Law Enforcement Digest

MARCH 2008

619th Basic Law Enforcement Academy – September 6, 2007 through January 17, 2008

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WASHINGTON STATE COURT OF APPEALS

WHERE, AFTER BEING STOPPED FOR DWLS, DRIVER WAS TOLD BY OFFICER THAT PICKUP WOULD BE TOWED, AND DRIVER THEN GOT OUT OF AND LOCKED HIS PICKUP BEFORE OFFICER FORMALLY PLACED HIM UNDER ARREST FOR DWLS, PICKUP WAS NOT SUBJECT TO SEARCH INCIDENT TO ARREST UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION

State v. Quinlivan, __ Wn. App. __, 2008 WL 305745 (Div. III, 2008)

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

> A Grant County sheriff's deputy stopped Willis Quinlivan because Mr. Quinlivan was not wearing a seat belt and because he was driving with a suspended driver's license. Mr. Quinlivan gave the deputy his driver's license and registration. He did not have proof of insurance. The deputy returned to his motorcycle. Mr. Quinlivan asked if his truck was going to be towed. The deputy told him it would be towed.
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> Mr. Quinlivan got out of the truck, locked it, put the keys in his pocket, and sat on the curb. The deputy then arrested him and asked for the keys to the truck. Mr. Quinlivan refused. He told the deputy he would not give him the keys without a search warrant. The deputy responded that he needed the keys to have the truck towed and impounded. Mr. Quinlivan again refused and said he would not hand over the keys without a warrant. The deputy handcuffed Mr. Quinlivan and patted him down. The deputy retrieved the keys from Mr. Quinlivan's pocket, opened the locked truck, and searched it. He found methamphetamine under the driver's seat.
>
> The State charged Mr. Quinlivan with possession of methamphetamine and third degree driving with a suspended license. Mr. Quinlivan moved to suppress the drug evidence seized from his truck. The court refused to suppress the evidence.
>
> The court found Mr. Quinlivan guilty of both charges following a trial on stipulated facts.

ISSUE AND RULING: Where, after being stopped for DWLS, the driver had been told by the officer that the vehicle would be towed, and the driver then got out of and locked his vehicle before the officer formally placed him under arrest, was the vehicle subject to search incident to arrest under article 1, section 7 of the Washington constitution? (ANSWER: No)

Result: Reversal of Grant County Superior Court conviction of Willis James Quinlivan, Jr. for possession of methamphetamine.

Status: Time remained as of the date of the March LED deadline (2-14-08) for the State to seek reconsideration or discretionary Washington Supreme Court review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The question presented is whether the deputy's search of Mr. Quinlivan's truck met the requirements set out in [State v. Stroud, 106 Wn.2d 144 (1986)], as a search incident to arrest.
>
> Mr. Quinlivan notes that he locked his vehicle before he was arrested. And from this he argues that under the rule set out in Stroud, the search was not incident to his arrest because he was out of the truck and the truck was locked before he was arrested. Mr. Quinlivan relies on State v. Perea for the proposition that police cannot conduct a warrantless search of a car if the car is locked and the suspect has walked away before he is arrested. State v. Perea, 85 Wn. App. 339 (Div. II, 1997) **June 97 LED:02**.
>
> The State says that Stroud sets out a bright line rule. And the State argues that the deputy met the requirements of Stroud here. The State relies on State v. Fladebo, 113 Wn.2d 388 (1989) as factually indistinguishable from Mr. Quinlivan's case. The State argues that the only difference between Fladebo and the facts here is that Mr. Quinlivan locked the door to his truck before being arrested. And the State maintains that under a proper Stroud analysis, this is not a material distinction and certainly not one Mr. Quinlivan should be allowed to get away with.
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> The court entered a number of findings of fact, including the following:
>
> 2.10 As [the deputy] was headed back to the defendant's pickup, the defendant *got out of the vehicle and locked the vehicle, putting his keys in his pocket and walked towards* [the deputy]. Mr. Quinlivan then sat down on the curb after being told to get back in his vehicle. **[LED EDITORIAL NOTE: The Court of Appeals attaches no significance to the facts (1) that the officer ordered Mr. Quinlivan back into his vehicle, and (2) that Mr. Quinlivan disobeyed the order - - see our LED EDITORIAL COMMENTS below.]** [The deputy] believes the Defendant was 6 to 15′ from his truck where he sat down. The Defendant believes it was closer to 50′. [The deputy] believes this would have put the Defendant out of his field of vision.
>
> 2.11 When [the deputy] *got to the defendant's position, he advised the defendant that he was under arrest* and asked for the keys for the purpose of searching the truck incident [to] arrest. The defendant replied by telling [the deputy] that he did not want the pickup searched and that [the deputy] would need a search warrant to conduct the search.
>
> 2.12 [The deputy] also told Mr. Quinlivan he would need the keys to impound Mr. Quinlivan's truck. Mr. Quinlivan replied that the keys were not needed to impound the truck. To which [the deputy] stated he was going to search Mr. Quinlivan's truck. Mr. Quinlivan replied by telling [the deputy] that he did not want the pickup searched and that [the deputy] would need a search warrant to conduct the search. At that point [the deputy] again advised Mr. Quinlivan he was under arrest for DWLS [driving with license suspended]. [The deputy] then had Mr. Quinlivan stand up and handcuffed him.

2.13 [The deputy] searched the defendant's person incident to arrest, retrieved the keys, unlocked the pickup and searched the pickup incident to arrest. [The deputy] did not have a search warrant and did not attempt to obtain a search warrant.

The trial judge concluded from this that:

> [The deputy] was entitled to search the passenger compartment of the Defendant's truck incident to his arrest.

. . . .

A warrantless search is per se unreasonable and can be justified only if it falls within one of the "jealously and carefully drawn" exceptions to the Fourth Amendment's general requirement of a warrant. One exception is the search of an automobile pursuant to a lawful custodial arrest. Under this exception, federal law permits the search of the entire passenger compartment, including any containers. New York v. Belton, 453 U.S. 454 (1981). Washington does not permit the search of locked containers in the passenger compartment. Stroud.

The "bright line" rule set out by Stroud is:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Arrest necessary for the search incident to arrest

State v. O'Neill is not helpful to the State because it is distinguishable on its facts. State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) **June 02 LED: 21.** There, after his initial seizure Mr. O'Neill was placed under *arrest before he stepped from his truck.* Mr. O'Neill was then handcuffed and placed in a patrol car before the arresting officer returned to discover Mr. O'Neill's truck was locked with the keys in the ignition. Here, Mr. Quinlivan was unquestionably *seized* when he was stopped and told his truck was to be towed. But the trial court found that Mr. Quinlivan was not *arrested* by [the deputy] until after the deputy reached the curb where Mr. Quinlivan was sitting, and that was after Mr. Quinlivan had left and locked his truck.

The state Supreme Court in State v. O'Neill (no relationship) made it clear that it is a lawful custodial arrest, and only that full lawful custodial arrest, that gives police the authority to search incident to an arrest. State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**. Probable cause to arrest or, for that matter, anything short of a full custodial arrest is not enough to confer "the authority of law" necessary to meet the narrow exception to the general requirement of a warrant. And the Supreme Court has previously said the same thing in State v. Parker in a different context: "It is the fact of arrest itself that provides the

‘authority of law’ to search, therefore making the search permissible under article I, section 7.” State v. Parker, 139 Wn.2d 486 (1999) **Dec 99 LED:13.**

The cases out of Division Two of this court have articulated and applied this narrow search incident to arrest exception in a way that honors both of the United States Supreme Court's holdings[.] A brief review of these cases suggests to us that Division Two has correctly applied this exception, which again has been described as narrowly applied and jealously guarded. Stroud.

Application of Stroud

First of all, in Stroud the court “weighed the privacy interests individuals have in items within their automobile and the dangers to the officers and law enforcement presented during *an arrest of an individual inside an automobile.*” The rule articulated in Stroud is based upon its federal antecedents and is only modified because of the heightened privacy protection we recognize because of article I, section 7 of our state constitution; we prohibit police from searching locked containers in a passenger compartment. What Stroud did not change from the federal rule was the necessity for an arrest as the event triggering police authority for the search without a warrant.

In State v. Fore, Division One of this court concluded, based on Stroud, that for the search to be valid incident to arrest requires only “a close physical and temporal proximity between the arrest and the search.” State v. Fore, 56 Wn. App. 339 (1989). The court in Fore relied on the state Supreme Court case of Fladebo for the proposition that “the validity of a Stroud search does not depend on an arrestee being in the vehicle when police arrive or on the physical ability of an arrestee to reach into the vehicle.” But as the court noted in State v. Johnston, it is unclear how far the defendants (in Fore) were from the automobile and whether the vehicle's doors were open or closed at the time of the arrest. State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) **Oct 01 LED:19**. And that concern aside, we are not sure that the conclusion reached in Fore necessarily follows from the court's analysis in Fladebo.

There were two essential arguments in Fladebo. First, Ms. Fladebo argued that her purse was a container entitled to the same privacy as the locked containers referred to in Stroud. The Supreme Court disagreed and said that a purse was not entitled to the same protection as a locked container. Ms. Fladebo then argued that any reason for the protective search disappeared after she was placed securely in the back of a squad car. The court concluded that Stroud expressly allowed the search even though the risk of injury to the officer or destruction of evidence (the traditional justification for a search incident to arrest) had been eliminated by placing the defendant in the back of the patrol car.

But from the factual recitation set out in Fladebo, it appears that the defendant was arrested while still in or near her open car. Neither the factual recitation nor the analysis in Fladebo addressed this issue. We assume the court did not address it because it was not raised. So it is difficult for us to conclude, as the court did in Fore, that the Stroud exception “does not depend on an arrestee being in the vehicle when police arrive.” More information about Ms. Fladebo (was she in or near the car) and the car (was the door open or unlocked) would be necessary to draw that conclusion. In any event, Fladebo certainly stands for

the proposition that police can search even when the defendant is securely held in a police car.

Division Two has held that reasonable access to the car is an essential preliminary to a valid Stroud search.

In Perea, an officer knew that defendant Perea's license was suspended. He saw Mr. Perea driving and radioed another officer to stop Mr. Perea. The second officer caught up with Mr. Perea just as Mr. Perea entered his driveway. The officer activated his emergency lights as he pulled in behind Mr. Perea. Mr. Perea ignored the lights and the officer's orders to return to his car and started toward his house. The officers seized Mr. Perea, handcuffed him, took his car keys, and then searched his car. The Court of Appeals concluded that Mr. Perea acted lawfully "when he got out and locked his car," and the seizure did not occur until after he had locked the car. The court then reversed the order denying Mr. Perea's motion to suppress evidence discovered in the search of his car. The court in Perea suggested that the result would have been different if "Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested."

In State v. Porter, the court addressed a question "[r]emaining unanswered by Stroud . . . whether an officer may search a vehicle incident to an arrest where the former occupant is arrested some distance from the vehicle." State v. Porter, 102 Wn. App. 327 (Div. I, 2000) **Nov 00 LED:05**. There, a detective saw Ms. Porter driving her van; her son Charles was in the passenger seat. Charles had outstanding warrants. The detective called a uniformed officer to seize Charles. Ms. Porter parked the van. Charles got out and started walking a dog. The uniformed officer arrested Charles; he was by that time some 300 feet from the van. Ms. Porter saw the arrest, walked to the arrest location, retrieved the dog, continued to walk, and did not return to the van. The trial judge refused to suppress drug evidence seized from the van. The court reversed concluding: "Thus, if the police initiate an arrest and the passenger compartment of a vehicle is not within the arrestee's area of 'immediate control,' Stroud does not apply."

In Johnston, the court observed that "[i]n State v. Stroud, the Washington Supreme Court followed Belton except for locked containers." Belton established the bright line rule that permits police to search a passenger compartment incident to arrest that the defendant had occupied. The court in Johnston reversed the trial court's refusal to suppress drug evidence seized from the car because the State failed to show that the defendant had "ready access to the passenger compartment at the time of arrest."

In State v. Rathbun, the defendant ran about 40 to 60 feet away from the truck he was working on as police approached. State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) **Jan 05 LED:08**. Police gave chase and seized him away from the truck. The police then searched his truck incident to the arrest. The court rejected arguments that the search incident to the arrest was proper because the defendant had access to the truck immediately before his arrest. The court concluded that the essential question was whether the vehicle was in his immediate control at the time of his arrest. The court also rejected the State's argument that the defendant should not be able to avoid a search by fleeing. In sum, the court held that "[i]f a suspect flees from a vehicle so that the vehicle is

> no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exists and there is no justification for the police to search the vehicle without first obtaining a warrant."
>
> Here, the uncontested findings are that Mr. Quinlivan got out of his truck, locked that truck, and walked some distance away from it to sit on a curb. Only then was he arrested by police. At that time, he did not have access to the passenger compartment of his car. As in Johnston, "[t]he State does not rely on any other exception to the warrant requirement." And, accordingly, police needed a warrant in order to search that vehicle incident to his arrest.
>
> We therefore reverse Mr. Quinlivan's conviction for possession of methamphetamine.

[Footnote and some citations omitted]

LED EDITORIAL COMMENTS: We will provide further comments on the Quinlivan decision in the April 2008 LED. For now, we will note just three things. First, we think that if, before Quinlivan got out of his pickup and locked it, the officer had told Quinlivan that he was under arrest for DWLS, or even had told Quinlivan that the officer was going to arrest him for that offense, Division Three would have upheld the search incident to arrest based on Division Three's decision in State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June 02 LED: 21. That assumes, of course, (1) that the officer would have made an arrest by the numbers, as he ultimately did here (see State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March 04 LED:11), and (2) that the officer, if later questioned in the following regard, had not decided, before conducting the search, to cite and release the suspect if nothing was found in the search (see State v. Pulfrey, 154 Wn.2d 517 (2005) Aug 05 LED:09).

Second, we note that the Quinlivan Court's legal analysis does not discuss the fact that Quinlivan did not obey the officer's order, after Quinlivan had gotten out and locked the pickup, to get back into the pickup. During even a routine traffic stop, an officer has discretion to order a driver (but not passengers) to stay in or get out of the stopped vehicle. See State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04. The Mendez rule recognizing this authority over the driver may not help here, where the officer did not tell Quinlivan that the officer wanted him in the pickup until after Quinlivan had gotten out and locked it. But we feel that, even assuming that the Quinlivan decision is correct, and even assuming that nothing was said about arresting a driver until after he or she had gotten out of the vehicle and locked it, an officer may be justified in conducting a search incident to arrest if the officer ordered the driver to stay in the vehicle before the driver got out and locked it.

Third, because the issue was not presented, the Quinlivan opinion does not discuss whether the officer had authority to impound the pickup truck (which he told the defendant, before the arrest, was his plan). The impound-authority issue was not posed because the officer exercised what he thought was search-incident-to-arrest authority. Impound might or might not have been lawful depending on facts that were not developed in the case. Note, however, that impounding of vehicles driver by DWLS drivers is not automatically authorized. Officers must consider whether there are reasonable alternatives to impound. All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb 03 LED:02; Potter v. WSP, 161 Wn.2d 335 (2007) Feb 08 LED:09.

STATE v. PARKER'S ARTICLE 1, SECTION 7 STATE CONSTITUIONAL RULE FOR VEHICLE SEARCH-INCIDENT REGARDING CONTAINERS POSSIBLY OWNED BY NON-ARRESTED PERSONS IS HELD TO APPLY SIMILARLY WHETHER THE ARREST IS OF DRIVER OR PASSENGER; COURT REJECTS DRIVER'S APPARENT DEFENSE THEORY THAT, AS TO NON-ARRESTED DRIVER, THE ENTIRE CAB OF THE VEHICLE WAS OFF LIMITS AS A CONTAINER KNOWN TO BELONG TO THE DRIVER

State v. Bello, __ Wn. App. __, 2008 WL 283663 (Div. I, 2008)

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

> Whatcom County Sheriff's Deputy James Triplett initiated a traffic stop of Lopez's car after pacing it traveling at approximately 38 miles per hour in a 25-mile-per-hour zone. As the car pulled over, Deputy Triplett noticed the passenger in the back seat, Bello, duck out of sight for approximately four seconds.
>
> Deputy Triplett exited his patrol vehicle and approached Lopez's car. When he reached the car, he requested the license, registration, and insurance information of the driver, Lopez. The front-seat passenger, Domingo Rabang, passed Deputy Triplett a laser pointer, commenting that it was what Deputy Triplett was looking for and stating that he thought that the traffic stop had been initiated because he had been activating the laser pointer out of the windows of the moving vehicle. Deputy Triplett also observed that Bello was not wearing a seat belt. Deputy Triplett then requested and was provided with identification from all three men in the car. The identification correctly showed that Lopez was the driver, Rabang was the front-seat passenger, and Bello was the back-seat passenger.
>
> Deputy Triplett then radioed the identities of the three men to the sheriff's office dispatcher in order to check for outstanding warrants or "wants" (indications that an individual is wanted by law enforcement for some purpose short of an arrest warrant). Deputy Triplett immediately received a response to his inquiry in the form of a mobile telephone call from Sergeant Hester. Sergeant Hester informed Deputy Triplett that Bello had "a drug history" and had previously been arrested on federal drug charges. Around this time, Bellingham Police Officer Brandland also arrived at the scene of the traffic stop.
>
> Based on the information provided by Sergeant Hester, Deputy Triplett radioed a request for assistance to Whatcom County Sheriff's Deputy Anthony Paz, a narcotics detection canine handler. Soon after Deputy Triplett requested Deputy Paz's assistance, and at the same time that Deputy Paz was pulling up to the scene of the traffic stop in his patrol vehicle, the sheriff's office dispatcher informed Deputy Triplett that a warrant existed for the arrest of Bello.
>
> Bello was asked to step out of the car, was arrested, and was read his Miranda rights by Officer Brandland. Following that, Deputy Paz had Lopez and Rabang step out of the car so that Deputy Paz could search it incident to Bello's arrest. The search was initiated by Deputy Paz using his dog to investigate the interior of the vehicle. The dog was trained to alert only to narcotics. During the search, the dog alerted to two locations in the car, the rear passenger seat and the front passenger seat. Deputy Paz removed the dog from the car. He then conducted a hand search of the car. He began this search in the rear seating area, where he found an unlocked CD container approximately one foot by six inches in size.

Deputy Paz unzipped the CD container and searched inside it. Secreted behind one of the pages containing CDs was a plastic bag, which Deputy Paz removed. The bag contained approximately 80 green pills, each of which was marked with a trefoil or club symbol of the type found or a playing card. Deputy Paz informed Deputy Triplett that he believed the pills were ecstasy.

Deputy Triplett then asked Bello, already in custody, if he knew anything about the pills. Nodding in Lopez and Rabang's direction, Bello stated that he knew nothing about the pills and that Deputy Triplett should ask Lopez and Rabang about them. Lopez and Rabang also stated that they knew nothing about the pills. At this point, Deputy Triplett placed Lopez under arrest. Deputy Triplett then read Lopez his Miranda rights and asked him if he had anything illegal on his person. Lopez reluctantly admitted that he had additional ecstasy pills in his coat pocket, which Deputy Triplett recovered upon searching Lopez.

In a subsequent suppression hearing, Lopez challenged the constitutionality of the search of his vehicle. Lopez testified that the CD container in the back of the car belonged to Bello and that Bello had brought it with him when he was picked up by Lopez earlier that evening. The superior court ruled that the search of Lopez's vehicle was properly conducted incident to the arrest of Bello. Accordingly, the superior court denied Lopez's motion to suppress the evidence of the ecstasy pills obtained by the search and the pills subsequently obtained during the search of Lopez's person incident to his own arrest. Following a trial on stipulated facts, the superior court found Lopez guilty of possession of a controlled substance, fined him, and sentenced him to three months in jail.

ISSUE AND RULING: Where the CD container was within arrested backseat passenger Bello's span of control at the time of his arrest, and where the police did not know that the container belonged to an occupant other than Bello, was the CD container subject to a search incident to the arrest of Bello? (Answer: Yes)

Result: Affirmance of Whatcom County Superior Court conviction of Adrian Alexander Lopez for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Lopez contends that the Supreme Court's decision in State v. Parker, 139 Wn.2d 486 (1999) **Dec 99 LED:13** requires the suppression of the evidence obtained against him and the reversal of his conviction. According to Lopez, the court's holding in that case that "the search incident to arrest exception . . . does not automatically extend to the 'private affairs' of persons who are not under arrest," mandates the conclusion that the search of his car was conducted in violation of [the Washington constitution, article 1, section 7]. Lopez contends that the police must presume that a car belongs to its driver and that this in turn requires the conclusion that Deputy Paz's search was unlawful due to Parker's holding that the police may not perform a warrantless search incident to arrest of "personal possessions police know or should know belong to . . . nonarrested individuals." In sum, Lopez contends that law enforcement officers may not search a car incident to the arrest of one of its passengers - - as opposed to the arrest of its driver - - in the absence of some independent probable cause to believe that the driver has committed a criminal offense. We disagree.

. . .

The simple fact that the lawful arrest of a vehicle's occupant has occurred ... does not give the police "the authority to conduct a full blown evidentiary search" of that vehicle. Parker. Rather, the scope of a warrantless vehicle search incident to the arrest of one of the vehicle's occupants must conform to the constitutional limitations articulated by the Supreme Court [in State v. Stroud, 106 Wn.2d 144 (1986)]:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Warrantless vehicle searches are further circumscribed by Parker. In that opinion, the Supreme Court examined three consolidated cases. In each of these cases the police had made a lawful arrest of the driver of a vehicle and, in the course of performing a warrantless search incident to that arrest, also searched within items that they knew or should have known were the personal belongings of one of the vehicle's passengers. The court held that the searches at issue were conducted in violation of article 1, section 7 because they did not fall within the automobile exigency exception to the warrant requirement as that exception was articulated in Stroud.

However, no analytical approach constituted a majority decision of the court. The lead plurality opinion stated that Stroud did not allow police officers, pursuant to the arrest of a driver, to search items such as handbags or jackets that were contained in a vehicle and which the officer performing the search actually knew or should have known belonged not to the arrested driver but, rather, to a nonarrested passenger who posed no obvious threat to the safety of the officer. The plurality [in Parker] stated that such items were not simply "containers" within the meaning of Stroud but, rather, were the personal property of the nonarrested passenger and were subject to article 1, section 7's limitations on searches of persons.

A narrowly focused dissent generally agreed with the plurality's articulation of the applicable rule, but concluded that the plurality had misapplied the rule in one of the cases in which the personal possession searched, a purse, had been within the span of control of the arrested individual immediately prior to that person's arrest. The dissent concluded that the permissible scope of a vehicle search incident to the lawful arrest of a vehicle occupant " 'includes a search of the immediately surrounding area or the area within the "immediate control" of the person arrested.' " Parker (quoting State v, Johnson, 128 Wn.2d 431 (1996) **March 96 LED:06**.

Subsequent cases have clarified that the rationale discussed in Justice Alexander's opinion is now the law. In Jones, a prosecution for illegal possession of a firearm, the defendant contended that the search by the police of a purse found in his car but clearly associated with another vehicle occupant violated

article 1, section 7. [State v. Jones, 146 Wn.2d 328 (2002) **July 02 LED:11**]. A unanimous court reversed Jones's conviction, noting that there was no evidence that the purse was in Jones's immediate control prior to his arrest. The court stated the applicable rule as being that the " 'personal effects of a passenger, such as a purse, jacket, or container, known to the officers to belong to the passenger, may not be searched incident to the arrest of the driver if not in the "immediate control" of the driver.' " Jones (quoting State v. Vrieling, 144 Wn.2d 489 (2001) **Oct 01 LED:02**).

Thus, the relevant concerns in this case are (i) whether the searching officers either knew or clearly should have known that the item in which the contraband was discovered did not belong to the original arrestee, and (ii) whether immediately prior to the arrest the item searched was within that arrestee's span of control. Whether the arrested person was the vehicle's driver or a passenger is not a dispositive consideration. See Parker ("There is simply no authority under our precedent to suggest that personal belongings clearly and closely associated with nonarrested *vehicle occupants* are subject to full blown police searches merely because some other *occupant of the vehicle* is arrested." (Emphasis added.)). Indeed, the Supreme Court has never addressed whether the rule articulated in Stroud must be applied differently depending on whether the arrested person is the driver of a vehicle or simply one of its passengers.

This court, however, has specifically examined that issue in two cases - - State v. Cass, 62 Wn. App. 793 (Div. II, 1991) **Jan 92 LED:06** and State v. Chelly, 94 Wn. App. 254 (Div. I, 1999) **April 99 LED:03**. In Cass, we addressed the then "novel question of whether a police officer may search a vehicle incident to the lawful arrest of a passenger, but not the driver, of the vehicle." In that case, an officer stopped Cass's car after recognizing one of its passengers, who was the subject of three valid outstanding arrest warrants. The officer then performed a warrantless search of Cass's car during which methamphetamine was discovered. Applying the rule articulated in Stroud, we held lawful the search of the vehicle in which the arrestee had been a passenger. We also held that article 1, section 7 did not require the exclusion of the evidence discovered during the search in a later prosecution of the driver. Similarly, in Chelly, we upheld a driver's conviction that resulted from the discovery of firearms and cocaine during a search of his vehicle incident to the arrest of a passenger.

Stroud carefully refers to "vehicle occupants," rather than distinguishing between drivers and passenger. Neither Parker nor Jones applies the rule articulated in Stroud differently depending on whether the arrested person is the driver of or a passenger in a vehicle. Accordingly, we discern no support in the law for Lopez's contention that vehicles in which passengers are arrested are the "personal effects" of the vehicles' drivers and are, therefore, not subject to the vehicle exigency exception to the warrant requirement.

Lopez's contention - - that because a vehicle subject to a traffic stop may be presumed to be the property of the driver, the vehicle is immune from the automobile exigency exception if the arrested party is a passenger rather than the driver - - both misapprehends the rationale for the vehicle exigency exception and ignores Cass and Chelly. Police may search a vehicle incident to the lawful arrest of one of the vehicle's occupants both because traffic stops present a scenario in which a likelihood exists that relevant evidence may be destroyed

and because traffic stops pose a well-demonstrated threat to officer safety. See Parker. These concerns exist regardless of whether the arrested individual is the driver or a passenger. See Cass. We are unwilling to ignore the concerns underlying the vehicle exigency exception and expand upon Parker to characterize vehicles as the "personal effects" of their drivers such that they are not subject to search following a passenger's arrest. Further, were we to so extend Parker's holding, we would be misapprehending the rationale of Parker itself, i.e., that a warrantless search of the personal effects belonging to a vehicle's occupant who has not been arrested is equivalent to a search of the nonarrested occupant's *person,* rather than equivalent to a search of the vehicle.

The rule articulated in Parker and Jones applies regardless of whether the arrested person is the driver or a passenger. Accordingly, we reiterate the rule announced by the Supreme Court and hold that personal possessions known by the police to belong to a specific vehicle occupant may not be searched incident to the arrest of another vehicle occupant unless the possessions were in the span of control of the arrested person immediately prior to the arrest. Applying this rule, we further hold that the search of the CD container located in Lopez's car was performed in accordance with the requirements of article 1, section 7.

In this case, no basis existed for any of the officers involved in the traffic stop to conclude that the CD container in which the ecstasy pills were found belonged to Lopez. To the contrary, testimony during the suppression hearing made clear that none of the vehicle's occupants at any time claimed ownership of the CD container.

Further, the evidence is unequivocal that the unlocked container in which the ecstasy was discovered was located on the backseat of Lopez's car next to Bello immediately prior to Bello's arrest and thus was in his immediate control. The evidence is equally unequivocal that Bello ducked out of sight in that same back seat as soon as the traffic stop was initiated by Deputy Triplett, giving rise to a concern that he may have been hiding weapons or destructible evidence.

The CD container was in Bello's immediate control prior to his arrest and there was no reason for the police to believe that the container belonged to either Lopez or Rabang. The police thus acted with authority of law when they looked within the container incident to the lawful arrest of Bello.

[Footnote and some citations omitted]

LED EDITORIAL COMMENTS: 1. The Lopez opinion is not internally inconsistent in its description of the knowledge element of the Parker case standard precluding the search of containers that may belong to non-arrestee occupants. In State v. Reynolds, 144 Wn.2d 282 (2001) Oct 01 LED:09, the Supreme Court stated that the standard is "knowledge" by the officer that the item belongs to a non-arrestee, not whether the officer "should have known" this. Reynolds is the controlling Washington Supreme Court precedent on point.

2. Note that if there is confusion as to whether a container or item of personal effects belongs to the arrestee or a non-arrestee occupant, the officer may inspect the contents

of the container or the item of personal effects. State v. Jackson, 107 Wn. App. 646 (Div. I, 2001) Oct 01 LED:16.

"NO TRESPASSING," "KEEP OUT" SIGNS PLUS CLOSED GATE AT ENTRANCE OF LONG DRIVEWAY AND SECLUDED, REMOTE LOCATION OF HOME ADD UP TO CONCLUSION THAT THE IMMEDIATE DRIVEWAY AND FRONT DOOR AREA OF THE HOME WERE NOT IMPLIEDLY OPEN TO THE PUBLIC UNDER STATE OR FEDERAL CONSTITUTION

State v. Jessen, ___ Wn. App. ___, 2008 WL 222717 (Div. III, 2008)

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

> On June 29, 2006, James Sigafoos, who owns property at 151 White Tail Flats Road east of Republic, Washington, discovered that a 20-foot extension ladder, assorted aluminum scrap, some gas cans, and a screen door frame had been stolen from his property. He drove to the upper part of his property where he found a white flat bed pickup hauling the missing items of personal property. He talked to the driver and another man. They told Mr. Sigafoos they were looking for "Paul" and that they were from Omak. They then drove off. Mr. Sigafoos knew Paul Jessen lived on the road just past his property.
>
> Mr. Sigafoos promptly drove into Republic and to the Ferry County Sheriff's Office where he was interviewed by, and provided a statement for [a deputy sheriff]. [The deputy] then followed Mr. Sigafoos up to the Sigafoos property. Mr. Sigafoos explained further that Mr. Jessen lived up at the end of the road, that he had earlier talked to him before coming to the sheriff's office, and that Mr. Jessen told him that there had been some people up there earlier in the day. But Mr. Jessen gave Mr. Sigafoos a different description of the visiting vehicle.
>
> [The deputy] then drove to Mr. Jessen's property. It was the middle of the day. The route took him 4 1/2 miles west on SR 20 to Sage Road, which is a county dirt road. He then drove one mile south on Sage Road until he reached a private easement road. He had to drive one-half mile up the private easement road to reach Mr. Jessen's driveway. Approximately one-half mile up the driveway, [the deputy] encountered a closed gate. Mr. Jessen's residence was past the closed gate. [The deputy] then drove to Mr. Jessen's property. It was the middle of the day. The route took him 4 1/2 miles west on SR 20 to Sage Road, which is a county dirt road. He then drove one mile south on Sage Road until he reached a private easement road. He had to drive one-half mile up the private easement road to reach Mr. Jessen's driveway. Approximately one-half mile up the driveway, [the deputy] encountered a closed gate. Mr. Jessen's residence was past the closed gate.
>
> The Sage Road area is sparsely populated and heavily forested, the private easement road is a primitive road, and Mr. Jessen's driveway is steep, poorly maintained and has severe ruts. The driveways off the private easement road are gated and are posted with "No Trespassing" or "Private Keep Out" signs.
>
> The Jessen residence cannot be seen from Sage Road or from any of the neighboring properties. The gate at Mr. Jessen's property was posted with a "No

> Trespassing" sign and just beyond the gate was a "Keep Out" sign. The gate was closed but not locked when [the deputy] entered the property.
>
> [The deputy], on arriving at the Jessen residence, observed an old log structure, three pickups, and the residence. He parked in the driveway. As he stood in the driveway, he could see through the clear glass door of a greenhouse on his right. Through the door of the greenhouse, he observed six to eight, 6-inch to 12-inch growing marijuana plants in garden-type plastic grow pots. He knocked on the front door of the residence several times, but no one appeared to be home. He ran the license plate on a gray van parked in the driveway and it came back to Paul Jessen, 163 White Tail Lane, Republic, Washington. The visible house number was 163 White Tail Lane. As he returned to his patrol vehicle, he again could clearly see the growing marijuana plants. At no time did he leave the driveway or the front door area of the residence. He turned around and left back down the driveway. [The deputy] entered Mr. Jessen's property for the sole purpose of investigating the theft - - not to look for marijuana.
>
> [The deputy] provided his report, including his observation of the marijuana plants, to a detective with the department and a search warrant was obtained. The search warrant was executed and the police seized several firearms in the Jessen residence and evidence of a marijuana grow operation.
>
> Mr. Jessen was charged with one count of manufacturing marijuana, one count of use of drug paraphernalia, and four counts of unlawful possession of a firearm by a felon. Mr. Jessen moved to suppress the evidence seized during the execution of the warrant. After a hearing on the motion, the trial court orally ruled that the motion was granted, but later reconsidered its decision and requested further briefing. Upon reviewing the additional briefing and arguments of counsel, the trial court reversed its ruling and denied the motion to suppress finding that, while Mr. Jessen had a subjective expectation of privacy, the police were conducting legitimate police business when the contraband was initially observed, and that the subsequent search was not unlawful.
>
> The information was subsequently amended so that only one count of unlawful possession of a firearm remained. Mr. Jessen was then found guilty of that crime after a stipulated bench trial on the facts set forth above.

<u>ISSUE AND RULING</u>: Where 1) the entrance to Jessen's driveway was posted with "no trespassing" and "keep out" signs, 2) the entrance had a closed (though unlocked) gate, 3) the property was in a remote area, and 4) Jessen's secluded home could not be seen from the driveway entrance or from any neighboring properties, was the home "impliedly open to the public" for purposes of article I, section 7 of the Washington constitution, such that an officer could lawfully approach the home in the middle of the day to talk to the resident as a possible witness to a theft? (<u>ANSWER</u>: No, although the mid-day approach to the home to talk to a possible witness was "legitimate police business," the home and the area immediately surrounding it was not "impliedly open to the public")

<u>Result</u>: Reversal of Ferry County Superior Court conviction of Paul E. Jessen for manufacturing marijuana.

<u>ANALYSIS</u>: (Excepted from Court of Appeals opinion)

Warrantless searches are per se unreasonable under the Fourth Amendment and article I, section 7 of the Washington Constitution, unless they fall within a few specific and well-delineated exceptions. Although residents maintain an expectation of privacy in the curtilage, or area contiguous with a home, "police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house." State v. Seagull, 95 Wn.2d 898 (1981) (footnote omitted). In so doing, however, an officer must conduct themselves as would a "reasonably respectful citizen." Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment.

Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry. An access route is impliedly open to the public, absent a clear indication that the owner does not expect uninvited visitors. [State v. Ross, 141 Wn.2d 304 (2000) **Sept 00 LED:02**; State v. Hornback, 73 Wn. App. 738 (Div. I, 1994) **Oct 94 LED:17**.] "No Trespassing" signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. *See* State v. Chaussee, 72 Wn. App. 704 (Div, III, 1994) **Jan 1995 LED:09.** Entry during daylight hours is more consistent with that of a reasonably respectful citizen. See Ross.

Before we can determine if the curtilage areas at issue here were impliedly open, we must first address whether [the deputy] was on legitimate police business when he entered the property. Ross. Entering property to speak with occupants as part of an investigation of a possible crime is legitimate police business. Ross. Here, [the deputy] had been informed that Mr. Jessen might have information regarding the possible suspects in the theft of Mr. Sigafoos' property and he entered the property for the sole purpose of asking Mr. Jessen about the suspects. Thus, substantial evidence supports the trial court's finding that [the deputy] was engaged in legitimate police business.

Next, we must determine whether Mr. Jessen's driveway was impliedly open to the public. Mr. Jessen's property is located in a remote, sparsely populated and heavily forested area. And, while [the deputy] entered the property during daylight hours, he had to drive down a long and rough, primitive driveway to access Mr. Jessen's home. He also had to enter through a closed, but unlocked gate posted with a "No Trespassing" sign. Mr. Jessen's home was not visible from the gate; nor was it visible from his neighbors' property or any other public area. The driveway and property surrounding it were posted with "No Trespassing" and "Keep Out" signs.

Based on these facts, the court's finding that a reasonable, respectful citizen would believe that he could enter the property is not supported by substantial evidence. While the "No Trespassing" signs alone are not sufficient to remove implied consent to the access of the property via the driveway, the closed gate, the primitive road, the secluded location of the home in addition to the posted signs are sufficient.

In sum, under these facts, a reasonable, respectful citizen seeking to contact an occupant would not believe he had consent to enter the property. There were no

exigent circumstances to justify entering the property and the police could have easily contacted Mr. Jessen to obtain permission to speak with him and/or enter the property. They did not do so. The motion to suppress should have been granted and the charges dismissed.

[Some citations omitted]

LED EDITORIAL COMMENT AND NOTE: The Jessen Court asserts that its decision is consistent with both the federal constitution's Fourth Amendment and with the Washington constitution. We are very doubtful that the decision is consistent with the Fourth Amendment case law, but the decision does appear to have support in the "independent grounds" rulings by the Washington appellate courts under article 1, section 7 of the Washington constitution.

Washington cases addressing Washington constitutional privacy protection for remote, secluded property – in addition to cases discussed in the Jessen opinion – include:

State v. Littlefair, 129 Wn. App. 330 (Div. II, 2005) Nov 05 LED:13 (Privacy protection extended to back yard area of two-acre parcel, where homeowner had posted "private property" and "no trespassing" signs alongside the roadway approaching his home, and the officer entered the backyard area around midnight dressed in camouflage)

State v. Thorson, 98 Wn. App. 528 (Div. I, 1999) Feb 00 LED:02 (Unfenced, un-posted, heavily-wooded property with orchard on remote rural island was protected from warrantless search under article 1, section 7 of the Washington constitution)

State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) Jan 95 LED:19 (Rural farm owner with fenced and gated property, posted with "No Trespassing" signs, had state constitutional privacy protection)

State v. Wilson, 97 Wn. App. 578 (Div. III, 1999) Jan 00 LED:07 (Naked-eye observation from airplane flying at FAA-permitted 500 feet of marijuana grow in roofless shed did not violate state constitutional privacy rights of property owner)

CHILD PORN SEARCH WARRANT EXECUTION HELD TIMELY DESPITE LONG DELAY IN COMPLETION OF COMPUTER SEARCH; AFFIDAVIT HELD TO MEET CONSTITUTIONAL PC, PARTICULARITY REQUIREMENTS; ALSO, STATE WINS ON SUFFICIENCY OF EVIDENCE; BUT DISCOVERY ISSUE REQUIRES REVERSAL OF CHILD PORN COUNTS

State v. Grenning, ___ Wn. App. ___, 174 P.3d 706 (Div. II, 2008)

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

1) Initial Investigation and Search Warrant

On March 3, 2002, the Tacoma police department received a call from a mother concerned that Grenning had sexually molested her five year old son, RW. She explained that Grenning was her neighbor and that he occasionally took care of RW. The officer suggested that the mother take RW to a hospital. RW's mother took him to Mary Bridge Children's Hospital where a doctor examined him. During the examination, RW told the doctor that "Neil" had touched him on his "pee pee."

On March 5, 2002, two days after RW's mother called the police, Detective Baker obtained a search warrant for Grenning's residence. In the affidavit in support of

the warrant, Detective Baker indicated that RW's mother found RW in the bathroom placing an object in his anus. RW told his mother he was "trying to get out what Neil had put into my butt." Detective Baker stated that RW handed his mother a jar of petroleum jelly and said, "[t]his is what Neil put on his [sic] pee pee and put in my butt." RW's mother also told Detective Baker that Grenning had once showed her a digital picture he took of RW and that RW told her Grenning had taken pictures of him unclothed.

Detective Baker explained in his affidavit that Grenning told the officers during an interview that he kept personal lubricant near his computer because "it was more enjoyable to do that while sitting at the computer." Grenning's computer was located in his bedroom. When the officers asked Grenning if he had pornographic materials on his personal computer, he stated that it was an older computer and that there may be some "old stuff" on it.

The search warrant granted the officers permission to search for and seize a variety of items concealed at Grenning's home that were material to the investigation or prosecution of first degree child molestation. It required detectives to enter and search the home within 10 days.

On March 6, officers entered Grenning's home. Detective Voce, who was assigned to handle all computer equipment during the search, lawfully seized Grenning's computer and hard drives. On March 15, Detective Voce copied Grenning's three hard drives and then began investigating and reviewing the copied hard drives. He recovered two images of what appeared to be commercial child pornography. At this point, he stopped his investigation to obtain another search warrant.

II. Second Warrant and Subsequent Investigation

On March 27, police detectives obtained a second search warrant, expanding the search to include photographs, photograph albums, and drawings depicting minors engaged in sexually explicit activity. The warrant required that the search be done within 60 days.

More than a year later, on April 3, 2003, Detective Voce continued reviewing the information on the copied hard drives, specifically looking for evidence of child molestation and child pornography. He ultimately uncovered approximately 35,000 to 40,000 photographs of minors engaged in sexually explicit conduct on Grenning's hard drives. He uncovered 300 images depicting RW being sexually assaulted and molested, 40 images of a second victim, BH, being sexually assaulted and molested, and 20 images of commercial child pornography. The commercial child pornography images depicted adult males sexually assaulting or molesting minors.

According to Detective Voce, the images were located in the "unallocated space" of two of the three hard drives seized from Grenning's house. Grenning's computer was a Macintosh brand computer with an Apple operating system. Macintosh hard drives contain seven different partitions (or sections) of the drive. Two of Grenning's hard drives only contained four of the seven usual partitions and it appeared to Detective Voce that they had been intentionally removed. Detective Voce explained that removing partitions would cause data to be listed as unallocated even if the user had not deleted it. Additionally, the removed

partitions made it more difficult to access the images and data on the hard drives. Detective Voce found all of the child pornography pictures on the two hard drives with unallocated space.

III. Continuing Investigation

In April 2003, the Criminal Misconduct Office in Brisbane, Australia contacted Detective Baker. Australian police suspected that pornographic photographs they discovered in a computer in Australia were Grenning's photos. The photos depicted victim BH being sexually assaulted and molested. Detective Voce obtained another search warrant using the information obtained from the Australian police to specifically look for evidence relating to BH on Grenning's copied hard drives.

Detectives found photos of BH on Grenning's hard drives and instant message chats. Chat participant “Photokind” referred to himself as a recent graduate of Pacific Lutheran University who was looking for work and applying for a teaching license. This description matched Grenning. In one chat, Photokind described a camping trip that matched up with the images found on Grenning's computer of BH being sexually assaulted. The chat gave a play-by-play narrative of the camping trip and detailed each of the pictures very specifically.

On June 7, 2004, prosecutors charged Grenning with 17 counts of first degree child rape, 2 counts of attempted first degree child rape, 6 counts of first degree child molestation, 26 counts of sexual exploitation of a minor, 1 count of second degree child assault, and 20 counts of possession of depictions of a minor engaged in sexually explicit conduct. As an aggravating factor, the State alleged that Grenning committed the second degree child assault and possession of child pornography crimes with sexual motivation.

IV. Pretrial Motion

Grenning made a pretrial motion to suppress the evidence the police obtained from the copies of his hard drives, arguing that the search was untimely. The trial court denied the motion. Grenning also made a pretrial motion for mirror-image copies of his computer hard drives. The trial court granted Grenning's motion, but it crafted a protective order requiring that the mirror-image hard drive copies only be viewed and tested at the Tacoma police facility, because it was a secured location. It directed police detectives to provide a computer, monitor, keyboard, mouse, and operating system for Grenning.

Grenning was allowed to access the hard drives between 8:30 a.m. and 4:30 p.m. Monday through Friday. The drives were to remain in the secured location. Only the defendant, his counsel, and his computer expert could view the data on the imaged drives. Once Grenning completed his examination, he had to notify Detective Voce, who would then remove the imaged drives and store them until completion of the case. While the drives were being stored, Detective Voce was not to view any of the data contained on the imaged drives or investigate what type of forensic evaluation Grenning conducted on the drives or the computer.

Grenning asked the trial court to reconsider the protective order and to allow him to remove the copied hard drives from the secure location so his expert could use his own lab to analyze the hard drives. The trial court denied the motion,

determining that the protective order was necessary to protect the victims and to ensure that material contained on the hard drives was not released on the internet.

V. Trial Testimony, Conviction and Sentencing

At trial, BH was nine years old. At the time of the events, BH was approximately six years old. BH testified that he went on a camping trip with his older brother and Grenning. BH slept in the same tent as Grenning, and BH testified that Grenning touched his penis with his mouth. BH was nervous testifying and had difficulty talking about the camping trip.

RW was seven years old at the time of trial. The trial court found RW unavailable to testify due to his age.

On June 18, 2004, a jury convicted Grenning of 16 counts of first degree child rape, 26 counts of sexual exploitation of a minor, 6 counts of first degree child molestation, 1 count of second degree assault of a child with sexual motivation, 20 counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation, and 2 counts of first degree attempted child rape.

At sentencing, the trial court imposed the high end standard range for each offense, ran the sentences for the convictions within each type of offense concurrently and then ran each class of offenses consecutively. This resulted in a total sentence of 1,404 months (117 years). Grenning appeals.

ISSUES AND RULINGS: 1) Was Criminal Rule 2.3(c) met where Grenning's computer hard drives were seized within 10 days of issuances of the search warrant, abut where the search of those hard drives was not concluded within 10 days? (ANSWER: Yes, because probable cause had not expired during the period of the search)

2) Where the affidavit stated that Grenning sexually molested RW, that he regularly masturbated at his computer, and that he admitted that there may be "old pornography" on the computer, was probable cause established to support a search of Grenning's computer for evidence of commercial child pornography and for evidence of his suspected child rapes? (ANSWER: Yes)

3) Did the trial court unlawfully restrict Grenning's pre-trial access to the computer hard drives and computer in relation to the prosecution for possession of commercial child pornography? (ANSWER: Yes)

4) Was the evidence sufficient to support Grenning's conviction for possession of commercial child pornography? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Neil Grenning for first degree child rape (16 counts), sexual exploitation of a minor (26 counts), first degree child molestation (6 counts), second degree assault of a child with sexual molestation (1 count) and first degree attempted child rape (2 counts); reversal and remand for possible re-trial on convictions for possession of depictions of minors engaged in sexually explicit conduct with sexual motivation (20 counts).

ANALYSIS:

1) Timely execution of search warrant

The key part of the Court's analysis on the timely-execution issue is as follows:

> Grenning argues that the search of his computer hard drives was untimely under CrR 2.3(c) *[Court's footnote: "A search warrant . . . shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named . . . ." CrR. 2.3(c) (emphasis added)]* because Detective Voce found two child pornography photographs more than 10 days after the March 5, 2002, warrant was issued. Grenning argues that because the warrant required that the search be executed within 10 days, any investigation of his computer after the 10 days was warrantless and in violation of his Fourth Amendment rights.
>
> Grenning further argues that there was no probable cause to issue the warrant on March 27, 2002 because discovery of the first two photographs that were the basis for probable cause was untimely. Thus, he contends that all evidence seized under both the March 5 and March 27, 2002 search warrants should be suppressed.
>
> This is an issue of first impression in Washington. There are no Washington cases dealing directly with the constitutionality of an ongoing forensic examination of information stored on copies of a hard drive that extends beyond the 10-day deadline specified in CrR 2.3(c). However, it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value. 2 Wayne R. LaFave, Search and Seizure § 4.10(e), at 771 (4th ed.2004).
>
> On March 5, the police obtained a search warrant to search Grenning's residence. The express terms of the warrant authorized police to search Grenning's residence for evidence relating to the investigation of first degree child molestation, specifically including photography equipment, computer hardware, computer software, and electronic communications. On March 6, the police entered Grenning's residence, searched the premises, and seized his computer and hard drives. Because the police entered and searched Grenning's residence within the 10-day warrant requirement, the search was timely and the seizure of his hard drives lawful. That investigators continued testing the hard drives in search of evidence after they were lawfully seized does not implicate the Fourth Amendment. However, even if the Fourth Amendment was implicated, it was not violated.
>
> A search is constitutionally timely so long as it begins before the expiration of a warrant and as long as probable cause continues through completion of the search. State v. Kern, 81 Wn. App. 308 (1996) **Oct 96 LED:12**. Here, Detective Voce searched information stored on imaged copies of Grenning's hard drives. Hard drives store permanent, static, and unchanging data. Due to the nature of the material seized, the passage of time did not affect probable cause.

> The Fourth Amendment does not provide for a specific time limit in which a computer may undergo forensic examination after it has been seized with a valid search warrant. United States v. Hernandez, 183 F.Supp.2d 468, 480 (P.R. Dec. 2002). If the delay is reasonable, it does not violate the Fourth Amendment. Because computer searches usually occur at a different location than where the computer was seized, involve more preparation than an ordinary search, involve a greater degree of care in the execution of the warrant, and contain more information than ordinary searches, delays are expected and reasonable. Hernandez; *See also* United States v. Syphers, 426 F.3d 461 (1st Cir .2005). In Syphers, a five-month delay in execution of a warrant did not invalidate the search of the defendant's computer since there was no showing that: (1) the delay caused a lapse in probable cause; (2) it created unfair prejudice to the defendant; or (3) officers acted in bad faith. Syphers. This test instructs our analysis here.
>
> Detective Voce had to search Grenning's three hard drives. He had to consult with another expert to obtain specialized software in order to complete his search. The information on the hard drives was not transitory, changeable, nor stale when Detective Voce reviewed the copies of the hard drives. There was a significant amount of information on the hard drives and the trial court found that it was not realistic or reasonable for Detective Voce to review it all in 10 days. Probable cause continued to exist throughout Detective Voce's search. The police did not act in bad faith in executing the warrant. The delay was reasonable and Grenning cannot demonstrate prejudice. We hold that the trial court did not err in admitting evidence obtained under the search warrants.

[Some citations omitted]

2) PC and particularity

The key part of the Court's analysis on the PC-particularity issue is as follows:

> Relying on State v. Smith, 60 Wn. App. 592 (1991), Grenning argues that general information about pedophilia in a search warrant does not establish probable cause when it is not demonstrated that the defendant is a pedophile. However in Smith, all the facts in the affidavit were 10 years old and the pedophile profile was the only basis for probable cause.
>
> Here, unlike in Smith, Baker's affidavit specifies facts about Grenning's molestation of RW. Thus, the issuing court did not rely solely on the profile of a typical pedophile to establish probable cause for searching Grenning's computer.
>
> Relying on [State v. Nordlund, 113 Wn. App. 171 (Div. II, 2002) **Nov 02 LED:08**] Grenning argues that greater particularity was required for probable cause to search his computer. In Nordlund, the court held that there must be a greater degree of particularity in the search warrant for a defendant's personal computer.
>
> However, in Nordlund, the affidavits did not recite particularized information linking the computer to possible evidence of crimes and only established the defendant's noncriminal use of the computer. The State seized the defendant's computer to search for evidence of his whereabouts on the day he allegedly

> attacked two young women, not to look for pornography or evidence of child molestation supported by other evidence in the affidavit.
>
> Here, Baker's affidavit established a reasonable inference that Grenning sexually molested RW, that he masturbated in front of his computer, and that there were sexually explicit photographs on Grenning's computer supporting a child molestation charge. We affirm the trial court's finding that probable cause existed to authorize the search of Grenning's computer and that the search was sufficiently particularized.

[Some citations omitted]

3) Discovery defense access to computer evidence

The key part of the Court's analysis of the discovery issue is as follows:

> The trial court did not have the benefit of the recent case of State v. Boyd, where the Washington Supreme Court held that a defendant is entitled to mirror-image copies of hard drives where the evidence on the computer supports charges of commercial child pornography possession. State v. Boyd, 160 Wn. 2d 424 (2007) **Oct 07 LED:10**. The analysis of the hard drives "requires greater access than can be afforded in the State's facility." Boyd. In child pornography possession cases, defense counsel is entitled to the hard drive copies, subject to a protective order, "where the forensic expert intends to use particular diagnostic equipment from his lab and must review tens of thousands of images from potentially disparate sources." Boyd.
>
> The Washington Supreme Court suggests safeguards to protect a victim's interests. As part of the protective order, the trial court should: (1) ensure that the evidence is secured and inaccessible to anyone besides defense counsel; (2) limit access by non-counsel without court order; (3) permit access only for purposes of the action; (4) ensure no additional copies are made; (5) require a copy of the protective order be kept with the evidence; (6) prohibit digitizing of the evidence; (7) order installation of a firewall between the internet and any computer used to access the protected materials during inspection; (8) require counsel to return the evidence if representation is terminated; (9) require any computer used in the evidence's examination to be cleared before it is accessed for other purposes; (10) order prompt return the evidence at the end of the criminal proceeding; and (11) require that law enforcement verify the data's destruction and confirm that destruction to the court. Boyd.
>
> Here, the trial court granted Grenning's motion for mirror-image hard drive copies. However, the trial court did not allow Grenning's attorney or computer expert to view or test the hard drive copies outside of the Tacoma police facility. Because expert analysis of the hard drives "requires greater access than can be afforded in the State's facility," the trial court's protection order was unduly restrictive for the commercial child pornography charges. Boyd. Thus, we reverse Grenning's convictions for 20 counts of possession of depictions of minors engaged in sexually explicit conduct and remand for proceedings consistent with this opinion.

4) Sufficiency of evidence of possession of commercial child pornography?

The key part of the Court's analysis of the sufficiency of the evidence of possession of commercial child pornography is as follows:

> Grenning argues that the evidence was insufficient to convict him under RCW 9.68A.070 because the State did not prove that he actually possessed the child pornography. He claims that though the pornography was found on his computer, there is no evidence to indicate he knew the images were there and that his possession conviction should be reversed. We reject this claim.
>
> The State presented evidence to the jury that the computer at issue was located in Grenning's bedroom and that other roommates did not likely know of the images. This computer stored a large number of pornographic images that Grenning personally took of RW and BH, as well as a large number of commercial child pornography photographs. Upon questioning by police as to the pornography on the computer, Grenning admitted that there may be some "old stuff" on it. Grenning also told police that he kept a bottle of lubricant next to the computer for personal use while he was at the computer.
>
> These facts presented to the jury are not in dispute and taken in the light most favorable to the State, they provide sufficient evidence that a reasonable trier of fact could find beyond a reasonable doubt that Grenning knew of the child pornography on his personal computer. Because double jeopardy is not implicated these charges may be retried on remand.

[Some citations omitted]

OFFICERS LAWFULLY OBTAINED SEARCH WARRANT EVEN THOUGH DEFENDANT HAD SHOWED THEM A MEDICAL MARIJUANA AUTHORIZATION; ALSO, MEDICAL MARIJUANA DEFENSE BASED ON ANGER AND ANXIETY CONDITIONS FAILS AT TRIAL BECAUSE "QUALIFYING PATIENT" DEFINITION NOT MET

State v. Fry, ___ Wn. App. ___, 174 P.3d 1258 (Div. III, 2008)

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

> On December 20, 2004, Stevens County sheriff's deputies went to Mr. Fry's house after obtaining information that he was growing marijuana. As officers approached the front porch, they could smell marijuana. When Mr. Fry opened the front door, the odor of marijuana was even stronger. Mr. Fry told the officers he had a prescription for marijuana and asked them to leave. His wife produced a document entitled "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State" for Mr. Fry. The authorization stated that marijuana may help Mr. Fry's "severe anxiety, rage, & depression related to childhood."
>
> Officers obtained a search warrant and found several containers of marijuana and numerous marijuana plants. The seized amount totaled more than two pounds (911 grams). The State charged Mr. Fry with manufacturing marijuana and possession of more than 40 grams of marijuana.
>
> Mr. Fry moved to suppress the evidence, arguing that once the officers were shown the medical use document, probable cause for the search no longer

existed. The State countered that medical use of marijuana under the Act is an affirmative defense for trial, not a defense to probable cause.

The court denied Mr. Fry's motion, finding the odor of marijuana provided probable cause to search his home and any evidence found as a result could either support or refute the medical marijuana affirmative defense. It also found that an affirmative defense does not negate probable cause, reasoning that such defenses are for the trier of fact not for earlier stages in the proceedings. The court granted Mr. Fry's request for a stay pending his motion for discretionary review. A commissioner of this court denied Mr. Fry's motion for discretionary review.

The State moved in limine to exclude the medical use defense, arguing that Mr. Fry was not a qualifying patient under the Act because severe anxiety is not a terminal or debilitating condition as defined by the Act. The trial court excluded use of the defense. Following a bench trial on stipulated facts, Mr. Fry was convicted of possession of over 40 grams of marijuana. The manufacture of marijuana charge was dismissed.

ISSUES AND RULINGS: 1) Where defendant showed officers a medical authorization document that might have, as an affirmative defense, justified his possession and use of marijuana, was probable cause established for a search of his residence? (ANSWER: Yes, PC was established regardless of whether the defendant showed officers what might have supported an affirmative defense under the Medical Use of Marijuana Act); 2) Where Mr. Fry's doctor had approved his use of marijuana to treat his severe anxiety and anger, was he a "qualifying patient" who could lawfully avail himself of the medical marijuana defense? (ANSWER: No, these medical conditions do not meet the statutory definition of "qualifying patient")

Result: Affirmance of Stevens County Superior Court conviction of Jason Lee Fry for possession of over 40 grams of marijuana.

ANALYSIS: (Excepted from Court of Appeals opinion)

1) Probable cause to search

Mr. Fry argues that his production of a medical use certificate negated probable cause for the search. Citing McBride v. Walla Walla County, 95 Wn. App. 33 (1999) **Oct 99 LED:16**, the State counters that the medical use affirmative defense does not negate probable cause. Rather, the defense is to be determined by a judge or jury at trial, not law enforcement.

. . .

A search warrant may be issued only upon a finding of probable cause. Probable cause supports a search warrant if the affidavit contains sufficient facts and circumstances to establish that the defendant is probably involved in criminal activity and that evidence of a crime will be found at the place to be searched. It is well settled that when a trained officer smells marijuana, this alone provides probable cause for a search. State v. Olson, 73 Wn. App. 348 (1994) **Jan 95 LED:17**.

Medical authorization for marijuana use is an affirmative defense under the Act. Former RCW 69.51A.040(1) (1999). Affirmative defenses are evaluated at trial, not by law enforcement at earlier stages of the proceedings. McBride. The issue in McBride was whether the affirmative defense of self-defense negated probable cause to arrest the defendant for assault. The defendant did not dispute hitting the victim, but claimed officers lacked probable cause to arrest him because they had information he was acting in self-defense. In concluding that the self-defense claim did not weaken probable cause, the court reasoned:

> Self-defense is an affirmative defense which can be asserted to render an otherwise unlawful act lawful. But the arresting officer does not make this determination. The officer is not judge or jury; he does not decide if the legal standard for self-defense is met. Moreover, . . . [the arresting officer] had only one side of the story. Mr. McBride's claim of self-defense was then a mere assertion, not fact. The self-defense claim did not vitiate probable cause.

This reasoning applies here. Information relating to the validity of a suspect's medical use defense will almost always be within the defendant's knowledge. The defendant's assertion of the defense is not necessarily a fact; further development of the facts at trial may well show that the medical use defense is not viable. Therefore, the mere production of a document purporting to be a marijuana use authorization does not prohibit further investigation by the State. Here, probable cause to search Mr. Fry's house existed as soon as officers smelled marijuana. His production of a medical use document did not provide automatic protection against a reasonable police investigation and search. Whether the affirmative defense of medical use of marijuana was viable was an issue for trial.

2) "Qualifying patient" status

Former RCW 69.51A.040(1) states "any qualifying patient who is engaged in the medical use of marijuana . . . will be deemed to have established an affirmative defense to . . . charges [of violating marijuana law] by proof of his or her compliance with the requirements provided in this chapter." Under this statute, a qualifying patient means a person who:

> (a) Is a patient of a [licensed] physician . . . ;
>
> (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
>
> (c) Is a resident of the state of Washington at the time of such diagnosis;
>
> (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
>
> (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3).

The trial judge prevented Mr. Fry from bringing the defense on the ground that his condition was not a terminal or debilitating medical condition under the Act. A terminal or debilitating medical condition includes:

> (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
>
> (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
>
> (c) Glaucoma . . . ;
>
> (d) Any other medical condition duly approved by the Washington state medical quality assurance board [commission] as directed in this chapter.

Former RCW 69.51A.010(4) (1999).

Mr. Fry is required to show by a preponderance of the evidence that he has met the requirements of the Act. State v. Shepherd, 110 Wn. App. 544 (2002) **May 02 LED:08**. He fails to do so. Relying primarily on Shepherd, Mr. Fry claims that because that court found the defendant was a "qualifying patient" under the Act even though his medical use document did not specify his terminal or debilitating condition, Mr. Fry must qualify because his physician determined that he had a debilitating condition.

But Mr. Fry's reliance on Shepherd is misplaced. In that case, the defendant suffered from a debilitating spine condition. His physician's authorization for medical use stated that he was treating the defendant for a " 'terminal illness or debilitating condition as defined in RCW 69.51A.010,' "but declined to specify the condition. However, the Shepherd court was not asked to determine whether Mr. Shepherd's condition qualified under the Act. In fact, it appears the parties did not dispute that the defendant suffered from a debilitating condition. Shepherd is not instructive here.

Mr. Fry's physician authorized the use of marijuana to treat Mr. Fry's severe anxiety and anger. Although former section (4)(d) of the Act permits the Washington State Medical Quality Assurance Commission to approve conditions in addition to those listed in former RCW 69.51A.010(4), Mr. Fry's condition is not among them. Therefore, as a matter of law, Mr. Fry is not a qualifying patient, and cannot avail himself of the medical marijuana defense. We conclude the trial court did not err in prohibiting Mr. Fry from presenting the medical use defense.

[Subheadings added; some citations omitted]

LED EDITORIAL NOTE: While the 2007 amendments to RCW 69.51A.040 (briefly summarized in the July 2007 LED) were not implicated in this case, we remind LED readers that the 2007 amendments inserted a new subsection 1 into RCW 69.51A.040 providing as follows:

> **If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to**

test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.

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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].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2006, is at [http://www1.leg.wa.gov/legislature]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's home page is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa].

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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. **LED**s 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]