, the second agent came across child pornography.

The second agent contacted Agent Kiesow, who instructed the second agent to continue searching for fake ID files, and, if during that search the second agent came across more child pornography files, to document them. Agent Kiesow then obtained a search warrant for possession of child pornography. Giberson appealed from the district court's denial of his motion to suppress evidence of child pornography subsequently found on his computer under the second warrant.

The Ninth Circuit affirms the Nevada U.S. District Court's conclusion that the second federal agent "was authorized to look at images and photographs; after discovering the pornographic images, [the officer] continued with his search for evidence of fake ID documents and only inadvertently came across more child pornography." The Ninth Circuit rules that the government made its intentional search for pornographic material on Giberson's computer only after the government had obtained a subsequent search warrant for child pornography. The government was therefore authorized to search for pornographic material under the second warrant.

The Ninth Circuit factually distinguishes U.S. v. Carey, 172 F.3d 1268 (10th Cir. 1999) (decision filed April 14, 1999). In Carey the Tenth Circuit suppressed evidence found when an officer, who was supposed to be searching a computer for drug-related documents, inadvertently found child pornography, and then began to intentionally search for more child pornography. The Carey Court found, based on the officer's testimony about his expansion of his search, that the child pornography "was not inadvertently discovered" because the officer had temporarily abandoned the search authorized by the warrant for the drug-related documents. Thus any evidence not related to the drug evidence search warrant was suppressed. In a concurring opinion, one of the Tenth Circuit judges stated that "if the record [in another case] showed that [the officer] had merely continued his search for drug-related evidence and, in doing so, continued to come across evidence of child pornography, . . . a different result would be required." Carey.

Result: Affirmance of the denial by U.S. District Court (Nevada) of Francis Eugene Giberson's motion to suppress the child pornography evidence.

WASHINGTON STATE SUPREME COURT

MOVING RIFLE ONTO A BED, BUT NOT TAKING IT, DURING AN INTERRUPTED BURGLARY DOES NOT CONSTITUTE BEING "ARMED" FOR PURPOSES OF EITHER (1) PROSECUTION FOR BURGLARY IN THE FIRST DEGREE UNDER CHAPTER 9A.52 RCW OR (2) SENTENCING ENHANCEMENT UNDER RCW 9.94A.533(3)

State v. Brown, 162 Wn.2d 422 (2007)

Facts and Proceedings below:

On August 6, 2001, Craig Ambacher returned to his residence and discovered that it had been burglarized. Although rooms had been ransacked and many of his belongings were gathered at various points in the house, nothing was missing. He found a rear sliding door open, and believed he had interrupted a burglary.

The trial court found that Brown, the defendant, removed a 7.62 mm rifle, from the closet and placed it on the bed in the master bedroom, a distance of six to seven feet from the closet. The defendant placed a gun clip near the rifle, although the clip did not match the rifle. The gun was not loaded at any time during the burglary. The rifle was accessible to the defendant and his accomplice during the course of the burglary, particularly while the defendant sorted through the dresser drawers of the bedroom.

The defendant and accomplice were interrupted during the course of the burglary by the sound of the homeowner's return, and the opening of his electric garage door. They fled the scene, leaving the rifle and clip behind on the bed.

Brown was charged with first degree burglary based on the fact that he or another participant in the crime was armed with a deadly weapon, the rifle. Brown waived the right to a jury trial, and the trial court found him guilty of the offenses charged. Among other things, the court concluded that "the gun lying on the bed would make the gun readily accessible to those who were in the process of ransacking this [master bed]room looking for bounty." Brown was convicted of first degree burglary, and the trial court imposed a firearm sentence enhancement.

ISSUE AND RULING: Does evidence that a burglar moved a rifle onto a bed during a burglary that was interrupted constitute evidence that he was "armed" for purposes of either the first degree burglary statute (chapter 9A.52 RCW) or the sentencing enhancement provisions of RCW 9.94A.533(3)? (**ANSWER:** No, rules a 5-4 majority)

Result: Reversal of Spokane County Superior Court convictions of Mickey William Brown for first degree burglary while armed with a deadly weapon and for intimidating a witness (the intimidating-a-witness facts, issue and analysis are not addressed in this **LED** entry); case remanded for retrial.

ANALYSIS BY MAJORITY: (Excerpted from lead opinion authored by Justice Charles Johnson)

Mr. Brown . . . contends that the Court of Appeals failed to correctly apply the "nexus test" to determine whether he was armed for purposes of both his conviction for first degree burglary and the firearm sentence enhancement. . . .

A close review of the testimony does not support the trial court's findings and conclusions [that Brown was armed].

The issue thus becomes whether, where a weapon was moved during a burglary, is sufficient to establish that a defendant is armed.

Our cases have recognized that the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed. State v. Barnes, 153 Wn.2d 378 (2005); State v. Schelin, 147 Wn.2d 562 (2002) **Feb 03 LED:07**; State v. Barnes, 153 Wn.2d 378 (2005) **March 05 LED:11**; Schelin; State v. Gurske, 155 Wn.2d 134 (2005) **Nov 05 LED:08**. A person is armed with a deadly weapon if it is easily accessible and readily available for use for either offensive or defensive purposes. And there must be a nexus between the defendant, the crime, and the weapon. To apply the nexus requires analyzing "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." Schelin. **LED EDITORIAL NOTE:** In our

entry on State v. Ague-Masters, 138 Wn. App. 86 (Div. II, 2007) in the August 2007 LED, we noted that: (1) in State v. Easterlin, 159 Wn.2d 203 (2007), the Supreme Court ruled that where a handgun was in the arrestee's lap just moments before he was arrested out of his car, and a loaded magazine had been on the car seat beside him, the evidence was sufficient to establish that he was "armed" during his commission of the crime of possession of cocaine; (2) in State v. O'Neal, 159 Wn.2d 500 (2007), the Supreme Court ruled that evidence that a methamphetamine manufacturer's home contained a loaded "AR-15" leaning against closet wall, and one of the accomplice family members testified that a pistol in the house was "there if I needed it," another accomplice living in the house was "armed" in the commission of the meth manufacturing crime; and (3) in State v. Eckenrode, 159 Wn.2d 488 (2007), the Supreme Court ruled that, where a marijuana grower had called 911 only minutes earlier regarding a possible intruder and told the dispatcher that he (the grower) had a loaded gun in his hand and was prepared to shoot any intruder, the discovery by responding police officers of a loaded rifle, an unloaded Ruger pistol, and a police scanner in the grow house was evidence that the defendant was "armed" in the commission of the crime of marijuana growing.]

Here, the crime was burglary and the type of weapon was a rifle at the scene. . . . No evidence exists that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime. In fact, Hill's testimony indicates that the weapon here was regarded as nothing more than valuable property.

Showing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon. "[T]he mere presence of a weapon at a crime scene may be insufficient to establish the nexus between a crime and a weapon." Schelin. Likewise, "[s]imply constructively possessing a weapon on the premises sometime during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapon." Schelin. "[A] person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." Eckenrode.

The dissent argues that inquiry into the defendant's intent or willingness to use the rifle is a condition in the nexus requirement that does not appear in any of this court's prior cases. We disagree.

. . .

[I]n Schelin we said that the nexus test . . . would enable a jury to infer that Schelin "was using the weapon to protect his basement marijuana grow operation." This case demonstrates that the defendant's intent or willingness to use the rifle is a condition of the nexus requirement that does, in fact, appear in Washington cases.

The dissent states, but does not apply, the principle that " 'where the weapon *is not actually used* in the commission of the crime, *it must be there to be used.*' " Here, the facts suggest that the weapon was merely loot, and not there to be

used. Evidence that the rifle was briefly in a burglar's possession, without more, does not make Brown armed within the meaning of the sentencing enhancement statutes.

[Some citations omitted]

CONCURRING AND DISSENTING OPINIONS: Justice Sanders writes a concurring opinion joined by Justice James Johnson. They agree with the majority's analysis, and then they attack the dissenting opinion's analysis as yielding "absurd" results such as making a burglar armed if, "when rifling through a silver drawer he touches a carving knife."

Justice Madsen writes the dissenting opinion joined by Justices Owens, Fairhurst and Bridge. The dissent argues in vain that the majority opinion "fails to follow our case law, fails to draw all reasonable inferences in favor of the State, and reaches a result that ignores the statutes."

WASHINGTON STATE COURT OF APPEALS

OFFICER'S REQUEST FOR VOLUNTARY PRODUCTION OF ID FROM PERSON WHO HAD JUST PARKED AND GOTTEN OUT OF A CAR WAS NOT A SEIZURE

State v. Vanderpool, __ Wn. App. __, 184 P.3d 1282 (Div. III, 2008)

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

Timothy Vanderpool drove a blue Ford Explorer through the parking lot of an apartment complex. A police officer ran a driver's license check on the car. The car was registered to Misty Schneider.

The police officer thought Mr. Vanderpool was Misty Schneider's husband, James Schneider. The officer ran a license check on him and discovered that Mr. Schneider's license had been suspended. The officer had never seen Mr. Schneider. But the driver's license check included his physical description. The driver, Mr. Vanderpool, fit the description. And the officer knew that Mr. Schneider had driven his wife's car in the past. The officer assumed the driver was Mr. Schneider.

Mr. Vanderpool parked the car and walked towards the apartment complex. The officer parked his patrol car behind the Ford Explorer. The officer rolled down his window and asked Mr. Vanderpool if he was James Schneider. He said he was not and that his name was Timothy Vanderpool.

The police then asked him for identification to confirm his identity. Mr. Vanderpool gave the officer an identification card. And he told the officer that he did not have a driver's license.

The officer ran a driver's license check on Mr. Vanderpool and found that his license had been suspended. The officer arrested Mr. Vanderpool for driving with a suspended license. He found methamphetamine in his search incident to that arrest. Mr. Vanderpool moved to suppress the drug evidence. The court denied the motion.

Mr. Vanderpool and the State stipulated to the facts of the case. The judge found Mr. Vanderpool guilty of unlawful possession of a controlled substance, methamphetamine, based on those facts.

ISSUE AND RULING: Did the officer seize Vanderpool when the officer requested that Vanderpool voluntarily show identification to the officer? (ANSWER: No, and therefore the State did not need to show reasonable suspicion for the stop)

Result: Affirmance of Benton County Superior Court conviction of Timothy Allen Vanderpool for unlawful possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Vanderpool contends that the officer did not have the legal authority to stop him and specifically that RCW 46.20.349 (conferring the right to stop a car if the registered owner's license is suspended) provided no authority to stop him.

The State responds that RCW 46.20.349 provided the necessary authority for the officer to stop Mr. Vanderpool, and the trial court therefore correctly denied the motion to suppress the drug evidence.

...

The trial court concluded that RCW 46.20.349 gave the officer the authority to "contact" Mr. Vanderpool. RCW 46.20.349 gives police authority to "stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked." But Mr. Vanderpool parked the car and was walking away from it when the officer contacted him. So the statute is not applicable and did not justify the officer's contact. RCW 46.20.349. The statute is irrelevant here.

Nonetheless, the court's findings and conclusions easily support its refusal to suppress the drug evidence. And we can affirm the judgment on any alternative legal basis supported by the record.

Here, the officer simply asked Mr. Vanderpool for identification to verify that he was not James Schneider. That is not a seizure. State v. Crane, 105 Wn. App. 301 (Div. II, 2001) **June 01 LED:08**, overruled on other grounds by State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**. The officer was in a public place, as was Mr. Vanderpool. Mr. Vanderpool may not have had to respond but did and volunteered that he did not have a driver's license.

At that point, the officer knows and therefore has probable cause to conclude that Mr. Vanderpool was driving without a license and those are grounds to arrest him. The officer had just seen Mr. Vanderpool drive Ms. Schneider's car.

These findings support the trial court's conclusion that the officer's conduct was legally appropriate. The officer had probable cause to arrest Mr. Vanderpool for driving without a valid license. The court correctly concluded that the arrest was valid. And the evidence was properly seized pursuant to that valid arrest.

[Some citations omitted]

SEIZURE OF POTENTIAL WITNESS NOT JUSTIFIED WHERE THERE WERE NO EXIGENT CIRCUMSTANCES, NOT EVEN A RECENT REPORT OF A CRIME

State v. Dorey, __ Wn. App. __, __ P.3d __, 2008 WL 2524561 (Div. III, 2008)

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

At approximately 8:46 p.m. on June 29, 2006, [a sheriff's deputy] responded to a complaint by a named citizen of a disturbance involving a black man and another man in a black shirt. [The deputy] arrived at the intersection where the alleged disturbance was reported to have occurred 5 to 10 minutes earlier and found nothing. He then went to a convenience store that was in the direction in which one of the males had reportedly run. Upon entering the parking lot, [the deputy] saw a car in the stall of the car wash and a male in a black shirt, Christopher Dorey, squatting down with his back to the deputy. The deputy went into the store and spoke with the clerk who knew nothing of the reported disturbance.

[The deputy] then pulled his patrol car up to Mr. Dorey, who was by then getting into his car to leave. **[LED EDITORIAL COMMENT: Not that it appears to matters to the Court's analysis, but the Court subsequently describes the situation as involving the deputy as stopping Mr. Dorey in Mr. Dorey's moving car.]** The deputy yelled at Mr. Dorey "to hold on a minute and indicated that he wanted to talk to [Mr. Dorey]." Mr. Dorey stopped his car, and got out to speak with the deputy. [The deputy] asked Mr. Dorey if he had seen anything. Mr. Dorey said that he saw a group of people, one of whom matched the race of one of the persons described by the deputy, but that group had just left.

The deputy asked for Mr. Dorey's identification, which Mr. Dorey provided. The deputy recorded the information and thanked Mr. Dorey. The deputy ran the information for warrants as he watched Mr. Dorey leave.

When the inquiry turned up warrants, the deputy took off after Mr. Dorey. He found Mr. Dorey within minutes, walking away from his car. The deputy saw Mr. Dorey toss a fanny pack into the bushes. Mr. Dorey was arrested on the warrants and charged with possession of the methamphetamine that was in the recovered fanny pack.

Mr. Dorey challenged the legality of the stop. The trial court denied his motion to suppress, holding "this was a valid Terry stop of a potential witness to the reported disturbance." The court further concluded that it was limited in time and purpose, and it was appropriate for the deputy to take Mr. Dorey's identification because Mr. Dorey had witnessed something associated with the disturbance. Mr. Dorey was found guilty as charged.

ISSUES AND RULINGS: 1) Did the deputy "seize" Dorey? (ANSWER: Yes); 2) Was the seizure justified where Dorey was only a possible witness to what had been vaguely reported as a "public disturbance," and there were no exigent circumstances, not even a recent report of a crime? (ANSWER: No)

Result: Reversal of Benton County Superior Court conviction of Christopher Todd Dorey for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Mere contact?

As an initial matter, the State suggests by citation to authority that there was no seizure in this case, rather merely a casual encounter with police in a public place. The State cites State v. Mote, 129 Wn. App. 276 (2005). **Nov 05 LED:10**. That case involved an officer speaking to the occupants of a stopped car. See State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** (concluding that where a vehicle is parked in a public space, the distinction between a pedestrian and the occupant of a vehicle dissipates). Police officers are permitted to approach citizens and permissively inquire into whether they will answer questions as part of their “community caretaking” function.

Here, [the deputy] stopped Mr. Dorey in a moving car. “[T]he use of language or tone of voice indicating that compliance with the officer's request might be compelled” is a seizure. Yelling at Mr. Dorey “to hold on a minute and indicat[ing] that he wanted to talk to [Mr. Dorey]” and “flag[ging] him down” was a seizure. We hold that Mr. Dorey was seized.

2) Justifiable seizure of witness?

The State argues, as the trial court held, that the deputy properly stopped Mr. Dorey under Terry as a witness to a disturbance. Mr. Dorey argues that Washington law does not authorize the police to stop him as a witness and even if it did, there was no crime under investigation.

The State found no Washington authority addressing the detention of a witness. But after the briefing in this case was completed, Division Two of this court filed a case on this issue holding: “There is no authority - - either statutory or otherwise - - permitting an officer to seize a witness without a warrant, absent exigent circumstances or officer safety.” State v. Carney, 142 Wn. App. 197 (Div. II, 2007) **Feb 08 LED:17** (Bridgewater, J.), *petition for review filed* (Wash. Jan 23, 2008) (No. 81124-5); (Penoyar, J., concurring); (Quinn-Brintnall, J., dissenting).

In Carney, a sheriff's deputy reported to an area to investigate a reckless motorcyclist that was reported by a citizen to be driving at high speeds and doing “wheelies” in a residential neighborhood. The deputy saw a motorcycle and rider that matched the description in the report talking to two occupants in a parked car. When the deputy approached, the driver ran to his bike and fled, swerving around the patrol car that the deputy attempted to use to block the motorcycle, and ignoring the deputy's emergency lights and verbal instructions to stop.

The deputy then pulled up behind the parked car with his emergency lights still on. He asked the two women in the car to show him their hands and requested identifying information. He radioed in their names and birthdates to conduct a records check. Ms. Carney, the passenger, was found to have an outstanding warrant. In a search incident to the arrest, the deputy discovered methamphetamine in Ms. Carney's jacket, resulting in a drug possession charge. The trial court denied her suppression motion. On appeal, the majority in Division Two reversed.

As previously stated, the majority held that an officer may seize a witness in exigent circumstances. The concurrence agreed that a witness may be held

under exigent circumstances. (Penoyar, J., concurring). From there, the majority split.

The author of the opinion found no exigency. But the concurrence opined that there was an exigency that justified the stop under both the limited circumstances in Washington's common law for exigency and the circumstances referred to in City of Kodiak v. Samaniego, 83 P.3d 1077 (Alaska 2004) [and in the American Law Institute "model code"].

...

[T]he concurrence referenced the danger the motorcycle posed to persons and property, and the mobility of the witnesses and the risk of losing their possible evidence. But the concurrence opined that the scope of the stop was exceeded when the deputy detained the occupants of the car to make the records check. Here, there was no exigency.

The dissent agreed that a witness may be seized in the circumstances approved by the ALI Model Code, which, the dissent opined, applied in Carney. But here, the deputy had no reason to believe that a dangerous crime had been committed or that Mr. Dorey had knowledge to aid in such an investigation or that stopping Mr. Dorey was necessary to investigation.

...

Significantly, Mr. Dorey points out that the nature of the disturbance for which the police were summoned was so innocuous, that there is no crime to investigate. We agree. The facts the trial court found concerning the disturbance show that whatever took place was in the early evening before sundown. The evidence does not support the inference of a crime.

Further, no ongoing or recently committed unsolved crime was afoot, so there was no reason to believe that Mr. Dorey could assist in the investigation. Nor was there any indication that the deputy was acting to ensure the health or safety of a crime victim.

...

Most important, the stop in this case was not reasonable.

...

In order for the recordation of Mr. Dorey's personal information to be reasonable under these circumstances, he would have had to provide such meaningful information as to make him a witness.

Mr. Dorey saw a black male in a parking lot that was in the direction of where a suspect in a disturbance was seen. There is nothing to show that Mr. Dorey also saw the black male approach the parking lot from the direction of the disturbance. Under the State's analysis, every black male in the vicinity would be a suspect. Mr. Dorey only stated that he saw a black male in a car with others who were having car problems. The deputy did not ask for a description of the black male or his clothing or of the type of car in which he was riding. The officer

simply took down the scant and innocuous information Mr. Dorey offered. In light of the limited and very possibly unrelated information Mr. Dorey provided, together with the absence of a crime for which an investigation would be futile, obtaining Mr. Dorey's identification was not reasonable.

Had Mr. Dorey not been stopped and his personal information not been recorded, his warrants would not have been discovered by the officer, and the methamphetamine would not have been discovered. Because the initial stop was improper, all evidence seized as a result of that stop must be suppressed.

[Some citations omitted]

LED EDITORIAL NOTE/COMMENT: See the LED entry immediately below regarding State v. Mitchell, ___ Wn. App. ___ (Div. I, 2008). See also State v. Carney, 142 Wn. App. 197 (Div. II, 2007) Feb 08 LED:17. Dorey, Mitchell and Carney address lawfulness of brief “detentions” of possible witnesses. We did not include in our excerpts from the Dorey opinion above the following quotation by the Dorey Court from the American Law Institute’s Model Code of Pre-arraignment Procedure, which states that an officer may temporarily detain a probable witness to a crime when:

(i) [T]he officer [has] reasonable cause to believe that a misdemeanor or felony, involving danger or forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and (ii) the officer [has] reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and (iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

The Dorey Court also notes that this view is shared by Professor LaFave, author of the leading treatise on Fourth Amendment search and seizure law. Reading Dorey, Carney, and Mitchell together, we think that Washington law currently accepts this view, though, because this is a totality-of-the-circumstances test, each case will turn on its own particular facts as observed, reported and testified to by officers.

OFFICERS ACTED LAWFULLY IN CONTINUING CONTACT WITH WOULD-BE VICTIM-WITNESS WHO ALLEGED THAT HE HAD BEEN ROBBED, BUT WHO SUBSEQUENTLY BECAME A SUSPECT FOR DRUG POSSESSION

State v. Mitchell, ___ Wn. App. ___, ___ P.3d ___, 2008 WL 2406441 (Div. I, 2008)

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

Matthew Mitchell appeals his conviction for possession of a controlled substance (cocaine), arguing the trial court abused its discretion by denying his motion to suppress the incriminating evidence. Mitchell claims that police officers improperly seized him without individualized reasonable suspicion of any criminal wrongdoing. In the alternative, Mitchell claims that his seizure amounted to a pretextual stop in violation of State v. Ladson [138 Wn.2d 343 (1999) **Sept 99 LED:05**] Finding no merit to either claim, we affirm Mitchell's conviction.

Late one night, a 911 caller reported that a man was being robbed and assaulted in a grocery store parking lot. Within a matter of minutes, several law enforcement vehicles arrived at the scene. Other patrol cars pursued and stopped the pickup truck the alleged suspects used to flee from the scene.

At the scene of the reported incident, the apparent victim, Matthew Preston Mitchell, was being treated for his injuries. Mitchell told the police that he had been assaulted by two people while he was in the parking lot, but later changed his story, stating that the suspects had at one point been inside his car. When a deputy asked permission from Mitchell to process the vehicle for evidence of the robbery, Mitchell denied the request. Mitchell then stated that he was no longer interested in participating in the investigation, and that he wanted to leave the scene. The deputy asked Mitchell to remain at the scene because he was the victim of a violent crime that was being investigated. When Mitchell told him that he was afraid he might be harmed if he cooperated with police, the deputy tried to calm his fears. After talking with the deputy, Mitchell agreed to try to identify his attackers in a show up. Meanwhile, the deputy saw what appeared to be marijuana in Mitchell's car, which led to a K-9 drug dog being ordered to the scene. When the dog arrived, it signaled that there were drugs in Mitchell's vehicle.

Mitchell was taken to where the suspects were detained, and identified his assailants. He then provided a written statement before he was returned to the grocery store parking lot and allowed to leave. Mitchell's vehicle, however, was impounded. A search warrant was obtained, and cocaine and drug paraphernalia were found in the car. Mitchell was charged with unlawful possession of cocaine.

Before trial, Mitchell moved to suppress the cocaine, arguing that he was illegally seized during his encounter with the police. After considering the testimony and other evidence presented, the court denied the motion to suppress, concluding that Mitchell had not been seized in violation of his constitutional rights.

ISSUES AND RULINGS: 1) Did the officers act reasonably and therefore lawfully in dealing with the defendant during the process in which he changed, in their assessment, in status from exclusively a possible robbery victim to status as both a possible robbery victim and a drug crime suspect? (**ANSWER:** Yes); 2) Did the officers engage in an unlawful pretext seizure at any point in the process? (**ANSWER:** No)

Result: Affirmance of Snohomish County Superior Court conviction of Matthew Preston Mitchell for unlawful possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution protect individuals from unreasonable seizures and searches by the government. If the detention is unreasonable, the fruits of the unreasonable seizure are subject to exclusion under the "fruit of the poisonous tree" doctrine. The constitutional protection is implicated, however, "only when an encounter between a police officer and a citizen rises to the level of a seizure."

We agree with Mitchell that the police officers who first arrived on the scene did not have a reasonable suspicion that he was involved in any criminal wrongdoing. But a brief detention of a potential witness to a crime is permitted, so long as it meets the Fourth Amendment's reasonableness requirement. As the United States Supreme Court explained [in Florida v. Royer, 460 U.S. 491, 497 (1983)],

[T]he law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen.”

In judging reasonableness, courts apply a balancing test that looks to “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

The police officers waited while Mitchell was receiving emergency medical care and treatment for his injuries before interviewing him. They then detained him only long enough to interview him, transport him to attend a show up identification and provide a written statement, and return him to the scene of the assault. These types of arrangements are ordinarily reasonable and constitutionally permissible.

It is very difficult to investigate or prosecute a crime without witnesses. Missing witnesses have been the bane of more than one prosecution. Identifying the witnesses and obtaining their stories is thus an essential part of police work, and is best done as quickly as possible. A Terry stop of a . . . witness is therefore the essence of good police work.

Other relevant factors to be considered include the seriousness of the crime being investigated, a reason to believe the person detained had knowledge of material aid in the investigation of such crime, and the need for prompt action.

Mitchell contends that he was seized when the deputy told him he had to remain at the scene of the robbery. Under the circumstances, this remark by the deputy did not transform an otherwise consensual police interaction into a constitutionally impermissible detention. By that time, Mitchell was viewed both as a victim and a suspect in the criminal investigation. Mitchell acknowledges that the deputy had observed a green leafy substance resembling marijuana in his car, and that Mitchell's girlfriend admitted to police that they had arranged to purchase marijuana from one of the robbery suspects. Given these facts and Mitchell's own inconsistent statements about what happened, the police had a reasonably articulable suspicion of specific criminal activity. An investigatory stop was warranted under Terry.

Alternatively, Mitchell argues he was illegally detained under Ladson. He argues that the deputy unlawfully used Mitchell's status as a victim of the robbery "as a pretext or justification to detain Mr. Mitchell for purposes of investigating [the deputy's] suspicions of a drug offense by [Mitchell]." Ladson, however, is readily distinguishable. In that case, two police officers followed a vehicle they believed was being driven by a person involved in drug dealing, hoping to find a reason to stop him. After following the car for some time, the police discovered the vehicle had expired license plate tabs. During the ensuing stop, the police learned that the driver had an expired license. They arrested the driver and searched the vehicle incident to arrest, discovering a gun in the car and drugs on the driver. The officers admitted that they used traffic infractions as an excuse to stop cars in order to investigate unrelated criminal activity. The Ladson court suppressed the evidence, finding it was obtained pursuant to a pretext stop. But in this case, the police were merely attempting to ascertain the motive for the robbery then under investigation.

No pretext was involved. The incriminating evidence was discovered in the course of a lawful police investigation. Mitchell's motion to suppress was properly denied.

[Some citations omitted]

UNDER FORMER WSU RESIDENCE HALLS REGULATION, WSU STUDENTS HELD TO HAVE A SHARED PRIVACY RIGHT AGAINST WARRANTLESS, UNCONSENTED, NON-EXIGENT POLICE ENTRY INTO RESIDENTIAL FLOOR HALLWAYS

State v. Houvener, __ Wn. App. __, __ P.3d __, 2008 WL 2524527 (Div. III, 2008)

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

According to the trial court's unchallenged findings of fact, at about 5:45 a.m. on February 11, 2006, [a] Washington State University [police officer] responded to a reported burglary on the third floor of the East Tower of the Stephenson dormitory complex. Salman Islman, a resident of room 323, reported waking up and seeing someone leave his room. Mr. Islman told the officer that his laptop computer and acoustic guitar were missing.

[The officer] left Mr. Islman's room and initiated a search of the dormitory complex. [The officer] started on the top of the complex, either the 12th or 13th floor, and walked the halls, descending eventually to the 6th floor.

Mr. Houvener and Jerid Scott Sturman-Camyn were in Mr. Houvener's room on the sixth floor. As he approached Mr. Houvener's door, [the officer] reported hearing music and voices, which he deemed suspicious given the early hour. He listened at the threshold of the door and "heard one voice say, 'I'm just paranoid we are going to get caught' and a second voice say, 'I don't think he would call the cops.'" [The officer] put his finger over the peephole to prevent the occupants from seeing who was there and knocked while stating, " 'let me in, this is Matt.' " The students inside ignored the knock and did not answer the door. [The officer] attempted this ruse at least once more, to no avail.

[The officer] eventually removed his finger from the peephole, knocked and identified himself as a police officer, and ordered the occupants to open the door. Mr. Houvener opened the door.

[The officer], dressed in his police uniform and armed with a visible pistol, asked Mr. Houvener to step out in the hallway and to walk down the hall with him. Mr. Houvener complied. As [the officer] questioned Mr. Houvener, he made incriminating statements to the effect that he had some items in his room that did not belong to him. Meanwhile, Mr. Sturman-Camyn, who was also a resident of that floor but not a roommate of Mr. Houvener's, was also asked out of Mr. Houvener's room and questioned by another officer. Mr. Sturman-Camyn likewise made incriminating statements. The statements given by the students were made without the benefit of Miranda warnings.

After Mr. Houvener made his incriminating statements, he was placed under arrest and advised of his Miranda rights. He was then asked to retrieve from his room the items stolen in the burglary, which he did. The request was not preceded by Ferrier warnings. The police did not have permission from Mr. Houvener or from any resident of the sixth floor to enter and search the sixth floor.

Mr. Houvener shares a bathroom, which is located across the hall from his room, with the other residents of his floor. He also shares a study lounge with other residents of the sixth floor. Each floor of Stephenson has a common bathroom and study lounge. Each floor of Stephenson East is limited to one sex. The sixth floor is a male floor; it has no women's bathroom.

While the lobby to the Stephenson East dormitory can be accessed by the general public, one cannot access any of the floors unless he or she is a resident with a special pass key or is the escorted guest of a resident. Nevertheless, Washington State University (WSU) housing authorities have issued passkeys to the police. The police conduct walk-through inspections of the dormitory hallways without having been invited by a resident and without having received the consent of any resident. These patrols occasionally uncover evidence of criminal behavior, i.e., minor drinking, smoking marijuana, which leads to further investigation and warrantless searches and/or arrests.

The trial court noted that WAC 504-24-020(2)(d) provides: " 'All guests must be escorted while in the building.' " "Guests are defined as anyone not residing in the residence hall." Former WAC 504-24-020(2)(e) (1987). [Footnote by Court of Appeals: *After this case was decided by the trial court, the regulation was changed to read: "Except for those persons authorized access by WAC 504-24-025, guests are defined as anyone not residing in the residence hall." WAC 504-24-020(e) (Order 06-23-158, filed Nov. 22, 2006, effective Dec. 23, 2006). A companion regulation, WAC 504-24-025, also effective December 23, 2006, was added to provide: "University administrators or designees, officers, agents, or employees whose duties include working with residence hall residents or programs, performing custodial, maintenance, or operations of residence halls, or performing safety, emergency, security, police, or fire protection services shall have access to residence halls at all times while in the performance of their assigned duties." We decline to comment on the effect, if any, these new regulations would have on our decision.]* "Each living group is permitted to

develop its own visitation schedule for its main lounge and lobbies.” WAC 504-24-020(3). But visitors are not allowed between 2 a.m. and 6:30 a.m.

...

Based on [its] findings and conclusions, the trial court suppressed the evidence. Because the State stipulated that without the evidence obtained from Mr. Houvener's room this prosecution could not proceed, the case against Mr. Houvener was dismissed with prejudice.

ISSUE AND RULING: Under the former WSU residence hall regulation, did defendant Houvener have a reasonable expectation of privacy against a warrantless, unconsented, non-exigent entry by police into the WSU residence hall hallway on the particular floor that Houvener shared with other male students on the floor? (ANSWER: Yes)

Result: Affirmance of Whitman County Superior Court order suppressing evidence in the prosecution of Jacob Sterling Houvener for residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State argued before the trial court that no search occurred because students do not enjoy a reasonable expectation of privacy in their hallways. Mr. Houvener argued, and the court agreed, that because each dormitory floor is treated by the university as an independent residential area and students are members of a living group – with shared bathroom, study facilities, lobbies, and hallways for which the residents are responsible and may govern – he had a subjective expectation of privacy that is objectively reasonable.

...

In assessing Mr. Houvener's privacy interest in his living group hallway, the focus is whether, under the circumstances, the hallway should be placed under the home's “ ‘umbrella’ of Fourth Amendment protection.” United States v. Dunn, 480 U.S. 294 (1987) (addressing curtilage). The curtilage has been considered “part of the home itself for Fourth Amendment purposes.”

The trial court held that Mr. Houvener had a reasonable expectation of privacy in his living group floor. We agree with the trial court's thoughtful analysis. The trial court cited three cases in its legal conclusion: State v. Dalton, 43 Wn. App. 279, 716 P.2d 940 (1986); People v. Killebrew, 76 Mich. App. 215, 256 N.W.2d 581 (1977); and Reardon v. Wroan, 811 F.2d 1025 (7th Cir.1987).

In Reardon, Delta Chi fraternity members at Illinois State University filed a civil rights lawsuit against law enforcement officers' warrantless entry into their fraternity house. The first question the court easily disposed of was “whether the hallway to the fraternity house where the plaintiffs were arrested is comparable, under a Fourth Amendment analysis, to the common areas of apartment buildings where cases have held that privacy interests are not protected.” The Seventh Circuit held: “Although there are certain similarities to the apartment building cases, fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building.”

The circuit court agreed with the district court's observation that, unlike apartment dwellers who are "simply co-tenants sharing certain common areas," the fraternity members were more like "roommates in the same house." The court also found that the fraternity's intended "exclusive living arrangement," had a goal of "maximizing the privacy of its affairs."

While the application process for a dormitory living group is presumably less rigorous than for fraternities, the physical layout of the premises in Reardon is similar to the sixth floor of Stephenson East. As the court found, the residents of the sixth floor share a study area and bathroom, and they are viewed as a living group independent of residents of other floors. While outsiders can access the lobby, they may not access any of the floors without a pass key or without the escort of a resident of that floor. WAC 504-24-020(2)(d), (3).

Thus, similar to the fraternity members in Reardon, Mr. Houvener had an expectation of privacy in the hallway, to the exclusion of residents of Stephenson East's other floors or other outsiders.

...

Because of the intimate nature of the activities in the hallway – most remarkably, towel-clad residents navigating the hallways to and from the shared shower facilities – it is reasonable to hold that this area is protected.

In Killebrew, the Michigan appellate court held that a hallway shared by tenants in a private, multiple-unit dwelling is not a public place. The court stated that since entry was limited by right to occupants of the building and their guests, the occupants could expect a high degree of privacy in that area. The same is true here.

Finally, in Dalton, a WSU student invited an undercover officer into her college dormitory to conduct an illegal drug transaction. The warrantless entry was upheld as nonintrusive since police were invited in and took nothing except what would have been taken by a willing purchaser. The court noted: "The purpose of WAC 504-24-020 is not to protect the defendants' illegal business, but rather to protect the privacy of dorm residents from members of the general public who have no reason to be in the dorm." Since the defendant invited the undercover officer into her room, she waived her right to privacy because she invited police inside, and her expectation of privacy was diminished by opening her home to outsiders for illegal drug sales.

...

The State also argues that using the WAC to exclude police would render the regulation meaningless because it would also prohibit entry by janitorial staff and WSU residential officials unless accompanied by a resident. We disagree. The dormitory support staff have implied permission to enter. See Stoner, 376 U.S. at 488-90 ([U.S. Supreme Court decision] refusing to expand the implied permission to enter given by motel guests to motel staff, such as maids, janitors, or repair persons, to provide motel management the authority to consent to warrantless searches).

The sixth floor student residents have a right to privacy in the hallway they share. These students are not strangers – they share close quarters, intimate spaces, and a common academic and social experience. This distinguishes their status from tenants in an apartment building. That the university allows the students in each living area to independently govern their common areas evinces an understanding of this private and synergic environment. It follows that the students in each living area have a common interest in the maintenance of their privacy.

The court also held that the police were not lawfully present in the student residents' sixth floor living area because the police had no greater right, absent a warrant or consent, than a private citizen to act in the manner that they did. We agree.

[Some citations omitted]

LED EDITORIAL NOTE: In a footnote excerpted above, the Court of Appeals notes that the applicable WSU residence halls regulation has been amended since the facts of this case arose. That may well change the privacy analysis should similar facts arise again.

OFFICERS EXECUTING SEARCH WARRANT AT RESIDENCE WERE NOT JUSTIFIED BY OBJECTIVE, ARTICULABLE SAFETY CONCERNS WHEN THEY SEIZED A NON-RESIDENT WHO ARRIVED AT THE SCENE JUST AS THE SEARCH WAS ABOUT TO BEGIN

State v. Smith, __ Wn. App. __, __ P.3d __, 2008 WL 2705668 (Div. III, 2008)

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

On the afternoon of April 5, 2006, [Detective A] led a team of officers to a location around the corner of a residence for which they had obtained a warrant to search. As [Detective A] was set to execute the warrant, a sport utility vehicle (SUV) pulled into the driveway. Two men got out of the car and went to the door. Two women, Marcy Northey and Tana Loy Smith, remained inside the car. The SUV was not listed in the search warrant. Nor were any women named in the warrant. The purpose of the SUV visitors' presence was not known to the officers.

A detective conducting a presearch surveillance of the residence reported the presence of the visitors to [Detective A], who later recounted, "I kind of had to change my tactical plan on the fly to incorporate these new bodies into the warrant." He therefore "reassign[ed] [the detective] and a couple other officers to take control of the SUV and the occupants."

As [Detective A] and his team came around the corner to conduct the knock-and-announce, three or four officers simultaneously contacted the two women in the SUV. Ms. Smith and Ms. Northey were ordered out of the car at gunpoint and forced to the ground. [Detective A] later justified the detention of the women by stating, "if I flow past them with my main body of entry, my main entry element, it opens up our back side and we don't know what these people are doing there."

[Detective A] testified that after securing the house, he "shifted into an investigation mode and went back outside to the second scene," where the other

officers were holding the women. As [Detective A] questioned Ms. Northey, he noted that “she was having difficulty staying on task.” He also “checked [her] pulse and noted an elevated pulse rate,” characteristics he attributed to methamphetamine use. He noted that Ms. Smith was grinding her teeth, her pupils were dilated, she had attention difficulty, and an abnormally high body temperature. He further testified that both women smelled of methamphetamine.

When the detective retrieved Ms. Northey's purse from the SUV to examine her identification, he detected the odor of methamphetamine, saw a prescription bottle with its label scratched off, and saw smoking devices. Both Ms. Smith and Ms. Northey eventually confessed to having smoked methamphetamine. The pipes tested positive for methamphetamine.

The State charged Ms. Smith with possession of methamphetamine. Ms. Smith moved to suppress all of the evidence discovered during what she characterizes was an unconstitutional seizure, which lacked individualized suspicion of danger or wrongdoing. The State argued that Ms. Smith's detention was justified under Michigan v. Summers, 452 U.S. 692 (1981) and State v. King, 89 Wn. App. 612 (1998) **April 98 LED:07**, which hold that officers may lawfully detain the occupants of a home during execution of a search warrant.

...

The trial court denied the motion to suppress holding that because the initial detention was justified the scope of the stop was expanded by the circumstances that presented themselves to the detective.

[Footnote and record citations omitted]

ISSUE AND RULING: Where the officers who were about to execute the search warrant knew nothing about the persons in the SUV arriving at the scene, and the officers did not observe anything that objectively indicated those persons were a threat, were the officers justified in seizing them in the manner they did? (**ANSWER:** No)

Result: Reversal of Benton County Superior Court conviction of Tana Loy Smith for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The most fundamental of the exceptions to the warrant requirement is the detention of a person that an officer has probable cause to believe has committed a crime. A second, narrower exception is an investigative Terry stop, based upon less evidence than is needed for probable cause to make an arrest, which permits the police to briefly seize an individual for questioning based on specific and articulable objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime.

Neither of these exceptions applies here. The officer expressly testified that he did not know why the women were present. He could not, therefore, and did not, have probable cause or reasonable suspicion that these women were involved in criminal activity.

“A third, still narrower application is that even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing

a search warrant at a residence to briefly detain *occupants* of that residence, to ensure officer safety and an orderly completion of the search.” This is the exception under which the State justifies the detention here.

As Ms. Smith correctly points out, however, this exception is limited in its application to occupants of the residence being searched. The State cites no authority to justify the detention of persons outside of a residence in which the search is to be conducted. And we decline to extend the holding in Summers.

...

This court has held that when a person comes into the residence in which a search is being conducted, any detention must be justified by specific and articulable facts that create an objective, reasonable belief that the suspect is armed and dangerous and may not be based on a generalized suspicion that people present during narcotic searches are often armed. State v. Lennon, 94 Wn. App. 573 (1999) **May 99 LED:04**. There are no facts to show an individualized suspicion that Ms. Smith posed a threat to officer safety.

Less intrusive action on the part of the officers could have achieved the desired result. Notably, the detective had recorded the comings and goings of other visitors and had not detained anyone else.

Because the officers had no reasonable articulable suspicion that Ms. Smith had committed or was about to commit a crime or that she was a threat to anyone's safety, the seizure violated Ms. Smith's Fourth Amendment rights. All “evidence obtained as a result of an unlawful seizure is inadmissible.”

[Some citations omitted]

CHILD PORNOGRAPHY CONVICTION OVERTURNED WHERE DEFENDANT HAD TAKEN PICTURES OF HIS 15-YEAR-OLD STEPDAUGHTER WITHOUT HER KNOWLEDGE; THIS WAS ONLY VOYEURISM, RULES THE 2-1 MAJORITY

State v. Whipple, __ Wn. App. __, 183 P.3d 1105 (Div. II, 2008).

Facts:

Whipple's daughter-in-law was using his laptop and discovered multiple still shots and short videos of Whipple's 15-year-old stepdaughter, E.J.E. The images showed E.J.E. in various stages of undress, including some completely nude images; it did not appear that E.J.E. was aware that she was being videotaped.

Whipple's wife, Suzanne Duscha, learned of the images, contacted the police, and moved out of the family home. Whipple, a high school principal, contacted the investigating officer and agreed to a meeting. He told the officer that he had lost his laptop. Whipple did not meet the officer at the specified time.

The officer then obtained a search warrant for Whipple's truck, hotel room, residence, school office, and the school computer files. During an investigation, the State recovered back-up copies of the images from the school's file server.

Proceedings below:

Following its investigation, the State charged Whipple by amended information with one count of sexual exploitation of a minor and 10 counts of possessing depictions of a minor engaged in sexually explicit conduct.

Whipple was convicted of 9 counts of possessing depictions of a minor engaged in sexually explicit conduct under former RCW 9.68A.080.

ISSUE AND RULING: Under the definition of “sexually explicit conduct” in RCW 9.68A.011(3)(e), did the defendant engage in “exhibition” of a minor’s naked private body parts where the defendant took pictures of the victim without her knowledge, but where he did nothing to aid or invite or cause her to become naked? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of the Jefferson County Superior Court convictions of Rex Edson Whipple for 9 counts of violation of RCW 9.68A.070.

Key Statutory Language:

One of the definitions of “sexually explicit conduct” is “[e]xhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” RCW 9.68A.011(3)(e). The focus in Whipple is on the undefined statutory term, “exhibition.”

ANALYSIS BY MAJORITY (Excerpted from majority opinion)

[T]he meaning of “sexually explicit conduct” in this case turns on what constitutes an “[e]xhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” See State v. Grannis, 84 Wn. App. 546 (Div. II, 1997) **July 97 LED:18**.

In Grannis, we addressed this exact issue, deciding what is required to prove possessing depictions of a minor engaged in sexually explicit conduct. There, the defendant clandestinely photographed minor girls on a playground and, later, clandestinely photographed one of the girls taking a bath. We held that an exhibition is inanimate and without any purpose of its own. We found no evidence that the defendant initiated, contributed to, or in any way influenced the girls’ conduct; and without evidence to prove that the purpose of the person or persons who initiate, contribute to, or otherwise influence the exhibition occurrence is to stimulate the viewer, the evidence did not establish that the girls were engaged in “sexually explicit conduct” within the meaning of RCW 9.68A.011(3).

Likewise, our Supreme Court applied similar reasoning in State v. Chester, 133 Wn.2d 15 (1997) **Oct 97 LED:06**. There, the defendant also clandestinely photographed his minor stepdaughter nude as she exited the shower and dressed herself. The minor did not know she was being filmed. Moreover, the defendant did not influence, alter, or affect her conduct in any way. The State charged the defendant with sexually exploiting a minor in violation of RCW 9.68A.040. That statute, like former RCW 9.68A.070, required proof that a minor engaged in sexually explicit conduct. After a jury convicted the defendant, we reversed because the State presented insufficient evidence to support the conviction.

The Supreme Court affirmed our rationale. It held that the legislature did not intend “to criminalize the photographing of a child, where there is no influence by the defendant which results in the child’s sexually explicit conduct.” And because there was no evidence that the defendant aided, invited, employed, authorized, or caused his stepdaughter to engage in sexually explicit conduct, it could not find him guilty of sexually exploiting a minor. In sum, the defendant in Chester was not actively involved in causing the exhibition or any sexually explicit conduct.

To contrast, in State v. Myers, we concluded that there was sufficient evidence to uphold the defendant’s conviction of sexually exploiting a minor in violation of RCW 9.68A.040. State v. Myers, 82 Wn. App. 435 (1996), affirmed, 133 Wn.2d 26 (1997) **Oct 97 LED:06**. We reasoned that the minor engaged in an “[e]xhibition of the genitals . . . for the purpose of sexual stimulation of the viewer,” because the defendant videotaped his minor daughter in the bathtub, over her objection, and coaxed her into positions that exhibited her vagina. In other words, the defendant had initiated or contributed to the exhibition of the minor’s genitals with the purpose of sexually stimulating the viewer. Therefore, the minor engaged in sexually explicit conduct.

Here, the evidence reveals that Whipple photographed E.J.E. from outside her exterior bedroom window. The parties stipulated that Whipple “did not initiate, contribute to, take any affirmative act to cause, or otherwise influence E.J.E. (d.o.b.7-13-1990) to engage in the conduct at issue in this case including her dressing and undressing, which was recorded on video and pictures during the periods of time charged in the amended information.” Moreover, the parties also stipulated that (1) E.J.E. did not know the camera was present during the charged periods; (2) E.J.E. did not know anyone was observing her as she undressed during the charged periods; and (3) no other person contributed to or influenced E.J.E.’s conduct, which was recorded during the charged periods. In fact, the record is deplete of any evidence suggesting that Whipple aided, invited, employed, authorized, or caused E.J.E. to engage in sexually explicit conduct. Although we find this conduct despicable, we are constrained to evaluate it under this specific statute. Consequently, the evidence is insufficient to support Whipple’s nine convictions of possessing depictions of a minor engaged in sexually explicit conduct. *[Court’s footnote: We note that this behavior is specifically prohibited under the voyeurism statute, RCW 9A.44.115(2)(a) and (b), and we have upheld such a conviction in State v. Stevenson, 128 Wn. App. 179 (2005) Oct 05 LED:23.]* We hold that the trial court erred and we reverse its decision.

Reversed and remanded to vacate the convictions.

[Some citations and footnotes omitted]

DISSENTING OPINION:

Judge Penoyar dissents, suggesting a different reading of the statute and precedents.

EVIDENCE HELD SUFFICIENT TO PROVE USE OF DRUG PARAPHERNALIA WHERE THERE WAS MARIJUANA IN BAGGIE, PLUS APPARENT MARIJUANA RESIDUE IN PIPE AND TIN, ALL OF WHICH WERE IN BACKPACK SEARCHED INCIDENT TO ARREST

State v. O'Meara, 143 Wn. App. 638 (Div. II, 2008).

Facts and Proceedings below:

On March 1, 2007, the police arrested O'Meara on outstanding warrants unrelated to this appeal. While searching O'Meara incident to his arrest, the police discovered a plastic baggie containing marijuana, a playing card tin appearing to contain marijuana residue, and a smoking pipe appearing to contain marijuana residue. The State charged O'Meara with one count of possession of marijuana in violation of RCW 69.50.4014 and one count of use of drug paraphernalia in violation of RCW 69.50.4121.

O'Meara pleaded guilty to possession of marijuana, but moved for dismissal of the use of drug paraphernalia charge, asserting that RCW 69.50.412 "does not prohibit the mere possession of drug paraphernalia but rather prohibits its use." The trial court granted his motion, holding that there were insufficient facts to indicate that O'Meara had used the pipe to smoke marijuana, and that therefore he could not be charged with use of drug paraphernalia. RCW 69.50.4121.

ISSUE AND RULING: Defendant was in possession of a backpack when he was searched incident to arrest. The backpack contained a playing card tin, a pipe, and a plastic bag containing marijuana. The playing card tin and the pipe appeared to contain marijuana residue. Was there sufficient evidence to support prosecuting defendant for unlawful use of drug paraphernalia? (ANSWER: Yes)

Result: Reversal of Jefferson County Superior Court order dismissing charge against Thomas Chad O'Meara for unlawful use of drug paraphernalia; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The applicable elements of a violation of RCW 69.50.412(1) under the facts alleged here are: (1) use of drug paraphernalia (as defined in RCW 69.50.102(a)); (2) to "store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body"; and (3) a controlled substance.

The State points to RCW 69.50.102(b) that lists 14 factors that should be considered "[i]n determining whether an object is drug paraphernalia . . . in addition to all other logically relevant factors." The State specifically relies on factors (4) and (5) involving the "proximity of the object to controlled substances" and the "existence of any residue of controlled substances on the object."

Here, the plastic baggie containing marijuana, the playing card tin, and the pipe were all found together in O'Meara's backpack. Both the playing card tin and the pipe appeared to contain marijuana residue. And "[c]ircumstantial evidence provides as reliable a basis for findings as direct evidence." Therefore, a rational trier of fact could conclude beyond a reasonable doubt that O'Meara used the playing card tin for storage of marijuana and used the pipe to inhale marijuana, both of which are violations of RCW 69.50.412. See State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) **Nov 02 LED:05** (noting that the RCW 69.50.102(b) factors can establish an inference that paraphernalia was used); State v. Williams, 62 Wn. App. 748 (Div. I, 1991) **Feb 92 LED:14** (noting that the existence of residue of controlled substances on an object will support an inference that the object is drug paraphernalia).

[Some citations omitted]

A CREDIT CARD MAY BE AN “ACCESS DEVICE” REGARDLESS OF WHETHER THE INTENDED USER HAS ACTIVATED THE CARD, SO LONG AS THE EVIDENCE SUPPORTS A FINDING THAT THE CARD COULD BE USED IN THE MANNER DESCRIBED BY RCW 9A.56.010(1).

State v. Clay, ___ Wn. App. ___, 184 P.3d 674 (Div. I, 2008).

Facts and Proceedings below:

Clay was arrested by a community corrections officer for violating the conditions of his probation for a previous conviction. During the search incident to Clay's arrest, the officer found a Mervyns credit card in Clay's pocket. The name on the front of the card was Berna B. Llorico, and the back of the card was signed with the same name. Llorico testified that the signature on the back of the card was not hers. She also testified that she had a single Mervyns account for more than five years, that her account number had changed, but that she never received a new card. Thus, she had neither seen nor signed the card in Clay's possession. **[LED EDITORIAL NOTE: The appellate court opinion is not explicit on the following point, but it appears that she also testified that she did not know Clay, or at least that he did not have her permission to possess the card.]**

At the end of the prosecution's case in chief, Clay moved to dismiss the charge of second degree possessing stolen property based on insufficient evidence. He argued that the State had failed to prove that the card was an access device as defined in RCW 9A.56.010(1). The trial court denied Clay's motion, ruling that there was sufficient evidence to support a finding that the card was an access device. Clay was convicted by a jury of second degree possessing of stolen property.

ISSUE AND RULING: Can a credit card that has never been activated by the intended user be an access device under RCW 9A.56.010(1)? (ANSWER: Yes)

Result: Affirmance of Snohomish County Superior Court conviction of Dennis James Clay for possessing stolen property in the second degree.

Statutory Definition of “Access Device”: RCW 9A.56.010(1) defines “access device” as follows:

"Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

ANALYSIS: (Excerpted from Court of Appeals opinion)

While the Mervyns card was never in Llorico's possession, the statutory definition of access device does not require that the account holder have possession of it at any time. Rather, the statute only requires that the device "can be used" to access anything of value.

In addition, the statute does not require that the access device be activated. RCW 9.56.010 focuses exclusively upon the capacity of the device to be used in the manner described and does not include within its definition of access device any reference to the status of that device with its issuer. While whether a card has been activated by its intended user may be relevant, this fact is not

dispositive in determining whether it "can be used." Companies that issue cards and merchants who accept them employ, to widely varying degrees, a variety of security measures, which may or may not include requiring a user to provide personal information in order to "activate" a card . .

...

Viewed most favorably to the State, the evidence is sufficient to support the jury's finding that the Mervyns card found in Clay's possession was an access device. Llorico had a single active Mervyns account that had been assigned a new account number, but had not received a card corresponding to that new number. Someone other than Llorico had signed her name in the signature box on the back of the card. Although Llorico testified that she had not activated the card, no evidence was offered that would prevent a rational juror from concluding that the card had been, or could be, activated by someone else or used without activation. As noted by the trial court, there was "no testimony that any additional steps needed to be taken to activate that card."

[Some citations omitted]

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

STALKING STATUTE'S PHRASE "INTENTIONALLY AND REPEATEDLY HARASSING OR FOLLOWING ANOTHER PERSON" RECEIVES PRO-STATE INTERPRETATION – In State v. Kintz, __ Wn. App. __, __ P.3d __, 2008 WL 2051050 (Div. I, 2008), the Court of Appeals rejects a "stalking" defendant's argument that he did not commit stalking where, on several occasions while driving his car, he followed individual woman who were strangers to him, contacted them, and then followed them for an additional extended period of time.

The stalking statute reads, in pertinent part, that "A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly harasses or repeatedly follows another person. . . ." RCW 9A.46.110(1)(a). The statute defines repeatedly as "on two or more separate occasions." RCW 9A.46.110(6)(e).

Defendant argued that he did not "repeatedly" do anything. He theorized that for each continuous period during which he engaged in his following of a woman, the following of the particular woman was merely one continuous "occasion," not a series of repeated occasions. The Court of Appeals explains as follows its reason for rejecting Kintz's argument:

Here, Kintz repeated his visual and verbal contact with each victim on separate occasions. For each of the charges, Kintz had several discrete encounters with his victims. Gudaz testified that she saw Kintz at least five times. Each time he either drove by her or stopped to talk to her and then drove out of eyesight. These breaks in contact, with time and distance between Kintz and Gudaz, separated the encounters into individual events. Similarly, Westfall saw Kintz in the parking lot and then lost sight of him when she walked down the trail. When she lost sight of Kintz, this particular incident ended. As soon as she emerged onto the road, the white van came up behind her, marking another encounter. These are two, individual encounters. Each contact between Kintz and his victims constitutes a separate occasion.

Therefore, we conclude the trial court did not err in interpreting the repeated contact provision of the statute, or in finding that sufficient evidence supported a conclusion that Kintz had contact with the victims on separate occasions as contemplated by the statute.

Result: Affirmance of Whatcom County Superior Court convictions of Clarence Andrew Kintz (aka Chuck Kintz) for stalking (two counts).

NEXT MONTH

The September 2008 LED will include the following recent appellate court decisions:

1) the July 10, 2008 Washington Supreme Court 7-2 decision in State v. Modica, __ Wn.2d __, __ P.3d __, 2008 WL 2686105 (2008), interpreting chapter 9.73 RCW's prohibition on taping phone conversations in which persons have a reasonable expectation of privacy, and holding that a King County jail inmate's phone calls from the jail to his grandmother were lawfully recorded by the jail in light of the following factors that, in combination, made the call participants' expectations of privacy not reasonable: a) jail inmates generally have a reduced expectation of privacy and the conversations were not with his attorney or otherwise privileged; b) a sign on the wall by the phone stated that inmate phone calls were being recorded; and c) a recorded message, which both parties to the conversation heard, that the call was being recorded;

2) the July 7, 2008 Division One Court of Appeals decision in State v. Prado, __ Wn. App. __, __ P.3d __, 2008 WL 2636557 (Div. I, 2008), ruling that a traffic stop was not justified where an officer saw a driver cross, by two tire widths for one second, an eight-inch-wide, white line dividing a freeway exit lane from the next traffic lane; and

3) the July 1, 2008 Division Three Court of Appeals decision in State v. Ibarra-Raya, __ Wn. App. __, __ P.3d __, 2008 WL 2581680 (Div. III, 2008), ruling that the late-night presence of persons in a house that a neighbor believed was "vacant" did not constitute exigent circumstances justifying warrantless, non-consenting police entry into the premises.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, 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 [\[http://supct.law.cornell.edu/supct/index.html\]](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 [\[http://www.supremecourtus.gov/opinions/opinions.html\]](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 [\[http://www.ca9.uscourts.gov/\]](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 are at [\[http://www.law.cornell.edu/uscode/\]](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 [\[http://www1.leg.wa.gov/legislature\]](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 [\[http://access.wa.gov\]](http://access.wa.gov). The internet address for the Criminal Justice Training Commission's home page is [\[https://fortress.wa.gov/cjtc/www/led/ledpage.html\]](https://fortress.wa.gov/cjtc/www/led/ledpage.html), while the address for the Attorney General's Office home page is [\[http://www.atg.wa\]](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 Criminal Justice Training Commission's Internet Home Page [\[https://fortress.wa.gov/cjtc/www/led/ledpage.html\]](https://fortress.wa.gov/cjtc/www/led/ledpage.html)