



Law Enforcement

SEPTEMBER 2008

Digest

628th Basic Law Enforcement Academy – March 24, 2008 through July 29, 2008

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Best Overall: Neil Wells – Granite Falls Police Department
Best Academic: Raymond Readwin – Pierce County Sheriff's Office
Best Firearms: Kevin Freeman – Bellingham Police Department
Tac Officer: Ron Tennyson – Tacoma Police Department

629th Basic Law Enforcement Academy – April 7, 2008 through August 12, 2008

President: Zakery T. Serad – Bellingham Police Department
Best Overall: Marc Powell – Seattle Police Department
Best Academic: Marc Powell – Seattle Police Department
Best Firearms: Matthew Trizuto – Bellevue Police Department
Tac Officer: Tamara De Vries – King County Sheriff's Office

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BRIEF NOTE FROM THE U.S. SUPREME COURT

FORFEITURE-BY-WRONGDOING HEARSAY EXCEPTION HELD LIMITED BY THE U.S. CONSTITUTION'S SIXTH AMENDMENT RIGHT TO CONFRONTATION TO CIRCUMSTANCE WHERE DEFENDANT HAD MOTIVE TO MAKE DECLARANT UNAVAILABLE – In Giles v. California, 128 S.Ct. 2678 (2008), the U.S. Supreme Court rules that the U.S. Constitution's Sixth Amendment right of confrontation requires narrow application of the hearsay exception known as the forfeiture-by-wrongdoing exception. The Giles majority holds that it is not enough that a defendant caused the death of a declarant. Only if the government can convince the trial judge that defendant's motive in the killing was to make the declarant unavailable for trial should the trial judge admit the hearsay testimony.

Prosecutors seldom invoke this rule. In Giles, as in most cases where a prosecutor seeks to invoke the forfeiture-by-wrongdoing exception to the hearsay rule, the out-of-court declarant was the victim in a murder prosecution, and told another person about interaction with the defendant. Prosecutors generally invoke this hearsay rule because no other hearsay exception, such as that for "excited utterances," can be applied.

The Giles majority explains that they believe their restrictive ruling is required by the Sixth Amendment confrontation clause as construed in Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** and Davis v. Washington, 547 U.S. 813 (2006) **Sept 06 LED:03**.

Result: Reversal of first degree murder conviction of Dwayne Giles by California trial court; case remanded for retrial.

LED EDITORIAL NOTE: The U.S. Supreme Court's Giles decision effectively overrules the Washington Supreme Court decision in State v. Mason, 160 Wn.2d 910 (2007) Oct 07 LED:10, which held that proof of motive to make the missing witness unavailable is not required in order for the hearsay to be admissible.

NINTH CIRCUIT, U.S. COURT OF APPEALS

SERGEANT HAD PRIVACY INTEREST IN TEXT MESSAGES VIEWED IN PAGER AUDIT - - AGENCY POLICY STATED THAT AGENCY WOULD MONITOR ELECTRONIC COMMUNICATIONS, BUT 1) POLICY DID NOT EXPRESSLY ADDRESS TEXT MESSAGES, 2) BY PRACTICE, OFFICERS WERE ALLOWED TO SIMPLY PAY FOR EXCESS USAGE, AND 3) NO PAGER AUDITS HAD OCCURRED IN THE PAST; ALSO, AGENCY WAS NOT JUSTIFIED IN CONDUCTING FULL SEARCH ON GROUNDS THAT AGENCY WAS MERELY TRYING TO DETERMINE WHETHER TO RAISE ITS TEXT MESSAGING LIMITS

Quon v. Arch Wireless Operating Company, Inc., 529 F.3d 892 (9th Cir. 2008) (Decision filed June 18, 2008)

Facts and Proceedings below:

The Ontario, California, Police Department contracted with a wireless company for two-way alphanumeric pagers for sending of official text messages. The contract allotted 25,000 characters per month per pager. Usage over that amount on any pager required the City to pay overage charges.

The City's policies for employees did not expressly address text messaging, but the City did have a general "Computer Usage, Internet and E-Mail Policy" policy for all employees. That

policy stated that the use of City computers and other associated equipment was limited to official City business, and that the use of equipment for personal purposes was a violation of the policy.

The policy had other provisions that allowed the City to monitor employee electronic communications. Ontario PD employees were told, but only orally, that text messaging was a form of electronic communication under the formal policy.

By informal practice followed in the firsts two years after Ontario PD employees were given pagers, text messages were limited to 25,000 characters per pager each month. Under the practice, personnel that used more than 25,000 characters in a month were required to compensate the Police Department a certain amount for each character over 25,000. During this initial period, Sergeant Quon, one of the plaintiffs in the subsequent civil rights lawsuit, had used over 25,000 characters in three to four separate months. No audit was conducted in response to the overages by Sergeant Quon or others. Instead, he and others were simply required to pay for the overages, no questions asked, per the informal practice.

The lieutenant who was required to request payment from officers exceeding the character limit was directed to conduct an audit to determine whether the characters that were being used were for official business only, and, if so, whether the character limit should be increased. Quon was among those officers audited, because he had gone over the character limit several times in the past. The audit revealed that Quon had sent sexually explicit and profane messages to his family and friends from his pager.

Quon was cited in an agency memorandum. Along with some of those he had texted, he subsequently brought suit, alleging privacy violations under the U.S. and California Constitutions, as well as the federal Stored Communications Act (NOTE: The latter theory, which was successful for Quon and the other plaintiffs, was against only the pager operating company; we do not address that issue in this LED entry). The U.S. District Court held that Quon had a reasonable expectation of privacy in his text messages as a matter of law. But the District Court then asked a jury to determine as a matter of fact whether the search was reasonable. The jury found that the agency's search was reasonable because the intent of the search was to determine whether to raise the character limit.

ISSUES AND RULINGS: 1) The Ontario, California, PD had a policy authorizing agency monitoring of electronic communications by its employees using agency equipment, but the policy did not address text messages explicitly, and there had been no prior auditing of text messages. Agency practice for text messaging on pagers allowed officers to simply pay for going over the monthly pager-character limit. As a matter of law under the Fourth Amendment of the U.S. Constitution, did Quon have a reasonable expectation of privacy in his text messages for purposes of this 42 U.S.C. section 1983 federal civil rights lawsuit? (ANSWER: Yes)

2) Where the purpose of the pager audit was not to discover wrongdoing but to determine if the monthly character limit should be increased, was the search lawful despite the fact that it intruded on Quon's privacy interests? (ANSWER: No)

Result: Reversal in part of U.S. District Court decision that denied relief to Sergeant Quon and other plaintiffs in the civil rights lawsuit; case remanded for re-trial.

ANALYSIS:

The Ninth Circuit 3-judge panel agreed with the District Court that Quon had a reasonable expectation of privacy under the Fourth Amendment. The formal policy stated that all electronic

data that originated from City equipment was subject to inspection. That policy was completely undercut, however, by the informal practice of the lieutenant in charge, who simply allowed employees to pay for overages when they went over the 25,000 character limit. The Ninth Circuit emphasized that Quon relied on the practice of allowing him to simply pay, no questions asked, for the text-character overages on at least three occasions prior to the audit. These facts, plus the fact that the formal policy did not explicitly address text messaging, gave Quon a right of privacy in the text messages.

The Ninth Circuit also rejects the City's argument that the audit of all contents of Quon's pager was reasonable, despite the privacy rights of Quon, because the reason for the search was to determine whether to raise the monthly 25,000-character limit on texting. The Court concludes that means less intrusive than a complete audit of past messages were available, including warning officers that the content of their messages would be reviewed in the future to ensure that uses were related to work.

LED EDITORIAL COMMENTS: Law enforcement agency administrators may wish to consult their legal advisors and to review policies and practices to ensure: 1) that formal policies limiting usage of equipment and authorizing audit of electronic devices explicitly address each specific type of technology (page, blackberry, etc.) used by employees; 2) that employees have been informed of all policies (ideally with employee acknowledgement of receipt of such communication), and of the possibility that a public records request may require disclosure of electronic and other communications; and 3) that policies, including provisions for auditing of electronic communications, are followed by employees.

WASHINGTON STATE SUPREME COURT

KING COUNTY JAIL'S RECORDING OF INMATES' NON-PRIVILEGED PHONE CALL UPHELD AGAINST RCW 9.73 ATTACK BECAUSE THE JAIL PROVIDED BOTH WRITTEN AND ORAL NOTICE OF RECORDING PRACTICE

State v. Modica, ___ Wn.2d ___, 186 P.3d 1062 (2008)

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

Shortly before Modica was arrested [for assaulting his wife and was ordered not to contact her], the King County jail installed a new recording system that automatically recorded every call made and tracked every number dialed. Again, signs are posted near the telephones warning that calls will be recorded, and an automated message repeats that warning to both those making and receiving the calls. For example, when Modica called his grandmother, both of them heard:

Hello, this is a collect call from [Desmond] an inmate at King County Detention Facility. This call will be recorded and subject to monitoring at any time. To accept the charges dial three. To decline the charges dial nine or hang up now. Thank you for using Public Communication Services. You may begin speaking now.

Modica enlisted his grandmother's help in arranging for his wife to evade the prosecutors and not appear in court. After Ms. Modica stopped responding to calls both from a King County domestic violence advocate and the prosecutor's

increasingly urgent efforts (including a subpoena), the State listened to some of these recorded calls. After listening, the State promptly and successfully moved for a material witness warrant for Ms. Modica and added a witness tampering charge to its existing case against Modica.

At trial, the judge denied Modica's motion to exclude the taped conversations and several of the calls were played for the jury. These recorded calls strongly supported the witness tampering charge. The jury convicted Modica of two counts of assault, one count of resisting arrest, and one count of tampering with a witness. The Court of Appeals affirmed. **Feb 07 LED:13.**

ISSUE AND RULING: Were a jail inmate's phone calls from the jail to his grandmother lawfully recorded by the jail under chapter 9.73 RCW in light of the following factors considered in combination: 1) jail inmates generally have a reduced expectation of privacy and the conversations were not with his attorney or otherwise privileged; 2) a sign on the wall by the phone stated that inmate phone calls were being recorded; and 3) a recorded message, which both parties to the conversation heard, stated that the call was being recorded? (ANSWER: Yes, the participants in the phone conversation may have expected it to be private, but that expectation was not reasonable)

Result: Affirmance of Court of Appeals decision (**Feb 07 LED:13**) that affirmed the King County Superior Court conviction of Desmond Earl Modica for witness tampering, assault in the second degree and in the fourth degree, and resisting arrest.

ANALYSIS: (Excerpted from majority opinion)

Generally, our privacy act makes it “unlawful ... to intercept, or record any: (a) [p]rivate communications transmitted by telephone ... between two or more individuals ... without first obtaining the consent of all the participants in the communication.” RCW 9.73.030(1). “Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state.” RCW 9.73.050. Whether a conversation is private is a question of fact but may be decided as a question of law where, as here, the facts are not meaningfully in dispute.

The privacy act does not define “private,” but we have previously found it means “ ‘belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or public.’ ” Among other things, the subject matter of the calls, the location of the participants, the potential presence of third parties, and the role of the interloper are relevant to whether the call is private. Further, “[a] communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.”

We will assume for purposes of our analysis that Modica and his grandmother intended that their conversations be private. This case then turns on whether that expectation was reasonable. We hold under these facts it was not. First, we have already held that inmates have a reduced expectation of privacy. Second, both Modica and his grandmother knew they were being recorded and that someone might listen to those recordings. Modica made the calls under a physical sign on the wall warning of that fact. He and his grandmother had to

listen to an automated system's warning that the call will be “recorded and [is] subject to monitoring at any time.” What is more, Modica and his grandmother were recorded discussing the fact that their calls were being recorded. Whatever expectation of privacy they had, it was not reasonable.

However, we caution that we have not held, and do not hold today, that a conversation is not private simply because the participants know it will or might be recorded or intercepted. Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. However, because Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy. *[Court's footnote: We note that such facts may also be relevant to the issue of implied consent.]*

The State also argues that these particular calls could not be private because Modica intended that messages be passed on to his wife. We do not find this argument persuasive. While in some circumstances, the fact that the content of the call is intended to be passed on to another may be relevant to whether it is private, it is certainly not determinative. This is not like *State v. Forrester*, 21 Wn. App. 855 (1978), where the defendant made calls to the police taking responsibility for a gruesome double homicide and threatening to kill again unless paid off. The defendant asked the police officer answering the telephone to arrange for the police chief and city mayor to be present for a second call where he asked for \$10,000 to be delivered to a bowling alley restroom by a young boy. He also threatened to kill again and report to the world that the city could have prevented the death by paying the money. Taken as a whole, the court reasonably found that “[t]hese are not the statements of someone who expects the substance of his telephone call to remain confidential.” But the mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private and must be determined from the totality of the circumstances.

Given our holding, we need not reach whether Modica and his grandmother impliedly consented to having their conversations recorded.

[Two footnotes and some citations omitted]

DISSENT: Justice Sanders writes a dissent that is joined by Justice Alexander. The dissent argues, in vain, that among other things, the presence of explicit provisions in chapter 9.73 RCW authorizing DOC to tape record DOC inmate calls under some circumstances requires a negative inference that such recordings are not permitted at local jails in the absence of any express authority in the statute.

LED EDITORIAL COMMENTS: The majority opinion in *Modica* at one point notes that a factor against the defendant's argument is that he and his grandmother talked about the fact that they were being recorded. We do not think that this factor is necessary to admissibility of recordings of non-privileged inmate calls under a program such as that of King County that gives both written and oral notice of recording.

Arguing for admissibility would be difficult, if not impossible, where the inmates making the non-privileged calls are of such limited English proficiency that they do not understand the written and oral English warnings, and where they are not given notice in a language that they do understand.

MODERATE ODOR OF MARIJUANA COMING FROM VEHICLE DURING TRAFFIC STOP, BY ITSELF, DID NOT GIVE OFFICER PROBABLE CAUSE TO ARREST PASSENGER UNDER THE WASHINGTON STATE CONSTITUTION ARTICLE 1, SECTION 7

State v. Grande, ___ Wn.2d ___, 187 P.3d 248 (2008)

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

On April 6, 2006, [a WSP trooper] passed a vehicle with very dark, tinted windows. [The trooper] turned around, followed the car about one block, and pulled the vehicle over. Both occupants of the car recognized [the trooper], presumably based on prior encounters. The driver, Lacey Hurley, became irate at [the trooper], accusing him of harassment. The passenger, Jeremy Grande, was able to calm Hurley down.

[The trooper] detected the “moderate[]” smell of marijuana coming from the car. He informed both Hurley and Grande they were under arrest based on the odor of marijuana. Hurley and Grande were both handcuffed and searched. The search of Grande revealed a marijuana pipe containing a small amount of marijuana. While searching the car, another trooper found a burnt marijuana cigarette in the car's ashtray. Hurley claimed the cigarette as hers. Both Grande and Hurley were arrested and charged with possession of marijuana; Grande was also charged with possession of drug paraphernalia. [Grande's motion to suppress was denied, and she obtained review in the Washington Supreme Court.]

ISSUE AND RULING: Under article 1, section 7 of the Washington state constitution, based solely on the moderate smell of marijuana coming from inside the car, did the officer have probable cause to arrest the passenger for possession of marijuana? (ANSWER: No, rules a unanimous Court)

Result: Reversal of Skagit County Superior Court ruling that reversed a District Court order that granted Jeremy Grande's suppression motion.

ANALYSIS: (Excerpted from Supreme Court opinion)

Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime. This probable cause requirement is derived from the language of the Fourth Amendment to the United States Constitution, which provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause” Our state constitution similarly protects our right to privacy in article I, section 7, stating, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Our cases require us to presume warrantless searches and seizures invalid unless an exception applies. The burden is on the State to show one of those exceptions applies, such as probable cause that a crime is being committed. In Rankin, we held that the freedom from disturbance in private affairs afforded to vehicle passengers in Washington under article I, section 7, prohibits law enforcement officers to effect a seizure against that passenger unless the officer has an articulable suspicion that that person is involved in criminal activity. We based this holding on the requirement that the articulable suspicion must be specific to the individual to rise to the level of probable cause to arrest.

...

An equivalent quantum of evidence is required whether the inquiry is one of probable cause to arrest or probable cause to search, although each requires somewhat different facts and circumstances. Thus, cases involving searches, although they may differ factually, help demonstrate the level of evidence required to constitute probable cause for a warrantless arrest, such as the arrest we are examining here.

In analyzing the requirements under article I, section 7, we determine “whether the State unreasonably intruded into the defendant's “private affairs.” “State v. Mendez, 137 Wn.2d 208 (1999). **March 99 LED:04**. In Mendez, we specifically recognized that this constitutional protection extends to automobile passengers. We held that the police must have a basis to believe that their safety is at risk to order passengers out of the car or to remain in the car. Requiring a police officer to “be able to articulate an objective rationale predicated specifically on safety concerns” before intruding on passenger privacy ensures that any intrusion into that person's privacy is de minimis. The point was emphasized in Mendez in relation to the privacy rights of passengers and supports our analysis in this case. The police officer's arrest of Grande was not predicated on safety concerns, but on the odor of marijuana emanating from the vehicle. As a result, the question is whether the police officer had an objective rationale that it was Grande committing a crime and consequently, probable cause for his arrest.

In other settings, we have concluded that where officers do not have anything to independently connect an individual to illegal activity, no probable cause exists and an arrest or search of that person is invalid under article I, section 7. State v. Parker, 139 Wn.2d 486 (1999). **Dec 99 LED:13**. In Parker, we examined the question of whether personal belongings of a nonarrested vehicle passenger were subject to search incident to the arrest of the driver. The lead opinion held that the arrest of one or more vehicle occupants does not, without more, provide “ ‘authority of law’ under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings.” Although Grande's case can be factually distinguished from the cases encompassed in Parker, our examination of article I, section 7 and its requirement for police to have individualized probable cause is applicable here.

The State argues that the Court of Appeals decision in State v. Hammond, 24 Wn. App. 596 (1979), supports a finding of individualized probable cause in this case. In Hammond, the court held that the odor of burning marijuana emanating from a vehicle established probable cause to arrest the passengers and the

driver. The State asserts that, based on Hammond and other cases from the Court of Appeals, the marijuana odor in such a small and confined space creates individualized suspicion to all passengers when the odor is not pinpointed to any one of them. See State v. Huff, 64 Wn. App. 641 (1992) **April 98 LED:09**; State v. Compton, 13 Wn. App. 863 (1975). We disagree with this argument, both factually and legally.

In Compton, the Court of Appeals held that the smell of marijuana was sufficient to establish probable cause for a search of the driver's person. As the sole occupant of the vehicle, Compton was more susceptible to search than a passenger where the police officer had concerns about safety or the impairment of Compton's driving ability. In that case, the trooper began his search with a frisk for weapons, during which Compton reached down into his shirt to grab something. At that point, the trooper stopped him and grabbed his hand, discovering the illegal drugs. Thus, it appears Compton's search began with a frisk out of concern for the officer's safety and is distinguished from this case. More importantly [sic] is the fact that Compton was the only occupant in the vehicle where the smell was emanating.

In Huff, both the driver and passenger were arrested where the police officer smelled methamphetamine coming from the car. Notably, neither occupant was arrested for possession. In determining whether the arrest of the passenger was valid, the Court of Appeals stated that "probable cause to arrest the occupants of a car for possession of a controlled substance exists when a trained officer detects the odor of a controlled substance is emanating from a vehicle." However, the court held there was probable cause to arrest the passenger based not solely on the smell of illegal drugs but on three factors: (1) the passenger looked back at him and made furtive gestures; (2) he smelled methamphetamine coming from the car; and (3) the passenger lied about her identity. The court's multifaceted analysis does not support the State's argument here that marijuana odor itself is a basis for probable cause to arrest a passenger.

Both Huff and Compton are distinguishable from this case, and, thus, Hammond remains the only case that debatably supports the State's argument. However, Hammond was decided three weeks before Ybarra v. Illinois, 444 U.S. 85 (1979), which was the United States Supreme Court's first explicit statement that the right to privacy and protections against search and seizure are possessed individually. In Ybarra, the Court recognized that a search or seizure of a person must be supported by probable cause particularized with respect to that person. The Court held that where a search warrant specified a particular tavern and the owner of that tavern may be searched for illegal drugs, search and seizure of a patron was unconstitutional without reasonable belief that the patron was involved in any criminal activity. The Constitution's protections against illegal search and seizure are "possessed individually." Because Hammond's holding is at odds with the privacy principles articulated in Ybarra and under our state constitution, Hammond was decided incorrectly and is overruled. Ybarra and our court's case law remain controlling precedent on this constitutional requirement of probable cause.

The State argues that the United States Supreme Court has distinguished between individualized probable cause in a situation like Ybarra and individualized probable cause in a vehicle, as examined in Maryland v. Pringle,

540 U.S. 366 (2003) Feb 04 LED:02. In Pringle, police officers found five baggies of cocaine and a large amount of money within reach of all three passengers in the vehicle. Because none of the occupants would admit to knowledge of the drugs, all three were arrested for possession. The Court held that where it is reasonable for a police officer to infer a common enterprise among the occupants, there is probable cause to arrest the passengers as well as the driver of a vehicle. An important distinction between Pringle and this case is that the drugs and paraphernalia were found prior to the arrest of the vehicle's occupants. Regardless, our probable cause determination has not embraced the "common criminal enterprise" inference of the United States Supreme Court. Our constitution requires individual probable cause that the defendant committed some specific crime.

The superior court in this case found that "[u]nless the odor of marijuana can be clearly associated with one person in a vehicle, thus alleviating suspicion of the other occupants of the car, the officer may proceed on probable cause." Actually, the reverse of this holds true. Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. We cannot wait until the people we are associating with "alleviat[e] the suspicion" from us. Unless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures.

This does not mean, however, that a law enforcement officer must simply walk away from a vehicle from which the odor of marijuana emanates and in which more than one occupant is present if the officer cannot determine which occupant possessed or used the illegal drug. **In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle. . . .** Instead, here the police officer arrested both occupants without first establishing individualized probable cause. Thus, Grande's warrantless arrest was invalid.

[Some citations and one footnote omitted; bolding added to final paragraph]

LED EDITORIAL COMMENTS:

1. THE GRANDE COURT'S STATEMENT THAT OFFICERS HAD PROBABLE CAUSE TO SEARCH IS NOT A STATEMENT THAT THEY COULD DO THAT WITHOUT A SEARCH WARRANT: We have bolded one sentence in the final paragraph of the excerpts of the opinion above, where the Court states that the officer had probable cause to search the car. It is important to remember that in State v. Ringer, 100 Wn.2d 686 (1983), the Washington Supreme Court held that article 1, section 7 of the Washington constitution does not permit the federal constitution's Fourth Amendment, mobile-car search warrant exception, also known as the Carroll Doctrine. For Washington officers, probable cause alone justifies impounding a vehicle that is in a public place, but the probable cause does not itself provide justification for a warrantless search of any part of the vehicle. So, under Grande, assuming that the officer has nothing more than odor to go on, the officer who wishes to search any part of the vehicle must impound the vehicle and its contents, and then seek a search warrant.

2. CAN THE DRIVER LAWFULLY BE ARRESTED ON A CONSTRUCTIVE POSSESSION THEORY IN THE CIRCUMSTANCE WHERE THERE IS A PASSENGER IN THE CAR? The Grande Court says that Washington constitutional law requires individualized probable cause, and the Court says that odor coming from the vehicle is not individualized probable cause as to a passenger. But the Court indicates approval of a 1975 Court of Appeals precedent where the appellate court upheld arrest of a driver based on marijuana odor coming from a vehicle where there was no passenger in the vehicle. The question that remains is whether, under the Grande facts, where there was a passenger, the theory of *constructive possession* would provide individualized probable cause as to the driver. Constructive possession posits that a driver is in control of the vehicle and therefore in possession of what is in the vehicle. Is that assumption, plus odor, enough to make an arrest of the driver under the probable cause standard? We would guess that prosecutors will differ on this question, and we are certain that criminal defense attorneys will almost uniformly oppose it if they are paying attention. But we think that the argument is plausible and not squarely negated by anything said in the Grande opinion. As always, we urge officers to consult their prosecutors and legal advisors on this and other legal questions.

3. IS THERE AT LEAST REASONABLE SUSPICION OF WRONGDOING THAT WILL JUSTIFY HOLDING EVERYONE TEMPORARILY FOR A TERRY INVESTIGATIVE INQUIRY? This comment assumes that the officer cannot justify arrest of the driver of a car with multiple occupants and search incident to arrest - - see comment 2 discussing that question above. Some criminal defense attorneys will likely argue that what the Supreme Court says about probable cause to arrest in Grande goes equally for purposes of reasonable suspicion analysis. That is, reasonable suspicion, like probable cause, must be individualized. But we think that the Supreme Court may find the lesser standard of reasonable suspicion to permit a Terry investigation in the Grande circumstance where there is marijuana odor, plus a driver and passenger. Such a Terry investigation would allow the officer to separate and individually question all of the occupants of the vehicle, (1) asking for voluntary production of identification or ID information, (2) asking questions regarding the odor of marijuana and where it might be coming from, (3) continuing to sniff the ambient air surrounding the person being questioned, and (4) trying to get a drug-sniffing K-9 quickly to the scene.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **CRIME OF “INVOLV[ING]” A PERSON UNDER AGE 18 IN A DRUG TRANSACTION DOES NOT COVER MERELY ALLOWING A MINOR TO BE PRESENT DURING A DRUG DEAL** – In State v. Flores, ___ Wn.2d ___, 186 P.3d 1038 (2008), the Washington Supreme Court rules by a 7-2 vote (Justices Owens and Fairhurst dissenting) that merely allowing a person under age 18 to be present during an unlawful drug transaction does not constitute “involv[ing]” the minor “in any manner” in the drug transaction within the meaning of RCW 69.50.4015.

The Flores Court distinguishes a Court of Appeals decision and explains as follows that the result would likely be different if there were evidence that the defendant used the minor, here his 13-year-old stepdaughter as a cover or as a decoy:

Former RCW 69.50.401(f) provides:

It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance.

State v. Hollis, 93 Wn. App. 804 (1999), is the only decision addressing the statute's scope. Hollis involved the consolidated appeals of Mark Hollis and Lawrence Reddick. Each man was convicted of involving a minor in a drug transaction, in violation of former RCW 69.50.401(f). An undercover officer approached Hollis on the street and said he wanted to purchase rock cocaine. Hollis said he would get it for him. Hollis then approached a minor and asked her to "deal to" the undercover officer. The minor reluctantly agreed after Hollis found someone to "vouch" for the officer.

In Reddick's case, an undercover officer approached two men on a downtown street and said he was looking for "a twenty," i.e., \$20 worth of narcotics. One of the men agreed to arrange the deal. Reddick approached the men arm-in-arm with his girl friend, a minor. After a brief exchange of signals, Reddick handed over a rock of cocaine, received a \$20 bill, and then walked away with his girl friend.

Hollis and Reddick challenged their convictions, arguing the phrase "in any other manner involve" in former RCW 69.50.401(f) is unconstitutionally vague.

Because Hollis involved a void-for-vagueness challenge, the issue was whether, in light of the particular facts of the case, the statute defines the offense "with sufficient definiteness that ordinary people can understand what conduct is proscribed" and whether it provided "ascertainable standards of guilt to protect against arbitrary enforcement."

The Court of Appeals rejected the constitutional challenge after considering the ordinary, dictionary meaning of the term "involve." The court stated:

A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves-i.e., surrounds, encloses, or draws in-a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or bringing a minor to a drug transaction, *or allowing the minor to remain during a drug transaction*. Hollis, 93 Wn. App. at 812, 970 P.2d 813 (emphasis added).

The court ruled the statute sufficiently notified Reddick that the "acts of approaching the drug transaction arm-in-arm with a minor, . . . and allowing that minor to remain present during the drug transaction, thereby obliging her to become associated with the drug transaction" would constitute a violation of the statute.

Flores urges us to disapprove of Hollis to the extent it suggests that allowing a minor to remain during a drug transaction, alone, constitutes a violation of former RCW 69.50.401(f). He contends the statute requires proof of the minor's active involvement in the transaction. He asks this court to apply the principles of accomplice liability and constructive possession in setting forth the standard of proof required.

As the Court of Appeals correctly observed, the statute does not require the minor's actual participation in the drug transaction: "the minor's culpability and actions-which are proscribed under other statutes-are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant's affirmative acts." It is not necessary to establish the minor had any criminal intent. Accordingly, the analogy to accomplice liability and constructive possession is inapt.

However, we agree with Flores that the statute does not encompass the mere act of selling drugs in the presence of a minor. We recognize that exposing children to unlawful drug transactions is deplorable. However, our task is to decide whether the legislature intended to penalize that conduct when it enacted RCW 69.50.401(f). We conclude that it did not.

. . .

[W]e reject the State's argument that "in any other manner involve," as found in former RCW 69.50.401(f), encompasses the act of allowing a minor to remain during a drug transaction, absent evidence of an intent for the minor to play some role in the transaction.

Unlike in Hollis, Flores' actions, in relation to the minor, were purely passive. He did not bring her to the site, he did not have any contact with her, physical or verbal, and there is no indication she was not free to leave. His failure to require her to leave was not an affirmative act that is encompassed by the statute.

Nor is there sufficient evidence to establish that Flores used Jessica as a decoy. Of the five drug transactions that occurred at the cabin, Jessica was present only twice. Two of the transactions occurred off the premises. There is no evidence that Flores intended to use Jessica as a cover to avoid detection of the drug transactions. Rather, it appears her presence was a matter of happenstance, not design. Most of the transactions occurred off the premises, outside the minor's presence. On the two occasions that drug transactions occurred at the orchard cabin in Jessica's presence, the confidential informant had arrived at the residence on his own: he was not invited there by Flores.

Because there is insufficient evidence to infer that Flores knowingly and purposefully brought or attempted to bring his stepdaughter into the drug buys, we reverse his convictions for involving a minor in a drug transaction.

[Some citations omitted]

Result: Reversal of Okanogan County Superior Court conviction of Octavio Gonzales Flores for involving a minor in a drug transaction; affirmance of convictions for unlawful delivery (6 counts) and for possession of unlawful drugs with intent to deliver)

(2) DOC'S AUTHORITY TO SCREEN PRISONER MAIL TRUMPS PUBLIC RECORDS ACT – In Livingston v. Cedeno, ___ Wn.2d ___, 186 P.3d 1055 (2008), the Washington Supreme Court rules 5-4, that DOC's authority to control the mail that is given to prisoners allows DOC to screen and reject mail that comes in response to a prisoner's Public Records Act request, even if the PRA does not itself preclude the prisoner's access to the information.

Result: Affirmance of Court of Appeals decision (see January 07 LED:22) that affirmed a Thurston County Superior Court decision that it was lawful for DOC to not allow the prisoner to see training records of a corrections officer.

WASHINGTON STATE COURT OF APPEALS

LATE-NIGHT PRESENCE OF PERSONS IN HOUSE THAT NEIGHBOR “THOUGHT” WAS VACANT, PLUS LIKELY-STOLEN TRUCK IN DRIVEWAY, WERE NOT EXIGENT CIRCUMSTANCES JUSTIFYING NON-CONSENTING POLICE ENTRY OF HOUSE; BUT EVIDENCE OF UN-DUSTY BINDLE CONVICTS ANOTHER DEFENDANT

State v. Ibarra-Raya, ___ Wn. App. ___, 187 P.3d 301 (Div. III, 2008)

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

At about 2:27 am on July 14, 2006, a neighbor called 911, regarding noise coming from a nearby house in Walla Walla that looked vacant during the day. Officers took the call as “noise coming from a vacant house.” When officers arrived at the house, they saw lights on and heard party noise, but reported nothing exceptional. A truck without a license plate, but with a temporary permit, was in the driveway. The vehicle identification number (VIN) check came back “stolen out of California.”

Two officers then knocked on the front door; immediately the lights in the living room went off. Walla Walla Police Officer Tim Morford was on the side of the house and saw two men, one later identified as Mr. Ibarra-Raya, go into a room off the hallway and then come out of the room and open the back door. Officer Morford ordered the men to remain in the house. Officer Morford then followed the two men into the house and conducted a protective sweep, seeing marijuana and a bundle of cash. At this point, the officers learned that solely the truck's license plates had been stolen and that Mr. Ibarra-Raya was subleasing the house. Based on Officer Morford's observations, officers obtained a search warrant that led to the discovery of cocaine, over \$400,000 sealed in plastic bags, and marijuana. Officers arrested Mr. Ibarra-Raya.

While at the police station, Mr. Ibarra-Raya's cell phone rang repeatedly. A drug enforcement administration agent eventually answered. A person later identified as Mr. Ibarra-Cisneros asked for his brother. Mr. Ibarra-Cisneros became agitated and threatening when the agent would not put Mr. Ibarra-Raya on the phone. The two agreed to meet in a parking lot where undercover officers saw a pickup pull in with Mr. Ibarra-Cisneros as the passenger. The officers followed the pickup to a mall parking lot where Mr. Ibarra-Cisneros got out of the vehicle and stood beside it.

At trial, the officers testified they approached Mr. Ibarra-Cisneros and found a bindle on the ground where he was standing that contained cocaine. It was fresh looking without dust on it. After he was arrested, Mr. Ibarra-Cisneros volunteered, “If you saw me drop it, then I'll admit it's mine. . . . But if you didn't see me drop it then you can't charge me with it.”

The State charged Mr. Ibarra-Raya with possession of a controlled substance-marijuana-with intent to deliver, and possession of a controlled substance-cocaine. The State charged Mr. Ibarra-Cisneros with possession of a controlled substance-cocaine. The court denied their evidence suppression motions based on an illegal house search for the evidence seized at the house. The brothers separately appealed.

ISSUES AND RULINGS: 1) Did the officers possess information adding up to exigent circumstance in light of the evidence of human activity inside a house that a neighbor thought was vacant, plus the presence in the driveway of a truck that was reported stolen out of California? (ANSWER: No); 2) Does the Exclusionary Rule require that evidence of the parking lot contact with one defendant be excluded as the fruit of the unlawful arrest at the house of another defendant? (ANSWER: No) 3) Is there substantial evidence that Mr. Ibarra-Cisneros constructively possessed the non-dusty bindle of cocaine that police found near him on the ground, and that he conditionally, and not too cleverly, admitted was his only if the police saw him drop it? (ANSWER: Yes)

Result: Reversal of Walla Walla County Superior Court conviction of Adrian Ibarra-Raya for possession of marijuana with intent to deliver and possession of cocaine; affirmance of Walla Walla County Superior Court conviction of Gilberto Ibarra-Cisneros for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Absence of exigent circumstances

[T]he police may enter a building without a warrant when facing exigent circumstances (emergency exception). The exception recognizes the “ ‘community caretaking function of police officers, and exists so officers can assist citizens and protect property.’ “ The emergency exception justifies a warrantless entry when: (1) the officer subjectively believes that there is an immediate risk to health or safety; (2) a reasonable person in the same situation would come to the same conclusion; and (3) there is a reasonable basis to associate the emergency situation with the place searched. A court examining these factors must consider “whether the officer’s acts were consistent with his or her claimed motivation.”

We evaluate whether the officer’s acts in the face of a perceived emergency were objectively reasonable. The Ninth Circuit has similarly defined “exigent circumstances” as “ ‘those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspects or some other consequence improperly frustrating legitimate law enforcement efforts.’ “ United States v. Echegoyen, 799 F.2d 1271, 1278 (9th Cir.1986). Thus, a substantial risk to persons or property, including property with evidentiary value, is required for an emergency exception application.

Here, the intruding officers believed they were investigating noises that were coming from a vacant house, but the record shows the report was simply for noises coming from a house that appeared to be vacant during the day. No immediate risk to health or safety is shown. The officers arrived at the house, heard noises and investigated the vehicle parked in an ungated driveway to check whether a new occupant resided in the house; arguably their activities were legitimate police business. They found what they believed was a stolen truck, although it turned out that just the license plate was stolen. While the

police suspected criminal activity, the facts would not lead a reasonable person to suspect a substantial risk to the persons or property within the house or a reasonable basis for an emergency search. Thus, the exigent circumstance exception to the general warrant requirement is not applicable to our facts.

After knocking and preventing the departure of the two occupants, rather than stopping, identifying, and questioning the occupants as intended, Officer Morford, without exigent circumstances to support a community caretaking purpose, entered the home and impermissibly collected the evidence used to obtain a search warrant. Therefore, the trial court erred in not denying the brothers' suppression motion.

2) Exclusionary Rule and "Attenuation"

[W]e do need to examine Mr. Ibarra-Cisneros' evidence insufficiency contention because any connection between Mr. Ibarra-Raya's cell phone and the bindle found at Mr. Ibarra-Cisneros's feet is too attenuated to affect his cocaine possession conviction, when considering the intervening circumstances, temporal factors, and lack of flagrant police conduct.

3) Constructive possession

Under RCW 69.50.4013(1), it is unlawful to possess a controlled substance. Possession can be actual or constructive. Actual possession requires that the controlled substance be in the personal, physical custody of the person charged with the crime. Because nothing in our record shows Mr. Ibarra-Cisneros was in physical custody of cocaine, the evidence presented at trial must support a finding of constructive possession.

Constructive possession involves "dominion and control" over the drugs in question or the premises in which they are discovered. Mere proximity to a controlled substance alone is insufficient to show dominion and control. Various factors determine dominion and control, and the cumulative effect of a number of factors is a strong indication of constructive possession. We must look at all the evidence tending to establish circumstances from which the jury could reasonably infer the defendant had dominion and control of the drugs to establish constructive possession.

Here, Mr. Ibarra-Cisneros called and inquired about his brother who was at that time in custody and being investigated for delivering a controlled substance. The officers suspected Mr. Ibarra-Cisneros was connected to drug trafficking because of the tone and content of his conversation and arranged a meeting. When the undercover officers eventually approached Mr. Ibarra-Cisneros, he was standing near the side of a truck and had been under observation. Officers found a bindle on the ground next to where Mr. Ibarra-Cisneros was standing that contained cocaine and testified it was fresh looking without dust on it. After he was arrested, Mr. Ibarra-Cisneros stated, "If you saw me drop it, then I'll admit it's mine. . . . But if you didn't see me drop it then you can't charge me with it." Mr. Ibarra-Cisneros did not challenge the admissibility of his statement. This evidence would permit a reasonable jury to infer that Mr. Ibarra-Cisneros had dominion and control of the cocaine. Accordingly, sufficient evidence supports his possession conviction.

[Some citations omitted; subheadings added]

TRAFFIC STOP HELD NOT JUSTIFIED WHERE DRIVER CROSSED AN EIGHT-INCH WIDE EXIT-LANE DIVIDER BY TWO TIRE LENGTHS FOR ONE SECOND

State v. Tonelli Prado, ___ Wn. App. ___, 186 P.3d 1186 (Div. I, 2008)

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

Benjamin Tonelli Prado was stopped in May 2004 as he exited Interstate 5 at James Street. A police officer observed Tonelli Prado's car cross an eight-inch white line dividing the exit lane from the adjacent lane by approximately two tire widths for one second. Tonelli Prado was subsequently arrested for driving under the influence of intoxicants. His motion to suppress was denied by the trial court on the grounds that he had done more than merely touch the white line but had actually crossed it. Tonelli Prado was subsequently convicted.

On RALJ Appeal, the superior court reversed, holding that the language "as nearly as practicable" required an analysis of the totality of the circumstances and that here there was nothing more than a brief incursion across the white lane line with no erratic driving or safety problems. The State Appealed and we granted discretionary review.

ISSUE AND RULING: RCW 46.61.140(1) requires that drivers remain within a single lane of travel "as nearly as practicable." Where a law enforcement officer saw a car cross, by two tire widths for one second, an eight-inch-wide white line dividing a freeway exit lane from the next traffic lane, did the officer have reasonable suspicion justifying a traffic stop? (ANSWER: No)

Result: Affirmance of King County Superior Court RALJ decision that reversed the King County District Court DUI conviction of Benjamin Tonelli Prado.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The pertinent statute, RCW 46.61.140(1), provides:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(1) A vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. [Court's footnote: (Emphasis added.)]

The phrase "as nearly as practicable" has not yet been interpreted by a Washington court. Courts in other jurisdictions, however, when construing similar language in the context of whether those observations of potential violations created the basis for a valid investigatory stop, have held such minor incursions over a lane line to be an insufficient basis for a stop. [Court's footnote: State v. Cerny, 28 S.W.3d 796, 800-01 (Tex.App. Corpus Christi 2000) (stop improper when driver's wheels only touched center line); State v. Gullett, 78 Ohio

App.3d 138, 604 N.E.2d 176, 180-81 (Ohio Ct. App.3d, Highland County 1992) (stop unreasonable where a vehicle driven on a roadway with no other traffic present, no speeding, erratic driving or other conduct, except for the edge line incident)].

Arizona has a similarly worded statute. In State v. Livingston, [Court's footnote: 206 Ariz. 145, 75 P.3d 1103 (Ariz. Ct. App. 2003).] an Arizona appellate court held that the language requiring a driver to remain exclusively in a single lane "as nearly as practicable" indicated an express legislative intent to avoid penalizing brief, momentary and minor deviations of lane lines. We agree.

In upholding the suppression of evidence, the Livingston court noted that the State did not dispute that Livingston otherwise drove safely apart from the minor breach of the shoulder line. Similarly, here, the State does not dispute that there is nothing other than this brief incursion over the lane line.

We believe the Legislature's use of the language "as nearly as practicable" demonstrates a recognition that brief incursions over the lane lines will happen. Here, like in Livingston, the officer did not testify to anything more than a brief incursion over the lane line. A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully. This stop was unlawful and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles. We agree with the RALJ judge that the totality of the circumstances here do not create a traffic violation under the statute.

[One footnote omitted]

"DEATH NOTIFICATION" TO IN-CUSTODY MURDER SUSPECT SHORTLY AFTER SHE INVOKED RIGHT TO COUNSEL WAS IMPERMISSIBLE "INTERROGATION"

State v. Wilson, 144 Wn. App. 166 (Div. III, 2008)

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

Ms. Wilson [who was suspected of stabbing her long-time companion, Mr. Thrush] was interrogated by [a law enforcement officer] at the Garfield County Jail. [The officer] advised her of her Miranda rights. Ms. Wilson executed a written waiver of her rights. During the interview, Ms. Wilson described a struggle where Mr. Thrush tried to smother her with a pillow. She began talking about the kitchen, but then she made a reference to an attorney. The interview was terminated. Later, [the officer] reentered the interrogation room and gave her a "death notification" that "her husband" had died. Ms. Wilson collapsed and said: " 'I didn't mean to kill him. I didn't mean to stab him.' " The trial court concluded that this statement was admissible because the officer delivering the death notification had no intent to elicit an incriminating response.

ISSUE AND RULING: Did the officer violate Miranda by giving Ms. Wilson the "death notification" shortly after she had invoked her right to counsel during custodial interrogation? (**ANSWER**: Yes)

Result: Reversal of Asotin County Superior Court conviction of Kelley A. Wilson for first degree felony murder and first degree burglary; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Ms. Wilson argues that the officers renewed their interrogation after she made a request for an attorney. The applicable law was set forth in Miranda v. Arizona, 384 U.S. 436 (1966). Miranda held that:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

....

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

The Supreme Court in Rhode Island v. Innis, set forth a test to determine whether statements made while in custody are the product of interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). The Court held that interrogation occurs and, therefore, the Miranda protections apply "whenever a person in custody is subjected to either express questioning or its functional equivalent." The functional equivalent of express questioning was defined by the Court as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." The last part of the definition focuses on the perceptions of the suspect, rather than on the intent of the police.

Here, the trial court ruled that Ms. Wilson's statement was admissible because the officer delivering the death notification did not intend to elicit an incriminating response. But this is not the test. The proper test is whether the words notifying Ms. Wilson that her "husband" was dead were spoken by an officer when he should have known that the words were reasonably likely to elicit an incriminating response. Here, the officer delivered the death notification to Ms. Wilson after she requested counsel.

Ms. Wilson was in jail for stabbing Mr. Thrush. Ms. Wilson had requested counsel, and her interview with police had been terminated. Given Ms. Wilson's situation, the officer should have known that the death notification was reasonably likely to elicit an incriminating response. The officer should not have initiated a conversation with Ms. Wilson by stating that Mr. Thrush had died. The

court erred by allowing Ms. Wilson's statement after she invoked her right to counsel.

The admission of Ms. Wilson's statement to police was constitutional error and not harmless beyond a reasonable doubt.

LED EDITORIAL NOTES:

For an article on Fifth and Sixth Amendment “initiation of contact” rules, see the Criminal Justice Training Commission’s internet LED page.

The Court of Appeals also based its reversal of the convictions on the trial court’s erroneous admission of irrelevant evidence of (1) the defendant’s prior bad acts and (2) her intent to kill. Those issues are not addressed in this LED entry.

DEFENDANT’S FINGERPRINTS ON ITEMS IN PICKUP CAB AND BED IN WHICH HE WAS FOUND HIDING HELD (IN 2-1 RULING) NOT SUFFICIENT EVIDENCE OF “CONSTRUCTIVE POSSESSION” TO SUPPORT METHAMPHETAMINE MANUFACTURING CONVICTION

State v. Enlow, 143 Wn. App. 463 (Div. III, 2008)

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

Officers approached 207 Quince Place, Kennewick, Washington, to execute a warrant to search for stolen property. An officer noticed an overwhelming smell of ammonia coming from a truck. The truck was registered to Raymond Eugene Gratrek of Prineville, Oregon. Officers obtained an amendment to the warrant allowing them to search the truck.

When the officers began searching the truck, they discovered [David] Enlow hiding under a blanket in the canopy part of the truck. Mr. Enlow told the officers that the truck did not belong to him and that he was only hiding there. A search of the truck revealed methamphetamine and the materials to make methamphetamine.

Mr. Enlow did not own or live in the house at 207 Quince Place. He was not the owner of the truck. During the search, officers found identification cards bearing Mr. Enlow's name. They also found another man's odometer disclosure form. Officers found property with Mr. Enlow's fingerprints on it, but these fingerprints were not on items containing methamphetamine or on items used to manufacture it. **[Also, a resident of the house referred to the truck as “David’s pickup.” LED Eds.]**

At the end of a stipulated facts bench trial, Mr. Enlow was convicted of one count of manufacturing methamphetamine. The court imposed a sentence of 100 months' incarceration.

ISSUE AND RULING: Was the evidence of David Enlow’s fingerprints on items inside the pickup cab and canopy, in which he was found hiding, plus the evidence that a lone resident referred to the pickup as “David’s pickup,” sufficient to show he was in constructive possession of the pickup and its meth lab such as to support his conviction for manufacturing methamphetamine? (**ANSWER:** No, rules a 2-1 majority of Judges Kulik and Schultheis, with Judge Brown dissenting)

Result: Reversal of Benton County Superior Court conviction of David Leon Enlow for manufacturing methamphetamine.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

When the officers began searching the truck, they found Mr. Enlow hiding under a blanket in the canopy section. Mr. Enlow told Detective Rick Runge that he was just hiding there and that he did not own the truck. Mr. Enlow also did not live at 207 Quince Place. During the search, deputies found Mr. Enlow's Washington State identification card in the canopy portion of the truck, and Mr. Enlow's Washington State inmate identification card in the pocket of a shirt in the truck's cab. Deputies also found a Washington State odometer disclosure form for "Nick Tobal." The truck was licensed in Oregon and registered to Raymond Gratreak, the legal owner.

Mr. Enlow's fingerprints were found on a one pint jar with residue which was untested, a quart jar, and a Thousand Island salad dressing bottle, all of which had no contents listed. These items were found in the bed of the truck. Walter Mettling, who owned the residence at 207 Quince Place, asked a detective what should be done with " 'David's' pickup." Numerous other items were found in the truck but the court did not find that they contained Mr. Enlow's fingerprints. The court found that: "[Mr. Enlow] had knowledge that methamphetamine is a controlled substance."

These findings do not support the court's conclusion that: "[Mr. Enlow] is guilty of the crime of Manufacture of a Controlled Substance, Methamphetamine, committed on or about the 10th Day of March, 2005." There is no direct evidence showing that Mr. Enlow was the person who manufactured methamphetamine in the truck. Thus, the State argues that Mr. Enlow had constructive possession of the truck and the items inside the truck. However, the trial court did not make a finding that Mr. Enlow owned or constructively possessed the truck.

Constructive possession is the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d 27 (1969). Constructive possession is established by viewing the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found. State v. Turner, 103 Wn. App. 515 (Div. II, 2000) **March 01 LED:11**. The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control. State v. Cote, 123 Wn. App. 546 (Div. III, 2004) **June 05 LED:20**.

Ownership of the truck is one factor to consider when assessing constructive possession. Exclusive control of the truck is not necessary to establish constructive possession but mere proximity alone is not enough to infer constructive possession. Here, Mr. Enlow did not own the truck and he did not own or rent the residence at 207 Quince Place.

In Callahan, Mr. Callahan did not own the houseboat he was on, but he was observed in close proximity to the drugs and he admitted handling the drugs earlier that day. Mr. Callahan had been on the houseboat for two or three days and he had with him two books, two guns, and a set of broken scales. The court

found insufficient evidence to find Mr. Callahan in constructive possession of the illegal drugs.

In State v. Spruell, 57 Wn. App. 383 (1990), police observed Luther Hill stand up from a table which was holding drugs and drug paraphernalia. The court refused to find constructive possession even though Mr. Hill's fingerprints were on a plate containing cocaine residue. Similarly, in Cote, the court found the evidence insufficient to establish dominion and control where a passenger in a vehicle left fingerprints on a jar containing contraband.

Fingerprint evidence alone is sufficient to support a conviction if the trier of fact could reasonably infer that fingerprints could have been made *only* at the time when the crime was committed. Significantly, here, the trial court did not find Mr. Enlow's fingerprints on numerous items containing methamphetamine.

The court's findings do not support the court's conclusion that Mr. Enlow is guilty of the manufacture of methamphetamine.

[Some citations omitted]

DISSENTING OPINION:

Judge Brown would have held that the evidence viewed most favorably for the State supports affirming Enlow's conviction.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **DEFENDANT'S STATEMENTS TO A MENTAL HEALTH PROVIDER THAT HE WANTED TO KILL HIS NEIGHBORS PASS "TRUE THREAT" STANDARD FOR FIRST AMENDMENT FREE SPEECH PROTECTION, AND THE STATEMENTS CONSTITUTED HARASSMENT** – In State v. Schaler, ___ Wn. App. ___, 186 P.3d 1170 (Div. III, 2008), the Court of Appeals rules 2-1 that, while the jury in this harassment prosecution should have been instructed on the First Amendment free speech standard for "true threats," the instructional error was harmless because the evidence of defendant's guilt was overwhelming. The majority opinion's first paragraph summarizes the factual and procedural background, and the majority ruling as follows:

Glen Arthur Schaler, crying and hysterical, called Okanogan Behavioral Health Care and reported he had been having dreams he killed his neighbor and was covered in blood. After law enforcement responded to Mr. Schaler's residence and determined no crime had occurred, Mr. Schaler was transported to the hospital for a mental health evaluation. Tonya Heller-Wilson spent four hours evaluating Mr. Schaler at the hospital, during which time he repeatedly stated he wanted to kill his neighbors. When Ms. Heller-Wilson asked Mr. Schaler if he was serious, he specifically stated he wanted to harm his neighbors. Ms. Heller-Wilson informed the neighbors, Kathy Nockels and Denise Busbin, of the threats. Both neighbors had previously obtained protection orders against Mr. Schaler. Mr. Schaler was charged with two counts of felony harassment-threats to kill. The case proceeded to a jury trial, where the jury was instructed on the definition of "threat," and "knowingly threaten," but not on the definition of a "true threat." Mr. Schaler was found guilty as charged. We hold the failure to instruct the jury on the definition of "true threat" was error, although under the specific facts

presented here, the error was harmless. Further, the evidence presented to the jury was sufficient to establish Mr. Schaler's statements were "true threats." Accordingly, we affirm the convictions.

Judges Korsmo and Brown are in the majority. Judge Sweeney argues that the case should have been remanded for retrial with instruction to the jury on the definition of "true threat."

Result: Affirmance of Okanogan County Superior Court conviction of Glen Arthur Schaler for two counts of felony harassment under RCW 9A.46.020.

LED EDITORIAL NOTE: Among the past Washington appellate court decisions addressing the "true threat" standard discussed in Schaler are State v. Kilburn, 151 Wn.2d 36 (2004) Oct 04 LED:05 and State v. Johnson, 156 Wn.2d 355 (2006) March 06:04.

(2) WHERE MAN EJACULATED ONTO HIS STEPDAUGHTER'S FACE WHILE SHE SLEPT, HE COMMITTED CHILD MOLESTATION BY "TOUCHING" HER WITH HIS PENIS – In State v. Jackson, ___ Wn. App. ___, 187 P.3d 321 (Div. I, 2008), the Court of Appeals rules that the evidence supports defendant's child molestation conviction.

Defendant masturbated and ejaculated onto the face of his 12-year-old stepdaughter while she slept. "Sexual contact" is defined under the sex crimes chapter to include the "touching" of the sexual or other intimate parts of the perpetrator or the victim, when done to gratify any person's sexual desire. The Court of Appeals rules that a man ejaculating semen onto the body of another person is "touching" that other person's body with his penis.

Result: Affirmance of King County Superior Court conviction of Ronell Ray Jackson for second degree child molestation.

(3) IT WAS FIRST DEGREE "ESCAPE" FOR DEFENDANT TO RUN FROM COURTROOM AFTER HEARING TRIAL JUDGE'S POST-VERDICT ORAL ORDER TO "HAVE [DEFENDANT] TAKEN INTO CUSTODY" – In State v. Eichelberger, 144 Wn. App. 61 (Div. II, 2008), the Court of Appeals rules that a trial judge's post-guilty-verdict oral open court statement - - "I'm going to have him taken into custody" - - was sufficiently clear to give the defendant notice that he was in custody for purposes of the first degree escape statute. RCW 9A.76.110 prohibits escape from "custody," and RCW 9A.76.010 provides that "custody" includes "restraint pursuant to . . . an order of a court." The defendant ran out of the courtroom immediately after hearing the judge's order to take him to jail based on the just-rendered jury verdict of guilty for unlawful possession of a firearm. Running out of the courtroom at that point was escape from custody, the Court of Appeals rules.

Result: Affirmance of Grays Harbor County Superior Court conviction of Jessie J. Eichelberger for first degree escape under 9A.76.110.

(4) UNDER SECOND DEGREE RAPE STATUTE, A VICTIM IS NOT "PHYSICALLY HELPLESS" IF ABLE TO COMMUNICATE VOCALLY – In State v. Bucknell, ___ Wn. App. ___, 183 P.3d 1078 (Div. III, 2008), the Court of Appeals rules that the second degree rape conviction of defendant Bucknell must be reversed because his victim was not "physically helpless" under the rape statute.

Engaging in sexual intercourse with a person who is "physically helpless" is second degree rape. RCW 9A.44.050(1)(b). "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5).

In this case, defendant Bucknell engaged in non-consenting sexual intercourse with his adult sister, who was suffering from Lou Gehrig's disease. At the time of the sex act in question, his sister's disease had progressed to where she was unable to move from her chest down. She was able to speak, however, and she retained her mental capacity. Under these circumstances, the Bucknell Court holds, the victim could not be found to be "physically helpless."

Result: Reversal of Spokane County Superior Court conviction of Dennis Patrick Bucknell; remand for entry of judgment on the lesser charge of third degree rape. (for which the Court of Appeals holds there is sufficient evidence).

(5) VERSION OF RCW 9.41.040 IN EFFECT IN 1993 WHEN CRIME WAS COMMITTED GOVERNS ON RESTORATION OF FIREARMS RIGHTS – In State v. Rivard, __ Wn. App. __, 183 P.3d 1115 (Div. III, 2008), the Court of Appeals rules that because defendant committed his crime in 1993, the 1993 version of provisions relating to restoration of firearms rights in RCW 9.41.040 governs the restoration question in this case, not a later, more restrictive, version in effect in 1997 when he was sentenced.

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

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 are at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2006, is at [<http://www1.leg.wa.gov/legislature>]. 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>].

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>]