



# Law Enforcement

NOVEMBER 2008

# Digest

632<sup>nd</sup> Basic Law Enforcement Academy – May 19<sup>th</sup>, 2008 through September 24, 2008

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**WASHINGTON STATE SUPREME COURT**

**DELAYED FRISK OF HANDCUFFED, COOPERATIVE BROTHER OF A WARRANT SUBJECT (IN MISTAKEN-IDENTITY SEIZURE) HELD NOT SUPPORTED BY REASONABLE BELIEF THAT DETAINEE WAS PRESENTLY ARMED AND DANGEROUS**

State v. Xiong, \_\_ Wn.2d \_\_ , 191 P.3d 1278 (2008)

**INTRODUCTORY LED EDITORIAL COMMENT:**

It reflects the unpredictable nature of the appellate review process that, in this frisk case, after Division Three of the Court of Appeals split 2-1 in favor of the frisk, (see May 07 LED:20-23) the Washington Supreme Court held unanimously that the frisk was not justified. As we produce this November 2008 LED, we cannot ignore that in just the past few months two law enforcement officers in Washington have been murdered in the course of street contacts with suspects. While officers should not use frisk authority as an excuse to look for evidence or contraband, officer safety is paramount.

We would have hoped for a concurring opinion in this case from at least one Washington Supreme Court justice recognizing that - - first and foremost - - law enforcement officers work in a dangerous job requiring that the danger standard for frisking must not be set too high. Such a hypothetical concurring opinion ideally would have asserted that the ruling in this case was based on a unique set of facts, and that the decision’s precedential effect is very limited. In light, however, of the lack of any such qualifying explanations in the Supreme Court’s unanimous decision delivered in a single opinion, we expect that some criminal defense attorneys will argue that the decision is sweeping authority against frisking in ambiguous circumstances such as those in this case. Our belief, however, is that this ruling will in future decisions be declared by Washington appellate courts to be limited to its relatively unusual facts, particularly the delay that occurred before the decision to frisk was made.

More important, we expect and hope that officers will continue to take actions that they believe are reasonably necessary to protect their safety. We have further comments - - among other things urging that officers and prosecutors in suppression hearings “sell” their officer-safety concerns. See below at page 6.

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

Five members of a joint law enforcement task force went to what they believed was Kheng Xiong's residence. Their intention was to serve him with an arrest warrant. In addition to the warrant, the officers had in their possession a black and white photograph of Kheng Xiong, which they intended to use in identifying him. While they were at the residence, a minivan pulled up in front of the house. One of the officers thought the passenger in the minivan was Kheng Xiong. The passenger was actually Bee Xiong (Bee), the defendant in this case.

The officers immediately handcuffed Bee and then performed a pat-down frisk of him. When asked, Bee told the officers that his name was Bee Xiong and that he was Kheng Xiong's brother. Although Bee did not have any identification on his person, he showed the officers a tattoo on his arm of the letter "B." Based on their examination of the photograph, the officers were unable to determine if the man before them was Kheng Xiong.

One of the officers had earlier noticed a bulge in Bee's front pocket. When the officer touched the bulge, Bee appeared to pull away. The officer then asked Bee if there was anything in his pocket that could hurt the officer. Bee responded, "[N]o." Bee also indicated that he did not want to be searched. The officer proceeded to squeeze the bulge in Bee's pocket and then conferred with other officers, telling them he thought there was a "potential weapon" in Bee's pocket.

One of the officers, [Officer A], then reached into Bee's pocket and pulled out a glass smoking pipe that was wrapped in facial tissue. The pipe apparently contained some residue that the officers believed was a controlled substance. Concluding that the pipe was "for smoking methamphetamine or some illegal substance," the officers arrested Bee for possession of a controlled substance. They then searched the minivan incident to the arrest and turned up a scale, some cash, and a small box in which there was a quantity of methamphetamine.

A short time later, Bee and Kheng Xiong's mother arrived at the residence and identified the man under arrest as Bee Xiong. One of the officers who testified at the suppression hearing said that he would not have "frisked" Bee if Bee had been correctly identified earlier.

Bee was charged in Spokane County Superior Court with possession of methamphetamine with intent to deliver. Bee's counsel moved before trial to suppress the evidence that flowed from the search of Bee's person, contending that the officers lacked (1) a reasonable or articulable suspicion which would justify a belief that Bee was armed and dangerous, *and* (2) a basis to believe that Bee was the target of the arrest warrant.

Officer [A], the officer who seized the glass pipe from Bee, testified at the suppression hearing. Although [Officer A] did not express a concern that Bee could access a weapon, he said it was "possible." Another officer, Sergeant [B], indicated that he "wasn't immediately concerned" but said that "at some point" when Bee's handcuffs were removed, "I didn't want him having access to any weapons."

The trial court granted Bee's suppression motion after concluding that there was no testimony of "any articulable facts specific and detailed [from] which the officer

could reasonably infer the detained individual was armed and dangerous.” Based on its suppression of the evidence, the trial court dismissed the charge against Bee.

The Court of Appeals, in a split decision, reversed the trial court, holding that “the [officers’] safety concerns” justified the search. State v. Bee Xiong, 137 Wn. App. 720 (Div. III, 2007) **May 07 LED:20**.

**ISSUE AND RULING:** Where the detainee was cooperative and his hands were cuffed behind his back, were the officers justified in patting and removing the hard object from the detainee’s pocket, in light of their delay in doing so, and in light of their later testimony at hearing indicating that, at the time of their actions, they were not immediately concerned that the detainee posed a threat? (**ANSWER:** No, their actions were not justified)

**Result:** Reversal of Division Three Court of Appeals decision that reversed a Spokane County Superior Court decision ruling the frisk of Bee Xiong unjustified and suppressing the evidence in this case.

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

Bee contends that the Court of Appeals erred in reversing the trial court’s suppression order, arguing that the law enforcement officers who seized the pipe from Xiong, and thereafter arrested him, did not have reasonable grounds to believe that he was armed and dangerous. In support of this contention, Bee’s counsel calls our attention to a decision of the Court of Appeals in which the facts were similar to those before us now, State v. Galbert, 70 Wn. App. 721 (Div. I, 1993) **March 94 LED:17**. There, a police officer, after entering a house pursuant to a search warrant, performed a frisk of Galbert, describing the frisk as a “ ‘quick around the mid-section check.’ ” After this frisk, the officer discovered marijuana on a table less than two feet from where Galbert was located. This caused the officer to perform a second frisk. Feeling “ ‘a lump’ ” in Galbert’s front right pants pocket, which the officer thought “ ‘could have been a weapon of some type,’ ” the officer reached into Galbert’s pants pocket and retrieved the object. It was later determined to be rock cocaine. The record showed that Galbert, who was handcuffed throughout, had been cooperative with the police officer prior to the seizure of the cocaine and had made no moves that could be interpreted as an attempt to retrieve a weapon. Noting an absence of any evidence that Galbert could reach his pants pocket while handcuffed, the Court of Appeals concluded that the second frisk was not supported by a reasonable suspicion that Galbert was armed and dangerous. Therefore, it determined that the seizure of the cocaine was unlawful. In doing so, the court said:

Although probable cause is generally required to perform a search and seizure, under narrowly drawn and carefully circumscribed circumstances lesser cause suffices. See Terry v. Ohio, 392 U.S. 1 (1968); State v. Broadnax, 98 Wn.2d 289 (1982). An officer may frisk a person for weapons if the officer has reasonable grounds to believe the person is armed and dangerous. See Terry; Broadnax. The officer “must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” “A ‘generalized suspicion’ is insufficient to justify a frisk”, even when a person is present at a location the police are

authorized to search by a valid warrant. Ybarra v. Illinois, 444 U.S. 85, 92-94, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); Broadnax, 98 Wn.2d at 295.

In a recent case, State v. Setterstrom, 163 Wn.2d 621 (2008) **July 08 LED:06**, this court reached a result similar to that reached by the Court of Appeals in Galbert. In Setterstrom, the record disclosed that the Tumwater Police Department received a report that two men were at the Department of Social and Health Services office in Tumwater and appeared to be under the influence of drugs. Two police officers responded to the scene and made contact with the men, one of whom was Michael Setterstrom. After questioning Setterstrom, the officers determined that he was lying to them about his true identity. They also noticed that he appeared to be “nervous [and] fidgety.” Setterstrom did not, however, make any threatening gestures and, indeed, he did not even stand when the officers approached him. Nevertheless, one of the police officers performed a pat-down of Setterstrom for weapons. Feeling hard objects in Setterstrom's front pants pocket, the officer reached into the pocket and removed everything inside, including a small plastic baggie filled with white powder. The officer testified that he took this action even though the objects did not feel like a gun.

This showing, we concluded, was not sufficient to justify a frisk for weapons, observing that “[a]t most, the record show[ed] that Setterstrom was under the influence [and that] this is not a crime.” We went on to say that an officer may “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.” (citing State v. Collins, 121 Wn.2d 168 (1993) **July 93 LED:07**). Significantly, we stated that police officers must have a basis for a frisk beyond the mere observation that a person of interest was nervous, fidgety, and had lied about his name.

Our decision here is guided primarily by our decision in Setterstrom. As noted above, Bee was handcuffed and patted down almost immediately after the officers contacted him. After this initial frisk, Bee, like Setterstrom, made no movements that could be interpreted as an attempt to retrieve a weapon. Furthermore, he gave no indication that he could reach his pants pocket while he was handcuffed, nor did he attempt to do so. Finally, it is noteworthy that Bee, like Galbert and Setterstrom, was not uncooperative with the police officers.

In determining that the trial court erred in suppressing the evidence seized from Xiong's pocket and from the minivan, incident to Xiong's arrest, the majority at the Court of Appeals placed reliance on what they said was the testimony of the police officers that “they feared for their safety.” There is nothing in the record to support such a conclusion. As noted above, Officer [A] never expressed concern that Bee might access a weapon. He simply said that it was “possible” for someone in handcuffs to retrieve something from his pocket. Sergeant McCabe's testimony was similar, the officer indicating that he “wasn't immediately concerned” that Bee was a threat, only that he did not want Bee to access an alleged weapon once his handcuffs were removed.

Where the propriety of the initial detention of Bee is established, law enforcement officers may perform, as they did here, a protective frisk in the nature of a pat-down in order to ascertain if the suspect is carrying a weapon or weapons. The scope of the frisk, however, must be limited to protective purposes. If an officer cannot point to specific articulable facts that create an “objectively” reasonable belief that a suspect is armed and “presently” dangerous, then no further intrusion is justified. Here, as the dissenting judge at the Court of Appeals correctly observed, there were no specific facts to support a reasonable belief that Bee was armed and presently dangerous. Indeed, as the dissenter pointed out, Bee was cooperative with the police, he made no effort to flee, and he did not make any moves that suggested he could reach into his pants pocket. Furthermore, he was handcuffed at all times and he identified himself from the start. Although the officers who confronted Bee may legitimately have had some generalized concerns about safety, none were specific to Bee and, thus, the officers had no basis for searching his pants pocket. It follows that the subsequent arrest of Xiong was unlawful as was the search of the minivan that followed the arrest. As we stated in Setterstrom, “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.” Setterstrom.

**LED EDITORIAL COMMENTS:**

**1) OFFICERS MUST BE TRUTHFUL BUT THEY MUST ALSO – AT LEAST IN WASHINGTON – “SELL” OFFICER SAFETY CONSIDERATIONS.**

The Supreme Court appears to have injected a subjective component into the frisk-justification review standard. The Court did not say so explicitly, and we would expect prosecutors to continue to argue that the standard is a purely objective one that asks if, in light of the officers’ training and experience and the facts before them, reasonable officers would have frisked. But we also hope that officers will do their best in their reports and, with prosecutor guidance in their suppression-hearing testimony, to make a record both 1) that they personally believed the person frisked possibly was presently armed and dangerous, and 2) that they felt that their beliefs were reasonable. Experience and training are part of such justification. See our previous comments in the July 2008 LED in the Setterstrom entry at pages 8-9 regarding justifying a frisk.

**2) WASHINGTON OFFICERS SHOULD NOT HESITATE TO FRISK IF THEY HAVE OFFICER SAFETY CONCERNS.**

Officer safety is paramount. We feel that in this case and a previous Washington Supreme Court decision - - State v. Glosbrener, 146 Wn.2d 670 (2002) Sept 02 LED:07 - - a large factor in the Supreme Court’s decision in each case to rule the frisk unjustified was the officer delay before performing the frisk. Washington officers should take their cue. He or she who hesitates in frisking is at greater risk of harm, as well as of being second-guessed by the Washington appellate courts.

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**WASHINGTON STATE COURT OF APPEALS**

**CITIZEN'S REPORT OF MAN 1) ACTING BIZARRELY AND ERRATICALLY, 2) POSSIBLY "ON DRUGS," AND 3) POSSIBLY DANGEROUS TO OTHERS OR HIMSELF JUSTIFIED OFFICER'S TERRY STOP OF THE MAN; ALSO, EVEN IF TERRY STOP WAS NOT JUSTIFIED, THAT WOULD NOT PROVIDE A DEFENSE FOR THE DETAINEE'S FIRST DEGREE ASSAULT ON OFFICER WITH A SCREWDRIVER**

State v. Kolesnik, \_\_ Wn. App. \_\_, 2008 WL 422423 (Div. I, 2008)

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

On December 13, 2005, Kolesnik approached Robert Stover, who was standing by his pick-up truck outside a shopping center in Vancouver, Washington. Kolesnik's bizarre and erratic behavior alarmed Stover. Concerned that Kolesnik was under the influence of drugs and might harm someone, Stover called 911.

[A police officer] responded to the 911 call. [The officer] was in uniform and driving a marked patrol vehicle when he contacted Kolesnik outside the shopping center. Although Kolesnik matched the caller's description of a "suspicious person" loitering in front of the shopping center and demonstrating bizarre behavior, [the officer] did not notice that Kolesnik was acting in an erratic manner at that time. [The officer] parked his patrol vehicle, approached Kolesnik, and asked to speak with him.

[The officer] asked Kolesnik for his identification. Kolesnik replied that he did not have his identification with him. Because the caller had indicated that Kolesnik had been displaying erratic behavior, [the officer] decided to frisk Kolesnik for weapons before talking with him further and instructed him to turn around. Kolesnik turned and ran from the scene.

After a few steps, Kolesnik slipped and fell to the ground. Kolesnik resisted [the officer's] attempts to restrain him and a struggle ensued. As [the officer] tried to handcuff Kolesnik, he noticed that Kolesnik was holding a long, slender metal object. Kolesnik hit [the officer] in the head with the metal object several times. Additional officers responded to assist [the officer].

Responding officers asked Kolesnik his name, whether and what kind of drugs he had used that morning, and whether he needed medical attention. In response to these questions, Kolesnik provided the name "Vasiliy Davidenko" and stated that he did not need medical attention. Kolesnik also made several statements containing numerous expletives, referenced prior drug use, and made hostile assertions to police officers. The police transported Kolesnik to the police station where they advised him of his Miranda rights.

[The assaulted officer] received medical treatment for several stab wounds and abrasions to his head. One stab wound was within a centimeter of [the officer's] temporal artery, and another penetrated an inch into his ear canal. According to the treating physician, [the officer's] wounds were consistent with injuries inflicted by a screwdriver. Officers found a screwdriver at the scene.

The State charged Kolesnik with one count of attempted second degree murder and, in the alternative, one count of first degree assault. Both charges included a deadly weapon enhancement. The State later amended the information to

include the law enforcement officer enhancement language of former RCW 9.94A.535(3)(v) (2005). Kolesnik asserted defenses of diminished capacity and self-defense.

...

The jury found Kolesnik guilty of first degree assault, and found that Kolesnik (1) had used a deadly weapon in the commission of the crime and (2) knew that his victim was a law enforcement officer engaged in his official duties at the time he assaulted him.

ISSUES AND RULINGS:

1) Based on the identified citizen's report that Kolesnik was 1) acting bizarrely and erratically, 2) possibly "on drugs," and 3) possibly dangerous to others or himself, did the officer have reasonable suspicion that Mr. Kolesnik was a danger or was about to commit a crime, and was the Terry stop therefore justified? (ANSWER: Yes);

2) Assuming for the sake of argument that the Terry stop was not supported by reasonable suspicion, could the (assumed) unlawfulness of the officer's actions in seizing the suspect without reasonable suspicion justify the defendant's response of stabbing the officer multiple times with a screwdriver? (ANSWER: No, anything more than passive resistance to a merely unlawful police seizure or arrest is not lawful.)

Result: Affirmance of Clark County Superior Court conviction of Michael Vasily Kolesnik for first degree assault and exceptional sentence of 240 months.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Lawful seizure

Kolesnik alleges that [the officer] had unlawfully detained him prior to the assault. Specifically, he argues that [the officer] did not have a reason to believe that he was engaged in any criminal conduct and could not approach him or frisk him for weapons. First, we note that Kolesnik did not challenge his initial detention below. Moreover, [the officer] limited detention of Kolesnik was founded on [the officer's] articulable suspicion of criminal activity based on the report of a concerned citizen that Kolesnik was behaving erratically and that the citizen had feared injury. [The officer's] purpose in contacting Kolesnik was to identify him and render aid if appropriate.

An investigative Terry stop is a recognized exception to the rule that seizures are appropriate only with a warrant or probable cause. Such seizures are reasonable if, based on the totality of the circumstances known to the police officer at the inception of the stop, there are " 'specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.' "

Here, based on the 911 call from an identified citizen who stated he was concerned for Kolesnik's welfare, as well as his own, it was reasonable for [the officer] to suspect that Kolesnik was engaged or about to be engaged in self-destructive or aggressive criminal activity. Kolesnik matched the description that [the officer] received of a "suspicious person" loitering in front of the shopping

center, displaying bizarre and erratic behavior. [The officer's] suspicion that Kolesnik was on drugs and had been engaged or was about to be engaged in criminal activity was articulable and reasonably based on the report from a concerned citizen. [The officer] had the authority to detain Kolesnik to identify him and conduct a limited investigative and welfare stop. When Kolesnik fled and assaulted [the officer] while he was performing this lawful duty, [the officer's] articulable suspicion ripened into probable cause for arrest.

2) No right to forcefully resist merely unlawful seizure

Moreover, we note that "unlawful detention" is not a defense to an assault charge as [Kolesnik] suggests. An individual only has the right to use reasonable and proportional force to avoid an unlawful arrest when acting in an attempt to avoid injury. State v. Valentine, 132 Wn.2d 1 (1997) **Aug 97 LED:16**. An individual may not use force against an officer making an unlawful arrest if he or she faces only a loss of freedom. Valentine. The right to be free from unreasonable seizures does not create a corresponding right to react unreasonably in response to an illegal detention.

Here, even if [the officer] had unlawfully detained Kolesnik, and we do not hold that he did, Kolesnik did not have the right to stab [the officer] six times in the head and ear with a screwdriver. [The officer] sought only to control Kolesnik and frisk him for weapons until he could verify his identification and need for assistance, if any. Kolesnik faced only a momentary loss of freedom and was not entitled to use deadly force to resist his detention at the scene.

[Some citations omitted, headings added]

**LED EDITORIAL COMMENT:** We agree with the result in this case. But we ask our readers to compare the facts of this case with those in the Xiong case digested above at pages 2-6. Take out the irrelevant fact that after the officer decided to frisk Kolesnik and told him to turn around so he could frisk him, Kolesnik attacked the officer with a screwdriver. Assume also that the officer in Kolesnik delayed a bit before deciding to order Kolesnik to assume the position so that the officer could frisk him. In those circumstances, would the Washington Supreme Court hold the seizure and intended frisk lawfully justified based on the facts as they existed just before Kolesnik attacked the officer? We would hope so, but the Xiong decision and the Setterstrom decision discussed in Xiong raise concern about how the Washington Supreme Court justices assess officer safety considerations. Regardless, of course, officers should think safety first, as we indicated above at page 6 in our comments on the Supreme Court's analysis in Xiong.

**SEARCH OF DWLS DETAINEE'S PANTS POCKET HELD TO HAVE BEEN INCIDENT TO ARREST, EVEN THOUGH OFFICER DID NOT FIRST SAY "YOU ARE UNDER ARREST"**

State v. Gering, \_\_\_ Wn. App. \_\_\_, 2008 WL 4355275 (Div. III, 2008)

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

On August 6, 2006 Mr. Gering was driving on Mullan Road between Appleway Boulevard and Sprague Avenue in Spokane Valley, Washington. [A deputy

sheriff] ran a check on Mr. Gering's license plate. The Department of Licensing records showed that Mr. Gering was the registered owner and that his license was suspended in the third degree. [The deputy] also accessed an electronic image of a booking photograph of Mr. Gering from October 2005 in order to verify the identity of the driver.

Mr. Gering parked his car in front of a business and walked inside. [The deputy] followed Mr. Gering inside, tapped him on the shoulder, and asked him to step outside. Once outside, [the deputy] arrested Mr. Gering for driving while license suspended (DWLS) in the third degree. Mr. Gering was handcuffed and searched incident to his arrest.

A clear sandwich bag containing a crystalline substance was found in his front pocket. A field test indicated the presence of methamphetamine. [The deputy] informed Mr. Gering of his constitutional rights, which Mr. Gering indicated he understood and waived. Mr. Gering admitted he obtained the methamphetamine earlier that day.

The State charged Mr. Gering with possession of a controlled substance (methamphetamine). Mr. Gering filed a motion to suppress. He argued that because the Spokane County Jail was on emergency status on the day of his arrest and the deputy knew that Mr. Gering would not have been accepted for booking for a DWLS charge, the deputy did not intend to undertake a custodial arrest. The trial court disagreed. After finding substantially the same facts as set forth above, the trial court concluded that the deputy manifested an objective intent to arrest Mr. Gering when the deputy followed Mr. Gering into the store, touched him on the shoulder, asked him to leave the store, arrested him, and placed him in custody by handcuffing him.

Mr. Gering agreed to a stipulated facts trial. The judge found Mr. Gering guilty of possession of a controlled substance.

**ISSUE AND RULING:** Where the officer directed Gering to step outside the store, and then the officer handcuffed Gering and searched his person, but the officer did not tell Gering that he was “under arrest,” was Gering under arrest for purposes of the search incident to arrest rule? (**ANSWER:** Yes)

**Result:** Affirmance of Spokane County Superior Court conviction of Robert A. Gering for possession of a controlled substance.

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

[The deputy] had probable cause to believe that Mr. Gering had violated RCW 46.20.342(1), by driving with a suspended license. The deputy therefore had the authority to make a full custodial arrest. RCW 10.31.100(3)(e). But the deputy could have also elected to arrest Mr. Gering by a temporary detention while the deputy issued a citation. RCW 46.64.015. The search incident to arrest was lawful only if the arrest was custodial. State v. Craig, 115 Wn. App. 191 (2002)  
**March 03 LED:12.**

A lawful, actual custodial arrest is a “ ‘constitutionally required prerequisite to any search incident to arrest.’” State v. O’Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**.

...  
“[T]he determination of custody hinges upon the ‘manifestation’ of the arresting officer’s intent.” State v. Radka, 120 Wn. App. 43 (2004) **March 04 LED:11** (citing State v. Clausen, 113 Wn. App. 657 (2002) **Dec 02 LED:17** and Craig, 115 Wn. App. at 196). A suspect is in custody if a reasonable person in the suspect’s circumstances would believe his movements were restricted to a degree associated with “formal arrest.” State v. Lorenz, 152 Wn.2d 22 (2004) Sept 04 **LED:10**). “[T]he test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest.” Radka, 120 Wn. App. at 49. When a suspect is handcuffed, placed in a patrol car, and told he or she is under arrest suggests custodial arrest, unless the suspect is told he or she will be free to go after the citation is issued.

Here, [the deputy] asked Mr. Gering out of the store, arrested him, and handcuffed him. While the record does not state that Mr. Gering was told he was under arrest, there is no indication that the deputy told Mr. Gering he was free to leave before searching him incident to arrest.

Mr. Gering argues that handcuffing can also be indicative of mere investigative detention. State v. Williams, 102 Wn.2d 733 (1984); State v. Cunningham, 116 Wn. App. 219 (2003) **June 03 LED:05**. But, as the State correctly points out, nothing remained to investigate. All of the elements of the crime were known and Mr. Gering’s identity was confirmed.

[Some citations omitted]

**LED EDITORIAL COMMENT:**

**1) We agree with the result but we have some quibbles with the analysis**

The Court notes that, at the trial court, the defendant argued that his arrest for DWLS 3 was unlawful on grounds that the local jail would not have accepted him for booking on a DWLS charge. But nowhere in its analysis does Division Three address this argument by the defendant. We think that the Court should have either addressed this argument or explained why it need not be addressed. Law enforcement agencies should consult their legal advisors or prosecutors for their views on whether this allegation by the defendant about local jail policy, if true, raises concerns about the lawfulness of the officer’s decision to make a custodial arrest and to search incident to that arrest.

Also of concern is that the Court of Appeals cites State v. Lorenz, 152 Wn. App. (2004) Sept 04 **LED:10** and State v. Cunningham, 116 Wn. App. 219 (2003) June 03 **LED:05** when discussing the question of whether Gering was under custodial arrest for purposes of the search incident to arrest rule. Lorenz and Cunningham are cases about Miranda custody. They are not directly on-point. The totality-of-the-circumstances standard for determining if there is Miranda custody is different and more encompassing than the standard for determining if incident-to-arrest search authority exists. For some discussion of the Miranda custody standard, see the September 2007 **LED** at pages 16-18

(comments on Daniels case) and the October 2008 LED at pages 7-8 (comments on Craighead case).

2) **Officers should say “you are under arrest” if custodial arrest is their intent**

It is better practice for officers to explicitly state “You are under arrest” before conducting a search incident to arrest. See State v. Radka, 120 Wn. App. 43 (2004) March 04 LED:11; State v. O’Neill, 148 Wn.2d 564 (2003) April 03 LED:03.

**AFTER OFFICER PULLED IN BEHIND DWLS SUSPECT’S PARKED CAR AND TURNED ON HER EMERGENCY LIGHTS, THE SUSPECT COULD NOT LAWFULLY THWART A SEARCH INCIDENT TO ARREST BY GETTING OUT OF THE CAR AND, AFTER OFFICER ORDERED HIM TO GET BACK IN CAR, LOCKING THE DOORS**

State v. Adams, \_\_\_ Wn. App. \_\_\_, 191 P.3d 93 (Div. I, 2008)

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

Shortly after midnight, King County Sheriff’s Deputy Heather Volpe observed a man sitting in his parked car outside a casino on Aurora Avenue. Volpe checked the license plates and learned that an arrest warrant had been issued in Pierce County for the registered owner for driving with a revoked license. The driver matched the registered owner’s description. Volpe turned around to initiate contact.

The driver quickly drove out of the parking lot onto Aurora. Volpe followed. Immediately and without signaling, the driver turned into a Taco Bell and parked. Volpe activated her emergency lights and pulled in about eight feet behind.

As Volpe got out of the patrol car, Adams stepped out of his vehicle, stood in the open swing of the driver’s door and yelled at Volpe, challenging the stop as racial profiling. Volpe repeatedly instructed Adams to get back in his car, but he ignored the command and continued yelling. Volpe stayed in the doorway of her patrol car and called for another unit to assist.

Adams slammed the car door, locked it, and stepped four to five feet away into the adjacent parking spot, where he stood screaming at Volpe, raising his arms in an agitated manner and ignoring repeated commands to return to his vehicle.

After a second officer arrived, Adams complied with instructions to turn around. Volpe put him in handcuffs and asked him to identify himself. Adams refused. Volpe frisked Adams and removed his keys and wallet, confirming his identity as the registered owner of the vehicle. Volpe arrested Adams on the warrant and for failing to provide information [Court’s footnote: RCW 46.61.020], and secured him in the back of her patrol car.

The other deputy took Adams’ keys and unlocked his vehicle. Volpe searched the passenger compartment and found cocaine in a bag in the center console. Volpe arranged to impound the vehicle.

The State charged Adams with possession of cocaine. Adams moved to suppress the cocaine as fruit of an illegal search. The trial court denied the motion, concluding that under Thornton v. United States [Court’s footnote: 541 U.S. 615 (2004) July 04 LED:02] Adams was a “recent occupant of his vehicle.”

The court also concluded that “[a] driver cannot defeat a valid search incident to arrest by getting out of the car and locking the car door when he is seen in the car and driving it, when the arrest is made very close in time and space to the driving of the vehicle.”

Adams agreed to a stipulated bench trial and was convicted as charged.

**ISSUE AND RULING:** The officer seized Adams while he was still in his car by turning on her emergency lights. After he got out of the car, she ordered him back in. He instead locked the car door, and he then stood near his car haranguing the officer. Was the car subject to search incident to arrest when he was arrested a short time later, still near his car? (**ANSWER:** Yes)

**Result:** Affirmance of King County Superior Court suppression ruling and conviction of Coryell Levoi Adams for possession of cocaine.

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

A warrantless search is unreasonable per se and can be justified only if it falls within one of the “jealously and carefully drawn” exceptions to the warrant requirement. One of these exceptions is the search of an automobile pursuant to a lawful custodial arrest. Under federal law, this exception justifies search of the entire passenger compartment, including any containers within it, even when the suspect has exited the vehicle before his or her arrest. In State v. Stroud, our Supreme Court held that article 1, section 7 of the Washington Constitution does not permit the search of locked containers within the passenger compartment. [*Court’s footnote:* 106 Wn.2d 144 (1986)]

The rationale for vehicle searches incident to arrest “rests in part on traditional justifications that a suspect might easily grab a weapon or destroy evidence.” Also important is the “the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee’s reach at any particular moment.” Thus, Washington law permits automobile searches incident to arrest “immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car,” even though, presumably, the exigencies justifying the search no longer exist. [*Court’s footnote:* Stroud, 106 Wn.2d at 152, 720 P.2d 436. We note that the Arizona Supreme Court recently held that when an arrestee is secured and is no longer a threat to officer safety or the preservation of evidence, the officer may not search the arrestee’s vehicle incident to arrest. State v. Gant, 216 Ariz. 1, 162 P.3d 640 (Ariz.2007). The Arizona court noted that the decision in Thornton left that question unresolved, and agreed with Justice Scalia’s concurrence where he stated that applying the Belton doctrine to justify a search of the car of a person handcuffed and confined in a police car “stretches [the doctrine] beyond its breaking point.” *Id.* at 4 n. 2, 162 P.3d 640 (quoting Thornton, 541 U.S. at 625, 124 S.Ct. 2127) (Scalia, J., concurring) (alteration in original). The United States Supreme Court granted certiorari in February. Arizona v. Gant, --- U.S. ---, 128 S.Ct. 1443, 170 L.Ed.2d 274 (U.S.2008).]

While the ability to search “does not depend on an arrestee being in the vehicle when police arrive,” there must be “a close physical and temporal proximity between the arrest and the search.”

How close the arrestee must be to the vehicle has been the subject of several cases. Division Two of this court addressed the question in State v. Porter [Court's footnote: 102 Wn. App. 327 (2000) **Nov 00 LED:05**] and State v. Rathbun [Court's footnote: 124 Wn. App. 273 (2004) **Jan 05 LED:08**]. In Porter, the passenger was arrested 300 feet away. The court held the search invalid because when the passenger compartment is not "within an arrestee's area of 'immediate control,' Stroud does not apply."

In Rathbun, the defendant saw police approaching and ran 40 to 60 feet away from the truck he was working on, hopping over a fence along the way. The State contended the search was proper because the defendant had access to the truck immediately before his arrest and should not be able to avoid a search by running away. Division Two disagreed: "If 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 exist and there is no justification for the police to search the vehicle without first obtaining a warrant."

Division Three of this court considered this question in State v. Quinlivan [Court's footnote: 142 Wn. App. 960 (2008) **March 08 LED:02**] where a driver was stopped because he was not wearing a seat belt and was driving with a suspended license. After learning that his truck would be towed, Quinlivan got out of the truck, put the keys in his pocket, and sat down on the curb, where he was arrested. The deputy testified Quinlivan was 6 to 12 feet away from the truck; Quinlivan testified it was more like 50 feet. The court held that because Quinlivan no longer had access to the passenger compartment when he was arrested, the search was improper: "[T]he act of leaving the truck and locking it precludes the search incident to arrest authorized by the court in Stroud. Though the court mentioned that Quinlivan had locked the truck, it is unclear whether and how that fact figured into the analysis.

In two other cases where the defendant locked his car before he was arrested, whether the police needed a warrant turned on whether the defendant had locked the door before or after he was seized.

In State v. Perea, [Court's footnote: 85 Wn. App. 339 (1997) **June 97 LED:02**] a police officer observed the defendant driving a vehicle, and knew that Perea's license had been suspended. As Perea parked in the front yard of his house, the officer pulled in behind and activated his emergency lights. Perea looked at the officer and immediately stepped out of the car, closed and locked the door, and began walking toward his house. The officer ordered Perea back to his vehicle, but Perea ignored the orders and continued walking. When a second officer arrived, Perea was arrested and handcuffed. Officers took his car keys, unlocked and searched the car, and found a loaded pistol. Division Two found that Perea had not been seized when he locked the car doors because he had refused to submit to the officer's authority. The court held that "because Perea lawfully exited and locked his car, the officers had no justification for entry into Perea's car to conduct a search incident to arrest." The court distinguished its holding from cases "where the defendant locked his car after seizure (either directly or by a remote device)."

In *State v. O'Neill*, [*Court's footnote*: 110 Wn. App. 604 (2002) **June 02 LED:21**] police made a traffic stop when O'Neill failed to signal. The officer handcuffed and arrested O'Neill for driving with a suspended license and placed him in the back of a patrol car. The officer returned to the vehicle, finding it locked with the keys in the ignition. He could see drug paraphernalia in plain view from the window, and called for an impound tow. When the tow operator opened the door, the officer searched the truck and found cocaine. O'Neill was then arrested for possessing a controlled substance.

Division Three upheld this search, and distinguished *Perea* on its facts, finding that unlike *Perea*, O'Neill was inside his vehicle when he was seized (when he submitted to the officer's authority by pulling over, providing information, and stepping from the vehicle at the officer's request). "Although Mr. O'Neill apparently locked his vehicle before or when he exited his truck, this does not prevent a valid search of the vehicle incident to arrest."

Adams contends his case is like *Perea* and demands the same result.

We question the usefulness of *Perea* for two reasons. First, the analysis focuses on the arrestee's proximity to the vehicle at the time of seizure, rather than at the time of arrest. But officer safety and evidence preservation concerns *incident to arrest* provide the rationale for the search. It is the circumstances at the time of arrest, not seizure, that are relevant. Further, the *Perea* court's analysis as to when *Perea* was seized derives from *California v. Hodari D.* [*Court's footnote*: 499 U.S. 621 (1991)] which our Supreme Court later explicitly rejected. [*Court's footnote*: *State v. Young*, 135 Wn.2d 498 (1998) **Aug 98 LED:02** (rejecting the *Hodari D* mixed objective/subjective test for determining whether a seizure has occurred under article 1, section 7 of the Washington Constitution).] We decline to rely upon *Perea*.

Adams acknowledges *Perea's* infirmity, but nonetheless relies upon it to argue that warrantless searches of locked cars are inconsistent with *Stroud's* limitation on searching locked containers within a vehicle incident to arrest.

The rationale for the *Stroud* court's exclusion of locked containers was twofold. First, an individual shows an increased expectation of privacy by locking a container. Second, the danger that the individual could access a weapon or destroy evidence inside a locked container within a vehicle is minimized: "The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container."

Adams contends locking the car doors minimizes the danger that the arrestee will gain access to a weapon or destructible evidence inside the car. We disagree. Whether using a mechanical key or a remote device, it takes only a second to unlock a car door (and, in many cases, one motion opens all doors at the same time). An arrestee could very swiftly gain access to any exposed weapon or evidence inside. This is not so when a locked container puts these items further out of reach. Further, the presence of a locked container inside a vehicle shows an increased expectation of privacy independent of the presence of police, whereas the act of locking a car when confronted by police has many connotations, of which privacy is only one.

We hold, therefore, that a vehicle locked in the presence of investigating officers is not equivalent to a locked container inside the vehicle.

Thus the only question here is whether Adams had “immediate control” or ready access to the passenger compartment of the car after he stepped away. We agree with the trial court that Adams was in close temporal and spatial proximity to his car when he was arrested. He was never more than four or five feet from his car, and was at all times closer to it than was the deputy. He could have reached it quickly in a couple steps. And though he locked the doors, he retained the keys.

Additionally, unlike the defendants in Porter, Rathbun, and Quinlivan, Adams did not move away from the car. He stood nearby, haranguing the deputy. He was agitated and belligerent, and refused to comply with repeated commands to return to his vehicle or turn around to be handcuffed and frisked. The officer feared for her safety and called for backup. This invokes the officer safety rationale, further distinguishing this case from any upon which Adams relies.

Adams was a recent occupant in immediate control of his car at the time of the arrest. The search was justified.

[Some citations and footnotes omitted]

## **ROBBERY EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS – WRITTEN DEMANDS FOR MONEY TO BANK TELLERS IMPLIED A THREAT IN EACH CASE**

State v. Shcherenkov, \_\_\_ Wn. App. \_\_\_, 191 P.3d 99 (Div. II, 2008)

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

This case involves four bank robberies.

In the first incident, Shcherenkov entered a Tacoma branch of Wells Fargo Bank and approached bank teller Linda Masten. He said nothing but held up a note with both hands for her to read. The note read, “Please be calm. This is a robbery.” Masten took a handful of bills out of her till and handed them to Shcherenkov. She testified that she had been trained to comply with demands like this, but she would have done so on her own “[f]or the safety of [her]self and others.” She interpreted the word “robbery” to convey an intent to harm, and she knew from her training that robberies can sometimes escalate and “[y]ou don't know the type of person that you are dealing with.” Shcherenkov himself was calm and did not “do anything physical” except to show her the note. He also reached into his pocket at one point for what might have been a cell phone or radio, and Masten worried that he was signaling someone else and that the robbery was going to escalate.

In the second incident, Shcherenkov entered a Lakewood branch of Columbia Bank and approached teller Crystal Jackson. He took a piece of paper out of his left pocket, unfolded it with one hand, and put it on the counter; he kept his right hand in his pocket. The note read, “Stay calm. This is a robbery. Put \$3,000 in envelopes.” Jackson testified that by keeping his hand in his pocket,

Shcherenkov implied that he had a gun. She felt threatened because of the content of the note and because “he did not look like he wanted to be messed around with, like it was not a joke.” Jackson gave him the money, and he left.

In the third incident, Shcherenkov entered a Tacoma branch of Key Bank “[o]verly covered up,” with a hood over his head and his hands in his pockets. When the bank teller, Deborah Chase, called him to her window, he presented a note with both hands. The note read, “This is a robbery. Put \$3,000 in an envelope.” Chase complied with the note because she “d[id]n't want to create an incident with somebody else getting hurt.” The note and “the fact that [she] was being robbed . . . made [her] feel threatened.”

In the fourth incident, Shcherenkov entered a Puyallup branch of Rainier Pacific Bank and approached bank teller Tanya James. As he approached, he kept his hands in his pockets. He smiled and set a note on the counter that stated in heavy capital letters, “Place \$4,000 in an envelope. Do not make any sudden movements or actions. I will be watching you.” His other hand remained in his pocket. James interpreted the “I will be watching you” part of the note to mean that he possibly had a weapon he might use. James “just did what [they] were trained to do and [gave] him what he asked for so that there were no injuries to anybody.”

Police arrested Shcherenkov three days after the fourth incident, and Shcherenkov confessed to the crimes. The State charged him with four counts of first degree robbery against a financial institution under RCW 9A.56.200(1)(b).

At the end of trial, the trial court gave the jury the following instruction, after argument by the parties regarding the applicability of State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997):

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use, *or explicit or implied threatened use*, of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone.

The jury found Shcherenkov guilty of all four counts of first degree robbery.

**ISSUE:** Did the State present sufficient evidence that defendant - - through his written demands to tellers and his other behavior - - threatened immediate force of violence within the meaning of the robbery statutes? **ANSWER:** Yes) **LED EDITORIAL NOTE:** **The Court of Appeals also rejected defendant’s challenge to the wording of the jury instructions quoted above; this LED entry does not excerpt from or otherwise address the jury-instruction analysis.**

**Result:** Affirmance of Pierce County Superior Court first degree robbery convictions (four counts) of Vladimir Shcherenkov.

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

“Any ... threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.” . . . . And, as discussed

above, the threat need not be explicit if the defendant indirectly communicates his intent. See RCW 9A.04.110(27).

Shcherenkov . . . focuses on Collinsworth. In Collinsworth, the defendant went to several banks, approached tellers, and said, "Give me your hundreds, fifties and twenties," or "I need your hundreds, fifties and twenties." He used a "serious" or "direct and demanding" voice to demand the money, but he did not display a weapon or make any explicit threats or threatening gestures. The defendant argued that the State's evidence was insufficient to support a robbery conviction because he did not threaten anyone; rather, he merely " 'exploit[ed]' a weakness in the banks' operating procedure [that] required tellers to comply with any demands for money." The trial court rejected this argument with the "implicit threat" language quoted above.

Shcherenkov argues that under Collinsworth, "theft becomes a robbery not because of anything that the defendant does or says, but because both the courts and bank personnel seem to believe that any demand for money is fraught with extreme danger." According to Shcherenkov, Collinsworth "removes the State's burden to establish that the defendant actually used or threatened to use force[,] . . . turns any demand for money within a bank into robbery simply because of the nature of the bank environment, and has essentially imposed strict liability for any face-to-face theft from a bank."

But as we have discussed above, we need not adopt or endorse the Collinsworth language that so disturbs Shcherenkov. We have held that the trial court's implied threat instruction was a proper statement of the law. And the State acknowledges it must still persuade the jury in every case that the defendant communicated, directly or indirectly, the intent to use immediate force beyond a reasonable doubt. RCW 9A.56.190; RCW 9A.04.110(27).

The communication requirement distinguishes this case from United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989), which Shcherenkov cites to support his concern that Collinsworth "blurs the line between theft and robbery." In Wagstaff, the defendant did not communicate anything; rather, he entered a bank, walked into the tellers' area, and started removing money from a cash drawer. The issue in that case was whether a teller's subjective fear upon witnessing the defendant's action was sufficient, standing alone, to establish a taking "by intimidation." By contrast, Shcherenkov directly demanded of each teller that she give him money, and the issue is whether those demands used a threat of immediate force as an inducement to comply.

The jury found that Shcherenkov's conduct, like Collinsworth's, did imply a threat of immediate force, and the evidence supporting that finding is even stronger than in Collinsworth. In three of the four robberies, Shcherenkov showed each bank teller a note explicitly stating that he was robbing them. The tellers reasonably interpreted this language to be threatening because robbery inherently involves a threat of immediate force. . . . In the fourth robbery, Shcherenkov's note said in heavy capital letters, "Place \$4,000 in an envelope. Do not make any sudden movements or actions. I will be watching you." A rational trier of fact could reasonably interpret Shcherenkov's statement, "I will be watching you," to be an indirect communication that he would use force if the

teller did not comply with his demands. Furthermore, Shcherenkov kept his hand in his pocket for the entire exchange, and the jury could have reasonably found that he was deliberately insinuating that he had a weapon. Under these circumstances, the jury's conclusion that Shcherenkov threatened use of immediate force was supported by sufficient evidence.

[Some citations omitted]

**PREMEDITATION EVIDENCE WAS SUFFICIENT WHERE IT SHOWED THAT THE ATTEMPTED-MURDER DEFENDANT 1) BROUGHT A LOADED GUN ON A NIGHT OUT WITH HIS FRIENDS, 2) PROVOKED A CONFRONTATION WITH A STRANGER, AND 3) FIRED MULTIPLE SHOTS AT THE STRANGER, WITH PAUSES IN BETWEEN SHOTS**

State v. Ra, 142 Wn. App. 868 (2008)

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

One evening, Ryna Ra and three friends (Vuthy Chau, Samnang Bun, and Dy Son) were parked in a silver sport utility vehicle (SUV) on the Ruston Way waterfront. Ra was in the front passenger seat, and Bun was in the rear passenger seat. Two cars pulled into the same parking lot together containing two couples who were friends: James Huff and Vianna Cornatzer, and Nick Serdar and Ashley Suhovorsnik. One or two empty parking stalls separated the SUV from the nearest of the two cars, which was owned by Suhovorsnik. Neither Ra nor any of his companions had ever met any member of the other group.

When the two girls got out of their cars, some of the young men in the SUV began catcalling about the young women. The SUV occupants also directed some comments at Huff and Serdar, including: go ahead and "do something," "I'm going to get your girlfriend," "I'm going to kick your f---ing ass." When the comments continued, Huff angrily approached the SUV. Ra fired three or four shots as Huff approached. Huff got close enough to kick at the SUV when the third or fourth shot hit him in the chest. The SUV left but was overtaken by police almost immediately. Later, the police found the weapon used in the shooting in some low bushes in an empty lot along Ruston Way.

Witnesses testified that as Huff approached the SUV he said, "Let's get out and fight," or "What the f--- is your problem?" Others testified that Huff shoved his companions aside as he ran toward the SUV. Ra also testified that Huff responded to the catcalling by shining a flashlight toward them, which Ra found "really disrespectful."

Ra and several of his friends testified that Ra told Huff to stop shining the flashlight at them, and then, when Huff was about 20 feet away, Ra fired a warning shot into the air. Ra was trying "to . . . scare him off. He wasn't scared. . . . I don't know how to defend myself after that." Ra then shot a window out from the SUV to let Huff know he had a real gun. When Huff kept coming, "jump-kick[ed] the car," and tried to open the door, Ra fired the last shot.

Son testified that Huff's approach to the SUV "was unexpected." Chau testified that he was afraid of Huff because he was "trying to attack" him and Ra. Bun testified that Huff was trying to reach in and grab Ra through the window.

Serdar testified that he was standing almost directly behind Huff when Ra first shot; he heard a “whooshing, or a whizzing kind of sound” go by them. Serdar described all the shots as “semi-rapid succession,” with the second shot fired when Huff was about 16 feet from the SUV and the later shots when Huff was much closer. Chau testified that Ra's second shot was aimed at Huff's body. Huff testified that when he was about two to three feet from the SUV, he saw the gun pointed at his head and a flash that went past the side of his head. He tried to kick the gun out of Ra's hand, but missed, kicking the door of the SUV instead. After the attempted kick, Ra pointed the gun at Huff and shot him in the chest.

The jury convicted Ra of attempted murder in the first degree while armed with a firearm, drive-by shooting, and second degree unlawful possession of a firearm.

**ISSUE AND RULING:** Was the evidence sufficient to support the jury's finding of premeditation where the evidence supported the State's claims that the attempted-murder defendant: 1) brought a loaded gun with him for his night out with his friends, 2) provoked a confrontation with a stranger, and 3) fired multiple shots at the victim, with pauses in between shots? (**ANSWER:** Yes)

**Result:** Reversal (on grounds not addressed in this **LED** entry) of Pierce County Superior Court convictions of Ryna Ra for attempted first degree murder and for drive-by shooting; case remanded for re-trial on those charges. (**Note:** Ra's appeal did not challenge his conviction of a third offense, unlawful possession of a firearm, second degree.)

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

Ra . . . argues that the State presented insufficient evidence that he premeditated the attempted killing because (1) he made no statements before the incident showing that he intended to kill Huff or anyone else, (2) he and his friends had no prior relationship with the victim and his friends and thus no motive to kill Huff, and (3) there was no evidence that he sought higher gang status or shot Huff for some other gang-related reason.

To prevail on a challenge to the sufficiency of the evidence, Ra must show that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In testing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State's favor. Here, the State charged Ra with attempted premeditated first degree murder, so it had to prove beyond a reasonable doubt that Ra acted with premeditated intent to cause Huff's death. RCW 9A.32.030(1)(a).

Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short. Premeditation must involve more than a moment in time. RCW 9A.32.020(1). The State can prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting them is substantial. Examples of circumstances supporting a finding of premeditation include motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene.

Here, when viewed in the light most favorable to the State, the evidence supports findings that Ra intentionally brought a loaded firearm to the scene, provoked a confrontation with Huff, then fired multiple shots at him. The first shot whizzed by Serdar, who was standing directly behind Huff. During the second shot, Huff saw the gun pointed at his head and a flash that went past the side of his head. Finally, Ra aimed and fired a third shot directly at Huff's chest from two to three feet away. This evidence supports an inference that Ra was aiming the gun at Huff from the beginning and intended to kill him. At least one witness testified that there was a "pause" between shots, which supports an inference that Ra had time to deliberate on and weigh his decision to kill Huff. And this, coupled with Ra's continued firing after missing twice, supports a finding of premeditation. *Compare with State v. Ross*, 56 Wn.2d 344 (1960) (even though defendant did not know victim and had spoken with him only a few minutes when shooting occurred, jury was entitled to find that a sufficiently appreciable period of time elapsed for him to form an intent and reflect upon it), *and State v. Massey*, 60 Wn. App. 131, 145, 803 P.2d 340 (1990) (planned presence of a deadly weapon adequate to allow issue of premeditation to go to jury). We conclude that the State presented sufficient evidence to support a finding that Ra premeditated killing Huff.

[Some citations omitted]

**SHOPLIFTER'S ACT OF PUSHING AWAY NEIGHBORING STORE'S EMPLOYEE WHO WAS ATTEMPTING TO DETAIN HIM WAS NOT ASSAULT THREE, BECAUSE EMPLOYEE DID NOT HAVE AUTHORITY TO DETAIN SHOPLIFTER PER RCW OR AS "CITIZEN'S ARREST"**

*State v. Garcia*, \_\_\_ Wn. App. \_\_\_, 2008 WL 4303740 (Div. III, 2008)

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

Ranch and Home's "Sensormatic" (theft security alarm) sounded when Gonzalo Garcia Jr. left the store. Ranch and Home's owner, Jeffrey Dress, followed Mr. Garcia to the parking lot where he asked Mr. Garcia to stop. Mr. Garcia said no and ran. He escaped into an adjacent store, Shopko, after an unsuccessful attempt to flee in a car.

Mr. Dress sent Ranch and Home employee, Jesus Sanchez, to Shopko to tell Shopko personnel about Mr. Garcia and to ask for help. Shopko did not have a written or verbal contract to provide security for Ranch and Home.

Mr. Sanchez told Antonio Moran, Shopko loss prevention investigator, that a person shoplifted merchandise from Ranch and Home and then ran into Shopko. Mr. Moran alerted his supervisor, Debbie Stovall. Ms. Stovall ordered Mr. Moran to follow Mr. Garcia around Shopko. She directed him to detain Mr. Garcia when he left the store. Mr. Moran approached Mr. Garcia as Mr. Garcia left the store. He identified himself as store security, showed Mr. Garcia his badge, and told him to stop. Mr. Garcia then pushed Mr. Moran and left the store.

Shopko and Ranch and Home employees then wrestled Mr. Garcia to the ground and detained him until police arrived.

The trial court convicted Mr. Garcia of third degree assault for pushing Mr. Moran.

ISSUES AND RULINGS:

1) Any assault committed with intent to resist lawful detention is assault in the third degree under RCW 9A.36.031(1)(a). A store employee with reasonable grounds to suspect that a customer may have shoplifted from that employee's store may use reasonable force to detain the suspected shoplifter. RCW 9A.16.080 and RCW 4.24.220. Did the neighboring store's employee lawfully detain Garcia after being asked by an employee of the victimized store to detain Garcia? (ANSWER: No, because the employee of the neighboring store was not an agent of the victimized store.)

2) Under common law (i.e., non-statutory case law authority), a private person can lawfully make a "citizen's arrest" of another private person for a misdemeanor if the misdemeanor 1) constitutes a breach of the peace, and 2) was committed in the presence of the person making the arrest. Was the seizure of Garcia by the neighboring store's employee a lawful citizen's arrest? (ANSWER: No, because a theft probably is not a breach of the peace, and, in any event, the theft did not occur in the presence of the neighboring store's employee.)

Result: Reversal of Benton County Superior Court third degree assault conviction of Gonzalo Garcia, Jr.; remand of case for entry of judgment and sentencing for fourth degree assault.

STATUTORY AUTHORITY OF STORE PERSONNEL TO DETAIN SHOPLIFTERS

RCW 9A.16.080 provides for merchants and their employees and agents a qualified defense against criminal liability when they seize suspected shoplifters:

In any criminal action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer, by the owner of the mercantile establishment, or by the owner's authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

RCW 4.24.220 provides merchants and their employees and agents a similar qualified defense against civil liability.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Statutory shopkeeper authority to detain

Mr. Garcia committed third degree assault if, and only if, he assaulted Mr. Moran with intent to resist lawful detention. RCW 9A.36.031(1)(a). The question then is whether Mr. Moran's attempt to detain Mr. Garcia was lawful.

Mr. Garcia admits that he pushed Mr. Moran to resist detention. He argues that Mr. Moran did not have legal authority to detain him because he was not Ranch and Home's agent-Ranch and Home did not control Mr. Moran's actions. The State maintains that Mr. Moran had legal authority to detain Mr. Garcia because Ranch and Home asked for help and he helped. He alerted his supervisor, followed Mr. Garcia around Shopko, and tried to stop Mr. Garcia before he left the building.

Both parties suggest that statutes authorize a shopkeeper's agent to lawfully detain a thief whom the agent reasonably believes was shoplifting. See RCW 9A.16.080 and RCW 4.24.220 (civil equivalent to RCW 9A.16.080).

But “an agency relationship results from the manifestation of consent by [the principal] that [the agent] shall act on his behalf and subject to his control, with a correlative manifestation of consent by the [agent] to act on his behalf and subject to his control.” Both the principal and the agent must consent to the relationship. The right to control the manner of performance is essential to prove agency. “ [T]he existence of the right of control, not its exercise, . . . is decisive.” “Mr. Moran was an agent of Ranch and Home only if Ranch and Home had the power to control (i.e., guide or manage) Mr. Moran's actions at the time of the assault.

The findings of fact here do not support the conclusion that Ranch and Home had an agency relationship with Shopko. In fact, they make no mention of Ranch and Home's right to control the manner of Mr. Moran's performance.

And our review of the testimony suggests there is no evidence to support the conclusion of an agency relationship. Shopko did not have a duty to provide security for Ranch and Home. Neither Mr. Moran nor Ms. Stovall, Mr. Moran's supervisor, asked Ranch and Home personnel how to go about detaining Mr. Garcia. Shopko's Ms. Stovall orchestrated Mr. Garcia's apprehension without directions from Ranch and Home. She told Mr. Moran to follow Mr. Garcia around the store and detain him as he left the store. Ranch and Home's employee, Mr. Sanchez, was with Ms. Stovall when she gave Mr. Moran his orders. Mr. Sanchez wanted Shopko to handle the situation. Ranch and Home did not control his actions. Mr. Moran was not Ranch and Home's agent when Mr. Garcia assaulted him.

2) Common law “citizen’s arrest” authority

Merchants may, however, detain a suspected shoplifter if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting. The right derives from the common law right of citizen's arrest.

But the cases that establish the shopkeeper's common law privilege are factually distinguishable from this case. In Miller and Johnston, an employee of the victimized store detained the suspected shoplifter. Here, Mr. Moran, a Shopko employee and not a Ranch and Home employee, did not observe the shoplifting. He nevertheless attempted to detain Mr. Garcia. We find no authority, then, that

would allow Mr. Moran to lawfully detain Mr. Garcia under the shopkeeper's privilege.

Nor does the common law privilege of citizen's arrest apply here. A private person may arrest another for a misdemeanor if it (1) constitutes a breach of the peace and (2) is committed in that person's presence. Again, Mr. Garcia did not commit the alleged misdemeanor (theft) in Mr. Moran's presence. And, in any event, no Washington case says that theft constitutes a "breach of the peace."

Mr. Garcia therefore was not resisting a lawful arrest when he assaulted Mr. Moran. And that is clearly a requirement of the statute under which he was prosecuted. RCW 9A.36.031(1)(a) ("A person is guilty of assault in the third degree if he . . . [w]ith intent to prevent or resist . . . the *lawful* apprehension or detention of himself assaults another" (emphasis added)). Mr. Moran did not have the shopkeeper's privilege or the citizen's right to arrest Mr. Garcia. The State did not, therefore, prove that Mr. Garcia committed third degree assault with intent to prevent or resist lawful apprehension on this evidence and these findings. We vacate the third degree assault conviction.

**LED EDITORIAL COMMENT: Merchants may be able to overcome the "not an agent" hurdle on the first issue by entering into mutual aid agreements with other merchants to make their respective employees agents of the parties to the agreements. Of course, this should not be done without consulting a private attorney.**

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### **BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS**

**VERSION OF RCW 9.41.040 IN EFFECT IN WHEN PETITION FOR RESTORATION OF RIGHTS WAS FILED, NOT VERSION IN EFFECT WHEN CRIME WAS COMMITTED OR WHEN SENTENCING OCCURRED, GOVERNS RESTORATION OF FIREARMS RIGHTS** – In State v. Rivard, \_\_ Wn. App. \_\_, 2008 WL 4472949 (Div. III, 2008), the Court of Appeals reverses its ruling that was reported in the **September 08 LED** at page 23. In a 2-1 decision issued following reconsideration, the Court rules that the more restrictive version of RCW 9.41.040 in effect when the petitioner filed for restoration of rights (or perhaps even later when the petition was acted on by the superior court) governs restoration of firearms rights, not the earlier, less restrictive, versions of the law in effect when he committed the crime or when he was sentenced.

**Result:** Reversal of Spokane County Superior Court order restoring the right of James Douglas Rivard to possess firearms.

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### **NEXT MONTH**

The December 2008 LED will include, among other entries, our annual LED Subject Matter Index, plus an entry regarding the October 2, 2008 Washington Supreme Court split decision in Brutsche v. City of Kent. Brutsche addressed a citizen's lawsuit against law enforcement agencies and officers for destruction of doors and door frames when officers executed a search warrant for a suspected methamphetamine lab on his property. The majority opinion in Brutsche recognizes that a citizen has a valid *trespass* claim against law enforcement if law

enforcement officers exceeded the scope of their lawful authority under a search warrant by unnecessarily destroying property. But the Brutsche majority opinion concludes that there was no trespass because the destruction of property was justified under the circumstances. The majority opinion also holds that, as a matter of law, the plaintiff could not pursue a claim that the damage was an unconstitutional taking of his private property for which the City must pay just compensation; on the latter point, the Court declined to overrule Eggleston v. Pierce County, 148 Wn.2d 760 (2003) **May 03 LED:11**.

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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. 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 2007, is at [<http://www.leg.wa.gov/legislature>]. Information about bills filed since 1991 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.gov>].

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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>]

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