Law Enforcement Digest

APRIL 2011

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

****

APRIL 2011 LED TABLE OF CONTENTS

****

NINTH CIRCUIT, U.S. COURT OF APPEALS

DEFENDANT'S TERRY, MIRANDA, CONSENT, AND CURTILAGE ARGUMENTS REJECTED IN CASE INVOLVING OFFICERS' INVESTIGATION OF PREVIOUS EVENING'S GUNFIRE AT CAMPSITE ON NATIONAL FOREST SERVICE LAND

U.S. v. Basher, 629 F.3d 1161 (9th Cir. 2011) (Decision filed January 20, 2011)

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

> On the night of September 1, 2007, campers on National Forest Service land in Yakima County, Washington heard intermittent gunfire over the course of two hours coming from a "dispersed" or undeveloped campsite on the bank of the South Fork River. Campers also observed a campfire at the same location, although a burn ban was in effect. Among the campers who heard the gunfire were two off-duty law enforcement officers.
>
> The topography surrounding the dispersed campsite, including a rock wall, caused an echo phenomenon that distorted the report of the firearm, so the officers could not tell what kind of weapon was being discharged. While the echo phenomenon distorted the report of the firearm, it did not seem to affect the campers' ability to locate the source of the firing. Campers and one of the officers identified the dispersed campsite as the source of the firing.
>
> The two off-duty officers – [a Yakima County Deputy Sheriff and a U.S. Forest Service Officer] – checked into duty the following morning and each traveled toward the dispersed campsite to investigate. [Court's footnote: *The Yakima County Sheriff's Department has a contract to provide law enforcement services to the United States Forest Service.*] [The U.S.F.S. officer] arrived first and contacted [the deputy] by radio, informing him that he wished to investigate the occurrences at the campsite. [The deputy] was en route, and arrived immediately after the radio communication.
>
> Upon arriving, [the deputy] parked his vehicle nose to nose with Basher's truck. While [the deputy] later testified that this would block the vehicle's exit, [the U.S.F.S. officer] testified that there was sufficient room to drive around the police vehicle. [The deputy] emitted a few short bursts from his vehicle's siren.
>
> [The deputy] noticed that the driver's side window of Basher's truck was rolled down, and that a box of shotgun shells was lying in plain view on the driver's

seat. He also noted that the box was open and half-empty. [The deputy] pointed out the box of shotgun shells to [the U.S.F.S. officer].

The officers also observed the fire ring as they approached the tent. [The U.S.F.S. officer] testified that in addition to the rocks typically placed around the edge of a fire ring, this fire ring had additional rocks stacked on top, creating a cone of rocks that could inhibit observation of the fire. [The deputy] testified that he saw smoke rising from the fire ring, and that the contents appeared to be smoldering. [The U.S.F.S. officer] remembered seeing ashes that were consistent with a recent fire, but could not recall seeing smoke.

From their position, the officers were facing the rear of the tent. Upon drawing closer to the tent, [the deputy] announced "Sheriff's Office" after noticing that the occupants were moving within the tent. The occupants were asked to exit the tent, and they came out of their own volition.

As the individuals exited the tent, [the deputy] told them to keep their hands in view. [The deputy] could not recall his exact words, and [the U.S.F.S. officer] could only recall that the word "hands" was used. The officers did not have their weapons drawn or yell at Basher or his son. There was no testimony that Basher and his son were ordered out of the tent. The officers guided Basher away from the tent, slightly separating him from his son. The officers engaged in small talk with them, and Basher lit a cigarette. No one was placed in handcuffs or frisked.

[The deputy] then asked Basher where the gun was. Basher responded "What gun?" [The deputy] told Basher that he had seen the shotgun shells and explained there were reports of gunfire coming from the campsite. Basher responded that the gun was in the tent.

[The deputy] asked if Basher's son could retrieve the weapon from the tent. Basher looked at his son and nodded affirmatively for him to retrieve the gun. [The deputy] gave the son instructions on how to safely retrieve the weapon. The officers did not enter the tent at any point.

The son went into the tent, and came out with a sawed-off shotgun. [The deputy] testified that he immediately recognized that the shotgun was of an illegal length, and arrested Basher. [The deputy] read Basher his Miranda rights, and Basher waived his rights. Basher subsequently made inculpatory statements. Upon running Basher's name through a database, [the deputy] discovered that Basher had an outstanding warrant from Lewis County. Basher was subsequently transported to jail. Ultimately, Basher was not formally charged with violating provisions in the Code of Federal Regulations ("C.F.R.") regarding the illegal campfire or the firing of the weapon, nor was he charged for analogous state crimes.

On November 13, 2008, Basher was indicted and charged with being a prohibited person in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d). Basher filed his motion to suppress on February 27, 2009, and a hearing was held on March 11, 2009. Neither Basher nor his son testified at the suppression hearing.

The district court denied the motion to suppress, following testimony and argument by counsel. The district court made the following factual findings: (1) both officers were aware that gunshots had been fired; (2) [the deputy] believed

> the firing came from the dispersed campsite and [the U.S.F.S. officer] did not know where the firing originated; and (3) [the U.S.F.S. officer] was able to determine from witness statements that the firing came from the dispersed campsite, and that there was an illegal fire at that location.
>
> The district court ruled that the officers' conduct was lawful under Terry v. Ohio, 392 U.S. 1 (1968). The [U.S. District Court] held alternatively that there was probable cause to arrest Basher for illegal discharge of a weapon and for violating the burn ban, and that in any event, the questioning regarding the gun falls under the public safety exception [to the Miranda warnings requirement].
>
> Basher entered a conditional guilty plea on April 24, 2009, and he was sentenced to a term of 15 months on August 4, 2009.

ISSUES AND RULINGS: 1) Did the officers have reasonable suspicion of criminal activity justifying a Terry seizure of Basher at the campsite? (ANSWER BY NINTH CIRCUIT PANEL: Yes, at the point when the contact developed into a seizure, the seizure was supported by reasonable suspicion)

2) Was Basher in arrest-like "custody" for Miranda purposes such that the officers were required to obtain a Miranda waiver before asking him about the gun? (ANSWER BY NINTH CIRCUIT PANEL: No, there was no Miranda custody at the point when they asked Basher about the gun, and, in any event, it appears that the "public safety exception" to the Miranda warnings requirement would apply to this situation)

3) Did Basher give consent to the request that his son retrieve the shotgun from his tent, and was the consent voluntary? (ANSWER BY NINTH CIRCUIT PANEL: Yes, on the totality of the circumstances, Basher's head nod was clear consent, and he gave the consent voluntarily)

4) Under the Fourth Amendment, was the campsite area surrounding Basher's tent the equivalent of curtilage surrounding a home such that the officers were restricted from entering the campsite without consent, exigent circumstances, or a search warrant? (ANSWER BY NINTH CIRCUIT PANEL: No, while there is privacy protection for the interior of a tent at a public campsite, the surrounding campsite is not the equivalent of curtilage)

Result: Affirmance of U.S. District Court (Eastern Washington) conviction of Michael Emery Basher for two federal gun crimes.

ANALYSIS: (Excerpted from Ninth Circuit 3-judge panel decision)

1) Lawful law enforcement-citizen encounter under Terry v. Ohio

> The officers' interaction with Basher was a valid Terry encounter. An investigatory stop or encounter does not violate the Fourth Amendment if the officers have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" United States v. Sokolow, 490 U.S. 1 (1989) (quoting Terry v. Ohio, 392 U.S. 1 (1968)).
>
> In deciding whether a stop was supported by reasonable suspicion, the court must consider whether "in light of the totality of the circumstances, the officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity."

[The officers] had well-founded suspicions of criminal activity originating in Basher's camp. The record indicates, and the district court found, that [the deputy] determined that the firing originated from Basher's dispersed campsite. Although [the U.S.F.S. officer] did not know initially where the firing came from, he was able to interview witnesses and determine that the firing came from the Basher's dispersed campsite. The witness reports received in person by the officers appear to have been credible, and provided a legitimate basis for investigating, although the officers did not write down the witnesses' names. See United States v. Palos-Marquez, 591 F.3d 1272, 1275-77 (9th Cir. 2010) **July 10 LED:11** (holding that an in-person tip can be sufficiently reliable to justify an investigatory stop).

Basher has attempted to portray the officers as merely acting upon a hunch. However, it appears from the record that there were specific and articulable facts that led each officer to believe that the shooting and campfire should be investigated. It is noteworthy that it appears from the record that each officer decided independently to pursue this matter.

Basher has argued that by the time the officers arrived at the dispersed campsite there was no longer a reason to investigate under Terry because the illegal acts had ceased. However, it was reasonable to believe that the activities would recur. When dealing with illegal sporadic gunfire, there is no guarantee that the culprits will refrain from firing again in the future. The same can be said for the use of an illegal campfire during a burn ban. Therefore, the officers could have reasonably assumed that the firing could resume sometime in the near term.

Basher states that [the deputy] had no reason under Terry to ask about a firearm after Basher and his son exited the tent, because they were unarmed and the weapon was in the tent. Although Terry often comes up in the context of officer safety, the whole purpose of a Terry encounter is to investigate suspected criminal activity. The officers were justified asking about the gun because it was within the scope of the investigation and to ensure officer safety.

Here, the officers were investigating a gun crime and an illegal campfire. When police officers investigate gun crimes, it is routine to ask questions about guns. It is reasonable for officers investigating a gun crime to determine whether a firearm is present, and what kind of firearm it is. Therefore, the questions regarding the gun were within the scope of the Terry encounter. [Court's footnote: *If the officers had asked questions about something other than a gun, it would not have necessarily created a seizure under the Fourth Amendment. In the context of a Terry stop, a person's Fourth Amendment rights are not violated by the asking of questions, as long as the seizure itself is lawful under Terry and the encounter is not prolonged by the questioning. See United States v. Mendez, 476 F.3d 1077, 1080 (9th Cir. 2007)* ***April 07 LED:02*** *(" '[M]ere police questioning does not constitute a seizure' unless it prolongs the detention of the individual, and, thus, no reasonable suspicion is required to justify questioning that does not prolong the stop." (quoting Muehler v. Mena, 544 U.S. 93 (2005)* ***May 05 LED:02****)); compare Illinois v. Caballes, 543 U.S. 405, 407-08, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)* ***March 05 LED:03, April 05 LED:02****) (holding that a dog sniff carried out during a traffic stop, when there is no reasonable suspicion of drug activity, does not violate the Fourth Amendment as long as the duration of the stop was not extended by the dog sniff).*]

2) No custody under Miranda v. Arizona

The parties dispute whether Miranda applies. Officers are required to inform suspects of their Fifth Amendment rights before custodial interrogations. The standard for determining whether police questioning rises to the level of a custodial interrogation is detailed below:

> Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." The "ultimate inquiry" underlying the question of custody is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. To answer this question, the reviewing court looks to the totality of the circumstances that might affect how a reasonable person in that position would perceive his or her freedom to leave.

In this case, there was no display of weapons by the officers, no use of physical force, and it does not appear there was threatening language. Immediately before the questions about the firearm, [the officers] were making small talk and Basher lit a cigarette. It does not appear that Basher's movements were significantly curtailed.

Basher argues that he and his son were seized while inside the tent because of the officers' show of force. Basher's assertion that the officers presented an overwhelming show of force is unpersuasive. [The deputy] merely alerted Basher and his son to the officers' presence by briefly sounding the siren and announcing "Sheriff's Department." Furthermore, Basher's emphasis on the "hands" comment is unfounded. Police officers routinely ask individuals to keep their hands in sight for officer protection, and in this case the request does not appear to have been made in a threatening manner. Although Basher argues that his truck was blocked in, the testimony on that issue was contradictory, with [the U.S.F.S. officer] testifying that there was room to drive away.

Basher further argues that he was under duress because under Forest Service regulations, campers and hikers are prohibited from interfering with the law enforcement activities of the officers, and that campers must respond to law enforcement contact. See 36 C.F.R. § 261.3.

This argument is without merit. First, it is unclear that this issue was properly presented to the district court. Second, Basher adduces no evidence that his cooperation was motivated by a desire to comply with an obscure regulation. Third, the regulation does not trump a person's Fifth Amendment right against self-incrimination. Thus, cooperation out of fear of violating the regulation would be unreasonable.

In any event, it appears that the public safety exception applies to the questioning. An officer's questioning of a suspect without a Miranda warning is proper if the questioning is related to "an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon." New York v. Quarles, 467 U.S. 649 (1984) (holding that similar facts established only a Terry stop). An officer's subjective motivation is not relevant in analyzing whether questioning falls within the public safety exception.

In this case, Basher had not been searched or handcuffed, and he could have retrieved a weapon. The officers had reliable information that there was at least one gun in the camp, and there was an objectively reasonable need to find out where it was located. Basher has argued that there was no reason to ask about the gun because Basher and his son were unarmed at the time the question was asked. However, it is not clear that the officers knew that Basher was unarmed when they asked him where the gun was located.

3) Voluntary consent to have gun retrieved from tent

The district court found that the retrieval of the weapon was voluntary, but it did not make a specific finding of fact on Basher's consent to the retrieval. The Fourth Amendment provides that people are protected from warrantless searches and seizures. Consent can be inferred from nonverbal actions, but it must be "unequivocal and specific" and "freely and intelligently given." United States v. Chan-Jimenez, 125 F.3d 1324, 1328 (9th Cir.1997) (quoting United States v. Shaibu, 920 F.2d 1423, 1426 (9th Cir.1990)). We have held that people can have a reasonable expectation of privacy in a tent pitched on public land. See United States v. Gooch, 6 F.3d 673, 677 (9th Cir.1993) **Feb 94 LED:02**.

The testimony indicates that [the deputy] asked for Basher's consent. It is undisputed that Basher affirmatively nodded his head regarding the retrieval of the shotgun. Basher's attorney did not cross-examine [the deputy] on this point.

From the record, the head nod did not seem to be ambiguous, and head nods have been found to express consent. The consent in this case seems to be specific – clearly defining who would enter the tent (his son) and the scope of the activity (bringing the gun outside). [Court's footnote: *Basher argues that one cannot give consent during a Terry encounter, claiming that police-citizen interactions are either wholly consensual or completely involuntary. This argument is without merit.*]

The totality of the circumstances determine whether consent was "freely and intelligently given." We look to five factors in determining voluntariness: "(1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that [he] had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained." We noted that "[i]t is not necessary to check off all five factors, but many of this court's decisions upholding consent as voluntary are supported by at least several factors."

In this case, the defendant was not in custody and the officers did not have their guns drawn. In addition, the officers did not tell Basher that a search warrant could be obtained if he refused to consent. [**LED Editorial Comment: It is not improper for officers the mention the search warrant alternative when requesting consent to search, but when doing so it is advisable – in order to support voluntariness of the consent – for officers to tell the person that they will "seek" or "ask a court for," as opposed to saying they will "get" or "obtain," a search warrant in the event of refusal of consent.**] On the other hand, Basher had not been told he could refuse consent. As indicated above, we hold that Basher was not in custody, so the fact that no Miranda warnings were given is inapposite. Considering the totality of the circumstances, it appears that no Fourth Amendment violation occurred in connection to the retrieval of the weapon.

4) Campsite area around the tent was not curtilage

Basher has made several arguments regarding the warrant requirement, and has drawn our attention to United States v. Struckman, 603 F.3d 731 (9th Cir.2010). **March 11 LED:15**. In that case, a neighbor saw Struckman toss a backpack over the fence of an unoccupied home, and then saw him climb over the fence into the backyard. After a 911 call, police arrived and confronted Struckman, who was acting erratically because he was high on methamphetamine. During a patdown search, police officers found a handgun magazine in Struckman's pocket and later located the handgun in the backpack. After questioning Struckman, the police learned that he resided at the home.

We reversed Struckman's conviction of being a felon in possession of a firearm, in part, because we held that the backyard of a home is curtilage, subject to Fourth Amendment protections. . . .

As mentioned above, Basher claims that he and his son were seized while in their tent, because of the officers' display of authority. As we have detailed, the officers merely announced their presence, and the district court held that Basher and his son exited the tent of their own volition. The district court's finding does not appear to be clearly erroneous, and therefore we will not disturb it.

Basher's seizure claim is distinguishable from Struckman because police officers entered Struckman's backyard, while here the Bashers left voluntarily. Because the Bashers left the tent voluntarily, the seizure argument necessarily fails.

In addition, Basher has referred to the warrantless entry or search of the camp by the officers. Under [U.S. v. Gooch, 6 F.3d 673, 677 (9th Cir.1993) **Feb 94 LED:02**] officers cannot enter a tent without a warrant [or justification under an exception to the warrant requirement], but [Gooch] did not address whether a campsite is also protected by the warrant requirement.

Classifying the area outside of a tent in a National Park or National Forest lands campsite as curtilage would be very problematic. A tent is comparable to a house, apartment, or hotel room because it is a private area where people sleep and change clothing. However, campsites, such as the dispersed, ill-defined site here, are open to the public and exposed.

In United States v. Dunn, 480 U.S. 294 (1987), the Supreme Court found that curtilage is defined by reference to four factors: proximity of the area to the home, the nature of the uses to which the area is put, whether the area is included in an enclosure around the home, and the steps taken by the resident to protect the area from observation. While these factors can be employed with reasonable certainty in the urban residential environment, the analysis does not necessarily carry over to most camping contexts. Parkland campsites often have layouts that are vague or dispersed, and individuals often camp in areas that are not predetermined campsites.

In the case at bar, Basher was staying in a dispersed, or undeveloped camping area. It appears that Basher's camp was visible from the developed camping area where the officers had stayed the previous night. Therefore, we hold that there was no expectation of privacy in the campsite, and that the area outside of the tent in these circumstances is not curtilage. Accordingly, Struckman does not control the outcome of this case.

[Some citations omitted]

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CONSENTING SEXUAL INTERCOURSE BETWEEN A HIGH SCHOOL TEACHER AND HIS 18-YEAR-OLD STUDENT HELD CRIMINAL; 5-4 MAJORITY OF SUPREME COURT REVERSES COURT OF APPEALS AND REINSTATES CHARGE OF FIRST DEGREE SEXUAL MISCONDUCT WITH A MINOR (NOTE: LEGISLATURE AMENDED RCW 9A.44.093 TO ELIMINATE CLAIMED LOOPHOLE) – In State v. Hirschfelder, 170 Wn.2d 536 (2010), Matthew Hirschfelder, a 33-year-old choir teacher at Hoquiam High School, had sexual intercourse in his office with an 18-year-old student (and member of the choir). Hirschfelder was charged with sexual misconduct with a minor in the first degree. At the time, the statute provided in relevant part:

> A person is guilty of sexual misconduct with a minor in the first degree when: . . . the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.

Former RCW 9A.44.093(1)(b).

The majority opinion explains the procedural history as follows:

> Hirschfelder filed a motion to dismiss . . . arguing that because the statute criminalized sexual intercourse with "minors," he committed no crime when he had sexual intercourse with an 18-year-old adult. Alternatively, he argued that the former statute was unconstitutionally vague and violated his right to equal protection. The trial judge denied the motion . . . The Court of Appeals reversed [see report on Court of Appeals opinion, **Mar 09 LED:23**] holding that the statute was ambiguous but that legislative history indicated that the legislature intended to criminalize only sexual misconduct between school employees and students aged 16 and 17.

The majority holds that "former RCW 9A.44.093(1)(b) criminalized sexual intercourse between a school employee and any registered student age 16 or older." The Court also holds that the former statute was constitutional. Justice Stephens is the author of the majority opinion. She is joined by Justices Fairhurst, Alexander, Chief Justice Madsen, and Justice James Johnson.

Result: Reversal of Court of Appeals decision, which reversed the order of the Grays Harbor County Superior Court denying Matthew J. Hirschfelder's motion to dismiss charges of first degree sexual misconduct; case remanded for trial under the former RCW 9A.44.093(1)(b).

LED EDITORIAL NOTE: While this case was pending in the Supreme Court, the Legislature amended RCW 9A.44.093(1)(b) to eliminate the theoretical loophole unsuccessfully claimed by the defendant in this case. See Laws of 2009, ch. 324, § 1, reported at June 09 LED:09. Because the statutory language has been revised, we have not addressed in this LED entry the Court's analysis of the former statute. RCW 9A.44.093(1)(b) now reads in relevant part:

> **A person is guilty of sexual misconduct with a minor in the first degree when: . . . the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student.**

(2) DEFENDANT IN SHOOTING SHOULD HAVE BEEN PERMITTED TO ARGUE BOTH SELF-DEFENSE AND ACCIDENT WHERE HE WAS FACING SEVEN SNARLING DOGS – In State v. Werner, 170 Wn.2d 333 (2010), Werner and his neighbor (Barnes) had an ongoing dispute. Werner began carrying a pistol as a result of Barnes' dogs coming onto his property. The Supreme Court describes the relevant facts in part as follows:

Two weeks later, Werner was on his property in the easement area when one of Barnes's pit bulls approached him, baring its teeth. Werner noticed six other dogs with the pit bull, including the Rottweiler and other pit bulls. As the dogs started circling Werner, he pulled out his pistol, thinking he could scare the dogs, and started yelling for Barnes to call off the dogs. Galpin [the neighbor's friend] was building a dog house on Barnes's property. He heard Werner yelling and ran to the easement area. According to Werner, when Galpin showed up, Werner lowered his gun and twice asked Galpin to call off the dogs. But Galpin did not comply. Instead, Galpin took some steps toward Werner, and the pit bull moved with him. Werner panicked and decided to call 911 on his cell phone, but due to his arthritis, as he tried to set the gun down to push the call button, the gun went off, discharging into the ground.

According to Galpin, he heard Werner yelling, went down to the easement, and called off the dogs. All the dogs left except for a pit bull puppy. After the dogs left, Werner pulled the gun. Galpin did not see Werner point the gun, but only saw it go off and discharge into the ground. Werner then contacted police.

The Court concludes that "[t]he defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both." The Court explains:

> To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary." Werner stated that he was afraid. That fear was arguably reasonable, given that he was facing seven snarling dogs, including several pit bulls and a Rottweiler. See, e.g., State v. Hoeldt, 139 Wn. App. 225 (2007) **Oct 07 LED:24** (pit bull can be a deadly weapon under RCW 9A.04.110(6)). There is evidence that Galpin refused requests to call off the dogs. By that conduct, Werner could reasonably have believed that Galpin personally posed a threat through the agency of a formidable group of canines that were under his control. As to the firing of the weapon, Werner claims it was an accident. There is sufficient evidence of both accident and self-defense to warrant instructing the jury on self-defense. Since the outcome turns on which version of events the jury believed, the failure to give a self-defense instruction prejudiced Werner.

[Some citations omitted]

Result: Reversal of affirmance by Court of Appeals of Lewis County Superior Court first degree assault conviction of Gary Werner; case remanded for re-trial.

(3) CHEEK SWAB TO OBTAIN DNA SAMPLE WHILE CHARGES ARE PENDING CONSTITUTES SEARCH REQUIRING WARRANT; COURT ORDER UNDER CrR 4.7 FOR SWAB MAY BE OK IF SUPPORTED BY PROBABLE CAUSE AND OTHER SAFEGUARDS, BUT RECORD IN THIS CASE HELD INSUFFICENT TO MAKE THAT DETERMINATION – In State v. Garcia-Salgado, 170 Wn.2d 176 (2010), the Washington State Supreme Court is unanimous in holding that a cheek swab to obtain a DNA sample from a defendant for evidentiary purposes constitutes a search under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution and accordingly,

absent an exception, the state is required to obtain a warrant. However, a court order pursuant to CrR 4.7(b)(2)(vi) (permitting the court to order samples to be taken from the defendant's body) may be sufficient to satisfy the warrant requirement if it "is supported by probable case based on oath or affirmation, is entered by a neutral and detached magistrate, describes the place to be searched and the thing to be seized, and if there is a clear indication that the desired evidence will be found, the test is reasonable, and the test is performed in a reasonable manner." The Court concludes that in the present case it is unclear from the record before the Court what evidence the trial court considered and whether there was probable cause to issue the order.

Result: Reversal of affirmance by Court of Appeals (reported at **Nov. 09 LED:15**) of King County Superior Court conviction of Alejandro Garcia-Salgado for first degree rape of a child; remand to Superior Court for further proceedings.

LED EDITORIAL NOTE: As noted above, this case involves a trial court's discovery order pursuant to CrR 4.7 after charges have been filed. This case does not involve the collection of DNA from convicted offenders pursuant to RCW 43.43.754.

****

WASHINGTON STATE COURT OF APPEALS

OPEN VIEW, SEARCH INCIDENT, AND WAIVER ISSUES DECIDED AGAINST STATE IN 2-1 DECISION SUPPRESSING EVIDENCE SEIZED IN CAR SEARCH
State v. Swetz, ___ Wn. App. ___, 2011 WL 481028 (Div. II, 2011)

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

> At 1:30 A.M. on the morning of August 19, 2008, [a police officer] was patrolling the City of Morton when Swetz flagged him down and told him that he had seen a black bear roaming the streets. [The officer] drove to the area that Swetz had described and saw a dog chasing a bear. Later that morning, [the officer] pulled up next to Swetz's parked vehicle and Swetz approached the officer's window. During their conversation, [the officer] noticed a "strong odor of burnt marijuana" on Swetz's breath and person. [The officer] walked with Swetz back to his vehicle and saw a bag of marijuana sitting on the passenger seat.
>
> [The officer] arrested Swetz for possession of marijuana, handcuffed him, placed him in the back seat of the patrol car, and advised him of his Miranda rights. He then searched Swetz's car and found additional containers of marijuana in the glove box, glass pipes with marijuana residue, and several containers of Diazepam [Valium] pills. The State charged Swetz with one count of possession of a controlled substance, Diazepam, and one count of possession of marijuana, and a jury convicted him of both counts.

ISSUES AND RULINGS: 1) Where, while his case was at the Superior Court, Swetz did not challenge the warrantless search of his car incident to arrest, did Swetz waive his right to challenge that search based on Washington Supreme Court decisions that were issued after Swetz had been convicted at Superior Court? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority)

2) Where Swetz was arrested out his car for possessing marijuana that was on a car seat in open view from outside the car, where Swetz was next handcuffed and secured in a patrol car, and the officer then conducted a warrantless search of Swetz's car incident to the arrest, did the

warrantless search violate the Washington constitution, article I, section 7? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority)

3) Was the officer's retrieval of a baggie of marijuana from the car following his arrest of Swetz lawful under article I, section 7 of the Washington constitution because the baggie was in open view from outside the car? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority, open view does not by itself justify entering a private area, including the interior of a car located on a public street)

Result: Reversal of Lewis County Superior Court convictions of Joshua A. Swetz for possession of Valium and marijuana.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

1) No waiver of constitutional challenge to car search

As we reported in the September 2010 LED entry reporting the Division Two Court of Appeals decision in State v. Cross, 156 Wn. App. 568 (Div. II, 2010) **Sept 10 LED:16**, there is a split among Division Two judges on issue of whether defendants who at trial did not challenge warrantless car searches when their trials occurred before appellate court decisions tightened the rules on search incident to arrest should be allowed to take advantage of those post-trial appellate court decisions. The majority opinion in Swetz is authored by Judge Armstrong, who is joined by Judge Van Deren. The majority opinion in Swetz concludes that Swetz should be allowed to argue on appeal that the car search in his case violated article I, section 7 of the Washington Supreme Court in State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**, State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**, and State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09**.

The dissenting opinion by Judge Hunt argues that Swetz waived his right to challenge the car search by not raising his theory at the time of trial. The waiver issue is currently pending in the Washington Supreme Court in the Court's review of the Court of Appeals decision in State v. Cross, 156 Wn. App. 568 (Div. II, 2010) **Sept 10 LED: 16** and another case consolidated with Cross; oral argument was presented in the cases in the Supreme Court on October 26, 2010; a written Supreme Court decision is awaited.

2) Unlawfulness of warrantless car search incident to arrest

The majority opinion in Swetz recognizes that under the Fourth Amendment car-search-incident-to-arrest rule as interpreted by the U.S. Supreme Court in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, the search of the passenger area of Swetz's car was lawful even though Swetz had been arrested and secured in a patrol car before the search occurred. That is because Gant's Fourth Amendment rule allows a search in this circumstance if the search is for evidence of the crime of arrest, i.e., here, possession of marijuana.

The Swetz majority opinion concludes, however, that under article I, section 7 as interpreted by the Washington Supreme Court in Patton, Valdez and Afana, the search was unlawful. The Swetz majority opinion interprets those three Washington Supreme Court decisions as not including the Gant exception permitting a search for evidence of the crime of arrest where the arrestee has already been secured in a patrol car and poses no real risk of going into the car from which he was arrested and destroying evidence or getting at a weapon that might be in the car. The Swetz majority opinion also indicates that the prosecutor conceded this point.

The Swetz dissent by Judge Hunt argues that the facts are different than as described in the majority opinion, that the officer actually reached in Swetz's car and seized the baggie of marijuana before arresting Swetz, and that this fact made the seizure of the open view

marijuana a lawful exigent circumstances seizure. Judge Hunt's dissent goes on, however, to assume that the facts are as described in the Swetz majority opinion. Judge Hunt then argues that the majority opinion misreads the Washington Supreme Court decisions in Patton, Valdez and Afana. In arguing that those Washington Supreme Court decisions do not preclude a search incident to arrest for evidence of the crime of arrest, even after the arrestee has been secured in a patrol car, she cites the Division Two decision in State v. Louthan, 158 Wn. App. 732 (Div. II, 2010) **Jan 11 LED:08**, and the Division One decision in State v. Wright, 155 Wn. App. 537 (Div. I, 2010) **June 10 LED:12**.

As we noted in the **November 2010 LED**, on October 5, 2010, the Washington Supreme Court granted discretionary review in two cases where the Court of Appeals upheld car searches incident to arrest by applying the search-for-evidence-of-the-crime rationale of Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**. The Court of Appeals decisions that will be reviewed by the Supreme Court on that question are State v. Snapp, 153 Wn. App. 485 (Div. II, 2009) **Jan 10 LED:06**, and State v. Wright, 155 Wn. App. 537 (Div. I, 2010) **June 10 LED:12**. One Senior Appellate Deputy Prosecuting Attorney has described the issue that is now before the Washington Supreme Court in those cases along the following lines:

> In State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**; State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**; and State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09**, the Washington Supreme Court held car searches incident to arrest to be not justified; in each of those cases, the officers conducting the car search did not have a reasonable belief that evidence of the crime of arrest would be found in the car. Does dicta (i.e., language not necessary to decide the cases on their particular facts) in those decisions overrule the longstanding Washington rule allowing law enforcement officers to search the passenger compartment of a vehicle, incident to the arrest of an occupant, for evidence of the crime for the suspect was arrested (assuming there is a reasonable belief that such evidence is in the vehicle passenger area)?

3) Open view does not justify warrantless entry of car

The Swetz majority opinion concludes that open view of evidence or contraband from outside a vehicle does not alone provide exigent circumstances or otherwise justify entry of the vehicle to seize the evidence without consent or a search warrant. Among the appellate court decisions cited in the Swetz majority opinion on the open view question is State v. Lemus, 103 Wn. App. 94 (Div. III, 2000) **Feb 01 LED:02**.

Judge Hunt's dissent disagrees with the majority's view of the open view rule (at least under Judge Hunt's view of the facts), citing, among other decisions, the Division Two decision in State v. Barnes, 158 Wn. App. 602 (Div. II, 2010) **Jan 11 LED:03**.

LED EDITORIAL COMMENT ON OPEN VIEW: Evidence discovered in open view, as opposed to plain view, is not the product of a "search" under the constitutional restrictions of the Washington and federal constitutions. In the "plain view" situation, the view takes place after a lawful intrusion into activities or areas as to which there otherwise is a reasonable expectation of privacy. The officer has already intruded but if the intrusion is constitutionally justified (e.g., consent, community caretaking, exigent circumstances), the objects of obvious evidentiary value in plain view may be seized lawfully and will be admissible.

In contrast, in the open view situation, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to a private area at that which is knowingly exposed to the public.

The image and information gathered from the open view observation is not subject to any reasonable expectation of privacy, and therefore the observation is not prohibited by the constitution. It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place, and therefore warrantless observations from outside a vehicle of objects inside the vehicle passenger area generally are permissible.

As we have in the past, however, we caution officers against relying on open view to justify warrantless entry of a vehicle or other private area to search it or to seize the item openly viewed. The majority opinion in Swetz relies in part on the Court of Appeals decision in State v. Lemus, 103 Wn. App. 94 (Div. III, 2000) Feb 01 LED:02. Lemus held that, absent actual exigent circumstances, open view does not justify entry of a vehicle to search it or to seize the evidence or contraband openly viewed, regardless of whether the vehicle is presently occupied or not. We think that Lemus reached the conclusion that the Washington Supreme Court will reach in independent grounds analysis under article I, section 7 of the Washington constitution. We doubt that the Washington Supreme Court will conclude that open view is an independent basis for entering or searching a vehicle without true exigent circumstances (and note that the probable-cause-warrantless-car-search doctrine – also known as the Carroll Doctrine – of the Fourth Amendment does not apply under article I, section 7 of the Washington constitution – see State v. Tibbles, 169 Wn.2d 364 (2010) Sept 10 LED:09).

As always, we suggest that officers and agencies consult their legal advisors and local prosecutors for legal advice on the current status of the law.

SEARCH WARRANT PROBABLE CAUSE AFFIDAVIT GETS BENEFIT OF THE DOUBT AND IS HELD TO ESTABLISH CONFIDENTIAL INFORMANT'S RECENT OBSERVATION OF DEFENDANT'S MARIJUANA GROW OPERATION

State v. Lyons, ___Wn. App. ___, 2011 WL 451753 (Div. III, 2011)

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

> [A narcotics officer] requested a search warrant based on his affidavit. He wanted to search the residence of Patrick Lyons. [The officer] believed Mr. Lyons was manufacturing marijuana with the intent to deliver based on information provided by an informant.
>
> In his affidavit, [the officer] outlined his training and experience investigating drug crimes, described the residence, and identified an individual believed to be living at the residence known as "Jimmy." The affidavit went on to relate the officer's probable cause to believe that "Jimmy" was manufacturing, or possessed with intent to deliver, marijuana. [The officer] represented that his probable cause was based upon the following information:
>
> > Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU 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.

[A judge] issued a warrant to search the property. Police found a fully operational marijuana grow operation along with a number of plastic baggies containing marijuana and two large containers of mushrooms. The State charged Mr. Lyons with one count of manufacturing a controlled substance (marijuana), one count of possession of a controlled substance with intent to deliver (mushrooms), and one count of possession of a controlled substance with intent to deliver (marijuana).

Mr. Lyons moved to suppress the drug evidence. The superior court judge made some preliminary observations: "I suspect that [the judge who issued the warrant] did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used . . . . [W]e have these procedures so we can review more carefully the warrants that are applied for." And the superior court then went on to analyze [the officer's] affidavit and the specific language in question as follows:

> If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it's within the last 48 hours a reliable confidential source of information contacted detectives, period. He observed narcotics being grown. So it shifts-as I read it, it shifts to the word being, but there is no-to use [defense counsel's] phrase, no temporal reference to what being means.

The judge then concluded that "[The affiant-officer] has simply said that [the informant] contacted law enforcement within the last 48 hours. We have absolutely no idea when he made the observation." The superior court then concluded that the affidavit was not sufficient to support the search warrant and the court suppressed the drug evidence. The State now appeals this ruling.

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 there fail to establish probable cause to search the defendant's residence to search for the grow operation? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority; Judge Sweeney is the author of the majority opinion, joined by Judge Korsmo; Judge Siddoway dissents).

Result: Reversal of Yakima County Superior Court suppression ruling; case remanded for trial of Patrick Jimi Lyons for one count each of manufacturing marijuana, possession of a controlled substance (illegal mushrooms) with intent to deliver, and possession of marijuana with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

> The State contends that [the issuing judge's] reading of [the officer's] affidavit reflects common sense rather than a prohibited hypertechnical reading of the affidavit. The State argues that, when so read, the logical and reasonable inference is that the informant both observed the growing marijuana and related that fact to the detective within the 48-hour period before the affidavit was signed. Mr. Lyons responds that [the officer's] affidavit simply told [the issuing judge] that the informant reported his information to the officer within 48 hours; it did not tell the judge with any precision when the informant saw the growing marijuana. And, therefore, the affidavit fails to establish probable cause to believe that the drugs would be present on the property when [the issuing judge] issued the warrant.

. . . .

We will not reverse a magistrate's determination of probable cause absent a showing that the judge abused his discretion. We are required to give the magistrate's determination of probable cause great deference.

Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," ibid., and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present."

Simply put, the courts should encourage police officers to seek judicially sanctioned search warrants. And deferring to a judicially sanctioned search warrant does just that. State v. Chenoweth, 160 Wn.2d 454 (2007) **Sept 07 LED:04**. Just as importantly, the information collected here "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

"The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application."

. . . .

The difficulty here is that the warrant does not clearly state the time between the informant's observations and the filing of the affidavit. It states, "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address." But the superior court's approach would bring a rigor to the appellate analysis that we conclude is discouraged by both the deferential standard of review and the canons by which we are required to read these affidavits. . . .

This affidavit certainly could be read as Mr. Lyons and, ultimately, the superior court judge read it. But the standard of review (abuse of discretion) and canons of construction (nontechnical reading, commonsense reading, with great deference to the magistrate, with doubts resolved in favor of the warrant) would require a reading in favor of the warrant. When so viewed, we conclude the language can be read to support both the observation and the reporting of that observation within 48 hours and therefore we conclude this warrant passes constitutional muster.

"[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

[Some citations omitted]

LED EDITORIAL COMMENT: The temporal element of the affidavit/declaration in this circumstance should be drafted 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 the target guess as to when the CI's observation actually occurred). 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, I received information from a confidential informant hereafter referred to as CI No. 1. . . . CI No. 1 told me that within the past YY hours, CI No. 1 . . . ."

ARREST FOR VIOLATION OF SEATTLE DRUG LOITERING ORDINANCE HELD UNDER SPECIAL FACTS TO MEET RCW 10.31.100 MISDEMEANOR PRESENCE REQUIREMENT, BUT COURT DECLARES THAT COLLECTIVE KNOWLEDGE, OR POLICE TEAM, RULE GENERALLY DOES NOT APPLY IN ANALYZING MISDEMEANOR-PRESENCE QUESTION

State v. Ortega, ____Wn. App. ___, 2011 WL 359144 (Div. I, 2011)

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

> After receiving complaints from local business owners, several officers from the Seattle Police Department's Community Police Team organized an investigation into suspicious drug activity in the Belltown neighborhood of Seattle. [Officer A] positioned himself to surveil the street from the second floor of a local business. [Officers B and C], the arrest team, positioned themselves nearby in patrol cars.
>
> From his surveillance location, [Officer A] observed Gregorio Ortega walking aimlessly with co-defendant Alfonso Cuevas. As [Officer A] watched, Ortega and Cuevas attempted to contact passersby through eye contact and head nods. They nodded at two passersby, who then walked with Ortega and Cuevas a short distance until the four of them stopped, and another passerby joined them. Ortega huddled by a payphone with two of the individuals, appearing to make exchanges of small items, while Cuevas paced the sidewalk, looking around. After each exchange, the other individuals quickly left the area. After completing the second suspected transaction, Ortega and Cuevas began walking away together. As they walked away, Ortega and Cuevas were approached by a female, who then walked with them for a few yards. A short time later, Ortega and the female stopped and stepped off the sidewalk to make a quick hand-to-hand transaction while Cuevas again appeared to act as a lookout. Ortega and Cuevas quickly walked away, as did the female. [Officer A] believed he was observing narcotics transactions, but he could not confirm that any of the items exchanged actually constituted a drug sale.
>
> After the third suspected narcotics transaction, [Officer A] believed he had probable cause to arrest Ortega for drug traffic loitering, a gross misdemeanor. [Officer A] radioed [Officers B and C], informing them that probable cause existed to arrest Ortega and Cuevas and giving specific instructions on the location and appearance of the suspects. Responding immediately by patrol car, [Officer B] arrested and searched Ortega, locating small rocks of cocaine and $780 in cash on his person. [Officer A] maintained visual contact with the suspects up to the time of the arrest, which occurred approximately 30 seconds after he radioed the arrest team. [Officer A] packed up his surveillance gear and met with [Officers B and C], immediately confirming that the suspects were the individuals he had observed.

The State charged Ortega with possession of cocaine with intent to deliver. In a pretrial hearing under CrR 3.6, the trial court heard evidence relating to Ortega's motion to suppress the evidence located during the search incident to arrest. The trial court then concluded that the officers were justified in arresting Ortega and denied the motion to suppress.

The case proceeded to trial. The jury found Ortega guilty as charged. The trial court sentenced Ortega to a standard sentence of 12 months plus one day.

ISSUE AND RULING: Where the arrest was for the gross misdemeanor crime of drug traffic loitering, which is not one of the many exceptions to the misdemeanor presence rule set forth in RCW 10.31.100, did the arrest of Ortega violate the misdemeanor presence rule? (ANSWER BY COURT OF APPEALS: No, but only because Officer A was an integral part of the arrest process)

Result: Affirmance of King County Superior Court conviction of Gregorio B. Ortega (aka Martin Dominguez Hernandez) for possession of cocaine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals lead opinion)

Probable cause for a warrantless arrest for misdemeanors is limited by RCW 10.31.100, which states in part, "A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer," except as provided in certain listed exceptions.

The presence requirement originated in common law. William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 58 Mo. Law Review 771, 788-89 (1993). . . . The purpose for the common law rule was to allow an officer to prevent a breach of the peace:

> "The common law did not authorize the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission."

People v. Phillips, 30 N.E.2d 488 (194) (quoting 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883)); *See also* Schroeder, above, at 788-89. The "in the presence" rule was a balance of "'accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy' with the result that 'only in the most serious of cases could the warrant be dispensed with.'" State v. Walker, 157 Wn.2d 307, 316 (2006) **Sept 06 LED:07** . . . .

RCW 10.31.100, though in derogation of the common law, accords with the purpose of the common law in the presence rule. Walker. RCW 10.31.100 favors arrests made pursuant to a warrant but allows for exceptions in limited situations. When originally enacted, the statute contained three exceptions to the warrant requirement. Former RCW 10.31.100 (Laws of 1969, 1st Ex.Sess., ch. 198, § 1); Walker. The statute has been amended at least 20 times since then

and has been expanded to include 24 exceptions. Walker. For example, the legislature removed the in the presence requirement for crimes involving physical harm to persons or property, violations of court orders, unlawful use of drugs and firearms, and specified traffic offenses. These exceptions reflect the legislature's determination that the need for immediate arrest outweighs the possibility of a mistaken arrest. Walker. The Supreme Court noted in Walker that the exceptions listed in RCW 10.31.100 address social problems either not recognized or not present during common law, such as domestic violence, driving under the influence, and the individual and social costs of marijuana abuse.

Ortega does not dispute that [Officer A], as the observing officer, had probable cause to arrest him for the misdemeanor of drug traffic loitering under Seattle Municipal Code (SMC) 12A.20.050(B). But, [Officer A] did not make the arrest. Ortega contends that [Officer B], the arresting officer, did not have authority to arrest Ortega, because Ortega did not commit the misdemeanor in [Officer B's] presence as required by RCW 10.31.100.

The State responds that probable cause transferred from [Officer A] to [Officer B] under the fellow officer rule, also known as the collective knowledge doctrine or the police team rule. The fellow officer rule is not a creation of English common law. Rather, it was developed as part of a general liberalizing of the common law presence requirement in response to the challenges of policing in modern times with modern technology. J. Terry Roach, Comment, The Presence Requirement and the "Police-Team" Rule in Arrest for Misdemeanors, 26 WASH. & LEE L.REV. 119, 119-21 (1969). Washington has adopted the fellow officer rule in the felony context. See, e.g., State v. White, 76 Wn. App. 801 (Div. I, 1995) **June 95 LED:09**. Under this rule, in those circumstances where police officers are acting together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect . . . State v. Mance, 82 Wn. App. 539 (Div. II, 1996) **Nov 96 LED:14**. . . .

No published misdemeanor prosecution case has explicitly held that the fellow officer rule applies. The State asserts that this court extended the fellow officer rule to misdemeanors in Torrey v. City of Tukwila, 76 Wn. App. 32 (Div. I, 1994) **May 95 LED:19**. In Torrey, undercover police officers were investigating violations of standards of conduct at an adult entertainment club. During the investigation, the undercover police officers observed a violation of the [Tukwila] Municipal Code that established probable cause for a misdemeanor. Later that day, another officer arrested the dancers. In a civil suit against Tukwila claiming violations of several constitutional rights, the dancers claimed that their arrest violated RCW 10.31.100, because the arresting officer was not the officer who observed the misdemeanor. In response to the dancer's RCW 10.31.100 claim, this court stated, "We have no difficulty applying the fellow officer rule to the facts of this case." Torrey. . . .

The court in Torrey applied the federal fellow officer rule to a misdemeanor arrest. The claim was civil rather than criminal and was based on violation of federal rights. But, a claim of violation of RCW 10.31.100 is not grounded in the federal constitution. The [Torrey] court was not squarely faced with the question before us. We are not constrained by it.

. . . .

> The fellow officer rule was not available at common law. It has not been extended to the misdemeanor context under RCW 10.31.100 exceptions to the presence requirement. Neither has the [State] Supreme Court applied the rule to a misdemeanor prosecution. Without these factors, it is for the legislature to extend the arrest authority of law enforcement officers. We decline to adopt or extend that rule to the misdemeanor context.
>
> Although we decline to adopt the fellow officer rule in the misdemeanor context, we hold that RCW 10.31.100 is not violated under these facts. The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. [Officer A's] continuous contact rendered him a participant in the arrest. Although [Officer A] was not the officer who actually put his hands on Ortega, [Officer A] was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.
>
> If Officer [X] was driving a squad car with Officer [Y] and Officer [X] witnessed a suspect commit a misdemeanor while Officer [X] did not, we would not construe the in the presence rule to require that Officer [X] could arrest the suspect but Officer [Y] would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.
>
> We hold the arrest of Ortega without a warrant did not violate RCW 10.31.100. Because the arrest was lawful, the search incident to the arrest was valid. Suppression of the evidence obtained during the search was not required. Because we hold that probable cause existed for the misdemeanor, we need not consider the State's argument that it also had probable cause to arrest Ortega for the commission of a felony.

[Some citations omitted]

Concurrence by Judge Grosse:

The lead opinion is authored by Judge Appelwick and concurred in by Judges Dwyer and Grosse. Judge Grosse also writes a very short concurring opinion, agreeing with the result but suggesting that "the discussion of the fellow officer rule in the context of RCW 10.31.100 is unnecessary to the decision and could be read as foretelling further evisceration of the statute, something I do not think the majority intends."

APPEALS COURT REVERSES DISTRICT COURT'S RULING THAT TRAFFIC STOP WAS PRETEXTUAL IN DUI CASE WHERE OFFICER FOLLOWED SPEEDING DRIVER FOR 3 BLOCKS AFTER SEEING HIM UNLAWFULLY EXIT PARKING LOT BY DRIVING OVER A SIDEWALK WITHOUT STOPPING, AND WHERE OFFICER DID NOT CITE HIM FOR EITHER OF THE TRAFFIC INFRACTIONS

State v. Weber, ___Wn. App. ___, 2011 WL 479881 (Div. III, 2011)

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

> [A Washington State Patrol trooper] saw Bryan J. Weber drive his car out of an apartment complex at about 2:53 a.m. He noticed that the car entered the street without stopping before crossing over a sidewalk. [The trooper] then paced Mr.

Weber's car for about three blocks. Mr. Weber drove 47 m.p.h. in a 35 m.p.h. zone.

[The trooper] pulled the car over. Mr. Weber's eyes were bloodshot and watery and he smelled like alcohol. Mr. Weber agreed to perform field sobriety tests, but did not perform them well. The trooper arrested him for driving under the influence (DUI) and transported him to the jail. Breath tests showed Mr. Weber's breath alcohol level to be .115 and .118. [The trooper] cited Mr. Weber for DUI, but did not cite him for the traffic infractions.

Mr. Weber moved to suppress the evidence obtained following the stop. He argued that the traffic stop for speeding and failure to stop was a pretext to investigate his possible driving under the influence. The matter was heard before a judge pro tempore. [The trooper] was the only witness called by the prosecution at the hearing. The trooper testified that he stopped Mr. Weber's vehicle for traffic infractions but is always on the lookout for DUIs when on duty:

JOHNSON [prosecutor]: What was the reason for the stop?
TROOPER: The combination of traffic violations. The failing to stop before the sidewalk and the speeding.

PHELPS [defense attorney]: What time of night was this.
TROOPER: . . . . [I]t was right before I was going home. 2:53 is when the stop happened.
PHELPS: A.M.?
TROOPER: Yes.
PHELPS: Was there any people out on the street as far as pedestrians?
TROOPER: I didn't indicate but there's not very many at 3:00 in the morning in that area.
PHELPS: Alright. Were there very many cars on the street?
TROOPER: I don't recall any other cars on the street.

. . . .

PHELPS: And part of your duties is DUI enforcement?
TROOPER: Yes.
PHELPS: Were you working a special detail [the] night of this incident?
TROOPER: No.
PHELPS: And were you looking for DUI's?
TROOPER: Yes.
PHELPS: And it's not uncommon for people to be drinking and driving late at night, is it?
TROOPER: Very common.
PHELPS: And part of what you do as a state trooper is look for DUI's.
TROOPER: Yes.
PHELPS: Did that play a part in stopping this particular defendant?
. . . .

TROOPER: I would have stopped him for those violations if it was at noon. The hour didn't make any difference, no.
. . . .

JOHNSON: Was DUI the basis for this stop?

> TROOPER: I guess I don't know how to clarify that. I'm always looking for DUI's at all hours every time I work. I'm always on the look out for that, but, the reason for the stop was traffic violations. [Emphasis added]
>
> The district court took the matter under advisement. The court subsequently issued a written ruling that concluded that the stop was pretextual and granted the suppression motion. The district court entered five findings of fact: (1) the trooper testified he was looking for DUIs at the time he observed Mr. Weber; (2) the trooper testified that he observed Mr. Weber fail to stop at the crosswalk while leaving an apartment complex in violation of RCW 46.61.365; (3) the trooper did not immediately stop Weber; (4) the trooper paced him for three blocks at 48 m.p.h. in a 35 m.p.h. zone before stopping him; (5) the officer did not cite for the traffic infractions, but did cite for DUI.
>
> From these findings, the court entered four conclusions of law: (1) the trooper "was not motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code," (2) "the traffic violations were not the real reason for the stop," (3) "the stop was an unlawful pretext stop," and (4) the motion to suppress was granted and all evidence was suppressed.
>
> The district court entered an order that the practical effect of the suppression order was to terminate the case. The State then appealed the ruling to the superior court pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). The superior court reviewed the district court transcript and the briefing of the parties. After hearing argument, the superior court reversed the district court. Its oral remarks discussed the factual basis for the stop before deciding that a pretext stop had not occurred. The written superior court ruling simply stated that there was "sufficient evidence introduced to reverse the Findings of Fact entered October 17, 2008," and reversed the district court order suppressing the evidence.

ISSUE AND RULING: Did the District Court err in finding the traffic stop to be pretextual where (1) the officer saw the driver commit a violation of RCW 46.61.365 as he entered the roadway from an apartment complex parking area by driving over a sidewalk without first stopping, (2) the officer then followed the driver for 3 blocks in a residential area at 48 mph in a 35 mph zone before signaling him to stop, and (3) the officer ultimately did not cite the driver for any infractions? (ANSWER BY COURT OF APPEALS: Yes, rule a 2-1 majority, Judge Korsmo writing for the majority, Judge Brown concurring, and Judge Sweeney dissenting).

Result: Affirmance of Benton County Superior Court ruling that the Benton County District Court should not have found pretext and should not have suppressed evidence that Bryan J. Weber committed DUI; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The issue . . . . is whether the district court correctly concluded that the stop was pretextual. Pretextual traffic stops violate the Washington State Constitution's article I, section 7. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. "A pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code." State v. Nichols, 161 Wn.2d 1 (2007) **Sept 07 LED:10**. If a stop is pretextual, all evidence following the stop must be suppressed. State v. Montes-Malindas, 144 Wn. App. 254 (Div. III, 2008) **July 08 LED:21**.

The court should consider "the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson. The failure to issue a citation for a traffic infraction is one factor to be considered but is not dispositive. State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) **Nov 00 LED:08**. An officer need not issue a citation. Nichols. An officer's candid admission to pretextual conduct is more probative than the denial of the conduct. Montes-Malindas.

Mr. Weber relies nearly exclusively upon Montes-Malindas, a case that involved a classic pretextual traffic stop. There, the arresting officer saw a van with three occupants parked outside of a Walgreen's store. The officer immediately suspected nontraffic criminal activity. He surveyed the van and its occupants from an adjacent parking lot. When the van exited the parking lot without turning on its headlights, the officer followed and later stopped the van. The officer admitted that the suspicions of criminal activity were probably on his mind when he decided to stop the van. This court concluded that the stop was pretextual after considering the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his behavior.

Montes-Malindas was similar to the other cases where pretext stops have been found – police officers suspecting criminal behavior used a stop for a traffic infraction to investigate a possible crime rather than the noncriminal traffic infraction. E.g., Ladson (gang detectives stopped vehicle for traffic infraction in order to investigate drug dealing); State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) **Nov 99 LED:12** (officer watching narcotics trafficking building stopped car to identify driver who left the location); State v. Myers, 117 Wn. App. 93 (Div. III, 2003) **Aug 03 LED:18** (officer who suspected driver's license was suspended stopped vehicle for traffic citations while awaiting record check on license status); State v. Meckelson, 133 Wn. App. 431 (Div. III, 2006) **Aug 06 LED:12** (counsel ineffective for not challenging stop where officer who suspected vehicle might have been stolen made traffic stop for infractions).

In contrast, a patrol officer who makes a traffic stop in the course of his patrol duties does not commit a pretext stop merely because there is reason to believe that other criminal activity is afoot. In Nichols, an officer saw a car pull into a parking lot, slowly drive around, and then returned to the street. In doing so, the car crossed over to the far lane instead of into the closest lane. Suspecting that the driver did not want to drive in front of the patrol car, the officer went in pursuit and activated his lights immediately upon catching up to the car. The court concluded that there was no basis for finding a pretext stop. There was no evidence that the officer was performing anything other than routine patrol duties when he observed what he thought were traffic infractions. It was objectively reasonable for the officer to stop to investigate the turning violation. The fact that the officer did not cite for the infraction also did not turn the stop into a pretext.

An earlier case reached a similar result. Hoang. [In Hoang] a patrol officer was observing a neighborhood known for drug transactions. At 4:00 a.m., the defendant drove up in a car, briefly stopped and talked to one group of people standing near the street, and then drove forward to do the same with another group. Suspecting that the driver was attempting to purchase drugs, but seeing no evidence that any drugs had been exchanged, the officer waited. The car stopped for a stop sign, but then turned without signaling. The officer immediately turned on his lights and made a traffic stop.

The trial court found that the officer would have made the stop even if he had not observed the suspicious behavior and determined that it was not a pretext. The Court of Appeals affirmed. The [Hoang] court expressly noted:

> Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

This case most closely fits the Nichols fact pattern. The trooper was on traffic patrol, which is the normal job description of most troopers. He had not seen Mr. Weber before and had no specific suspicion of criminal activity by Mr. Weber. As in Nichols, traffic violations were committed in the trooper's presence during the dark of night and he promptly acted upon seeing those violations. [Court's footnote: *Mr. Weber argues that he was followed for three blocks before the traffic stop. The trooper testified he was pacing Mr. Weber to determine his speed. Traveling three blocks at nearly 50 m.p.h. does not take a great deal of time. A mere three-block pace is not evidence that the stop was a pretext.*] These are not the facts of a pretext stop.

The trooper was doing his job as a patrol officer. While he was always on the lookout for lawbreaking, including people driving while under the influence, that fact does not mean that everyone the trooper] stops is the subject of a pretext stop. It is expected that patrol officers are looking out for improper activity. Under petitioner's theory, any officer who came upon a car weaving all over the road would be making a pretext stop simply because the officer expected to find an impaired driver behind the wheel. That theory turns training and experience into a basis for not enforcing the law.

As in both Nichols and Minh Hoang, the trooper was not conducting an investigation unrelated to traffic offenses. It was objectively reasonable for him to stop a car driving through a residential area at 48 m.p.h. in the middle of the night. [Court's footnote: *That would be the case even under Mr. Weber's theory since the DUI statutes are found in the traffic code, chapter 46.61 RCW.*] Thus, even if we go further than the trial court and infer that a factual finding had been made that [the trooper] was not enforcing the traffic code, it is not sufficient to find a pretext stop. Under Ladson, both the subjective intent of the officer and the reasonableness of the stop must be considered before finding a pretext. This was a reasonable stop. In light of the nonexistence of an improper motive, there is no basis for finding that this traffic stop was a pretext.

The traffic stop was valid. We affirm the superior court ruling that remanded the case for trial.

[Some citations omitted]

DISSENT: Judge Sweeney argues that the Superior Court (in review of District Court ruling) and the Court of Appeals have only appellate roles in this context, that appellate courts are not supposed to re-weigh the evidence even if they would have made a different factual determination if they had been sitting as the District Court fact-finder. Judge Sweeney argues in vain that the Court of Appeals should have ruled that there is substantial evidence to support

the District Court's pretext determination, and that therefore the determination should be affirmed.

LED EDITORIAL COMMENT: In the Hoang case (Nov 00 LED:08) discussed in the Weber majority opinion, the arresting officer explained that it was his practice to not write citations for infractions where the circumstances were likely to result in a felony charge or charges by the prosecutor. The Hoang Court's analysis then expressly approved this reasonable practice of officers reporting the details of such an incident and leaving it to the prosecutor which violations of law to pursue.

****

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

IN POSSESSING STOLEN VEHICLE CASE, DEFENDANT LOSES ARGUMENT THAT HE POSSESSED ONLY STOLEN CAR PARTS, NOT A STOLEN CAR – In State v. Acevedo, ___Wn. App. ___, 2010 WL 5644799 (Div. III, 2010), the Court of Appeals rejects a defendant's argument that because the stolen 1998 Acura that he knowingly possessed did not have a front end, engine or transmission when he received it, he was in knowing possession of only stolen vehicle parts, not of a vehicle.

Defendant argued that the jury should have been instructed that the law under RCW 9A.56.068, 9A.04.111(28), and RCW 46.04.320 limits the concept of "vehicle" to something that is capable of self-propulsion as a vehicle at the time of possession. The Court of Appeals rejects his argument and concludes that an amalgam of vehicle parts, as here, "designed for self-propulsion," is a "vehicle." In prosecuting for knowing possession of a stolen vehicle, It is not necessary for the State to prove that the amalgam of parts was capable of self-propulsion while the defendant possessed it.

Result: Affirmance of Columbia County Superior Court conviction of Miguel Angel Acevedo for possessing a stolen motor vehicle; reversal of restitution order in part (on issue not addressed in this LED entry), and remand of case for revision of restitution order.

LED EDITORIAL COMMENT: The Acevedo decision is a first-impression case. How many stolen vehicle parts amalgamated in what way constitutes something "designed for self-propulsion" remains to be sorted out in future court decisions addressing other fact patterns.

****

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

****

The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

****