Law Enforcement Digest

JUNE 2012

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

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PART TWO OF THE 2012 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part Two of a two-part compilation of 2012 State of Washington legislative enactments of interest to law enforcement. This second part includes (1) an update on two bills passed during the regular session which were contingent on funding, (2) one bill passed during the first special session, and (3) the Legislative Index.

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

Text of each of the 2012 Washington acts and of their bill reports is available on the Internet at [http://apps.leg.wa.gov/billinfo/]. Use the 4-digit bill number for access to the act and bill reports.

We will include some RCW references in our entries, but where new sections or chapters

are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser likely will not be completed until early fall of this year.

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

We also refer readers to the WAPA website: www.waprosecutors.org, where the 2012 Legislative Summary prepared by Pamela Loginsky, WAPA Staff Attorney, is posted. In particular we would direct readers to the "Miscellaneous Crimes" section which covers some miscellaneous crimes that the LED does not cover.

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

LED EDITORIAL NOTE REGARDING CHAPTER 82 (ESSSB 6284) AND CHAPTER 220 (HB 2346): Both of these bills had contingency clauses that provided that if the Legislature did not provide specific funding by June 30, 2012 the bills would be null and void. The Legislature has provided funding for both bills. Funding for chapter 82 (ESSSB 6284), Reforming Washington's Approach to Certain Nonsafety Civil Traffic Infractions by Authorizing a Civil Collection Process for Unpaid Traffic Fines and Removing the Requirement for Law Enforcement Intervention for the Failure to Appear and Pay a Traffic Ticket, May 12 LED:08, is provided in chapter 86, Laws of 2012 (HB 2190)(Supplemental Transportation Budget), Section 208(15) (p. 22). Funding for chapter 220 (HB 2346), Removing the Requirement that Correctional Officers of the Department of Corrections Purchase Uniforms from Correctional Industries, May 12 LED:23, is provided in chapter 7, Laws of 2012, Second Special Session (HB 2127)(Supplemental Operating Budget), Section 220(2)(f)(p. 124-5).

COMMUNITY SUPERVISION
Chapter 6, First Special Session (2E2SSB 6204)

Effective Dates: **May 2, 2012 (Section 2)**
June 1, 2012 (Sections 1, 3-9, and 11-14)
August 1, 2012 (Section 10)

Amends several statutes relating to offenders on Department of Corrections (DOC) community supervision. The Final Bill Report summarizes the bill as follows:

> A new violation process for offenders on community custody is outlined. DOC will adopt rules creating a structured violation process that includes presumptive sanctions, aggravating and mitigating factors, and definitions for low-level violations and high-level violations. DOC must define aggravating factors that may present a current and ongoing foreseeable risk and therefore elevate an offender to a high-level violation process. DOC is not civilly or criminally liable for a decision to elevate or not to elevate an offender's behavior to a high-level violation unless it acted with reckless disregard. For low-level violations, DOC may sanction an offender to one or more non-confinement sanctions. For

second and subsequent low-level violations, DOC may sanction the offender to not more than three days in total confinement. After an offender has received five low level violation sanctions, all subsequent violations must be treated as high level violations. For high-level violations, DOC may sanction an offender to not more than 30 days in total confinement per hearing. An offender accused of committing a high-level violation is entitled to a hearing.

When an offender on community custody commits a new crime in the presence of a community corrections officer, the officer may arrest the offender and report the crime to local law enforcement or local prosecution. DOC will not hold the offender more than three days from the time of notice to law enforcement. If the offender has a specified underlying offense, the offender will be held in total confinement for 30 days from the time of arrest or until a prosecuting attorney files new charges against the offender, whichever occurs first.

As part of its implementation of the new sanctioning system, DOC must establish stakeholder groups, communicate with law enforcement, and periodically survey community custody officers for ideas and suggestions. DOC must report back to the Legislature at the end of 2012 and 2013.

Also amends RCW 9.94A.706 to prohibit offenders from owning, using or possessing explosives (as defined in RCW 46.04.170) (in addition to firearms and ammunition).

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT DECISION IS REVERSED AS DETECTIVES GET QUALIFIED IMMUNITY FOR SEARCH WARRANT APPLICATION BROADLY SEEKING FIREARMS AND GANG EVIDENCE DURING INVESTIGATION OF SHOOTING THAT PLAINTIFFS CHARACTERIZED AS ISOLATED DOMESTIC VIOLENCE INCIDENT; FACTOR IN QUALIFIED IMMUNITY ANALYSIS IS SUPERVISOR AND PROSECUTOR APPROVAL

Messerschmidt v. Millender, ___ U.S. ___, 132 S. Ct. 1235 (Feb. 21, 2012)

Facts and Proceedings below: (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> Shelly Kelly was afraid that she would be attacked by her boyfriend, Jerry Ray Bowen, while she moved out of her apartment. She therefore requested police protection. Two officers arrived, but they were called away to an emergency. As soon as the officers left, Bowen showed up at the apartment, yelled "I told you never to call the cops on me bitch!" and attacked Kelly, attempting to throw her over a second-story landing. After Kelly escaped to her car, Bowen pointed a sawed-off shotgun at her and threatened to kill her if she tried to leave. Kelly nonetheless sped away as Bowen fired five shots at the car, blowing out one of its tires.
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> Kelly later met with Detective Curt Messerschmidt to discuss the incident. She described the attack in detail, mentioned that Bowen had previously assaulted her, that he had ties to the Mona Park Crips gang, and that he might be staying at the home of his former foster mother, Augusta Millender. Following this conversation, Messerschmidt conducted a detailed investigation, during which he confirmed Bowen's connection to the Millenders' home, verified his membership in two gangs, and learned that Bowen had been arrested and convicted for numerous violent and firearm-related offenses. Based on this investigation, Messerschmidt drafted an application for a warrant authorizing a search of the Millenders' home for all firearms and ammunition, as well as evidence indicating gang membership.
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> Messerschmidt included two affidavits in the warrant application. The first detailed his extensive law enforcement experience and his specialized training in gang-related crimes. The second, expressly incorporated into the search warrant, described the incident and explained why Messerschmidt believed there was probable cause for the search. It also requested that the warrant be endorsed for night service because of Bowen's gang ties. Before submitting the application to a magistrate for approval, Messerschmidt had it reviewed by his supervisor, Sergeant Robert Lawrence, as well as a police lieutenant and a deputy district attorney. Messerschmidt then submitted the application to a magistrate, who issued the warrant. The ensuing search uncovered only Millender's shotgun, a California Social Services letter addressed to Bowen, and a box of .45-caliber ammunition.
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> The Millenders filed an action under 42 U. S. C. §1983 against petitioners Messerschmidt and Lawrence, alleging that the officers had subjected them to an unreasonable search in violation of the Fourth Amendment. The District Court granted summary judgment to the Millenders, concluding that the firearm and gang-material aspects of the search warrant were overbroad and that the officers were not entitled to qualified immunity from damages. The Ninth Circuit, sitting en banc, affirmed the denial of qualified immunity. [Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir. 2010) **Oct 10 LED:03**]. The court held that the warrant's authorization was unconstitutionally overbroad because the affidavits and warrant failed to establish probable cause that the broad categories of firearms, firearm-related material, and gang-related material were contraband or evidence of a crime, and that a reasonable officer would have been aware of the warrant's deficiency.

ISSUE AND RULING: Should the officers involved in the application for the search warrant be granted qualified immunity on the rationale that a reasonable officer could have believed, even if erroneously, that the affidavits established probable cause broadly to search the Millender home for all firearms and ammunition, as well as for evidence indicating gang membership? (ANSWER BY SUPREME COURT: Yes, rules a 6-3 majority, the officers are entitled to qualified immunity under all of the facts, including the fact of prior supervisor and prosecutor approval)

Result: Reversal of Ninth Circuit U.S. Court of Appeals decision denying qualified immunity to the officers in this case; remand for dismissal. (Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir. 2010) **Oct 10 LED:03**.)

ANALYSIS IN MAJORITY OPINION: (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> (a) Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U. S. 223, 231 [(2009)]. Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner, or in "objective good faith." United States v. Leon, 468 U. S. 897, 922–923 [(1984)]. Nonetheless, that fact does not end the inquiry into objective reasonableness. The Court has recognized an exception allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." Malley v. Briggs, 475 U. S. 335, 341 [(1986)]. The "shield of immunity" otherwise conferred by the warrant will be lost, for example, where the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U. S. at 923. The threshold for establishing this exception is high. "[I]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination" because "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." Leon, 468 U.S. at 921.
>
> (b) This case does not fall within that narrow exception. It would not be entirely unreasonable for an officer to believe that there was probable cause to search for all firearms and firearm-related materials. Under the circumstances set forth in the warrant, an officer could reasonably conclude that there was a "fair probability" that the sawed-off shotgun was not the only firearm Bowen owned, Illinois v. Gates, 462 U. S. 213, 238 [(1983)], and that Bowen's sawed-off shotgun was illegal. Cf. 26 U. S. C. §§ 5845(a), 5861(d). Given Bowen's possession of one illegal gun, his gang membership, willingness to use the gun to kill someone, and concern about the police, it would not be unreasonable for an officer to conclude that Bowen owned other illegal guns. An officer also could reasonably believe that seizure of firearms was necessary to prevent further assaults on Kelly. California law allows a magistrate to issue a search warrant for items "in the possession of any person with the intent to use them as a means of committing a public offense," Cal. Penal Code Ann. §1524(a)(3), and the warrant application submitted by the officers specifically referenced this provision as a basis for the search.

(c) Regarding the warrant's authorization to search for gang-related materials, a reasonable officer could view Bowen's attack as motivated not by the souring of his romantic relationship with Kelly but by a desire to prevent her from disclosing details of his gang activity to the police. It would therefore not be unreasonable—based on the facts set out in the affidavit—for an officer to believe that evidence of Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly, in supporting additional, related charges against Bowen for the assault, or in impeaching Bowen or rebutting his defenses. Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence could demonstrate Bowen's control over the premises or his connection to other evidence found there.

(d) The fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. A contrary conclusion would mean not only that Messerschmidt and Lawrence were "plainly incompetent" in concluding that the warrant was supported by probable cause, Malley, 475 U.S. at 341, but that their supervisor, the deputy district attorney, and the magistrate were as well.

(e) In holding that the warrant in this case was so obviously defective that no reasonable officer could have believed it to be valid, the court below erred in relying on Groh v. Ramirez, 540 U. S. 551 [(2004) **April 04 LED:02]**. There, officers who carried out a warrant-approved search were not entitled to qualified immunity because the warrant failed to describe any of the items to be seized and "even a cursory reading of the warrant" would have revealed this defect. Id. at 557. Here, in contrast, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the supporting affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. Unlike in Groh, any error here would not be one that "just a simple glance" would have revealed. Id. at 564.

DISSENT: Justice Kagan writes an opinion that concurs on qualified immunity on the all firearms and ammunition issue but disagrees on the gang evidence question. Justice Sotomayor writes a stinging dissent, joined by Justice Ginsburg, dissenting on qualified immunity on both questions.

LED EDITORIAL COMMENTS: It is important to remember that the Supreme Court majority in Millender granted only qualified immunity from civil liability. The Supreme Court did not rule that the affidavit established probable cause to search for the broad categories of items listed, and because this was a civil case, the Court did not rule on whether the evidence seized was admissible for criminal prosecution purposes. Those drafting search warrant applications should exercise caution in the breadth of the search warrant authorization in light of the facts set forth in the affidavit.

On a positive note, however, it is important to recognize that the Millender majority opinion gave weight in its qualified immunity analysis to the fact that the officers preparing the search warrant application submitted the paperwork to supervisors and a deputy prosecutor before submitting it to a judge for approval.

Such supervisor and prosecutor review is not required. And we think from our reading of Exclusionary Rule analysis in Washington Supreme Court decisions that such supervisor/prosecutor review will not help make evidence seized under a search warrant admissible in a criminal case reviewed under Washington law; it appears to us that the Washington Supreme Court has rejected application of a good faith exception to exclusion of evidence in the search warrant context. But, no matter what the Washington Supreme Court thinks about the value of such supervisor/prosecutor review, such review will be helpful on the qualified immunity issue addressed in Millender because the U.S. Supreme Court has the last word on what is to be considered on qualified immunity in federal Civil Rights Act cases.

CONSIDERING ALL THE CIRCUMSTANCES, INCLUDING FACT THAT SUSPECT FIELDS WAS TOLD AT START AND LATER THAT HE WAS FREE TO LEAVE AT ANY TIME AND RETURN TO HIS JAIL CELL, FIELDS WAS NOT IN CUSTODY FOR MIRANDA PURPOSES – AND THEREFORE MIRANDA WARNINGS AND WAIVER WERE NOT REQUIRED – WHERE OFFICERS HAD HIM REMOVED FROM HIS CELL AND QUESTIONED HIM ABOUT UNCHARGED OFFENSES ALLEGEDLY COMMITTED PRIOR TO HIS INCARCERATION

Howes v. Fields, ___ U.S. ___, 132 S. Ct. 1181 (Feb. 21, 2012)

Facts (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion):

> Respondent Fields, a Michigan state prisoner, was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff's deputies about criminal activity he had allegedly engaged in before coming to prison. At no time was Fields given Miranda warnings or advised that he did not have to speak with the deputies. As relevant here: Fields was questioned for between five and seven hours; Fields was told more than once [including prior to the start of questioning] that he was free to leave and return to his cell; the deputies were armed, but Fields remained free of restraints; the conference room door was sometimes open and sometimes shut; several times during the interview Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell; after Fields confessed and the interview concluded, he had to wait an additional 20 minutes for an escort and returned to his cell well after the hour when he generally retired.

ISSUE AND RULING: Considering all of the circumstances, including the fact that Fields was told that he was free to leave at any time and return to his jail cell, was Fields in custody for Miranda purposes when officers had him removed from his jail cell and questioned him about uncharged sex offenses he was suspected of committing prior to his incarceration? (ANSWER BY SUPREME COURT: No, rules a 6-3 majority)

Result: Reversal of decision of Sixth Circuit, U.S. Court of Appeals, thus reinstating Fields' Michigan State Court sex offense convictions and sentence.

ANALYSIS BY MAJORITY:

The majority opinion explains that the Sixth Circuit misread U.S. Supreme Court precedents. Those precedents have consistently rejected a per se custody rule for questioning of imprisoned persons who are taken aside and questioned about crimes that allegedly occurred outside jail or prison walls.

Questioning a person who is already in prison does not generally involve the shock that often accompanies arrest of a person who is not, the majority opinion explains. Unlike persons in the latter situation, a prisoner is unlikely to be lured into speaking by a longing for prompt release. Also, a prisoner knows that his questioners probably lack authority to affect the duration of his sentence. And, taking a prisoner aside for questioning may involve additional limitations on the prisoner's freedom of movement, but it does not necessarily convert a noncustodial situation into Miranda custody, the majority opinion explains. Isolation may contribute to a coercive atmosphere when a non-prisoner is taken to a police station and questioned, but questioning a prisoner in a private area does not generally remove him from a supportive atmosphere, and that actually may be in his best interest. Neither does questioning a prisoner about criminal activity outside the prison have a significantly greater potential for coercion, the majority opinion asserts, than questioning the prisoner under otherwise identical circumstances about criminal activity within the prison walls.

The majority opinion explains that the question of Miranda custody is a highly fact-based one that looks at all of the circumstances of the interrogation to determine if a reasonable person would feel free, other than in the circumstance of a temporary seizure for investigation, to terminate the conversation and leave. In determining that Fields was not in Miranda custody, the majority opinion assesses the circumstances as follows:

> The record in this case reveals that [Fields] was not taken into custody for purposes of Miranda. To be sure, [Fields] did not invite the interview or consent to it in advance, and he was not advised that he was free to decline to speak with the deputies. The following facts also lend some support to [Fields'] argument that Miranda's custody requirement was met: The interview lasted for between five and seven hours in the evening and continued well past the hour when [Fields] generally went to bed; the deputies who questioned [Fields] were armed; and one of the deputies, according to [Fields], "[u]sed a very sharp tone," and, on one occasion, profanity.
>
> These circumstances, however, were offset by others. Most important, [Fields] was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. . . . Moreover, [Fields] was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was "not uncomfortable." He was offered food and water, and the door to the conference room was sometimes left open. "All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave."
>
> Because he was in prison, [Fields] was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell. But he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than police questioning; under no circumstances could he have reasonably expected to be able to roam free. And while [Fields] testified that he "was told . . . if I did not want to cooperate, I needed to go back to my cell," these words did not coerce cooperation by threatening harsher conditions. Returning to his cell would merely have returned him to his usual environment.

> Taking into account all of the circumstances of the questioning—including especially the undisputed fact that [Fields] was told that he was free to end the questioning and to return to his cell—we hold that [Fields] was not in custody within the meaning of Miranda.

[Footnotes, some citations to cases and to the record omitted]

CONCURRENCE/DISSENT: Justice Ginsburg writes an opinion joined by Justices Breyer and Sotomayor. She argues: (1) that the majority should have avoided answering the custody question by ruling against Fields on grounds that the law was not "clearly established" for purposes of indirect federal court review of a State court conviction; but (2) that, since the majority opinion did not do that, the majority should have ruled that Fields was in custody for Miranda purposes.

LED EDITORIAL NOTES: Note that the officers in this case were questioning Fields about uncharged sex crimes, so only the Fifth Amendment Miranda rule was implicated. If Fields had already been charged with the sex crimes, then, under the Sixth Amendment, Miranda warnings and waiver would have been required prior to any questioning.

Note also that one of the precedents discussed in Fields is Maryland v. Schatzer, 130 S. Ct. 1213 (2010) April 10:LED:03 (holding that the Firth Amendment initiation-of-contact rule has a 14-day break-in-custody limit that includes convicted and sentenced prisoners returned to the general prison or jail population in certain circumstances).

LED EDITORIAL COMMENTS ON THE TACTIC OF NON-CUSTODIAL, UN-MIRANDIZED QUESTIONING: We repeat here with some tailoring our comments from LEDs of the past several years addressing the thorny Miranda custody question.

Deciding whether to use the tactic of non-custodial, un-Mirandized interrogation

We recognize that officers will in rare circumstances make a considered decision, based on all of the factual circumstances, and often relying on a wealth of experience, that un-Mirandized questioning will be more fruitful. This is a difficult decision for officers, because the test for "custody" is an unpredictable, totality of the circumstances test. Another concern in this context is that, while the Washington Supreme Court has to date held that the Washington constitution does not impose greater restrictions on Washington law enforcement officers in relation to Miranda requirements, there is always the chance that the Court will depart from those precedents.

When officers make that difficult decision tactically to do a non-custodial interrogation without Miranda warnings, extra effort must be made to make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, we think that officers should first tell the suspect that the suspect does not have to answer the questions and that the suspect can leave at any time. Officers conducting such "tactical" un-Mirandized questioning outside the jail or prison setting should be prepared to allow the suspect to go free after the questioning is completed.

Also, in light of some discussion tying the "custody" question to officer-deception in past Washington appellate court decisions, officers probably should not use deception that would be permissible with a Mirandized suspect. For cases touching on the custody-deception issue, see, for instance, State v. Hensler, 109 Wn.2d 357 (1987)

(Miranda not required in non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (Miranda not required in non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (Miranda not required in non-deceptive, non-custodial questioning of suspect as scene of MVA). The Washington appellate courts 1) have only occasionally talked about would-be "deception-custody" test; 2) have never explained the source of the test or its specifics for application; and 3) have never excluded a statement based on deception during non-custodial questioning. Nonetheless, the above-noted decisions lead us to suggest that deception be avoided in tactical, non-custodial interrogations.

Custody-determination factors

We close this LED entry with a non-exhaustive list of some of the things, in addition to age of a juvenile suspect, that courts consider in trying to determine whether, balancing all of the objectively evaluated circumstances in their totality, Miranda custody exists –

- **Whether the officers informed the suspect that he was not under arrest and was free to leave;**
- **Whether the officers informed the suspect that he or she did not have to answer their questions;**
- **The place (e.g., how private or public was the setting);**
- **The announced or objectively obvious purpose of the questioning;**
- **The length of the interrogation;**
- **The manner of interrogation (e.g., friendly and low key vs. accusatory);**
- **Whether the suspect consented to speak with law enforcement officers;**
- **Whether the suspect was involuntarily moved to another area prior to or during the questioning;**
- **Whether there was a threatening presence of several officers and/or a display of weapons or physical force;**
- **Whether the officers deprived the suspect of documents or other things he needed to continue on his way;**
- **Whether the officers' express language or tone of voice would have conveyed to a reasonable person that they expected their requests to be obeyed;**
- **Whether the officers revealed to the suspect that he was the focus of their investigation and/or confronted him with the incriminating evidence;**
- **Whether the officers used deception in the questioning;**
- **Whether the officers allowed the suspect to leave at the end of the questioning.**

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WASHINGTON STATE SUPREME COURT

STALENESS PROBLEM: WHILE SEARCH WARRANT AFFIDAVIT ESTABLISHED THAT CONFIDENTIAL INFORMANT RECENTLY TOLD DETECTIVE OF CONFIDENTIAL INFORMANT'S OBSERVATION OF DEFENDANT'S MARIJUANA GROW OPERATION, AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE BECAUSE AFFIDAVIT FAILED TO ESTABLISH WHETHER CI MADE THE OBSERVATION RECENTLY

State v. Lyons, ___Wn.2d ___, 2012 WL 1436677 (April 26, 2012)

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

A Yakima District Court judge issued a search warrant for Lyons' property, based on an affidavit by [a law enforcement officer]. [The officer-affiant] made the following statement of probable cause in the affidavit:

> Within the last 48 hours a reliable and confidential source of information (CS) contacted [narcotics] Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth. . . .

When they executed the search warrant, police discovered more than 200 mature marijuana plants maintained in a pole barn on Lyons' property. On the property police also found small, juvenile marijuana plants, supplies for packaging marijuana, and a large quantity of mushrooms. Lyons was arrested and charged with manufacturing marijuana, possession of mushrooms with intent to deliver, and possession of marijuana with intent to deliver.

Lyons moved to suppress the evidence seized from his property, arguing that the affidavit for search warrant failed to state timely probable cause. The superior court judge found that although the affidavit identified when the officer received the CS's information, it "said nothing about the timing of the informant's observation." The judge held that the affidavit was legally insufficient and the search unlawful and granted Lyons' motion to suppress. The State appealed.

In a two-judge majority opinion, the Court of Appeals reversed the trial court. State v. Lyons, 160 Wn. App. 100, 102 (2011) **April 11 LED:11**. The majority held that the language in [the officer's] affidavit, "[w]ithin the last 48 hours," could be read either to apply solely to when the CS contacted police or to apply both to the time of contact and of the CS's observations. The majority went on to hold the standard of review required the language be read to support the warrant.

The dissenting judge called this analysis a strained and unnatural reading. We agree with Judge Siddowa''s dissent.

[Some citations to record and cases omitted]

ISSUE AND RULING: Did the search warrant affidavit fail to establish that the confidential informant had recently observed the defendant's marijuana grow operation, and therefore fail to establish probable cause to search the defendant's residence to search for the grow operation? (ANSWER BY COURT OF APPEALS: Yes, rules a unanimous Washington Supreme Court).

Result: Defendant Patrick Jimi Lyons, aka Jimi Luke Andring, prevails; reversal of Division Three Court of Appeals' decision that had reversed Yakima County Superior Court suppression ruling; case remanded to Superior Court for further proceedings consistent with the Supreme Court opinion. **[LED EDITORIAL NOTE: We assume that this decision by the Supreme Court will result in dismissal of the charges against defendant of one count each of (1) manufacturing marijuana, (2) possession of a controlled substance (illegal mushrooms) with intent to deliver, and (3) possession of marijuana with intent to deliver.]**

ANALYSIS:

To establish probable cause for a warrant to search premises based exclusively (i.e., without considering any corroborating information) on a confidential informant (CI), the Washington Supreme Court held in State v. Jackson, 102 Wn.2d 432 (1984) that the affidavit must establish both the CI's: (1) basis of knowledge (i.e., the affidavit must show the CI's first-hand knowledge about the current presence of the items sought), and (2) the CI's veracity (i.e., the affidavit must show the CI's credibility, as shown through a track record of providing criminal leads or through proof that the CI is giving information against his or her penal interest, or otherwise demonstrate credibility). Thus, under State v. Jackson, in a case such as Lyons, where the affidavit contains no corroboration of the information brought forward by the CI, both the basis of information and the veracity of the CI must be shown in the affidavit.

The test of State v. Jackson described in the preceding paragraph is known as the "two-pronged Aguilar-Spinelli test" for informant-based probable cause. The test was developed in the 1960s by the U.S. Supreme Court in interpreting the Fourth Amendment in the cases of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. U.S., 393 U.S. 410 (1969). In 1983 in Illinois v. Gates, 462 U.S. 213 (1983), the U.S. Supreme Court, as a matter of Fourth Amendment interpretation, relaxed the Aguilar-Spinelli test, substituting a "totality of the circumstances test" for informant-based probable cause. However, the following year, in State v. Jackson, 102 Wn.2d 432 (1984), the Washington Supreme Court chose to adhere to the strict two-pronged, Aguilar-Spinelli test in an independent grounds reading of the Washington constitution.

The Lyons Supreme Court opinion does not set forth or describe that part of the affidavit that explains why the CI should be deemed *credible*. But a footnote in the opinion acknowledges that the affidavit supplied sufficient information to establish that the CI was credible.

The Lyons Court focuses on the *basis-of-information* prong of the Aguilar-Spinelli test. Under that prong, even if the CI is shown in the affidavit to have made a first-hand observation of the criminal activity at issue, the observation must have been recent enough to make it probable that the information is not stale. The affidavit must establish that the evidence sought is still located inside the private premises that are the target of the search warrant.

The Lyons Court recognizes that the test for currency (or, as seen on the flipside, staleness) of information is flexible, depending on the nature and scope of the crime under investigation. The Court cites with approval a 1989 Washington Court of Appeals decision in which an account of a CI's observation of a marijuana grow operation two months prior to the warrant application was deemed not stale in light of the ongoing nature and extensive scope of the crime at issue.

However, the Lyons Court concludes that in the affidavit under review, there is no way to determine from the officer's description of the CI's report the point in time when the CI made his or her observation. Even though search warrant affidavits are to be given commonsense readings that are not hypertechnical, and even though such readings must defer to the magistrate who issued the search warrant, those guidelines for interpretation of affidavits do not help the State in the Lyons case, the Court concludes. The affidavit's statement as to when the CI provided information to the officer-affiant in Lyons does not provide any information about when the CI made his or her observation. And no other information in the affidavit allows an inference as to when the CI made his or her observation of the grow operation.

Along the way, the Lyons Court overrules a prior Washington Supreme Court decision, State v. Partin, 88 Wn.2d 899 (1977), "to the extent that [Partin] stands for the conclusion that timely probable cause may be supported by the recency of the tip alone." The Court also asserts that decisions from appellate courts in several other states support its analysis of probable cause under the Lyons' facts. Finally, the Court says that the contrary approach by Court of Appeals in Lyons appears to be along the lines of the relaxed Fourth Amendment "totality of the circumstances" test for informant-based probable cause. As noted above, the Washington Supreme Court rejected the "totality of the circumstances" test in its 1984 decision in State v. Jackson.

LED EDITORIAL COMMENT: Affiants should draft the temporal element of the affidavit/declaration in a case such as Lyons with the dual purposes of: (1) establishing non-stale probable cause (by showing the observation was made recently enough to make it likely the contraband or evidence is still present), and (2) protecting the identity of the confidential informant (by being vague enough to make it difficult for the target guess as to when the CI made his or her observation, but not too vague to establish that the information is not stale). The preferred way to reference the timing of the CI's observation and the timing of the CI's reporting of that observation to the affiant-officer is to address the two temporal elements separately along the following lines: "Within the past XX hours/days, I received information from a confidential informant, hereafter referred to as CI No. 1, that John Doe is growing marijuana in his residence at 1234 Criminal Lane in Happy Town, Washington. CI No. 1 told me that within YY hours/days prior to giving me the information, CI No. 1 saw marijuana being grown indoors at the listed address."

WHERE THERE WAS EVIDENCE THAT A VICTIM OF A SHOOTING KNEW WHO SHOT HIM AND HIS COMPANION, BUT HE CONSISTENTLY CLAIMED TO POLICE THAT HE DID NOT KNOW, THE SHOOTING VICTIM DID NOT COMMIT RENDERING CRIMINAL ASSISTANCE

State v. Budik, 173 Wn.2d 727 (Feb. 16, 2012)

Facts and Proceedings below:

Budik was a passenger in a pickup truck parked near a home where a party was ongoing. Budik and the driver were shot at relatively close range. The driver was killed in the shooting. At all times after the shooting, Budik's response to skeptical police questioning was that he did not see or know who did the shooting.

His conversation with the mother of the deceased driver went a little differently. The Supreme Court majority opinion describes that exchange as follows:

> Several days after the shooting, Walton's mother, Rae Ann Walton (Rae), went to Budik's home and left a note in the mailbox asking Budik to call her. Budik did so one or two days later. Rae asked Budik, "[W]ho killed my son," and he replied, "Rascal [Juwuan Nave] did it." Budik went on to indicate that Nave had walked from behind Freddie Miller and that the shooting then began.

The Supreme Court majority opinion describes certain relevant aspects of the police investigation of the shooting as follows:

> During their investigation, the police quickly became aware of three primary suspects: Titus Davis, Nave, and Miller. Police believed that these three

> individuals were gang members. Miller was detained and interviewed the day of the shooting and was later charged with murder. Police identified Davis as a suspect by September 15, 2007, and had heard of Nave's involvement "[e]arly on."
>
> [A detective] described the investigation as "one of the most difficult cases" that he had ever worked on, owing to the fear witnesses had of cooperating with the police. Ultimately, both Davis and Miller were charged with murder. Nave, however, was never charged because although police could place him at the scene, they could not connect him to the fatal shooting of Walton. [The detective] testified that it would have been "helpful" had he known that someone had seen Nave participate in the shooting and that the investigation would "have been able to take a different turn" if Budik had told him that Nave was the shooter. However, [the detective] also testified that he did not credit the account Budik related to Rae; [the detective] believed this was simply a rumor circulated to make Nave the "fall guy" for the shooting.

Based on Budik's repeated disavowals of knowledge of the shooters' identities, the State charged him with first degree rendering criminal assistance. A jury found him guilty. The Court of Appeals affirmed the conviction. State v. Budik, 156 Wn. App. 123 (2010) **Oct 10 LED:17**.

ISSUE AND RULING: Is there evidence in the record to support Budik's conviction for rendering criminal assistance in the first degree? (ANSWER BY SUPREME COURT: No, rules a 8-1 majority)

Result: Reversal of decision of Court of Appeals that affirmed Spokane County Superior Court conviction of Kenneth Richard Budik for first degree rendering criminal assistance.

ANALYSIS IN MAJORITY OPINION:

Mr. Budik was charged with first degree rendering criminal assistance under RCW 9A.76.050(4). That provision requires proof that a person "[p]revents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension" of a person who has committed [in a first degree case, a murder or is sought as the perpetrator of that crime]. RCW 9A.76.050(4), 070. The State's theory at trial was that Budik's false statements about not knowing who did the shooting constituted deception that prevented or obstructed law enforcement in its actions that might aid in the discovery or apprehension of the perpetrator(s) of the shooting.

The Supreme Court majority opinion asserts that the deception contemplated by RCW 9A.76.050(4) requires an affirmative act or statement, and that the statute does not encompass mere false disavowals of knowledge, as occurred in this case. While the term "deception" may be literally broad enough to include false disavowals, such an interpretation would ignore the statutory scheme and past interpretations of the principles underlying the crime. In addition, the majority opinion states, such an interpretation would ignore the Washington Supreme Court's holdings in State v. Williams, 171 Wn.2d 474 (2011) **July 11 LED:19** (holding that words alone cannot constitute obstructing) and predecessor decisions that statutes purporting to criminalize false statements made to law enforcement officers implicate constitutional guaranties of speech and privacy and therefore must be narrowly construed.

Next, the majority opinion states an alternative basis for its result. The majority opinion indicates that even if one assumes that there was "deception" within the meaning of the statute,

there are two problems with the State's theory that Budik actually prevented or obstructed the performance of some act that might have aided in discovery or apprehension of one of the shooters.

First, based on the legislative history of the statute, the majority opinion suggests that it not clear that prevention or obstruction of the State from filing charges against another is included in RCW 9A.76.050(4).

Second, the majority opinion asserts, there is no evidence in the record that Budik's false statements, as opposed to his nondisclosure of information, prevented or obstructed any act. The majority opinion's analysis on this point is as follows:

> RCW 9A.76.050 includes within the definition of rendering criminal assistance "deception" that "[p]revents or obstructs" certain acts, RCW 9A.76.050(4); it does not include "nondisclosure" that "prevents or obstructs" certain acts. This is a critical distinction. If law enforcement officers are unable to act because an individual has not provided them with information, it is the nondisclosure of information that is preventing them from undertaking some act. This is not rendering criminal assistance. This is so whether or not the individual has also made a false statement to law enforcement officers. This is obviously to be distinguished from the situation in which the false statement itself prevents some act that might aid in the discovery or apprehension of another person. The relevant question therefore becomes whether some act would have been performed but for the false statement. If not, it cannot be said that the deception prevented or obstructed an act that might aid in the discovery or apprehension of another person.
>
> The evidence the State relies upon to show prevention or obstruction is testimony from [the detective] that it would have been "helpful" and that the investigation would "have been able to take a different turn" if Budik had told him that Nave was responsible for the shooting. This is clearly evidence that any prevention or obstruction of the performance of any act that might have aided in the discovery or apprehension of the shooters was caused by Budik's nondisclosure, not his false statements. There is simply no evidence in the record that but for Budik's false disavowal of knowledge of the identity of the shooters (i.e., had he said nothing) anyone would have "perform[ed] an act that might aid in the discovery or apprehension" of one of the shooters. RCW 9A.76.050(4). As such, there is no evidence that Budik's deception - - assuming his false disavowal of knowledge amounted to deception - - caused the prevention or obstruction of any act. Even if Budik's false disavowal of knowledge of the shooter's identity amounted to deception under RCW 9A.76.050(4), there would be insufficient evidence to sustain his conviction.

[Footnote, some citations, omitted]

CONCURRING AND DISSENTING OPINIONS: Chief Justice Madsen writes a separate opinion in which she agrees with the majority opinion, that under the record in this case (see the digesting of the final element of the majority opinion above), there is no evidence that Budik's deception caused the prevention or obstruction of any act. But she otherwise disagrees with the legal analysis in the majority opinion. Justice James Johnson disagrees with all elements of the majority opinion and would have upheld Budik's conviction.

LED EDITORIAL NOTE: Other possible charge? The majority opinion in Budik includes a footnote stating: "We are not presented with the question of whether Budik would have been properly charged with making a false or misleading statement to public officials under RCW 9A.76.175 and reserve that question for the appropriate case."

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SUPREME COURT OVERRULES ITS PRIOR OPINIONS IN STATE V. KIRKPATRICK AND STATE V. KRONICH IN LIGHT OF UNITED STATES SUPREME COURT OPINION IN MELENDEZ-DIAZ – In the consolidated cases of State v. Jasper, State v. Cienfuegos, and State v. Moimoi, ___ Wn.2d ___, 271 P.3d 876 (Mar. 15, 2012) the Washington State Supreme Court overrules its prior decision in State v. Kirkpatrick, 160 W n.2d 873 (2007) and State v. Kronich, 160 Wn.2d 893 (2007) where it held that certified copies of driving records from the Department of Licensing (DOL) were not testimonial for purposes of Crawford v. Washington, 531 U.S. 36 (2004) **May 04 LED:20** and thus were admissible in criminal trials to establish a defendant's driving status.

In the two cases involving DWLS charges the state introduced DOL records. In the first case the state introduced an affidavit from a custodian of records stating that "After a diligent search, our official record indicates that the status on February 14, 2005, was: . . . Suspended in the third degree." In the second case the state introduced a certified copy of driving record (CCDR) from DOL. In the third case the defendant was charged with unregistered contracting and the state introduced a certification from the clerical registration section of the Department of Labor and Industries. All three defendants were convicted. The DWLS convictions were reversed based on Melendez–Diaz v. Massachusetts, 577 U.S. 305 (2009) **Sept 09 LED:03**; the unregistered contracting conviction was affirmed.

The Court's analysis is in part as follows:

> The United States Supreme Court's decision in Melendez–Diaz casts doubt on Kirkpatrick and Kronich. In Melendez–Diaz, the Court considered whether "'certificates of analysis'" introduced in a criminal prosecution were testimonial statements. The certificates reported the results of a forensic analysis establishing that a seized substance was cocaine. The Court held the certificates were "quite plainly affidavits," falling squarely within the "'core class of testimonial statements'" described in Crawford. The Court emphasized that the certificates were used for the purpose of establishing a fact at trial and thus were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" The Court also underscored the fact that "not only were the affidavits '"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"' but under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance, Mass. Gen Laws, ch. 111, § 13."
>
> In its discussion, the Melendez–Diaz Court rejected the government's attempt to distinguish the certificates from other statements that were more clearly testimonial. The government averred, for example, "that the analysts are not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing." The Court dismissed the

argument as unsupported by either the constitutional text or the Court's case law. It reasoned that "[t]o the extent the analysts were witnesses (a question resolved above), they certainly provided testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine."

The government also argued the certificate was akin to a business or public record and thus not testimonial. In rejecting this argument, the Court explained that even if the certificates qualified as business records, they were nonetheless testimonial because they were created for use in court. The Court made plain that "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But this is not the case if the regularly conducted business activity is the production of evidence for use at trial."

In sum, the Court considered any document prepared for use in a criminal proceeding to be testimonial. It observed one exception: "a clerk's certificate authenticating an official record—or copy thereof—for use as evidence." Yet, the Court stressed that at common law, "a clerk's authority in that regard was narrowly circumscribed. He was permitted 'to certify to the correctness of a copy of a record kept in his office,' but had 'no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.'" Thus, "[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against the defendant."

. . .

The Court in Melendez–Diaz rejected the rationale underlying our opinions in Kirkpatrick and Kronich, emphasizing that confrontation clause analysis does not focus on the nature of the particular records addressed by the certification, but on the nature of the certification itself. Most recently, in Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011) **Sept 11 LED:02**, the Court signaled it remains focused on the testimonial nature of certifications and the need to cross-examine the government agents who prepare them. See 131 S. Ct. at 2715 ("This Court settled in Crawford that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause." (Alterations in original.)); id. n. 7 ("Even so, [the analyst's] testimony under oath would have enabled Bullcoming's counsel to raise before a jury questions concerning [his] proficiency, the care he took in performing his work, and his veracity."). After Melendez–Diaz, it is difficult to regard certifications of the type here (especially those attesting to the nonexistence of official records) as akin to business records, which may be admitted into evidence without confrontation. Instead, as other courts have recognized since Melendez–Diaz, they are best understood as testimonial statements falling within the ambit of the Sixth Amendment. Accordingly, we hold the clerk's affidavits involved in these three cases are testimonial statements and we overrule Kirkpatrick and Kronich to the extent those opinions are contrary to United States Supreme Court precedent. Because the defendants were not given the opportunity to cross-examine the official who authored the certifications, the admission of the certifications into evidence violated the defendants' rights under the confrontation clause.

Result: Affirmance of Court of Appeals' reversal of King County Superior Court conviction of Douglas Scott Jaspar for DWLS 3 (affirmance of felony Hit and Run conviction); affirmance of King County Superior Court reversal of District Court conviction of Cesar Valadez Cienfuegos for DWLS; reversal of King County Superior Court affirmance of District Court conviction of Laki Moimoi for unregistered contracting. All cases are remanded for retrial rather than dismissal.

LED EDITORIAL COMMENT: Washington's Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 6.13, the notice and demand rule that allows for crime laboratory and other certifications in lieu of live testimony, has been amended to add a notice and demand provision that allows a certificate to be admitted in lieu of live testimony from a DOL custodian of records. See our comments on "notice and demand" procedures in our entry regarding Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011) in the September 2011 LED.

(2) AUTOMATED TRAFFIC SAFETY CAMERAS ARE NOT A PROPER SUBJECT OF INITIATIVE POWER – In Mukilteo Citizens for a Simple Government v. City of Mukilteo, ___ Wn.2d ___, 272 P.3d 227 (Mar. 8, 2012) the Washington State Supreme Court holds that the legislature expressly granted authority to the governing bodies of cities to enact ordinances on the use of automated traffic safety cameras, accordingly, automatic traffic safety cameras are not within the initiative power.

Result: Reversal of Snohomish County Superior Court order denying declaratory and injunctive relief (the relief sought was an order preventing the initiative from appearing on the ballot).

LED EDITORIAL NOTE: Readers interested in this topic may also want to see American Traffic Solutions v. City of Bellingham, 163 Wn. App. 427 (Div. I, Sept. 6, 2011) (ballot initiative regarding automated traffic safety cameras is beyond local initiative power).

(3) IN PROSECUTION FOR ATTEMPTED PROMOTION OF COMMERCIAL SEXUAL ABUSE OF MINOR STATE MUST PROVE DEFENDANT KNEW VICTIM WAS A MINOR, BUT DEFENDANT MAY BE CONVICTED EVEN WHERE "VICTIMS" ARE ADULT UNDERCOVER POLICE OFFICERS – State v. Johnson, 173 Wn.2d 895 (Feb. 23, 2012) the Washington State Supreme Court holds that a defendant can be found guilty of attempted promotion of commercial sexual abuse of a minor when the defendant intends the criminal result of the crime, believes that the intended victim is a minor (even if the victim is an adult posing as a minor), and takes a substantial step toward the commission of the crime.

The facts are as follows: (excerpted from the Supreme Court opinion)

> In July 2009, [a police sergeant] organized a sting operation targeting the commercial sexual abuse of minors . . . [The sergeant] chose two female decoy officers who looked young . . . He instructed [the officers] to hang out at the Westlake Mall and act like 17 year olds. After two hours with no result, [the sergeant instructed the officers] to stroll toward the nearby McDonald's restaurant. Roosevelt Johnson and Lester Payton approached the officers en route to McDonald's.
>
> When Johnson asked their ages, [the officers] told him they were 17. Johnson acknowledged that both women were 17. After the officers agreed to hang out with Johnson and Payton, Johnson told them that the two men were making money illegally. Payton suggested that the two officers could also make money for himself and Johnson by selling sexual favors. Johnson attempted to arrange

a training session with the two officers and one of his experienced girls. The officers left the area after Johnson and Payton told them to go to Aurora Avenue to walk up and down the street soliciting sexual transactions and gave them instructions on how much to charge for different sexual services. Uniformed police officers arrested Johnson and Payton shortly thereafter. The two men were tried together.

The Court's analysis is as follows:

> Johnson was convicted of attempting to promote the commercial sexual abuse of a minor. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). The intent required is the intent to accomplish the criminal result of the base crime. . . . Neither factual nor legal impossibility is a defense to criminal attempt. RCW 9A.28.020(2).
>
> A person promotes commercial sexual abuse of a minor "if he or she knowingly advances commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct." RCW 9.68A.101(1). The statute further defines advancing commercial sexual abuse of a minor as any conduct, by someone other than the minor or the customer, "designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor." RCW 9.68A.101(3)(a). A person, other than the minor or the customer, profits from commercial sexual abuse of a minor by accepting or receiving "money or other property pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor." RCW 9.68A.101(3)(b).
>
> Thus, the prosecution was required to prove that Johnson (1) intended to either advance or profit from the commercial sexual abuse of a minor and (2) took a substantial step toward doing so. Johnson challenges the sufficiency of the evidence to support his conviction.
>
> Here, the State proved that Johnson asked the officers how old they were, that each officer told him that she was 17 years old, and that Johnson acknowledged that each officer said that she was 17. After he learned that they were 17 years old, Johnson asked Officer J if she was interested in working for him as a "'ho.'" Johnson explained to Officer J what a "ho" does (pleasure men for money), what type of customer they should seek, and that they should bring the money back to him. Johnson instructed both officers that each would have to choose whether to work for him or for Payton. Johnson even tried to arrange training for the two officers from one of his experienced girls.
>
> A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Based on this evidence, it is clear that a rational trier-of-fact could conclude beyond a reasonable doubt that Johnson intended to both advance and profit from the sexual exploitation of two women who claimed to be 17 years old and that he took a substantial step in that direction. Johnson admits as much but bases his argument solely on the fact that the officers were not actually 17.
>
> Johnson's challenge to the sufficiency of the evidence fails because it is essentially an impossibility defense. He argues that the verdict was not

supported by substantial evidence because the officers were both adults and there was no evidence of an actual minor victim because neither officer was actually 17. In other words, it was impossible for him to commit the crime with these officers. But our legislature has rejected both factual and legal impossibility as a defense to criminal attempt. RCW 9A.28.020(2).

Result: Affirmance of conviction of Roosevelt Rafelo Johnson for attempted promotion of commercial sexual abuse of a minor.

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WASHINGTON STATE COURT OF APPEALS

THERE IS NO PRETEXT PROBLEM WHERE OFFICERS MAKE A TRAFFIC STOP OF AN INDIVIDUAL TO DETERMINE THE PERSON'S NAME, AND OFFICERS ALREADY POSSESS PROBABLE CAUSE TO ARREST THE PERSON FOR SELLING DRUGS, THOUGH THEY CHOOSE TACTICALLY TO NOT YET MAKE THE ARREST

State v. Quezadas-Gomez, 165 Wn. App. 593 (Div. II, Dec. 20, 2011)

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

I. Possession With Intent To Deliver

A. Controlled "Buys"; Probable Cause To Arrest

From July 22 to July 25, 2009, a confidential informant (CI) working with [a police officer] conducted several controlled drug buy operations. The CI telephoned a man known as "El Gordo," set up drug "buys" at specified locations, contacted "El Gordo" at these locations, purchased cocaine from "El Gordo" using prerecorded money from the police, and turned the cocaine over to [the officer].

The CI had previously described "El Gordo" to [the officer] as a "Hispanic male, about thirty years old, about 6′00 [*] tall and about 250 pounds in weight." During the controlled buys, [the officer] watched the CI enter the prearranged locations and observed a man fitting "El Gordo's" description arrive in a silver Nisson Sentra with Oregon plates numbered 902DQU and enter the premises where the CI's drug transactions took place. After the CI returned, [the officer] asked the CI to describe "El Gordo," and the CI described the man [the officer] had seen arrive in the silver Nisson Sentra.

B. Investigatory Stop

Nine days later, on August 4, [the officer] was on "uniformed patrol" when he "observed the subject described as El Gordo driving the same Nisson Sentra" and stopped the car "for the purpose of identifying [the driver] as a suspect in [the drug] investigation." The driver identified himself as Eduardo Quezadas–Gomez and stated his address as 3412 Northeast 66th Avenue, number C29, Vancouver, Washington, and then drove away.

C. Search Warrant

> [The officer] and other officers conducted additional controlled drug buy operations, using Quezadas–Gomez's address to observe Quezadas–Gomez going from his residence to the specified controlled "buy" location on at least one occasion. [The officer] incorporated Quezadas–Gomez's name and address and other information he had obtained during the earlier controlled buys and the post-stop surveillance of Quezadas–Gomez's residence to draft an affidavit for a warrant authorizing the search of Quezadas–Gomez's person, his residence, and two cars. Executing the search warrant, the officers found drugs and a variety of materials suggesting drug sale activities.
>
> II. Procedure
>
> The State charged Quezadas–Gomez with unlawful possession of a controlled substance with intent to deliver, with a school-bus-route-stop sentencing enhancement. Quezadas–Gomez moved to suppress the evidence the police had seized with the search warrant, arguing that the vehicle stop that led to his identification was an unlawful pretextual stop under [State v.] Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05** and, therefore, any evidence flowing from the "pretextual-stop" discovery of his identity and address was unlawful. The State responded that the vehicle stop was not pretextual but, rather, an investigatory stop, supported by "reasonable suspicion (if not probable cause)."

[Footnotes omitted]

ISSUE AND RULING: Where officers have probable cause to arrest a suspect for selling drugs, do the pretext-stop rule of State v. Ladson preclude officers from making a stop of the suspect to learn the identity of the suspect where the officers do not inform the suspect of the real reason for the stop, and the officers release the suspect after the brief traffic stop? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority, the pretext-stop rule does not bar this intrusion)

Result: Reversal of Clark County Superior Court order suppressing evidence in prosecution of Eduardo Quezadas-Gomez for possession of controlled substance with intent to deliver.

Status: On April 24, 2012, the Washington State Supreme Court denied the defendant's petition for review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> We first address whether the trial court properly determined that [the officer's] stop of Quezadas–Gomez's car was pretextual under Ladson. A traffic stop is pretextual when an officer stops a vehicle, under the guise of enforcing the traffic code, to conduct an investigation unrelated to driving. Pretextual stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations-violations for which the officer does not have probable cause." State v. Myers, 117 Wn. App. 93, 94-95 [**Aug 03 LED:18**], review denied, 150 Wn.2d 1027 (2004). Such stops violate article I, section 7 of the Washington State Constitution because "they are seizures absent the 'authority of law' which a warrant would bring." Although the police may enforce the traffic code, "[t]hey may not . . . use that authority as a pretext or justification to avoid the warrant requirement for an unrelated criminal investigation."

To determine whether a stop is pretextual, courts consider the totality of the circumstances, including the officer's subjective intent and the objective reasonableness of the officer's conduct. Generally, if the trial court finds that the stop was pretextual, all subsequently obtained evidence from the stop must be suppressed. The trial court correctly noted Ladson's rationale:

> We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

We disagree, however, with the trial court's application of this rationale to the facts here.

[The officer's] search warrant affidavit established that his sole intent in stopping Quezadas–Gomez was to investigate the drug sales in which he had observed Quezadas–Gomez participating and for which he needed Quezadas–Gomez's name and address. [The officer] never purported to use any traffic code violation as a pretext for the stop. Neither Ladson nor any other Washington case that the parties cite, or of which we are aware, address the apparently unique circumstances here: where law enforcement acquires probable cause before an investigative stop, conducts the investigative stop for the sole purpose of obtaining identifying information to be used to further the investigation, and then releases the suspect and continues the investigation. Thus, this case presents an issue of first impression.

As we have already explained, [the officer] had probable cause to arrest Quezadas–Gomez for delivering cocaine to the CI. But, despite having probable cause to arrest Quezadas–Gomes, whom [the officer] knew only by the nickname "El Gordo," [the officer] decided to stop him only to obtain his true name and address so that [the officer] could conduct surveillance on "El Gordo"/Quezadas–Gomez's residence and eventually obtain a warrant to search his house. In our view, because the greater intrusion of an arrest was legally justified, then this lesser intrusion of a mere stop to ask for name and address was also legally justified; and we so hold.

This stop, therefore, did not meet the Ladson criteria for suppressing the evidence eventually obtained with the search warrant. The stop was not based on a traffic code violation pretext. And collecting Quezadas–Gomez's name and address to advance an ongoing criminal investigation did not negate the officer's probable cause to intrude lawfully on Quezadas–Gomez's privacy, whether to effect a full-scale arrest or to effect some lesser intrusion, such as briefly speaking with Quezadas–Gomez and allowing him to drive away.

Even by [the officer's] own testimony, the record is clear that he did not stop Quezadas–Gomez's car to enforce the traffic code; nor does the record suggest in any way that [the officer] used the traffic code as a pretext for the stop. On the contrary, [the officer] expressly stated that he stopped the car only to obtain the true name and address of the driver, whom he recognized as "El Gordo," the

> drug dealer in the CI's controlled "buys." And, as we have already noted, the record shows that [the officer] had probable cause to arrest Quezadas–Gomez at the time of this stop. Thus, the record does not support the trial court's conclusion that the stop was a pretextual traffic stop.
>
> We hold, therefore, that (1) because [the officer] had probable cause to arrest "El Gordo," the lesser intrusion of this investigatory stop to obtain Quezadas–Gomez's true name and address was lawful; and (2) the evidence was subsequently lawfully seized under the search. Accordingly, we reverse the trial court's suppression of the evidence and remand for trial.

[Footnotes omitted]

Dissent: Judge Johanson dissents arguing that the stop was an unlawful pretext stop.

LED EDITORIAL COMMENTS: When presented with facts similar to those in this case, many seasoned officers cautious not to violate Ladson, can at least at first glance reach the same conclusion as the trial court – that such a stop would be pretext. However, we agree with the majority opinion that where officers already possess probable cause to make an arrest, a traffic stop to determine the suspect's name is not a pretextual stop.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

INVENTORY OF CONTENTS OF IMPOUNDED VEHICLE WAS PERMISSIBLE AND NOT A PRETEXT FOR AN EVIDENTIARY SEARCH; CONSENT IS NOT REQUIRED PRIOR TO AN INVENTORY SEARCH, AT LEAST UNDER THE FACTS OF THIS CASE – In State v. Tyler, 166 Wn. App. 593 (Div. II, Jan. 26, 2012) the Court of Appeals holds that an inventory of an impounded vehicle was permissible.

An officer stopped Tyler's vehicle for speeding and learned that Tyler had a suspended license. After confirming the suspension, the officer arrested Tyler and placed him in his patrol car.

> [The deputy] asked Tyler for consent to search the car; Tyler refused. After learning that the registered owner of the car was incarcerated, [the deputy] suggested that Tyler's passenger use Tyler's cell phone to find a driver who could move the car. But despite making several calls, the effort was unsuccessful. Because of the car's unsafe location and the lack of a driver, [the deputy] called a towing company to impound the car. [The deputy] also inventoried the car based on the sheriff office's impound policy and standard practice. The car contained expensive, unsecured stereo equipment. Near these amplifiers, [the deputy] saw a clear baggie containing white powder, later identified as methamphetamine.
>
> The State charged Tyler with unlawful possession of a controlled substance, methamphetamine . . . ; use of drug paraphernalia . . .; and third degree driving with a suspended license . . . . Tyler moved to suppress the evidence seized from the car arguing that the inventory search was a pretext for an evidentiary search and also that our Supreme Court has stated that police must obtain consent before conducting an inventory search. . . .

. . .

The defendant conceded, and the Court agreed, that the deputy lawfully impounded the vehicle. The Court of Appeals' analysis in key part is as follows:

> It is well settled that police officers may conduct a "good faith" inventory search following a "lawful impoundment" without first obtaining a search warrant. State v. Bales, 15 Wn. App. 834, 835 (1976), review denied, 89 Wn.2d 1003 (1977); State v. Montague, 73 Wn.2d 381, 385 (1968). Unlike a probable cause search, where the purpose is to discover evidence of a crime, the purpose of the inventory search is to perform an administrative or caretaking function. State v. Dugas, 109 Wn. App. 592, 597 (2001). The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger. Our Supreme Court has recognized that an additional "valid and important" purpose for the inventory search is to protect the public from vandals who might find a firearm or contraband drugs.
>
> But the Houser court noted that such purposes will not serve to justify an inventory search in each and every case. Accordingly, the Houser court limited the scope of the inventory search to protect against only "substantial risks to property in the vehicle" and invalidated the inventory search of a locked trunk because no reason existed to believe items in the trunk presented a "great danger of theft."
>
> Here, [the deputy] and a backup officer cataloged two expensive, unsecured stereo amplifiers, located in the interior of the car. As a consequence of [the deputy's] routine and lawful cataloging, [the deputy] saw, in plain view, a clear baggie containing what appeared to be methamphetamine. [The deputy] lawfully seized this bag in plain view. State v. Gibson, 152 Wn. App. 945, 954 (2009) ("officer may seize evidence without a warrant if he has made a justifiable intrusion and inadvertently sights contraband in plain view.").
>
> Washington courts "regularly" uphold inventory searches following a lawful impoundment provided the search is not a pretext for a general exploratory search and provided police conducted these searches according to "standardized police procedures which do not give excessive discretion to the police officers." The "general" inventory search rule provides:
>
> > When . . . the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.
>
> Montague, 73 Wn.2d at 385.

Although the general rule does not mention consent, Tyler claims that police must first obtain consent before conducting an inventory search. Tyler relies on dicta from State v. Williams, 102 Wn.2d 733, 743 (1984). In Williams, the court considered whether evidence found in petitioner's car was the product of an illegal search incident to arrest or alternatively, a routine inventory search. . . . Regarding the inventory search, the Williams court rejected the argument that the search was a valid routine inventory search because the police officer's decision to impound the vehicle did not satisfy the requisite criteria. . . . After resting its determination on this basis, the Williams court commented on consent:

> However, even if impoundment had been authorized, it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur . . . .

The U.S. Supreme Court reasoned that police are not required to obtain the owner's consent to inventory a properly impounded car because valid purposes of the inventory search include alerting officers of potential danger (1) to themselves or (2) to the public from items inside the car. Where the court recognizes the purposes of protecting police officers (from more than lawsuit based on property loss) and protecting the public, the car owner cannot waive an inventory after the proper impoundment of the car.

Tyler does not challenge the lawfulness of his arrest; additionally he concedes that [the deputy] reasonably impounded his friend's car. Tyler did not own the car, which had expensive, unsecured stereo equipment in the backseat. [The deputy] searched the interior of the car in order to find, list, and secure the property from loss during Tyler's detention. In cataloging the stereo equipment, [the deputy] had plain view of the methamphetamine. Under these facts, we decline to hold that a non-owner's lack of consent invalidated an otherwise valid inventory search.

We agree with the trial court that it would be inappropriate for [the deputy] to impound the car without inventorying the interior contents. Substantial evidence supports the trial court's finding of fact that the search was reasonable under all the circumstances and not a pretext for an evidentiary search. Therefore, we hold that the trial court did not err when it denied Tyler's motion to suppress evidence. We affirm Tyler's convictions.

[Footnotes and some citations omitted]

Judge Armstrong dissents, arguing that in light of evidence not discussed in this LED entry, the trial court should have held an additional hearing to take a deeper look at whether the inventory was pretextual.

Result: Affirmance of Jefferson County Superior Court convictions of Larry Dean Tyler of unlawful possession of a controlled substance and driving while license suspended in the third degree.

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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.supremecourt.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 (CJTC) 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 edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor 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 CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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