



Law Enforcement

JUNE 2010

Digest

Law enforcement officers: Thank you for your service, protection and sacrifice.

658th Basic Law Enforcement Academy – December 15, 2009 through April 23, 2010

President: Danny D. Benavente, Auburn Police Department
Best Overall: Franklin D. Nelson, Lake Stevens Police Department
Best Academic: Richard D. Albo, Cle Elum Police Department
Best Firearms: Franklin D. Nelson, Lake Stevens Police Department
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PART TWO OF THE 2010 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part Two of a two-part compilation of 2010 State of Washington legislative enactments of interest to law enforcement. A subject matter index for both parts is provided beginning on page 8 of this LED.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2010 regular session take effect on June 10, 2010 (90 days after the end of the regular session). For some acts, different sections have different effective dates within the same act. We will generally indicate the effective date(s) applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our legislative updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and workers' compensation benefits.

Text of each of the 2010 Washington acts and of their bill reports is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the 4-digit bill number for access to the act and bill reports.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed until early fall of this year.

Thank you to the staff of the Washington Association of Prosecuting Attorneys (WAPA) and Washington Association of Sheriffs and Police Chiefs (WASPC) for assistance in our compiling of acts of interest to Washington law enforcement.

We remind our readers that any legal interpretations that we express in the LED regarding either legislation or court decisions: (1) do not constitute legal advice, (2) express only the views of the editors, and (3) do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

REVISING LAW RELATING TO VEHICLES AT RAILROAD GRADE CROSSINGS

Chapter 15 (SSB 6213)

Effective date: June 10, 2010

Completely rewrites RCW 46.61.350. The Final Bill Report summarizes the act as follows:

The list of vehicles required to stop at railroad crossings is modified. The list references federal guidelines and vehicle classifications to describe vehicles carrying explosive, flammable, and hazardous substances. In addition, commercial motor vehicles transporting passengers are added to the list of vehicles required to stop before crossing railroad tracks.

The list of railroad crossings that are exempt from the stopping requirement is modified. Vehicles must stop at crossings controlled by crossing gates or traffic control signals unless a functioning control signal is transmitting a green light. In addition, the list of exempt crossings is modified to include tracks that are abandoned or marked with an out-of-service sign, and tracks that are used exclusively for a streetcar or for industrial switching purposes.

The State Patrol is given authority to identify, by rule, crossings where stopping is not required. The Superintendent of Public Instruction is given authority to identify, by rule, circumstances under which stopping is not required for drivers of school buses or private carriers carrying children or other passengers.

AUTHORIZING COURT-APPROVED ISSUANCE OF DLI, DOR AND ESD SUBPOENAS

Chapter 22 (SHB 2789)

Effective date: June 10, 2010

This act was adopted in response to State v. Miles, 160 Wn.2d 236 (2007) **Nov 07 LED:07**. Provides a process for the Department of Revenue, Department of Labor and Industries, and the employment security department to apply for court approval of an agency investigative subpoena which is authorized under current law in cases where the agency seeks such approval, or where court approval is required by Article 1, section 7.

LED EDITORIAL COMMENT: Like the Miles decision, this act will not have a direct impact on investigations by Washington law enforcement officers because in our opinion Washington law enforcement officers may not obtain administrative subpoenas. Rather they must seek a warrant from a court. Washington law enforcement agencies do, however, often receive information from other agencies that has been obtained through administrative subpoenas. Such instances may have created problems in light of Miles, and this act should avoid those problems for information obtained through court-ordered subpoenas under the act.

REQUIRING NOTIFICATION OF STATE AND LOCAL LAW ENFORCEMENT RELATING TO ESCAPE OF DISAPPEARANCE OF THOSE COMMITTED UNDER CHAPTER 10.77 RCW

Chapter 28 (SHB 2422)

Effective date: June 10, 2010

Amends RCW 10.77.165 to require the superintendent of a state facility to immediately notify state and local law enforcement of the escape or disappearance of a person who has been committed to the facility pursuant to chapter 10.77 RCW.

AUTHORIZING LOCAL GOVERNMENT TO REQUEST BACKGROUND CHECKS FROM WSP

Chapter 47 (SB 6288)

Effective date: June 10, 2010

Adds new sections to chapters 36.01, 35.21, and 35A.21 RCW. The Final Bill Report summarizes the act as follows:

Local governments may, by ordinance, require a state and federal background investigation of license applicants or licensees in occupations for which the local government has licensing authority. State background investigations must be processed through the WASIS, as provided for in statute, and may also include a fingerprint-based national background check through the FBI. The WSP must be the sole source for receipt of fingerprint submissions, as well as responses to the submissions, from the FBI. The WSP is also responsible for disseminating the results of the national background investigations to the requesting local government. The local government requesting the background investigation is responsible for transmitting the appropriate fees for a state and national criminal history check to the WSP, unless alternately arranged.

ALLOWING AGENCIES TO RESPOND TO PUBLIC RECORDS REQUESTS THROUGH LINK TO INTERNET SITE IN SOME CIRCUMSTANCES

Chapter 69 (SSB 6367)

Effective date: June 10, 2010

Adopts a new section in chapter 42.56 RCW reading as follows:

The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.

Amends RCW 42.56.520 by inserting a subsection that allows an agency to respond to a public records request by:

providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; . . .

AUTHORIZING CANADIAN AND OTHER-STATE APRS TO PRESCRIBE LEGEND DRUGS

Chapter 83 (SB 6627)

Effective date: June 10, 2010

Amends RCW 69.41.030 to allow a Washington pharmacist to fill a prescription by an advanced registered nurse practitioner who is licensed either: (1) in any province of Canada that shares a common border with the state of Washington, or (2) in any state of the United States.

ADDRESSING MILITARY LEAVE FOR PUBLIC EMPLOYEES

Chapter 91 (SSB 2403)

Effective date: June 10, 2010

Amends RCW 38.40.060. The Final Bill Report summarizes the act as follows:

Military leave is granted for required military duty, training, or drills including those in the National Guard under Title 10 U.S.C., Title 32 U.S.C., or state active status. An officer or employee of state or local government is charged military leave only for the days that he or she is regularly scheduled to work for the state or local government.

ENHANCING PROTECTION OF VULNERABLE ADULTS

Chapter 133 (SSB 6202)

Effective date: June 10, 2010

Amends RCW 30.22.210, 74.34.020, 74.34.035; also adds new sections to chapter 74.34 RCW. The Final Bill Report summarizes the act as follows:

A financial institution [as specially defined in the act], including a broker-dealer or investment advisor, which reasonably believes that financial exploitation of a vulnerable adult has occurred or is being attempted may, but is not required to, refuse a transaction pending investigation by the financial institution, DSHS, or law enforcement. The financial institution and its employees are immune from civil liability for making this determination in good faith.

The financial institution must provide notice to all interested persons if the financial institution has contact information, and notify law enforcement and DSHS. The hold of the transaction must expire after five business days, or ten business days if the transaction involves a sale of securities, unless extended by court order. A financial institution must ensure that existing employees who have contact with customers and account information receive training concerning the financial exploitation of vulnerable adults.

The existing statutory list of “mandated reporters” of abuse of vulnerable adults and children is not changed under this 2010 act. That list continues to include social service and health care providers, social workers, and law enforcement. Under the act’s amendment to RCW 74.34.035, a mandated reporter must report the death of a vulnerable adult to a medical examiner or coroner and law enforcement when the mandated reporter suspects that the death was caused by abuse, neglect, or abandonment.

STREAMLINING AND MAKING TECHNICAL CORRECTIONS TO VEHICLE AND VESSEL REGISTRATION AND TITLE PROVISIONS

Chapter 161 (SB 6379)

Effective date: July 1, 2011 (Except amendment to RCW 88.02.050, which is effective June 30, 2012)

The Final Bill Report summarizes this act as follows:

Numerous vehicle and vessel title and registration statutes, including applicable tax and fee statutes, are streamlined and reorganized, and written in plain language so as to assist the reader. The bill is revenue and policy neutral, with two exceptions: (1) the permit to licensed wreckers for junk vehicles was repealed because the permit has never existed, and (2) the Cooper Jones emblem was repealed because the emblems are no longer provided, due to the recent enactment of the Share the Road special license plate promoting bicycle safety and awareness.

ADDING CHILDREN’S ADVOCACY CENTERS TO THOSE INVOLVED IN CHILD SEX ASSAULT AND SEX ABUSE INVESTIGATION PROTOCOLS

Chapter 176 (SHB 2596)

Effective date: June 10, 2010

Amends RCW 26.44.020 to add a definition for “children’s advocacy center.” Amends RCW 26.44.180 and RCW 26.44.185 to direct that, children’s advocacy centers, if available, be part of investigation protocols under those statutes.

ENHANCING WDFW’S ABILITY TO PROTECT SHELLFISH

Chapter 193 (SHB 2593)

Effective date: June 10, 2010

Adds new crimes to chapter 77.15 RCW: (1) unlawful use of shellfish gear for commercial purposes, a gross misdemeanor; and (2) guilty of the unlawful use of shellfish gear for personal use purposes, a misdemeanor. Also amends the crimes contained in: (1) RCW 77.70.500 (removal of crab pots); RCW 77.15.520 (commercial fishing using unlawful gear or methods); RCW 77.15.380 (recreational fishing in the second degree); and RCW 77.15.750 (unlawful use of a WDFW permit).

CIVILLY DETAINING AND TRANSFERRING TO OTHER STATE PERSONS PREVIOUSLY FOUND IN THAT STATE NOT GUILTY BY REASON OF INSANITY

Chapter 208 (SHB 2533)

Effective date: June 10, 2010

Adds a new section to chapter 71.05 RCW to provide a special procedural mechanism for civil detention and interstate transfer to another state of an individual who was found not guilty by reason of insanity in the other state and who fled that state.

ADDRESSING ACCESSIBILITY FOR PERSONS WITH DISABILITIES

Chapter 215 (ESSB 5902)

Effective date: June 10, 2010

Among other things, amends RCW 46.16.381 to add an additional \$200 assessment to any penalty or fine imposed for: (1) the unauthorized use of the special person-with-disabilities placard, special license plate, or identification card; (2) parking in, blocking, or otherwise making inaccessible the access aisle located next to a space reserved for persons with physical disabilities; (3) parking in a persons-with-disabilities spot without the proper placard or license plate. The extra assessment is to be used for special needs transportation programs. A court may reduce the assessment, but any reduction in any penalty or fine and assessment shall be applied proportionally between the penalty or fine and the assessment.

PROVIDING EDUCATION PROGRAMS FOR JUVENILES HOUSED IN ADULT JAILS

Chapter 226 (2SSB 6702)

Effective date: June 10, 2010

The extensive provisions of this act require that education programs be provided for juveniles housed in adult jails.

PROTECTING CHILDREN FROM SEXUAL EXPLOITATION

Chapter 227 (ESHB 2424)

Effective date: June 10, 2010

Amends RCW 9.68A.001, 9.68A.011, 9.68A.050, 9.68A.060, 9.68A.070, 9.68A.110, 9.94A.030, 9.94A.515, and 9.94A.535; also adds new sections to chapter 9.68A.RCW.

In part, the Final Bill Report summarizes the act as follows:

Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of the offense of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct (Viewing) if the person intentionally views over the

Internet visual or printed matter depicting a minor engaged in sexually explicit conduct. To determine whether a person intentionally viewed such depictions, the trier of fact must consider the following: the title, text, and content of the matter; Internet history; search terms; thumbnail images; downloading activity; expert computer forensic testimony; the number of depictions; the defendant's access to and control over the electronic device upon which the depictions were found; and the contents of the electronic device upon which the depictions were found. The government has the burden to prove beyond a reasonable doubt that the computer user initiated the viewing.

First and Second Degree Offenses and Units of Prosecution.

For the offenses of Dealing, Sending or Bringing into the State, Possession, and Viewing, a person is guilty of a first degree offense when the depiction involves intercourse, penetration, masturbation, sadomasochistic abuse, and defecation or urination for the purpose of the viewer's sexual stimulation. A person is guilty of a second degree offense when the depiction shows the genitals or unclothed pubic or rectal areas or breasts, or the touching of those areas, for the purpose of the viewer's sexual stimulation. The minor need not have known that he or she was participating in the depiction.

The unit of prosecution for Dealing, Sending or Bringing into the State, and Possession is per image for the first degree offenses and per incident for the second degree offenses. The unit of prosecution for Viewing is per Internet session, which is defined as a period of time during which an Internet user, using a specific Internet protocol address, visits or is logged into an Internet site for an uninterrupted period of time. Classifications of the crimes are established as follows . . . [list omitted from LED entry]

For the offense of Viewing, paying to view over the Internet depictions of a minor engaged in sexually explicit conduct is an aggravating factor that supports a sentence above the standard.

Affirmative Defenses.

It is an affirmative defense in a prosecution for a crime related to the depiction of a minor engaged in sexually explicit conduct that the defendant had written authorization to assist a law enforcement officer in an investigation of a sex-related crime against a minor and was acting at the officer's direction. It is an affirmative defense that the defendant was conducting research for an institution of higher education when the research was approved in advance and viewing or possession of the depictions was an essential component of the research. It is also an affirmative defense that the defendant was legislative staff conducting research requested by a legislator where viewing or possession of the depiction was an essential component of the research, and the research was directly related to a legislative activity. The act is not intended to impact the immunity of Internet service providers who are required by federal law to report child pornography.

Predatory Sex Offenses.

The definition of “predatory” includes a perpetrator who was a teacher, counselor, volunteer, or other person in authority providing home-based instruction where the victim was a student under the person’s authority or supervision. The definition excludes the victim’s parent or legal guardian.

PROTECTING RUNAWAY YOUTH

Chapter 229 (ESHB 2752)

Effective date: June 10, 2010

RCW 13.32A.082 is expanded to require unlicensed youth shelters or runaway and homeless youth programs to promptly report the location of the child to the parent, the law enforcement agency of the jurisdiction in which the person lives, or the Department of Social and Health Services (DSHS). Absent compelling reasons not to make the notification, licensed shelters must contact the youth’s parent, preferably within twenty-four hours, but in no event no later than seventy-two hours following the time that the youth is admitted to the shelter or other licensed organization’s program. Licensed shelters must also regularly check the WSP publicly available information to see if one of the youths they are housing is listed as missing. If so, a shelter must immediately notify DSHS of the shelter’s contact with the youth listed as missing.

RCW 43.43.510 is amended to allow the WSP to, at the request of a parent, legal custodian, or guardian who has reported a child as having run away from home or the custodial residence, make public information about a runaway child.

REVISING LAWS RELATING TO LICENSING AND PRACTICE OF “EAST ASIAN MEDICINE PRACTITIONERS” (FORMERLY KNOWN AS “ACUPUNCTURISTS”)

Chapter 286 (SSB 6280)

Effective date: June 10, 2010

This act amends many RCW provisions, primarily in Title 18 RCW, and adopts a new section in chapter 18.06 RCW. Most of the provisions affected relate to licensing, but there are continue to exist criminal sanctions for some violations of the licensing provisions.

The state’s professional designation of acupuncturist is changed to East Asian Medicine Practitioner (EAMP). Those who are currently licensed under Title 18 RCW as “acupuncturists” are to be granted the title of EAMP upon license renewal. In addition to the techniques and methods used by practitioners under the current law, an EAMP may lawfully use lancets, give dietary advice, use breathing, relaxation and exercise techniques, Qi Gong, health education, East Asian massage, Tui Na, hot and cold therapies, and make use of herbs, vitamins, minerals, and dietary and nutritional supplements.

It is clarified that individuals may provide the following techniques and services without being licensed as an EAMP: dietary advice and health education, breathing, relaxation, and East Asian exercise techniques, Qi Gong, East Asian massage, Tui Na, and superficial heat and cold therapies.

East Asian Medicine Practitioners are allowed to continue to treat a patient who has refused a consultation with a primary health care provider if the patient signs a waiver which includes: an explanation of the practitioner’s scope of practice, and a statement that the services that an East Asian Medicine Practitioner is authorized to provide will not resolve the patient’s underlying potentially serious disorder.

2010 WASHINGTON LEGISLATIVE UPDATE SUBJECT MATTER INDEX

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JUNE 2010 LED (PART TWO)

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NINTH CIRCUIT, U.S. COURT OF APPEALS

NO "EXCESSIVE FORCE" AND HENCE NO CIVIL RIGHTS ACT LIABILITY BECAUSE OFFICERS ACTED REASONABLY AND THEREFORE ARE ENTITLED TO QUALIFIED IMMUNITY IN RELATION TO THEIR USE OF A TASER IN "TOUCH/DRIVE-STUN" MODE ON A MISDEMEANANT ARRESTEE WHO WAS RESISTING ARREST

Brooks v. City of Seattle, 599 F.3d 1018 (9th Cir. 2010) (decision filed March 26, 2010)

Facts and Proceedings below: (Excerpted from Ninth Circuit majority opinion)

On November 23, 2004, [Officer A] stopped Brooks for speeding in a school zone. The situation deteriorated rather quickly. Brooks claimed she had not been speeding, took her driver's license out of [Officer A's] ticket book and only reluctantly gave it back, and then repeatedly refused to sign a Notice of Infraction ("Notice") regarding her speeding violation. **[LED EDITORIAL NOTE: In 2006, the Washington legislature amended the relevant statutes to remove the requirement that the recipient of a notice of infraction sign the notice. See Chapter 270 (HB 1650), Laws of 2006 May 06 LED:15].** When [Officer B] arrived at the scene, [Officer A] told him that Brooks had refused to sign the Notice and was being uncooperative. [Officer B] tried to obtain her signature himself, but Brooks also refused his entreaties, despite assurances that signing was not tantamount to admitting the violation. She accused [Officer B] of lying to her about the import of signing, suggested he was being racist, and became upset, repeating "I'm not signing, I'm not signing" over and over. Throughout, she remained in the car with the ignition running.

[Officer A] then called his supervisor, [Sergeant C]. When [Sergeant C] arrived, Brooks continued to refuse to sign the Notice. [Sergeant C] then asked her "if [she] was going to sign the ticket." When she refused, he told [Officers A and B] to "[b]ook her." They attempted to follow those orders.

Brooks refused to leave her car, remaining in it with the engine running and her door shut. [Officer B] then showed Brooks his Taser, explaining that it would hurt "extremely bad" if applied. Brooks told them she was pregnant and that she needed to use the restroom. The officers discussed where to tase her, deciding on her thigh. [Officer B] demonstrated the Taser for her. Brooks still remained in the car, so [Officer A] opened the door and reached over to take the key out of the ignition, dropping the keys on the floorboard.

[Officer A] then employed a pain compliance technique, bringing Brooks's left arm up behind her back, whereon Brooks stiffened her body and clutched the steering wheel in order to frustrate her removal from the car. [Officer B] discharged the Taser against Brooks's thigh, through her sweat pants, which caused Brooks "tremendous pain." She began to yell and honk the car's horn.

Within the next minute, [Officer B] tased her two more times, against her shoulder and neck, the latter being the only area of exposed skin. Brooks was unable to get out of the car herself during this time because her arm was still behind her back. The third tasing moved Brooks to the right, at which point [Officers A and B] were able to extract her from the car through a combination of pushing and pulling. She was immediately seen by medical professionals, and two months later delivered a healthy baby.

Brooks was charged with (1) violation of Seattle Municipal Code 11.59.090 for refusing to sign the Notice, and (2) resisting arrest. She was convicted of the first charge, but the jury hung on the second, which was later dismissed.

Brooks then filed this action [in federal court] against the Officers, asserting a [civil rights] claim under 42 U.S.C. section 1983 and assault and battery claims under state tort law for the alleged excessive force. The U.S. District Court denied the Officers' motion for summary judgment on those claims, finding a clearly established constitutional violation that deprived the Officers of qualified immunity on both the federal and state claims.

ISSUE AND RULING: The officers deployed the Taser in “touch” or “drive-stun” mode (not “dart” mode). The officers applied the Taser on a misdemeanor who was actively resisting arrest. They did so only after they had made considerable effort without success to get cooperation, and only after they had warned the increasingly confrontational suspect several times that non-cooperation would result in use of the Taser. Can the officers be held liable under the federal Civil Rights Act in these circumstances? (**ANSWER:** No, rules a 2-1 majority, because the officers acted reasonably and therefore did not use “excessive force” in violation of the Fourth Amendment)

Result: Reversal of U.S. District Court order denying summary judgment to the officers and to the City of Seattle.

Status: Time remains for Brooks to seek further review, either in the Ninth Circuit or in the U.S. Supreme Court.

ANALYSIS BY MAJORITY:

[INTRODUCTORY EDITORIAL NOTE: The majority opinion and dissenting opinions are lengthy. This relatively brief LED summary would best be followed up by reading the actual opinions, which are accessible at <http://www.ca9.uscourts.gov/>]

Where the government is seeking dismissal of a Civil Rights Action, the court’s review is limited to the question of whether, assuming all conflicts in the evidence are resolved in plaintiff’s (i.e., Brooks’s) favor, the Officers would be entitled to judgment as a matter of law.

The majority opinion has no difficulty determining that the officers had probable cause to arrest Brooks. The focus in the case is whether the officers are entitled to qualified immunity for use of the taser. The qualified immunity inquiry asks two questions: (1) was there a violation of a constitutional right, and, if so, then (2) was the right at issue “clearly established” such that it would have been clear to a reasonable officer that his or her conduct was unlawful in that situation? In this case, the majority opinion concludes that the Officers' actions do not amount to a constitutional violation under the Fourth Amendment’s prohibition on application of excessive force, and therefore the majority opinion does not need to reach the second question.

The inquiry into whether an arresting officer's use of force was reasonable under the Fourth Amendment requires attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether she is actively resisting arrest or attempting to evade arrest by flight; these factors are considered in relation to the amount of force used.

As to severity of the crime, the majority opinion notes that the Officers were attempting to take Brooks into custody for refusing to sign the Citation to Appear. Her behavior also gave the officers probable cause to arrest her for obstructing a police officer in the exercise of his official duties. Although obstructing an officer is a more serious offense than the traffic violations, it is nonetheless not a serious crime, the majority opinion acknowledges.

But Brooks did pose some immediate threat to the officers, the majority opinion explains. While she might have been less of a threat because her force up to the point of the use of the Taser had been essentially directed at immobilizing herself, a suspect who repeatedly refuses to comply with instructions or leave her car escalates the risk involved for officers unable to predict what type of noncompliance might come next. That Brooks remained in her car, resisting even the pain compliance hold the officers first attempted reveals that she clearly was not under their control.

Finally, there is little question that Brooks resisted arrest, the majority opinion explains. As the District Court noted in the proceedings below: she “does not deny that she used force to resist the [O]fficers’ efforts;” she grasped the steering wheel and wedged herself between the seat and steering wheel; and she refused to get out of the car when asked. Such conduct is classified as “active resistance.”

The majority opinion also notes that the officers gave multiple prior warnings that a Taser would be used. They also explained the Taser’s effects. Even though the Taser was used three times in this case, which constitutes a greater application of force than a single tasing, in light of the totality of the circumstances, this does not push the use of force into the realm of excessive in light of all of the circumstances, the majority opinion concludes.

The majority opinion explains that, while use of the Taser in “touch” or “drive-stun” mode is painful, such application is also temporary and localized, without incapacitating muscle contractions or significant lasting injury. This amount of force is more on par with pain compliance techniques, the majority opinion asserts. The Ninth Circuit has held in past cases that pain compliance techniques involve a “less significant” intrusion upon an individual’s personal security than most claims of force, even when the techniques cause pain and injury.

Ultimately, the Brooks majority opinion sums up that this case presents a less-than intermediate use of force, prefaced by warnings and other attempts to obtain compliance, against a suspect who while accused of a minor crime, was (1) actively resisting arrest, (2) becoming increasingly out of police control, and (3) posing some, though not great, immediate threat to the officers. Under these circumstances, the officers’ behavior did not amount to a constitutional violation, the majority opinion concludes.

The dissenting judge writes a long, impassioned opinion complaining that the force used by the officers was clearly excessive in light of all of the circumstances.

LED CROSS REFERENCE NOTE: For previous LED entries on taser use as alleged excessive force, see Bryan v. McPherson, 590 F.3d 767 (9th Cir. 2009) (decision filed December 28, 2009) Feb 10 LED:02; and Mattos v. Agarano, 590 F.3d 1082 (9th Cir. 2010) (decision filed January 12, 2010) March 10 LED:05.

WASHINGTON STATE COURT OF APPEALS

DIVISION ONE COURT OF APPEALS PANEL INTERPRETS POST-VALDEZ WASHINGTON VEHICLE SEARCH INCIDENT RULE TO PERMIT A SEARCH FOR MARIJUANA BASED ON ODOR FROM PASSENGER AREA; ALSO, STOP FOR NO HEADLIGHTS UNDER RCW 46.37.020 HELD JUSTIFIED BY REASONABLE SUSPICION AND HELD NOT PRETEXTUAL

State v. Wright, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1531484 (Div. I, 2010)

LED INTRODUCTORY EDITORIAL COMMENT: We expect that the “search incident” ruling in Wright will ultimately be reviewed by the Washington Supreme Court. We like Wright’s search incident ruling, but we question whether the ruling by the three-judge Court of Appeals panel is consistent with the Supreme Court decision in State v. Valdez, 167 Wn.2d 761 (2009) Feb 10 LED:11. The Wright decision by a three-judge panel of the Court of Appeals does, however, give us some hope that when the Washington Supreme Court reviews Wright (discretionary review seems inevitable), a majority of the Washington Supreme Court will join in an opinion:

(A) that reads along the lines of Justice Debra Stevens’ October 22, 2009 lead opinion for the majority in State v. Patton, 167 Wn.2d 379 (2009) Dec 09 LED:17, essentially equating the Washington constitution’s vehicle-search-incident rule with that of the Fourth Amendment under Arizona v. Gant, 129 S.Ct. 1710 (2009) June 09 LED:13;

and (B) that backs away from much of the restrictive, anti-search language of Justice Sanders’ December 24, 2009 lead opinion for the majority in Valdez.

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

At approximately 4:45 p.m. on November 26, 2007, [Officer A] stopped Roger Sinclair Wright for driving without headlights after sunset. **LED EDITORIAL NOTE:** As the Court of Appeals explains in the analysis portion of its opinion, this was 24 minutes after sunset. RCW 46.37.020 specifies that one alternative way to violate that statute is to operate a vehicle 30 minutes after sunset. But weather conditions can also be relevant, and the conditions at 4:45 p.m. on November 29, 2006 were dark and icy.] Before stopping the car, [Officer A] called for backup.

[Officer A] approached the car on the driver's side. Wright was the only occupant in the car. [Officer A] immediately smelled the "strong odor of marijuana" emanating from the car. Wright admitted that he did not "have on any lights and he was backing up around his dad's house illegally." Wright asked [Officer A] to give him a citation and let him go. [Officer A] said Wright appeared nervous and was physically shaking.

[Officer A] asked Wright twice for the vehicle registration. But each time Wright started to open the glove compartment, he retracted his hand. When Wright finally opened the glove compartment, [Officer A] saw a large roll of money. Wright quickly closed the glove compartment without retrieving the registration, and appeared even more agitated and nervous. [Officer A] said Wright was "moving his hand uncontrollably, and his eyes started to well up with tears."

[Officer A] arrested Wright for possession of marijuana. The police handcuffed Wright and placed him in the patrol car. Wright gave the officers permission to retrieve the registration from the glove compartment. As [Officer A] leaned into

the car to get the registration, he noticed the odor of marijuana was much stronger. After reading Wright his Miranda rights, [Officer A] asked why he smelled marijuana in the car. In response, Wright admitted smoking marijuana earlier but refused to answer any more questions.

[Officer A] requested the assistance of a K-9 drug unit with a drug-sniffing dog. After the dog alerted to the presence of drugs in the car, the police searched the car. The police recovered two baggies of marijuana and a prescription bottle of oxycodone in the console of the passenger compartment, and two baggies of marijuana and a scale in the back seat. The police later obtained a warrant to search the trunk of the car and found a large bag of marijuana, a small bag of marijuana, and a ziplock bag containing 250 pills of MDMA, a/k/a "Ecstasy".

The State charged Wright with possession of marijuana with intent to deliver and possession of MDMA with intent to deliver. Wright filed a CrR 3.6 motion to suppress his statements to the police and the drugs. Wright argued that [Officer A] was not justified in stopping him for driving without headlights. Alternatively, Wright argued that the stop was a pretext. Wright did not challenge the validity of the search incident to arrest.

[Officer A] was the only witness to testify at the CrR 3.6 hearing. The [superior] court denied Wright's motion to suppress. The court entered detailed findings of fact and conclusions of law. The court ruled that [Officer A] had reasonable suspicion to stop Wright for a traffic infraction and that based on the totality of the circumstances, the stop was not a pretext.

Wright waived his right to a jury trial. The court convicted Wright of possession of marijuana with intent to deliver and the lesser included offense of possession of MDMA.

ISSUES AND RULINGS: 1) Where the sun had set only 24 minutes before the stop, but where weather conditions on November 29, 2006 caused dark and icy early evening conditions, did the officer have reasonable suspicion to stop Wright for violating RCW 46.37.020? (ANSWER: Yes);

2) Does any evidence or any of Wright's speculation about possible motives that the officer might have had for the initial traffic stop support a conclusion that the stop was pretextual in light of a record that reflects that the officer had virtually no opportunity to form an ulterior motive for stopping Wright? (ANSWER: No);

3) Did the officer's detection of the odor of marijuana coming from the single-occupant vehicle give him probable cause to arrest the occupant? (ANSWER: Yes, in regard to the arrest of the single occupant, this is distinguishable factually from the circumstance in State v. Grande, 164 Wn.2d 135 (2008) **Sept 08 LED:07**, where the officer was held not to have probable cause to arrest a passenger in a multiple-occupant vehicle based on the odor of marijuana coming from the vehicle);

4) Where the suspect was arrested out of the vehicle for possessing marijuana, and the officers had at least a "reasonable suspicion" that there was marijuana in the vehicle, was the search-incident of the vehicle passenger area lawful under Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**, and State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**? (ANSWER: Yes)

Result: Affirmance of King County Superior Court convictions of Roger Sinclair Wright for 1) possession of marijuana, 2) possession of marijuana with intent to distribute, and 3) possession of Ecstasy.

Status: At LED deadline, time remained for defendant Wright to petition the Washington Supreme Court for discretionary review.

ANALYSIS:

1) Reasonable suspicion to stop for violating RCW 46.37.020

The Court of Appeals analyzes the RCW 46.37.020 reasonable suspicion issue as follows:

In general, a warrantless seizure violates both the state and the federal constitution. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:09**. An investigatory detention under Terry v. Ohio, 392 U.S. 1 (1968) is an exception. To justify an investigative stop under the Terry exception, a police officer must have a reasonable suspicion based on specific and articulable objective facts that the person stopped has been or is about to be involved in a crime. The reasonable suspicion standard is a lower standard than the probable cause standard. In evaluating the reasonableness of such a stop, a court must look to the totality of the circumstances known to the officer at the time of the stop.

Our courts have applied the Terry stop exception under the Fourth Amendment and article I, section 7 of the Washington State Constitution to stops incident to traffic infractions. State v. Duncan, 146 Wn.2d 166 (2002) **June 02 LED:19**. To be lawful, a traffic stop must be justified at its inception. Police may conduct a warrantless traffic stop if the officer has a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. Ladson.

Because the sun had set less than 30 minutes before the stop, Wright argues [Officer A] did not have a valid basis to stop him under RCW 46.37.020. [Court's footnote: *The sun set at 4:21 p.m. on November 29, 2006, 24 minutes before Wright's vehicle was stopped at approximately 4:45 p.m.*] RCW 46.37.020 provides:

Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernable at a distance of one thousand feet ahead shall display lighted headlights, other lights, and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles, and such stop lights, turn signals, and other signaling devices shall be lighted as prescribed for the use of such devices.

Wright relies on RCW 46.37.020 in an attempt to negate the lawfulness of the traffic stop. However, the question is not whether Wright actually violated the traffic code, but rather whether the facts and circumstances warranted the stop. The reasonableness of a stop under Terry only requires reasonable suspicion to believe Wright violated the traffic code. The undisputed evidence establishes

that it was dark, the weather was cold and icy, and Wright was driving without the headlights on. Under these circumstances, it was reasonable for [Officer A] to believe Wright had committed a traffic infraction. Even Wright admitted that he thought he had been stopped because he did not have the headlights on. Given the totality of the circumstances, [Officer A] was justified in making the traffic stop under Terry.

[Some citations omitted]

2) No pretext

The Court of Appeals analyzes the pretext issue as follows:

As an alternative argument, Wright contends that the traffic stop was a pretext for an unlawful search. A pretextual traffic stop occurs when an officer stop a vehicle, not to enforce the traffic code, but to conduct an investigation unrelated to driving. Ladson. Pretext stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations -- violations for which the officer does not have probable cause." A warrantless traffic stop based on pretext violates article I, section 7 of the Washington State Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law necessary to intrude upon a citizen's privacy interests. Ladson.

In determining whether a stop is pretextual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's conduct. If the court finds the stop is pretextual, all subsequently evidence obtained from the stop must be suppressed. Ladson.

Wright focuses on [Officer A]'s possible motivation for initiating the traffic stop. Noting that [Officer A] called for backup due to a "suspicious vehicle stop" and his testimony that the area where the stop occurred was known for car prowls and vehicle thefts, Wright argues that the real reason for the stop was to investigate suspicious criminal conduct, not to enforce the traffic code. But "patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as the enforcement of the traffic code is the actual reason for the stop." State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) **Nov 00 LED:08**. A stop is a pretext only "when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." State v. Nichols, 161 Wn.2d 1 (2007) **Sept 07 LED:10**.

The undisputed facts establish that [Officer A] initiated the stop based on his observation that the car headlights were not turned on even though it was dark and icy. And unlike the cases cited by Wright, the undisputed facts show that [Officer A] had virtually no opportunity to form an ulterior motive for stopping the car.

Wright also claims that the reason for the stop was because he was a "young African American" driving a late model Lexus. But according to the undisputed facts, [Officer A] could not see inside the vehicle prior to initiating the stop.

Substantial evidence supports the trial court's conclusion that Wright was stopped for having committed an apparent traffic violation, and not for purposes of conducting an unrelated criminal investigation.

[Some citations omitted]

3) Probable cause to arrest Wright based on smell of marijuana

On the PC-to-arrest issue, the Court of Appeals distinguishes this case factually from State v. Grande, 164 Wn.2d 135 (2008) **Sept 08 LED:07**, where the officer was held not to have probable cause to arrest a passenger in a multiple-occupant vehicle based on the odor of marijuana coming from the vehicle as the officer approached the vehicle. Here, where there was only one person in the vehicle, and the smell of marijuana was coming out of the vehicle, the officer had probable cause to arrest the single occupant. The Grande opinion is consistent with that probable cause ruling, the Wright Court explains.

4) Lawfulness of search of the vehicle incident to arrest under Gant, Patton and Valdez

In its decision in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, U.S. Supreme Court changed the course it had been following for the previous three decades and created a more restrictive Fourth Amendment rule for the trigger to vehicle searches incident to custodial arrest of a vehicle occupant. The **LED** summarized that new rule of Gant as follows in the June 2009 **LED** at page 21:

After officers have made a custodial arrest of a motor vehicle occupant - including searching the arrestee's person - and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may **automatically** search - without a search warrant and without need for justification under any other exception to the search warrant requirement - the passenger compartment of the vehicle and any unlocked containers in that compartment **if and only if** A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.

The Wright Court concludes that the search in this case meets the Gant test. The Court asserts that the "reasonable belief" standard of Gant is a "reasonable suspicion" standard, which was easily met by the officer's detection of a strong smell of marijuana when the officer entered the vehicle, following the arrest, with Wright's permission to retrieve the vehicle registration (indeed, the smell of marijuana provides probable cause both to arrest and to search in this context).

The Wright Court provides detailed discussion of the October 22, 2009 Washington Supreme Court decision in State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**. The Wright Court asserts that its search-incident ruling is consistent with Patton: "Here, unlike in Patton, the unchallenged facts establish [Officer A] had probable cause to arrest Wright for possession of marijuana and there was a nexus between his arrest, the crime or arrest, and the search of the vehicle."

The Wright Court notes that the defendant submitted a "statement of additional authorities" citing the December 24, 2009 Washington Supreme Court decision in State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**. The Wright Court states: "Valdez does not change our

analysis in this case.” Nothing in Wright, however, provides any analysis of Valdez or any explanation as to why the Court believes the search was lawful under Valdez.

LED EDITORIAL COMMENTS:

As always, we caution that our editorial comments express our personal views. We urge Washington law enforcement agencies to consult their own agency legal advisors and local prosecutors with any questions regarding Wright, Gant, Patton, and Valdez, as well as other cases we digest in the LED.

In the February 2010 LED, we noted that it had been suggested by some Washington commentators that, because in Valdez there was no evidence of the crime of arrest (where the arrest was on an arrest warrant), one can treat as dicta much of the discussion in Justice Sanders’ lead opinion for the Valdez majority. “Dicta” is discussion in an opinion that is not necessary to support the resolution of the case. Dicta is not binding precedent. What Justice Sanders’ majority opinion said about search incident to arrest under the Washington constitution would essentially eliminate searches incident to arrest where vehicles are concerned. We stated in the February 2010 LED that we hoped that in the near future some prosecutors would select some cases with good facts and make the “dicta” argument, urging an interpretation of the Washington constitution consistent with Gant’s reading of the Fourth Amendment. After all, that is what the Washington Supreme Court seemed to say in its decision two months prior to Valdez in Patton.

But we pessimistically said in the February 2010 LED that we thought that the “dicta” argument was unlikely to succeed with the current makeup of the Washington Supreme Court. Our guess was that the Washington Supreme Court would respond to the “dicta” argument with an assertion that the discussion in Valdez regarding differences between the Fourth Amendment and the Washington constitution’s article I, section 7 was central to the “independent grounds” ruling regarding the car search. In light of our pessimism, in the February 2010 LED we said that, using “strikeout” for deletions of language and underlining for new language of the rule to show how the Valdez decision had changed the Gant/Patton rule, the “new” Washington rule was as follows:

After officers have made a custodial arrest of a motor vehicle occupant – including searching the arrestee’s person – and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may automatically search the vehicle – without a search warrant and without need for justification under any other exception to the search warrant requirement – NEVER.

~~the passenger compartment of the vehicle and any unlocked containers in that compartment if and only if A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.~~

Now, after Wright, we are not so sure what the Washington rule is or ultimately will be. In what we think is almost a certainty of Washington Supreme Court review in Wright (or in another case that addresses the Wright decision), we expect that the prosecutor will

assert to the Washington Supreme Court that the Gant/Patton rule is the Washington constitutional rule, and that much of the language in Justice Sanders' lead opinion in Valdez is dicta.

SEARCH OF PERSON INCIDENT TO ARREST HELD LAWFUL AND NOT LIMITED UNDER THE RATIONALE OF RECENT CASE LAW LIMITING SEARCHES OF VEHICLES INCIDENT TO ARREST

State v. Johnson, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1611893 (Div. III, 2010)

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

On September 6, 2007, while on routine patrol, [a law enforcement officer] noted Ms. Johnson's vehicle on the highway and ran a routine check of the vehicle license plates. [The officer] noticed nothing suspicious about Ms. Johnson's vehicle. [The officer] was preparing to turn onto another highway when dispatch advised him that the registered owner's license was suspended. [The officer] then initiated a traffic stop as Ms. Johnson was pulling into a gas station parking lot. Ms. Johnson exited her vehicle with her purse and confirmed her identity as the registered owner of the vehicle.

[The officer] arrested Ms. Johnson for driving with license suspended in the third degree (DWLS), handcuffed her, and placed her in the back of his patrol car. [The officer] then searched her purse and vehicle incident to arrest. Ms. Johnson's purse contained a purple bag containing a glass pipe with burnt residue. The purple bag contained a blue, semi-transparent plastic container with two small baggies containing a white crystalline substance that field-tested positive for methamphetamine. [The officer] then advised Ms. Johnson she was also under arrest for possession of a controlled substance.

Ms. Johnson made a motion before the trial court to suppress the evidence on grounds that her arrest for DWLS was a pretext to search her. At the suppression hearing, on direct examination, [the officer] testified that he searched Ms. Johnson and the property she had on her, incident to arrest and according to department policy, to protect him from weapons and to prevent contraband from entering the jail. On cross-examination, [the officer testified:

A. A typical suspended stop is I stop the driver to determine if they are suspended, ask them to exit their vehicle, advise them they are under arrest; I place them in handcuffs, search them incident to arrest, and place them in the backseat of my patrol car.

Q. So you search them?

A. Yes, sir.

Q. Regardless of whether you're going to let them go?

A. I haven't made that determination yet.

Q. But you search them regardless of whether or not you're going to let them go?

A. Incident to arrest, yes, sir.

Q. All right. Now, you don't let them go when you find drugs on them, right?

A. No, sir.

Q. People you don't find drugs on, you let go?

A. I issue them a criminal citation and release them.

Q. Okay. You let them go. . . . You're looking to search them when you've stopped them for DWLS, right?

A. I search them incident to custodial arrest.

Q. That's part of your intent in stopping, is to search them, right?

A. No, sir. I stop them because they're committing a crime, and I arrest them for that crime.

Q. Okay. And you know that you're going to search them when you stop them?

A. That's part of procedure, yes.

Q. All right. So part of your intent when you pull someone over for driving with license suspended is to search them?

A. I - - I guess when you put it this - - that way, yes, I - -

Q. All right.

A. Search them incident to arrest.

[The officer] further testified:

Q. All right. Now, you're not just looking for weapons. You're looking for drugs; you're looking for any evidence of a crime that you might find, correct?

A. That's a full and complete search, sir.

Q. So is that a "yes"?

A. Searching a person incident to arrest is for searching that person for weapons and contraband if I do choose to take them to jail.

. . . .

Q. So you're . . . doing a full-blown I-want-to-find-something kind of search, right?

A. When I - - you search a person incident to arrest, yes, to make sure they don't - - something doesn't get by you in the backseat of your car.

[The officer] also testified that he searches incident to arrest for DWLS to look for Department of Licensing paperwork that confirms an arrestee knows their license is suspended, but admitted he needed no such evidence to cite or arrest Ms. Johnson. On redirect, [the officer] testified that it was jail policy to conduct a search of items taken to jail with a person in order to prevent contraband from entering the jail.

The trial court denied Ms. Johnson's motion to suppress and found her guilty of one count of possession of a controlled substance.

ISSUES AND RULINGS: 1) Does the record support the trial court's finding that the traffic stop was not pretextual, and does the trial court's finding support the trial court's conclusion of law that the traffic stop was not pretextual under State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:09**? (ANSWER: Yes and yes);

2) Was the search of Ms. Johnson's person incident to her arrest lawful in light of the vehicle search limitations imposed in the U.S. Supreme Court's interpretation of the Fourth Amendment in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**? (ANSWER: Arizona v. Gant does not limit searches of the person, as opposed to searches of vehicles, and the search here was a lawful search incident to Ms. Johnson's arrest)

Result: Affirmance of Spokane County Superior Court conviction of Shirley Ann Johnson for possession of a controlled substance.

Status: At LED deadline, time remained for defendant Johnson to petition the Washington Supreme Court for discretionary review.

ANALYSIS: (Excerpted from the Court of Appeals opinion)

1) Finding of fact and conclusion of law that there was no pretext

First, Ms. Johnson challenges the trial court's finding that "[t]here was no evidence presented to support the defendant's claim that she was stopped, placed under custodial arrest and/or searched incident to arrest in a law enforcement effort to discover evidence of a crime or contraband unrelated to the stop."

[The officer] repeatedly testified that his reason for stopping Ms. Johnson was the dispatch report that the license of the vehicle's registered owner was suspended. Furthermore, when viewing the testimony that Ms. Johnson emphasizes in context, the record indicates that [the officer's] intent to search Ms. Johnson was knowledge that he would search her incident to arrest and pursuant to department policy. Obviously, if drugs or other contraband were discovered incident to arrest, an officer would choose, as in this case, to retain custody of the arrestee. Finally, [the officer] repeatedly testified the purpose of the search was to prevent weapons and contraband from entering the jail.

Accordingly, substantial evidence supports the trial court's finding [of no pretext].

Second, Ms. Johnson challenges the trial court's conclusions that (1) she was lawfully arrested when her purse was searched, and (2) there is no evidence that the traffic stop was conducted for any pretextual reasons. . . . Ms. Johnson contends her arrest was a pretext to search for evidence of an unrelated crime and violated article I, section 7 of the Washington Constitution.

Warrantless searches and seizures are per se unreasonable and violate article I, section 7 of the Washington Constitution unless an exception applies. One such exception is a search incident to arrest. But an officer may not arrest a person as a pretext to search for evidence. Accordingly, "a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." . . . State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:09**. "A pretextual stop occurs when an officer stops a vehicle in order to conduct a

speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." If a stop is determined to be pretextual, all evidence following the stop must be suppressed.

To determine whether a traffic stop is a pretext for accomplishing a search, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." "To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code." "The Ladson court recognized that an officer's candid admission to pretextual conduct is more probative than the denial of the conduct."

Certain traffic offenses, such as driving with a suspended license in the first, second, and third degrees, are criminal offenses. State v. Reding, 119 Wn.2d 685 (1992) **Dec 92 LED:17** (citing Laws of 1979, 1st Ex. Sess., ch. 136, § 2, codified as RCW 46.63.020)); RCW 46.20.342. Accordingly, a police officer having probable cause to believe that a person has committed or is committing the offense of driving a vehicle while his or her license is suspended or revoked has authorization to place the driver under custodial arrest without a warrant. RCW 10.31.100(3)(e); State v. Gaddy, 152 Wn.2d 64 (2004) **Sept 04 LED:19**.

Police are not required to make a full custodial arrest for the crime of driving with a suspended or revoked license. Officers may opt instead to issue a citation and notice to appear in court. RCW 46.64.015; CrRLJ 2.1(b)(1).5 A citation and notice to appear releases a defendant on his or her personal recognizance after a noncustodial arrest has been made.

In State v. Pulfrey, 154 Wn.2d 517 (2005) **Aug 05 LED:09**, under facts almost identical to the facts in this case, our Supreme Court concluded the plain language of RCW 10.31.100, RCW 46.64.015, and CrRLJ 2.1, when read together, allows officers to arrest a person for DWLS and then exercise discretion to retain the person in custody or cite and release. The Pulfrey court stated:

[The Deputy] arrested people for driving while license suspended, as he is authorized to do, and then later discussed with them the possibility of release with a citation and promise to appear in court. In this case, the process was truncated by the discovery of methamphetamine, possession of which is a felony. This discovery eliminated the possibility of release.

If discretion may be exercised at some point after the arrest and any search incident to it, then we need not decide, and do not decide, whether officers must exercise discretion in every situation. It is enough [the officer] could have exercised that discretion after the arrest, as he said he often does, but did not need to after discovering evidence of a felony. Pulfrey. The court also concluded that the traffic stop did not violate Washington public policy. The Pulfrey court refused to consider the defendant's claim that his arrest violated article I, section 7 based on his failure to raise the issue at trial. Ms. Johnson raised this issue at trial and now asks this court to consider it on grounds that the traffic stop here was pretextual.

Most cases of pretextual traffic stops decided by this court follow the pattern of the arresting officer having a suspicion of non-traffic-related criminal activity and subsequently following an arrestee's vehicle until a traffic infraction occurs, initiating the stop, and discovering evidence of an unrelated crime during a search incident to arrest. The facts here do not fall within the classic pattern; the trial court found [the officer's] testimony credible, that he possessed no suspicions regarding Ms. Johnson's vehicle when he began following it. Likewise, [the officer] had probable cause of DWLS when he initiated the stop. Furthermore, the stop appears objectively reasonable since [the officer], lacking suspicions of erratic driving, was about to cease following Ms. Johnson's vehicle when he was informed that its registered owner's license was suspended; thus, giving him probable cause for the stop.

Accordingly, we conclude that the totality of the circumstances indicates that the traffic stop was not a pretextual stop in violation of article I, section 7.

2) Search incident of arrestee's person

Ms. Johnson contends her conviction must be reversed based on Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**. Rodney Gant was arrested for driving with a suspended license. Mr. Gant was handcuffed and locked in the back of the patrol car. Officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Gant.

The [Gant] court concluded that searching the vehicle violated the Fourth Amendment because Mr. Gant could not have accessed his car to retrieve weapons or evidence at the time of the search and the officers had no possibility of discovering offense-related evidence without conducting the search. The court stated that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant applies retroactively to all similarly situated defendants in Washington. State v. McCormick, 152 Wn. App. 536 (2009) **Nov 09 LED:21**.

Gant is not applicable here because Gant applies to warrantless searches of vehicles incident to arrest. Here, [the officer] contacted Ms. Johnson as she was exiting her car. Ms. Johnson exited the car with her purse. Ms. Johnson was arrested for driving with a suspended license, then her person was searched and she was handcuffed and placed in the officer's patrol car. The officer then searched the purse. The police did not obtain her purse by searching the vehicle. In Gant, the item was left inside the car, and the Supreme Court treated the search as a vehicle search.

The search here is not a vehicle search. A search incident to arrest is an exception to the warrant requirement. State v. Smith, 119 Wn.2d 675 (1992) **Dec 92 LED:04**. And a search incident to the arrest of a person may include those items that are immediately associated with the person. Smith. A search incident to arrest is valid under the Fourth Amendment (1) if the object searched was within the arrestee's control when he or she was arrested, and (2) if the events

occurring after the arrest but before the search did not render the search unreasonable. Smith.

Applying Smith here, the search was reasonable. Ms. Johnson exited her vehicle with her purse and confirmed her identity. She was arrested, placed in the back of the patrol car, and her purse was searched. The purse was in her control when she was arrested, and the search was not unreasonable.

In conclusion, we hold that the trial court did not err by denying the motion to suppress the evidence found in Ms. Johnson's purse. The search of the purse was proper.

[Some citations omitted]

EVIDENCE SUPPORTS MARIJUANA GROWER'S CONVICTION FOR POSSESSING MARIJUANA WITH INTENT TO DELIVER

State v. O'Connor, __ Wn. App. __, __ P.3d __, 2010 WL 961597 (Div. III, 2010)

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

Officers obtained a search warrant for Mr. O'Connor's home partly based on an informant's tip. There, officers found 131 marijuana plants in various stages of production, six and a half pounds of drying harvested marijuana, and a triple beam scale. One of the officers characterized the operation as sophisticated and "a nice grow." An officer testified that the purpose of the scale was, in his experience, to weigh controlled substances and not typically for personal use. The informant testified that Mr. O'Connor threatened him and requested \$50,000 from him for "lost" weed and attorney fees.

.....

The jury found Mr. O'Connor guilty . . . of . . . two drug charges.

ISSUE AND RULING: Where the marijuana grow operation was large and sophisticated, and there was a triple beam scale onsite, was the evidence sufficient to support O'Connor's conviction for possessing marijuana with intent to deliver? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court convictions of Sean Joseph O'Connor of manufacturing a controlled substance and possessing a controlled substance with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. An insufficiency claim admits the truth of the State's evidence and requires that all reasonable inferences be drawn in the State's favor and interpreted most strongly against the defendant. Circumstantial evidence is equally as reliable as direct evidence.

The elements of possession of a controlled substance with intent to deliver under RCW 69.50.401(1) are (1) unlawful possession (2) with intent to deliver (3) a

controlled substance. Intent to deliver may be inferred where the evidence shows both possession and facts suggestive of a sale. State v. Hagler, 74 Wn. App. 232 (Div. I, 1994) **Oct 94 LED:13**. Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. State v. Lopez, 79 Wn. App. 755 (Div. III, 1995) **April 96 LED:16**. At least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. Hagler (large amount of cocaine and \$342 sufficient to establish intent to deliver); State v. Lane, 56 Wn. App. 286 (1989) (one ounce of cocaine, large amount of cash, and scales).

Here, the large amount of marijuana, the sophistication of the grow operation, and the scale sufficiently support an intent-to-deliver inference to convict.

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DIVISION ONE OF THE WASHINGTON COURT OF APPEALS DISAGREES WITH DIVISION TWO AND WITH NINTH CIRCUIT OF U.S. COURT OF APPEALS ON APPLICATION OF A CASE-LAW-BASED GOOD FAITH EXCEPTION TO SUPPRESSION OF EVIDENCE – In State v. Riley, 154 Wn. App. 433 (Div. I, 2010), a three-judge panel of Division One of the Washington Court of Appeals rules by a 2-1 vote that, while a January 7, 2007 search of a vehicle incident to arrest on an arrest warrant violated the rules later announced in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**, and State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**, the evidence should not be suppressed because the officers acted in good faith reliance on the federal and state case law precedents in existence on January 7, 2007.

The majority opinion in Riley disagrees with the ruling of the Ninth Circuit of the U.S. Court of Appeals in U.S. v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) **Nov 09 LED:10**, which held that the exclusionary rule for the Fourth Amendment of the U.S. constitution does not include a case-law-based good faith exception. The majority opinion in Riley also disagrees with the ruling of Division Two of the Washington Court of Appeals in State v. McCormick, 152 Wn. App. 530 (Div. II, 2009) **Nov 09 LED:21**, which held that there is no such good faith exception under either the Fourth Amendment or article I, section 7 of the Washington constitution.

Result: Affirmance of King County Superior Court conviction of Donald Eugene Riley for methamphetamine possession.

Status: At LED deadline, time remained for defendant Riley to petition the Washington Supreme Court for discretionary review.

LED EDITORIAL COMMENT: In State v. Adams (Supreme Court Docket No. 82210-7), the Washington Supreme Court currently is reviewing the issue of whether the federal and Washington constitutions contain case-law-based good faith exceptions to exclusion of evidence.

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/].

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 own website at [<http://www.supremecourtus.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. 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. Click on "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 LED 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/>].

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]. 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 Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]
