Law Enforcement Digest

FEBRUARY 2013

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

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FEBRUARY 2013 LED TABLE OF CONTENTS

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INADVERTENT RECORDING OF ATTORNEY TELEPHONE CALLS IN VIOLATION OF ATTORNEY-CLIENT PRIVILEGE: The Law Enforcement Digest occasionally addresses recurring issues impacting law enforcement that are not related to a recently issued appellate court decision. It has been pointed out that the inadvertent recording of attorney telephone calls, made while a suspect is in a holding area or jail, has been occurring with some frequency. The following is adapted from material prepared by the Washington Association of Prosecuting Attorneys (WAPA).

Telephone calls between a suspect and his or her attorney are often made from a jail or holding area. Jail telephone calls are typically recorded. Jail telephone call recording systems can create a challenge when the telephone system records a call between an inmate and his or her attorney. Such a call is generally privileged under the attorney-client privilege. RCW 5.60.060(2).

If a police officer intentionally accesses such telephone calls, the court will dismiss the charges with prejudice. State v. Cory, 62 Wn.2d 371 (1963). In Cory, the sheriff installed a microphone in the attorney conference room. The sheriff and his officers listened to recordings made of the consultations that occurred in the room between prisoners and their attorneys. The Supreme Court was outraged by this conduct and decided that the "only disposition of the case which would afford an adequate remedy to the defendants and effectively discourage the odious practice of eavesdropping on privileged communication between attorney and client" is a dismissal of charges. **[LED EDITORIAL NOTE: Washington appellate court decisions that we have addressed in the LED where appellate courts found law enforcement officer violations of the attorney-client privilege are State v. Perrow, 156 Wn. App. 322 (Div. III, 2010) July 10 LED:26 (dismissal of child sex crime charges held to be appropriate based on detective's seizure and scrutiny of attorney-client-protected papers taken during execution of a search warrant), and State v. Granacki, 90 Wn. App. 598 (Div. I, 1998) Aug 98 LED:19 (dismissal of theft and robbery charges held to be appropriate where the lead**

detective snooped the notes that the defense attorney had left at counsel table during a break in the trial). Both of these cases also involved intentional violations.]

More likely, however, is the case where an officer inadvertently accesses a telephone call between a prisoner and his or her attorney due to the nature of the telephone recording system. Depending on the circumstances, officers may not realize the call has even been recorded. Officers may also believe that the advisement that the telephone call is being recorded acts as a waiver of the attorney client privilege.

Regardless of the reason, if a telephone call between a prisoner and his or her attorney is inadvertently recorded, upon learning of the recording, the officer should consider taking the following steps:

- Not listen, or immediately discontinue listening.
- Make a record of his or her actions – including the date and time of the call that was inadvertently accessed and how many minutes and/or seconds of the call was listened to before the officer realized the call was privileged.
- Immediately send a report of what happened to the prosecutor, but do not include what was heard in the conversation.
- Do not repeat what was heard on the call to other police officers, prosecutors, etc.
- Alert the jail that the defendant's attorney calls are being recorded.

As always we encourage officers to seek counsel from their assigned agency legal advisors and/or prosecutors.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: WARRANTLESS ENTRY INTO CURTILAGE IN GANG NEIGHBORHOOD IN HOT PURSUIT OF SUSPECT WHERE ARREST PROBABLE CAUSE WAS ONLY FOR DISOBEYING ORDER TO STOP WAS NOT JUSTIFIED UNDER EITHER EXIGENT CIRCUMSTANCES OR EMERGENCY EXCEPTIONS TO THE WARRANT REQUIREMENT – In Sims v. Stanton, ___ F.3d ___, 2012 WL 5995447 (9th Cir., Dec. 3, 2012) the Ninth Circuit denies qualified immunity to officers who kicked down the gate to a six-foot-fence-enclosed front yard in pursuit of a fleeing individual where the officers had probable cause to arrest only for the misdemeanor of disobedience of an order to stop for police.

The Court describes what it asserts are largely undisputed facts as follows:

> On May 27, 2008 at approximately one o'clock in the morning, Officer Stanton and his partner responded to a radio call regarding an "unknown disturbance" in the street involving a baseball bat in La Mesa, California. The officers were driving a marked car and wearing police uniforms. Stanton was familiar with the area as one "known for violence associated with the area gangs," and he "was also aware of gang members being armed with weapons such as guns and knives." Still, when the officers arrived, they observed nothing unusual.
>
> The officers noticed three men walking in the street. Upon seeing the car, two of the men turned into a nearby apartment complex. The third, who turned out to be Patrick, crossed the street about twenty-five yards in front of the police car and walked quickly toward Sims's home, which was located in the same direction as the police car. Neither officer saw Patrick with a baseball bat or any other

possible weapon. The officers had no information that would link Patrick to the disturbance. Nor did the officers observe any conduct on Patrick's part that would suggest that he had been involved in the disturbance that they had been called to investigate.

According to Stanton's version of the facts, he exited the patrol car, announced "police," and ordered Patrick to stop multiple times in a voice that was loud enough that all persons in the area would have heard his commands. Whether Patrick heard the commands or not, he did not stop. Instead, he entered the gate to Sims's front yard and the gate shut behind him. Believing that Patrick was disobeying his lawful order (a misdemeanor offense under California Penal Code § 148) and "fearing for [his] safety," Stanton made a "split-second decision" to kick open the gate to Sims's yard. Sims was standing behind the gate when it flew open, striking her and sending her into the front stairs. She was temporarily knocked unconscious, or at least became incoherent, as a result of the blow and sustained a laceration on her forehead, an injury to her shoulder, and was taken to the hospital.

The gate Stanton kicked open is part of a fence made of "sturdy, solid wood" that is more than six feet tall, enclosing the front yard to Sims's home. Sims lives in a manufactured home with a small front yard that abuts the house. She states that she "enjoy[s] a high level of privacy in [her] front yard." Her fence, which was built for "privacy and protection," ensures that her outdoor space is "completely secluded" and cannot be seen by someone standing outside the gate. Additionally, the front yard is used for talking with friends, as Sims was doing on the evening of the incident, and for storing her wheelchair, which she keeps parked inside the fence.

The Court concludes that the fenced area was curtilage, and that no exceptions to the warrant requirement apply.

Curtilage

. . .

Sims's small, enclosed, residential yard is quintessential curtilage. "[A] small, enclosed yard adjacent to a home in a residential neighborhood [ ] is unquestionably such a 'clearly marked' area 'to which the activity of home life extends,' and so is 'curtilage' subject to the Fourth Amendment protection." United States v. Struckman, 603 F.3d 731, 739 (9th Cir. 2010) **March 11 LED:15** (quoting Oliver v. United States, 466 U.S. 170, 180, 182 n.2 (1984)). Because Sims's front yard obviously meets the definition of curtilage, the district court did not need to analyze it under the factors announced by the Supreme Court in United States v. Dunn, 480 U.S. 294, 300 (1987). These factors serve as "useful analytical tools" to ensure that Fourth Amendment protections extend to areas that are much further from the house but that still should be "treated as the home itself." Id. at 300-01. Here, however, the factors are unnecessary because it is "easily understood from our daily experience" that Sims's yard is curtilage.

Because curtilage is protected to the same degree as the home, the district court erred in applying a "totality of the circumstances" balancing inquiry that justified the warrantless intrusion based in part on a "lesser expectation of privacy" in

one's front yard as compared to one's home. We hold that the Fourth Amendment protects Sims's yard, a mere extension of the home itself, from warrantless search. Stanton's warrantless entry, therefore, was presumptively unconstitutional.

Exceptions to the Warrant Requirement

Exigent Circumstances Exception

Stanton does not argue that this case involves probable cause for any crime more serious than the single misdemeanor of disobeying an officer's order to stop. We do not doubt that Stanton believed that Patrick might escape arrest if he did not follow him into Sims's front yard. The possible escape of a fleeing misdemeanant, assuming Patrick had been fleeing, is not, however, a serious enough consequence to justify a warrantless entry. . . .

The warrantless intrusion is particularly egregious in this case because Stanton violated the Fourth Amendment rights of an uninvolved person, Sims. Stanton could have knocked on the door and asked Sims for permission to enter and speak with, or arrest, Patrick. Knocking on the door would still not have justified a warrantless entry, but at the very least, with the warning of a knock, Sims might have been able to move away from behind the gate before Stanton kicked it open. In any event, the record before us does not reveal any "rare" circumstances that would call for an exception to the rule that "where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment."

Emergency Exception

Stanton asserts that he pursued Patrick into Sims's curtilage because he feared for his own safety. To establish that the circumstances gave rise to an emergency situation, Stanton must show an "objectively reasonable basis for fearing that violence was imminent." Ryburn v. Huff, ___ U.S. ___, 132 S. Ct. 987, 992 (2012) **April 12 LED:03**. As in the case of an exigency exception, an "officer['s] assertion of a potential threat to [his] safety must be viewed in the context of the underlying offense." Where the threat is to the officer's safety, we observe that "[o]ne suspected of committing a minor offense would not likely resort to desperate measures to avoid arrest and prosecution." Reviewing the constitutionality of the warrantless entry de novo, we conclude that the record does not support a finding of an emergency after Patrick entered Sims's fenced yard.

. . .

In sum, Stanton's "assertion of a potential threat to [his] safety," based on generalized assumptions concerning the neighborhood or its residents, rather than specific facts relating to the individuals involved, did not justify an exception to the warrant requirement when viewed "in the context of the underlying offense," at most a misdemeanor.

[Footnotes and some citations omitted]

Qualified Immunity

The Court determines that the officers are not entitled to qualified immunity from damages because "a reasonable officer should have known that the warrantless entry into Sims's front yard violated the Fourth Amendment because clearly established law afforded notice that Sims's front yard was curtilage and, was therefore, protected to the same extent as her home." The Court also determines that the law was clearly established that exigent circumstances do not permit a warrantless entry in pursuit of a misdemeanant, and that the emergency exception does not apply because the "circumstances of this case belie the reasonableness" of the officer's claim that he feared for his safety.

Result: Reversal of United States District Court (Southern District Cal.) order granting summary judgment to officers based on qualified immunity.

LED EDITORIAL COMMENT ON EXIGENCY ISSUE: The key U.S. Supreme Court precedent that the Sims Court relies on regarding the exigent circumstances issue is Welsh v. Wisconsin, 466 U.S. 740 (1984). There, officers entered a residence without consent or a warrant to arrest a DUI suspect. Witnesses reported that the suspect had a few minutes earlier walked to his neighboring home from a car that he had abandoned in a field.

The Welsh Court explained (1) that residences receive the Fourth Amendment's highest privacy protection, (2) that in Wisconsin at the time of the incident a first DUI was only a civil infraction, (3) that the officers were not in true hot pursuit because they arrived at the scene after the suspect had already gone inside his home, and (4) that, in light of Wisconsin's then-designation of the offense as only civil, the law could not justify a non-consenting warrantless entry of a residence to make an arrest. The Court distinguished U.S. v. Santana, 427 U.S. 38 (1976), where the Court upheld a non-consenting warrantless entry to arrest a PC-felony suspect under true hot pursuit circumstances.

Since deciding Welsh, the U.S. Supreme Court has not clarified whether it would have made a difference in Welsh if the DUI offense had been a misdemeanor (as opposed to a civil matter) and the officers had been in true fresh pursuit. It is possible that the U.S. Supreme Court will place such a limit on its Welsh ruling in the future. Lower courts, including Washington courts, have given mixed signals in their interpretations of Welsh in DUI cases, so seeking a search warrant is the safest legal route at this time for getting non-consenting entry into a residence to arrest a fleeing misdemeanant.

For a Washington appellate court decision with similar outcome on somewhat similar facts to those in Sims (with the main factual difference that in the Washington case entry into the residence itself, not just the curtilage, though the Sims Court says this fact difference makes no legal difference), see State v. Bessette, 105 Wn. App. 793 (Div. III, 2001) Aug 01 LED:14. In Bessette, the Court of Appeals held that a homeowner could not be charged with obstructing for denying residential entry to a law enforcement officer who was in true hot pursuit of an MIP suspect who had gone into a home to get away from the officer. The Bessette Court held: (1) that the hot pursuit of the misdemeanor MIP offender did not justify non-consenting, warrantless entry of the residence; and (2) (2) therefore, that the homeowner was justified in denying the officer entry into his residence to look for the offender.

For some additional case law addressing pursuit of misdemeanants into residences, see the following current outlines on the Criminal Justice Training Commission's LED Internet page: "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and

Prosecutors May 2012," by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys (pages 168-69); "Law Enforcement Legal Update Outline: Cases on arrest, search, seizure, and other topical areas of interest to law enforcement officers; plus a chronology of independent grounds rulings under Article I, Section 7 of the Washington Constitution," by John R. Wasberg (pages 28-29).

(2) NINTH CIRCUIT ISSUES AN AMENDED OPINION IN UNITED STATES V. CERVANTES – In U.S. v. Cervantes, ___F.3d __, 2012 WL 5951618 (9th Cir., Nov. 28, 2012), the Ninth Circuit amended the majority and dissenting opinions in United States v. Cervantes, 678 F.3d 798 (9th Cir., May 16, 2012) **Aug 12 LED:06**. In the May 16, 2012 majority opinion that was reported in the **August 2012 LED**, the Court ruled by a 2-1 vote that a vehicle impound-inventory violated the Fourth Amendment on two alternative grounds: first, the community caretaking rationale for impound was not met, and second, the inventory was pretextual; also, as an apparent third alternative rationale for rejecting the impound-inventory, the original majority opinion indicated that the arrest did not support impound-inventory because the impound-inventory preceded the arrest.

The November 28, 2012 amended opinion for the majority reaches the same suppression result as the earlier majority opinion. The new majority opinion also contains essentially the same analysis as the earlier opinion: (1) in holding that the community caretaking rationale was not met by the facts, and (2) in indicating, in the alternative, that the impound was improper because the impound preceded the arrest.

The amended majority opinion does, however, abandon the pretext rationale. Without commenting on the pretext issue or the reason for deleting references to it, the majority judges simply deleted altogether the pretext holding and analysis of their earlier opinion. The amended dissenting opinion is essentially the same as the original dissent, except that the dissenting opinion likewise no longer contains any reference to the pretext issue.

(3) A 2-1 MAJORITY CONCLUDES THAT: (1) DELAY IN FRISKING SUSPECT UNDERCUTS GOVERNMENT'S ARGUMENT THAT FRISK WAS JUSTIFIED BY REASONABLE BELIEF OF DANGER; AND (2) IN ANY EVENT, GOVERNMENT FAILED TO PRESENT EVIDENCE TO SHOW THAT LIFTING SUSPECT'S SHIRT WAS DONE FOR SAFETY REASON – In United States v. I.E.V., ___F.3d ___, 2012 WL 5937702 (9th Cir., Nov. 28, 2012), a 2-1 majority of a Ninth Circuit panel concludes that delay by U.S. Border Patrol agents before they frisked a detainee is a factor that helps tip the scale against the lawfulness of their decision to frisk.

Under Terry v. Ohio, 392 U.S. 1 (1968), the Fourth Amendment of the U.S. constitution permits a frisk during an investigatory stop if officers have a reasonable belief that the detainee is armed and dangerous. The majority opinion in I.E.V. describes the facts along the following lines.

The agents lawfully stopped a vehicle occupied by two teenagers at a border checkpoint located about 100 miles north of the Mexican border. A drug dog alerted on the vehicle while the teens were still inside. The agents directed the teens to get out of the vehicle. After they exited, the dog sniffed at the teens and did not alert. The agents then asked the teens a few questions. The agents next asked for consent to do a search of the vehicle. The teens consented. The agents did a cursory search using the dog, but the dog did not detect any drugs.

After the car search, the agents decided to frisk both of the teens, even though no weapons or suspicious bulges had been observed, and even though neither teen gave any indication of dangerousness, except that defendant I.E.V.'s companion seemed nervous and was continually touching his abdomen area. In patting I.E.V., an agent patted something in the abdomen area

that apparently aroused the agent's suspicion. The agent then pulled up I.E.V.'s shirt to reveal a brick of marijuana taped to I.E.V.'s abdomen. Significantly, in the later suppression hearings, the government prosecutor did not present evidence from the agent who frisked I.E.V. Thus, no evidence was presented as to whether the agent reasonably believed from his sense of touch that the object patted was a weapon such that the government could support an argument that, for safety reasons, the agent could lawfully retrieve the patted object by lifting I.E.V.'s shirt and seizing the object.

Did the circumstances justify conducting a frisk? The majority judges in I.E.V. conclude that the evidence, as they see it, does not justify the frisk of defendant. Mere nervous behavior of the teen suspect's companion, even where coupled with the evidence of the drug dog's earlier alert on the vehicle while the two suspects occupied it, does not support a conclusion that the defendant was armed and dangerous. A factor in the majority's analysis is that the agents delayed until well into the process of the contact before doing the frisk. The majority opinion concludes that the delay contradicts the government's contention that the agents were searching for weapons and were not on a fishing expedition for illegal drugs.

Did the government present evidence supporting the lifting of defendant's shirt during the patdown? The majority opinion also concludes, as an alternative rationale for suppressing the drugs, that even if the agents had been justified in conducting a frisk of the defendant, the government failed to establish in the suppression hearing that the frisking officer's sense of touch during the frisk provided a reasonable basis for lifting the defendant's shirt to look for a weapon. Because the government failed to present testimony from the officer who conducted the frisk and did not otherwise present supporting evidence on the point, the government did not meet its burden of establishing that the officer was searching for a weapon (as opposed to searching for drugs) when he lifted the defendant's shirt.

The dissenting judge criticizes the majority judges for, among other things: (1) not deferring to the trial court's factual findings; (2) misinterpreting several parts of the factual record; (3) not considering the totality of the circumstances in its legal analysis, but instead artificially isolating and separately considering certain pieces of evidence; and (4) failing to recognize that courts should give considerable deference to officers' assessments of their safety needs in contacts with suspects.

Result: Reversal of U.S. District Court (Arizona) federal drug possession conviction against I.E.V. on grounds that lower court should have granted the defendant's motion to suppress the evidence.

LED EDITORIAL COMMENT: The "delay in frisking" issue in this case is debatable, as is reflected in the dissenting opinion in the I.E.V. case. As the dissent points out, officers must be allowed to constantly assess all of the facts relating to dangerousness as events develop in the field. But we do note, as we did a decade ago in our entry on State v. Glosbrener, 146 Wn.2d 670 (2002) Sept 02 LED:07, the general consensus of law enforcement trainers is that, for both officer-safety and legal reasons, officers generally should conduct safety frisks of suspects or their vehicles as soon as officers develop a reasonable belief that the suspects may be armed and dangerous or that their vehicles contain weapons.

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WASHINGTON STATE COURT OF APPEALS

SEIZURE, NOT MERE SOCIAL CONTACT, OCCURRED WHERE OFFICER'S ACCUSATION OF CRIMINAL ACTIVITY WAS FOLLOWED BY HIS REQUEST THAT TEENS VOLUNTARILY EMPTY THEIR POCKETS; ALSO, COMMUNITY CARETAKING ARGUMENT BASED ON TRUANCY LAW REJECTED BECAUSE EVIDENCE FAILS TO SUPPORT IT

State v. Guevara, ___Wn. App. ___, 288 P.3d 1167 (Div. III, Dec. 6, 2012)

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

> [A law enforcement officer] worked as a school resource officer at Eisenhower High School in Yakima, Washington. [The officer] saw three boys walk east to the 3800 block of Webster Avenue. He knew one was an Eisenhower High student. He also knew that students often went to that area to smoke marijuana. [The officer] thought that the boys would be late for 8:00 a.m. classes because it was about 7:55 a.m. and the boys were more than a block from the high school.
>
> The officer followed the boys in his marked patrol car. He wore his police uniform. He stopped his car about 20 feet behind the boys. He got out of his car and walked east toward them. He asked them what they were doing. They replied that they were going for a walk. [The officer] told them that he believed they were skipping school to smoke marijuana. He then asked them if they would show him the contents of their pockets. The boys began showing him what was in their pockets. He asked them to "bunny ear" their pockets one by one so he did not miss anything. Ulises Ibarra Guevara was the last to empty his pockets. When he did, [the officer] saw a plastic baggie tucked behind Mr. Ibarra Guevara's Eisenhower identification card. He asked Mr. Ibarra Guevara what the baggie contained and Mr. Ibarra Guevara responded marijuana.
>
> The State charged Mr. Ibarra Guevara with possession of less than 40 grams of marijuana. Mr. Ibarra Guevara moved to suppress the drug evidence. The court concluded that the stop was a "social contact" and denied the motion. The court found Mr. Ibarra Guevara guilty as charged.

ISSUES AND RULINGS: (1) Where the law enforcement officer combined his accusation that the young men were about to smoke marijuana with a request that they voluntarily empty their pockets, did he seize them such that reasonable suspicion of criminal activity was required to justify the request? (ANSWER: Yes, he seized them, and this was unlawful because he did not have reasonable suspicion of criminal activity);

(2) Considering that RCW 28A.225.060 authorizes law enforcement officers to detain children for skipping school, was the stop of the young men justified as a community caretaking action? (ANSWER: No, because the purpose and nature of the stop was an investigation of unlawful drug possession)

Result: Reversal of Yakima County Superior Court conviction of Ulises Ibarra Guevara for possession of less than 40 grams of marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. Law enforcement social contact or seizure?

Article I, section 7 of our state constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." It "casts a wider net than the Fourth Amendment's protection against unreasonable search and seizure." [State v. Harrington, 167 Wn.2d 656 (2009) **Feb 10 LED:17**]

A person is seized when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**. Police actions likely to amount to a seizure include, "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02** (quoting United States v. Mendenhall, 446 U.S. 544 (1980)).

A "social contact" is not a seizure. It "occupies an amorphous area . . . resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." A social contact may involve a police officer asking for identification or to remove one's hands from his pockets. State v. Armenta, 134 Wn.2d 1 (1997) **March 98 LED:05**; State v. Nettles, 70 Wn. App. 706 (1993) **Nov 93 LED:09**. These activities, in isolation, do not amount to a seizure. But even these seemingly innocuous small intrusions may amount to a seizure when combined. Harrington, 167 Wn.2d at 668 (citing State v. Soto-Garcia, 68 Wn. App. 20 (1992) **March 93 LED:09**).

In Harrington and Soto-Garcia, the trial court concluded that the combination of small intrusions did ripen into a seizure. In both cases, the defendants were walking in public when officers stopped and questioned them. The defendants answered voluntarily at first but the police kept prying. In Harrington, the officer asked Mr. Harrington to remove his hands from his pockets and consent to a search as another officer arrived. In Soto-Garcia, the officer asked if he had any cocaine on him, Mr. Soto-Garcia denied having cocaine, and the officer asked for consent to a search. The courts in both cases concluded that these amounted to more than "social contacts" and therefore concluded that the drug evidence should have been suppressed.

The Harrington court suggested that an officer's request to search is particularly significant. It noted that "[r]equesting to frisk is inconsistent with a mere social contact." It explained that "[if the officer] felt jittery about the bulges in Harrington's pockets, he should have terminated the encounter—which [the officer] initiated—and walked back to his patrol car." And it concluded that the request to search ultimately caused the social contact to mature into an unlawful seizure.

Cases where a social contact did not mature into an unlawful seizure typically involve requests for identification rather than direct requests to search. See State v. Bailey, 154 Wn. App. 295 (2010) **March 10 LED:13**; State v. Smith, 154 Wn. App. 695 (2010) **April 10 LED:17**; State v. Johnson, 156 Wn. App. 82 (2010) **July 10 LED:21**. In Bailey and Johnson, officers approached the defendants in public areas and asked the defendants to identify themselves. Police checked for outstanding warrants. Both men had outstanding warrants.

Police then discovered drugs in a subsequent search incident to the arrest on the warrants. In Johnson, the court cited several factors in concluding that the incident was not an unlawful seizure: the officer parked some distance behind Mr. Johnson, did not activate his lights, was not accompanied by other officers, and did not demand identification or ask that Mr. Johnson step out of the car. In Bailey, we noted that the officer did not display force, for example, by using sirens or lights, and that Mr. Bailey voluntarily approached the officer and answered his questions. The court then concluded that, without more, a reasonable person would have felt free to leave.

Smith's facts are more complicated but also start with an officer asking Mr. Smith for identification. Mr. Smith's true identity was unclear, so the officer asked to look in Mr. Smith's wallet. The officer found cards in different names and drugs in the wallet. The court in Smith distinguished the facts from Harrington and Soto-Garcia by noting that the officer did not ask Mr. Smith "about illegal activity, attempt to control his actions, or request to frisk him." The court concluded that the contact was not an unlawful seizure because the officer merely asked for identification and looked through Mr. Smith's open wallet with Mr. Smith's permission.

Here the officer expressed suspicion that these kids were using drugs and skipping school. And the officer asked for and received permission to search them. We concluded that this is inconsistent with the tenets of a "social contact." The defendant here would hardly have felt free to simply walk away. Like in Soto-Garcia, the officer here voiced suspicion of drug possession and asked for consent to search. The request to search alone is inconsistent with a social contact. See Harrington.

2. Community caretaking function?

Alternatively, the State suggests that Mr. Ibarra Guevara and his cohorts were detained by the officer in his capacity as a community caretaker. RCW 28A.225.060. . . . Police may certainly detain a child skipping school and return the child to his parents or the school. RCW 28A.225.010. That is not what was done here.

The community caretaking function recognizes that police officers may contact individuals for noncriminal, non-investigatory reasons, including emergency aid and routine checks on health and safety. See State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07**. Whether such a contact is reasonable depends on whether the public's interest in police performing a community caretaking function outweighs an individual's interest in freedom from police interference. The community caretaking function should be cautiously applied because "even well-intentioned stops" carry a "real risk of abuse." State v. DeArman, 54 Wn. App. 621 (1989).

. . . .

Here [the officer] did not detain Mr. Ibarra Guevara and take him back to school as authorized by RCW 28A.225.010. He asked about illegal drug use and then asked him to empty his pockets. We conclude this is not community caretaking

but rather an unwarranted intrusion into Mr. Ibarra Guevara's private affairs, an intrusion prohibited by our state constitution. Const. art. I, § 7.

[Some citations revised for style reasons or omitted]

LED EDITORIAL COMMENT REGARDING THE CONTACT VS. SEIZURE QUESTION: Officers must do difficult balancing in communicating with persons who arouse their suspicions but as to whom the officers do not have reasonable suspicion to make a seizure. On the one hand, for a variety of good reasons, including officer safety, officers need to not put themselves in a posture of weakness. On the other hand, if they want to contact such persons without turning the social contact into a seizure, they must avoid doing things that would cause a reasonable innocent person, under the totality of the circumstances, to believe that he or she is not free to (1) leave at any time or (2) decline any request.

To make the contact less intrusive, an officer might tell the person that he or she (1) need not answer the officer's questions and/or (2) is free to leave at any time, and/or (3) is free to not consent to a search. The State's brief in this case states that the officer testified that he asked the teens "if they would be willing" to show the contents of their pockets. While that phrasing is sufficient to make the request a valid one for obtaining voluntary consent in this context, it does run the risk of making a social contact into a seizure where the request follows a question or accusation from the officer regarding suspected illegal conduct.

CIVIL RIGHTS ACT LAWSUIT: QUALIFIED IMMUNITY GRANTED IN LAWSUIT ATTACKING USE OF TASER IN 2006 IN MAKING GROSS MISDEMEANOR ARREST; COURT HOLDS THAT NINTH CIRCUIT 2010 BRYAN V. MCPHERSON DECISION SUPPORTS GRANTING THE OFFICER QUALIFIED IMMUNITY; COURT ALSO HOLDS THAT STATE LAW SUPPORTS USE OF REASONBLE FORCE TO MAKE AN ARREST FOR A MISDEMEANOR OR GROSS MISDEMEANOR

Strange v. Spokane County, ___ Wn. App. ___, 287 P.3d 710 (Div. III, Oct. 30, 2012)

Facts and Proceedings below:

A Spokane County sheriff's deputy stopped a car for accelerating rapidly and making several improper turns during the early morning hours of January 22, 2006. The car had two occupants, the female driver and a male front seat passenger. The deputy later learned that the passenger was Daniel Brian Strange, the driver's boyfriend, and that Strange owned the car. The deputy approached the driver. She opened her door instead of rolling the window down.

During the initial contact, Strange became belligerent in arguing with the officer over whether Strange had been wearing his seatbelt. The officer collected the identifications for both occupants, instructed them to remain in the car, and closed the driver's door with some force. Strange got out of the car, took two steps forward, and yelled, "Don't slam my door."

The officer drew his firearm and called for backup. He repeatedly ordered Strange to get back into the car. The officer eventually holstered his firearm and pulled out his Taser. He advised Strange that if he did not get back into the car he would be arrested. The officer heard Strange say something in response and understood it to be defiant and challenging.

The officer then told Strange that he was under arrest and ordered him to turn around with his hands behind his back. Strange instead started to re-enter the car. The officer discharged his Taser into Strange's back. The officer arrested Strange for resisting arrest (a misdemeanor) and obstructing a public servant (a gross misdemeanor).

Strange sued the officer and Spokane County for excessive use of force in violation of his civil rights under 42 U.S.C. § 1983 (the Civil Rights Act). He contended that the officer misused his law enforcement powers when he used a Taser to effect a misdemeanor arrest.

Strange also claimed that Spokane County was liable under the Civil Rights Act as an agency on the rationale that the County knowingly maintained a custom and policy of deliberate indifference to the rights and safety of its citizens. On this issue, the trial court granted the County's motion to reject this theory. The trial court ruled that there was no official policy or policy maker that chose to use such force, no program-wide failure to train the officers on how and when to use force, and no affirmative decision by the County to ratify the deputy's conduct.

Strange also had a theory that his arrest was unlawful under State law on the rationale that Washington officers may not use force to arrest for a misdemeanor or gross misdemeanor. The trial court rejected that theory.

A jury then found that the officer did not use unreasonable force, and that the officer made the arrest with probable cause.

ISSUES AND RULINGS: 1) In light of the Ninth Circuit's grant of qualified immunity to the law enforcement officer in the case of Bryan v. McPherson, 630 F.3d 805 (9th Cir., November 30, 2010) involving a 2005 application of a Taser, was the law not clearly established against the use of a Taser under the 2006 circumstances of the Strange case such that the deputy should be granted qualified immunity? (ANSWER: Yes);

2) Does Washington law authorize use of reasonable force in order to make an arrest for a misdemeanor or gross misdemeanor? (ANSWER: Yes, as to both classes of crimes)

3) Is there evidence supporting Strange's theory that the County should be held liable based on agency custom and policy? (ANSWER: No)

Result: Affirmance of Spokane County Superior Court judgment for Spokane County and a named Spokane County deputy sheriff.

ANALYSIS:

LED EDITORIAL NOTE: Much of the analysis by the Court of Appeals on the qualified immunity issue in this case centers on the Ninth Circuit's decision in Bryan v. McPherson, 630 F.3d 805 (9th Cir., November 30, 2010). The 3-judge Ninth Circuit panel in Bryan issued three opinions in the case, only first two of which were reported in the LED. The third opinion, issued November 30, 2010, is the version relied on by the Court of Appeals in Strange. The first opinion in Bryan was reported in the February 2010 LED, and the second opinion (which replaced the first opinion) was reported in the September 2010 LED. The second opinion revised the Court's analysis and result on the qualified immunity issue, concluding that the officer was entitled to qualified immunity because he could reasonably have concluded that application of the Taser was permitted under the case law in existence as of the summer of 2005 when he applied the Taser. The third, and final, Bryan opinion (which replaced the first and second opinions) was not reported

in the LED, but the essence of the analysis by the Court did not change from the second opinion to the third opinion.

1. Qualified immunity for the officer from Civil Rights Act liability

The U.S. Supreme Court has established that in a Civil Rights Act case, in determining whether a police officer alleged to have violated a constitutional right is entitled to qualified immunity under the Act, two questions must be answered. The first question is whether the officer's conduct violated a constitutional right, an element of the plaintiff's claim. This question is answered by viewing the evidence in the light most favorable to the party asserting injury where dismissal is sought on qualified immunity grounds. The second question, specific to qualified immunity, is whether, given the specific context of the case before the court, the constitutional right was clearly established such that a reasonable officer should have known at the time of the conduct at issue that the conduct was unconstitutional.

In Pearson v. Callahan, 555 U.S. 223, 236 (2009), the U.S. Supreme Court held that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." In the Strange case, the Court of Appeals chooses to address only the second question and to not address whether the force used in the case was unreasonable in violation of the Fourth Amendment.

As noted, the analysis by the Strange Court on qualified immunity focuses on the Bryan decision of the Ninth Circuit (whose analysis is not controlling but deserves considerable deference on this issue, the Strange Court says). Bryan involved the Tasing of a young man in boxer shorts from 20 feet away during a traffic stop for a seatbelt infraction. The young man fell down face first and the asphalt cracked four teeth and drove in a Taser probe so deeply it needed surgical removal. The Bryan Court concluded that Tasers "used in dart-mode constitute an intermediate, significant level of force that must be justified by the government interest involved."

The Strange Court notes that Bryan addressed both the question of whether a constitutional right was violated and the question of whether the relevant law was clearly established. On the first question, the Strange Court asserts that Bryan appears to hold that it is unreasonable to use a Taser in dart-mode on an unarmed misdemeanant who is noncompliant and somewhat erratic, but is not armed or overtly threatening or posing any other concern for the safety of the officer or the suspect.

On the second question, the Strange Court explains, the Bryan Court further held, that a nonviolent traffic violator's right not to be subjected to an electronic stun weapon was not "clearly established" in July of 2005. The Bryan Court concluded that the officer was on notice that it was unreasonable to deploy intermediate force in the traffic stop context with which he was presented. But the Bryan Court then held that it was not clearly established at that time by the relevant case law that use of a Taser constituted use of intermediate force. As of July 24, 2005, the date of the arrest, there was no Supreme Court decision or Ninth Circuit decision determining whether the use of a Taser in dart mode constituted an intermediate level of force.

The Bryan Court thus concluded that a reasonable officer in the officer's position could have made a reasonable mistake of law regarding the constitutionality of the Taser use in the circumstances he confronted in July of 2005. Therefore, the officer was entitled to qualified immunity.

Based on Bryan, the Strange Court concludes that at the time of the officer's contact with Strange in January of 2006, it was not clearly established that use of a Taser in dart-mode constitutes intermediate force. A reasonable officer could have made a reasonable mistake of

law regarding the constitutionality of Taser use in the circumstances encountered with Strange in January of 2006, and therefore the deputy is entitled to qualified immunity, the Court rules.

2. Washington law on use of force in arresting for a misdemeanor or gross misdemeanor

The Strange Court's analysis supporting its conclusion that Washington officers are authorized to use force in making arrests for misdemeanors or gross misdemeanors is as follows:

> Mr. Strange argues that [the deputy] did not have the authority to use force. RCW 9A.16.020 defines the lawful use of force in Washington. It provides that force is lawful "[w]henever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction." RCW 9A.16.020(1). Mr. Strange contends that the mere authority to make a misdemeanor arrest does not equate to a legal duty to make that arrest. He notes that section two of the statute specifically authorizes the use of force for arresting a person who has committed a felony, but fails to mention misdemeanor arrests. RCW 9A.16.020(2).
>
> The [trial] court here concluded that "since one has an ability to arrest for a misdemeanor or a gross misdemeanor, it falls, in my view, within the definition of legal duty under [RCW] 9A.16.020." We agree. [The deputy] has the duty to arrest people who commit crimes. RCW 36.28.010(1) (sheriff or deputies "[s]hall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses"). That authority is limited in the case of misdemeanors to crimes committed in the deputy's presence. RCW 10.31.100. But that limitation does not detract from his duty, in the first place, to arrest people who commit crimes. The fact that he can exercise some discretion in the case of misdemeanors does not distract from his statutory obligation – duty **–** to enforce the law in the first place.

3. No agency liability

The Strange Court's analysis supporting its conclusion that Spokane cannot be held liable as an agency is as follows:

> To establish a § 1983 claim against a municipality, a plaintiff must: (1) identify a specific policy or custom; (2) show that the policy was sanctioned by those responsible for making that policy; (3) show a constitutional deprivation; and (4) establish a causal connection between the custom or policy and the constitutional deprivation. . . . The county is liable only if a constitutional deprivation directly resulted from a county policy. Monell v. Dep't of Soc. & Health Servs., 436 U.S. 658 (1978) . . . "If the police did not use excessive force in making the arrest, there can be no municipal liability." Estate of Lee v. City of Spokane, 101 Wn. App. 158, 173 (2000) **Sept 00 LED:11**. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (emphasis omitted).
>
> The jury here concluded that [the deputy] did not use excessive force and the county then cannot perforce be liable.

[Some citations omitted and some citations shortened]

LED EDITORIAL COMMENT: The issue of whether Taser use was reasonable turns on the totality of the factual circumstances of any given case. The Strange opinion does not provide much detail as to the facts in this case, so it is not easy to assess the decision. LED readers know that the LED has covered a number of Taser Civil Rights Act cases in the past few years. See the annual subject matter indexes for the 2010-2012 LEDs under the topic "Civil Liability." Current information on cases on civil liability nationally in the use of Tasers and other electronic control weapons can be found on the Internet by searching: "Americans for Effective Law Enforcement" + "Electronic Control Weapons." Most LED readers are familiar with publications put out by AELE.

UNDER THE TOTALITY OF THE CIRCUMSTANCES, OFFICER ACTED LAWFULLY UNDER FEDERAL AND STATE CONSTITUTIONAL DOCTRINES FOR SEARCH INCIDENT TO ARREST WHEN HE SEARCHED A LAPTOP BAG THAT WAS TAKEN FROM THE ARRESTEE, WHO AT THE TIME OF THE SEARCH WAS IN HANDCUFFS STANDING ABOUT A CAR'S LENGTH AWAY FROM THE BAG

State v. MacDicken, ___Wn. App. ___, 286 P.3d 413 (Div. I, Oct. 8, 2012)

Facts and Proceedings below:

Law enforcement officers were investigating an armed robbery that occurred recently at an Extended Stay America hotel in their city. They determined that a cell phone stolen from one of the robbery victims was at a motel in a nearby city. Also taken in the robbery was a laptop computer and some other personal property.

The officers went to the motel where the cell phone had been located. One of the officers spotted MacDicken in the motel parking area. MacDicken was carrying a laptop bag and pushing a rolling duffel bag. The officer recognized MacDicken as the robbery suspect from a surveillance photo the officer had viewed, courtesy of the Extended Stay America hotel in the nearby city where the robbery occurred.

Officers initiated a "high risk" arrest. While MacDicken was lying on the ground, an officer advised him that he was under arrest for robbery. An officer handcuffed him and stood him up. At that point, an officer moved the laptop bag and rolling duffel bag away from MacDicken.

An officer searched the laptop bag while MacDicken stood in handcuffs about a car's length away. The officer found a handgun, the stolen laptop and a letter addressed to one of the victims, among other things. At the time of the search of the bag, officers were also dealing in the same motel parking area with three women who had been in a motel room that was linked to a vehicle that had been identified as being at the scene of the robbery.

The State charged MacDicken with two counts of first degree robbery while armed with a firearm and one count of first degree unlawful possession of a firearm. MacDicken moved to suppress the evidence obtained from the search of the bags. He argued that the search was unlawful search incident to arrest. The trial court denied the suppression motion, concluding:

> Although handcuffed, the defendant was standing next to the patrol car[;] he could still kick at the officers or reach for a weapon despite the handcuffs. . . . At the time of the arrest and the search, there were three of the defendant's associates in close proximity, only one of which had been arrested. The actions of [one of the officers] in securing the second of the defendant's associates and removing the bags a short distance from the defendant were not a sufficient intervening event to render the search no longer a search incident to arrest. They were reasonable [steps] taken to assure the safety of [the officer] and the

other officers and the public at the time of the arrest and the search incident thereto.

A jury convicted MacDicken as charged and returned a special verdict, finding that MacDicken was armed with a firearm at the time he committed the crimes.

ISSUE AND RULING: Under the totality of the circumstances, did the officer act lawfully under federal and state constitutional doctrine for search incident to arrest when he searched the laptop bag that was taken from the arrestee, who at the time of the search was in handcuffs standing about a car-length away from the bag? (ANSWER BY COURT OF APPEALS: Yes, because the totality of the circumstances – (1) MacDicken was being arrested for a violent crime and he had access to the bag, even though he was in handcuffs, and (2) other persons apparently associated with the suspect were in the area and required officer attention – presented threats that justified the search of the bag in order to reduce threat to the officers, as well as to preserve any evidence in the bag.)

LED EDITORIAL NOTE REGARDING THE ISSUE/ANALYSIS: The analysis by the Court of Appeals does not separately address the federal and state constitutions. Thus, the analysis does not indicate whether the three judges on the panel believe that there is any difference between the search incident to arrest standards of the Fourth Amendment, on the one hand, and the Washington constitution's article I, section 7. It appears that the Court of Appeals assumes that, for purposes of resolving the issues raised by the particular facts of this case, the standards are the same (or that any differences do not matter). As we explain in our LED editorial comments at the conclusion of this LED entry, there is a difference in the federal and state standards. The Washington rule is more restrictive on such searching in at least one respect – in the context of motor vehicle searches incident to arrest. But as our comments below also explain, the constitutional case law is unsettled where non-vehicle searches incident to arrest are involved. Finally, we agree with the three-judge panel's apparent view that any differences in the federal and state standards for searches incident to arrest does not matter for purposes of resolving the search issue under particular facts of this case.

Result: Affirmance of Snohomish County Superior Court conviction of Abraham MacDicken on two counts of first degree robbery while armed with a firearm and one count of first degree unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> An officer may conduct a warrantless search of limited scope incident to a lawful arrest. The search incident to arrest exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." Arizona v. Gant, 566 U.S. 332 (2009) **June 09 LED:13**. In Chimel v. California, 395 U.S. 752 (1969), the United States Supreme Court stated that the permissible scope of a search incident to arrest includes the arrestee's person and the area within his or her immediate control, meaning "the area from within which he might gain possession of a weapon or destructible evidence."
>
> "That limitation . . . ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." Arizona v. Gant. Thus, if a possibility exists that an arrestee could reach into the area that officers seek to search, both justifications for the search incident to arrest exception are present. Arizona v. Gant. Once officers have obtained exclusive control of an item, such that no danger exists that the arrestee might gain access to the item to seize a weapon or destroy evidence, officers may not

conduct a warrantless search of that item incident to the arrest. United States v. Chadwick, 433 U.S. 1 (1977), overruled on other grounds by California v. Acevedo, 500 U.S. 565 (1991).

[LED EDITORIAL COMMENT ON THE IMMEDIATELY PRECEDING SENTENCE IN THE MACDICKEN ANALYSIS: The MacDicken Court is clearly mistaken both (1) in relying on the Chadwick decision as a current source of Fourth Amendment law, and (2) in stating its expansive unqualified proposition of law about an "exclusive [government] control" rule for search incident to arrest under the Fourth Amendment. We recognize that this area of law is confusing in light of the case-law developments of the past 35 years or so. The MacDicken Court's error in relying on Chadwick is thus understandable.

Based on our review of the briefing in MacDicken, we believe that the Court took its misplaced reliance on and discussion of Chadwick from the opening brief of defendant MacDicken. It is true that in 1977 in Chadwick the U.S. Supreme Court included expansive language that suggested a broad "exclusive control" proposition as an across-the-board limit on searches incident to arrest. But four years later, in New York v. Belton, 453 U.S. 454 (1981) the U.S. Supreme Court explained that the only problem with the conduct of the officers in Chadwick, for search-incident-to-arrest purposes, was the long delay prior to searching, where the luggage at issue had been seized by police during an arrest that occurred more than an hour prior to the search. A good explanation as to how Belton explicitly limited Chadwick to a timing-based restriction can be found in State v. Smith, 119 Wn.2d 675 (1992) Dec 92 LED:04.

Admittedly, in 2009, almost thirty years after deciding Belton, in Arizona v. Gant the U.S. Supreme Court made a revisionist interpretation of Belton. But the Gant majority, concurring and dissenting opinions made not a single mention of the dead-letter Chadwick decision. And, more significantly, the Gant majority opinion's rule for motor vehicle search incident to arrest allowed an evidence-of-the-crime-of-arrest exception that is clearly inconsistent with the expansive language of Chadwick that the MacDicken Court relies on for the sentence in the opinion that we criticize here. See our further editorial comments below following our excerpting from the MacDicken Court's analysis.]

> Here, MacDicken could have possibly reached the bags to seize a weapon. The bags were not in [the officer's] exclusive control, and officer safety was a substantial concern during MacDicken's arrest, given the nature of his crime.
>
> Officers suspected MacDicken of committing a crime involving a firearm and considered him a "high-risk" arrestee because he was potentially armed. Additionally, the arrest occurred in a public area, and several people associated with MacDicken stood nearby. Although [the officer] moved the bags some distance away from MacDicken, they were still within reaching distance.
>
> Therefore, their relocation did not eliminate the possibility of MacDicken accessing them. Neither did the fact that MacDicken was in handcuffs. Cases exist where handcuffed individuals have acted extraordinarily, threatening officers and public safety. **[LED EDITORIAL NOTE: Here, the Court cites and quotes from federal court decisions.]** Under these circumstances, the search was commensurate with the twin justifications for a search incident to arrest -- protecting arresting officers and preserving evidence.
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> MacDicken relies on State v. Byrd, 162 Wn. App. 612 (2011) **Oct 11 LED:21**, review granted, 173 Wn.2d 1001 (2011) **Jan 12 LED:23** and United States v. Maddox, 614 F.3d 1046 (9th Cir. 2010) **Feb 11 LED:03**. In Byrd and Maddox,

> however, the defendants were handcuffed and secured in the back of a patrol car at the time the searches occurred. The defendants could no longer reach the searched objects, rendering those cases distinguishable from this one. Unlike the cases where the arrestee is in the back of a police car, MacDicken was not completely removed from the immediate area of the search. [Court's footnote: *We decline to consider MacDicken's argument that Gant overruled the case the trial court relied upon to deny his motion to suppress, State v. Smith,119 Wn.2d 675, 835 P.2d 1025 (1992)* ***Dec 92 LED:04****. Regardless of Smith's continuing validity, the trial court's decision to deny MacDicken's motion is supported by Chimel, a case that the United States Supreme Court reaffirmed in Gant*.] A reasonable possibility still existed that MacDicken might access the bags.

[Most citations moved from footnotes into body and revised for style; some citations omitted]

LED EDITORIAL COMMENTS: MacDicken was an easy case for the Court to decide under the particular facts of the case. The defendant was dangerous and could have accessed the nearby bag despite his handcuffs. Therefore, even under the most restrictive rules for search incident to arrest conceived by any appellate court anywhere in recent times, the search of the bag was justified to protect the officers and to preserve evidence in the bag. Under the facts of this case, it does not matter whether analysis is under the Fourth Amendment or article I, section 7.

But let us assume a hypothetical scenario in which the handcuffed arrestee MacDicken had already been placed in the backseat of a patrol car before the officer searched the nearby bag that had been taken away from MacDicken during the arrest process.

First, we address this hypothetical, fully-secured-arrestee scenario under the Fourth Amendment case law.

In Arizona v. Gant, 566 U.S. 332 (2009) June 09 LED:13, the U.S. Supreme Court held that, if an arrestee has been taken from a vehicle, handcuffed, and placed in the backseat of a patrol car, the search-incident rule of the Fourth Amendment does not generally allow officers to search the vehicle that was recently occupied by the arrestee. The rationale for this restriction is that the vehicle is now essentially in the exclusive control of law enforcement, and the arrestee no longer poses a risk to the officers or to evidence that might be in the vehicle. But Gant allowed a significant bright-line exception to its exclusive-control rule. That exception is that officers may contemporaneously search the passenger area of the vehicle for evidence of the crime of arrest, even though the fully secured arrestee does not pose a realistic risk of getting out of the patrol car and harming the officers or destroying evidence in the car.

In the three years since the Supreme Court decided Gant, appellate courts in Washington and elsewhere have not agreed whether the exclusive-control restriction of Gant applies outside of the motor vehicle context. Thus, it is not clear under the Fourth Amendment whether a purse or wallet or cigarette pack or other item taken from an arrestee during arrest may be contemporaneously searched incident to arrest even though the arrestee is sitting in a patrol car in handcuffs. That issue is currently before the Washington Supreme Court in a case decided by the Court of Appeals as a Fourth Amendment issue in State v. Byrd, 162 Wn. App. 612 (2011) Oct 11 LED:21, review granted, 173 Wn.2d 1001 (2011) Jan 12 LED:23 (note that, while the Court of Appeals addressed only the Fourth Amendment in Byrd, the Washington Supreme Court will likely also address article I, section 7 of the Washington constitution when it decides Byrd).

In Byrd, the arrest was based on an arrest warrant, so the facts are such that the State cannot argue with much, if any, force that even if Gant applies to non-vehicle searches

incident to arrest, Gant's evidence-of-the-crime-of-arrest exception applies to the search of the arrestee's purse in Byrd. In MacDicken the State's brief argued in the alternative to the Court of Appeals that the search could be upheld under the theory that a search incident to arrest was authorized to search under a per se rule not requiring proof that the arrestee posed a threat to the officers or to the evidence. That per se rule is equivalent to the Gant evidence-of-the-crime-of-arrest rule. Thus, the prosecutor argued in MacDicken that a search for evidence related to the crime of arrest (searching the bag for a handgun and items taken in the armed robbery) would be lawful even if the handcuffed arrestee were deemed to be fully secured. The Court of Appeals opinion in MacDicken does not explicitly address that theory. Clearly, under the Fourth Amendment, even if Gant applies to searches incident to arrest outside of the vehicle context, the search in MacDicken meets the evidence-of-the-crime-of-arrest exception to Gant's exclusive-control rule.

Next, we address the hypothetical, fully-secured-arrestee scenario in light of case law under article I, section 7 of the Washington constitution.

In State v. Snapp, 174 Wn.2d 177 (2012) May 12 LED:25, in an "independent grounds" interpretation interpreting the Washington constitution as being more restrictive than the Fourth Amendment in this context, the Washington Supreme Court rejected Gant's evidence-of-the-crime-of-arrest exception for motor vehicle searches incident to arrest. The Court of Appeals opinion in MacDicken mentions article I, section 7 of the Washington constitution, but the Court does not mention State v. Snapp. Nor, as noted above, does the MacDicken Court suggest that the Washington constitution is more restrictive on search incident to arrest where a motor vehicle search is not involved, and where personal property has been taken from an arrestee, where the arrestee has been fully secured, and then the personal property has been searched without a warrant or consent. Nor has any other published Washington appellate decision yet addressed the latter issue.

So MacDicken, due to its narrow factual context, leaves the following two fundamental questions unanswered under article I, section 7 of the Washington constitution: (1) Does the Washington constitution's search incident to arrest rule for non-vehicle searches preclude searches of containers and items of personal property taken from arrestees if such searches occur after the arrestees have been handcuffed and placed in patrol cars, such that the arrestees do not pose a risk to officers or to the seized evidence? and (2) If the Washington constitution's search incident to arrest rule generally precludes searches in this context, does the Washington rule contain an evidence-of-the-crime-of-arrest exception, as does the Fourth Amendment rule?

We must await future cases to resolve these unresolved questions. Meanwhile, as always, we caution that what we say in the LED is our own personal thinking and is not legal advice. We always recommend that officers consult their own legal advisors and local prosecutors regarding how to proceed in light of the appellate court decisions that we report and comment upon in the LED.

RECORDING OF ONE-ON-ONE KITCHEN CONVERSATION WITH BROTHER-IN-LAW BY MAN WHO SUSPECTED BROTHER-IN-LAW OF MOLESTING MAN'S DAUGHTERS HELD ADMISSIBLE UNDER CHAPTER 9.73 RCW ON RATIONALE THAT CONVERSATION WAS NOT "PRIVATE"; ALSO, OTHER-CRIMES EVIDENCE HELD ADMISSIBLE UNDER ER 404(b) WHERE UNCHARGED CHILD MOLESTING SHOWED COMMON SCHEME OR PLAN

State v. Kipp, ___Wn. App. ___, 286 P.3d 68 (Div. II, Oct. 2, 2012)

Facts and Proceedings below:

One of Kipp's nieces accused him of engaging in sexual conduct with her during a period when he was an adult and she was 12-to-14-years-old. The girl accused Kipp of molesting her at her grandparents' house by touching her genitals and digitally penetrating her. She also accused him of digitally penetrating her while she was staying overnight at Kipp's house.

The girl's older sister alleged that Kipp also had sexually assaulted her during a period when he was an adult and she was 15-years-old. She accused Kipp of molesting her at his house by fondling her breasts while they watched TV during a time that she lived in his house. The older sister also alleged that on one occasion Kipp molested her at her grandparents' house by performing oral sex on her and rubbing his penis on her genitals.

Joseph T., the father of the two girls and Kipp's brother-in-law, confronted Kipp about his daughters' allegations. The conversation occurred in the kitchen of a private home, with no one else in the room. The son of Joseph T. had been in the kitchen just before the conversation began, was asked to leave the room, and had apparently remained elsewhere in the home during the conversation. Joseph T. secretly recorded Kipp's confession to the sexual conduct with the children. During that conversation, Kipp requested a further meeting elsewhere between just the two of them so that Kipp might provide a better explanation.

Kipp was later charged with three sex crimes against the younger girl, but he was not charged with any crimes against the older sister. Kipp moved pretrial under Washington's Privacy Act, chapter 9.73 RCW, to suppress the audio recording. Kipp's counsel asserted in a hearing on the motion that Kipp's testimony would establish: (1) the conversation took place in a kitchen in a private residence, (2) the reasons why Kipp believed that the conversation was private in that room, and (3) a third party (Joseph T.'s son) had left the room so that Kipp and Joseph T. would be alone. Rather than take testimony on these points of fact, the trial court accepted that the facts were as alleged by Kipp's counsel.

The trial court denied Kipp's motion to suppress, ruling that Kipp's conversation with Joseph T. was not a private conversation and thus not subject to suppression under the Privacy Act. The recording was played to the jury. Also, the trial court admitted the older sister's testimony about Kipp's uncharged sexual conduct with her, ruling the older sister's testimony admissible under Evidence Rule 404(b) to show a common scheme or plan.

A jury found Kipp guilty of the sex crimes charged.

ISSUES AND RULINGS: 1) Does substantial evidence support the trial court's findings of fact regarding the circumstances (secret recording of one-on-one kitchen conversation with brother-in-law by underage-girls' father who suspected brother-in-law of molesting the girls) of the electronic audio recording in the kitchen, and do the findings of fact support the trial court's conclusion of law under the Privacy Act, chapter 9.73 RCW, that the conversation was not private, thus making the recording admissible? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, the conversation was not private; Judge Van Deren dissents on this issue);

2) Did the trial court rule lawfully within its discretion under Evidence Rule 404(b) in admitting other-crimes evidence of uncharged child molesting against the older sister on the rationale that the uncharged child molesting was part of a common scheme or plan? (ANSWER: Yes, the trial court did not abuse its discretion. There is no dissent on this issue.)

Result: Affirmance of Kitsap County Superior Court convictions of William J. Kipp, Jr., of two counts of second degree child rape and one count of second degree child molestation.

ANALYSIS BY MAJORITY:

1. Privacy Act, chapter 9.73 RCW – meaning of undefined phrase, "private conversations"

Three Washington Supreme Court decisions are central to analysis of whether the conversations were private under the Privacy Act. The decisions are State v. Clark, 173 Wn.2d 405 (1996) **July 96 LED:07** (wired informant's conversations with drug vendors on the street and in his car held not private); Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178 (1992) **Aug 92 LED:06** (phone conversation held not private where person answered call from stranger – an officer who did not identify himself as such – and had a very brief conversation in which she provided only the inconsequential and non-incriminating information that a resident of the home was not then present); State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11** (Internet ICQ communications between undercover detective and suspected child molester were private under the Privacy Act, but evidence regarding the communications was admissible under an implied consent theory).

The Kipp Court sets the framework for legal analysis around these three decisions as follows:

> The privacy of a conversation turns on the "'intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.'" State v. Clark, 129 Wn.2d 211, 224 (1996) (quoting Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190 (1992)). One factor in deciding whether a conversation was private is the subjective intentions of the parties. State v. Townsend, 147 Wn.2d 666, 673 (2002). We also consider other factors "bearing upon the reasonable expectations and intent of the participants[:]" (1) the duration and subject matter of the conversation, (2) the location of the conversation and potential presence of third parties, and (3) the role of the nonconsenting party and his or her relationship to the consenting party. Clark, 129 Wn.2d at 225-26. "While each of these factors is significant in making a factual determination as to whether a conversation is private, the presence or absence of any single factor is not conclusive for the analysis." Clark, 129 Wn.2d at 227.

The majority opinion in Kipp explains at the beginning of its analysis that the standard of review of trial court suppression rulings asks whether the trial court's findings of fact are supported by substantial evidence, and whether those findings support the trial court's conclusions of law.

The Court then describes the suppression motion and the trial court's findings on the "private conversation" issue as follows:

> The trial court ruled on Kipp's motion to suppress based on the parties' moving papers, in-court argument, and the contents of the recording. Kipp submitted a declaration in conjunction with his motion to suppress asserting: (1) Kipp feared Joseph T., (2) Kipp believed Joseph T. was armed with a knife, (3) Joseph T. secretly recorded the conversation, and (4) Kipp did not consent to being recorded. **[LED EDITORIAL NOTE: The first two allegations go to Kipp's contention that Joseph T. coerced a false confession. The trial court ruled, and the majority opinion agrees, that truth or falsity of the confession is irrelevant to determining if the conversation was private.]** Kipp's counsel asserted in a hearing on the motion that Kipp's testimony would establish: (1) the conversation took place in a kitchen in a private residence, (2) the reasons why Kipp believed that the conversation was private in that room, and (3) a third party (Joseph T.'s son) had left the room so that Kipp and Joseph T. would be alone.
>
> Rather than take testimony, the trial court accepted the facts as put forward by Kipp's counsel. The trial court also listened to the recording of Kipp's conversation with Joseph T. In the recording, Kipp admitted the allegations,

> offering the excuse that he was only 19 when he molested JMC, and claiming that JMC initiated the sexual contact. With regard to DGT, Kipp's only excuse was "there was a lot going on at the time." Kipp acknowledged to Joseph T. that his conduct was a crime. At the end of the conversation, Kipp asked Joseph T. to meet with him in private to discuss the matter further, saying, "[W]hen we get a chance, just you and I, we will go somewhere and we'll talk, try to . . . understand everything."
>
> The trial court issued an oral ruling finding the conversation admissible under the privacy act. The trial court first addressed the . . . ["[subject matter] and duration" of the conversation, finding that they split evenly. The court found that the duration of the conversation was over 10 minutes long and concluded that this weighed in Kipp's favor. But the court found that Kipp made a confession of child molestation to the victim's father, concluding that that is not the sort of subject matter that remains private, weighing against Kipp.
>
> The trial court next addressed the location of the conversation and the potential presence of third parties. The trial court accepted Kipp's offer of proof that the conversation took place in a kitchen and that Joseph T.'s son had left the room. But the court found that, because it was a common area, the potential presence of third parties was higher than it would have been in a different area of the residence.
>
> The trial court then considered the role of the nonconsenting party and his relationship to the consenting party. The trial court found that Kipp and Joseph T. were not speaking as brothers-in-law, but "as father of a daughter and the accused molester."
>
> Finally, the trial court found that the analysis tipped against Kipp based on evidence of the parties' subjective intentions. The trial court found that Kipp's offer to meet with Joseph T. in private at the end of the conversation demonstrated that Kipp did not subjectively believe the conversation was private.

[Footnotes omitted]

The Kipp majority opinion rules that substantial evidence supports the trial court's findings. The majority opinion then determines that the trial court was also correct in its reasoning and legal conclusion that the conversation was not private for purposes of the Privacy Act. The majority opinion declares that "[t]he facts and circumstances show that Kipp had neither the intent nor the reasonable expectation that the conversation would remain private."

Dissenting opinion on meaning of "private conversation"

Judge Van Deren vigorously dissents on the Privacy Act issue. At the outset of her dissent, she sums up her objection as follows:

> If a conversation between two family members – after clearing the room in a private residence in order to speak alone – about an incriminating matter does not fall within the act's scope, I fail to see how our highly-restrictive privacy act provides any meaningful protection to the privacy rights of Washington's citizens.

2. ER 404(b) "other crimes" evidence restriction – common scheme or plan exception

ER 404(b) bars a trial court from admitting evidence of a person's other crimes, wrongs, or acts to prove a person's character to show that the person acted in conformity with such acts. But

ER 404(b) does not forbid such other-crimes evidence admitted for other purposes, such as to show a common scheme or plan.

In order for other-crimes evidence to be properly admitted to show a common scheme or plan under ER 404(b), it must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. Kipp disputes only the second element of this test, whether the older sister's testimony was lawfully admitted for the purpose of proving a common scheme or plan.

There are two types of evidence admissible to show a common scheme or plan under ER 404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. This case deals with the second type of common scheme or plan, a single plan followed to commit separate but very similar crimes. Such a common scheme or plan may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. Evidence of such a plan must demonstrate not merely similarity in results, but also common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are examples. State v. DeVincentis, 150 Wn.2d 11, 19 (2003) **Oct 03 LED:05**; State v. Lough, 125 Wn.2d 847, 860 (1995) **June 95 LED:01**). But such common features need not show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21.

The Kipp majority opinion explains as follows the analysis for its determination that the uncharged sex abuse of the older sister was part of a common scheme or plan:

> Here, there was "'such occurrence of common features'" between Kipp's abuse of DGT and JMC that his abuse of both victims was naturally to be explained as manifestations of a general plan, making JMC's testimony admissible under ER 404(b). DeVincentis, 150 Wn.2d at 19-20 (quoting Lough, 125 Wn.2d at 860). The victims were of similar ages, and both were Kipp's nieces. Also, Kipp molested both victims in two places: his house and their grandparents' house.
>
> While Kipp performed different sex acts on each victim, the evidence shows that he had a common scheme or plan to get his nieces alone at his house or their grandparents' house and sexually abuse them, which he used on both DGT and JMC. See State v. Gresham, 173 Wn.2d 405, 422-23 (2012) (evidence showed common scheme or plan when defendant took trip with young girls and fondled their genitals at night when other adults were asleep, notwithstanding some difference between sex acts performed); Lough, 125 Wn.2d at 849-52, 861 (defendant's history of drugging and raping women with whom he had a personal relationship showed common scheme or plan despite differences in details of each assault); State v. Sexsmith, 138 Wn. App. 497, 505 (2007) (evidence showed common scheme or plan where defendant was in position of authority over both victims, victims were the same age, and defendant isolated them and forced them to perform similar sex acts).
>
> The trial court accordingly did not abuse its discretion in admitting JMC's testimony to show a common scheme or plan under ER 404(b). Kipp's claim to the contrary fails.

LED EDITORIAL COMMENT: It is important to remember that the Privacy Act, chapter 9.73 RCW, restricts – with civil and criminal sanctions, as well as a broad exclusionary provision – interception and recording of electronic communications by both governmental and non-governmental entities and persons.

We think that this case presents a very close question on whether the recorded conversation was "private" for purposes of the Privacy Act. The decision of the majority opinion is highly fact-based, as well as deferential to the trial court's findings of fact. Also, it was a 2-1 decision, and the defendant has asked the Washington Supreme Court to grant discretionary. The outcome could change if the Supreme Court grants review. For these reasons, we see risk in relying on the result of the Court of Appeals decision in Kipp to guide assessment of what conversations are private under the Privacy Act. As always, we urge law enforcement officers to consult with their legal advisors and local prosecutors on cases and issues addressed in the LED.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

PUBLIC RECORDS ACT: CITY'S SEARCH FOR RECORDS WAS REASONABLY CALCULATED TO UNCOVER RELEVANT RECORDS; PURELY PRIVATE E-MAILS, FROM PERSONAL COMPUTERS, WERE NOT PUBLIC RECORDS WITHIN THE MEANING OF THE PRA – In Forbes v. City of Gold Bar, ___ Wn. App. ___, 288 P.3d 384 (Div. I, Nov. 13, 2012), the Court of Appeals holds that the City of Gold Bar's search for records responsive to a public records request was adequate as it was reasonably calculated to uncover relevant responsive records. The Court also holds that City officials' purely private e-mails, sent from their personal computers, are not public records within the meaning of the Public Records Act (PRA).

The PRA request in this case covered e-mails sent by City officials conducting City business from their personal computers. In order to retrieve and search the e-mails the City hired an outside consultant, which took additional time.

The Court concludes that the City's search was adequate. "The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Citing Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 720 (2011) **Feb 12 LED:12**. The PRA requires agencies to promptly respond to a request for public records within five business days by providing the records, denying the request, or providing a reason able timeframe within which to respond to the request. In this case, the "records requests encompassed records that were stored on the personal computers of city officials necessitating the hiring of an outside consultant to retrieve records from various Internet providers. The response to the request was reasonable in light of the difficulty the city had in retrieving the information and the efforts it expended to recover the information."

The City's consultant, hired to retrieve e-mails from the officials' personal computers, retrieved purely personal e-mails as well as e-mails related to City business. The Court concludes that those purely personal e-mails, in which no City business was discussed, are not public records. See RCW 42.56.010(3)("any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.") The Court distinguishes Mechling v. City of Monroe, 152 Wn. App. 830 (2009), review denied, 169 Wn.2d 1007 (2010), where the court held that personal e-mail messages of city council members in which they discussed City business were not exempt from disclosure under the personal information exemption.

Result: Affirmance of Snohomish County Superior Court order granting summary judgment dismissal in favor of the City.

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

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

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

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

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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