Law Enforcement Digest

SEPTEMBER 2010

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

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NINTH CIRCUIT, U.S. COURT OF APPEALS

USE OF DEADLY FORCE AGAINST DRIVER OF IMPERILING, CAREENING VAN WAS NOT UNLAWFUL UNDER EITHER THE FOURTH OR FOURTEENTH AMENDMENT

Wilkinson v. Torres, 610 F.3d 546 (9th Cir. 2010) (decision filed July 6, 2010)

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

> [Officer A joined the pursuit of a person suspected of driving a stolen minivan] with his siren on and eventually took the lead in order to execute a Pursuit Immobilization Technique ("PIT") maneuver on the minivan. The pursuit proceeded at a moderate speed-five to ten miles over the speed limit. After the minivan entered a "T" intersection, [Officer A] executed the PIT maneuver,

causing the minivan to spin. The minivan kept going, however, and [Officer A] executed a second PIT maneuver, causing the minivan to enter a yard on the northwest corner of the intersection.

After entering the yard on the eastern side, the minivan regained control and accelerated in a southwest direction back toward the road. At this point, [Officer B], who had arrived at the scene, positioned his car in the minivan's path to block the escape. The minivan swerved and hit a telephone pole next to [Deputy B's] car.

[Officers C and A] got out of their patrol cars and approached the minivan on foot. [Officer A] yelled at the driver to show his hands. [Officer C] attempted to open the driver-side front door and fell on the ground about the same time as the minivan started moving in reverse. The front of the minivan swung toward the driver side, and the rear of the minivan swung toward the passenger side. The wheels on the minivan were spinning and throwing up mud. After one to two seconds, according to Plaintiffs' witness, [Officer C] got up and "walked[ ] or jumped out of the way . . . so he wouldn't get [run] over ."

Once he saw [Officer C] fall down, [Officer A] yelled at the driver to stop. [Officer A] believed that [Officer C] had been run over. The minivan continued to back up, and [Officer A] began shooting through the passenger-side window. After a slight pause during which he assessed the situation, [Officer A] continued firing at the driver of the minivan. The minivan continued to arc around [Officer A], but eventually straightened out and slowed down. [Officer A] called in that shots had been fired. Evidence later showed that [Officer A] had fired eleven rounds of a fifteen-round magazine. According to radio logs, the elapsed time between the final PIT maneuver and the radio call after the shots had been fired was nine seconds.

The driver of the minivan died of multiple gunshot wounds and was later identified as Wilkinson. Plaintiffs brought this 42 U.S.C. section 1983 [Civil Rights Act] action against [Officer A] and others. The district court denied [Officer A's] motion for summary judgment based on qualified immunity.

[Footnotes omitted]

ISSUES AND RULINGS: 1) Where the eluder's minivan was accelerating, its tires were spinning, mud was flying, and Officer A reasonably believed Officer C to have been struck or to be in danger of being struck by the minivan, was Officer A's used of deadly force reasonable under the Fourth Amendment of the federal constitution? (ANSWER: Yes, rules a 2-1 majority)

2) Did Officer A shoot at the minivan operator with "deliberate indifference" such as to "shock the conscience" and thus violate the Fourteenth Amendment of the federal constitution? (ANSWER: No, rules a 2-1 majority, in light of the split-second decision-making required of the officer and the legitimate law enforcement objective for the shooting, the Fourteenth Amendment was not violated)

Result: Reversal of U.S. District Court (Western District of Washington) decision that denied summary judgment to Officer A.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) Fourth Amendment reasonableness of use of deadly force

Apprehension by deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. See Graham v. Connor, 490 U.S. 386 (1989). However, an officer using deadly force is entitled to qualified immunity, unless the law was clearly established that the use of force violated the Fourth Amendment. See Brosseau v. Haugen, 543 U.S. 194 (2004) **Feb 05 LED:06**. The qualified immunity inquiry consists of two parts: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."

Case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. Tennessee v. Garner, 471 U.S. 1 (1985). On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."

In assessing reasonableness, the court should give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." In addition, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation."

Whether the use of deadly force is reasonable is highly fact-specific . . .

Here, [Officer A] did not violate a constitutional right. Even construing the facts in the light most favorable to Plaintiffs, a reasonable officer in [Officer A's] position had probable cause to believe that Wilkinson posed an immediate threat to the safety of [Officer C] and himself. When he fired the shots, [Officer A] was standing in a slippery yard with a minivan accelerating around him. The driver of the minivan had failed to yield to police sirens as well as to direct commands to put his hands up and to stop the vehicle. Compare Brosseau (finding that "shoot[ing] a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight" was not a clearly established Fourth Amendment violation). The minivan was accelerating, its tires were spinning, mud was flying up, and a fellow officer was nearby either lying fallen on the ground or standing but disoriented. The situation had quickly turned from one involving a crashed vehicle to one in which the driver of a moving vehicle, ignoring police commands, attempted to accelerate within close quarters of two officers on foot. In this "tense, uncertain, and rapidly evolving" situation, a reasonable officer had probable cause to believe that the threat to safety justified the use of deadly force.

. . . .

2) Fourteenth Amendment standard ("deliberate indifference" vs. "purpose to harm")

> This circuit has recognized that parents have a Fourteenth Amendment liberty interest in the companionship and society of their children. Official conduct that "shocks the conscience" in depriving parents of that interest is cognizable as a violation of due process. In determining whether excessive force shocks the conscience, the court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives. For example, a purpose to harm might be found where an officer uses force to bully a suspect or "get even."
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> In [Porter v. Osborn, 546 F3d 1131 (9th Cir. 2008) **Jan 09 LED:02**], this court found that actual deliberation was not practical where a five-minute altercation between the officers and victim evolved quickly and forced the officers to make "repeated split-second decisions." The court noted that "deliberation" should not be interpreted in the narrow, technical sense, reasoning that the Supreme Court had rejected the deliberate indifference standard even in cases where an officer giving chase could have deliberated while pursuing the suspect. Instead, the heightened purpose-to-harm standard applies where a suspect's evasive actions force the officers to act quickly.
>
> Here, application of the purpose-to-harm standard is clearly appropriate. Within a matter of seconds, the situation evolved from a car chase to a situation involving an accelerating vehicle in dangerously close proximity to officers on foot. Ultimately, Wilkinson's act of accelerating in reverse despite repeated warnings to stop forced [Officer A] to make a split-second decision. As opposed to the five minutes which elapsed in Porter, the entire sequence of events here from the PIT maneuver to the final shot occurred in less than nine seconds.
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> Applying this standard, no evidence shows that [Officer A] had a purpose to harm Wilkinson apart from legitimate law enforcement objectives. . . .

[Footnote and some citations omitted; subheadings revised]

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

(1) CIVIL RIGHTS ACT LIABILITY BASED ON FIFTH AMENDMENT VIOLATION: CALIFORNIA OFFICERS USED UNLAWFUL COERCION WHEN THEY TOLD 14-YEAR-OLD DURING CUSTODIAL INTERROGATION THAT, IF HE CONFESSED, HE WOULD GET TREATMENT, BUT IF HE DID NOT CONFESS, HE WOULD GET JAIL – In Crowe v. County of San Diego, 608 F.3d 406 (9th Cir. 2010) (decision filed June 18, 2010), a three-judge Ninth Circuit panel holds in a Civil Rights Act case under 42 U.S.C. section 1983 that California law enforcement officers investigating a murder of a 12-year-old girl violated her 14-year-old

brother's constitutional rights when they told him in custodial interrogation that, if he confessed, he would get treatment, but if not he would get jail. The brother and two other teenage boys were charged and pre-trial proceedings went on for a year, at which point DNA testing established that the likely perpetrator was an adult transient who had been seen acting in a strange, harassing and possibly intoxicated manner in the neighborhood on the night of the murder. The charges against the boys were dropped, and the transient was later convicted of the murder.

The Ninth Circuit panel holds that a Fifth Amendment cause of action for the coercive interrogation ripened when the coerced statement was introduced during pre-trial proceedings. The panel bases this holding primarily on the Ninth Circuit ruling in Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009) **Oct 09 LED:08**, a case in which the United States Supreme Court denied review to the City of Everett. See 130 S.Ct. 2343 (April 5, 2010). Also, the panel holds that the officers are not entitled to qualified immunity because the case law against coercing confessions was clearly established at the time of the interrogation.

Result: Affirmance in part, reversal in part of U.S. District Court (Southern District of California) decision on summary judgment motions.

LED EDITORIAL NOTE: This LED entry addresses only summarily just one of many issues in the Crowe case. Some may view the Crowe case as a cautionary tale for investigators and prosecutors alike as to law enforcement choices of investigative tactics and prosecutorial charging decisions in highly charged murder cases. Readers may wish to read the decision to make their own assessments (recognizing, of course, that the Ninth Circuit opinion does not tell all, and is not without the authoring judge's slant). If readers put "Stephanie Crowe" into an Internet search engine, they will find that at least two full-length books have been written regarding this case (the most popular book, of course, is a true-crime novel by John Philpin that places most of the blame on government personnel, but at least one book, authored by Paul E. Tracy, presents a more balanced view).

There were many issues in this Civil Rights case. To give an idea of the broad scope of the decision's discussion of constitutional issues, we will set forth here the Ninth Circuit panel's paragraph summarizing the results of its decision:

> **We reverse the district court's grant of summary judgment [against the plaintiffs] as to: (1) Michael and Aaron's Fifth Amendment claims; (2) Michael and Aaron's Fourteenth Amendment substantive due process claims; (3) all otherwise surviving claims against [Detective] McDonough; (4) all otherwise surviving claims against [Dr.] Blum; (5) the Crowes' deprivation of familial companionship claim based on Michael's detention; and (6) the Housers' deprivation of familial companionship claim based on Aaron's detention.**
>
> **We affirm the district court's grant of summary judgment as to: (1) Aaron's Fourth Amendment claim that police lacked probable cause to arrest him; (2) Michael's Fourth Amendment claim that police lacked probable cause to arrest him; (3) Michael's claim that police violated his Fourth Amendment rights by strip searching him; (4) Aaron's Fourth Amendment claim that the warrants authorizing the search of his home were not supported by sufficient probable cause; (5) the conspiracy claims against [Detective]**

McDonough; (6) Michael and Aaron's defamation claims against Stephan; (7) Aaron's defamation claim against [Dr.] Blum; and (8) all claims against the Cities of Escondido and Oceanside.

Additionally, we affirm the district court's denial of summary judgment [to the government defendants] as to: (1) Cheryl, Stephen, and Shannon Crowes' claims that police violated their Fourth Amendment rights by strip searching them; (2) Cheryl and Stephen's Fourth Amendment claims that the warrant authorizing police to draw blood samples was not supported by probable cause; (3) Cheryl and Stephen's Fourth Amendment claims of wrongful detention; and (4) the Crowes' deprivation of familial companionship claims based on the placement of Michael and Shannon in protective custody.

We remand to the district court for further proceedings consistent with this opinion.

(2) THREE-JUDGE PANEL REVISES OPINION IN CIVIL RIGHTS ACT CASE INVOLVING TASER USE; OPINION STILL HOLDS THAT OFFICER USED EXCESSIVE FORCE BUT NOW CONCLUDES THAT OFFICER IS ENTITLED TO QUALIFIED IMMUNITY – In Bryan v. McPherson, 608 F.3d 614 (9th Cir. 2010) (decision filed June 18, 2010), the three-judge panel revises the December 28, 2009 Opinion that we reported in the **February 2010 LED** at pages 2-5.

The panel does not change its ruling that a law enforcement officer used excessive force in tasing a highly agitated 21-year-old during a traffic stop. But the panel reverses itself by granting the officer qualified immunity, ruling in the revised Opinion that the officer could have made a reasonable mistake of law in concluding that using the taser was reasonable under the circumstances and under then-existing case law.

Result: Reversal in part of U.S. District Court (for the Southern District of California) ruling that denied qualified immunity to the officer.

(3) FURTIVE GESTURES BY PASSENGER PLUS OTHER SUSPICIOUS BEHAVIOR ADD UP TO JUSTIFICATION FOR FRISK OF PASSENGER DURING LATE-NIGHT TRAFFIC STOP – In U.S. v. Burkett, ___ F.3d ___ , 2010 WL 2814312 (9th Cir. 2010) (decision filed July 20, 2010), a three-judge Ninth Circuit panel rules that a WSP trooper with 22 years of experience had justification under Terry v. Ohio, 392 U.S. 1 (1968) to frisk a vehicle passenger during a traffic stop.

Under the Fourth Amendment and Terry, an officer may frisk a vehicle passenger if the officer reasonably suspects that the passenger is armed and dangerous. Arizona v. Johnson, 129 S.Ct. 781 (2009) **March 09 LED:03**. In the Burkett case, after the trooper turned on his emergency lights in a 1 a.m. traffic stop, the female driver of a car that the officer was attempting stop for speeding traveled almost a mile and pulled over only after turning onto a less-traveled side road. There was no apparent reason for her not to pull over sooner. Before the driver pulled over, the trooper observed, with the aid of his spotlight, the adult male passenger engage in furtive gestures as if he was hiding or retrieving something under the passenger seat.

When the trooper arrived at the driver-side window after the suspect car had stopped, the trooper asked the passenger what he had been doing before the car came to a stop. The passenger replied "nothing," and then, after the trooper said he had observed the passenger leaning forward as if to put something under the seat, the passenger said that he had been placing his alcoholic beverage on the transmission hump, which answer was not consistent with the forward leaning activity the trooper had observed. After asking for and getting the passenger's identification, but before doing a radio check on the identification, the trooper asked the passenger to step out of the vehicle. The Ninth Circuit describes as follows what happened after that:

> [R]ather than using the hand closest to the door, his right hand, to open it, Burkett made the "unusual movement" of reaching across his body and opening the door with his left hand, thereby blocking the officer's view of both of his hands with his body. Because this further heightened [the trooper's] suspicions, he walked to the back of the car to reposition himself so he could see Burkett as he got out of the car.
>
> Iniitally, [the trooper] could not see Burkett's hands as he got out of the car. But then, as Burkett turned toward the back of the car and the trooper, "it appeared that he was reaching with his right hand trying to find [the] front coat pocket" of his white, knee-length jacket. [The trooper] yelled for him to keep his hands out of his pocket and then stepped forward and grabbed Burkett by the right arm.

The trooper frisked Burkett, during which process Burkett acknowledged that he had pistol in his right front jacket pocket.

The three-judge panel concludes that the experienced trooper had good reason to believe that Burkett was armed and dangerous, and that therefore a frisk was necessary.

Result: Affirmance of U.S. District Court (Western District of Washington) conviction of Robert James Burkett for being a felon in possession of a firearm in violation of federal law.

LED EDITORIAL COMMENTS: In our March 2009 LED Editorial Comments regarding the U.S. Supreme Court decision in Arizona v. Johnson, 129 S.Ct. 781 (2009) March 09 LED:03, we pointed out that some analysis beyond federal Fourth Amendment analysis is necessary to determine whether a frisk of a vehicle passenger is justified. Article 1, section 7 of the Washington constitution requires that, before directing the passenger to get out of a vehicle during a traffic stop, the officer have articulable "heightened awareness of danger" regarding the circumstances of the stop. State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04. We think, however, that the trooper in Burkett did have such heightened awareness of danger before directing Burkett to get out of the car.

Also, asking passengers for ID documents or information unrelated to the traffic stop is generally not permitted under Washington's constitution where the passenger is not reasonably suspected of committing a violation of law. See State v. Rankin, 151 Wn.2d 689 (2004) Aug 04 LED:07; State v. Brown, 154 Wn.2d 787 (2005) Sept 05 LED:17; State v. Allen, 138 Wn. App. 463 (Div. II, 2007) July 07 LED:21. But, again, we think that safety concerns in Burkett justified the trooper in asking for identification when he did.

Finally, we remind our readers of the obvious – the better the officer's powers of observation and the better the officer is in articulating those observations in a written report, the better the chance that the officer's actions will be held to have been justified.

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WASHINGTON STATE SUPREME COURT

ODOR OF MARIJUANA FROM CAR GAVE OFFICER AT TRAFFIC STOP PROBABLE CAUSE THAT WOULD HAVE SUPPORTED SEARCH WARRANT AND WARRANTLESS ARREST OF LONE OCCUPANT, BUT MOBILITY OF CAR PLUS LATE NIGHT HOUR AND RURAL LOCATION DID NOT ADD UP TO EXIGENCY FOR WARRANTLESS SEARCH

State v. Tibbles, ___ Wn.2d ___, ___ P.3d ___ , 2010 WL 3036764 (2010)

PRELIMINARY LED EDITORIAL COMMENT: Readers should note at the outset, as will be addressed a bit more below, that there was no issue presented in Tibbles on search of a vehicle incident to arrest of an occupant. That is because the officer in Tibbles searched the car before making an arrest. The sole issue presented in Tibbles was whether the officer was presented with exigent circumstances that justified a warrantless search of the car.

We think that the outcome and the "exigent circumstances" analysis in the majority opinion in Tibbles is not surprising in light of the Washington Supreme Court precedents of State v. Ringer, 100 Wn.2d 686 (1983) and State v. Patterson, 112 Wn.2d 731 (1989). Under Ringer and Patterson, and now Tibbles, Washington is among a handful of states whose highest courts have held that their state constitutions do not include the Fourth Amendment "Carroll Doctrine," that is named after a 1925 U.S. Supreme Court decision. Under the Carroll Doctrine that applies in federal jurisdictions and in the vast majority of state jurisdictions, the mere mobility of a vehicle located in a non-private area generally is held to establish exigent circumstances such that a warrantless search is permitted if there is probable cause to believe that the vehicle contains evidence of a crime. In Washington and the referenced handful of other states, officers need other circumstances beyond vehicle mobility to establish exigency. For a partial list of other states that have at some time in the past held that their state constitutions do not include the Carroll Doctrine, see 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, section 7.2, n. 79, 4th ed. 2004 & 2009-2010 Supplement.

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

> Just before midnight on October 28, 2004, [a WSP trooper] noticed that a vehicle driven by Tibbles had a defective taillight. He stopped the car and, upon making contact with Tibbles, detected a strong odor of marijuana. At the trooper's request, Tibbles provided his license but could not find his registration. {The trooper] asked Tibbles to step out of his vehicle, and Tibbles complied. The trooper informed Tibbles he could smell marijuana; Tibbles replied that he did not have any in his possession. [The trooper] then searched Tibbles but did not find either marijuana or drug paraphernalia. In response to the trooper's questioning, Tibbles denied smoking marijuana that day.

> [The trooper] then proceeded to search the interior of Tibbles's car. Under the front passenger seat inside a brown paper bag, he found a glass pipe, a glass container with what he believed was marijuana, a knife, and two lighters. Tibbles denied the marijuana was his.
>
> [The trooper] did not arrest Tibbles but cited and released him after confiscating the suspected marijuana and drug paraphernalia. Subsequent testing by the Washington State Patrol [Crime Laboratory] verified that the substance in the glass container was marijuana.
>
> The State charged Tibbles with misdemeanor possession of marijuana and drug paraphernalia. Before his trial in district court, Tibbles moved to suppress the evidence . . . as the poisonous fruits of an illegal search. The district court denied his motion, concluding exigent circumstances justified the warrantless automobile search. Tibbles was convicted following a stipulated facts trial.
>
> Tibbles appealed the denial of his motion to suppress. Recognizing the legal issue as whether the stipulated facts established exigent circumstances, both the superior court and the Court of Appeals affirmed [by unpublished opinion].

ISSUE AND RULING: Did the mobility of the car plus the late hour and rural nature of the area where the trooper made the traffic stop add up to exigent circumstances that would support a warrantless of the car for marijuana? (ANSWER: No, rules a 6-3 majority)

Result: Reversal of Island County Superior Court conviction of Micah Newman Tibbles for misdemeanor possession of marijuana and of drug paraphernalia.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> The question before us is whether the warrantless search of Tibbles's car violated his right to privacy under article I, section 7 of the Washington State Constitution. . . .
>
> Preliminarily, there is no issue in this case about probable cause. We recently recognized that the odor of marijuana emanating from an automobile may provide probable cause to search. State v. Grande, 164 Wn.2d 135 (2008) **Sept 08 LED:07** (stating, "In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle."). Tibbles does not appear to challenge the existence of probable cause to search. Nor does he dispute that the odor of marijuana in a vehicle may provide probable cause to arrest the sole occupant, as we recognized in Grande. But, the existence of probable cause, standing alone, does not justify a *warrantless* search. . . . Because [the trooper] did not arrest Tibbles, and did not have a warrant when he searched Tibbles's car, the search must be justified by one of our recognized warrant exceptions. The State relies solely on the exception for "exigent circumstances."
>
> The exigent circumstances exception to the warrant requirement applies where "'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the

destruction of evidence.'" State v. Smith, 165 Wn.2d 511 (2009) **March 09 LED:10**.

This court has identified five circumstances from federal cases that "could be termed 'exigent'" circumstances. State v. Counts, 99 Wn.2d 54, 659 P.2d 1087 (1983). (emphasis added). They include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence"; State v. Terrovona, 105 Wn.2d 632 (1986). However, merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. A court must look to the totality of the circumstances in determining whether exigent circumstances exist.

[LED EDITORIAL NOTE: The majority opinion's footnote immediately below includes some possible categorical exigency factors that are not completely rational as guidelines for determining exigency that justifies a car search. See our further editorial comments that follow these excerpts from the Tibbles majority opinion.]

Court's footnote 3: *Six nonexclusive factors may aid in determining the existence of exigent circumstances: "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably." Smith*.]

Considering the relevant factors in determining an exigency, the State has not shown that exigent circumstances justified the warrantless search of Tibbles's car. The situation in this case stands in sharp contrast to other situations in which we have held exigent circumstances to exist. In [State v. Patterson, 112 Wn.2d 731 (1989)], we concluded that exigent circumstances justified entry into a parked vehicle where a burglary had very recently been committed, the suspect was likely in the immediate vicinity of the vehicle because the officers discovered the vehicle a mere five minutes after the robbery [sic - - **NOTE: the crime under investigation was burglary, not robbery - - LED Eds.**], information in the automobile could help identify and locate the suspect, and a delay in searching the vehicle could have allowed the suspect to flee the area. Similarly, we found exigencies in [State v. Smith **March 09 LED:10**] where there was a tanker truck filled with 1,000 gallons of a dangerous chemical parked next to a house, a rifle had been seen in the house, the rifle went missing, and the two known occupants of the house did not possess the rifle.

On the stipulated facts in this case, the State has not shown any need for particular haste. The suspect was not fleeing, nor has there been any showing that he presented a risk of flight. While there was probable cause that evidence of contraband existed in the vehicle, Tibbles was outside the vehicle when [the trooper] searched it and the State has not established that the destruction of evidence was imminent. Additionally, the State has not established that obtaining a warrant was otherwise impracticable. For example, we do not know whether [the trooper] could have used a cell phone or radio to procure a

telephonic warrant or whether he could have called backup to secure the scene while [the trooper] went to procure a warrant. The record contains no evidence of what [the trooper] would have had to do to procure a warrant at the time of the search.

With regard to safety concerns, the stipulated facts do not establish that [the trooper] felt he or anyone else was in danger as a result of Tibbles's actions. Tibbles was not stopped on suspicion of impaired driving, but rather for a defective taillight. Tibbles was alone, was compliant with the trooper's requests, and moreover, was released rather than arrested and allowed to drive away even after [the trooper] searched the car and seized the marijuana and drug paraphernalia.

It is the State's burden to establish that one of the exceptions to the warrant requirement applies. In the case of hot pursuit or similar situations presenting a risk to officer safety, the State's burden can be met by establishing the immediacy of the risk of flight or risk of harm. The facts, as presented here, do not implicate these concerns, nor has the State attempted to show why it was impracticable for [the trooper] to obtain a warrant before conducting his search. To find exigent circumstances based on these bare facts would set the stage for the exigent circumstances exception to swallow the general warrant requirement. It would give the erroneous impression that an exigency may be based on little more than a late-night stop for defective equipment, an officer working alone, and circumstances indicating possible drug possession. This very likely describes any number of encounters between law enforcement and private citizens that occur everyday.

We conclude that the State has not carried its burden to show that the stipulated facts in this case present an exigency. At best, the State has shown it was expedient for [the trooper] to conduct the search as he did. But, whatever relative convenience to law enforcement may obtain from forgoing the burden of seeking a warrant once probable cause to search arises in circumstances such as here, we adhere to the view that "mere convenience is simply not enough." Patterson. The underlying theme of the exigent circumstances exception remains "[n]ecessity, a societal need to search without a warrant." Patterson. The State has not met its burden to establish exigent circumstances. Accordingly, we hold that the warrantless search of Tibbles's car violated article I, section 7 of the Washington Constitution, and the evidence obtained as a result of the search should be suppressed.

[Court's footnote 4: *It should be noted that [the trooper] likely had probable cause to arrest Tibbles based on the strong odor of marijuana coming from the car. See Grande* ***Sept 08 LED:07****. Because he did not do so, but instead released Tibbles, the State does not assert the "search incident to a lawful arrest" exception to the warrant requirement. Nor does the State seek to justify the warrantless search under a "plain smell" variation of the "plain view" exception. The State proffered only the exigent circumstances exception. We emphasize these facts to make clear that we are not presented here with a choice between no search or this search. We decline to apply the exigent circumstances exception to these facts, but this does not mean that another exception would not be available in similar circumstances.*]

. . . .

> Exigent circumstances will be found only where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. State v. Smith, **March 09 LED:10**. Because the State failed to establish exigent circumstances justifying the warrantless search of Tibbles's car, we reverse the Court of Appeals.

LED EDITORIAL COMMENTS:

Question 1: What constitutes exigent circumstances that will justify a warrantless probable cause vehicle search for evidence under article I, section 7 of the Washington constitution?

Answer: Telephonic search warrants are lawful in Washington and generally can be obtained relatively quickly. Also, officers have legal authority to impound a vehicle based on probable cause to search it. These two factors make it generally quite difficult to make an argument for exigent circumstances for a vehicle search. The Patterson case discussed in the Tibbles majority opinion held that the need to search a vehicle to aid in identifying and locating the perpetrator(s) of a very recently committed crime constitutes exigent circumstances. Other exigent circumstances would include probable cause to believe that the following circumstances, or similar circumstances, exist: (1) that a volatile substance, such as a meth lab, needs to be retrieved from the vehicle for the protection of those involved in impounding the vehicle (this would also qualify as "manifest necessity" under the impound-inventory rule of the Washington constitution – see State v. Ferguson, 131 Wn. App. 694 (Div. III, 2006) April 06 LED:17; (2) a suspect is hiding in the vehicle; and (3) evidence, such as a marijuana cigarette seen burning in the ashtray, will be lost if not immediately retrieved.

Question 2: Footnote 4 of the Tibbles majority opinion points out that the prosecutor did not raise, and therefore the Supreme Court did not rule on, theories of "plain smell" or "search incident to arrest." Does footnote 4 signal that the Washington Supreme Court is still open to the idea that the Washington constitution's vehicle search incident rule is not that far from the rule of the Fourth Amendment?

Answer: We hope so.

"Plain smell"? We think that the majority opinion was actually talking about "open smell" and not "plain smell," neither of which terms constitute well-defined terms of legal art (we will not attempt here to explore the contours and nuances of meaning that might be given the term, "plain smell"). The officer's detection of the odor of marijuana was lawful because he made no unlawful intrusion in reaching the location outside the car where his sense of smell detected marijuana. But this was "open smell," the equivalent of "open view." We used the phrase, "open smell," in the way that the Washington courts use the phrase, "open view," a detection by the sense of sight while lawfully located *outside* a constitutionally protected private area. Open view or open smell does not by itself justify warrantless entry of the private area, including the interior of a civilian's vehicle.

Search incident to arrest? But, on the other hand, we do think that the Tibbles' majority opinion's reference to search incident to arrest authority in footnote 4 signals that there is still a chance that the Washington Supreme Court will adopt a "search incident" rule for vehicle searches along the lines of the ruling that Division One of the Court of Appeals made earlier this year in State v. Wright. See our most recent discussion of Wright and the relevant U.S. Supreme Court (Arizona v. Gant) and Washington Supreme Court decisions (State v. Patton, State v. Valdez, and State v. Afana), at pages 10-12 of the August 2010 LED. The May 2010 Washington Law Review (of the University of Washington) contains a 30-plus page article/"comment" by UW Law Student, Jacob R. Brown (WESTLAW, JLR, at 85 WALR 355), suggesting that the Court of Appeals holding in Wright should be the Washington rule on the vehicle-search-incident issue.

Question 3: Could the officer lawfully arrest the driver and lone occupant of the vehicle even though the officer had only the odor of marijuana as his probable cause?

Answer: Yes. Although the discussion in the Tibbles majority opinion on this point is a bit guarded, we think that State v. Grande, 164 Wn.2d 135 (2008) Sept 08 LED:07 clearly supports that the officer had probable cause for an arrest.

4. Is mere possession (as opposed to use) of drug paraphernalia a crime under chapter 69.50 RCW?

A. No. One of the misdemeanor crimes for which Tibbles was convicted was possession of drug paraphernalia. Justice Madsen's dissent in Tibbles is primarily focused on stating her reasons for believing that exigent circumstances were present in this case. But she goes on to point out on this separate question that chapter 69.50 RCW law does not prohibit mere possession of drug paraphernalia, and that therefore Tibbles may have been convicted of a non-offense. The majority opinion in Tibbles does not address this aspect of the case.

Some local jurisdictions have lawfully adopted ordinances prohibiting mere possession of drug paraphernalia, but if State law is going to be invoked, then mere possession (as opposed to use) cannot be charged.

TRIP OUT OF STATE FOR TRAINING DID NOT TOLL THE STATUTE OF LIMITATIONS

State v. Willingham, ___ Wn.2d ___, 234 P.3d 211 (Div. II, 2010)

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

> On August 14, 2008, the State filed an information charging Willingham with two counts of indecent liberties, the second alleged act occurring on August 1, 2005. Willingham filed a motion to dismiss, arguing that the three-year statute of limitations for the crime barred prosecution. In response, the State provided evidence that Willingham had visited Utah for two weeks in June 2008 for job-related training. Noting that there was no evidence that Willingham intended to relocate out of state, the trial court dismissed the charges as time barred. The Court of Appeals reversed, in an unpublished opinion, holding that Willingham's mere absence from the state tolled the statute of limitations.

ISSUE AND RULING: RCW 9A.04.080(2) tolls the running of the statute of limitations for criminal prosecution for any period while the person later charged is "not usually and publicly resident within this state." During defendant's two-week trip to Utah for training, did he remain usually and publicly resident within the state of Washington for purposes of the statute? (ANSWER: Yes, rules a unanimous Supreme Court)

Result: Reversal of Court of Appeals decision (unpublished) and remand to Jefferson County Superior Court, presumably for dismissal of charge of indecent liberties against Jesse Alan Willingham.

ANALYSIS: (Excerpted from Supreme Court's unanimous opinion)

> The State must file indecent liberties charges within three years of the commission of the crime. RCW 9A.04.080(1)(h). A criminal statute of limitations is jurisdictional and creates an absolute bar to prosecution if charges are not timely filed. The statute of limitations is tolled, however, during any time the person charged is "not usually and publicly resident within this state." RCW 9A.04.080(2). Tolling occurs during such an absence regardless of whether the defendant was absent for the purpose of avoiding authorities, even when the State knew of the defendant's whereabouts. State v. King, 113 Wn. App. 243 (Div. I, 2002) **July 03 LED:21**.
>
> In holding that Willingham's two-week trip to Utah for job training tolled the statute of limitations, the Court of Appeals [in an unpublished opinion] relied on a passage from State v. Ansell, 36 Wn. App. 492 (1984), stating that a defendant's "'mere absence'" from the state tolls the statute of limitations. But despite the seemingly broad language of Ansell, the defendant there did not merely visit another state. Instead, as in all other cases from this state holding that the statute of limitations was tolled, the defendant relocated to another state during the tolling period. The specific question in Ansell was whether, in order for the statute to be tolled, the defendant must be absent with intent to conceal. It is in this context that the court held that "mere absence" tolls the statute. The court did not suggest that any absence from the state, whatever the reason and however temporary, tolls the statute.
>
> Unlike the defendants in previous decisions, Willingham did not relocate to another state. Instead, he only visited Utah for two weeks for training with his trucking company employer. He received a temporary Utah license, but his permanent residence remained in Washington. By its terms, the statute of limitations is not tolled whenever the person charged is absent from the state, but only when the person is not usually and publicly resident within the state. A person may be absent without changing his residence. The trial court reviewed the evidence and found no indication that Willingham intended to change residences. Willingham's brief and temporary absence from the state, with no intent to relocate, did not toll the statute of limitations.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) UNDER CRIMINAL DISCOVERY RULE 4.7 AND STATE V. BOYD, ATTORNEYS FOR DEFENDANT HAVE THE RIGHT TO TAKE AND FREELY REVIEW MIRROR IMAGES OF HIS COMPUTER'S HARD DRIVE – In State v. Grenning, 169 Wn.2d 47 (2010), the Supreme Court rules 6-3 that the precedent of State v. Boyd, 160 Wn.2d 424 (2007) **Oct 07 LED:10** applies in this child pornography prosecution. Therefore, the defendant is entitled under CrR 4.7 to have his attorneys, subject to a protective order from the court, take a mirror image of his computer's hard drives out of the State's control for purposes of review and analysis by defense experts.

Result: Affirmance of Division Two Court of Appeals decision (see **March 08:LED 15**) that reversed the Pierce County Superior Court convictions of Neil Grenning for 20 counts of possession of depictions of minors engage in sexually explicit conduct with sexual motivation. The Supreme Court did not review and hence did not disturb the Court of Appeals affirmance of Neil Grenning's convictions for 16 counts of first degree child rape, 26 counts of sexual exploitation of a minor, and 6 counts of first degree child molestation.

(2) 2009 OPINION ADDRESSING AUTHORITY OF TRIBAL PEACE OFFICERS TO PURSUE VIOLATORS OFF THE RESERVATION IS WITHDRAWN – In State v. Eriksen, the Washington Supreme Court has withdrawn the opinion that we digested in the **November 2009 LED** at page 10-11. Reconsideration is pending.

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WASHINGTON STATE COURT OF APPEALS

ARRESTEE'S STATEMENT FROM BACK SEAT OF PATROL CAR THAT HE "WOULD KICK [OFFICER'S] ASS IF [HE] WASN'T IN HANDCUFFS," PLUS OTHER FACTS, HELD TO SUPPORT HIS HARASSMENT CONVICTION; HIS MOTOR VEHICLE SEARCH-INCIDENT CHALLENGE HELD WAIVED BECAUSE HE DID NOT RAISE THEORY IN TRIAL COURT

State v. Cross, 156 Wn. App. 568 (Div. II, 2010)

Facts:

While in the process of arresting a driver for reckless driving, Officer A developed suspicion (from seeing the front seat passenger's furtive gestures and hearing a slamming noise from inside the vehicle) that the passenger, Cross, may have access to a handgun. Cross did not obey an order to put his hands in the air. Officer A called for backup. While completing the arrest of the driver, Officer A saw that Cross had gotten out of the car and was attempting to flee the scene on foot. Cross ignored [Officer A's] orders to "stop."

The Court of Appeals describes as follows what happened after that:

> [Officer A] chased Cross through a residential neighborhood. The chase ended when Cross jumped over a six-to-eight-foot tall wooden fence and found himself trapped in a yard. When [Officer A] caught up to him Cross put up his fists in an offensive fighting stance. After missing Cross with his stun gun, [Officer A] leg swept Cross to the ground, applied the stun gun directly to Cross's back, and handcuffed him.

> [Officer B] arrived on the scene and spotted [Officer A] walking back to his patrol car with Cross in handcuffs. Cross was "very hostile and agitated," and [Officer B] had to hold him against the trunk of his patrol car so that [Officer A] could frisk Cross for weapons. No weapons were found on Cross, who was then placed in [Officer B's] patrol car. Cross yelled obscenities as [Officer B] read him his Miranda rights. Cross refused to identify himself. Another officer who arrived on the scene recognized Cross, retrieved a police report and booking photo from a previous incident, and used these to identify Cross.
>
> Next, while [the arrestee's] were secured in separate patrol cars, [the officers] searched the vehicle . . . . The officers found two guns. . . .
>
> While [Officer B] waited for [the] car to be impounded, Cross, who was handcuffed and seated in the back of the patrol car, made several inappropriate racial and sexual comments about [Officer B] and stated that "he would kick [Officer B's] ass if he wasn't in handcuffs."

Proceedings below: Cross was convicted in a jury trial of first degree unlawful possession of a firearm, gross misdemeanor harassment, resisting arrest, and obstructing a law enforcement officer. At no time in the 2008 trial court proceedings did Cross challenge the search of the car incident to his arrest.

ISSUES AND RULINGS: 1) Where Officer B was aware at the time of his contact with Cross that just a few minutes earlier Cross had physically resisted his arrest by Officer A, and where Officer B believed at the time of the contact that Cross still posed a risk of assault when Cross said from the back seat that he "would kick [Officer B's] ass if [he] wasn't in handcuffs," is there sufficient evidence to support the conviction of Cross for gross misdemeanor harassment? (ANSWER: Yes);

2) Did Cross waive his challenge to the search of the vehicle by not raising the issue until his case was on appeal? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Pierce County Superior Court convictions of Kevin Lee Cross for first degree unlawful possession of a firearm, gross misdemeanor harassment, resisting arrest, and obstructing a law enforcement officer.

ANALYSIS:

1) Gross misdemeanor harassment

On the gross misdemeanor harassment charge, the Court of Appeals analyzes the issue as follows:

> Under RCW 9A.46.020(1), in order to prove that Cross committed the crime of harassment, the State must show that,
>
> (a) [w]ithout lawful authority, the person knowingly threatens:

> To cause bodily injury immediately *or in the future* to the person threatened or to any other person; or [other alternatives deleted] . . .
>
> and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

(Emphasis added by Court of Appeals)

RCW 9A.46.020(2) outlines the requirements for determining if the harassment committed is a felony or a gross misdemeanor stating,

> (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
>
> (b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

In this case, Cross did not threaten to kill [Officer B] and the State charged him with a gross misdemeanor harassment violation rather than with a felony harassment violation. To prove a gross misdemeanor violation of this statute, the State was required to prove "that the person threatened was placed in reasonable fear of 'the threat' – the actual threat made" and prove that the harm threatened and the harm feared are the same. State v. C.G., 150 Wn.2d 604, 609 (2003) **Feb 04 LED:09**. Conditional threats fall within the definition of "threat" established in RCW 9A.04.110, a chapter and section establishing definitions that apply to RCW 9A.46.020. State v. Edwards, 84 Wn. App. 5 (1996). The State is not required to prove a "nonconditional present threat" where the charging statute and applicable statutory definitions do not establish such an element. Assuming evidence shows the victim's subjective fear, the standard for determining whether the fear was reasonable is an objective standard considering the facts and circumstances of the case.

Here, neither RCW 9A.46.020 nor the definition of "threat" in RCW 9A.04.110 requires the State to prove a nonconditional present threat for a jury to find the person making the threat guilty of a gross misdemeanor harassment. Although Edwards involved a threat against property under RCW 9.61.160 and not a threat against a person, the analysis and holding is otherwise on all fours with the present case. We do not distinguish between threats against property and people and the Edwards holding applies equally to cases involving harassing conditional threats made against a person.

To the extent Cross argues that the circumstances under which he made his threat reflected the condition that he was in handcuffs and that condition precluded [Officer B] from taking the threat seriously, we disagree. Cross's feet were not shackled and, although Cross was in handcuffs when he threatened to assault [Officer B] "if he wasn't in handcuffs," Cross would not remain handcuffed indefinitely and could carry out his threat at some time in the future.

Thus, we hold that neither the criminal statute nor applicable statutory definition requires that a threat to harm a person must be unconditional to support a harassment conviction. In addition, when the condition stated is temporary, the State need not prove a nonconditional present threat to support a jury's verdict finding that the victim's fear of the threat was reasonable.

Sufficient evidence supports the jury's verdict finding Cross guilty of gross misdemeanor harassment. Here, [Officer B] indicated that Cross made his threat while handcuffed in the back of his patrol car. At the time of the threat, [Officer B] knew that Cross had fled the scene because [Officer B] had responded to [Officer A's] call for assistance and [Officer B] had already had to forcibly restrain Cross so that [Officer A] could frisk him for weapons. In addition, [Officer A] had described to [Officer B] the path of the chase and the yard where the fight occurred and asked him to check for any evidence along the route. Thus, the jury could reasonably infer from the officers' testimonies that [Officer B] had knowledge of the extent of Cross's assaultive ability from his efforts to resist arrest and from his fight with [Officer A]. Moreover, [Officer B] testified that he took Cross's threat to "kick [Officer B's] ass" "seriously" and that he had been previously assaulted by handcuffed defendants. [Officer B] noted that handcuffed defendants "can do things to assault you not with their hands" such as "kick or bite or headbutt" you. In light of all the evidence, Cross's threat, as well as Cross's belligerent and assaultive conduct, any reasonable juror could find beyond a reasonable doubt that [Officer B's] concern for his safety was reasonable.

Cross relies on C.G. for his argument that there is insufficient evidence to support a finding that [Officer B] reasonably feared bodily harm from his conditional threat. But C.G. is distinguishable and Cross's reliance is misplaced. In C.G., a student shouted, "I'll kill you Mr. Haney, I'll kill you" to her school's vice principal. The State charged C.G. with felony harassment because her threat involved death. RCW 9A.46.020(2). Our Supreme Court had to determine whether sufficient evidence supported a finding that Haney reasonably feared that C.G. would carry out this threat and cause Haney's death. At trial, Haney did not testify that he believed C.G. would kill him; instead, he testified that C.G.'s threat caused him concern only about a future "harm." On this testimony, our Supreme Court reversed C.G.'s felony harassment conviction, holding that the evidence was insufficient to prove Haney's fear of death as a result of the threat. Our Supreme Court suggested that if the State had charged C.G. with gross misdemeanor harassment, the evidence could have established that Haney feared bodily harm that and supported a gross misdemeanor harassment conviction even though the evidence could not support a finding that Haney reasonably feared death as a result of the threat. Here, the State charged Cross with gross misdemeanor harassment and there is sufficient evidence to support the jury's finding that [Officer B] had a reasonable fear that bodily harm could

> have resulted from Cross carrying out his threat to "kick [Officer B's] ass." Accordingly, we affirm Cross's gross misdemeanor harassment conviction.

[Some citations and footnotes omitted]

2) Waiver of search incident challenge

On the waiver issue, two of the three judges opine that Cross waived his right to challenge the search incident to arrest by failing to raise the issue at the time of trial. Judge Houghton disagrees, arguing that the 2009 U.S. Supreme Court ruling in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13** significantly changed the law, and that this should excuse the failure of a defendant to raise the issue. She notes that at this time Division Two's judges are split: Judges Houghton, Armstrong, Penoyar and VanDeren do not apply waiver in this context, while Judges Quinn-Brintnall, Bridgewater and Hunt do apply waiver. **LED EDITORIAL NOTE: The Washington Supreme Court is expected to resolve this waiver issue relatively soon.**

ELECTRONIC INTERCEPT-AND-RECORD COURT ORDER UNDER PRIVACY ACT (RCW 9.73.090 AND RCW 9.73.130) WAS SUPPORTED BY A SHOWING THAT OTHER NORMAL INVESTIGATIVE PROCEDURES WOULD BE "UNLIKELY TO SUCCEED"

State v. Constance, 154 Wn. App. 861 (Div. I, 2010)

Facts and Proceedings below:

While in jail for contempt of court in relation to child support obligations, Dino Constance solicited Ricci Castellanos to murder [Constance's ex-wife, Koncos]. Castellanos reported the solicitation to law enforcement officers, hoping to get a break on the terms of his supervision following release from jail. Castellanos agreed to allow police to record telephone conversations between himself and Constance. The police applied for a court order under RCW 9.73.090 and RCW 9.73.130 to allow the recording of conversations involving Castellanos and Constance, and possibly also involving a specified police detective who was to play the role of hit man.

The extensive, detailed application (with numerous incorporated attachments) for the one-party consent court order included the following provision, which was the primary effort in the application to meet RCW 9.73.130(3)(f), which requires a showing, individualized for the case at hand, that "other normal investigative procedures . . . have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ":

> "Normal investigative techniques are unlikely to succeed if tried and are too dangerous to try. Castellanos was in contact with Constance as the two shared a jail cell over the weekend. Outside the above described investigative operation, involving the murder of Constance's ex-wife, Constance has not requested to meet Castellanos' "hit-man". The idea of arresting Constance in hopes he will admit his intent to hire a hit-man to murder his ex-wife is unlikely. Even if Constance did divulge his desire to have his ex-wife murdered, that alone may not support his prosecution for Solicitation to Commit Murder in the First Degree and Criminal Conspiracy. In the meantime, as Constance has demonstrated, he may be soliciting other individuals to murder his ex-wife. I believe time is of the essence, as Constance is out of jail and may be soliciting another person or persons, to murder his wife. The statements made by Castellanos and the sworn

> testimony made under oath by Jordan and Michael Spry support my belief. Additionally, Constance has demonstrated a propensity toward violence, as detailed in the many police reports attached herein (Exhibit No. 5).
>
> An additional, but significant problem occurs with Castellanos' testimony. His felony criminal history is of a nature that they will be disclosed to a jury during any trial. Although his information corresponds with the statements of Jordan and Michael Spry, who testified in court that Constance tried to hire them to kill Koncus [sic], any solicitation of Castellanos is a separate crime. Because of the nature of Castellanos' criminal background, independent verification of his statements is necessary to help prove he was solicited. A recording of statements between Castellanos and Constance will be the best way to verify Castellanos ['] statements.
>
> Further, because of the nature of the crime, a recording of all of the conversations is appropriate and helpful to prove that the scheme originates in the mind of Constance and that he is not entrapped into committing the crime. Given Castellanos['] background and potential issues with his criminal history being placed in front of a jury, a recording will be the best way to ensure that he has not overstepped his role and entrapped Constance.

The superior court approved the application, as well as an application for an extension, and police obtained some incriminating evidence when they recorded several phone conversations between Constance and Castellanos.

Constance was charged with solicitation to commit first degree murder (three counts, one of which related to the recorded solicitation of Castellanos), as well as one count of solicitation to commit assault in the second degree. Prior to trial, he moved unsuccessfully to suppress the recording that related to one of the first degree murder solicitation charges. He was convicted by a jury as charged.

ISSUES AND RULINGS: 1) Did the application for court authorization to conduct the interception and recording of the phone conversations, despite the application's inclusion of considerable "boilerplate" that was generic to similar investigations, satisfy RCW 9.73.130(3)(f), which requires in this context an individualized showing that "other normal investigative procedures" would be "unlikely to succeed if tried"? (ANSWER: Yes)

2) Did the police reports submitted with the application to intercept and record telephone conversations between defendant and a former jail cellmate support the characterization of Constance as a "violent" criminal where: 1) the reports indicated that Constance was a suspect in a number of domestic violence assaults, and that he had violated an order protecting his ex-wife 11 times over the previous three years; and (2) where, although Constance contended that many of those incidents were minor or were instigated by his ex-wife, the most recent police reports described his failed attempt to abduct his son, his violent assault of his ex-wife, and his threat to kill her? (ANSWER: Yes)

Result: Affirmance of Clark County Superior Court first degree felony murder conviction of Dino J. Constance on three counts of solicitation to commit first degree murder and one count of solicitation to commit second degree assault.

Status: Constance's motion for reconsideration is pending in the Court of Appeals.

ANALYSIS:

1) Showing regarding unavailability of "other normal investigative procedures"

Unless an exception is provided, chapter 9.73 RCW generally prohibits the interception and recording of private conversations. Chapter 9.73 provides remedies of suppression, civil damages and criminal penalties. RCW 9.73.090(2) provides an exception for court-ordered, one-party-consent interception and recording where there is probable cause to believe that the non-consenting party "has committed, is engaged in, or is about to commit a felony." But an application for such a court order must meet the extensive requirements of RCW 9.73.130. Under RCW 9.73.130(3)(f), an application for authorization to record communications or conversations must include [among many other things]:

> (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

The Constance Court rejects the defendant's argument under State v. Manning, 81 Wn. App. 714 (Div. I, 1996) **Sept 96 LED:14**, that, because the application in his case includes boilerplate justifications, it violates the requirement of RCW 9.73.130(3)(f) for the application to provide a statement of facts making an individualized showing that other normal investigative procedures were tried or appear reasonably unlikely to succeed in that particular case.

In Manning, the issuing court authorized the police to intercept and record conversations between a confidential informant and a suspected drug dealer based almost entirely on boilerplate about the generic reasons why the investigators and prosecution wished to do the interception and recording. The Manning Court described a portion of the application as follows:

> The anticipated conversations were of primary importance to the investigation. Interception and recording would avoid a "one-on-one swearing contest" as to who said what, provide uncontroverted evidence of Manning's criminal intent, minimize factual confusion, and rebut anticipated allegations of entrapment. The application stated, "[n]o more reliable evidence of the communications or conversations is available than a recording, or recordings, of the actual conversations. The spoken words are themselves the best evidence of criminal intent. No other investigative method is capable of capturing these words in such clear and admissible evidentiary form.' In further justification, the application averred it was necessary 'to intercept and record conversations at the earliest stage of case development to maintain the integrity and proper direction of the investigator."

Manning held that the above-described and quoted justifications in the application were inadequate by themselves to meet RCW 9.73.130(3)(f) because they were mere boilerplate contrary to the statutory mandate to provide a particular statement of facts. Such "boilerplate," the Manning Court complained, had become common in such applications. Manning declared that there must be a showing of that law enforcement gave "serious consideration to other methods." Nonetheless, the Manning Court concluded that the application in that case was "minimally adequate" because it contained more than general boilerplate justifications. The Manning application stated, in addition to the boilerplate, that the defendant was the target of a

previous inconclusive investigation, was known to be armed and dangerous, and that using an undercover officer without the protection of a transmitter would be unlikely to succeed because of the risk to the officer.

The Constance Court explains that the decision in Manning does not prohibit the use of boilerplate language altogether, and that in Constance, as in Manning, the application does not rely solely on general boilerplate justifications to show that the police gave serious consideration to other normal investigative techniques. The application in Constance explained why normal investigative methods were inadequate and unlikely to succeed or too dangerous to employ against Constance:

> Normal investigative techniques are unlikely to succeed if tried and are too dangerous to try. Castellanos was in contact with Constance as the two shared a jail cell over the weekend. Outside the above described investigative operation, involving the murder of Constance's ex-wife, Constance has not requested to meet Castellanos' "hit man". The idea of arresting Constance in hopes he will admit his intent to hire a hit-man to murder his ex-wife is unlikely. Even if Constance did divulge his desire to have his ex-wife murdered, that alone may not support his prosecution for Solicitation to Commit Murder in the First Degree and Criminal Conspiracy. In the meantime, as Constance has demonstrated, he may be soliciting other individuals to murder his ex-wife. I believe time is of the essence, as Constance is out of jail and may be soliciting another person, or persons, to murder his wife. The statements made by Castellanos and the sworn testimony made under oath by Jordon and Michael Spry support my belief.

The Constance application also described the unsuccessful previous attempt to question Constance about the threat to kill Koncos that he made to Jordan Spry. When the police asked Constance about the reported threat to kill Koncos, he flatly denied making any such threat.

Moreover, the Constance Court continues, the crime of solicitation contains an "intent" element, and in deciding whether to authorize interception and recording, one must take into account the nature of the crime and the inherent difficulties in proving that particular crime, including whether the crime has a particular mental state as an element of the crime. See State v. Porter, 98 Wn. App. 631 (Div. III, 1999) **April 00 LED:11** (ultimately determining that an application in a drug case did not meet the test of RCW 9.73.130(3)(f)). And, as the Constance application points out, this particular investigation using ex-con Castellanos as a police agent also posed a heightened risk of a claim of entrapment.

The Constance Court also notes that the application explained the need, in light of Constance's propensity for violence, to monitor the undercover officer for safety reasons. "It would be unsafe for Detective Hess to meet with Constance without audio and video capability so that other investigators can monitor the meetings and ensure the ability to respond quickly if anything goes wrong." The application stated that because the undercover officer would not always be in close proximity to the police protection teams, "[t]he only way to monitor the safety of the officer is through the use of transmitted conversation."

2) Support for the application's assertion regarding Constance's violent nature

The Constance Court also rejects his argument that the police reports submitted with the application do not support the characterization of him as a violent criminal. The application states:

> [T]he investigative plan described above, if successful, is anticipated to result in the arrest and prosecution of a habitual domestic violence offender and violent ex-con . . . .
>
> Constance's interactions with his ex-wife and his criminal history show him to be an active and elusive criminal who has been engaged in criminal activity for quite some time. He is therefore not likely to speak about his criminal activity or to participate in the planned murder of his ex-wife if he thinks non-participant witnesses are in a position to overhear his conversations.

The police reports reflect that Constance was a suspect in a number of domestic violence assaults and violated the protection order against Koncos [his ex-wife] eleven times over the previous three years. While Constance contended that many of these incidents were minor or were instigated by his ex-wife, the Court of Appeals notes that his selective memory ignores the most recent police reports describing hisfailed attempt to abduct his son and the violent assault of his ex-wife, Koncos, and the threat to kill her.

LED EDITORIAL COMMENT: The law regarding applications for court-authorized, one-party consent recordings under the combined provisions RCW 9.73.090 and RCW 9.73.130 is complex. Such applications probably should not be attempted without the active involvement of an attorney from the prosecutor's office.

LED EDITORIAL NOTE: This case did not involve the provisions of chapter 9.73 RCW that allow single-party-consent, agency-authorized interceptions, RCW 9.73.210 and 9.73.230. The latter sections allow agency-authorized interceptions in specified drug-investigation circumstances. There is no requirement under either of those latter sections of the statute that a showing of unavailability of "other normal investigative procedures" be made. Only court-authorized interceptions under the combined provisions of RCW 9.73.130 and 9.73.090 require the kind of showing that was the subject of this appeal.

"WITNESS TAMPERING" CONVICTION SUPPORTED WITHOUT PROOF THAT (1) DEFENDANTS BELIEVED VICTIM TO BE COMPETENT TO TESTIFY, (2) VICTIM ACTUALLY TESTIFIED, OR (3) DEFENDANTS MADE PROMISES TO VICTIM

State v. Thompson, 153 Wn. App. 325 (Div. I, 2009)

Facts and Proceedings below:

James and Judith Thompson were convicted on charges of witness tampering and first degree theft in relation to their long-term manipulation of a vulnerable, elderly woman suffering from advanced dementia. They insinuated their way into her confidence to obtain almost all of her assets.

The witness tampering conviction was based primarily on the Thompsons' making of a videotape with the victim in their preparation for a guardianship hearing. The hearing had been scheduled after the Thompsons had come under investigation for their thievery of the victim's

assets. The Court of Appeals summarizes some of the facts relating to the making of the tape recording as follows:

> The Thompsons came to the hearing on September 14, 2005 with a videotape of Shirley Crawford that they wanted to present to the court. They indicated that they had made the videotape quite recently and that it demonstrated that Shirley Crawford wanted them to have as a gift the proceeds of the sale of her house. The State obtained this videotape and showed it to the jury at the Thompsons' criminal trial in 2008. The videotape was the foundation for the witness tampering charge against both of the Thompsons.
>
> On the video, Judith and James and other members of the Thompson family are shown gathered in Crawford's nursing home room. Judith Thompson hands a typed statement to Crawford. James Thompson tells Crawford that he wrote it from things she said. Judith Thompson reads from the statement, which is written in the first person as if Crawford were speaking. It includes statements such as, "I wanted Jim and Judy to have my house." The video shows Crawford nodding and agreeing with the statements.

ISSUES AND RULINGS: Should the witness tampering convictions be set aside based on one or more of the Thompsons' alternative arguments, i.e., that they could not be convicted of witness tampering because: (1) in light of the victim's advanced dementia, neither they nor any reasonable person would have believed the victim competent to testify as a witness; (2) the tape recording of an unsworn statement is not testimony within the meaning of the witness tampering statute; (3) the Thompsons were not (so they allege in their argument) attempting to induce any inaccurate statements from the victim; and (4) the Thompsons did not make any promises to the victim in their inducing efforts? (ANSWERS: No, to each of the four alternative arguments)

Result: Affirmance of King County Superior Court convictions of James L. Thompson and Judith E. Thompson for witness tampering and first degree theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The evidence at trial showed that Crawford's mental capacity declined steadily after her fall in 2001. The Thompsons argue that by 2005, her dementia was so advanced that any reasonable person would know she was not competent to testify. They say it was impermissible for the jury to infer that when they made the videotape, they had reason to believe Shirley Crawford "was about to be called as a witness" in an official proceeding.
>
> It is reasonable to infer from the videotape that the Thompsons' objective in making it was to show that as long as Crawford had enough oxygen, she was sufficiently lucid to give a reliable account of her desire to give them the proceeds of her house. Near the end, the videotape shows James Thompson saying to Crawford, "No coercion. You don't mind us video taping, so they can't argue. They can't argue with the video camera."
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> The State does not argue that the Thompsons actually believed Crawford was competent. There is substantial evidence that they did not. But the statute does not require proof that they believed Crawford was competent to testify according to a technical legal definition of competency. The statute merely requires proof

that the Thompsons had reason to believe Crawford would be called as a "witness" in a court proceeding. This requirement was satisfied by evidence that the Thompsons brought the video to the guardianship hearing, and when the court did not review it then, they offered a copy to the investigator for Adult Protective Services.

[The Thompsons] argue that Crawford's statements on the video did not satisfy the technical definition of "testimony" because it was not taken under oath as an affidavit, at a deposition or court proceeding. But again, the crime does not require the use of a narrow legal definition of "testify" and it does not require success in inducing false testimony, only the attempt. In other words, the victim does not need to testify under oath for a conviction of witness tampering to be upheld. The Thompsons supplied Crawford with a script and told her it was accurate and that she agreed with it. They told her she needed to retain the statements in the script in case representatives of the State questioned her at a later date. They told her they were going to have to go to court again and hoped the video tape would make a difference in court. They brought family members to watch and sign the purported declaration as witnesses to Crawford's affirmative statements. A reasonable jury could find that the Thompsons believed that, through the videotape, they would be able to present Crawford as a witness at the guardianship hearing, or else use it to impeach her if Crawford ever made contrary statements at some future time.

The videotape shows that the Thompsons attempted to get Crawford to adopt as her own the statements they read to her. The Thompsons argue there was insufficient evidence that the statements were false. But Judith Thompson conceded at trial that some of those statements were inaccurate. For example, one part of the declaration had Crawford express her awareness that $150,000 from the house proceeds had been invested in James Thompson's trucking business to compensate him for losing his previous employment with a trucking company because of all the time he had devoted to taking care of Crawford's affairs. However, the evidence showed that only some $12,000 was arguably related to the trucking business; much more of the house proceeds went to buy [a $200,000 fishing boat for an Alaska charter business]. Judith Thompson admitted as much on cross examination.

The declaration has Crawford express that her "mind just wanders a little bit" when she is on oxygen. On the stand, Judith Thompson admitted that oxygen would not cure or correct Crawford's dementia.

The Thompsons wanted to present Crawford as having given informed consent in 2003 to their appropriation of the money that came from the sale of her house. But given the evidence about Crawford's mental state at that time, that was false testimony; she was incapable of giving informed consent. We conclude there is sufficient evidence of an attempt to induce false testimony.

James Thompson argues that one cannot "induce" false testimony unless one threatens or offers a reward to the witness, citing State v. Rempel, 114 Wn.2d 77 (1990). We disagree. An express threat or a promise of reward is evidence that may support a charge of witness tampering, but it is not an element of the charge. Rempel stands for the proposition that witness tampering requires a

definitive attempt to affect the testimony of a witness, not merely to get someone to drop charges.

The Thompsons assert that the State's evidence was insufficient because it merely pyramided inference on inference. It is true that the State relied on circumstantial evidence to prove the elements of witness tampering, but circumstantial evidence is sufficient so long as the jury is convinced of a defendant's guilt beyond a reasonable doubt.

The evidence supports a determination that the Thompsons videotaped Crawford in a setting where they manipulated her to appear as if she were expressing approval of their scheme. They took a copy to a guardianship hearing to show that Crawford knew and approved of how they were managing her affairs. This was sufficient evidence to support the charge of witness tampering.

[One case citation omitted]

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

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].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. 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]

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