Law Enforcement Digest

AUGUST 2010

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

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661st Basic Law Enforcement Academy – February 2, 2010 through June 17, 2010

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Best Academic:	Katherine L. Loney – Walla Walla Police Department
Best Firearms:	Thomas H. James – University of Washington Police Department
Tac Officer:	Officer Tom Arnold – Lakewood Police Department

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ANNOUNCEMENT: WAPA STAFF ATTORNEY PAM LOGINSKY'S 2010 SUMMARY ON CONFESSIONS, SEARCH, SEIZURE AND ARREST IS ACCESSIBLE ON CJTC LED PAGE

Most LED readers are familiar with the excellent and comprehensive summary on law-enforcement-related law topics by Pam Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. Ms. Loginsky updates the summary periodically. The May 2010 version of her summary is now available, along with several other relatively current summaries and outlines of interest to law enforcement on the Criminal Justice Training Commission's internet LED page under a link at: "**Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors," May 2010, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.**

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UNITED STATES SUPREME COURT

POLICE EMPLOYER'S WARRANTLESS REVIEW OF OFFICER'S PAGER TRANSCRIPT HELD REASONABLE AS A NON-INVESTIGATORY, WORK-RELATED SEARCH; SUPREME COURT AVOIDS RESOLVING TECHNOLOGY-PRIVACY QUESTIONS

City of Ontario, Calif. v. Quon, ___ S.Ct. ___, 2010 WL 2400087 (2010) (Decision filed June 17, 2010)

Facts and Proceedings below:

The Ontario, California, Police Department (OPD) contracted with a wireless company for two-way alphanumeric pagers for sending of work related text messages. The contract allotted 25,000 characters per month per pager. Usage over that amount on any pager required the City to pay overage charges.

The City's policies for employees did not expressly address text messaging, but the City did have a general "Computer Usage, Internet and E-Mail Policy" policy for all employees. That policy stated that the use of City computers and other associated equipment was limited to official City business, and that the use of equipment for personal purposes was a violation of the policy.

The policy had other provisions that allowed the City to monitor employee electronic communications. Ontario PD employees were told, but only orally, that text messaging was a form of electronic communication under the general written policy.

The informal practice during the first two years after OPD employees were given pagers limited text messages to 25,000 characters per pager each month. Under the practice, personnel that used more than 25,000 characters in a month were required to compensate OPD a certain amount for each character over 25,000. During this initial period, Sergeant Quon had used over 25,000 characters in three or four separate months. No audit was conducted in response to the overages by Sergeant Quon or others. Instead, he and others were simply required to pay for the overages, no questions asked, pursuant to the informal practice.

Eventually, the lieutenant who was required to request payment from officers exceeding the character limit was directed to conduct an audit to determine whether the characters that were being used were for official business only, and, if so, whether the character limit should be increased. Quon was among those officers audited, because he had gone over the character limit several times. The audit produced pager transcripts revealing that Quon had sent a large number of sexually explicit and profane messages to his family and friends from his pager (Quon's lawsuit alleged that he was disciplined for this in some way by OPD).

Quon and some of those he had texted brought a federal civil rights lawsuit alleging privacy violations under the U.S. and California Constitutions, as well as the federal Stored Communications Act. The U.S. District Court held that Quon had a reasonable expectation of privacy in his text messages as a matter of law. But the District Court then asked a jury to determine as a matter of fact whether the search was reasonable. The jury found that the agency's search was reasonable because the intent was to determine whether to raise the character limit. The District Court therefore granted summary judgment dismissing the lawsuit.

Quon and the other plaintiffs appealed, and the Ninth Circuit reversed, holding that the plaintiffs had a reasonable expectation of privacy in the text messages, and that the audit was not reasonably conducted, because the audit of the pager transcript was not the least intrusive way

to deal with the employer's concerns about the monthly character limit on use of pagers. Quon v. Arch Wireless Operating Company, Inc., 529 F.3d 892 (9th Cir. 2008) **Sept 08 LED:03.**

ISSUES AND RULINGS: 1) The Ontario, California, PD had a policy authorizing agency monitoring of electronic communications by its employees using certain agency equipment, but the policy did not address text messages explicitly, and there had been no prior auditing of text messages. Agency practice for text messaging on pagers allowed officers to simply pay for going over the monthly pager-character limit. As a matter of law under the Fourth Amendment of the U.S. Constitution, did Quon and the other plaintiffs have a reasonable expectation of privacy in the text messages? (ANSWER: The U.S. Supreme Court opinion declines to answer this question, and instead rules, as noted below under Issue # 4, that – assuming for the sake of argument that Quon and the other plaintiffs had a reasonable expectation of privacy – the employer's actions were reasonable.)

2) Did the employer's pager audit constitute a search under the Fourth Amendment? (ANSWER: The U.S. Supreme Court opinion declines to answer this question, and instead rules, as noted below under Issue # 4, that – assuming for the sake of argument that the pager audit was a search – it was lawful.)

3) In O'Connor v. Ortega, 480 U.S. 709 (1987), four U.S. Supreme Court justices signed the lead opinion in a case regarding a public employer's search of a public employee's office. That lead opinion stated an "operational realities" test under which one must look on a case by case basis at the totality of the circumstances to answer the Fourth Amendment questions of (A) whether a public employee has a reasonable expectation of privacy in the contents of his or her office, and (B) whether, in any event, the employer's search of the employee's office was reasonable. In a lone concurring opinion in O'Connor, Justice Scalia stated a view that generally assumed Fourth Amendment protection for the government employee's office but also generally assumed lawfulness of searches of such offices to retrieve work-related materials or to investigate violations of workplace rules if such searches would be deemed reasonable and normal in the private-employment context. Should the Supreme Court adopt one or the other of these tests? (ANSWER: The U.S. Supreme Court opinion declines to answer this question, and instead rules, as noted below under Issue # 4, that regardless of which O'Connor test is applied, the employer's actions were reasonable under all of the circumstances.)

4) Where a jury found that the purpose of the pager audit was not to discover wrongdoing but to determine if the monthly character limit should be increased, and where the search was not unreasonably excessive in its scope, were the employer's actions lawful regardless of whether the actions constituted a search that intruded in some measure on Quon's privacy interests, and regardless of which of the two public-employer- search tests of O'Connor is applied? (ANSWER: Yes)

Result: The City of Ontario, California, wins. The Supreme Court reverses the Ninth Circuit U.S. Court of Appeals decision that in turn had reversed a U.S. District Court decision dismissing the federal civil rights lawsuit of Sergeant Quon and the other plaintiffs.

ANALYSIS:

As noted above in the Issue statements, the U.S. Supreme Court decision in Quon generally avoids directly answering the most difficult questions before it. The decision thus does not add much clarity to the law relating to searches of employer-provided electronic equipment issued to public employees. The lead opinion by Justice Kennedy is signed by seven other justices. The

Kennedy opinion explains that the Court's reluctance to commit to rulemaking at this time in this area of law is driven by concerns about the fast-changing nature (1) of technology and (2) of societal usage and expectations regarding such technology:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In [Katz v. U.S., 389 U.S. 347 (1967)], the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.
>
> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one [friend-of-the-court] brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another [friend-of- the-court brief] points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.
>
> Even if the Court were certain that the O'Connor plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity [presence everywhere] of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.
>
> A broad holding concerning employees' privacy expectations vis-a-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions [**for the sake of argument**]. First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, [the employer's] review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

[Some citations omitted]

Justice Kennedy's lead opinion then resolves the case under the following analysis determining that the employer acted reasonably in light of the legitimate work-related purpose for the audit:

> Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are per se unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has held that the "'special needs'" of the workplace justify one such exception. O'Connor.
>
> Under the approach of the O'Connor plurality, when conducted for a "non-investigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search. The search here satisfied the standard of the O'Connor plurality and was reasonable under that approach.
>
> The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a non-investigatory work-related purpose." As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.
>
> As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not "'excessively intrusive.'" Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.
>
> Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this

might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises – and given that Quon had received no assurances of privacy – Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a "host of simple ways to verify the efficacy of the 25,000 character limit . . . without intruding on [respondents'] Fourth Amendment rights." The [Court of Appeals] suggested that Scharf "could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript."

This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." This rationale "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," because "judges engaged in [after the fact] evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished". The analytic errors of the Court of Appeals in this case illustrate the necessity of this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated the [federal Stored Communications Act – SCA] by giving the City the transcripts of Quon's text messages. The merits of the SCA claim are not before us. But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that [the employer] actions were unreasonable. [Quon and the other plaintiffs] point to no authority for the proposition that the existence of statutory protection renders a search per se unreasonable under the Fourth Amendment. And the precedents counsel

> otherwise. Furthermore, [they] do not maintain that any OPD employee either violated the law him- or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law. The otherwise reasonable search by OPD is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.
>
> Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the O'Connor plurality. For these same reasons – that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification – the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice SCALIA's concurrence [in O'Connor]. The search was reasonable, and the Court of Appeals erred by holding to the contrary. [The employer] did not violate Quon's Fourth Amendment rights.

[Some citations omitted]

Justice Stevens signs the majority opinion but he also writes a concurring opinion suggesting a slightly different, more civil liberties focused, way of looking at the Fourth Amendment issues in the case. Justice Scalia joins in most of the majority opinion, but he also offers some criticism of part of that opinion. He suggests that the Justice Kennedy lead opinion is inconsistent when, on the one hand, it states that it will not issue holdings on certain privacy and search questions, but then hints in its extensive analysis at the answers to such questions.

LED EDITORIAL COMMENTS: Law enforcement agency administrators may wish to consult their legal advisors and to review policies and practices to ensure: 1) that formal policies limiting usage of equipment and authorizing audit of electronic devices explicitly address each specific type of technology (computer, pager, blackberry, etc.) used by employees; 2) that employees have been informed of all policies (ideally with employee acknowledgement of receipt of such communication), and of the possibility that a public records request may require disclosure of electronic and other communications; and 3) that policies, including provisions for auditing of electronic communications, are followed by employees.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

THROUGH THE FOURTEENTH AMENDMENT, THE SECOND AMENDMENT OF THE U.S. CONSTITUTION APPLIES TO LIMIT STATE AND LOCAL FIREARMS LAWS – In McDonald v. City of Chicago, ___ S.Ct. ___, 2010 WL 2555188 (2010), the U.S. Supreme Court rules 5-4 that the Second Amendment of the U.S. Constitution is incorporated by the Fourteenth Amendment in a way that makes the individual "right . . . to keep and bear arms" provision of the Second Amendment applicable to the states. This means that state statutes and local ordinances are restricted by the U.S. Constitution.

The McDonald case began with Second Amendment-based challenges in Illinois federal district court to Chicago and Village Park ordinances. Those ordinances essentially ban all possession of handguns, even in one's own home, by almost all private persons. The lower federal courts had rejected the challenges and had held, based on their interpretations of past decisions of the U.S. Supreme Court, that the Second Amendment restricts only federal statutes and does not

apply to restrict state and local laws. The majority U.S. Supreme Court justices in McDonald – though not all in agreement as to the particular text of the Fourteenth Amendment that leads to the legal conclusion – together conclude that the latter amendment requires application of the individual right to bear arms to restrict state and local laws in the same way that the Second Amendment restricts federal laws.

The McDonald decision does not define the contours of Second Amendment individual firearms rights, nor does the decision otherwise address the merits of the Chicago and Village Park ordinances. Instead, the McDonald Court remands the case for the lower federal courts to determine whether the ordinances violate the Second Amendment.

Any further court review on remand in McDonald, assuming that the cities do not capitulate, would include consideration of the U.S. Supreme Court decision in District of Columbia v. Heller, 128 S.Ct. 2783 (2008) **Aug 08 LED:03**. In Heller, the U.S. Supreme Court declared that the Second Amendment includes a protection of an individual right to keep and bear firearms. By a 5-4 vote, Heller struck down a law of the District of Columbia (a federal jurisdiction) banning possession of handguns generally, and banning possession of immediately operable firearms in the home. The same five justices were in the majority in Heller as in McDonald, and the dissenters in Heller were, of course, also the same except that Justice Sotomayor has replaced Justice Souter on the Court.

The majority opinions in McDonald and Heller carefully leave intact the power of legislative bodies to adopt *reasonable* legislative restrictions on firearms, such as restrictions on 1) sensitive places of possession, such as schools and government buildings; 2) possession by felons and the mentally ill; 3) types of firearms that may be possessed; 4) carrying firearms concealed; and 5) conditions and qualifications on commercial sale. Exactly what is *reasonable* in these and other regards was left unclear in Heller, and future litigation will be required to sort this out. In light of the ruling in McDonald, such litigation will generally address validity of federal, state and local laws under both the U.S. Constitution and state constitutions. Like the Second Amendment, Washington's constitution, article I, section 24, provides a qualified right to keep and bear firearms in its provision that protects "[t]he right of the individual citizen to bear arms in defense of himself."

Result in McDonald: Reversal of decision of Seventh Circuit of the U.S. Court of Appeals affirming a decision of the U.S. District Court for the Northern District of Illinois rejecting constitutional challenges by Otis McDonald and others; case remanded further proceedings.

LED EDITORIAL NOTES: It seems unlikely that the broadly prohibitive ordinances at issue in McDonald would survive Second Amendment review under Heller. Recent newspaper accounts have reported that shortly after the U.S. Supreme Court's late-June announcement of its decision, the City of Chicago amended its ordinance in a relatively narrow fashion to maintain significant restrictions on gun possession, likely setting up a new Second Amendment-based challenge.

In State v. Sieyes, 168 Wn.2d 276 (2010) April 10 LED:16, the Washington Supreme Court anticipated this ruling by the U.S. Supreme Court with a ruling that the Second Amendment's individual right to bear arms applies to restrict state and local laws. Because of what the Sieyes Court characterized, however, as inadequacy of the briefing and arguments by counsel for the seventeen-year-old challenger, the Sieyes Court declined to address the particular challenge brought in that case to restrictions on gun possession by children.

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

CLAUSE IN SEARCH WARRANT HELD NOT OVERBROAD IN AUTHORIZING SEIZURE OF INDICIA OF ID OF PERSONS IN CONTROL OF PREMISES – In Ewing v. City of Stockton, 588 F.3d 1218 (9th Cir. 1218) (decision filed December 9, 2009), an appeal arising from a lawsuit under the federal Civil Rights Act (42 U.S.C. section 1983), a 3-judge Ninth Circuit panel once again rejects a challenge to a particular stock search warrant clause. The lawsuit related to, among other things, a search of the residence of a couple suspected at the time of the search (but later cleared) of participating in a murder at a Stockton, California bar. The Ninth Circuit panel addresses a number of issues in the case, only one of which we will address in this LED entry. The panel rejects the plaintiffs' attack on a stock search warrant clause authorizing a search for and seizure of "Indicia tending to establish the identity of persons in control of the premises." The panel explains its ruling on this issue as follows:

> Turning to the Ewings' second argument, they contend first that [paragraph 1], regarding "Indicia tending to establish the identity of persons in control of the premises," is overbroad. However, this court has long upheld warrants containing such language. See, e.g., U.S. v. Alexander, 761 F.2d 1294, 1302 (9th Cir. 1985) (collecting cases). The Ewings argue that such cases typically involve situations where the premises in question are used to commit crimes. See, e.g., U. S. v. Whitten, 706 F.2d 1000, 1009-10 (9th Cir. 1983), implied overruling on other grounds recognized by U.S. v. Rodriguez-Rodriguez, 441 F.3d 767 (9th Cir. 2006). But the Ewings cite no authority limiting the language to such cases. Further, in the present case, where the female biker – reasonably believed to be Heather [Ewing] – left the scene of the crime with two males, it was reasonable for the officers to seek such evidence.

[Footnote omitted]

Result: Affirmance in part and reversal in part of U.S. District Court (Eastern District of California) grant of summary judgment to government employees and entities; remand for further District Court proceedings on issues not addressed in this **LED** entry.

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WASHINGTON STATE SUPREME COURT

VEHICLE SEARCH INCIDENT TO ARREST HELD UNLAWFUL – COURT IS NOT CLEAR AS TO WHETHER IT EQUATES U.S. AND WASHINGTON SUPREME COURT HOLDINGS IN GANT, PATTON AND VALDEZ; "GOOD FAITH" EXCEPTION TO EXCLUSIONARY RULE REJECTED IN ANALYSIS UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 7

State v. Afana, ___ Wn.2d ___, ___P.3d ___, 2010 WL 261216 (2010)

LED INTRODUCTORY EDITORIAL COMMENTS: As always, we caution that our comments express our personal views. We urge Washington law enforcement agencies to consult their own agency legal advisors and local prosecutors with any questions regarding this and other cases that we digest and comment on in the LED.

In the June 2010 LED, we commented on the vehicle-search-incident ruling of Division One Washington Court of Appeals decision in State v. Wright, 155 Wn. App. 537 (Div. I, 2010). Wright interpreted Washington and federal constitutional law on motor vehicle

search incident to arrest as being the same on the threshold question of what facts trigger the authority to conduct such a warrantless vehicle search. We said that we liked Wright's search incident ruling, but we questioned whether the ruling by the three-judge Court of Appeals panel was consistent with the Washington Supreme Court decision in State v. Valdez, 167 Wn.2d 761 (2009) Feb 10 LED:11.

We nonetheless expressed hope for a future Washington Supreme Court opinion: (A) that would read along the lines of Justice Debra Stevens' October 22, 2009 lead opinion for the Washington Supreme Court majority in State v. Patton, 167 Wn.2d 379 (2009) Dec 09 LED:17, which we believed at the time to have essentially equated the Washington constitution's vehicle-search-incident rule with that of the Fourth Amendment under the U.S. Supreme Court decision in Arizona v. Gant, 129 S.Ct. 1710 (2009) June 09 LED:13; and (B) that would back away from much of the restrictive, anti-search language of Justice Sanders' December 24, 2009 lead opinion for the Washington Supreme Court majority in Valdez.

The Washington Supreme Court's lead opinion in Afana, issued on July 1, 2010 and digested here, appears to be joined by all of nine justices (there is a concurring opinion in the case, but it supports the main thrust of the lead opinion). That lead Afana opinion by Justice Alexander is not written in clear enough terms to allow a reader to use the opinion to fully compare and contrast the holdings in Gant, Patton and Valdez. But it appears to us that the lead opinion, though far from clear on the point, is bad news. The Alexander opinion appears to equate the Patton and Valdez state constitutional rulings, which suggests to us that the Afana lead opinion is telling us that in the December 2009 LED we misread the Patton decision (at least as recast in Afana) as equating the state and federal constitutional standards. We hope that we are wrong, and we still have some hope for a Washington Supreme Court decision in the near future that will tell us that Division One of the Court of Appeals got it right in Wright.

As we stated in the February 2010 LED in our comments on Valdez, the Valdez opinion appeared to impose greater restrictions on vehicle search incident to arrest than does the U.S. Supreme Court decision in Gant. In the February 2010 LED, we presented the following question and answer based on our interpretation of Valdez:

Question: *What is the "new" (using that word loosely) independent grounds rule under article I, section 7 for the trigger to law enforcement authority to conduct a vehicle search incident to arrest?*

Answer: We previously summarized in the June 2009 LED the the Fourth Amendment rule of Arizona v. Gant for law enforcement authority to conduct vehicles searches incident to custodial arrests of vehicle occupants. Using "strikeout" for deletions of language and underlining for new language of the rule to show how the Valdez decision appears to have shrunk Washington officers' authority, we now summarize the Washington rule:

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

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

In the remainder of this Afana digest entry below, we have bolded and underlined text in the Afana lead opinion that should be scrutinized by those seeking to compare and contrast the Washington Supreme Court's treatment of Gant, Patton and Valdez.

Introduction by Supreme Court in its lead opinion: (Excerpted from opinion)

> Mark Joseph Afana asks this court to reverse a decision of the Court of Appeals in which that court reversed the trial court's suppression of drug evidence found in his car. Afana contends that the warrantless search of his car incident to the arrest of his passenger violated the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. **Because the arresting officer did not, at the time of the search, have a reasonable basis to believe that the arrestee posed a safety risk or that Afana's car contained evidence of the crime for which the arrest was made, we hold that the trial court properly suppressed the drug evidence as fruit of an unconstitutional search under article I, section 7.** In reversing the Court of Appeals, we reject the State's proposed good faith exception to our exclusionary rule.

[Bolding and underlining added]

Facts and Proceedings: (Excerpted from lead opinion for Supreme Court)

> At 3:39 a.m. on June 13, 2007, [a deputy sheriff] noticed a car parked at the corner of Rimrock and Houston streets in Spokane County. Although the car was legally parked, the deputy's suspicions were aroused and, consequently, he parked behind the car and shined his spotlight on it. The light revealed two people inside the car. [The deputy] then approached the car and asked the occupants what they were doing. The driver said they were watching a movie on his portable DVD (digital video disc) player.
>
> [The deputy] proceeded to ask both occupants for identification. The driver, Afana, gave the deputy his driver's license; the passenger, Jennifer Bergeron, gave her name. The deputy made a note of both names and handed Afana's license back to him. He then advised Afana and Bergeron that they should find some other place to watch the movie. After returning to his patrol car, [the deputy] ran warrant checks on both names. The check disclosed that there was an existing warrant for the arrest of Bergeron for the misdemeanor offense of trespass. Because, at this point, Afana and Bergeron were beginning to drive away, the deputy turned on his emergency lights in order to stop the car.
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> After the car stopped, [the deputy] walked to it and asked Bergeron to step out. When she complied, he placed her under arrest. [The deputy] then asked Afana to step out. When he did so, [the deputy] proceeded to search the interior of the car. The search turned up a black cloth bag behind the driver's seat with the

words "'My Chemical Romance'" on the outside. The bag contained a crystalline substance that the deputy said "looked like Methamphetamine." Marijuana, a glass marijuana pipe, needles, and plastic scales were also found in the bag. The discovery of these items caused [the deputy] to arrest Afana.

At a pretrial suppression hearing, Afana sought to suppress the items that had been found in his car, arguing that [the deputy's] request for Bergeron's identification constituted an unlawful seizure. The trial court, citing this court's decision in State v. Brown, 154 Wn.2d 787 (2005) **Sept 05 LED:17**, granted Afana's motion and dismissed the case, concluding that the practical effect of the suppression order was to terminate the State's case.

The State then appealed. The Court of Appeals reversed the trial court, citing our decision in State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**, in which we said that a request for identification from the driver of a legally parked car did not constitute a seizure. State v. Afana, 147 Wn. App. 843 (Div. III, 2008) **Jan 09 LED:07.**

Afana petitioned this court for review, and we granted his petition. While Afana's petition for review was pending here, the United States Supreme Court issued its decision in Arizona v. Gant, 129 S. Ct. 1710 (2009) **June 09 LED:13**. There, the Court said that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Upon granting review, we asked the parties to provide supplemental briefing on the effect, if any, of Gant. The Washington Defender Association, the American Civil Liberties Union, and the Washington Association of Criminal Defense Lawyers submitted briefs as amici curiae.

Prior to oral argument in this case, our court held, consistent with Gant, that under article I, section 7 of our state constitution, the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17**.

[Bolding and underlining added]

ISSUES AND RULINGS: 1) Where the officer did not have a reasonable basis to believe that the arrestee posed a safety risk or that the vehicle contained evidence of the crime of arrest that could be concealed or destroyed, was the search of the vehicle unlawful under article I, section 7 of the Washington constitution? (ANSWER: Yes);

2) Is there a good faith exception to exclusion of evidence under article I, section 7 of the Washington constitution for the circumstance where law enforcement was following the settled interpretation of the federal and state constitutions at the time of a search? (ANSWER: No)

Result: Defendant prevails; reversal of Court of Appeals decision that reversed a Spokane County Superior Court decision suppressing evidence in a drug prosecution against Mark Joseph Afana.

ANALYSIS:

1) Vehicle search incident to arrest under Gant, Patton and Valdez

The lead opinion by Justice Alexander analyzes the vehicle search incident issue as follows:

> The [search warrant] exception at issue here is the automobile search incident to arrest exception. This brings us to a discussion of the aforementioned decision of the United States Supreme Court in Gant **June 09 LED:13** and this court's decision in **Patton Dec 09 LED:17**. In Gant, the United States Supreme Court repudiated what it characterized as other courts' "broad reading" of its decision in New York v. Belton, 453 U.S. 454 (1981). This decision is significant because courts around the country had been of the view that under Belton an automobile search did not run afoul of the Fourth Amendment to the United States Constitution as long as it was incident to a recent occupant's arrest, even if there was no possibility of the arrestee gaining access to the automobile at the time the search was conducted**. In Gant, the Supreme Court, seemingly reining in the reach of Belton, held that under the Fourth Amendment "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."**
>
> Following Gant, we ruled in Patton that article I, section 7 of the state constitution **"requires no less"** than the Fourth Amendment, and thus **the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search**. Patton **Dec 09 LED:17**. In Buelna Valdez, a decision handed down shortly after Patton, **we reiterated that a warrantless search of an automobile is permissible under the search incident to arrest exception only "when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest."** In view of Gant and our recent decisions in Patton and Buelna Valdez, the **question before us, further refined, is whether the search in this case was justified by a concern for the safety of the arresting officer or the concealment or destruction of evidence of the crime of arrest.**
>
> Nothing in the record justifies the search that took place here as incident to arrest. **We say that because, while the warrant for Bergeron's arrest clearly gave [the deputy] a valid basis for arresting her, he had no reason to believe that the vehicle in which she was a passenger contained evidence of the crime for which she was being arrested, namely, trespass. Nor did the deputy have reason to believe that the arrestee, Bergeron, posed a safety risk since she was already in custody at the time of the search.**
>
> Furthermore, the fact that the driver of the car, Afana, was unsecured at the time of the search does not justify the search. This is so because he was not under arrest at the time the search was conducted and, as we have observed, the United States Supreme Court said in Gant that "[p]olice may search a vehicle

> incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search."
>
> Similarly, in Patton, we said that "the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk." When the search that is before us took place, the only arrestee, Bergeron, was in custody and posed no risk. **Therefore, under Patton, the deputy had no authority of law to search Afana's vehicle because it was out of the reach of the arrestee at the time. Thus, the search violated article I, section 7 of our state constitution.**
>
> [Court's footnote: *In Gant, Patton, and Buelna Valdez, the arrestee was handcuffed and placed in a patrol car prior to the challenged search. Here, the record does not reveal Bergeron's precise situation at the time of the search, only that she was "under arrest." The State has not, however, argued that Bergeron was unsecured at the time of the search or that she posed a safety risk, and it is the State's burden to show that the automobile search incident to arrest exception applies.*]

[Bolding and underlining added]

Justice James Johnson writes a lone concurring opinion to emphasize that the Afana decision and Gant, Patton and Valdez do not prohibit vehicle searches where officers have articulable and reasonable safety concerns that justify the searches. Justice Johnson's opinion does not contain discussion that relates to the comparing and contrasting of the holdings of Gant, Patton and Valdez.

2) No good faith exception to exclusion of evidence under article I, section 7

Justice Alexander's lead opinion rejects the State's argument for a good faith exception to exclusion of evidence under the Washington constitution where, as here, officers were following settled understanding of federal and state case law at the time of a search. The opinion points out that in rejecting an "inevitable discovery" exception to exclusion in State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24**, the Washington Supreme Court explained that article I, section 7 of the Washington constitution has been construed by the Court to be "nearly categorical" in excluding illegally obtained evidence. The Afana lead opinion distinguishes otherwise lawful actions of officers in good faith enforcement of a statute or ordinance later declared unconstitutional. The latter circumstance, per Washington precedent unless the statute or ordinance is "grossly and flagrantly unconstitutional" (see State v. Potter, 156 Wn.2d 835 (2006) **June 06 LED:14**) does provide an exception to exclusion of evidence. The reason for not excluding evidence in the latter situation, the Court asserts, is that the search was actually lawful at the time that it was conducted.

But such is not the case, the lead opinion asserts, for a search that is ultimately determined to have been unlawful, such as where officers have relied on court precedent (ala Afana), or where officers have miscalculated in assessing whether they have probable cause. In circumstance of mis-reliance on precedent or miscalculation of probable cause, the search or seizure is unlawful when it occurs, and the evidence must be excluded under article I, section 7, even if, at the time, the officers reasonably believed they were acting lawfully.

LED EDITORIAL NOTE REGARDING GOOD FAITH ISSUE: We will not set forth or attempt to offer a detailed summary of the Court's extensive discussion on the good faith issue,

nor will we offer a critique of the Court's logic. Suffice it to say that the bottom line is that evidence will be excluded by Washington courts where officers have acted reasonably and in good faith reliance on settled search and seizure precedents, but the Washington appellate courts subsequently overturn the precedents and tighten search and seizure restrictions.

* *

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SENTENCING ENHANCEMENT FOR ILLEGAL DRUG DELIVERY NEAR SCHOOL BUS ROUTE STOP: MEASURING WHEEL EVIDENCE MUST BE AUTHENTICATED IF IT IS TO BE USED TO PROVE DISTANCE FROM BUS STOP OF DRUG-DELIVERY LOCATION – In State v. Bashaw, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 2615794 (2010), a 7-2 majority of the Washington Supreme Court holds as to a drug dealer's school-bus-route-stop sentence enhancement that in order to admit distance testimony from a person who did measuring with a "measuring wheel" a trial court must have evidence authenticating the device. The majority opinion equates a measuring wheel with a radar speed measuring device, and notes that in the Bashaw case, "[n]o comparison of results generated by the device to a known distance was made nor was there any evidence that it had ever been inspected or calibrated." The majority opinion determines, however, that in two of the three cases before it, there was sufficient other evidence of the distance to make the admission of the measuring wheel evidence harmless error.

In dissent, Judge Madsen argues in vain and as follows for common sense and against the majority opinion's requirement for authentication of the measuring wheel:

> [T]there is no protocol for calibrating a measuring wheel and no rule or statute dictating testing prior to use. . . .
>
> This is logical, since, unlike a radar device or breath testing equipment, a measuring wheel does not rely for its result on complex scientific theory or complicated mechanical operation; a measuring wheel is no more than a round ruler. Its operation is within the common understanding of jurors. The accuracy of the device's result is a question of weight to be given the evidence and not admissibility. I disagree with the majority's conclusion that a measuring wheel is subject to the same authentication requirements as radar devices.

Result: Reversal of all three Ferry County Superior Court sentence enhancements (based on instructional error not addressed in the LED), and remand to trial court, presumably for additional sentencing proceedings.

LED EDITORIAL COMMENT: The Supreme Court does not offer suggestions regarding what minimum authentication effort is needed for measuring wheels. But we would think that comparison of results generated by the device to a known distance based on a tape measure would be sufficient. Yes, we know that the defense attorney will probably ask how one knows the tape measure, or several tape measures, is/are accurate, but common sense should prevail at some point.

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WASHINGTON STATE COURT OF APPEALS

RECENTLY INCREASED RESTRICTIONS ON VEHICLE SEARCHES AGAIN HELD NOT APPLICABLE TO SEARCHES OF PERSONS INCIDENT TO ARREST

State v. Whitney, ___ Wn. App. ___, ____ P.3d ___, 2010 WL 2197427 (Div. III, 2010)

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

> [Officer A] pulled over a vehicle driven by Mr. Whitney for failure to yield. [Officer A] determined Mr. Whitney's driver's license was suspended. [Officer B] arrived to assist. The pair placed Mr. Whitney under arrest. [Officer B] then searched Mr. Whitney, recovering a prescription pill bottle from Mr. Whitney's pocket. The pill bottle was labeled for Mr. Whitney's azithromycin prescription, but [Officer B] found several different types of pills inside. [Officer B] later identified the pills as azithromycin, vicodin, hydrocodone, and methadone.
>
> The State charged Mr. Whitney with one count of possessing hydrocodone and one count of possessing methadone, both controlled substances, in violation of RCW 69.50.4013(1). Mr. Whitney moved to suppress the pill bottle evidence based on Arizona v. Gant, 129 S. Ct. 1710 (2009) **June 09 LED:13**. After argument, the trial court denied the suppression motion . . . . A jury found Mr. Whitney guilty as charged.

ISSUE AND RULING: 1) Mr. Whitney's was lawfully placed under custodial arrest. An officer searched Mr. Whitney's person and seized a prescription pill bottle that he found in Mr. Whitney's pocket. The pill bottle was labeled for Mr. Whitney's azithromycin prescription, but the officer found several different types of pills inside. Did the seizure of the pill bottle and search of its contents exceed the scope of a lawful search of Mr. Whitney's person incident to his arrest? (ANSWER: No);

2) Do the restrictions under Arizona v. Gant, 129 S. Ct. 1710 (2009) **June 09 LED:13** on motor vehicle searches incident to arrest apply by analogy to searches of persons incident to arrest? (ANSWER: No)

Result: Affirmance of Spokane County Superior Court convictions of Richard Nolan Whitney for possession of hydrocodone and methadone.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> While acknowledging the factual differences, Mr. Whitney contends under Gant principles, the officers lacked the authority to inspect the contents of the pill bottle. [**LED EDITORIAL NOTE: See Arizona v. Gant, 129 S. Ct. 1710 (2009) June 09 LED:13**]
>
> . . . .
>
> The Fourth Amendment to the United States Constitution guarantees a right to privacy against unreasonable searches and seizures. . . . . "A warrantless

search is presumed unreasonable except in a few established and well-delineated exceptions." State v. Smith, 119 Wn.2d 675 (1992) **Dec 92 LED:04.** "A search incident to a lawful arrest is such an exception." Smith. Further, the burden is on the State to establish an exception to the warrant requirement.

Mr. Whitney contends Officer Crane's search of Mr. Whitney's person and the pill bottle found in his pocket constituted an unconstitutional search under Gant. See Gant **June 09 LED:13** (delineating the scope of a permissible vehicle search incident to an occupant's arrest). He argues Officer Crane was not searching for a weapon or evidence of driving with a suspended license when he opened the pill bottle. In Gant, the court held "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." The court further held, "[w]hen these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

Contrary to Mr. Whitney's argument, Gant does not apply here. The facts do not raise Gant principles because it applies to warrantless vehicle searches incident to arrest; here, the search was of Mr. Whitney's person incident to his arrest, not his vehicle. [Officer B's] pill bottle search was permissible incident to Mr. Whitney's arrest. See State v. White, 44 Wn. App. 276 (1986); State v. Gammon, 61 Wn. App. 858 (1991).

In White, the defendant's search incident to his drunk driving arrest revealed a plastic cosmetic case in his pocket. The police officer opened the case, and discovered a white powdery substance later identified as cocaine, a razor blade, and a straw. After the trial court granted the defendant's motion to suppress the contents of the cosmetic case, the State appealed. The White court reversed, concluding the evidence was properly seized. It reasoned "once arrested there is a diminished expectation of privacy of the person, which includes personal possessions closely associated with the person's clothing." White (citing United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981)). The [White] court stated, "the courts distinguish between items found on the person, such as a wallet or cigarette package, from purses, briefcases or luggage, the latter having a greater expectation of privacy." [**LED EDITORIAL NOTE: See our editorial comments at the end of this digest entry explaining our view that the distinction among containers asserted by the Court of Appeals in 1986 in White and in 1991 in Gammon has since been impliedly overruled by the Washington Supreme Court.**] And, the court reasoned "property seized incident to a lawful arrest may be used to prosecute the arrested person for a crime other than the one for which he was initially apprehended."

In Gammon, the defendant's search incident to his shoplifting arrest revealed a translucent prescription pill bottle in his pocket. The police officer could see the contents of the bottle, and observed an object that did not look like a pill. The officer opened the bottle, and discovered rock cocaine inside. On appeal, the defendant argued the inspection of the bottle's contents exceeded the permissible scope of a search incident to arrest. The court disagreed, finding, "[t]he fact that [the defendant] was under lawful custodial arrest gave the officer authority to make a warrantless search of the contents of the pill vial." The

> Gammon court reasoned "[u]nder White, [the defendant] had a diminished expectation of privacy in the prescription bottle thus allowing a detailed inspection of the vial without a warrant." The court stated, "[e]ven if the officer had not seen the irregularly shaped object in the vial, we hold the search was a permissible search incident to a lawful arrest."
>
> Here, Mr. Whitney was lawfully arrested. Thus, [Officer B] had the authority to search the contents of the pill bottle found on Mr. Whitney's person without a warrant. See White; Gammon; see also State v. Jordan, 92 Wn. App. 25 (1998) **Feb 99 LED:09** (reversing suppression of evidence found inside a film canister and a pill bottle recovered from the defendant's pockets during searches incident to his arrest on outstanding warrants). Mr. Whitney had a diminished expectation of privacy in the pill bottle. See White; Gammon. Accordingly, the trial court did not err in denying Mr. Whitney's motion to suppress.

[Some citations omitted]

LED EDITORIAL COMMENTS: 1. The same Division Three panel decided State v. Johnson a few months ago, and yet no mention is made of that decision in Whitney.

It is strange and troubling that the Whitney opinion does not cite State v. Johnson, 155 Wn. App. 270 (Div. III, 2010) June 10 LED:18, a case in which, just a few months earlier, the same Division Three, three-judge panel (Kulik, Brown and Sweeney) likewise rejected the identical Gant-based argument (i.e., an argument seeking to extend the rationale of Gant to non-vehicle searches of persons incident to arrest), though under quite different analysis. See Comment 2 immediately below. Johnson's author was Judge Kulik, while Whitney's author is Judge Brown. In both cases, the defendants have petitioned the Washington Supreme Court for discretionary review.

2. The Whitney opinion, while reaching the right result, fails to recognize that the discussion of container searches incident to arrest in the old White and Gammon Court of Appeals decisions has been overruled.

Judge Brown's opinion in Whitney discusses, among other court decisions, two Washington Court of Appeals decisions and a Ninth Circuit U.S. Court of Appeals decision that Judge Kulik's opinion in Johnson wisely did not discuss. As we noted above, the part of the Whitney opinion that is of concern quotes from State v. White, 44 Wn. App. 276, 278 (1986) as follows:

> **"[O]nce arrested there is a diminished expectation of privacy of the person, which includes personal possessions closely associated with the person's clothing." White (citing United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981)). The [White] court stated [at 278-79], "the courts distinguish between items found on the person, such as a wallet or cigarette package, from purses, briefcases or luggage, the latter having a greater expectation of privacy."**

The Ninth Circuit's 1981 decision in Monclavo that was cited by the White Court involved a warrantless search of an arrestee's purse at the stationhouse conducted about one hour after an arrest on the street. The arrestee had the purse when she was arrested out of a car, but the arresting officer claimed in later suppression hearings, implausibly we think, that he delayed searching the purse until return to the stationhouse for safety

reasons. Monclavo's distinction of types of personal effects does not appear to comport with current case law as to searches that are purportedly conducted incident to arrest but are considerably delayed occur at a different location. We believe that the search in Monclavo would simply be ruled unlawful under current case law for two independent reasons: (1) the one-hour delay and (2) the change of location from the scene of the arrest.

In any event, Monclavo is a narrow decision that has no applicability to an *on-scene, non-delayed* search of the person incident to arrest. The Court of Appeals panels in White and State v. Gammon, 61 Wn. App. 858 (1991) (relying on White) erroneously brought the Ninth Circuit's 1981 decision in Monclavo into their discussions of search-incident authority in circumstances where Monclavo was irrelevant. In White and Gammons, as in Whitney and Johnson, there was no change of location or delay involved in the searches of personal effects.

While White and Gammon have never been *expressly* overruled, we think that they were *implicitly* overruled in State v. Smith, 119 Wn.2d 675 (1992) Dec 92 LED:04. Our December 1992 LED Editorial Comment re Smith attempted to explain our view that the previous Court of Appeals rulings were wrong, and that under Smith all objects within the arrestee's control at the moment of custodial arrest are subject to a contemporaneous search incident to arrest. There is no distinction among types of personal effects and containers. All personal effects and containers (at least if unlocked) on or within the lunge area of the arrestee at the time of arrest are automatically subject to a thorough search for evidence, contraband or weapons on the spot with no need to justify the search other than as an incident of the arrest.

OFFICER'S CONTACT WITH PERSON IN PRIVATE MARINA AND REQUEST FOR ID WAS NOT A SEIZURE; OFFICER'S STATE OF MIND WAS IRRELEVANT TO SEIZURE ISSUE

State v. Hopkins, ___ Wn. App. ___, ____ P.3d ___, 2010 WL 2278472 (Div. III, 2010)

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

> On June 28, 2007, at about 6:30 am [a law enforcement officer] observed a suspicious vehicle near the local marina. [The officer] lives in the immediate area and had never seen the truck before. He knew that the area near the marina is largely abandoned and prone to burglaries and vehicle prowls. [Court's footnote: *The marina itself had been burgled many times. The facility included a boat storage area, a seasonal tackle and convenience store, a mechanical shop, and living quarters where the owner and her father lived. The marina kept irregular business hours and was not open on June 28, 2007. That day, the marina's entrance doors and storage areas were locked.*]
>
> [The officer] looked in the truck's window and saw clothes, food, tools, and blankets, suggesting that someone was living in the truck. He then ran the vehicle plates on his mobile data computer, which returned with a photograph of the registered owner. He also checked the immediate area to see if someone might have gone into the nearby woods to sleep. He looked for someone walking around, did not find anyone, and also contacted some of the neighbors to see if the truck belonged to them.

As [the officer] was contacting residents in the neighborhood, he observed Hopkins walking up the street with a woman, coming from the marina's direction. He recognized Hopkins from the photograph as the truck's registered owner.

[The officer] approached the couple, asked how it was going, and what they were up to. The woman, Michelle Webb, was cooperative and friendly, but she seemed a little embarrassed. Hopkins became agitated about [the officer] asking him questions. Hopkins swore at the officer and claimed he was having a romantic stroll on the beach with Webb. But [the officer] observed a flashlight and a pair of gloves hanging out of Hopkins's pocket, and Hopkins was quite dirty, as if he had been working on something.

[The officer] asked the two for identification. Webb provided her identification. Hopkins at first yelled and stomped and refused to give his identification, but then changed his mind and decided he would give his identification to the officer], and went to the cab of his truck to retrieve it.

Hopkins's conduct caused [the officer] concern for his safety, so he focused his attention on Hopkins as Hopkins reached into the truck cab. As this was occurring, Webb moved around [the officer] and he saw that she had a knife in her hand. [The officer] responded by drawing his gun and ordering the couple to the ground. [The officer] called for priority backup. When it arrived, he handcuffed the two, patted them down for weapons, put them into two separate patrol cars, and read Webb her Miranda rights.

After he interviewed Webb, [the officer] read Hopkins his Miranda rights and interviewed him. Hopkins waived his rights and first claimed that he and Webb were just down at the beach for a romantic stroll. But later he told [the officer] that he saw a mother raccoon and some babies in the marina, so he went inside to see them. Hopkins said he had the flashlight to see the raccoons and that he had the gloves to protect him from the raccoons. Hopkins told the officer that he had climbed over the main gate and then entered another door to go inside the marina and look around. Hopkins acknowledged that he knew the marina was closed and that he was not supposed to be in there.

[The officer] then arrested Hopkins for burglary. When he searched Hopkins's person incident to the arrest, he found some wire in Hopkins's pants pocket.

After [the officer] concluded his interview with Hopkins, he investigated the marina. He found a door to the marina forced open, showing indications that it had been kicked in. He also observed other fresh damage around the marina, including other doors that appeared to have been forced open. He also found fishing poles that appeared to have been readied for easy removal in the future.

The State charged Hopkins with one count of second degree burglary.

. . . .

The jury . . . returned a guilty verdict.

ISSUE AND RULING: The officer approached the couple, asked how it was going, and what they were up to. Hopkins became agitated, swore, and claimed the couple was having a

romantic stroll. But the officer observed Hopkins had a flashlight and pair of gloves, and that Hopkins was quite dirty. The officer asked the two for ID. The woman provided ID. Hopkins at first yelled and stomped and refused to give his identification, but then changed his mind and went to the cab of his truck to retrieve it. Hopkins's conduct caused the officer concern for his safety. As this was occurring, the woman moved around the officer. The officer saw she had a knife in her hand. The officer responded by drawing his gun and ordering the couple to the ground. Did the "seizure" of Hopkins occur only at the point when the officer ordered him and his companion to the ground? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court conviction of Greg Richard Hopkins for second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Our Supreme Court has explained that under article I, section 7 of the Washington State Constitution, a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained and a reasonable person would not have believed he or she is either free to leave, given all the circumstances, or free to otherwise decline an officer's request and terminate the encounter. State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**. "The standard is 'a purely objective one, looking to the actions of the law enforcement officer.'" O'Neill (quoting State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**).
>
> A seizure depends on whether a reasonable person would believe, in light of all the circumstances, that he was free to go or otherwise end the encounter. O'Neill. Whether a seizure occurs does not turn on the officer's suspicions; whether a person has been restrained by a police officer must be determined based on the interaction between the person and the officer. O'Neill. The officer's subjective intent is irrelevant to whether a seizure occurred, unless he conveyed that intent to the defendant. O'Neill.
>
> Where an officer commands a person to halt or demands information from the person, a seizure occurs. O'Neill. But no seizure occurs where an officer approaches an individual in public and requests to talk to him, engages in conversation, or requests identification, as long as the person involved need not answer and may walk away. O'Neill. In other words, "asking for identification from a pedestrian does not constitute a seizure." State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07** (citing Young).
>
> Hopkins contends that the record shows he was seized when [the officer approached him. But he is incorrect. [The officer] approached Hopkins and Webb as they walked along the road leading from the beach and the marina. He greeted them and said, "[H]ow's it going, what you guys up to?" Hopkins became agitated when [the officer] approached them, and Hopkins claimed that they were just having a romantic stroll on the beach. When [the officer] requested identification, Webb cooperated, but Hopkins at first declined, and then he went to his truck to retrieve his identification. As [the officer] watched Hopkins approach his truck, he noticed Webb moving behind him with a knife in her hand. [The officer] testified that he became concerned for his safety, pulled out his gun, and ordered both Webb and Hopkins to the ground. With that display of force, Hopkins was clearly seized, but there was no seizure prior to [the officer] using

his gun as a show of force and ordering Webb and Hopkins to the ground. Rankin; O'Neill; Young.

Hopkins relies on [the officer's] testimony during the CrR 3.5 hearing that Hopkins's claim about a romantic stroll did not match his dirty appearance and the rubber gloves and flashlight hanging from his pocket. [The officer] testified that, based on the incongruence between Hopkins's appearance and his stated purpose, he intended to investigate further. Defense counsel asked [the officer] whether Hopkins was free to go when he requested Hopkins's identification. [The officer] responded, "He was not told he was detained. He did not ask if he was detained, but if he would have, hypothetically, asked to leave, then I would have prevented that." Hopkins now contends that he was seized because [the officer] "intended to prevent Mr. Hopkins from leaving." But Hopkins misperceives the proper test for detention. As discussed above, an officer's unconveyed, subjective intent is irrelevant to whether a seizure has occurred. O'Neill.

Here, there was no objective basis for Hopkins to feel he was detained until [the officer] drew his gun. Accordingly, there was no seizure until that event. Moreover, [the officer's] action of drawing his gun was reasonable given Webb's conduct while holding a knife in her hand.

Thereafter, [the officer] arrested Hopkins and read him his Miranda rights. Hopkins waived those rights and talked with [the officer], admitting that he had been in the marina, which was clearly posted as private property, and admitting that he knew he was not supposed to be there. At that point, [the officer] arrested Hopkins for burglary. We hold that under these circumstances Hopkins's assertion – that he was unlawfully seized without suspicion of criminal activity and that the evidence seized following his arrest should be suppressed – fails.

[Some citations omitted]

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR UNLAWFULLY POSSESSING FICTITIOUS IDENTIFICATION

State v. Tinajero, 154 Wn. App. 745 (Div. III, 2009)

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

On August 18, 2007, [a detective] contacted Rodolfo Tinajero with the intent of executing an arrest warrant for Mr. Tinajero. Following the arrest, [the detective] searched Mr. Tinajero and found a pay stub, a social security card, a permanent resident card, a Washington identification card, a Costco card, and a Mexican government identification card. The Washington identification card had Mr. Tinajero's name on it. The Costco card and Mexican identification card also contained his name, along with his picture. The social security card and permanent resident card were both in the name of Jose Luis Olivera, but did not contain any pictures. Additionally, the pay stub was in the name of Jose Luis Olivera and contained the social security number found on the social security card previously mentioned. Mr. Tinajero was subsequently charged with unlawful possession of fictitious identification pursuant to RCW 9A.56.320(4).

> At trial, [the detective] was qualified by the court as an expert witness regarding the validity of various forms of identification. [The detective] testified that he believed the social security and permanent resident cards found on Mr. Tinajero were forged documents, based on the lack of proper security features on the cards, as well as the quality of paper used to create them. He also testified that the Washington identification card appeared to be valid.
>
> The State also presented Glennis Wilson, a bookkeeper for Big Cherry Orchards, who testified that the pay stub was valid and confirmed that an individual named Jose Luis Olivera had indeed worked for the company. Celestino Rodriguez, a supervisor involved in the hiring process at Big Cherry Orchards, also testified. He stated that, as part of the hiring process, workers were required to show identification, including a "green card."
>
> Following the State's presentation of the case, Mr. Tinajero moved to dismiss the case, arguing that the State could not meet its burden as a matter of law. After an extended colloquy, the court reserved its decision on the motion until after the jury's verdict.
>
> The jury returned a verdict of guilty. The court granted Mr. Tinajero's motion to dismiss and vacated the jury's verdict. The court based its decision on the fact that the State had not shown that a potential employer would be harmed or defrauded by the use of false identification and that, therefore, there was no evidence of intent to commit forgery. The court specifically noted that in order for Big Cherry Orchards to be defrauded by Mr. Tinajero, there must be both an intent to deceive and an intent to deprive. Although the court found that there was clearly an intent to deceive, it held that the State did not provide sufficient evidence to show that Big Cherry Orchards was deprived of anything.

ISSUE AND RULING: The evidence showed that Mr. Tinajero possessed and used false identification documents to obtain employment with Big Cherry Orchards. Was this evidence sufficient to support the jury verdict of guilty of unlawful possession of fictitious identification? (ANSWER: Yes)

Result: Reversal of Yakima County Superior Court order vacating jury verdict against Rodolfo Ramirez Tinajero for violating RCW 9A.56.320(4).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> We evaluate a trial court's decision to vacate a jury verdict by first reviewing the elements of the crime charged. RCW 9A.56.320(4) states that "[a] Person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit . . . forgery." A person is guilty of forgery if "[h]e possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged," with the "intent to injure or defraud." RCW 9A.60.020(1). Written instruments may include social security cards or permanent resident cards. See State v. Esquivel, 71 Wn. App. 868, **(Div. III, 1993) May 4 LED: 04**. With regard to the intent to defraud, it is sufficient "if an intent appears to defraud any person, association or body politic or corporate whatsoever." RCW 10.58.040.

In Esquivel, two men presented forged resident alien and social security cards to police officers after separate incidents. The documents correctly identified the individuals, but were not authentic. In both cases, the officers had reason to believe that the documents were forged and arrested the men for forgery.

At trial, both men admitted that the documents were not authentic, but argued that they did not intend to defraud the police officers. The trial court granted both defendants' motions to dismiss. On appeal, the court stated that "although possession alone is insufficient to prove guilty knowledge, possession together with slight corroborating evidence may be." The court also determined that "'the unexplained possession and uttering of a forged instrument . . . is strong evidence or is evidence, or makes out a prima facie case of guilt of forgery of the possessor. 'The court concluded that the trial court erred by dismissing the cases because, "[b]y showing the cards to the officers, [the defendants] misrepresented their legal status, even though they did not misrepresent their legal names and other details about them."

Here, the State presented expert testimony suggesting that Mr. Tinajero's social security and permanent resident cards were not authentic. These cards did not contain Mr. Tinajero's name.

The primary issue for the trial court was whether Mr. Tinajero intended to defraud Big Cherry Orchards by presenting inauthentic documents. Neither party disputes that the alleged actions of Mr. Tinajero were deceptive. However, the court struggled with whether Big Cherry Orchards had been deprived of something as a result of Mr. Tinajero's actions. The State argued that Big Cherry Orchards was deprived of the knowledge of the true identity of its employee.

Big Cherry Orchards is legally obligated to ensure that each of its employees has sufficient legal status to obtain employment in the United States. See 8 U.S.C.A. § 1324. If, in fact, Mr. Tinajero was not authorized to work in the United States, Big Cherry Orchards could incur potential liability for employing him. To avoid potential liability, Big Cherry Orchards must know the true identity of its employees. Although it is unclear what Mr. Tinajero's legal status was at the time that he was employed, it can be inferred that through his use of forged documents, he intentionally deprived Big Cherry Orchards of information that may have been material to his hiring.

In analyzing the trial court's decision to vacate a jury verdict, a trial court "may only determine whether there was 'substantial evidence' tending to support all necessary elements of the crime."

Notably, "it is unnecessary for the court to be satisfied of the defendant's guilt beyond a reasonable doubt." It is only necessary for the court to be "satisfied that there is 'substantial evidence' to support either the state's case, or the particular element in question." And the court must view the evidence in the light most favorable to the State. Here, we conclude that the State presented substantial evidence to support the jury's determination.

[Some citations omitted]

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

STATE PROSECUTOR IN DRUG CASE REQUIRED TO DISCLOSE TO DEFENDANT THAT FEDERAL AGENCY WAS CONDUCTING VIDEO SURVEILLANCE OF DEFENDANT'S HOME DURING TIME OF ALLEGED STATE CRIMES – In State v. Krenik, ___ Wn. App. ___, 231 P.3d 252 (Div. I, 2010), the Court of Appeals rules that under the criminal discovery provision in section 4.7 of the Washington Criminal Rules for Superior Court (CrR 4.7), the prosecutor in a drug case was required to disclose to the defense attorney the fact that a federal agency (the DEA) was conducting video surveillance of the suspect's residence during a period of time that was relevant under the State's case. This obligation existed, the Krenik Court holds, even if the prosecutor believed the information was not material to the prosecution of the State charges. The Court of Appeals concludes, however, that the defendant did not show sufficient prejudice from the violation of CrR 4.7 to merit dismissal of the charges, which was the only remedy that she sought.

Result: Affirmance of Thurston County Superior Court conviction of Christine Diane Krenik for unlawful delivery of methamphetamine (two counts) and unlawful manufacture of marijuana.

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

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

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address.

Click on “Washington State Legislature,” “bill info,” “house bill information/senate bill information,” and use bill numbers to access information. Access to the “Washington State Register” for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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

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