



# Law Enforcement

JULY 2008

# Digest

624<sup>th</sup> Basic Law Enforcement Academy – January 28, 2008 through June 3, 2008

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Best Academic: Kevin Glasenapp – Grandview Police Department  
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**WAPA STAFF ATTORNEY PAM LOGINSKY'S 2008 SUMMARY ON CONFESSIONS, SEARCH, SEIZURE AND ARREST IS ACCESSIBLE ON THE CJTC LED PAGE**

Many LED readers are familiar with the excellent and comprehensive summary on law-enforcement-related law topics by Pam Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. Ms. Loginsky updates the summary annually. The May 2008 version of her summary is accessible on the internet on the Criminal Justice Training Commission's internet LED page under a link at: "**Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors,**" May 2008, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

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**LEGISLATIVE UPDATE - - CORRECTION NOTICE RE EFFECTIVE DATE OF CH. 230**

In the June 2008 LED at pages 10-11, we reported on chapter 230, Laws of 2008, that makes it a class B felony for an adult to fail to register as a sex offender or kidnapping offender. We reported an effective date of June 12, 2008 for the enactment, but in fact the effective date is 90 days after adjournment *sine die* of the 2010 legislative session, which the Final Bill Report states is June 9, 2010.

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**BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**VIRGINIA OFFICERS' SEARCH INCIDENT TO CUSTODIAL ARREST FOR CRIME THAT WAS NOT SUBJECT TO CUSTODIAL ARREST UNDER VIRGINIA LAW WAS VALID UNDER THE U.S. CONSTITUTION'S FOURTH AMENDMENT – In Virginia v. Moore, 128 S.Ct.**

1598 (2008), the U.S. Supreme Court unanimously rules that, under the U.S. Constitution's Fourth Amendment, police 1) may lawfully arrest a person based on probable cause as to any crime, and 2) may search incident to the arrest, even though under state law the police would not be authorized to make a custodial arrest under the circumstances.

**LED EDITORIAL COMMENT:** The **Moore** ruling will not directly affect how Washington law enforcement officers do their jobs. They must follow the many independent constitutional grounds rulings of the Washington appellate courts placing greater restrictions on law enforcement than do the U.S. Supreme Court rulings under the Fourth Amendment. But the **Moore** ruling will help Washington officers and their agencies defend against civil lawsuits alleging Fourth Amendment violations. Also, for criminal cases that are **federally** prosecuted, while Washington officers should always follow the Washington rules, the **Moore** decision means that actions of Washington officers will be tested exclusively under Fourth Amendment standards without consideration of Washington law restrictions.

**Result:** Reversal of Virginia Supreme Court decision; case remanded, presumably for reinstatement of Virginia trial court conviction and sentence of David Lee Moore for possessing cocaine with intent to sell.

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#### **BRIEF NOTES FROM THE NINTH CIRCUIT, UNITED STATES COURT OF APPEALS**

**(1) OFFICER'S INADVERTENT USE OF GLOCK INSTEAD OF TASER, AN ERROR THAT WAS FATAL FOR THE DETAINEE, WILL BE REVIEWED FOR REASONABLNESS BY FACT-FINDER IN SECTION 1983 CIVIL RIGHTS ACTION** – In Torres v. Madera, 534 F.3d 1053 (9<sup>th</sup> Cir. 2008), the Ninth Circuit Court of Appeals reverses a U.S. District Court ruling that the following facts, as described by the Court of Appeals, present a case in which a fact-finder could determine that the police officer “intentionally” applied the force that was used:

In the process of responding to a loud music complaint, Madera City Police officers arrested two individuals-Erica Mejia and Everardo Torres-handcuffed them, and placed them in the back of a patrol car. After the two were in the patrol car for approximately thirty to forty-five minutes (during which time Everardo had fallen asleep), Mejia was removed from the car and her handcuffs were readjusted. At this time, Everardo awoke and started yelling and began kicking the back window of the patrol car. In response, Officer Noriega approached Everardo's side of the patrol car. At least one witness saw Officer Noriega say something as she approached, which Officer Noriega described as “yelling at [Everardo] to stop or he was going to be tased.” Officer Noriega then opened the patrol car door and reached down with her right hand to her right side, where she had a Glock semiautomatic pistol in a holster in her officer belt and, immediately below, a Taser M26 stun gun in a thigh holster. She unholstered a weapon, pointed the weapon's laser at Everardo's center mass, and pulled the trigger of her similarly-sized-and-weighted Glock, mortally wounding Everardo.

Although the Ninth Circuit applies a more elusive and questionable analytical approach than did the Fourth Circuit Court of Appeals in essentially identical circumstances in Henry v. Purnell, 501 F.3d 374 (4<sup>th</sup> Cir. 2007), the result is the same – the officer and the police agency cannot argue that the application of force was not intentional merely because the officer inadvertently

used a Glock instead of a taser. As the Fourth Circuit explained in Henry, this circumstance is not distinguishable from such circumstances as: (1) an officer attempting to strike a person with a gun and having the gun inadvertently fire, or (2) an officer inadvertently seizing the wrong person or searching the wrong place. Such volitional acts are intentional, for Civil Rights Act purposes, even if the result that was desired was not achieved.

Result: Case remanded to U.S. District Court for reasonableness determination.

**(2) STRIP SEARCH RULING IN CIVIL RIGHTS SUIT WITHDRAWN; 3-JUDGE PANEL TO REHEAR CASE INVOLVING STRIP SEARCH OF TRESPASSER** – In Edgerly v. City and County of San Francisco, on May 22, 2008, the 3-judge panel withdrew its July 17, 2007 opinion (reported at 495 F.3d 645 (9<sup>th</sup> Cir. 2008) **Oct 07 LED:02**) and granted rehearing of the argument.

The issue in the case is whether law enforcement officers could be subject to federal civil rights liability for strip searching a trespass arrestee at the police station. The question is whether this minor, non-violent crime and other facts in the case justified conducting the strip search at the police station; the manner of conducting the strip search is not at issue.

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### **WASHINGTON STATE SUPREME COURT**

**SUSPECT'S 1) EYES GETTING BIG AT SEEING POLICE, 2) FURTIVE GESTURE, AND 3) WALKAWAY DOES NOT ADD UP TO REASONABLE SUSPICION FOR TERRY STOP; COURT DOES NOT ADDRESS THE FACT THAT HIS WALKAWAY FROM THE OFFICERS WAS JAYWALKING IN THEIR PRESENCE**

State v. Gatewood, \_\_\_ Wn.2d \_\_\_, 182 P.3d 426 (2008)

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

The facts are undisputed. Shortly after midnight on June 26, 2004, [Officers A and B] were patrolling the Rainier Valley area of Seattle. [Officer A] was driving a marked patrol car, and [Officer B] was riding in the passenger seat. As they drove north on Rainier Avenue South, [Officer B] saw three or four people, including Gary Gatewood, sitting in a bus shelter. Gatewood looked at [Officer B] and the police cruiser, and [Officer B] testified that Gatewood's "eyes got big ... like he was surprised to see us." [Officer B] then observed Gatewood "twist [ ] his whole body to the left, inside the bus shelter, as though he was trying to hide something."

[Officer B] told [Officer A] he thought Gatewood was hiding something and that he wanted to circle back and investigate. [Officer A] turned right at the next intersection, turned right again, and then drove the wrong way down a one-way street returning to the intersection near the bus shelter.

By the time the officers reached the intersection, Gatewood had left the bus shelter and was walking north on Rainier Avenue. Gatewood then jaywalked [Court's footnote: *At the trial court level Gatewood contested officers' assertion that he jaywalked; however, he does not contest this on appeal.*] across Rainier

and began walking south on the other side of the street. He turned right onto 39th Avenue and continued walking. [Officer A] drove slowly behind Gatewood and then pulled the police car in front of him blocking his path. [Officer B] jumped out of the car and said to Gatewood, "Stop. I want to talk to you." Gatewood turned around and walked away. [Officer B] ordered him to stop several times, but Gatewood kept walking.

When Gatewood reached some bushes, he bent over and reached into his waistband. The officers could not see what he was doing, so they drew their guns and ordered Gatewood to stop and show his hands. Gatewood pulled something out of his waistband, threw it into the bushes, and then complied with the officers' request. [Officer A] immediately handcuffed Gatewood, and [Officer B] recovered a loaded .22 caliber handgun in the bushes. The officers found marijuana on Gatewood, and a subsequent search of the bus shelter yielded cocaine.

The State charged Gatewood with second degree unlawful possession of a firearm, possession of cocaine, and possession of less than 40 grams of marijuana. At a CrR 3.6 hearing, Gatewood moved to suppress the evidence, claiming the officers did not have reasonable, articulable suspicion of criminal activity justifying the seizure. ***[Court's footnote: Although Gatewood also argues that the officers used jaywalking as a pretext to stop, it is not necessary here to attempt to further discern the officers' subjective intent in stopping Gatewood.]*** The trial court denied his motion. A jury found Gatewood guilty of unlawful possession of a firearm and unlawful possession of marijuana. The Court of Appeals affirmed Gatewood's convictions [by unpublished opinion].

**ISSUE AND RULING:** Gatewood's "eyes got big" in apparent uncomfortable surprise when a patrol car rolled by a bus stop shelter at midnight. Gatewood twisted to the side in a furtive gesture that suggested he might be discarding something. Gatewood then got up and walked away, perhaps to avoid contact with the officers in the patrol car. Do these facts provide reasonable suspicion for a Terry stop of Gatewood? (**ANSWER:** No, rules a unanimous Court)

**Result:** Reversal of King County Superior Court conviction of Gary Nathaniel Gatewood, Sr., for second degree unlawful possession of a firearm and unlawful possession of marijuana.

**STATUS NOTE FROM LED EDITORS:** The King County Prosecutor's Office has filed a motion seeking clarification from the Supreme Court regarding the Gatewood opinion's footnote that we have bolded above. The Prosecutor's Office is asking the Supreme Court to make it clear that the trial court in this case never made a required finding of fact that Gatewood had committed an infraction, and that the officers stopped him based on the infraction, so therefore the Supreme Court: (1) was unable to decide whether an infraction justified the stop, and (2) was also unable to assess the defendant's claim that the stop was pretextual. The Prosecutor's Office asserted in its motion to the Supreme Court that such clarification is necessary because the Gatewood opinion as written might be erroneously interpreted by some as holding that officers may not seize someone suspected of committing an infraction where they also suspect the person of committing a crime.

**ANALYSIS:** (Excerpted from Supreme Court opinion)

Terry requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*.” The officers’ actions must be justified at their inception.

The State concedes that when [Officer B] said “Stop, I need to talk to you,” it was a seizure. Thus, we only need to analyze the facts known to the officers up to this point: (1) Gatewood’s widened eyes upon seeing the patrol car, (2) his twist to the left like he was trying to hide something, (3) his departure from the bus shelter, and (4) his crossing the street mid-block.

These facts are insufficient for a Terry stop. Startled reactions to seeing the police do not amount to reasonable suspicion. State v. Henry, 80 Wn. App. 544 (1995) **Aug 96 LED:19; Oct 96 LED:19-21** (nervousness is not sufficient for Terry stop). Although Gatewood twisted to the side, [Officer B] did not see what, if anything, Gatewood was hiding. Flight from police officers may be considered along with other factors in determining whether officers had a reasonable suspicion of criminal activity, State v. Little, 116 Wn.2d 488 (1991), but Gatewood did not flee from the police. [Officer A] said he was unsure whether Gatewood saw their patrol car returning when he left the bus shelter. And [Officer B] specifically testified that Gatewood was not walking very fast because their car rolled up behind him. We cannot conclude Gatewood was “fleeing” from the officers simply because he walked away from the shelter.

The trial court relied on two cases in its denial of Gatewood’s motion to suppress: State v. Graham, 130 Wn.2d 711 (1996) **Feb 97 LED:06** and State v. Sweet, 44 Wn. App. 226 (1986). This case is distinguishable. In Graham, officers patrolling on bicycles almost ran into the defendant who was walking along the street. He was carrying a wad of money in one hand and a small plastic baggie with white rocks, which officers suspected was cocaine, in the other. When he saw the officers, he looked nervous, shoved his hands into his pockets and began crossing the street against the “Don’t Walk” signal. We upheld the warrantless seizure. In the instant case, however, the officers saw far less. [Officer B] observed Gatewood’s widened eyes and twist to the left as the police cruiser drove by. He did not see what Gatewood was trying to hide. In fact, from his vantage point in the passing patrol car, [Officer B] could not have seen much.

In Sweet, officers received a call about a suspicious truck which they subsequently found parked and unoccupied in front of a closed business. They then saw a man standing in the shadows nearby, and when the officers approached him, the defendant “fled at a full run.” The Court of Appeals held the ensuing Terry stop valid. The facts here are very different. Gatewood was not alone or in a suspicious place, and he did not flee from the officers but simply walked away.

Officers’ seizure of Gatewood was premature and not justified by specific, articulable facts indicating criminal activity. Although circling back to investigate Gatewood’s furtive movements was proper, the officers did not have reasonable suspicion that he committed or was about to commit a crime. They could have continued to follow Gatewood or engaged in a consensual encounter to further investigate the activity [Officer B] observed in the bus shelter. Since Gatewood did not flee from the officers, it was not necessary to take swift measures.

**LED EDITORIAL COMMENT:** As we stated above in our “status note,” the Prosecutor’s Office has requested clarification from the Supreme Court in this case. The Prosecutor is seeking clarifying language to the effect that, because there were no findings by the trial court on the questions of whether Gatewood jaywalked or whether the officers used jaywalking as a pretext to stop him, this case does not have any implications for Washington’s pretext-stop rule. Such clarification would be useful because some attorneys and judges might otherwise mistakenly read a pretext rationale into the decision contrary to case law holding that, even though an officer has a hunch as to more serious criminal activity at the time that the officer sees a person commit an infraction, that does not necessarily preclude the officer from making the infraction stop. See, for example, State v. Hoang, 101 Wn. App. 431 (Div. I, 2000) Nov 00 LED:08 and State v. Nichols, 161 Wn.2d 1 (2007) Sept 07 LED:10; but see State v. Montes-Malindas, digested below in this July LED beginning at page 21. We will report the result of the State’s Gatewood motion for clarification when the Supreme Court decides it.

**OFFICER COULD NOT LAWFULLY FRISK SEIZED MAN BASED SOLELY ON FACT THAT THE MAN WAS NERVOUS AND FIDGETING**

State v. Setterstrom, \_\_\_ Wn.2d \_\_\_, 183 P.3d 1075 (2008)

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

On the morning of February 28, 2005, someone called the police, complaining about two young men in the lobby of the Department of Social and Health Services (DSHS) building in Tumwater. The caller alleged one of them was sleeping and the other appeared under the influence of drugs. The dispatcher sent out word, and [Officers A and B] responded.

Arriving at the DSHS building, the officers found the scene as the caller had described. One man, Joseph Rice, was asleep on a bench in the lobby. The other, Michael Setterstrom (later the defendant and petitioner), sat next to Rice, filling out a benefits application.

The officers approached the men. Setterstrom had partially filled out the application, listing his name. [Officer A] saw the name and asked Setterstrom if that was his name; Setterstrom said yes. When asked how to spell it, Setterstrom changed his mind and said it was not his name and that he was just filling out the form for a friend. He said his real name was Victor M. Garcia.

Trying to determine which name was real, [Officer A] asked Rice (who by now was awake) what Setterstrom’s name was. Before Rice could answer, Setterstrom blurted “Victor,” in an apparent attempt to keep his friend from revealing his true identity.

[Officer A] described Setterstrom as nervous and fidgeting, behavior that quickly escalated. [Officer A] believed Setterstrom was under the influence, probably from methamphetamine. [Officer A] often encounters people on methamphetamine, and he believes they are erratic and can become violent without warning, even though Setterstrom himself did not stand up, put his hands in his pockets, or actually do or say anything threatening.

[Officer A] feared danger, so he patted down Setterstrom for weapons. In Setterstrom's right front pants pocket he felt hard objects. How many or what the objects were, [Officer A] did not remember. He testified that none felt like a gun.

[Officer A] reached into Setterstrom's pocket and grabbed everything inside. He does not remember what the hard objects were because, on emptying the pocket, he quickly focused on the small plastic baggie filled with white powder. He put the pocket's contents on the bench and told Setterstrom he was under arrest.

What happened next was, we assume, unusual. Setterstrom dropped to his knees, grabbed the baggie, and swallowed it. [Officer A] tried to make Setterstrom spit it out but was unsuccessful. For obvious reasons, police never recovered the baggie.

The police did, however, arrest Setterstrom and seize the backpack he had with him. Inside [Officer A] found a small locked safe. He later applied for and received a warrant to search the safe. Inside was a baggie of methamphetamine, together with a needle, a pipe, and a set of scales.

The State charged Setterstrom with possessing a controlled substance. Setterstrom moved to suppress the evidence, claiming the search was illegal. The trial judge denied the motion. The case went to trial and a jury convicted Setterstrom. The judge sentenced him to six months in jail.

Setterstrom appealed, and the commissioner of Division Two of the Court of Appeals affirmed. Setterstrom moved to modify the commissioner's ruling, and a three-judge panel denied the motion.

**ISSUE AND RULING:** Setterstrom concedes that the officer lawfully seized him. Does the fact that Setterstrom was nervous and fidgeting during the seizure justify the officer in frisking Setterstrom? (**ANSWER:** No, rules a unanimous court)

**Result:** Reversal of Court of Appeals decision that affirmed (by unpublished opinion) the Thurston County Superior Court conviction of Michael Derek Setterstrom for possession of methamphetamine.

**ANALYSIS:** (Excerpted from Supreme Court opinion)

Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search. An officer may, though, frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons. State v. Collins, 121 Wn.2d 168 (1993) **July 93 LED:07**. The failure of any of these makes the frisk unlawful and the evidence seized inadmissible. Setterstrom concedes the initial stop was justified, so we need only decide whether [Officer A] had a reasonable concern of danger and whether [Officer A] properly limited the scope of the frisk.

...

To justify a frisk without probable cause to arrest, an officer must have a reasonable belief, based on objective facts, that the suspect is armed and

presently dangerous. Collins. Reasonable belief that the suspect is armed and presently dangerous means, “ ‘ some basis from which the court can determine that the detention was not arbitrary or harassing.’ “ State v. Belieu, 112 Wn.2d 587 (1989).

We do not find such a basis here. The police received an anonymous call claiming Setterstrom was under the influence, heard a lie about his name, and observed his nervous, fidgety behavior. The record shows no threatening gestures or words. Setterstrom did not even stand. At most, the record shows that Setterstrom was under the influence; this is not a crime in itself.

Moreover, Setterstrom was lawfully in a public area of the DSHS building, filling out a DSHS benefits form. It seems likely that some people filling out benefits forms exhibit erratic behavior, making employment difficult and benefits applicable. This is not a situation where the officers encountered Setterstrom in a dark alley in a crime-ridden area. See State v. Glover, 116 Wn.2d 509 (1991).

[Officer A] has been on the force for 20 years, three of them spent in the narcotics division. He may, of course, rely on this experience in deciding how to act. Surely officers may protect themselves when the situation reasonably appears dangerous, but a frisk is a narrow exception to the rule that searches require warrants. The courts must be jealous guardians of the exception in order to protect the rights of citizens. The justification for the frisk here was simply not sufficient.

Since the frisk was unjustified, we do not decide whether the officer took the frisk too far.

(Some citations omitted)

**LED EDITORIAL COMMENT:** This decision does not change the broad authority under case law interpreting Terry v. Ohio for law enforcement officers to do what is reasonably necessary for safety. Setterstrom is a highly-fact-based decision. Sometimes the problem in such rare adverse appellate rulings on frisking is that somehow something got lost in the translation between (1) the officer’s observations at the scene and (2) what the appellate court gleans from the record. We do not know if that happened here. But officers should support their frisks in their reports, prosecutors should bring out that support in hearings, in written findings prepared for the trial court, and in briefing.

Usually, one should know the crime for which a person was seized when analyzing whether a frisk was justified. We do not learn from the Supreme Court’s Gatewood opinion what crime defendant was suspected of committing. The Supreme Court simply says the Court need not address the lawfulness of the initial seizure, because the defendant conceded that he had been lawfully seized. The Supreme Court did not need to accept that concession, but the Court did.

As every officer knows, Terry v. Ohio frisk authority is generally not automatic following a stop based on reasonable suspicion, except for stops for types of crimes where a person is likely to be armed, such as armed robbery or assault with a weapon. Beyond that, officers must support frisks in their reports with a description of articulable objective facts. Such justification is highly fact-based, depending on the totality of the circumstances, taking into account not only the seriousness of the crime and the officer’s experience and training, but also a variety of other things. Such justification

**should recount such things as: suspicious bulge in suspect's clothing consistent with presence of a weapon; poor lighting; suspect's bulky clothing; suspect's criminal record; intelligence about danger specific to the particular suspect; suspect's sudden move toward a pocket or area; suspect's awkward movements as if trying to hide something; suspect's erratic and/or aggressive words or other behavior; officer's need to transport the suspect; officer's need to do something else that will make the officer vulnerable to attack from the suspect; suspect's failure initially to stop vehicle or otherwise heed the officer's request to stop; presence of an empty holster or knife sheath or knife or gun; officer's arrest of suspect's companion; lone officer outnumbered by potentially hostile persons; and other facts bearing on the assessment of danger.**

**WASHINGTON CONSTITUTION'S ARTICLE 1, SECTION 7 DOES NOT INCLUDE FOURTH AMENDMENT DOCTRINE THAT PERMITS LAW ENFORCEMENT OFFICERS TO SEARCH WITHOUT A SEARCH WARRANT THOSE OBJECTS AND AREAS THAT A PRIVATE PERSON HAS ALREADY SEARCHED**

State v. Eisfeldt, \_\_\_ Wn.2d \_\_\_ (2008)

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

In January 2003, James Wege leased a house in Lacey, Washington (the Lacey house), where Eisfeldt lived. On August 5, 2003, Michael Piper, a repairman called by the owner, arrived at the Lacey house to repair a diesel spill in the living room. Eisfeldt left a key to the house under the mat for Piper. To ventilate the diesel fumes, Piper went into the attached garage to open the garage door. Piper noticed foam sealant surrounding the garage door, which he broke to open the garage door. After opening the door, Piper saw a garbage bag on the floor and looked inside. The bag contained a large amount of what he believed to be marijuana, silver reflective material, and wiring. Piper became suspicious and called the police.

Detectives [A] and [B], of the Thurston County Narcotics Task Force (TNT), were sent to the Lacey house to meet Piper. When they arrived Piper brought the detectives inside the house and showed them the spill in the living room. Piper then led the detectives through the living room and into the attached garage. Once they were in the garage, the detectives saw the foam sealant around the garage door and the heavy duty wiring. The police looked inside the garbage bag and saw a bucket containing some dried marijuana "shake" and Mylar. At this point the detectives suspended their search and sought a warrant.

Detective [B] obtained a telephonic search warrant for the Lacey house based largely on his observations during this search of the Lacey house. The TNT executed the search warrant and gathered evidence against Wege, Eisfeldt, and Ben Charles. Following this second search [Detective B] believed, based on his experience and training, the house had contained a marijuana grow operation. On August 27, 2003 based on the evidence seized in the Lacey house, Detective [B] sought, and was granted, a search warrant for a second residence, this one in Olympia (the Olympia house). When the police served this warrant, they discovered an active marijuana growing operation. Eventually, Wege, Charles, and Eisfeldt admitted to growing marijuana in both the Lacey and Olympia houses.

Eisfeldt was charged with two counts of unlawful manufacture of a controlled substance with a school bus enhancement. Arguing the searches were unconstitutional, Eisfeldt sought to suppress the evidence collected during the searches of the Lacey and Olympia houses. The trial court denied Eisfeldt's motion. Following the denial of his suppression motion, Eisfeldt agreed to a stipulated facts trial. The trial court found Eisfeldt guilty of both counts.

Eisfeldt timely appealed the order denying his suppression motion to the Court of Appeals. He claimed the warrantless search of the Lacey house by the police violated the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution. . . . The Court of Appeals [in an unpublished decision] held no warrant was required for the initial police search because it did not go beyond the scope of the private search.

ISSUES AND RULINGS: 1) the U.S. Supreme Court has held that the Fourth Amendment permits law enforcement officers to search without a search warrant containers and objects (and arguably) areas where private persons acting on their own initiative have already searched. Does the Washington Constitution, article 1, section 7, include this doctrine? (ANSWER: No, rules a 7-2 majority) 2) Did the contractor have authority to give the officers consent to search the premises that he had been hired to clean up? (ANSWER: No)

Even if the contractor did not have authority to consent to the search, was the search lawful because the officers reasonably believed that he had authority to consent to the search? (ANSWER: No; under State v. Morse, (see **Feb 06 LED:02**), there is no “apparent authority” consent rule under article 1, section 7 of the Washington Constitution)

ANALYSIS BY MAJORITY (Excerpted from the majority opinion authored by Justice Sanders; the **LED** Editors added the first subheading)

Majority's introduction regarding “independent grounds” generally

Although they protect similar interests, “the protections guaranteed by article 1, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches.

By contrast article 1, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article 1, section 7 of the Washington Constitution.” Understanding this significant difference between the Fourth Amendment and article 1, section 7 is vital to properly analyze the legality of any search in Washington.

(1) The warrantless search of the Lacey house by the police was contrary to article 1, section 7 of the Washington Constitution

Article 1, section 7's blanket prohibition against warrantless searches is subject to a few well guarded exceptions. “Absent an exception to the warrant requirement, a warrantless search is impermissible under . . . article 1, section 7 of the Washington Constitution. This constitutional protection is at its apex

“where invasion of a person's home is involved.” Exceptions to the warrant requirement are narrowly drawn, and “[t]he State bears a heavy burden in showing that the search falls within one of the exceptions.” Here the State fails to carry this heavy burden to show an exception applies. *[Court's footnote: Eisfeldt does not claim Piper's search of the Lacey house was unconstitutional. Article 1, section 7 and Fourth Amendment protections apply only to searches by state actors, not to searches by private individuals. See Burdeau v. McDowell, 256 U.S. 465 (1921); State v. Carter, 151 Wn.2d 118 (2004) June 08 LED:06. Piper had no relationship with any police officer and was not encouraged by the State to search the house. Since Piper was a private actor when he searched the house, Eisfeldt's constitutional protections are not implicated.]*

The State argues because the search did not go beyond the scope of Piper's search, the police search was constitutional under the private search doctrine. See United States v. Jacobsen, 466 U.S. 109 (1984); State v. Dold, 44 Wn. App. 519 (1986). However, the private search doctrine is inapplicable under the Washington Constitution. The State also argues the detectives were given consent to search the Lacey house by Piper or had a reasonable basis to believe they had consent. But Piper had no authority to consent, and article 1, section 7 is unconcerned with the reasonable belief of the police officers.

(a) The private search doctrine is contrary to the Washington Constitution

Under the private search doctrine a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search. The doctrine was first espoused in Walter v. United States, 447 U.S. 649 (1980), and later applied in Jacobsen to sanction a warrantless search by state actors. Underlying this doctrine is the rationale that an individual's reasonable expectation of privacy is destroyed when the private actor conducts his search. Where the State does not violate an individual's reasonable expectation of privacy, the Fourth Amendment is not offended.

Here article 1, section 7 provides greater protection from state action than does the Fourth Amendment. The analysis under article 1, section 7 begins with a determination of whether the State has intruded into a person's private affairs. Unlike the Fourth Amendment and its reasonability determination, article 1, section 7 protections are not “confined to the subjective privacy expectations of modern citizens.” Instead article 1, section 7 protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”

We have repeatedly held the privacy protected by article 1, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed. For example in State v. Boland, 115 Wn.2d 571 (1990) this court found a warrantless search of an individual's garbage violated article 1, section 7, even though “it may be true an expectation that [others] will not sift through one's garbage is unreasonable. . . .” By contrast, the United States Supreme Court previously held individuals had no reasonable expectation of privacy in their garbage, and therefore there was no protection under the Fourth Amendment. California v. Greenwood, 486 U.S. 35 (1988).

We held the same in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). In Gunwall, we considered whether the State could collect without a warrant phone numbers dialed by an individual. United States Supreme Court precedent holds an individual's reasonable expectation of privacy is destroyed when he dials a phone number because he "had to convey that number to the telephone company. . . ." Smith v. Maryland, 442 U.S. 735 (1979). But we held the individual privacy interest, no matter how unreasonably held, survives the conveyance of the phone number to the phone company and, as such, article 1, section 7 prohibits collecting these numbers without a warrant. Gunwall.

The individual's privacy interest protected by article 1, section 7 survives the exposure that occurs when it is intruded upon by a private actor. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, the individual's privacy interest is not extinguished simply because a private actor has actually intruded upon, or is likely to intrude upon, the interest. The private search does not work to destroy the article 1, section 7 interest, unlike the Fourth Amendment's, because the Fourth Amendment's rationale does not apply to our state constitutional protections.

We therefore reject the private search doctrine and adopt a bright line rule holding it inapplicable under article 1, section 7 of the Washington Constitution.

(b) The police did not receive consent to search the Lacey house

Piper lacked the actual authority to consent to the police search of the Lacey house. In Washington an individual has authority to consent to a search only where the individual had "free access to the shared area and authority to invite others into the shared area. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that the consenting co-occupant would invite others into the shared area." State v. Morse, 156 Wn.2d 1 (2005) **Feb 06 LED:02**.

Here, Piper lacked authority to consent to a search of the Lacey house. An individual does not assume the risk that a contractor "would invite others into the" house simply by requesting the contractor work within the house. Since Piper had no authority to grant consent, his consent to the search does not validate the presumptively invalid warrantless search.

Furthermore the police officers' reasonable belief that Piper had authority to consent to the search is irrelevant. The State argues the officers' reasonable belief provides a good-faith exception to the warrant requirement. But unlike the Fourth Amendment, article 1, section 7 "focuses on the rights of the individual rather than on the reasonableness of the government action." Morse. Rejecting an exception to the warrant requirement based on apparent authority to consent, we have indicated, "while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article 1, section 7, we focus on expectations of the people being searched and the scope of the consenting party's authority." Morse. The detectives' beliefs, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution.

- (2) The evidence found at the Lacey and Olympia houses was obtained unconstitutionally and must be suppressed

Since the warrantless search of the Lacey home was unconstitutional, all evidence gathered during that search must be suppressed.

In addition the evidence seized during the searches of the Lacey and Olympia houses made pursuant to search warrants must be suppressed. Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as “fruit of the poisonous tree.’ . . . The court must view the warrant without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant. If the warrant, viewed in this light, fails for lack of probable cause, the evidence seized pursuant to that warrant must also be excluded.

Here the majority of the evidence supporting the warrant for the Lacey house was obtained during the unconstitutional, warrantless search of the Lacey house. As the State conceded at argument, excluding the improperly gathered evidence renders the Lacey warrant invalid for lack of probable cause. This requires the exclusion of the evidence collected pursuant to the Lacey house search warrant as fruit of the poisonous tree.

In turn the evidence collected pursuant to the Olympia house search warrant must also be excluded as fruit of the poisonous tree. The search warrant was based largely on evidence seized at the Lacey house during both the warranted and warrantless searches. When this evidence is excised from the affidavit supporting the Olympia house search warrant, it is insufficient to support probable cause for its issuance. The evidence collected at the Olympia house must also be excluded as fruit of the poisonous tree.

[Some footnotes and citations omitted]

#### CONCURRING OPINION:

Justice Madsen writes a concurring opinion joined by Justice Charles Johnson. Her concurrence argues in vain that the majority should not have rejected the “private search” doctrine, and should instead have held that the doctrine was not applicable under the facts of this case, and that the evidence should have been excluded on that narrower basis.

**LED EDITORIAL COMMENTS: The new rule created by the Washington Supreme Court is fairly simple. If 1) a private person who is without authority to consent to a law enforcement search shares information about having seen something suspicious inside the private area of a building or inside a closed, opaque package, and 2) the private person does not (on his or her own initiative) bring the suspicious object to officers or leave it exposed in plain view in a non-private area, then officers must obtain a search warrant or must have justification under one of the exceptions to the warrant requirement before retrieving the object for inspection. We do not know the record of the Eisfeldt case, but we think that in most circumstances officers, through careful questioning of the citizen, should be able to develop probable cause for a search warrant when a private person provides information regarding what was observed.**

It is also important to note that the Eisfeldt decision does not affect the constitutional rule that generally exempts from the Exclusionary Rule evidence seized by citizens and

brought to officers on the citizens' own initiative, even if the citizens acted unlawfully in accessing or seizing the evidence.

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### WASHINGTON STATE COURT OF APPEALS

#### **FRISK OF MERE PASSENGER IN STOLEN CAR HELD NOT SUPPORTED BY TRIAL COURT'S FINDINGS OF FACT THAT DID NOT SHOW ANY DANGER**

State v. Adams, \_\_\_ Wn. App. \_\_\_, 181 P.3d 37 (Div. III. 2008)

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

Police Officer [A] stopped a car because the car had been reported stolen. Jennifer Adams was a passenger in the stolen car. He detained the driver and the passenger to investigate. Officer [A] handcuffed Ms. Adams. Officer [A] was alone. Officer [B] responded later to assist Officer [A].

Officer [B] told Ms. Adams that he was going to pat her down for weapons. He asked if she had anything on her that would poke him. She responded there was a syringe in her coat pocket. Officer [A] asked if he could remove the syringe. Ms. Adams responded that he could.

There is no finding by the trial judge here that Ms. Adams "hesitated" in getting out of the car. There is no finding by the trial judge that she "refused" to lie down when ordered. There is no finding that she was taken down. And there is no finding that the officer was "trying to control two subjects."

Again, Officer [B] reached into the pocket and saw a syringe along with a plastic bag containing a white crystal substance. He recognized the substance as methamphetamine and seized the syringe and the bag.

The police arrested Ms. Adams. The State charged her with possession of methamphetamine. She moved to suppress the drug evidence. The court denied her motion. And a judge found Ms. Adams guilty of possession of a controlled substance, methamphetamine.

ISSUE AND RULING: Where the superior court made no specific finding that the frisking officer had any articulable basis for safety concerns other than the mere fact that she was a non-suspect passenger in a stolen car, do the superior court findings support the frisk of the passenger? (ANSWER: No, rules a 2-1 majority – Judges Sweeney and Kulik)

Result: Reversal of Spokane County Superior Court conviction of Jennifer Lynn Adams for possession of methamphetamine.

ANALYSIS: (Excerpted from majority opinion)

[One exception to the constitutional search warrant requirement] allows officers to briefly detain a person when they have a reasonable suspicion that the person has committed or is about to commit a crime or is a safety threat. But even such a brief detention must be justified by "specific and articulable facts which, taken

together with rational inferences from those facts, reasonably warrant that intrusion.”

In Terry, the Supreme Court acknowledged that there is “ ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’ ” This is a case-by-case inquiry in which we evaluate the totality of the circumstances presented to the officer, including the nature of the crime being investigated.

Where an officer's conduct is connected to safety concerns rather than investigatory goals, we are particularly reluctant to substitute our own judgment for that of the officer. A frisk for weapons is permissible if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk, and (3) the scope of the frisk is limited to the protective purpose.

Washington courts have held that a reasonable concern for officer safety justifies a protective frisk in a number of factual circumstances. One such situation is where, as here, police legitimately contact a suspect and incidentally come into contact with the suspect's companion or vehicle passenger and the conduct of the passenger justifies the frisk. State v. Horrace, 144 Wn.2d 386 (2001) **Oct 01 LED:04** (vehicle passenger properly frisked based on furtive movements by driver) . . . In State v. Laskowski, 88 Wn. App. 858 (Div. I, 1997) **May 90 LED:04** the search was justified by “ [a]ny reasonable basis supporting an inference that the investigatee *or a companion* is armed will justify a protective search for weapons.”

Here, the officer legitimately came in contact with the driver because the car was reported stolen. He incidentally came into contact with Ms. Adams, the passenger in the car.

The remaining question then is whether the officer had reasonable, articulable safety concerns before the frisk that would have justified it. Here, the trial court found that Ms. Adams was a passenger in a stolen car. Officer [A] stopped the car. Two people were in the car while Officer [A] was alone. The trial court also found that Officer [A] told Ms. Adams that she was being detained during the investigation of the stolen car. Officer [B] responded to assist Officer [A].

Officer [B] told Ms. Adams that he was going to pat her down for weapons. After that he asked her if she had anything that might poke him. She told him that she had a syringe in her coat pocket.

But the protective frisk of a passenger in a car under Terry requires that “the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous.”

In Horrace, a police officer arrested a car's driver for driving on a suspended license with outstanding warrants for his arrest. The officer saw the driver moving irregularly toward the center console and in the passenger's direction while he waited for the results of the radio check. These irregular movements concerned the officer.

The officer believed that the driver could have concealed a weapon inside or behind the passenger's heavy jacket. The officer had then specific, articulable facts that gave rise to the belief that the passenger could be armed and dangerous. This justified the pat down of the passenger. He found a concealed weapon and methamphetamine.

...

We also recognize that the association with a person suspected of criminal activity “does not strip away the protections of the fourth amendment to the United States Constitution.” Further, even a brief seizure is not justified by mere proximity to criminal activity. Rather, there must be something more to indicate that the particular person seized may be a threat to safety or armed.

Here, there was nothing to indicate that the passenger seized was a threat to safety or armed. The trial court made no finding that the officer had any safety concerns that justified the initial pat-down search of Ms. Adams. There were no furtive movements as in Horrace.

Merely being a passenger in a stolen car does not alone justify such a search under Terry. The officer has to point to specific, articulable facts that would lead a reasonable person to believe that the passenger could be armed and dangerous. Here, it is not clear what those facts are. Furthermore, there was no finding that Ms. Adams even knew that she was in a stolen car.

Since there was no reasonable basis for the officer to believe that she was armed and dangerous (outside the fact that she was in a stolen car), there was no legal basis to do a protective search under Terry.

We conclude the search occurred outside the scope of Terry. And the evidence therefore should have been suppressed.

[Some citations omitted]

DISSENT:

Judge Stephen Brown dissents, arguing that Ms. Adams consented to the search of her coat pocket. Also, in discussing the frisk and the officer-safety considerations, Judge Brown points out that the police report provides support that the majority judges should have considered.

**LED EDITORIAL COMMENTS (See also our comments on frisk justification beginning above at page 8 at the end of the Setterstrom entry in this July LED):**

**Judge Brown’s voluntary consent-search theory in his dissent seems dubious in light of the fact that Ms. Adams gave consent only after the officer stated unequivocally that he was going to frisk her. But the majority opinion is questionable as well.**

**The majority opinion in Adams makes much of the procedural circumstance that the trial court did not make express and explicit findings from the police report. The police report, which is part of the court record, indicated: 1) that Ms. Adams initially hesitated before getting out of the car as requested by an officer; 2) that she refused to lie down, as requested by an officer, after getting out of the stolen car; and 3) that the stop was made in the early morning hours. We believe that, despite a lack of trial court findings on these points, the Court of Appeals could have considered the police report. The report**

appears to us to make frisking Ms. Adams justified. Also, if the majority judges wanted the trial court to make findings on these points, the majority opinion could have simply remanded the case for further proceedings to do that.

**Safety first, of course. But officers should always detail in their reports what justified the frisk, and prosecutors should always detail in their proposed findings for the court that justification as brought out at the suppression hearing.**

**OFFICER'S LATE-NIGHT SOCIAL CONTACT OF PEDESTRIAN, FOLLOWED BY OFFICER'S PATTING OF PEDESTRIAN'S POCKETS WHEN PEDESTRIAN KEPT PUTTING HIS HANDS IN AND OUT OF THEM, HELD LAWFUL**

State v. Harrington, \_\_\_ Wn. App. \_\_\_, 183 P.3d 352 (Div. III, 2008)

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

Officer Reiber, while on patrol in Richland, saw Mr. Harrington walking at 11:00 p.m. and decided to talk to him. He turned his patrol car around and parked in a driveway ahead of Harrington. He then got out of his car and, standing away from the sidewalk, asked to speak with Mr. Harrington. Harrington agreed to talk and Reiber advised him that he was not under arrest.

The officer asked Mr. Harrington what he was doing; he also noted several objects were in Harrington's pockets. Told that Harrington had just visited his sister, the officer asked where she lived. Mr. Harrington replied that he did not know where she lived. The officer became suspicious.

During the conversation, Trooper William Bryan drove by and decided to stop. He parked on the street and walked up to where the two men were talking. Neither participant acknowledged the trooper's presence; Bryan did not involve himself in the conversation.

Mr. Harrington was nervous and kept putting his hands in his pockets despite the officer's request that he not do so. Eventually Officer Reiber asked if he could check Mr. Harrington's pockets. Harrington agreed. A pat down of the outside of the pocket revealed a hard cylindrical object. When asked what it was, Mr. Harrington candidly told the officer it was a "meth pipe." Officer Reiber told Mr. Harrington he was now under arrest. Harrington fled but was apprehended by the two officers a short distance away.

A search incident to the arrest revealed a small amount of methamphetamine in the pipe. Mr. Harrington moved to suppress, contending that he had been seized when the officer approached him. The trial court disagreed, finding that there was a consensual meeting and that defendant's actions in repeatedly putting his hands in the pockets justified a pat down for officer safety. After his motion to suppress the evidence was denied, Mr. Harrington was found guilty during a stipulated facts trial. He then appealed to this court.

**ISSUE AND RULING:** The city police officer: 1) did not block Harrington with his car or his person; 2) asked open-ended, non-accusatory questions (to which Harrington responded inconsistently); 3) told Harrington to quit putting his hands in his pockets (but Harrington

continued doing it); and 4) asked Harrington for permission to pat his pockets (which permission Harrington gave, leading to the officer's patting of a hard object that was a possible weapon, and which Harrington admitted to the officer was a meth pipe). During the contact, a WSP trooper stopped nearby and got out of his vehicle to observe the contact.

Was Harrington "seized" for constitutional search and seizure law purposes? (ANSWER: No, rules a 2-1 majority, and therefore it was not necessary for the State to prove reasonable suspicion of criminal activity)

Result: Affirmance of Benton County Superior Court conviction of Dustin Warren Harrington for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A seizure occurs when a person's movements have been restrained to the extent that a reasonable person would believe he was not free to walk away from an officer. The record supports the trial court's determination that the encounter between Mr. Harrington and Officer Reiber was not a seizure. Officer Reiber parked his car out of the way and did not impede Mr. Harrington's ability to use the sidewalk. The officer *asked* if Harrington would talk with him. There was simply no show of authority that would support a finding that Mr. Harrington was seized.

The appearance of Trooper Bryan at the scene did not change the assessment. The trooper stood a respectful distance away without becoming part of the encounter. His presence did not seize Mr. Harrington. Law enforcement officers routinely back each other up. An additional officer, arriving without a show of force, simply does not change the nature of the original encounter.

[Mr. Harrington] also contends that the request to check the pockets constituted a seizure, citing to State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) **March 93 LED:09**, abrogated in part by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996) **Aug 96 LED:13**. [*Court's footnote: Asking a person engaged in a voluntary encounter with an officer to keep his hands out of his pockets and in plain sight also does not constitute a seizure. State v. Nettles*, 70 Wn. App. 706 (Div. I, 1993) **Nov 93 LED:09**.] There an officer had contacted Mr. Soto-Garcia walking from the "little Tijuana" section of Kelso known for cocaine dealing. After learning his name, the officer ran a warrants check in his presence. When that came back negative, the officer asked Mr. Soto-Garcia whether he had any cocaine. After receiving a negative response, the officer asked and received permission to search. The search revealed cocaine. The trial court found that under these facts the officer had seized Soto-Garcia by asking to conduct the search. Division Two of this court agreed, finding that the Fourth Amendment standard for seizure had been established under this combination of facts. It then ruled that the consent to search was invalid due to the improper seizure.

The facts of this case do not rise to the level of Soto-Garcia. There the combination of the records check, the inquiry about illegal drug possession, and the request to search constituted a seizure. In contrast, this was a consensual encounter not marred by inquiries concerning warrant status and illegal activity. Rather, the encounter was more like that in State v. Thorn. There an officer,

after observing suspicious behavior, walked up to a parked car and asked, "Where is the pipe?" The trial court had found the question constituted a seizure and suppressed the controlled substances found during a subsequent arrest and search. The Washington Supreme Court reversed, concluding that the totality of the circumstances did not show a seizure had occurred when the officer asked the question about the pipe.

Similarly here, asking for consent to search did not turn a voluntary meeting into a seizure. [Mr. Harrington's] position, if accepted, would essentially vitiate any consent to search where probable cause to search did not already exist. Such is not the state of the law.

[Mr. Harrington's] repeated placing of his hands in the object-laden pockets, after repeated requests not to do so, also justified the pat down independent of the consent. See City of Seattle v. Hall, 60 Wn. App. 645 (1991) (officer could pat down person engaged in voluntary conversation who was "antsy" and caused legitimate concern for officer safety).

The trial court correctly determined that no seizure took place.

[Some citations omitted]

**DISSENT:**

Judge Sweeney dissents, arguing in vain (in what appears to be a misreading of applicable case law) that the totality of the circumstances constituted a seizure of Harrington.

**LATE NIGHT STOP OF FAST-MOVING UNLIT BICYCLE HEADING AWAY FROM AREA OF "SHOTS FIRED" REPORTS HELD TERRY STOP ON REASONABLE SUSPICION**

State v. Rowell, \_\_\_ Wn. App. \_\_\_, 182 P.3d 1011 (Div. III, 2008)

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

At 1:41 a.m. on March 17, 2005, Pasco Police Officer Justin Greenhalgh responded to a shots-fired call in a narrowly described Pasco residential neighborhood. While the officer was enroute, dispatch told him of a second shots-fired call in the same area. Officer Greenhalgh arrived at the area about five minutes after the first call. Within two or three minutes, he spotted Mr. Rowell about a block away and pursued him. The officer testified Mr. Rowell appeared to be fleeing from the reported location on a speeding, unlit bicycle. The officer described Mr. Rowell when stopped as "scared or trying to get the heck out of the area for some reason." Mr. Rowell then appeared "very nervous," "very uneasy," "fidgety," and "very on the edge." Officer Greenhalgh needed to "calm" Mr. Rowell in order to complete his investigation.

Officer Greenhalgh related his difficulty in dispelling his suspicions and his concern: "I'm just trying to investigate. [Mr. Rowell] kept asking, 'Why are you stopping me? Why are you stopping me?' And I kept telling him, 'I'm just stopping you to try to find out about this. I need to I.D. you because you're in the area so I can let my dispatcher know in case anything develops later on.'" Officer Greenhalgh next took and reported Mr. Rowell's name to dispatch before requesting and receiving his permission for a pat-down search. The officer

explained, “due to the safety, I was like, ‘Can I just pat you down because you're making me nervous?’” Just after the search, Officer Greenhalgh arrested Mr. Rowell on warrants reported by dispatch.

During routine jail booking procedures, methamphetamine was found in Mr. Rowell's sock. The State charged Mr. Rowell with possession of a controlled substance, methamphetamine. Mr. Rowell unsuccessfully moved to suppress the evidence. After a stipulated-facts bench trial conviction, he appealed.

**ISSUE AND RULING:** Did the combination of the recent “shots fired” reports in the area and the fast-moving bicycle heading away from the area add up to reasonable suspicion to stop the bicycle? (**ANSWER:** Yes, rules a 2-1 majority)

**Result:** Affirmance of Franklin County Superior Court conviction of Benjamin Howard Rowell for possession of methamphetamine.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

Under the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Washington Constitution, a police officer may conduct an investigatory stop based on less than probable cause if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility that criminal conduct has occurred or is about to occur.”

When evaluating the reasonableness of an investigatory detention, a court considers the totality of the circumstances known to the officer at the inception of the stop, including the officer's training and experience. If an officer has a well-founded suspicion of criminal activity, he or she may stop a suspect, and ask that person for identification and an explanation of his or her activities. The circumstances must be more consistent with criminal conduct than with innocent behavior.

Here, substantial evidence shows two different callers reported in quick succession that shots were fired in the same locale. Officer Greenhalgh responded to the first call and received word of the second call while enroute. About five minutes after the first call, the officer arrived to investigate. Within two or three minutes, he spotted Mr. Rowell within about a block of the reported location appearing to flee on a speeding, unlit bicycle. On contact, Mr. Rowell displayed well-described distinctive behaviors to Officer Greenhalgh that reasonably raised his suspicions and required the officer's attempt to calm him. The officer had difficulty dispelling his suspicions to the extent that he became nervous for his safety and reported Mr. Rowell's name to dispatch before the pat-down search. Mr. Rowell's arrest came, “right after I had searched and found the knives, they told me that he had warrants.”

The court orally found Mr. Rowell was peddling away from the reported shots-fired area in a “very fast manner . . . like he was scared or had to get out of the area.” The court stressed the seriousness of a shots-fired call, then found Officer Greenhalgh's stop reasonable under the circumstances: “He saw the defendant acting very nervously. He was very nervous. He was uneasy. He was fidgety.

He was looking around, and I think that's a basis for going further beyond anything about the shots fired. So I'm going to-I'm going to hold that the stop was appropriate."

Written finding of fact two detailed that Officer Greenhalgh detected Mr. Rowell "two or three minutes after beginning his search" about "one block away" while "peddling hard" in a way "consistent with attempting to flee the area." This required the officer to "accelerate and race his motor in order to catch up with the bike." "The officer observed no other vehicle or pedestrian traffic in the area." Finding three detailed Mr. Rowell's "nervous and fidgety" behavior. Finding three detailed the warrant arrest circumstances and later methamphetamine discovery. The officer's testimony is substantial supporting evidence of well-founded, criminally suspicious circumstances. The trial court concluded:

The officer was responding to a report of shots fired in a residential neighborhood in the early morning hours, which justified more proactive action than may have been appropriate in a less serious matter. The defendant was the only person . . . in the early morning hours and was rapidly riding a bicycle as though fleeing the area of the shooting. It was appropriate for the officer to briefly detain the defendant to enable the officer to confirm or dispel his suspicions.

A law officer may ask a person for identification when the officer has a reasonable suspicion that the person is involved in criminal activity. Mr. Rowell was spotted apparently fleeing from the shots-fired location within minutes of the calls, at an early-morning hour when no others were present. Mr. Rowell's apparent flight was reasonably suspicious to both the officer and the trial court. Indeed, it is generally accepted as evidence of guilty activity. Mr. Rowell's nervous and fidgety behavior prompted Officer Greenhalgh to attempt to "calm" him. These specific, articulated, suspicious facts do not suggest a pretext issue.

Further, warrant checks during an investigatory stop are accepted, routine police procedures. The purpose of this stop was serious, to investigate shots-fired calls. No evidence of excessive physical intrusion on Mr. Rowell's liberty exists. No unreasonable delay was involved in securing the warrant check. And, "an officer may call in his or her location and activity to enhance the officer's personal safety" under these circumstances.

Considering the totality of the circumstances, we conclude Officer Greenhalgh possessed the sufficient particularized suspicion necessary to support Mr. Rowell's stop and identification. Thus, we hold the trial court did not err in deciding the officer made a lawful Terry investigative stop and denying Mr. Rowell's evidence suppression motion.

[Citations omitted]

DISSENT: Judge Schultheis argues that, because only "shots fired" and no crime had been reported, the officer lacked reasonable suspicion for the stop.

**PRETEXT STOP RULING IS BASED ON OFFICER'S PRIOR SUSPICION AND HIS SURVEILLANCE, FOLLOWED BY HIS STOP OF THE SUSPECT VAN FOR DRIVING 100 YARDS WITHOUT HEADLIGHTS**

State v. Montes-Malindas, \_\_\_ Wn. App. \_\_\_, 182 P.3d 999 (Div. III, 2008)

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

On October 25, 2005, [a police officer] was in a Walgreen's parking lot speaking with a gentleman whose daughter had run away. During this conversation, [the officer] saw Jesus Montes-Malindas and two other people in a van, acting nervously. One of the men in the van got out and into another occupied car, and left the area. Mr. Montes-Malindas then switched places with the occupant in the driver's seat.

After concluding talking with the father of the runaway, [the officer] decided to watch the van occupants. He drove to a car dealership across the street from Walgreen's and parked so that he could not be seen by the van occupants. He saw the occupants of the van go into Walgreen's and leave the store a few minutes later with a female. The parties returned to the van and drove south on Miller Street, passing the car dealership where [the officer] was parked.

When the van pulled out of the parking lot onto Miller Street, [the officer] noticed that the headlights of the van were not illuminated, although it was dark. As the van passed, [the officer] pulled out and got behind the van. The driver then turned the headlights on. The van had driven about 100 yards without its lights illuminated.

[The officer] then radioed in that he was going to stop the van, and turned his overhead lights on to initiate the stop. Mr. Montes-Malindas turned the next corner and stopped.

[The officer] decided to approach the van from the passenger side for safety reasons. He later explained that, in addition to protection from traffic, the occupants would not expect such an approach and he could better see into the passenger area. [The officer] noted that the male rear seat passenger was not wearing a seatbelt. The female front seat passenger told him the van was hers and she had no insurance. Both passengers provided identification to the officer.

As another officer arrived, [the officer] moved to the driver's side. Mr. Montes-Malindas told [the officer] that he did not have a driver's license and that he did not have any identification. Because of his lack of license and identification, combined with the suspicious activity he saw in the parking lot, the officer decided to be cautious. He therefore refused to allow a passenger to get out of the van. Mr. Montes-Malindas initially gave [the officer] a false name. [The officer] arrested Mr. Montes-Malindas for having no valid operator's license.

The female passenger was removed from the van and checked for weapons. There were none. The male passenger became nervous and started shaking during his pat-down. The officer found some narcotics paraphernalia on his person, and arrested him for possession.

A firearm was found in the vehicle during a search of the van incident to arrest. In his patrol car the officer found a residue-filled baggie that contained crystal methamphetamine, which Mr. Montes-Malindas had in his hand when he was arrested. Mr. Montes-Malindas was charged, among other things, with

possession of methamphetamine and first degree unlawful possession of a firearm.

Prior to trial, defense counsel filed a motion to suppress, contending that the stop was pretextual and therefore illegal. The trial court denied the suppression motion.

Mr. Montes-Malindas was found guilty of unlawful possession of a firearm in the first degree and possession of methamphetamine after a bench trial on stipulated facts. This appeal followed.

**ISSUE AND RULING:** After viewing the suspicious nighttime behavior of occupants of a van in a parking lot, an officer decided to watch them from a hidden location. The van pulled out of the lot with its headlights off. The officer followed. After about 100 yards, the van turned on its headlights. The officer pulled the van over for driving after dark without lights. Was the traffic stop unlawfully pretextual under article 1, section 7 of the Washington constitution as interpreted in State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED: 05**? (ANSWER: Yes)

**Result:** Reversal of Chelan County Superior Court convictions of Jesus M. Montes-Malindas for unlawful possession of a firearm in the first degree and possession of methamphetamine.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

“[A] traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further.” State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. If a pretextual stop occurs, the Washington Constitution requires that “all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”

This court has noted the “fundamental difference between the detention of a citizen for the purpose of discovering evidence of crimes and a community caretaking stop aimed at enforcing the traffic code.” State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) **Nov 99 LED:12**. Under Ladson, inquiry is “whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that ‘authority of law’ represented by a warrant.”

To determine whether a traffic stop is a pretext for accomplishing a search, “the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code.

The State argues that, because the trial court found that [the officer] was credible in his testimony that he did not follow the van hoping to find a legal reason to stop it and his subjective intent was to stop the van and cite the driver for not having his headlights on, [the officer]’s testimony about his own subjective intent is dispositive. We disagree.

In Ladson, the Washington Supreme Court rejected the purely objective test for pretext stops because “an objective test may not fully answer the critical inquiry:

Was the officer conducting a pretextual traffic stop or not?" The court therefore added a subjective component to the test: "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior."

But by enhancing the test with a subjective feature, the court did not eliminate the objective considerations. Instead, the test announced in Ladson made it easier for courts to find that a stop was pretextual based on the totality of the circumstances rather than only the objective circumstances, regardless of an admission of any pretextual subjective reasons for the stop. The Ladson court recognized that an officer's candid admission to pretextual conduct is more probative than the denial of the conduct. Ladson; DeSantiago, (reverses conviction when, despite the trial court's finding that the officer " 'wanted to identify [Mr. DeSantiago's] license plate and was looking for a basis to stop the vehicle,' " it denied the suppression motion); State v. Myers, 117 Wn. App. 93 (Div. III, 2003) **Aug 03 LED:19** (reversing conviction where officer admitted that he pulled a driver over to check if the driver's license was suspended, rather than to cite the driver for making two lane changes while signaling simultaneously). Thus, "[i]t is not enough for the State to show that there was a traffic violation. The question is whether the traffic violation was the real reason for the stop." State v. Meckelson, 133 Wn. App. 431 (Div. III, 2006) **Aug 06 LED:12**.

Here, besides stating that the stop was made only because of the delayed engagement of the headlights, [the officer] also stated that he was suspicious of the activity that he saw in the parking lot, and that those suspicions probably were on his mind when he decided to pull over the van and approach on the passenger side, rather than the driver side. And he spoke to the passengers first, rather than to the driver, suggesting that the stop was premised on more than the driver's actions.

These facts suggest that [the officer] was not on routine patrol; he was conducting surveillance on the van. DeSantiago. (That the officer was assigned to routine patrol was not material when the officer was actually surveilling a narcotics hot spot); see also Myers (whether an officer was on routine patrol is not dispositive).

[The officer] testified that he stops the majority of the drivers he sees driving without their headlights on, unless he is responding to a call, but he sometimes will just signal them to turn on their lights. As noted by this court in Myers, our response is "so what?" What is significant is what [the officer] did in this case. And it is not reasonable to stop a car only after its lights have been turned on. He also did not issue a citation for any headlight violation. Although failure to issue a citation for the underlying infraction is one of the factors to be considered when assessing objective reasonableness, it is not dispositive. State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) **Nov 00 LED:08** (police are not required "to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext").

No evidence was presented to indicate the presence of other traffic on the roadway or the existence of endangerment to pedestrians or property resulting from Mr. Montes-Malindas's brief roadway travel without his headlights on. He

pulled onto the street in front of a business and traveled about 100 yards, apparently without interfering with any other vehicular or pedestrian traffic, before turning his headlights on.

Backup arrived as the officer was speaking to Mr. Montes-Malindas. Obviously, the additional officer arrived in response to the radio call. This suggests, as does his decision to proceed with caution, that [the officer] was preparing for something more than a traffic stop.

Based on the totality of the circumstances, we conclude that this was an unlawful pretext stop.

“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” Ladson. Suppression is constitutionally required under article 1, section 7. The traffic stop in this case was without authority of law because the investigatory reason for the stop was not exempt from the warrant requirement. The court erred by denying the suppression motion.

We reverse the conviction. Accordingly, we need not address the other issues raised by Mr. Montes-Malindas, including the validity of his arrest, the legitimacy of the search of the passenger, and the validity of the search of the van.

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## **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](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 are 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

[\[http://www1.leg.wa.gov/legislature\]](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).

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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)

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