Law Enforcement Digest

JANUARY 2009

634th Basic Law Enforcement Academy – July 14, 2008 through November 18, 2008

President:	Christopher Whitsett – Kittitas County Sheriff's Office
Best Overall:	Christopher Whitsett – Kittitas County Sheriff's Office
Best Academic:	Christopher Whitsett – Kittitas County Sheriff's Office
Best Firearms:	Christopher Whitsett – Kittitas County Sheriff's Office
Tac Officer:	Tony Nowacki – Des Moines Police Department

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NOTICE REGARDING LED SUBJECT MATTER INDEX FOR 2004-2008

The Criminal Justice Training Commission has added a five-year LED subject matter index for the years 2004 through 2008 to the Commission's internet LED page at [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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

THE PROOF STANDARD IN SECTION 1983 FEDERAL CIVIL RIGHTS CASE INVOLVING OFFICER'S URGENT USE OF DEADLY FORCE FOCUSES ON WHETHER OFFICER "ACTED WITH A PURPOSE TO HARM . . . UNRELATED TO LEGITIMATE LAW ENFORCEMENT OBJECTIVES" – In Porter v. Osborn, __ F.3d __, 2008 WL 4614334 (9th Cir. 2008) (decision filed October 20, 2008), the Ninth Circuit reverses the ruling of a U.S. District Court on the standard of proof to apply in a federal civil rights action alleging that, in using deadly force, law enforcement officers violated the constitutional due process rights of a person.

The parents of a deceased young man sued two Alaska State Troopers who had shot him in a nighttime incident where one of the officers had perceived that the young man was trying to

drive his vehicle as a lethal weapon into the other officer. The Alaska U.S. District Court ruled that the question for the jury in the case was whether the officers' actions "shocked the conscience" under a deliberate indifference standard. The Ninth Circuit declares that the District Court set the standard of proof to low for the plaintiffs. The proper standard asks whether the officers "acted with a purpose to harm . . . unrelated to legitimate law enforcement objectives."

Result: Case remanded for U.S. District Court (Alaska) to assess whether the officers are entitled to qualified immunity under the purpose-to-harm legal standard.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

WSP MAY BE LIABLE FOR DAMAGES BASED ON FORMER POLICY OF MANDATORY IMPOUND OF VEHICLES OF SUSPENDED DRIVERS – In Potter v. Washington State Patrol, __ Wn.2d __, __ P.3d __, 2008 WL 5007216 (2008), the Washington Supreme Court rules, 6-3 (Justices Madsen, J. Johnson, and Owens in dissent), that RCW 46.55.120, which allows redemption and challenges to the impound of vehicles, and provides for impoundment, towing, storage fees and damages for loss of use where an impound is invalid, is not an exclusive remedy for a person whose vehicle is impounded. The Supreme Court holds that drivers may bring subsequent conversion claims.

Previously, in a decision reported at 161 Wn.2d 335 (2007) **Feb 08 LED:09**, the Supreme Court had voted, 6-3 (Justices Madsen, J. Johnson and Fairhurst in dissent), to reject WSP's argument that the agency and its officers were privileged, as a matter of law, in actions under a former WSP policy that directed the automatic impounding of vehicles of drivers arrested for DWLS. Then, in May of 2008, the Supreme Court re-heard oral argument in order to consider the issue of whether the "conversion" theory of the lawsuit was barred on grounds that the exclusive remedy for wrongful impound is under RCW 46.55.120. As noted above, the Supreme Court has now rejected WSP's alternative "exclusive remedy" theory of defense.

Result: Reversal of Thurston County Superior Court summary judgment ruling for WSP; case remanded to Superior Court for further proceedings to consider whether conversion torts occurred and the extent of damages, if any.

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WASHINGTON STATE COURT OF APPEALS

CAR FRISK FOR GUN WAS REASONABLE AFTER CUFFING SUSPECT BESIDE THE CAR FROM WHICH HE WAS SEIZED; ALSO, POSSESSING STOLEN CHECKING ACCOUNT NUMBERS CONSTITUTED POSSESSION OF STOLEN ACCESS DEVICES

State v. Chang, __ Wn. App. __, 195 P.3d 1008 (Div. I, 2008)

Facts and Proceedings below:

> Police responded to a report of a suspected forgery at a bank. Inside the bank, the suspect told them he had arrived at the bank in a white Subaru driven by Steven Chang. Some of the officers found Steven Chang in a white Subaru in the parking lot and detained him. Meanwhile, asked whether there were any

weapons on Chang or in the Subaru, the suspect inside the bank told police that Chang had a handgun. This information was relayed via radio to the officers outside, who had already removed Chang from the Subaru. One of the officers patted Chang down and handcuffed him, then looked inside the car and saw a bulge under the driver's side floor mat. Reaching in, he pulled back the floor mat and immediately saw a handgun on the floorboard. Chang denied ownership of the gun. He was placed under arrest for carrying a concealed weapon.

The police searched the interior of Chang's car incident to arrest. They found a backpack in the rear seat. Inside were several bank checks with different names on them, a small quantity of drugs, and several documents bearing Chang's name and personal information. Police also found a small quantity of marijuana and a methamphetamine pipe in the center console.

The State charged Chang with three counts of possession of stolen property in the second degree for the checking account numbers in his possession, unlawful possession of a firearm in the second degree, and two counts of drug possession.

Chang moved to suppress the checks, the handgun, and the drugs. The court denied the motion, concluding that the warrantless search was justified by officer safety concerns.

After the State rested, Chang moved to dismiss the counts of possession of stolen property, arguing that the checks were not access devices under RCW 9A.56.010(1) because they were paper instruments. The trial court denied the motion. The jury convicted Chang as charged.

ISSUES AND RULINGS: 1) Where a forgery suspect told police he had been driven to the bank by Chang, and that Chang had a gun, was it reasonable for the officers, after seizing Chang from his car, handcuffing him just outside his car, and then observing a suspicious bulge under a floor mat, to enter his car and look under the mat to see if the bulge was a handgun? (ANSWER: Yes);

2) Did Chang's unauthorized possession of checking account numbers belonging to other persons constitute possession of stolen access devices? (ANSWER: Yes)

Result: Affirmance of King County Superior Court convictions of Steve K. Chang for possession of stolen property in the second degree (three counts), unlawful possession of a firearm in the second degree, and unlawful drug possession (two counts).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Vehicle frisk

The court found that when Chang was detained, he was standing at the rear driver's side bumper area of his car and about two strides from the driver's side door. Upon receiving the information that Chang had a gun, an officer patted Chang down and handcuffed him, then looked inside the car and found the gun under the floor mat. The gun was loaded, and the officer removed and secured it.

The protective search exception to the warrant requirement applies when a valid Terry stop includes a vehicle search to ensure officer safety. . . . State v. Larson, 88 Wn. App. 849 (Div. I, 1997) **May 98 LED:06**. If a police officer has a reasonable belief that the suspect in a Terry stop might be able to obtain weapons from a vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden.

In determining whether the search was reasonably based on officer safety concerns, a court should evaluate "the entire circumstances" surrounding the Terry stop. State v. Glossbrener, 146 Wn.2d 670 (2002) **Sept 02 LED:07**. For example, if a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed. . . . Larson (when an officer following a speeding driver saw him leaning towards the floorboard, the officer properly searched inside in the area of the furtive movement); Glossbrener (the officer's safety concern based on the driver's furtive movement seen before stopping the car was no longer objectively reasonable at the time of the search because the officer had completed his investigation and the search was an afterthought).

When an officer reasonably believes that a suspect's vehicle contains a weapon, the ability to search is limited to the area "within the investigatee's immediate control." [State v. Kennedy, 107 Wn.2d 1 (1986)]. In Kennedy, the court applied this reasoning to approve a search where a passenger still remained in the car after the police had removed the driver who made a furtive movement. Chang attempts to distinguish Kennedy by pointing out that he was standing handcuffed outside the car, there was no one inside the car, and therefore no one had immediate access to any gun that might be inside. However, Kennedy "did not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns only to situations in which either the driver or passenger remain in the vehicle." For example, where a lone driver is outside the automobile and has no immediate access to the car, police may conduct a protective search if the suspect will have a later opportunity to return to his vehicle. Larson; Glenn, [140 Wn. App. 627 (Div. I, 2008) **Nov 07 LED:08**]. In Larson, once the suspect was pulled over, the driver was ordered to get out of his truck. In order to obtain his registration, the driver would need to return to his truck. Because of the driver's initial furtive movement raising suspicion that a weapon might be inside the vehicle, the court recognized sufficient grounds for safety concerns to justify the warrantless search by the police.

Similarly, the court held there was a reasonable officer safety concern in Glenn because the police knew they would have to return Glenn to his car if they found no weapon on his person. There, a child told his mother that a man in a passing car had pointed a gun at him from the car window. Based on this report, the police identified Glenn as a suspect and conducted a protective search of his car. This court ruled that a legitimate citizen's report about the gun was sufficient to justify concern about the safety of the officers. If the officers had returned Glenn to his car without making sure that the weapon seen by the boy was not inside, "they would not have been ensuring their own safety or that of the surrounding community."

Here, as established by the trial court's undisputed findings of fact, the officers were informed that Chang might be connected to the forgery attempt and that he reportedly had a handgun with him. Like Glenn, Chang was handcuffed and standing outside the car, but the police did not necessarily intend to arrest him without further investigation. Without a formal arrest, the police could not detain Chang in handcuffs longer than necessary to investigate his possible connection to the forgery attempt. Securing the scene required ensuring that the reported weapon would not be available to Chang if the police eventually released him to get back in his car.

Because the police had information that Chang had a gun in his car, their safety concern was reasonable, and the trial court did not err in concluding that the warrantless search was valid. The order denying the motion to suppress is affirmed.

2) Possessing stolen access device

Possession of stolen property means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). A person who possesses a "stolen access device" is guilty of possessing stolen property in the second degree. RCW 9A.56.160(1)(c). Chang claims the evidence of the checks he possessed was insufficient to support a conviction because the statutory definition of "access device" contains an exclusion for paper instruments.

. . .

Contrary to Chang's argument, it was not the checks but rather the account numbers on the checks that the State relied on as proof of the charge. The question, then, is whether account numbers on checks satisfy the definition of "access device."

The statute defines access device as:

> any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

[LED EDITORIAL NOTE: At this point in the opinion, the Court of Appeals engages in extensive discussion - - omitted from this LED entry to save space - - 1) of legislative history of this statute and 2) of interpretation in federal cases of an analogous federal statute.]

Considering this history of the federal statute, a federal circuit court has concluded that Congress wished to zero in on major counterfeiting and trafficking activities without supplanting state and local regulation of less sophisticated schemes of forgery and fraud. United States v. Hughey, 147 F.3d 423 (5th Cir.1998).

In Hughey, the defendant was charged under the federal statute with *use* (not possession) of an unauthorized access device. The conduct for which he was charged consisted of completing, presenting and cashing counterfeit checks. His conviction on this count was reversed, the court holding that his conduct concerned only transfers "originated solely by paper instrument", which was "not within the ambit of the conduct that Congress sought to prohibit." The government argued that Hughey's conviction on this count should nonetheless be affirmed on the basis that he was in possession of the checking account numbers which had the "inherent potential for use with other devices." The court rejected this argument, stating that it ignored the plain text of the exclusion. "Hughey used the account numbers to originate a transfer solely by paper instrument. Hughey did not use the subject account numbers independently to gain account access."

The "paper instrument" exception was also at issue in United States v. Tatum, 518 F.3d 769 (10th Cir. 2008). In Tatum, the defendant was convicted of uttering a counterfeit check with the intent to deceive an organization in violation of 18 U.S.C. § 513(a). The trial court imposed a sentencing enhancement because it concluded that the defendant's conduct involved "production or trafficking of any access device," which requires sentencing enhancement under the federal sentencing guidelines. The Tenth Circuit reversed, following ***Hughey***:

> We agree with the Fifth Circuit's reasoning. The statutory definition of access devices unambiguously excludes "transfer[s] originated solely by paper instrument," which is precisely the conduct involved in Defendant's offense. The government introduced no evidence that Defendant used, possessed, produced, or trafficked in bank account numbers in any way except as part of his scheme to pass counterfeit checks. We therefore conclude that both the counterfeit checks and the account numbers printed on those checks fall outside the statutory definition of an access device.

Tatum, 518 F.3d at 772.

The federal cases persuasively show that the statute is not intended for use in cases where a defendant is charged with actually using a paper check to attempt or achieve a transfer of funds. We agree with that interpretation. But Hughey at least suggests that mere possession of checking account numbers is also outside the scope of the statute. Hughey ("We are not persuaded that Hughey's mere possession of the numbers, at least without additional evidence demonstrating the possibility of an additional use, is sufficient to overcome the express statutory provision excluding his conduct from the ambit of § 1029"). We regard this statement as dicta not compelled by the plain meaning of the statute. Unlike in Hughey, Chang was charged and convicted solely for his conduct of possessing stolen account numbers. There was no charge, no proof and no argument that he had passed bad checks or that his conduct was part of a scheme to pass bad checks.

> Where the State seeks only to prove that a defendant possesses stolen checking account numbers, we conclude - - considering the ordinary meaning of the language of the exclusion and the statutory scheme as a whole - - that the State is not precluded from obtaining a conviction under RCW 9A.56.010(1). While the use of paper checks has long been known as a method of gaining access to bank accounts, today there is also widespread use of devices such as telephones and computers to initiate paperless banking transactions using account numbers only. The statute permits the State to prosecute those who possess stolen checking account numbers without waiting to see whether there will be an actual attempt at passing bad checks. Where a defendant has actually used or attempted to use a paper instrument to initiate a transfer of funds, the more traditional charges like forgery or fraud remain available as charging options.

[Footnote, some citations omitted]

ASKING OCCUPANTS OF A LEGALLY PARKED CAR WHAT THEY WERE DOING AND REQUESTING IDENTIFICATION WAS NOT A "SEIZURE"

State v. Afana, __ Wn. App. __, __ P.3d __, 2008 WL 5088179 (Div. III, 2008)

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

> On June 13, 2007, at 3:39 am, Deputy Miller noticed a legally parked car at the corner of Rimrock and Houston in Spokane County. Deputy Miller pulled his car behind the parked car and shined his spotlight into it, revealing two occupants in the vehicle. Deputy Miller then approached the vehicle and asked the occupants what they were doing. The driver, Mr. Afana, responded that they were watching a movie.
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> Deputy Miller asked for identification from both Mr. Afana and the other occupant, Jennifer Bergeron. Mr. Afana gave the deputy his driver's license and Ms. Bergeron gave her name. Deputy Miller wrote down both names, gave Mr. Afana back his license, and suggested they go elsewhere to watch their movie. Deputy Miller returned to his vehicle and ran warrant checks on both names. Ms. Bergeron's check came back with a local misdemeanor warrant. Mr. Afana began to pull away. At this point, Deputy Miller activated his emergency lights to prevent the car from leaving. He walked back to the car, arrested Ms. Bergeron, and had Mr. Afana exit the vehicle. Deputy Miller searched the vehicle incident to arrest and found a bag which contained methamphetamine, marijuana, and drug paraphernalia. Mr. Afana was arrested and charged with possession of a controlled substance.
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> Prior to trial, Mr. Afana brought a CrR 3.6 motion to suppress the drugs found in the search incident to the arrest of the passenger in the vehicle. The trial court granted the motion to suppress and dismissed the case.

ISSUE AND RULING: Where the officer asked the two occupants of the legally parked car what they were doing, requested ID from both, wrote down the ID information and immediately returned the driver's license to the person who had used his license to ID himself, and where the officer did not require that the car occupants stay put (as he returned to his patrol vehicle to

run a warrants check), did the officer make a "seizure" requiring reasonable suspicion of unlawful activity? (ANSWER: No)

Result: Reversal of Spokane County Superior Court suppression ruling and remand of case for prosecution of a drug possession charge against Mark Joseph Afana.

ANALYSIS: (Excerpted from decision of the Court of Appeals)

> Article I, section 7 of the Washington Constitution provides greater protection to individuals than the [U.S. Constitution's] Fourth Amendment. State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**. A seizure occurs when "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." [Rankin] This an objective standard. [Rankin]
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> In State v. Armenta, 134 Wn.2d 1 (1997) **March 98 LED:05**, the Supreme Court held that an officer asking for identification during a casual conversation did not constitute a seizure because the officer's request for identification was not accompanied by force or a display of authority, such that the citizens did not feel free to leave. A police officer's manner and tone are important in determining, objectively, whether a person would feel free to leave in a particular situation. State v. Thorn, 129 Wn.2d 347 (1996) **Aug 96 LED:13** [overruled on other grounds by State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**]. Moreover, police are permitted to converse and ask for identification even without an articulable suspicion of wrongdoing. State v. Young, 135 Wn.2d 498 (1998) **April 98 LED:03**.
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> While a request for identification of a pedestrian is not automatically a seizure, the Supreme Court determined that asking for identification from a passenger in a car that was parked more than one foot away from the curb violated the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Larson, 93 Wn.2d 638 (1980). Based on Larson, the request for identification here would be unlawful. [**LED EDITORIAL COMMENT: We believe that the Court of Appeals is misreading the Larson case. That case involved an investigation by officers of a possible parking law violation whereas here there was no parking violation.]**
>
> However, later in O'Neill, the court stated that "where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates." O'Neill involved a conversation between police and a citizen but did not follow either a parking or a traffic violation. O'Neill held that when a car is parked in a public place, occupants of the car should be treated as pedestrians for search and seizure purposes. Here, Mr. Afana's car was parked in a public place and Deputy Miller did not seek contact with Mr. Afana and his passenger because of any violation. Based on O'Neill, any request that Deputy Miller could lawfully make of a pedestrian, he could make of Mr. Afana's passenger, including asking for her identification.
>
> Later, in State v. Rankin, the court held that law enforcement officers were not allowed to ask for identification from passengers for investigatory purposes,

during a traffic stop, without an independent basis. Rankin, however, did not overrule O'Neill.

Here, the trial court based its decision on State v. Brown, 154 Wn.2d 787 (2005) **Sept 05 LED:17**. However, in Brown, the defendant was a passenger in a vehicle that was stopped because a police officer believed the vehicle's trip permit was faulty. The result in Brown is consistent with the other cases in which the officers made contact with citizens in a car because of a violation.

In accepting Brown, the trial court rejected State v. Mote, 129 Wn. App. 276 (Div. I, 2005) **Nov 05 LED:10**. But Mote is directly on point.

In Mote, two people were sitting in a legally parked car at 11:45 PM when a police officer approached the car to ask what the occupants were doing. The officer asked for identification from the driver, and for the name and date of birth of the passenger, Curtis Mote. Division One makes clear the distinction between stopping a car for a violation, in which case the police want to talk to the person who violated the law, as opposed to making a social contact with people in a parked car where police want to talk to everyone in the car about what was going on. When the police make a social contact with a group of people on the street, they are free to ask for names without their inquiry automatically constituting a seizure. Because the purpose of making a social contact with a group of pedestrians is the same as making a social contact with people inside a parked car, it does not automatically constitute a seizure when an officer asks people in a car for their identification.

We agree with the reasoning in Mote. Rankin did not overrule O'Neill. Brown simply followed the analysis laid out in Rankin. Here, O'Neill and Mote should control. The passenger in Mr. Afana's car should be treated the same as pedestrians for search and seizure purposes. Under this standard, the court erred by suppressing the drug evidence.

We reverse the trial court's suppression order and remand.

[Some citations omitted]

UNDER TOTALITY OF CIRCUMSTANCES, PASSENGER IN PARKED CAR WAS "SEIZED" WHERE OFFICER TOLD DRIVER THAT SHE WAS NOT FREE TO LEAVE, AND THEN TOLD PASSENGER THAT HIS LAUNDRY STORY WAS "SUSPICIOUS" AND ASKED HIM FOR ID

State v. Beito, __ Wn. App. __, 195 P.3d 1023 (Div. III, 2008)

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

At 3:40 a.m., [officers A and B] drove past an open convenience store and noticed a car parked in the parking lot with two individuals standing nearby. Four minutes later, they drove past the store again and noticed the individuals sitting inside the car. Out of concern for the individuals' welfare and premise's safety, the officers decided to make contact.

> The officers parked directly behind the vehicle; they did not activate their emergency equipment. Officer [B] approached the driver and Officer [A] approached the passenger, Mr. Beito. Mr. Beito told the officer he was okay and just waiting for a friend. Mr. Beito told Officer [A] he thought his friend's name was Ryan. Mr. Beito claims the driver then received a call from Ryan and asked to leave, but Officer [A] said no.
>
> Officer [A] observed several suitcases and bags in the back of the vehicle. Mr. Beito told the officer they just finished doing laundry and wanted to keep their clothes separate. Officer [A] told Mr. Beito he found his stories about the friend and the laundry suspicious and asked for identification. Mr. Beito did not have identification on him. Officer [A] then asked Mr. Beito for his name and birth date. A police database search showed Mr. Beito had a warrant for his arrest. In a search incident to arrest, the officers found a stolen gas card in Mr. Beito's rear pants pocket.
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> The State charged Mr. Beito with second degree possession of stolen property.

ISSUE AND RULING: Under the Washington constitution, a seizure occurs where, due to an officer's threat or use of force or display of authority, a reasonable innocent person would believe that he or she was restrained and was not free to leave and not free to decline a request from the officer. In this case, under the totality of circumstances, was the passenger in the parked car seized where: 1) two officers were questioning the driver and passenger in tandem, 2) one officer had just told the driver that she was not free to leave, 3) the officer then told the passenger that his story was "suspicious," and 4) the officer asked the passenger for identification, and followed that with a request for name and date of birth, and 5) the officer then did a warrant check? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court order suppressing evidence and dismissing possessing stolen property charge against Curtis Neil Beito.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under the Washington Constitution, no person "shall be disturbed in his private affairs . . . without authority of law." CONST. art. I, § 7. Article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment. The person asserting an unconstitutional seizure bears the burden of proving that there was a seizure. A seizure under article I, section 7 occurs when, due to an officer's use of physical force or display of authority, an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request. "This determination is made by looking objectively at the actions of the law enforcement officer."
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> . . .
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> Police officers are permitted to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function. Where an officer commands a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away."

A police encounter may ripen into a seizure in circumstances, for example, where the police officer retains the identification such that the defendant is not free to leave or becomes immobilized. In State v. Thomas, 91 Wn. App. 195 (Div. II, 1998) **Nov 98 LED:15**, a seizure occurred when an officer, while retaining the defendant's identification, took three steps back to conduct a warrants check on his hand-held radio. Similarly, in State v. Dudas, 52 Wn. App. 832 (Div. I, 1988), a seizure occurred under the Fourth Amendment when the deputy took the defendant's identification card and returned to the patrol car. In State v. O' Day, 91 Wn. App. 244 (Div. III, 1998) **Sept 98 LED:15**, the court found that a passenger was seized when the officer ordered her out of the car, placed her purse out of reach, asked if she had drugs or weapons, and asked if she would consent to a search. In each of these cases, the officer removed the defendant's identification or property from the defendant's presence, effectively immobilizing the defendant.

Courts have also found, however, that a seizure has occurred when the police immobilized a defendant even without removing the defendant's property or identification from the defendant's presence. In State v. Coyne, 99 Wn. App. 566 (Div. III, 2000) **May 00 LED:20 (reported in the May 2000 LED as "State v. Burt")**, the officer directed the defendants to sit on the hood of the patrol car. In State v. Ellwood, 52 Wn. App. 70 (1988), a seizure occurred after the defendant verbally identified himself and the officer told him to "wait right here" while he ran a warrant check on the verbal identification. In each of these cases, the police immobilized the defendant by a verbal show of authority.

Here, Mr. Beito was sitting inside a vehicle on the passenger side. The officer stood outside the door, blocking Mr. Beito from exiting. The driver was told she was not free to leave. Officer [A] then told Mr. Beito he thought his stories were suspicious and requested identification. Mr. Beito did not have identification on him. Officer [A] persisted and asked for his name and birth date. He continued to stand outside the passenger door while doing a warrant check over his radio. Under the totality of the circumstances, a reasonable person would not have felt free to terminate the encounter or refuse to answer Officer [A]'s questions. This amounts to a seizure.

Because the officers had no reasonable articulable suspicion that Mr. Beito had committed or was about to commit a crime or that he was a threat to anyone's safety, the seizure violated his constitutional rights. All "evidence obtained as a result of an unlawful seizure is inadmissible." Had Mr. Beito not been seized and his personal information not been recorded, his warrants would not have been discovered by the officer, and the credit card would not have been discovered.

[Some citations omitted]

NO "CUSTODY" AND HENCE NO NEED FOR MIRANDA WARNINGS TO SUSPECTED CHILD MOLESTER WHO CAME TO STATION VOLUNTARILY FOR POLYGRAPH; ALSO, HEARSAY RE STATEMENT OF DECEASED SIX-YEAR-OLD DETERMINED RELIABLE

State v. Grogan, __ Wn. App. __, 195 P.3d 1017 (Div. III, 2008)

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

One evening in summer 2001, Sandra Holloway, Mr. Grogan's stepdaughter, was bathing six-year old M.L. and M.L.'s sister at Mr. Grogan and Harriet Grogan's home in Cusick, Washington. M.L. told Ms. Holloway, "'Pap-pa' or 'Pop-pa'-'has touched me down there.'" When Ms. Holloway asked M.L. where she meant, M.L. pointed toward her vagina. M.L. also pointed toward Mr. and Mrs. Grogan. Ms. Holloway confronted Mr. and Mrs. Grogan, and then removed M.L. from the home. Ms. Holloway told Spokane Police Department Detective Kip Hollenbeck of M.L.'s statements. On November 24, 2001, M.L. and her mother, Sandra Bowyer, were found murdered.

In February 2003, Mr. Grogan voluntarily came in during the murder investigation for a polygraph examination conducted by Detective Douglas Orr in the Spokane Public Safety Building. Before and after the exam, Mr. Grogan was read and signed a waiver of rights form. Detective Orr told Mr. Grogan he thought he was lying. He was then interviewed by detectives without Miranda warnings. The detectives told Mr. Grogan he was free to leave; Mr. Grogan agrees. Mr. Grogan's statements included his sex-offense history and thoughts of molesting M.L. Mr. Grogan did leave that afternoon after giving statements. He then learned police had seized his car.

In May 2006, the State charged Mr. Grogan with one count of first degree child molestation of M.L. Mr. Grogan's statements were allowed in evidence after a lengthy CrR 3.5 voluntariness hearing where custody was the sole dispute. The trial court ruled orally, but did not enter written findings. The hearing is factually developed in our analysis below. The court also held a pretrial child-hearsay hearing under RCW 9A.44.120 to determine the admissibility of M.L.'s statements to Ms. Holloway.

At the child-hearsay hearing, Dawn Scalise, M.L.'s grandmother, testified she had daily contact with M.L. during the spring and summer of 2001. Ms. Scalise testified Ms. Holloway returned M.L. to her after returning from the Grogan home. She testified M.L. was "rather quiet," "quieter than normal." When asked about M.L.'s capacity to tell the truth, Ms. Scalise testified M.L. was not the type of child who would tell lies, or who was prone to exaggerate events.

Ronald Bowyer, M.L.'s stepfather, Ms. Holloway's brother, and Mr. Grogan's stepson, testified by video deposition. Mr. Bowyer testified M.L. would make up stories, and at times, he would have to help her understand the difference between right and wrong.

The court ruled M.L.'s statements to Ms. Holloway admissible after considering the Ryan [State v. Ryan, 103 Wn.2d 165 (1984)] factors and the elements of the child hearsay statute, RCW 9A.44.120. The trial court made specific findings on each Ryan factor that are detailed in our analysis below. Regarding corroboration for unavailable witnesses as required by RCW 9A.44.120, the court found sufficient: Mr. Grogan's statements to the detectives; evidence from the State regarding Mr. Grogan's prior bad acts, and Ms. Scalise's testimony that she noticed a change in M.L.

The jury heard the CrR 3.5-hearing evidence and the child-hearsay hearing evidence. Ms. Scalise testified during her life, M.L. referred to Mr. Grogan as

both “Pop-po” and “Pop-pa.” Mr. Bowyer testified that after M.L.'s funeral, Mr. Grogan told him, “I touched [M.L.] inappropriately.”

Mr. Grogan did not call witnesses. The jury found Mr. Grogan guilty as charged. The court sentenced Mr. Grogan to life in prison without the possibility of early release as a persistent offender. He appealed.

ISSUES AND RULINGS: 1) Grogan came voluntarily to the police station to take a polygraph. After the exam, the polygrapher told Grogan that the polygrapher thought Mr. Grogan was being deceptive. Detectives contacted Grogan and asked permission to question him. They told him that he was free to leave whenever he chose. They provided him with coffee and provided a bathroom break. As soon as he asked to leave, they allowed him to go. Was Grogan in custody for purposes of Miranda? (ANSWER: No);

2) Considering the child’s lack of motive to lie, the child’s general character of truthfulness, and other relevant circumstances, was the child’s out of court accusatory hearsay statement reliable under RCW 9A.44.120 and therefore admissible? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court first degree child molestation conviction of Clifford J. Grogan.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No Miranda custody

“A defendant is in custody for purposes of Miranda when his or her freedom of action is curtailed to a ‘degree associated with formal arrest.’ “ . . . [T]he reviewing court applies an objective test to determine the ultimate inquiry: whether there was a formal arrest or restraint of the defendant to a degree consistent with formal arrest.”

First, addressing lack of written findings on the CrR 3.5 hearing, the trial court orally found:

> [Mr. Grogan] came in voluntarily; he wasn't forced or compelled to come into the Public Safety Building; he was not placed under formal arrest. We know that because he was free-he-he left with his wife after the-the interview was concluded. He was told that he could leave at any time; he acknowledged that he was told he could leave at any time. He was given coffee. He asked to use the restroom and was allowed to use the restroom.

Mr. Grogan does not raise any coercion issues.

Mr. Grogan testified he voluntarily came in for the polygraph examination, was not handcuffed or arrested, and was allowed to leave that day. Mr. Grogan concedes the detectives told him he was free to leave at any time. Although Mr. Grogan testified otherwise, Detective Hollenbeck testified Mr. Grogan first asked to leave at 4:45 p.m., and was allowed to leave immediately. Other detectives agreed with Detective Hollenbeck. Detective Minde Connelly testified without

contradiction that Mr. Grogan was allowed to use the restroom and was given coffee.

Second, the trial court properly concluded Mr. Grogan was not in custody. The facts do not show "a formal arrest or restraint of the defendant to a degree consistent with a formal arrest."

The polygraph examination took a little over an hour, and then during a short break, Mr. Grogan was walked to another office and interviewed in a non-coercive atmosphere. Mr. Grogan sat alone while Mrs. Grogan was interviewed. A detective asked Mr. Grogan if he wanted to wait for Mrs. Grogan or leave the building, but he chose to stay. Mr. Grogan was not aware his vehicle was seized until he departed. No door key or police escort was needed to leave the interview area, ordinary, unlocked interview rooms. Given all, a reasonable person would have felt free to leave. Even though Mr. Grogan responded to police interrogation, he was not in custody. Thus, no Miranda warnings were required.

2) Reliable child hearsay

RCW 9A.44.120 allows admission of certain hearsay statements made by a child. The statute partly provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another . . . is admissible in evidence in ... criminal proceedings . . . in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

. . .

"Admissibility under [RCW 9A.44.120] does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable." Therefore, the critical question is whether sufficient reliability existed to admit M.L.'s statements under RCW 9A.44.120.

. . .

We apply the Ryan factors to determine if a child's hearsay statements should be deemed reliable:

> "(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness [;]" . . . [(6)] the statement contains no express assertion about past fact [;] [(7)] cross examination could not show the declarant's lack of knowledge [;] [(8)] the possibility of the declarant's faulty recollection is remote [;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement."

State v. Borboa, 155 Wn.2d 120 (2006) (quoting State v. Ryan, 103 Wn.2d 165 (1984)). Not all of the factors must be satisfied for admissibility, but the factors must be "substantially met."

The trial court orally considered each Ryan factor: (1) "I heard testimony that [M.L.] got along very well [with Mr. Grogan] . . . I don't see that there was any sort of motive to lie"; (2) "Ms. Scalise said [M.L.] was a truthful and honest child . . . she was generally a truthful child"; (3) solely Ms. Holloway heard the statement; (4) the first statement by M.L. was spontaneous, and although M.L.'s pointing was done in response to a question, "the statements came fairly quickly and were not prompted by anyone or anything"; (5) "[t]his was Ms. Holloway, who apparently was assuming some sort of a caretaking function for [M.L.] . . . apparently, [M.L.] felt comfortable enough for Ms. Holloway to assist her with her bath and comfortable enough to make this type of disclosure"; (6) discussed, but no finding made; (7) "if [M.L.] took the stand, it would be just like any other situation where . . . you might get some details; you may not get some details"; (8) "[i]t was a spontaneous situation. [M.L.] . . . felt comfortable enough to disclose that information to someone"; and (9) when Ms. Holloway asked her who touched her, [M.L.] "pointed directly in the direction of [Mr. Grogan]."

The trial court applied the correct criteria and gave tenable reasons and grounds to conclude that M.L.'s statements were reliable. While factors (3), (6), and (7) did not indicate reliability, the factors were "substantially met." Accordingly, the trial court did not abuse its discretion in finding M.L.'s statements admissible under RCW 9A.44.120.

FISH AND WILDLIFE OFFICER'S CONSENT REQUEST WHILE IN SUSPECT'S DRIVEWAY ASKING TO SEE COW ELK CARCASSES DID NOT NEED FERRIER WARNINGS

State v. Overholt, __ Wn. App. __, 193 P.3d 1100 (Div. III, 2008)

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

> [A Fish and Wildlife Officer] investigating a report of unlawful hunting, found two fresh cow elk gut piles in the Cougar Canyon area of Columbia County. It was not hunting season for cow elk. He found a cigarette with brown stripes and the word BRONCO inscribed on it. There were ATV and trailer tire tracks near the gut piles, and another set of vehicle tire tracks nearby. [The officer] followed the tracks 2.5 miles to Mr. Overholt's home on Cougar Canyon Road. The officer

parked in the driveway and started walking toward the front of the house. He observed fresh blood spots on the floor of the carport.

Mr. Overholt approached the officer in the driveway. He was smoking a BRONCO cigarette. The officer explained about the elk guts, the matching BRONCO cigarette he had found in the field, the fact that the tracks went from the field to Mr. Overholt's house, and the fresh blood in the carport. Mr. Overholt's hand began shaking. After a period of quiet, he asked the officer if he was "going to write him a ticket." The officer responded that he first needed to check the two cow elk. Mr. Overholt led the officer to a nearby shed and opened the door. Two cow elk were hanging inside.

Ten weeks later the four counts of second degree unlawful hunting of big game were filed. In addition to being a closed season, Mr. Overholt did not have a license to hunt elk. He moved to suppress, arguing that the officer needed to give him Ferrier warnings before "searching" the shed. [See State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02 (requiring in knock-and-talk consent search case that home occupant be advised of 1) right to refuse consent, 2) right to restrict scope of search, and 3) right to retract consent at any time**)].

The trial court found that the officer had probable cause to believe the crime of unlawful big game hunting had occurred and was lawfully on the premise. The court also found that the officer was not coercive and that Mr. Overholt voluntarily led the officer to the shed. The court concluded that Ferrier warnings were not required and the display of the elk carcasses was voluntary. After the motion was denied, the trial court convicted the defendant on stipulated facts.

Mr. Overholt appealed to the Columbia County Superior Court. The superior court concluded that the district court had properly found the facts and applied the correct law. Accordingly, it affirmed the convictions. This court subsequently granted review to determine the application of Ferrier to this fact pattern.

ISSUE AND RULING: In State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**, the Washington Supreme Court held that in a knock-and-talk residential consent search request, officers seeking consent to search must give warnings of the rights to refuse, to restrict scope, and to retract at any time. When requesting, while talking to the suspect in his driveway, consent to see the cow elk, was the WDFW officer required to give Ferrier warnings? (ANSWER: No)

Result: Affirmance of Columbia County Superior Court convictions of Allen N. Overholt for second degree unlawful hunting of big game (four counts).

ANALYSIS: (Excerpted from Court of Appeals opinion)

In Ferrier, officers acting on a tip that marijuana was being grown in a residence, arrived in force to seek a "voluntary" consent to search a woman's house. The officers did not tell the woman that she had the ability to refuse consent. After being invited into the home, the officers asked for consent to search the residence. A detective explained that this "knock and talk" procedure was used in order to avoid seeking a search warrant. The Washington Supreme Court reversed the conviction, ruling that because the woman had a heightened right of privacy in her home under article I, § 7 of our constitution, officers could not enter

a home to seek voluntary consent to search the dwelling without first informing her, [among other things], that she did not need to consent. The court's analysis repeatedly emphasized the heightened protection given the home under our constitution.

Our appellate courts since have considered the application of Ferrier to varying fact patterns. The Washington Supreme Court has several times considered whether Ferrier governed in cases where officers went to residences for different purposes than gaining entry with intent to obtain consent to search in lieu of obtaining a warrant. In each instance, the court has found that the different purpose in going to the residence took the case outside of the need for Ferrier warnings. *See* State v. Khounvichai, 149 Wn.2d 557 (2003) **Aug 03 LED:06** (Ferrier warnings not required where police request entry to a home merely to question or gain information regarding an investigation); State v. Williams, 142 Wn.2d 17 (2000) **Dec 00 LED:14** (Ferrier warnings not required where police request consent to enter a home to arrest a visitor under a valid warrant); State v. Bustamante-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02** (Ferrier warnings not required when police and INS agent gained consensual entry to defendant's home to serve a presumptively valid deportation order). The Court of Appeals likewise has addressed and resolved Ferrier issues by focusing on the purpose for which the officers entered a residence. E.g., State v. Dodson, 110 Wn. App. 112 (Div. III, 2002) **May 02 LED:15** (Ferrier not applicable to officers looking on rural property for other man suspected in vehicle theft), State v. Johnson, 104 Wn. App. 489 (Div. II, 2001) **May 01 LED:05** (Ferrier warnings not necessary when officers went to house with probable cause to arrest suspect); State v. Leupp, 96 Wn. App. 324 (1999) **Oct 99 LED:05** (Ferrier warnings not applicable when police officers arrived at a residence in response to a 911 call).

On other occasions, the courts have considered the application of Ferrier to locations other than a residence [*Court's footnote: This court treated a motel room as the equivalent of a house for Ferrier purposes in State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001)* ***Nov 01 LED:06***] and concluded that Ferrier warnings are not required other than in the situation of the heightened scrutiny applied to the home. E.g., State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) **July 04 LED:13** (Ferrier warnings do not apply to search of purse).

We do not decide whether the shed on the property is entitled to the same protections the Ferrier court emphasized belong to the home. Instead, as in the other cases where the Washington Supreme Court has not found Ferrier applicable, we focus here on the intent of the officer. He was in fresh pursuit of criminal activity, investigating an offense within his authority. He did not enter the property with the intent of obtaining consent to search in order to evade a search warrant. Unlike Ferrier, the officer did not even enter into the home or any other building on the property prior to seeking consent to search. Indeed, the officer never even asked for consent to search the property-he simply expressed his interest in seeing the cow elk. This was a far cry from the Ferrier situation.

There simply was no deception about the officer's intention. He followed the trail to the house and asked to see the cow elk. The Ferrier court's concern about police entering the property before expressing their true purpose - - obtaining consent to search - - is not at issue here. Of the Washington Supreme Court cases considering Ferrier, this case is most like Khounvichai. There, officers

> went to a home and explained that they had come in order to question an occupant about possible involvement in a crime. They were permitted entry and eventually spoke to their suspect; in the course of doing so they saw evidence of another crime that implicated another person in the house. Our court declined to extend the Ferrier warning requirement to this situation, emphasizing that Ferrier was intended to protect houses against searches, not serve as a threshold requirement for all police-suspect meetings. Similarly here, [the officer] candidly told Mr. Overholt why he was there and why he suspected Mr. Overholt's involvement in the offense. There was no attempt to mislead Mr. Overholt about what was going on.
>
> The facts of this case are far different from Ferrier and there was no need to convey the consent warnings of that case in the midst of investigating the game offenses. Accordingly, the trial court correctly denied the motion to suppress.

[Some citations omitted]

LED EDITORIAL COMMENTS:

1) Voluntariness of consent must be proved

The Court of Appeals does not provide an explicit description of what the WDFW officer said to the suspect. When an officer tells a suspect that the officer "needs to see" something, the suspect's cooperation thereafter may be deemed by some courts (perhaps the Washington Supreme Court if it grants review in this case) to have not been voluntary. It would be legally safer for an officer to follow up such a statement of "need to see" with an inquiry along the lines of "Do you want to show me?"

2) Officers should assume that an outbuilding has the same protection against warrantless intrusion under Ferrier as does a residence or areas of a business not open to the public

The Overholt Court expressly declines to address whether Ferrier's knock-and-talk, consent-request requirement applies to outbuildings on residential property. We think that officers should assume that it does.

WARRANTLESS EMERGENCY HOME SEARCH TO LOOK FOR CHILD SEX VICTIM OK, AS WAS PROTECTIVE SWEEP, BUT FOLLOW-UP WARRANTLESS ENTRY AND PRE-WARRANT WALK-THROUGH NOT OK; ALSO, DETECTIVE'S POST-MIRANDA-INVOCATION STATEMENT TO SUSPECT 1) TELLING SUSPECT THAT OFFICER WOULD BE SEEKING A SEARCH WARRANT AND 2) STATING AGE OF VICTIM WERE NOT "INTERROGATION," SO INCRIMINATING RESPONSE WAS VOLUNTEERED

State v. Sadler, __ Wn. App. __, 193 P.3d 1108 (Div. I, 2008)

Facts and Proceedings below:

Clark County Sheriff's Office informed Pierce County Sheriff's Office that an internet investigation provided reason to believe that a 14-year-old girl posing as a 19-year-old was possibly engaged in sadomasochistic sex with Sadler, a Pierce County man in his 40s. When Sadler answered the knock at his door by a PCSO deputy and a Fircrest police officer, Sadler was sweating profusely, and he looked surprised. When the officers asked about the girl, he

said she was asleep. He then turned and started up the inside stairs calling the girl's name. Without requesting consent, the officers followed him upstairs to a bedroom.

After the officers had found the girl partly undressed and under other suspicious circumstances that corroborated the earlier report regarding sexual activity, they arrested Sadler. One of the officers then did a "protective sweep" of other areas of the house where a person might be hiding.

After the officers then secured the house from the outside, a PCSO detective arrived. In order to get a first-hand view of the layout of the house so that his search warrant affidavit would be more accurate, the detective had one of the initially responding officers take him through the house on the path the officer had followed in the initial entry and search for the girl.

Earlier, one of the originally responding officers had advised Sadler of his Miranda rights after arresting him. After waiving his rights and answering several questions, including stating that the girl had told him she was 19, Sadler asked for an attorney. The officer stopped questioning Sadler at that point. After the detective arrived, he was told that Sadler had invoked his right to an attorney. The detective then contacted Sadler and told him: 1) that the detective would be applying for a search warrant, and 2) that the girl was a 14-year-old runaway. Sadler stated again that the girl had told him she was 19, the detective reminded Sadler that he had asked for an attorney, and Sadler repeated that the girl had told him she was 19.

The officers obtained a search warrant for the house, executed it, and obtained evidence against Sadler.

The State charged Sadler with 38 felonies, including 8 counts of sexual exploitation of a minor. Sadler moved to suppress testimony from the officers regarding their observations in the two warrantless entries of his house, as well as evidence seized under the search warrant that was issued on the basis of those observations. He also moved to suppress statements that he made to the detective after he invoked his Miranda right to an attorney. The trial court denied his suppression motions. A jury convicted him of 8 counts of sexual exploitation of a minor.

ISSUES AND RULINGS: 1) Clark County Sheriff's Office informed Pierce County Sheriff's Office that an internet investigation provided reasons to believe that a 14-year-old girl posing as a 19-year-old was possibly engaged in sadomasochistic sex with Sadler, a Pierce County man in his 40s. When Sadler answered the knock at his door by officers from Pierce County, Sadler was sweating profusely, and he looked surprised. When officers asked about the girl, he said she was asleep. He then started upstairs calling her name. Did the officers have justification to enter the house at that point and follow Sadler up the inside stairs to the bedroom where the girl was located? (ANSWER: Yes, the emergency exception to the constitutional search warrant requirement justified the entry and search for the girl);

2) After the officers placed Sadler under arrest just outside the bedroom where they had found the girl under suspicious circumstances that corroborated the earlier report, one of the officers did a cursory visual inspection, a "protective sweep" of other areas of the house where a person might be hiding. Was this "protective sweep" justified under the circumstances? (ANSWER: Yes);

3) After the officers had secured the house from the outside, a PCSO detective arrived. In order to get a first-hand determination of the layout of the house, so that his search warrant affidavit would be more accurate, the detective had one of the initially responding officers take him

quickly through the house on the path following the initial entry and search for the girl. Was this second nonconsenting entry lawful? (ANSWER: No, because there no longer existed any emergency);

4) One of the originally responding officers advised Sadler of his Miranda rights after arresting him. After waiving his rights and answering several questions, including stating that the girl had told him she was 19, Sadler asked for an attorney. The officer stopped questioning Sadler at that point, but after the detective arrived, the detective, knowing that Sadler had invoked, contacted Sadler and told him: 1) that the detective would be applying for a search warrant, and 2) that the girl was a 14-year-old runaway. Sadler stated again that the girl had told him she was 19, the detective reminded Sadler that he had asked for an attorney, and Sadler repeated that the girl had told him she was 19. Were the detective's statements about his plan to seek a warrant and about the girl's age "interrogation" in violation of Miranda? (ANSWER: No, Sadler's statements were volunteered statements)

Result: Reversal (in part based on grounds not addressed in this LED entry) of Pierce County Superior Court convictions of Stanley Scott Sadler for eight counts of sexual exploitation of a minor.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Initial emergency entry

> The emergency exception to the warrant requirement applies when: (1) an officer subjectively believes someone is in need of assistance for health or safety reasons, (2) a reasonable person in the same situation would believe there was a need for assistance, and (3) there is a reasonable basis to associate the place searched with a need for assistance. State v. Gocken, 71 Wn. App. 267 (Div. I, 1993) **March 94 LED:12**. This exception recognizes the community caretaking function of police officers and exists so police can aid citizens and protect property. State v. Menz, 75 Wn. App. 351 (Div. II, 1994) **Feb 95 LED:17**. "When invoking the emergency exception, the State must show that the claimed emergency is not merely a pretext for conducting an evidentiary search." State v. Leffler, 142 Wn. App. 175 (Div. II, 2007) **April 08 LED:25** (citing State v. Schlieker, 115 Wn. App. 264 (Div. II, 2003) **May 03 LED:12**).
>
> Here, when the officers entered Sadler's house, they knew the following facts: (1) a 14-year-old girl had "disappeared" from her foster home in another county, (2) she had been missing for some time, (3) she was suspected to be involved in sadomasochistic sex, (4) she was inside the home of a significantly older man, (5) the man took some time to come to the door when [an officer] knocked and rang the doorbell, and (6) the man was sweating profusely and looked surprised when he finally opened the door. And the officers' testimony supports their subjective belief that K.T. was in a potentially dangerous situation that put her health or safety at risk. Furthermore, nothing in the record shows that at the time they entered, the officers had any purpose other than locating K.T. to ensure her safety.
>
> Additionally, given the risk that K.T., a minor, was involved in a sadomasochistic relationship (a relationship that necessarily implies the infliction of pain on at

least one of the parties as well as sexual activity) with an older man, a reasonable person would believe that this circumstance justified immediate entry into Sadler's home to find K.T. and determine that she was not in distress or in need of assistance. A reasonable person could also easily conclude that leaving such a child alone in the presence of someone who may have been engaging in sadomasochistic activities with her to await a warrant would potentially expose that child to additional risks. Finally, once Sadler told the officers that K.T. was inside, the officers had a reasonable basis for believing she was in the residence. Accordingly, the trial court's findings clearly support entry under the emergency or community caretaking exceptions and the facts support those findings. Thus Sadler does not show that the trial court erred by denying his CrR 3.6 motion based on an unlawful initial entry.

2) Initial protective sweep

Police may conduct a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect. State v. Hopkins, 113 Wn. App. 954 (Div. II, 2002) **Jan 03 LED:06**). The scope of such a sweep is limited to a visual inspection of only those places where a person may be hiding. An officer need not justify his actions in searching the area that immediately adjoins the place of the arrest. But if the sweep extends beyond the immediately adjoining area, the officer must be able to point to articulable facts, which, taken together with rational inferences from those facts, warrant a reasonable belief that the area involved in the protective sweep may harbor an individual who poses a danger to those on the scene. A general desire to make sure that there are no other individuals present is not sufficient to justify an extended protective sweep.

Here, (1) the officers took Sadler into custody just outside the upstairs bedroom where they found K.T.; (2) [one of the deputies] searched the adjoining rooms and did a cursory search of the floor below, where he detained Sadler for a short time; and (3) nothing in the record suggests that [the deputy's] search went beyond a cursory visual inspection of only those places where someone could be hiding. Thus, the trial court did not err when it found that [the] security sweep was lawful.

3) Second warrantless entry to check layout

We agree with the trial court that the officers' initial entry and subsequent security sweep were lawful, but we do not agree that [the detective's] later entry into Sadler's residence was lawful. First, [the detective] entered Sadler's residence without permission. Second, there was no longer an emergency because the officers had removed K.T. from the residence and secured the residence. Having ensured K.T.'s safety, the officers could have easily awaited a search warrant based on [the officers' earlier] observations (and potentially any statements from K.T.) before they reentered the residence. And, finally, [the detective's] sole purpose for entering the residence was to gather information to use in the search warrant affidavit, in other words, to investigate a possible crime; the fact that he merely retraced the other officers' steps was irrelevant to whether his warrantless entry was lawful. Thus, the trial court's finding that the second entry was proper is incorrect and any information in the search warrant affidavit based on this entry should be struck.

> Although the independent source doctrine would likely help resolve this issue, the record does not establish what sources [the detective] relied on for each allegation in his search warrant affidavit. In fact, the record does not contain the search warrant or the supporting affidavit and, at the suppression hearing, [the detective] did not specify what information came from which source. Furthermore, because the trial court found [the detective's] entry was proper, Sadler had no reason to challenge the sufficiency of the search warrant affidavit on this basis at that time.
>
> Accordingly, on remand, the trial court should give Sadler the opportunity to challenge the search warrant affidavit, and the trial court should determine whether the officers would have sought the search warrant without the information [the detective] gathered and whether the independent information supports the search warrant. See Murray v. United States, 487 U.S. 533 (1988) (trial court must conduct separate factual inquiry into the effect of illegally obtained information upon the officer's decision to seek the warrant); State v. Gaines, 154 Wn.2d 711 (2005) **Oct 05 LED:04**; see also State v. Spring, 128 Wn. App. 398 (Div. I, 2005) **June 05 LED:16**.

4) "Interrogation" vs. volunteered statement

> Here, [the detective] merely advised Sadler that he intended to apply for a search warrant. He did not ask Sadler any questions, let alone any specific questions about his contact with K.T. or what K.T. had told him about her age. Merely telling a suspect about the status of the investigation is not reasonably likely to elicit a response. Furthermore, Sadler's statement that K.T. had told him she was 19 is not related to the information [the detective] gave Sadler at that time. These facts are sufficient to support the trial court's conclusion that Sadler's statement to [the detective] was spontaneous and voluntary.

[Some citations omitted; subheadings inserted]

LED EDITORIAL COMMENT ON MIRANDA ISSUE: We think it was a close question in this case whether the detective's statement to the suspect about the girl's age was a form of interrogation. Compare the Miranda ruling in this case to Miranda ruling in the case of State v. Wilson, 144 Wn. App. 166 (Div. III, 2008) September 08 LED:18, where the Court of Appeals ruled that a "death notification" to an in-custody murder suspect shortly after she had invoked her right to counsel was impermissible post-invocation "interrogation."

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) NO ATTORNEY FEE AWARD IN DRUG FORFEITURE CASE – FAMILY OF DECEASED WAS NOT "PREVAILING PARTY" WHERE FAMILY WON AS TO CAR AND $9342 IN CASH, BUT LOST AS TO ANOTHER $57,990 IN CASH – In Guillen v. Contreras, __ Wn. App. __, 195 P.3d 90 (Div. III, 2008), the Court of Appeals rules 2-1 that, under the controlled substances forfeiture statute, RCW 69.50.505(6), because claimants in a forfeiture

action won as to far less than half of all assets at issue, they were not the "prevailing party" and therefore were not entitled to an award of attorney fees.

The facts and proceedings below in this case are summarized by the Court of Appeals as follows:

> The relevant facts relate largely to procedural matters and are not disputed. In the course of investigating a drug-related shooting on June 28, 2005, the Sunnyside Police Department seized $9,342 in cash found on deceased Jesus Jaime Torres's person, $57,990 in cash found in a package on a loveseat in the living room where the drug transaction occurred, and a 1997 BMW automobile that Mr. Torres drove to the transaction scene. Mr. Torres's family filed a claim with the department for the return of the property. See RCW 69.50.505(5). The municipal court decided that the vehicle and all of the money would be forfeited to the department.
>
> The family filed an appeal with the Yakima County Superior Court. The family advanced four theories for the return of three articles of property. The primary theory was that the innocent owner defense applied to all property seized. Second, the family asserted that the department had not met its burden of proof that the $9,342 was forfeitable under RCW 69.50.505. The third theory was that seizure and forfeiture of the $57,990 was the result of an unlawful search. Lastly, the family contended that forfeiture of the $57,990 was flawed due to lack of proper notice or due process.
>
> The superior court held in favor of the family on two issues: (1) the department did not meet its burden of proof as to the $9,342 and (2) the family was an innocent owner of the BMW. It therefore ordered the return of the $9,342 and the 1997 BMW automobile to the family. The superior court held that the family failed in their claim for the $57,990 because any right to the cash had been relinquished to another prior to death. The superior court reserved the issue of attorney fees for further briefing.
>
> The family submitted a demand for attorney fees under RCW 69.50.505(6). The department expressly indicated that it had no objection to the amount of attorney fees. Counsel argued that the recovery of the car and the $9,342 in cash constituted relief on a significant issue. In denying attorney fees, the court struggled with the meaning of the statute's language that permits the recovery of attorney fees "where the claimant substantially prevails." RCW 69.50.505(6). The court ruled: "I'm looking at the totality of the circumstances, the overall picture, and saying that <u>you haven't shown that he's substantially prevailed, whatever that means</u>." (Emphasis added.) Reconsideration was also denied.

This **<u>LED</u>** entry will not excerpt from or attempt to summarize the statutory construction analysis in the majority opinion (authored by Judge Korsmo, joined by Judge Kulick) or in the dissent (authored by Judge Schultheis).

<u>Result</u>: Affirmance of Yakima County Superior Court's denial of an attorney fee award to the family of Jesus Jaime Torres.

LED EDITORIAL COMMENT: Both the majority and dissenting opinions make valid points, and it would not be surprising to see the Washington Supreme Court grant review in this case.

(2) COUNTY GOVERNMENT IS CIVILLY LIABLE FOR WORKPLACE DISCRIMINATION BY ITS ELECTED PROSECUTOR – In Broyles v. Thurston County, __ Wn. App. __, 195 P.3d 985 (Div. II, 2008), the Court of Appeals rejects an argument by Thurston County that it should not be held liable for acts of workplace discrimination by its elected prosecutor, but instead that the prosecutor's office should be held civilly liable separate and apart from the rest of county government for such civilly actionable conduct. The Broyles Court holds that a county is a single unit of government for litigation and liability purposes.

Result: Affirmance of Mason County Superior Court judgment on jury verdict holding Thurston County liable based on hostile work environment and retaliation claims.

(3) CAR SEARCH HELD NOT LAWFULLY INCIDENT TO ARREST BECAUSE RECORD FROM SUPPRESSION HEARING FAILED TO SHOW HOW CLOSE DEFENDANT WAS TO CAR AT TIME OF ARREST – In State v. Webb, __ Wn. App. __, 195 P.3d 550 (Div. I, 2008), the Court of Appeals rules that where neither the evidence in the record nor the findings of fact by the superior court show how far defendant was from his car at the time he was placed under arrest, the search cannot be held to have been a lawful search incident to arrest.

Defendant was stopped on suspicion of DUI on a four-lane street. He parked his car in the right lane. An officer administered field sobriety tests to Webb in the nearby driveway of a bank parking lot. Webb failed the tests and was arrested. At a later suppression hearing, no evidence was presented to establish how far Webb was from his car when he was arrested. The trial court upheld a search of Webb's car incident to the arrest, but the Court of Appeals reverses.

The Court of Appeals discusses numerous Washington appellate court decisions on car searches incident to arrest, most of which focus on proximity and access of the arrestee to the car at the time of the arrest, and a few of which do not. The Webb Court notes that most Washington cases require that the arrestee have been in close physical proximity to a vehicle at the time of arrest. Among the cases that the Webb Court cites are those in a footnote that reads in part as follows:

> State v. Adams, 146 Wn. App. 595 (Div. I, 2008) **Nov 08 LED:11** (holding vehicle search valid where suspect locked vehicle in presence of investigating officers and was four to five feet from his car when arrested); State v. Quinlivan, 142 Wn. App. 960 (Div. III, 2008) **March 08 LED:11** (holding vehicle search invalid where suspect had no access to passenger compartment at time of arrest because vehicle was locked); State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) **Jan 05 LED:08** (holding vehicle search invalid where suspect arrested 40 feet from vehicle after fleeing and vehicle unrelated to arrest); State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) **Oct 01 LED:18** (holding vehicle search invalid where facts did not prove suspect was arrested near vehicle or that he had "immediate control" or "ready access" to passenger compartment); State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) **March 01 LED:04** (holding vehicle search invalid where suspect was not arrested near the vehicle); State v. Porter, 102 Wn. App. 327 (Div. II, 2000) **Nov 00 LED:05** (holding vehicle search invalid where passenger compartment not within arrestee's immediate control); State v. Perea,

85 Wn. App. 339 (Div. II, 1997) **June 97 LED:02** (holding vehicle search invalid where suspect arrested nearby but at time of arrest, car was lawfully parked and locked); State v. Fore, 56 Wn. App. 339 (Div. I, 1989) (construing Stroud to require both physical and temporal proximity between arrest and vehicle search) (holding vehicle search valid where arrestees were "sufficiently close" to vehicle and search "essentially contemporaneous" with arrest).

Result: Reversal of King County Superior Court conviction of Chaun Lemueal Webb, aka Chaun Lemueal Wyatt, for five VUCSA counts: possessing cocaine, heroin, oxycodone, methadone, and marijuana.

LED EDITORIAL COMMENT: The decision of the Court of Appeals is provides a lesson to both prosecutors and officers. Prosecutors need to bring out more specific information from officers in putting on a case to justify a car search incident to arrest. At suppression hearings, prosecutors should bring out, among other things, the distance that the defendant was from the vehicle at the point when he was arrested.

The decision supports the following generality that law enforcement officers should keep in mind: While safety should be the first consideration in the decision where at the scene to make the custodial arrest, the further the person is from the vehicle at the time of arrest, even if the person was initially seized while inside the vehicle, the more likely it is that the courts will hold against application of the bright-line rule for searching that person's vehicle incident to the arrest. Also, officers will want to include in their reports at least estimates of the relevant distance in feet from the point of arrest and the vehicle.

Finally, we admit some surprise that in Webb Division One of the Court of Appeals did not discuss a Division Two Court of Appeals decision that seems to us to be similar to this case. In State v. Turner, 114 Wn. App. 653 (Div. II, 2002) March 03 LED:15, Division Two addressed a car search in light of testimony and findings of fact that defendant was observed, just before arrest, to be "near" the open swing of the driver-side door of his parked car while urinating at the edge of the roadway. Division Two held that the word "near" was not precise enough language for the Court to determine if circumstances met the physical proximity requirement of the search incident rule.

(4) 2-1 MAJORITY RULES THAT SUBJECTIVE INTENT OF OFFICERS AT THE TIME THAT THEY UNLAWFULLY SEARCHED CAR'S TRUNK PRECLUDES APPLICATION OF "INDEPENDENT SOURCE" EXCEPTION TO THE EXCLUSIONARY RULE – In State v. Perez, __ Wn. App. __, 193 P.3d 1131 (Div. II, 2008), a 2-1 majority of the Court of Appeals rules that because the prosecutor stipulated the officers had no intent to seek a warrant before they conducted an unlawful warrantless search of the defendant's car trunk, the "independent source" rule cannot be applied to make the evidence found in the trunk admissible based on a subsequently obtained search warrant.

Judge Quinn-Brintnall dissents, asserting, as she did in the earlier unpublished opinion in this case, that the majority judges are improperly using a subjective test. She argues that the "independent source" rule is objective – looking at the search warrant affidavit's description of evidence lawfully obtained and excluding from probable cause consideration the description of evidence unlawfully obtained.

Result: Reversal of Jefferson County Superior Court conviction of Adrian Perez, Sr., for manufacturing methamphetamine.

(5) JUVENILE COURT ADJUDICATION AS CLASS A FELONY SEX OFFENDER PERMANENTLY PRECLUDES RESTORATION OF FIREARMS RIGHTS – In State v. Hunter, __ Wn. App. __, __ P.3d __, 2008 WL 4615910 (Div. I, 2008), the Court of Appeals rejects a variety of arguments by an adult - - who at age 13 was adjudicated guilty of a class A felony sex offense - - seeking restoration of his firearms rights.

The Court first rejects the petitioner's argument against application of the plain language of subsection (4) of RCW 9.41.040 that bars a person convicted of a class A felony sex crime (or certain other specified crimes) in adult or juvenile court from ever seeking restoration of firearms rights under that subsection. The Court then rejects the petitioner's alternative arguments that: (1) the juvenile court judge at the time of sentencing had ruled that his rights could be restored at some point; (2) a later court order, in relation to his age-13 adjudication, relieving him from responsibility to register as a sex offender also constituted a "certificate of rehabilitation" restoring his firearms rights (among other things, the Hunter Court points out that Washington case law holds that Washington courts have no authority to issue "certificates of rehabilitation, and none was issued here - - see Graham v. State, 116 Wn. App. 185 (Div. II, 2003) **May 05 LED:15**)); and (3) the statute's lifetime prohibition on restoration of firearms rights for certain classes of felons, at least as applied to juvenile adjudications, violates the State or federal constitution's guarantee of the right to bear arms.

Result: Affirmance of King County Superior Court's denial of restoration of firearms rights to Ryan Patrick Hunter.

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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 website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 1997 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. 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. “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 Washington State Criminal Justice Training Commission's Law Enforcement Digest 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. **LED**s from January 1992 forward are available via a link on the Criminal Justice Training Commission’s Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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