



Law Enforcement

APRIL 2009

Digest

639th Basic Law Enforcement Academy – October 20, 2009 through March 5, 2009

President: Jacob Bement – Bellevue Police Department
Best Overall: Jason L. Day – Washington Department of Fish and Wildlife
Best Academic: Tay M. Jones – Redmond Police Department
Best Firearms: Michael C. Thompson – Renton Police Department
Tac Officer: Jeff Eddy – Renton Police Department

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**LAW ENFORCEMENT MEDAL OF HONOR PEACE OFFICERS MEMORIAL
CEREMONY IS SET FOR
FRIDAY, MAY 8, 2009 IN OLYMPIA AT 1:00 P.M.**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year’s ceremony will take place Friday, May 8, 2009, commencing at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus, which is adjacent to the Supreme Court Temple of Justice. This is the third year that the Medal of Honor

and Peace Officers Memorial ceremonies will be a combined program. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

UNITED STATES SUPREME COURT

FEDERAL STATUTE THAT BARS POSSESSION OF GUNS BY THOSE CONVICTED OF “A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE” DOES NOT REQUIRE THAT THE UNDERLYING MISDEMEANOR CRIME HAVE AS AN ELEMENT A DOMESTIC RELATIONSHIP BETWEEN THE PERPETRATOR AND THE VICTIM

U.S. v. Hayes, 129 S.Ct. 1079 (2009)

Facts and Proceedings below: (Excerpted from summary provided by the Reporter of Decisions; the summary is not part of the Court’s opinion)

In 1996, Congress extended the federal Gun Control Act of 1968's prohibition on possession of a firearm by convicted felons to include persons convicted of “a misdemeanor crime of domestic violence,” 18 U.S.C. § 922(g)(9). Responding to a 911 call reporting domestic violence, police officers discovered a rifle in . . . Hayes's home. Based on this and other evidence, Hayes was charged under §§ 922(g)(9) and 924(a)(2) with possessing firearms after having been convicted of a misdemeanor crime of domestic violence. The indictment identified as the predicate misdemeanor offense Hayes's 1994 conviction for battery against his then-wife, in violation of West Virginia law. Hayes moved to dismiss the indictment on the ground that his 1994 conviction did not qualify as a predicate offense under § 922(g)(9) because West Virginia's generic battery law did not designate a domestic relationship between aggressor and victim as an element of the offense. When the District Court denied the motion, Hayes entered a conditional guilty plea and appealed. The Fourth Circuit reversed, holding that a § 922(g)(9) predicate offense must have as an element a domestic relationship between offender and victim.

ISSUE AND RULING: Does 18 U.S.C. § 922(g)(9) prohibit possession of a firearm by a person previously convicted of misdemeanor battery against his then-wife even though the misdemeanor statute under which he was convicted did not have as an element a domestic relationship between the perpetrator and the victim? (ANSWER: Yes)

Result: Reversal of Fourth Circuit U.S. Court of Appeals decision that set aside the U.S. District Court conviction of Randy Edward Hayes for possessing a firearm after having been convicted of a misdemeanor crime of domestic violence.

ANALYSIS: (Excerpted from summary provided by the Reporter of Decisions)

The definition of “misdemeanor crime of domestic violence,” contained in § 921(a)(33)(A), imposes two requirements. First, the crime must have, “as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.” § 921(a)(33)(A)(ii). Second, it must be “committed by” a person who has a specified domestic relationship with the victim. The definition does not, however, require the predicate-offense statute to include, as an element, the existence of that domestic relationship. Instead, it suffices for the Government to charge and prove a prior conviction that was, in fact, for “an offense . . . committed by” the defendant against a spouse or other domestic victim.

BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) NINTH CIRCUIT 3-JUDGE PANEL REVERSES ITSELF AND HOLDS OFFICERS HAD QUALIFIED IMMUNITY FROM CIVIL RIGHTS ACT LIABILITY IN ARREST OF PERSON WHO PASSED WHAT APPEARED TO BE A COUNTERFEIT BILL – In Rodis v. City and County of San Francisco, __ F.3d __, 2009 WL 579510 (9th Cir. 2009) (decision filed March 9, 2009), a 3-judge panel rules for law enforcement in reversing the same panel’s earlier decision that held unconstitutional the arrest of a man suspected of passing a counterfeit bill (the earlier decision was reported in the **April 2008 LED** starting at page 10).

The case involves a Civil Rights Act lawsuit under 42 U.S.C. section 1983. The lawsuit arose out of officers’ arrest of a man who passed a suspicious-looking \$100 bill that officers initially thought was counterfeit, but which turned out to be legitimate. In its earlier decision, the 3-judge panel held that the officers did not have probable cause for the counterfeiting arrest because they did not have any information specifically bearing on the suspect’s *knowledge* that the bill passed was counterfeit. On reconsideration, the panel notes that five other federal circuit courts have addressed similar facts. Each of those other circuit courts has held that if officers have probable cause, as in this case, to believe a suspicious-looking note is counterfeit, they have probable cause to arrest the person who passed the note even if the officers have no specific information bearing on the bill-passer’s knowledge of the character of the bill. The 3-judge panel concludes unanimously that the arrest in this case meets the Civil Rights Act standard for qualified immunity, which requires extension of qualified immunity where officers did not violate “clearly established” law in making an arrest.

Result: Reversal of U.S. District Court (Northern District of California) order that denied qualified immunity to the law enforcement officers; case remanded for entry of judgment for the officers and for the San Francisco Police Department.

(2) PAYTON RULE REQUIRING WARRANT BEFORE OFFICERS MAKE FORCIBLE ARREST FROM RESIDENCE HELD NOT APPLICABLE TO 12-HOUR STANDOFF BECAUSE FOR STANDOFFS EXIGENCY IS DEEMED TO EXIST FROM START TO FINISH – In Fisher v. City of San Jose, __ F.3d __, 2009 WL __ (9th Cir. 2009) (decision filed March 9, 2009), an 11-judge panel of the Ninth Circuit votes 6-5 to reject a 3-judge panel’s prior 2-1 ruling in a Federal

civil rights lawsuit (the 3-judge panel's 2-1 decision was reported in the **March 2007 LED** beginning at page 11). The earlier ruling that is rejected by the 11-judge panel was that, in order to make a lawful arrest of a heavily-armed, drunk, erratic, belligerent, barricaded man, City of San Jose police officers were required to first obtain an arrest or search warrant at some point during the 12-hour standoff.

The earlier ruling of the 3-judge panel concluded that, while circumstances were exigent when police first arrived to deal with the barricaded man, the exigency dissipated and ceased to exist at some point during the standoff. Under Payton v. New York, 445 U.S. 573 (1980), unless an exception to the search warrant requirement applies, officers need an arrest warrant or a search warrant to forcibly arrest a person from his or her home. The majority opinion of the 11-judge panel rejects the 3-judge panel majority's dissipation-of-exigency analysis. The new decision concludes as a broad, general principle that the exigency that exists at the start of a standoff must be deemed to continue to exist throughout the standoff regardless of whether the police get matters under relative control during the course of the standoff.

Judge Richard Tallman is the author of the majority opinion for the 11-judge panel. The introduction to the majority opinion summarizes the lengthy opinion as follows:

We address the Fourth Amendment's exigent circumstances doctrine in the context of armed standoffs. Steven Fisher triggered a standoff with San Jose police after he pointed a rifle at a private security guard who was investigating loud noises at Fisher's apartment complex. When the police arrived at his apartment, a noticeably intoxicated Fisher pointed one of his eighteen rifles at the officers and threatened to shoot them. The ensuing standoff last more than twelve hours and ended peacefully when Fisher finally emerged and allowed himself to be taken into custody. We hold that Fisher's civil rights were not violated when police arrested him without a warrant.

Fisher and his wife sued under 42 U.S.C. section 1983 naming the City of San Jose, its police department, and several of its officers (collectively, "police"). The suit alleged, among other claims, that police violated Fisher's Fourth Amendment right to be free from unreasonable seizure by arresting him in his home without a warrant. The case went to trial, and the jury found that exigent circumstances excused the need for a warrant. The district court nonetheless granted Fisher's renewed motion for judgment as a matter of law, holding that no reasonable jury could have found that there was insufficient time to obtain a warrant [during the standoff]. The police appeal.

We consider whether sufficient evidence supports the jury's verdict. We believe so, and in reaching this conclusion, we take the opportunity to clarify our jurisprudence relating to the Fourth Amendment's application to armed standoffs. **We hold that, during such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.** We therefore reverse the district court and remand with directions to reinstate the jury's verdict and enter judgment in favor of the police.

[Footnote omitted; bolding added]

There are two dissenting opinions, both complaining that at some point in the standoff the officers should have contacted a judge to get an arrest warrant.

Result: Reversal of U.S. District Court (Northern District of California) order (1) that overturned a jury verdict for the officers and San Jose Police Department, and (2) that held as a matter of law that the law enforcement officers had violated the rights of Fisher in not obtaining an arrest warrant during the standoff; case remanded for entry of judgment for the officers and for the San Jose Police Department.

WASHINGTON STATE COURT OF APPEALS

WHERE UNCLE WAS OUTSIDE THE HOTEL ROOM HE WAS SHARING WITH HIS NEPHEW WHEN UNCLE COMPLAINED TO POLICE ABOUT THE NEPHEW, COMMUNITY CARETAKING EXCEPTION TO CONSTITUTIONAL WARRANT REQUIREMENT DID NOT SUPPORT FORCIBLE POLICE ENTRY OF ROOM, ALSO, UNCLE'S CONSENT DID NOT SUPPORT ENTRY BECAUSE NEPHEW'S CONSENT WAS ALSO REQUIRED

State v. Williams, ___ Wn. App. ___, 201 P.3d 371 (Div. II, 2009)

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

On March 13, 2007, [officer A] responded to a 911 call about a disturbance at a local hotel. As he pulled into the parking lot, Cledale Graham approached him and said that his nephew, Williams, was "being violent" with him and that he wanted Williams removed from his hotel room. He added that his nephew was on parole for a crime committed in California. [Officer A] called for additional assistance from [officer B], and the two officers walked to Graham's hotel room with him. One of the officers knocked on the door.

An individual, later identified as Williams, opened the door. Williams's left hand was behind the partially-opened door and not visible to the officers. [Officer A] asked Williams to show his hand. The officers heard the sound of an object dropping behind the door and Williams brought his left hand into view. Williams then backed up, and the officers and Graham walked into the hotel room. *[Court's footnote: At the CrR 3.6 hearing, [officer A] testified that the officers walked into the room with Graham; [Officer B] testified that Graham entered first and gave the officers permission to enter. The trial court's findings of fact do not indicate whether Graham gave the officers permission to enter. No findings of fact support that Williams gave officers permission to enter, and the State did not argue that Williams gave permission.]* The officers had Williams sit down.

[Officer B] asked Williams his name and Williams said his name was Leo. [Officer B], however, was suspicious because (1) Graham had identified his nephew as Williams, (2) "there are very few black males named Leo," and (3) [officer B] saw a luggage tag with the name "John Williams" on it in the hotel room. Williams could not give [officer B] the year of his birth. [Officer B] searched records for "Leo" and did not find anything, but he did find a criminal history for a person named John Williams. At some point during this discussion, [officer B] advised Williams that he was under arrest and handcuffed him.

While the officers were trying to identify Williams, [officer B] looked around the room and saw steel wool on a dresser. *[Court's footnote: [Officer B] testified that he looked around the room before the arrest and searched it post-arrest.]* He testified that steel wool is often used as a filter in drug smoking devices. He then peered into a partially opened dresser drawer and saw what he believed to be rock cocaine. A search of the room post-arrest revealed rock cocaine in the dresser, a glass smoking tube behind the door, and \$1,700 in cash.

At some point during this process, [officer A] walked outside the hotel room with Graham. Graham told him that Williams had assaulted him and had broken his jaw. [Officer A] returned to the hotel room and learned that [officer B] was waiting for a K-9 unit to assist with the hotel room search. The K-9 unit swept the room and the officers transported Williams to the jail. During a later search at the jail, an officer found two crack pipes on Williams.

The State charged Williams with one count of unlawful possession of cocaine. *[Court's footnote: After a CrR 3.5 hearing, the State added a second count of possession for cocaine discovered on Williams at the Kitsap County Jail and later added a third count to address cocaine Williams dropped behind the door of the hotel room. It further amended the information a final time, correcting certain dates.]* He moved to suppress the evidence seized at the hotel room. After a CrR 3.6 hearing, the trial court entered findings of fact and conclusions of law. It concluded that the community caretaking function allowed the officers to enter the room.

In addition, the trial court found that the officers did not seize Williams when they initially asked him for identification. It found that Terry v. Ohio, 392 U.S. 1 (1968), justified the officer's request for Williams to sit in a chair. Finally, it concluded that the officers had probable cause to arrest Williams for making a false statement, and they properly searched the hotel room incident to the legal arrest.

A jury found Williams guilty on all counts.

ISSUES AND RULINGS: 1) Officers had probable cause to believe that the nephew had earlier assaulted the uncle. When officers arrived at the scene, there was no one other than the nephew inside the hotel room that the nephew was sharing with the uncle. There was no evidence that the nephew was a present danger to himself or others. Does the "community caretaking function" exception to the constitutional search warrant requirement apply to justify the officers' entry of the room without a search warrant? (ANSWER: No, rules a 2-1 majority)

2) Where the nephew in the shared room was not asked by police for consent to enter the room, could the uncle, who was outside the room, give consent for police entry of the room? (ANSWER: No, rules a 2-1 majority)

Result: Reversal of Kitsap County Superior Court convictions of John Lee Williams for three counts of unlawful cocaine possession.

Status: The prosecutor has requested discretionary Washington Supreme Court review. It will likely be at least six months before the Supreme Court decides whether to grant review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Community caretaking function

The trial court primarily relied on State v. Jacobs, 101 Wn. App. 80 (Div. II, 2000) **Nov 00 LED:15**, in concluding that the officers could legally enter the hotel room without a warrant. The [community caretaking] exception set out in Jacobs, provides that officers may enter a residence if

(1) the officers subjectively believed that someone inside might need medical assistance; (2) a reasonable person in the same situation would have similarly believed that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched in light of the preceding 911 domestic violence call.

A proper community caretaking function and the related emergency aid exception are separate from a criminal investigation. Where an officer's primary motivation is to search for evidence or make an arrest, the caretaking function does not create any exception to the search warrant requirement.

With respect to the entry here, the trial court ruled

they had the requirement to go to the door and to start a community caretaking process, which would allow them to enter the room. . . .

It doesn't matter to this Court whether or not Mr. Graham offered consent or was asked for consent. In my opinion, the police officers did not need consent at that point. And, indeed, for the safety and protection of individuals, frequently, there may be other events going on, that an individual may have to say things or not give consent, because there may be hostages, there may be other events. They have to assume, given a domestic violence situation, assaultive behavior, that they have to go in and check the premises. In light of the behavior at the door, the entry was lawful in my opinion.

Two cases, Jacobs and State v. Menz, 75 Wn. App. 351 (Div. II, 1994) **Feb 95 LED:17**, illustrate that officers do not need to know that an alleged victim is inside a residence with an alleged attacker in order to justify a warrantless entry. In Jacobs, the victim previously obtained a no-contact order against the defendant. One morning, the victim made a 911 call but called back to say he did not need assistance. Officers approached the residence and saw the victim leave the house, enter it, and leave again. The victim came to the front gate and appeared intoxicated. He told the officers that the defendant "was beating" him but also stated that the defendant had left. The victim did not want the police to enter, but an officer told the victim that she was worried that other people were in the house and might be injured. The officer entered the house and saw the

defendant. She arrested him for violation of the no-contact order. The opinion in Jacobs noted that the entry was justified.

In Menz, officers responded to a domestic violence call. They saw the front door to the residence open and heard a television on. They knocked and announced, but no one came to the door. They then entered to make sure that any occupants were safe. They found marijuana plants growing in a bedroom. Again, the trial court held that the entry justified.

With these cases in mind, we address the three factors necessary to allow warrantless entry under the community caretaking/emergency aid exception. The first factor requires officers to subjectively believe that they need to enter the residence to provide medical assistance. The trial court's factual findings reference that Graham stated to the officers that Williams had been violent and that the officers had no reason to disbelieve Graham. It concluded that the officers had the right to accompany Graham to the room to speak with Williams. It added that the community caretaking exception also allowed officers to enter the hotel room. Missing from the factual findings, conclusions of law, and testimony of the officers, however, is any indication that before entering, officers actually believed that someone inside the hotel room might need medical assistance or be in danger.

The State essentially admits that this was not the case by arguing that the officers could use the community caretaking function to remove Williams from the hotel room or to ensure Graham's safe re-entry into the room. It argues by example that unless the exception applied, "where a homeowner reported a burglar or violent guest in his or her home, if the homeowner sought refuge at a neighbor's before the police arrived, the police would be powerless to immediately enter the home at the owner's request to ensure the owner's safe reentry." It relies on cases other than Jacobs and Menz that restate the relevant factors in slightly broader terms to include not only risks to health but also safety: 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.

Even under the first factor, . . . to affirm the trial court's conclusion that the officers' warrantless entry into the hotel room in this matter, we would have to take a broader view of the emergency aid exception than current cases support. The Washington cases applying the exception, even Jacobs and Menz, contain some evidence to support that the officers believed they needed to enter a residence because of an ongoing risk to the health or safety of someone inside the residence. Menz, the case in which officers arrived at a house with the door open and the television on, states, "The officers testified that they subjectively believed someone in the home might need help." In Jacobs, the case in which the victim met the officers outside the residence, an officer stated to the victim that "she 'felt obligated to check his residence . . . to briefly look inside to make sure that no one was inside bleeding, hurt, or anything like that.' "

. . .

Here, the findings of fact and the officers' testimony do not indicate any concern that somebody inside the hotel room was in immediate danger. Graham never stated that any person other than Williams was in the hotel room or had traveled with them to the hotel. Moreover, unlike a larger residence in which victims could be located far from the front door, much of the hotel room was visible to the officers when Williams opened the door. This case, therefore, fails to satisfy the first prong of the emergency aid exception.

The State also argues that because this matter involved domestic violence as defined in RCW 10.31.100(2)(c), the officers acted lawfully in entering the room. RCW 10.31.100(2)(c) allows an officer to effect a warrantless arrest if he or she has probable cause to believe that a person 16 years or older, within the preceding four hours, assaulted a family member and caused bodily injury, even if not visible to the officer, or caused that person to fear imminent serious bodily injury or death. The definition of "family member" includes an adult uncle and an adult nephew. RCW 10.99.020(3) (also includes "adult persons related by blood or marriage").

The record, however, lacks sufficient support that any alleged assault occurred within four hours prior to Graham's 911 call. RCW 10.31.100(2)(c). The trial court found that "Graham told Officer [officer A] that John Williams, the defendant, was being violent, had assaulted him, had stolen money from him and was threatening him." Graham stated that "the defendant had punched him in the jaw on the way up from California." The trial court added during the CrR 3.6 hearing that "given a domestic violence situation [and] assaultive behavior, . . . they have to go in and check the premises." Therefore, while the record supports that Williams had been violent to Graham at some point, but there is no indication when any assault occurred.

Another factor that indicates the officers did not believe RCW 10.31.100(2)(c) applied is that, although they testified they had probable cause to arrest Williams for making a false statement, no one testified regarding probable cause to arrest for domestic violence/assault. Moreover, the State's reliance on the community caretaking exception is directly at odds with a position that officers could enter the hotel room to effect a warrantless arrest. As noted, a proper community caretaking function and the related emergency aid exception cannot overlap with a search performed during a criminal investigation. Where an officer's primary motivation is to search for evidence or make an arrest, the caretaking function does not create any exception to the search warrant requirement.

Consent

Another potential means to legalize the entry is to find that Graham invited the officers to enter the hotel room. . . . Consent to a search by one having the authority to give such consent constitutes one exception to the warrant requirement. "Where two persons have equal right to the use or occupancy of the premises, either one can authorize a search." But where both persons are present,

[w]e have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent. State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**. We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

State v. Morse, 156 Wn.2d 1 (2005) **Feb 06 LED:02**. [*Court's footnote: The dissent believes that Graham had the sole right to occupy the premises and consent to the search because he paid for the hotel room. The record, however, supports that both men had common authority over the hotel room: Graham and Williams were traveling long distances together and both stored personal effects in the hotel room. As set out in United States v. Matlock, 415 U.S. 164 (1974), common authority is established by "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right."* Moreover, although the parties do not address it, Williams may also have automatic standing to object to the search. State v. Jones, 146 Wn.2d 328 (2002). **July 02 LED:11.**] Consequently, even had Graham consented to the entry, the officers did not ensure that Williams validly consented as well. As a result, we cannot conclude that the officers acted legally in entering the hotel room. Cf. State v. Raines, 55 Wn. App. 459, 462, 778 P.2d 538 (1989) (addressing whether homeowner gave implied waiver of right to exclude officers).

[Some footnotes and citations omitted]

DISSENT:

Judge Robin Hunt dissents strenuously. On the consent issue, the salient part of her analysis is as follows:

To qualify as a cohabitant for purposes of common authority, a person must possess equal control over the premises. Morse (citing State v. Thompson, 151 Wn.2d 793 (2004) **Aug 04 LED:13**). Here, the record shows that Williams did not possess equal control over the motel room.

The facts giving rise to consent to enter here differ from cases in which officers initiate contact at a home or apartment, for example, and then ask the occupant(s) for consent to enter. Here, the officers did not initiate contact; rather, it was the victim who called 911 and summoned the officers to the motel. Washington courts have found equal control and common authority in cases where all cohabitants were signatories on the premises lease, State v. Leach, 113 Wn.2d 735 (1989), and where a married couple jointly occupied the premises, State v. Walker, 136 Wn.2d 678 (1998) **Jan 99 LED:03**. In contrast,

our courts have not found equal control and common authority where a son was living on only a portion of his parents' property and did not pay rent. Thompson.

Unlike the cohabitants in Leach and Walker, Williams was neither a signed registrant for Graham's motel room nor the spouse of the sole registered inhabitant, Graham. In addition, like the son in Thompson, Williams had not paid for the motel room. Rather, at best, Williams was inside Graham's motel room only at Graham's earlier invitation, which invitation Graham had terminated. Therefore, Williams was not a cohabitant of the motel room, nor did he possess equal control/authority over it. As a result, Williams' consent to the search of Graham's room was unnecessary. In other words, lack of Williams' consent did not vitiate Graham's invitation and consent for the officers to enter his (Graham's) motel room to help evict his assaultive, thieving, out-of-control nephew. Accordingly, I would affirm the trial court's denial of Williams' motion to suppress the evidence based on the consent exception to the warrant requirement.

[Some citations omitted]

On the community caretaking issue, she provides a lengthy explanation of her disagreement with the majority. Among other things, she notes:

With all due respect to my learned colleagues, their majority holding prevents Graham and persons similarly situated from seeking police intervention to remove a violent transient guest from the victim's motel room. Williams had repeatedly assaulted Graham, had stolen from Graham, and continued to behave violently toward Graham. Graham needed to enter his motel room to sleep, but could not do so with Williams remaining inside in his volatile state. Rather than resorting to "self-help" to extract Williams from his motel room so that he (Graham) could reenter safely, Graham did "the right thing" by summoning help from the police. Under the circumstances here, "self-help" likely could have resulted in additional violence, contrary to the legislature's intent in enacting the domestic violence statute, former RCW 10.31.100(2)(c).

LED EDITORIAL COMMENT:

This is a debatable ruling, and we think that there is a good chance that the Washington Supreme Court will accept review on the community caretaking function question. We think the State's arguments are solid. But we do not think it matters to the analysis in this case whether the prior alleged assaults by the nephew were domestic violence assaults or whether the assaults occurred within the four hours immediately preceding the police contact with the uncle. In our view, the four-hour rule of RCW 10.31.100(2)(c) mandating arrest for DV crimes within the preceding four hours does not matter in relation to the community caretaking function justification (or any other justification) for forced entry. We believe that officers cannot lawfully force entry to a premises without an arrest or search warrant where the only justification is that the perpetrator, who is believed to now be alone inside, and who is not believed to be a present danger to himself or others, committed DV assault within the preceding four hours. But this is just our view, and we recognize that no published Washington appellate decision has squarely addressed this question involving (1) RCW 10.31.100(2)(c) and (2) entry of a residence to arrest. As always, we note that our comments are only our own informal thinking, and that law enforcement officers and agencies may wish to consult their legal

advisors and local prosecutors on this and other thorny search and seizure questions.

SEARCH UNDER WARRANT UPHELD: WARRANT'S DESCRIPTION OF SHED WAS ADEQUATE, AND THE INFORMANT-BASED PROBABLE CAUSE TEST WAS MET

State v. Danielson, __ Wn. App. __, __ P.3d __, 2009 WL 313331 (Div. II, 2009)

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

Acting on an informant's tip, Detective Tim Boardman, a deputy sheriff with the Clark County Skamania Drug Task Force, requested a warrant to search a Vancouver residence that was reportedly involved in the manufacture and sale of methamphetamine. The informant told Detective Boardman that he/she had observed the following items inside the residence: (1) methamphetamine; (2) numerous people consuming methamphetamine; (3) five or six drug transactions; and (4) multiple scales, packaging material, and drug paraphernalia. The informant had previously aided law enforcement with a controlled buy of illegal drugs.

After meeting with the informant, Detective Boardman went to a trailer park abutting the residence to gather additional information for the warrant affidavit. Detective Boardman incorporated his observations into the affidavit, describing the geographic, structural, and aesthetic characteristics of the property, which included a mobile home unit, a storage shed, a carport awning, and a fenced-in yard. From Detective Boardman's vantage point, the mobile home and storage shed appeared "like all one building."

Defendants Alan Brewer and Melissa Danielson lived as co-tenants on this property, which they rented from neighbor Tantum Thorp; the lease agreement listed Brewer as the tenant. On June 13, 2006, the superior court issued a search warrant for the residence. The search warrant provided the following description of the property to be searched:

A white mobile home with green trim and an adjacent shed with a gray tarp covering the roof and the front of the shed. The mobile home is located down a gravel drive that runs east to west from 131st Ave. There is a mail box on the south side of the driveway entrance that reads 5910. The home has a specific address of 5910 NE 131st Ave, Vancouver Clark County Washington.

While searching the mobile home, law enforcement found pseudoephedrine, coffee filters, hot plates, and plastic tubing, all of which appeared to be used for manufacturing methamphetamine. The officers also found 2.4 grams of methamphetamine in crystalline form, instructional literature for manufacturing methamphetamine, and financial documents identifying both defendants by name.

Danielson then pointed out the window and told Detective Boardman to look in an adjacent storage shed. The shed, a small, four-sided structure, stood adjacent to the mobile home unit, mere inches away from the mobile home's outer wall; wiring and nails connected the shed to the mobile home's wall. Danielson led Officer Josanna Hopkins to the shed and gestured toward a red

suitcase. Inside the red suitcase, Officer Hopkins found “lab equipment,” including flasks, tubing, matchbooks, red phosphorous, and iodine.

The State charged both Brewer and Danielson with [several controlled substances crimes.]

...

Defendants moved to suppress all evidence seized during the warrant execution. The trial court denied this motion, ruling that the warrant had sufficiently identified the mobile home and adjacent storage shed as places to be searched and that the officers had acted within the scope of the warrant while conducting the search.

...

The jury found both Defendants guilty on all counts.

ISSUES AND RULINGS: 1) Under the Fourth Amendment of the U.S. constitution, did the search warrant provide a sufficiently accurate and detailed description of the shed? (**ANSWER:** Yes);

2) Did information about the confidential informant meet the two-pronged test (credibility plus first-hand basis of information) for informant-based probable cause? (**ANSWER:** Yes)

Result: Affirmance of Clark County Superior Court convictions of Alan Gene Brewer and Melissa Rene Danielson for several controlled substances crimes; several sentence enhancements, resulting in 124-month sentences for each defendant, are also affirmed (the sentencing issues are not addressed in this **LED**).

ANALYSIS: (Excerpted from Court of Appeals opinion)

Particularity standard generally

The Fourth Amendment to the United States Constitution requires that a search warrant describe “with particularity” the place to be searched and the person or things to be seized. Generally, “[a] warrant is sufficiently particular if it identifies the place to be searched adequately enough so that the officer executing the warrant can, with reasonable care, identify the place intended.” A perfect description is not required.

Warrant’s description of the shed

The search warrant here described Defendants' mobile home, the storage shed, and other home areas with sufficient particularity to justify the scope of the search. The warrant included a description of the storage shed as part of Defendants' property, describing the property to be searched as a “white mobile home with green trim and an adjacent shed with a gray tarp covering the roof and the front of the shed.” Additionally, both Detective Boardman and the property's owner, Tantum Thorp, Defendants' landlord, described the shed as a part of Defendants' mobile home unit.

The adjacent shed appeared to be part of Defendants' mobile home residence both (1) when Detective Boardman procured and the superior court issued the search warrant and (2) at the time of the pretrial suppression hearing when the

trial court considered the legality of the warrant and the search. The issue of whether the adjacent shed was actually attached to the mobile home, or technically separated by mere inches, did not arise until later at trial when the State introduced Exhibit 36, a photograph that showed a slight space between the mobile home's outerwall and the adjacent shed. Thus, when the officers executed the search warrant, they understood the adjacent shed to be part of the mobile home described in the warrant, as did the mobile home's owner.

Thus, we hold that the search warrant described the shed with sufficient particularity.

Informant-based probable cause

Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that the evidence of the crime can be found in the place to be searched. "Probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched."

Here, the warrant affidavit established adequate probable cause. The affidavit explained that the informant was credible and reliable, because the informant had previously aided law enforcement with a controlled buy of illegal drugs. After meeting with the informant, Detective Boardman had gone to a trailer park next to Defendants' residence to gather additional information for the warrant affidavit. From Boardman's vantage point, the mobile home and shed appeared "like all one building." The affidavit described the geographic, structural, and aesthetic characteristics of the property, which included a mobile home unit, a carport, and a carport awning.

Taken as a whole, this information in the search warrant affidavit described the places and things to be searched in sufficient detail and provided law enforcement with adequate probable cause to believe that they would find methamphetamine and related drug paraphernalia on Defendants' property. Accordingly, we hold that the warrant affidavit established adequate probable cause to issue a search warrant, which included the shed as part of the residence to be searched.

[Citations omitted, subheadings added]

LESS-THAN-TWO-MINUTE VISIT TO KNOWN DRUG HOUSE AT 3:20 A.M. BY PERSON UNKNOWN TO POLICE OFFICER HELD TO PROVIDE OFFICER WITH REASONABLE SUSPICION THAT JUSTIFIED STOPPING THE SUSPECT'S CAR AS HE DROVE AWAY

State v. Doughty, __ Wn. App. __, 201 P.3d 342 (Div. III, 2009)

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

[A law enforcement officer] was watching a particular house for drug activity because informants identified it as a drug house. At 3:20 a.m., [the officer] saw a car park in front of the house. The driver, Walter Doughty, entered the house and returned to his car in less than two minutes. Mr. Doughty drove away from the house. [The officer] suspected drug activity based on the time of day,

complaints of drug activities from neighbors, the fact that police had identified the house as a drug house, and the short duration of the visit. He stopped the car.

[The officer] ran a records check and discovered Mr. Doughty's license was suspended. He arrested Mr. Doughty and searched his car incident to arrest. The officer found a pipe and scale with methamphetamine residue. Police also found a baggy of methamphetamine in Mr. Doughty's shoe during the booking process.

Mr. Doughty moved to suppress the drug evidence. The trial judge concluded that the officer had a reasonable suspicion of criminal activity “[b]ased on the time of day, the designation by the police of the house as a drug house, the neighbors' complaints and the defendant's actions.” The State and Mr. Doughty stipulated to the facts for trial, and the court found Mr. Doughty guilty of one count of possession of methamphetamine.

ISSUE AND RULING: Do the facts of a less-than-two-minute visit by an unknown person to a known drug house at 3:20 a.m. add up to reasonable suspicion supporting a Terry stop to investigate possible illegal drug activity? (ANSWER: Yes, rules a 2-1 majority; Judges Sweeney and Brown are in the majority; Judge Schultheis dissents)

Result: Affirmance of Spokane Superior Court conviction of Walter Moses Doughty for possession of methamphetamine.

Status: Defendant Doughty has requested discretionary Washington Supreme Court review. It will likely be at least six months before the Supreme Court decides whether to grant review.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

Terry stop

The defendant here appeals the trial court's refusal to suppress drug evidence seized after he visited a drug house at 3:20 a.m. for a two-minute-long visit. We conclude that the circumstances provided ample grounds for a Terry stop and affirm the trial judge's refusal to suppress the drug evidence.

Mr. Doughty assigns error to the trial judge's conclusion that police had sufficient grounds to warrant a Terry stop. The court concluded that “the officer had a reasonable suspicion that the defendant was involved in criminal activity.”

. . . .

A police officer may conduct an investigatory stop based on less than probable cause if the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” We decide the “reasonableness” of the officer's suspicion based on the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained.

The trial court concluded that the stop in this case was justified because of the early morning hour, the designation by the police of the house as a drug house, the neighbors' complaints, and Mr. Doughty's "actions." Mr. Doughty argues that the State provided no reliable information to support its assertion that the house on Gardner was a drug house, noting that the record fails to show any efforts by law enforcement to determine the identity of the informants or verify the accuracy of their complaints. But that misses the essential point on appeal here. The house had already been identified as a drug house, and Mr. Doughty does not challenge that finding of fact. Indeed, the finding appears to us to be well supported by the record, in any event.

So the question before us is whether the following facts give rise to a reasonable suspicion of criminal activity sufficient to support a Terry stop:

- A house identified as a drug house;
- Mr. Doughty stops at the drug house;
- he is there for only two minutes; and
- he visits the drug house at 3:20 in the morning.

The stop here was a seizure. The question is whether it was reasonable given these circumstances. The stop is reasonable if the State can point to " 'specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.' " The stop must be based on more than the officer's hunch. The Washington Supreme Court has held a stop valid under similar circumstances. [State v. Kennedy, 107 Wn.2d 1 (1986)] (Terry stop after police see defendant leave a suspected marijuana dealer's house and, before police reached the car, defendant leaned forward in his car as if to place something under the driver's seat). And we conclude there are sufficient grounds here to justify the stop.

We have required more than simple presence in a high crime area or physical proximity to a suspected drug dealer to justify a stop. In State v. Richardson, a patrolling officer saw the appellant walking in a "high drug activity" neighborhood of Yakima with a person the officer suspected of "running drugs." 64 Wn. App. 693 (Div. III, 1992) **Aug 92 LED:15; Jan 93 LED:07**. The officer stopped both men, questioned them, and examined the contents of the appellant's pockets. The primary question in Richardson was whether the search was consensual. Here, the State does not argue that the search of Mr. Doughty was consensual because it clearly was not. The Richardson court also addressed the question whether the Yakima police had reasonable grounds to seize the defendant. The court concluded that presence in a high crime area and proximity to a suspected drug runner was not enough to support the necessary suspicion for the stop.

Here, however, [the officer's] suspicion was supported by more than Mr. Doughty's proximity to a drug dealer or his mere presence in a certain neighborhood that supported the officer's suspicion. It was supported instead by Mr. Doughty's own suspicious behavior. He drove to a drug house at 3:20 a.m., entered the house for a mere two minutes, and then left. We conclude that this scenario, in this setting, is legally sufficient to support with substantial probability

the officer's reasonable suspicion that criminal conduct had occurred.

Non-pretextual nature of stop

Mr. Doughty also contends that the stop was a pretextual stop under article I, section 7 the Washington Constitution. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. We need not address that issue since we conclude the officer had ample reason to stop Mr. Doughty based on factors other than a traffic infraction; and, in fact, the officer never claimed that he stopped Mr. Doughty for a traffic infraction.

DISSENT BY JUDGE SCHULTHEIS

Judge Schultheis argues that the officer needed more suspicious facts to justify a stop of the car. The dissenting opinion notes that the officer “did not observe any activities within the house, see Mr. Doughty make contact with anyone, see him with unusual objects, or overhear any conversation.”

LED EDITORIAL COMMENT: This is a close case, and we will keep a close watch on its status. We would hope that, before making a stop of a person they observe making a brief, late-night stop at a “known drug house,” officers will have at least one more fact supporting reasonable suspicion of the visitor than was present in this case. Also, the Court of Appeals does not define what constitutes a “known drug house.” We would think that the objective evidence should be fairly substantial that the premises are being used to sell drugs on a regular basis in order for officers to draw this conclusion. Again, we note that our comments are only our own informal thinking, and that officers and agency heads may wish to consult their own legal advisors and local prosecutors on the issues discussed here.

ACQUITTAL IN CRIMINAL PROSECUTION UNDER BEYOND-A-REASONABLE-DOUBT PROOF STANDARD DOES NOT PRECLUDE PROBATION REVOCATION BASED ON SAME CONDUCT BUT DETERMINED UNDER LOWER PROOF STANDARD

City of Aberdeen v. Regan, 147 Wn. App. 538 (Div. II, 2008)

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

On January 13, 2005, the Aberdeen Municipal Court found Regan guilty of fourth degree assault, sentenced him to 365 days of jail with 360 days suspended, and placed him on probation for 24 months. As one of the conditions of his probation, Regan agreed to commit “no criminal violations of the law.”

On April 28, 2006, the City charged Regan with fourth degree assault and criminal trespass. As a result of these new charges, the City petitioned the municipal court for a probation revocation hearing, which the court continued until after trial. At trial, a jury acquitted him of both criminal trespass and fourth degree assault.

At the probation revocation hearing, the municipal court revoked five days of Regan's suspended sentence. The judge, who had also presided at the criminal trial, ruled that although the jury found Regan not guilty using a beyond a reasonable doubt standard, the evidence supported “at least a criminal trespass violation.” Regan appealed to the superior court.

The superior court agreed with the City “that an acquittal in a criminal proceeding does not preclude revocation of a suspended sentence.” But the superior court reversed the municipal court, reasoning that Regan's probation conditions prohibited “ ‘criminal violations of the law’ “ and, therefore, any violation must be proved beyond a reasonable doubt.

ISSUE AND RULING: In a probation revocation hearing where the government alleges that the probationer violated a condition of probation requiring that the person commit “no criminal violations of law,” is the standard of proof beyond a reasonable doubt? (**ANSWER:** No, such hearings require only evidence sufficient to reasonably satisfy the court that the defendant violated a condition of probation)

Result: Reversal of Grays Harbor County Superior Court ruling that the alleged probation violation by Francis James Regan must be proved under beyond-a-reasonable-doubt proof standard; case remanded to implement municipal court's revocation ruling.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Both parties rely on Standlee v. Smith, a habeas corpus case where the court reaffirmed the validity of the trial court's parole revocation even after the defendant's acquittal of underlying felony charges. 83 Wn.2d 405 (1974). As the Standlee court explained, even when probation revocation hearings and criminal trials are premised on the same alleged violation, the two carry distinct burdens of proof, thereby precluding application of collateral estoppel and res judicata. The Supreme Court has firmly established that the standard of proof in a criminal trial is “beyond a reasonable doubt.” Likewise, as the Standlee court recognized that the burden of proof in probation revocation proceedings is whether “the evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation.”

Here, the superior court determined that the probationary condition of “no criminal violations of the law” requires proof beyond a reasonable doubt because the condition contains the word “criminal.” But Standlee dictates the opposite conclusion. See *also* State v. Johnson, 92 Wn.2d 598 (1979) (acknowledging that under Standlee “collateral estoppel does not bar a parole board from finding the accused guilty of violations after the accused has been acquitted on the same charges in a criminal trial”); State v. Barry, 25 Wn. App. 751 (1980). As the Barry court noted, “Whether the probation proceeding or the criminal trial comes first makes no difference, because the judge may revoke probation if he is reasonably satisfied of the defendant's misconduct, be it criminal or a breach of the conditions of probation.” The municipal court determined that it was reasonably satisfied with the evidence establishing Regan's violation of his probation conditions and, thus, the evidence met the burden of proof announced in Standlee.

Our Supreme Court has spoken on this issue: Probation revocation hearings for criminal offenses are not subject to proof beyond a reasonable doubt standard. Instead, such hearings require evidence sufficient to reasonably satisfy the court that the defendant violated a condition of probation. For these reasons, we reverse and remand.

[Some citations omitted]

EVIDENCE HELD NOT SUFFICIENT TO SUPPORT POSSESSION ELEMENT OF MINOR IN POSSESSION BY CONSUMPTION CHARGE

State v. Francisco, __ Wn. App. __ , 199 P.3d 478 (Div. III, 2009)

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

At about 3:00 a.m. on June 3, 2006, [a] police officer was dispatched to a residence in College Place, Washington to investigate a report of a person sleeping in a driveway. Upon arrival, [the officer] saw Mr. Francisco lying on a driveway about 20 to 30 feet from the street. The officer tried to rouse Mr. Francisco, but he was unresponsive. [The officer] could detect a strong odor of alcohol coming from Mr. Francisco. After a few minutes, [the officer] elicited a few incoherent responses from Mr. Francisco pertaining to his name, address, and birthday. Eventually, he was able to determine Mr. Francisco's full name, age, and address.

Upon confirming that Mr. Francisco was under 21 years of age, [the officer] arrested him for minor in possession of alcohol by consumption. During a search incident to arrest, [the officer] found a baggy of cocaine in the front pocket of Mr. Francisco's jeans. The State charged Mr. Francisco with possession of cocaine and minor in consumption/possession of liquor.

...

The jury convicted Mr. Francisco of both counts.

ISSUE AND RULING: Where 1) Francisco was intoxicated at the time of police contact but there were no nearby alcohol containers, 2) Francisco did not confess to possessing alcohol, and 3) no witnesses testified that Francisco had possessed alcohol, was the evidence sufficient to support his conviction for possessing-consuming alcohol in violation of subsection (2)(a) of RCW 66.44.270? (ANSWER: No)

Result: Reversal of Walla Walla County Superior Court conviction of Edwin S. Francisco for minor in possession of alcohol in violation of RCW 66.44.270(2)(a); affirmance of Francisco's conviction for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 66.44.270(2)(a) makes it "unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor." " 'Consume' includes the putting of liquor to any use, whether by drinking or otherwise." Former RCW 66.04.010(9) (2005). Possession can be established if a person "knows of the substance's presence, it is immediately accessible, and he or she exercises dominion or control over it." State v. Dalton, 72 Wn. App. 674 (Div. III, 1994) **Sept 94 LED:14**.

However, the presence of liquor in a person's body does not constitute possession because the person's power to control, possess, or dispose of it ends upon assimilation. State v. Hornaday, 105 Wn.2d 120 (1986); State v. Allen, 63 Wn. App. 623 (Div. III, 1991) **April 92 LED:06**. But evidence of assimilation is circumstantial evidence of prior possession and when combined with other

corroborating evidence, alcohol consumption may support a possession conviction. Dalton.

Here, [the officer] testified that Mr. Francisco smelled of alcohol, that it took several minutes to rouse him, and that he was incoherent and unable to walk. However, the State offered no corroborating evidence to prove possession. For example, no alcohol containers were found on or near Mr. Francisco and he did not confess to possessing any liquor. See, e.g., Allen (evidence of intoxication without more does not support minor in consumption of liquor conviction); State v. A.T.P.-R., 132 Wn. App. 181 (Div. III, 2006) **Aug 08 LED:16** (odor of alcohol on juvenile's body and proximity to an open bottle of beer is insufficient to sustain conviction); **Aug 08 LED:16**, 131 Wn. App. 556 (Div. III, 2006) **April 06 LED:05** (evidence of intoxication (swaying and odor of alcohol) and proximity to refrigerator full of beer insufficient to support a finding of constructive possession). Viewing the evidence in the light most favorable to the State, the evidence was insufficient to establish that Mr. Francisco exercised any dominion and control over any alcohol. Accordingly, we reverse Mr. Francisco's conviction for minor in possession/consumption of alcohol.

[Some citations omitted]

LED EDITORIAL NOTE: We assume that the reason that Francisco was not prosecuted under subsection (2)(b) of RCW 66.44.270 – for being “in a public place exhibiting the effects of having consumed liquor” – is that the residential driveway where the officer contacted him was not a “public place.” The Court of Appeals does not discuss subsection (2)(b) of the statute.

WEBCAM VIEWING IS “PHOTOGRAPH[ING]” UNDER SEXUAL EXPLOITATION OF A MINOR STATUTE

State v. Ritter, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 473657 (Div. III, 2009)

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

Mr. Ritter was the director of the youth ministry at Holy Cross Lutheran Church and taught at the church's school. On six occasions, he had sexual intercourse with a member of his youth group, C.J. The convictions involving C.J. are not in dispute except as they bear on our sentencing issue.

K.M. attended the youth group and the school. Mr. Ritter communicated with K.M. via computer and the telephone. While communicating via the computer, Mr. Ritter persuaded K.M. to remove her top and expose her bare chest. He viewed her bare chest through a Webcam. After K.M. showed her breasts, Mr. Ritter instant messaged her that she “was gorgeous. Perfect. He wished that he could touch them and see them every night.” K.M. later reported the incident to her mother. C.J. also confided in K.M.'s mother her involvement with Mr. Ritter. K.M.'s mother reported the incidents to the police.

The State charged Mr. Ritter with six counts of first degree sexual misconduct for his actions involving C.J., one count of communication with a minor for immoral purposes for his actions involving K.M., and one count of sexual exploitation of a minor for his actions involving K.M.

Cory Pritchard, a digital forensic specialist with the Spokane County Sheriff's office, testified at Mr. Ritter's bench trial. He was able to recover chat logs and e-mails from Mr. Ritter and K.M.'s computer. The chat logs indicate Mr. Ritter was viewing Webcam images. He explained a Webcam picture is captured and then transmitted to the designated computer, but he could not recover the web camera pictures from Mr. Ritter's computer because Web camera transmissions are viewed almost instantaneously rather than downloaded to the computer.

The court convicted Mr. Ritter as charged. His offender score was "18." The court imposed an exceptional sentence, running the 60-month sentence for the six counts of first degree sexual misconduct consecutive with the 120-month sentence for sexual exploitation of a minor. The court concluded "[a] standard range sentence is too lenient under the facts and circumstances of this case." The court also concluded Mr. Ritter was in a position of trust during the abuse of K. M.

ISSUE AND RULING: Is WEBCAM viewing "photograph[ing]" under the sexual exploitation of a minor statute? (**ANSWER:** Yes)

Result: Affirmance of Spokane County Superior Court convictions of James D. Ritter's convictions for first degree sexual misconduct (six counts), communication with a minor for immoral purposes (one count) and sexual exploitation of a minor (one count); also, affirmance of sentence. **NOTE:** Only one issue in the appeal is addressed in this **LED** entry.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The issue is whether sufficient evidence supports Mr. Ritter's sexual exploitation of a minor conviction. He contends the record does not show he compelled K.M. to "photograph" herself because a Webcam viewing is not considered a photograph.

...

Under RCW 9.68A.040(1), a person is guilty of sexual exploitation of a minor if he or she:

- (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; [or]
- (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.

The legislature has defined "photograph" as a "print, negative, slide, digital image, motion picture or videotape." RCW 9.68A.011(1). "A 'photograph' means anything tangible or intangible produced by photographing." The legislature added the words "digital image" and "intangible" in 2002.

...

Interpreting "photograph" as broadly as possible to encompass any technology containing child pornography, and viewing Mr. Pritchard and K.M.'s testimony in favor of the State, the sexually explicit acts viewed by Mr. Ritter over his

Webcam would be considered a “photograph” for purposes of RCW 9.68A.040. A Webcam viewing would be characterized as an intangible digital image. Therefore, sufficient evidence exists to support Mr. Ritter's exploitation conviction.

DVPA PROTECTION ORDER CANNOT BE ISSUED TO PROTECT 14-YEAR-OLD BECAUSE DEFINITION OF “FAMILY OR HOUSEHOLD MEMBER” NOT MET

Neilson v. Blanchette, __ Wn. App. __, __ P.3d __, 2009 WL 468577 (Div. III, 2009)

Facts and Proceedings below:

After a 17-year-old boy and 14-year-old girl stopped dating, the mother of the girl acted on the girl's behalf to obtain a domestic violence order protecting the girl from the boy.

ISSUE AND RULING: Under the DVPA, does a court have authority to issue a protection order to protect a person who is 14 years old where the relationship that is the basis for the order is a dating relationship? (ANSWER: No)

Result: Reversal of Spokane County Superior Court decision granting DVPA order to protect 14-year-old Jamie Crump Neilson against Jacob Michael Blanchette.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under the Domestic Violence Protection Act (the Act), chapter 26.50 RCW, a victim of domestic violence may petition for an order of protection. RCW 26.50.030. “Domestic violence” is defined, in relevant part, as “[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault, *between family or household members* ___ [or] sexual assault *of one family or household member by another.*” RCW 26.50.010(1)(b)(c) (emphasis added). “Family or household members” are defined, in relevant part, as “persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.” RCW 26.50.010(2).

...

Plainly, the statutory definition of “family or household members” does not apply here, as Ms. Crump was not a “person[] sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.” RCW 26.50.010(2). At the time the protection order was entered, Ms. Crump was 14 years old. None of the other definitions of “family or household members” apply to the situation between Mr. Blanchette and Ms. Crump. See RCW 26.50.010(2). Accordingly, the acts committed by Mr. Blanchette against Ms. Crump were not “domestic violence,” because they were not committed “between family or household members” or “of one family or household member by another.” RCW 26.50.010(1)(a)(b). The trial court lacked authority to issue the domestic violence protection order.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) IN UNLAWFUL POSSESSION PROSECUTION UNDER RCW 9.41.040, ANTIQUE REPLICAS HELD TO BE A “FIREARM” AS DEFINED IN RCW 9.41.010(1), DESPITE

FACT THAT DEFENDANT WAS NOT IN POSSESSION OF FLINT, FLINT-WRAP, GUNPOWDER, BALL SHOT AND WADDING – In State v. Releford, __ Wn. App. __, 200 P.3d 729 (Div. I, 2009), the Court of Appeals rejects a defendant’s argument that – because he was not in possession of a flint, flint-wrap, gunpowder, ball shot, and wadding – the antique replica gun that police found in his possession does not meet the definition of “firearm” at RCW 9.41.010(1). Therefore, the Court upholds the conviction of defendant, who was a previously convicted burglar, for unlawful possession of firearm in the first degree in violation of RCW 9.41.040(1)(a). The key part of the Court’s analysis of whether the gun qualifies as a “firearm” is as follows:

For purposes of the offense of unlawful possession of a firearm in the first degree, “firearm” is defined as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(1). This definition is ambiguous because it is unclear exactly what “may be fired” means. State v. Padilla, 95 Wn. App. 531 (Div. I, 1999) **Jan 00 LED:18**. Accordingly, the courts have attempted to provide certainty with respect to the statute’s application by interpreting it in such a way that, for purposes of unlawful possession of a firearm, “a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1).” Padilla. Similarly, an unloaded gun is still a “firearm,” because it can be rendered operational merely by inserting ammunition. State v. Berrier, 110 Wn. App. 639 (Div. II, 2002) **Sept 02 LED:16**. The jury that found Releford guilty was correctly instructed as to these rules.

Releford nevertheless contends that the State introduced insufficient evidence to support the jury’s guilty verdict because the replica pistol at issue did not have its firing flint, the leather piece that wraps around the flint, its gunpowder, or its projectile ball and wadding. Releford contends that these absences require adoption of the legal conclusions that the pistol had never been fully assembled and, thus, that the pistol could not be rendered operable within a reasonable time or with reasonable effort.

This chain of reasoning does not withstand scrutiny. Contrary to Releford’s characterization, the absence of these components does not mean that the jury was required to conclude that Scamman had never finished assembling the pistol. Indeed, Scamman himself testified that the pistol was completely assembled when it was stolen from his home, and thus was also fully assembled when it appeared in the stolen backpack carried by Releford . . .

Releford’s argument amounts to nothing more than an insistence that the jury was required to disregard this testimony. It was not.

Moreover, although Releford is indisputably correct that the pistol could not be fired without, at a minimum, the ball and powder, that conclusion is nothing more than an assertion that the gun was unloaded. As the State convincingly demonstrated at trial, the missing flint, leather piece, ball, wadding, and powder together perform precisely the same functions that are combined in a single modern ammunition cartridge. The fact that this technology is dated does not render it something other than what it is: ammunition. There is no dispute that an unloaded firearm is still a firearm for purposes of the offense that Releford was convicted of having committed. Berrier (citing State v. Faust, 93 Wn. App. 373 (Div. II, 1998)) **March 99 LED:16**.

[Some citations omitted]

Result: Affirmance of King County Superior Court conviction of Terrence Levine Releford for unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a).

(2) PUBLIC RECORDS REQUEST MUST BE SENT TO AGENCY'S DESIGNATED PERSON – In Parmelee v. Clark, __ Wn. App. __, __ P.3d __, 2008 WL 5657802 (Div. I, 2008), the Court of Appeals denies a penalty request under the Public Records Act because the requestor failed to send his request to the correct person at the public agency. See RCW 42.56.040.

The Court of Appeals summarizes the facts and its ruling as follows:

Appellant Allan Parmelee, a Washington State inmate, sued to penalize the Department of Corrections for not timely responding to his request for public records. The law permits an agency to designate a person to whom a request for records should be directed. Because Parmelee chose not to submit his request to the designated person, the trial court properly dismissed his suit.

Result: Affirmance of Snohomish County Superior Court order dismissing Alan Parmelee's lawsuit.

NEXT MONTH

The May 2009 LED will discuss, among other recent court decisions, the March 10, 2009 decision of the Court of Appeals, Division Two, in State v. Ramos, __ Wn. App. __, __ P.3d __, 2009 WL 596991 (Div. II, 2009). Ramos holds under the facts of that case that the Washington Legislature violated constitutional separation of powers principles by enacting RCW 4.24.550(6) delegating to sheriffs the power to act alone in some circumstances in classifying sex offenders for registration purposes.

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