Law Enforcement Digest

JANUARY 2010

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

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652nd Basic Law Enforcement Academy – August 4, 2009 through December 11, 2009

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Tac Officer:	Officer Mark Best – Tacoma Police Department

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

(1) CIVIL RIGHTS ACT LAWSUIT: OFFICER HELD QUALIFIEDLY IMMUNE IN TAKING OF POSSIBLY ENDANGERED CHILD INTO PROTECTIVE CUSTODY WITHOUT COURT ORDER OR PARENTAL NOTICE; HOWEVER, ACTION AGAINST AGENCY MUST GO TO TRIAL ON FAILURE-TO-TRAIN THEORY, IN PART BASED ON FAILURE OF OFFICER TO NOTIFY LOCAL NON-CUSTODIAL (BUT LOCAL AND ACTIVELY INVOLVED) PARENT – In Burke v. County of Alameda, ___ F.3d ___, 2009 WL 3739333 (9th Cir. 2009) (decision filed November 10, 2009), the Ninth Circuit rules that a law enforcement officer (Officer Foster of the Alameda County Sheriff's Office in California) is entitled to qualified immunity for taking a possibly endangered child into custody without a warrant. The Ninth Circuit concludes that it was reasonable for the officer not to know at the time of his actions that he should have contacted the local, non-custodial parent (who had an active roll in the child's life) before placing the child in protective custody.

But the Ninth Circuit sends the case back to U.S. District Court for a trial on whether the County of Alameda should be held liable for failure to adequately train the officer on the parental notice requirements for a warrantless placement of a possibly endangered child in protective custody. The Ninth Circuit describes the facts and the lower court procedural circumstances of the case as follows:

> B.F. is the fourteen-year old daughter of Melissa Burke and Clifton Farina. Melissa and Farina are divorced and David Burke is B.F.'s stepfather. Although Melissa and Farina shared joint legal custody of B.F., B.F. lived with the Burkes. Farina, however, called B.F. and saw her frequently.
>
> On June 21, 2005, B.F. ran away from home with Ricardo Maciel, a nineteen-year old male. The Burkes immediately reported her as a runaway to the Alameda County Sheriff's Office ("ACSO"). At some point during the ensuing investigation, the ACSO investigating officers heard "something about Mr. Burke

having sexually molested his daughter." [*Court's footnote: The officers could not recall the specifics of the source of the allegation.*]

On July 3, 2005, approximately two weeks later, B.F. returned home of her own volition. The following week, Officer Mark Foster called the Burkes to schedule an interview with B.F. to discuss the circumstances surrounding the runaway. The Burkes scheduled the appointment for July 12, 2005 at the police station. B.F. was interviewed by a woman, Omparo Azuna, and [Officer] Foster viewed the interview by monitor in another room.

During the first thirty-five minutes of the interview, Azuna talked to B.F. about the circumstances surrounding the runaway. B.F. stated that she left home because her stepfather was unduly strict. When [interviewer] Azuna asked B.F. more specifically about David, approximately halfway through the interview, B.F. disclosed that when she returned home on July 3, David immediately questioned her about Maciel. B.F. said that when she refused to disclose any information, David struck her fifteen times on the face with an open hand. After Melissa arrived, David again struck B.F. on the face and thighs. Melissa asked David to stop, but later commented that B.F. "deserved" the beating. The slaps left red marks.

B.F. further reported that David told her not to tell the police about the blows because "it would cause problems." He also told her that if she did not disclose Maciel's address to the officers, he was going to "beat [her] ass." B.F. stated that David had once "beaten up" her stepsister when she was fourteen and that her stepbrother had contemplated "pressing charges" against David.

B.F. stated that since the day of her return, David had not struck her. When asked if she felt safe, she replied in the affirmative, although she repeatedly expressed anxiety about whether her family would know what was discussed in the interview. B.F. stated that it would "be worse for her" when she arrived home because her parents would view the report as an attempt to blame them for her runaway. She believed that her stepfather would "go off" when she returned.

B.F. went on to report that David made inappropriate comments to her regarding her sexual partners and breasts and frequently called her "big titty mama." B.F. further stated that David pinched her on the buttocks on several occasions and repeatedly grabbed her breasts when he hugged her. The touching began in May 2004 and occurred every couple of days. The last time David had grabbed one of her breasts was approximately one week before she ran away from home. B.F. told her mother about the inappropriate conduct. Although her mother told David to stop, the touching continued.

When asked about Farina, her biological father, B.F. stated that he did not abuse her, but that she felt unwelcome in his home because her stepmother did not want her there.

Forty-five minutes into the interview, [Officer] Foster was informed that David was acting "impatiently" and wanted to go to work. [Officer] Foster refused to stop the interview but told David that he would give B.F. a ride home. Thirty minutes later, Melissa called and asked that [Officer] Foster bring B.F. home. [Officer] Foster

again refused. Eventually, Melissa drove to the station to bring B.F. – who is diabetic – a shot of insulin.

Upon Melissa's arrival, [Officer] Foster asked her to speak with him, and she agreed. During the interview, Melissa confirmed the beating and acknowledged that David engaged in "titty twisters" with B.F. Melissa characterized the "titty twisters" as a playful imitation of wrestling but admitted that the conduct was inappropriate. She confirmed that she had asked them both to stop. She blamed both B.F. and David, but stated that B.F. "started it." Melissa denied any other sexual contact and accused B.F. of lying.

After interviewing Melissa, [Officer] Foster did a follow-up interview with B.F., who confirmed the "titty twisters," but distinguished them from the breast grabbing. The "titty twisters" had only occurred four or five times and were different in kind – when he squeezed her breast he placed his entire hand on her breast and held it there for several seconds. When told that her mother denied the abuse, B.F. stated that she knew her mother would "take David's side."

Following the interviews [Officer] Foster immediately advised the Burkes that he was removing B.F. from their home and placing B.F. in protective custody. He did not seek a protective custody warrant before doing so. He also did not discuss with Melissa alternatives to removal nor did he contact Farina or suggest taking B.F. to Farina's home. Farina found out about the removal two days later.

On July 25, 2006, David, Melissa, and Farina filed suit in the Northern District of California under 42 U.S.C. § 1983, claiming . . . that removing B.F. without a warrant interfered with their constitutional right of familial association. They also included a claim against the County for failure to train its officers on the need to procure protective custody warrants. In late 2007, the parties filed cross-motions for summary judgment. The court granted summary judgment to the defendants and denied plaintiffs' motion.

Result: Affirmance of U.S. District Court (California) grant summary judgment for Officer Foster based on qualified immunity; remand for trial on issue of whether agency is liable for failure to train Officer Foster on the general need to procure a protective custody warrant or notify all parents, including local non-custodial parents.

(2) TRADING DRUGS FOR FIREARMS CONSTITUTES POSSESSING THE FIREARMS "IN FURTHERANCE OF" THE DRUG TRAFFICKING OFFENSE – In U.S. v. Mahan, ___ F.3d ___, 2009 WL 3807100_ (9th Cir. 2009) (decision filed November 16, 2009), a 3-judge panel of the Ninth Circuit rules that trading illegal drugs (here, methamphetamine) for firearms constituted possessing the firearms "in the furtherance of" drug trafficking under federal law.

Section 924(c)(1)(A) establishes minimum penalties for offenders who use firearms to commit drug trafficking offenses. It provides, in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or *who, in furtherance of any such crime, possesses a firearm*, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to a term of imprisonment of not less than 5 years. (Emphasis added).

The Ninth Circuit's analysis in part is as follows:

> [W]hen one accepts a gun in exchange for drugs, the gun is an integral part of the drug sale because without the gun – the "currency" for the purchase – the drug sale would not take place. As the Sixth Circuit observed:
>
> > As a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell does "promote or facilitate" that illegal sale. If the defendant did not accept possession of the gun, and instead insisted on being paid fully in cash for his drugs, some drug sales — and therefore some drug trafficking crimes — would not take place.
> >
> > U.S. v. Frederick, 406 F.3d at 754, 764 (6th Cir. 2005). When a defendant accepts a gun as payment for his drugs, his sale – and thus his crime – is incomplete until he receives possession of the firearm. We fail to see how possession that completes a drug trafficking offense is not possession "in furtherance of" a drug trafficking offense.

Result: Affirmance of U.S. District Court (Oregon) conviction of William John Mahan for, among other things, possessing a firearm "in furtherance of" a drug trafficking offense in violation of 18 U.S.C. section 924(c).

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) HIGH STANDARD SET FOR OVERTURNING ARBITRATOR'S RULING IN DISCIPLINARY MATTER – In Kitsap County Deputy Sheriff's Guild v. LaFrance, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3465930 (2009), the Washington Supreme Court votes 6-3 to reverse a Court of Appeals decision that had reversed an arbitrator's decision that had reinstated a dismissed deputy sheriff. The Supreme Court majority opinion's introduction summarizes the Court's decision as follows:

> Kitsap County (County) fired Deputy Brian LaFrance for 29 documented incidents of misconduct, including untruthfulness. An arbitrator heard the case pursuant to a collective bargaining agreement and determined that the charges against LaFrance were accurate but that termination was not the appropriate penalty. [See 140 Wn. App 516 (Div. II, 2008) **Feb 08 LED:24**] The Court of Appeals overturned the arbitrator's decision as contrary to public policy. The Kitsap County Deputy Sheriff's Guild (Guild) appeals that decision, contending that the Court of Appeals failed to describe the specific public policy violated by the arbitrator's decision. Further, the Guild argues that the arbitrator's decision qualifies LaFrance for back pay.
>
> In order to vacate an arbitrator's decision as contrary to public policy, the public policy must be explicit, well defined, and dominant. We reverse the Court of Appeals because the arbitrator's decision does not violate an explicit, well defined, and dominant public policy. We affirm the trial court's holding that LaFrance is not entitled to back pay because the arbitrator's decision explicitly denied any such pay.

Result: Reversal of Court of Appeals decision that reversed a Kitsap County Supreme Court decision and arbitrator's decision.

Status: Kitsap County moved for reconsideration on November 18, 2009; further briefing is likely, followed by the Supreme Court's action on the motion.

(2) MOTION FOR RECONSIDERATION IS PENDING IN TRIBAL OFFICER FRESH PURSUIT CASE – In the **November 2009 LED**, we reported briefly on the Washington Supreme Court's decision in State v. Eriksen, 166 Wn.2d 953 (2009) upholding a Lummi tribal officer's fresh pursuit and seizure of a non-Indian DUI suspect, and the tribal officer's detaining of the suspect until a Whatcom County Deputy Sheriff arrived to make an arrest.

The defendant in Eriksen has moved the Supreme Court for reconsideration, and the prosecutor has responded. Among other things, the prosecutor's response addresses a point that we did not address in the **November 2009 LED**. In a part of the Eriksen opinion that was not necessary for the Court to reach its result of upholding the pursuit and seizure by the tribal officer, the Court asserted that tribal officers, simply by virtue of their status as officers for the tribe, are "general authority Washington peace officers" under chapter 10.93 RCW. The prosecutor has pointed out to the Supreme Court that there is no support in chapter 10.03 RCW for that passage in the opinion.

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WASHINGTON STATE COURT OF APPEALS

UNDER GANT, CUSTODIAL ARREST OF DRIVER FOR USE OF DRUG PARAPHERNALIA JUSTIFIES SEARCH OF VEHICLE FOR ILLEGAL DRUGS

State v. Snapp, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3720658 (Div. II, 2009)

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

> At approximately 8:00 am on July 22, 2006, [a WSP trooper] observed a blue Ford Escort driving eastbound in the lane next to him. He initially noticed some debris hanging from the rearview mirror. As he got closer to the vehicle, [the trooper] thought that the seat belt was patched together with what appeared to be an aluminum rock-climbing carabiner. As a result, [the trooper] dropped back behind the Escort and pulled the car over.
>
> The driver, later identified as Snapp, pulled into the Silver Dollar Casino parking lot. [The trooper] observed Snapp lean forward, as if hiding something under the seat. [The trooper] called for assistance, then approached Snapp and asked for his driver's license, registration, and proof of insurance. Snapp did not have a license, but he provided his Washington State Department of Corrections inmate identification card. Snapp quickly opened the glove box, grabbed the registration, and immediately closed the glove box. Nevertheless, [the trooper] observed what appeared to be a plastic bag with white powder in the glove box. The trooper, who is a drug recognition expert, also believed Snapp was under the influence of drugs because of his fidgety, restlessness, quick, and jerky movements.

> Based on these observations, [the trooper] asked Snapp to exit the car. After he asked Snapp if he had any weapons, Snapp produced one knife voluntarily and [the trooper] recovered another knife during a pat down. He then conducted a field sobriety test and concluded that Snapp exhibited signs of someone who was under the influence but not to the point where [the trooper] believed an arrest was warranted. [The trooper] asked Snapp if there were any drugs or paraphernalia in the car. Snapp admitted there was a methamphetamine pipe but no methamphetamine. [The trooper] retrieved the pipe from underneath the driver's seat.
>
> Subsequently, [the trooper] advised Snapp of his Miranda rights, arrested Snapp for drug paraphernalia, and placed Snapp in the trooper's patrol car. In addition, a driver's license check revealed that Snapp's license was revoked and he had a no-bail felony warrant. Meanwhile, a second trooper arrived on the scene and removed the passenger from the car.
>
> [The trooper] searched the car incident to Snapp's arrest. During the search, he recovered a clear, plastic, blue accordion file folder with items containing persons' identities. In addition, he found a black compact disc (CD) wallet containing identification cards and credit cards of various other people. Neither the accordion file nor the CD wallet was locked or capable of being locked. The trooper was not looking for weapons, nor was he concerned that either item contained evidence that could be immediately destroyed. But he was searching for drugs. In addition, [the trooper] found three credit cards not belonging to Snapp in Snapp's wallet. Finally, [the trooper] folded down the back seat of the car and observed in the trunk area a large number of items. Snapp stated that the items were not his and that he had borrowed the car from his girlfriend. At that point, [the trooper] stopped his search, had the car impounded, and obtained a search warrant for the items in the rear of the car.
>
> The State charged Snapp with one count of first degree identity theft and twenty-one counts of second degree identity theft. The following July, Snapp filed a motion to suppress evidence, contending that (1) [the trooper] did not have probable cause to stop the car Snapp was driving for obstructed vision or defective equipment, (2) the search of the car was illegal, and (3) it exceeded the legal scope of a search incident to arrest. On October 3, 2007, after a CrR 3.6 hearing, the superior court denied Snapp's motion.
>
> On November 16, 2007, the State filed an amended information, charging Snapp with six counts of second degree identity theft. That same day, Snapp entered a Newton plea, in which he pleaded guilty to all six counts. On Snapp's statement of defendant on plea of guilty, the prosecutor included a handwritten statement stating: "Alford [defendant] can appeal 3.6 motion."

ISSUE AND RULING: Under Arizona v. Gant, where the custodial arrest of Snapp in this case was for use of drug paraphernalia, did the officer have reason to believe he would find evidence of the crime of arrest (i.e., illegal drugs) in the vehicle? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Daniel Gerald Snapp for six counts of second degree identity theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Although Gant applies to this case, it does not warrant suppression of the evidence. In Gant, police officers arrested Gant for driving on a suspended license, handcuffed him, and placed him in the back of a patrol car. Officers then searched his vehicle and found cocaine in a jacket in the back seat. On appeal, the United States Supreme Court reversed, holding that police officers may search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe that the vehicle might contain evidence of the offense of arrest.

Here, although [the trooper] searched Snapp's vehicle after placing Snapp in his patrol car, unlike in Gant, [the trooper] searched Snapp's vehicle for evidence related to the crime for which he arrested Snapp. [The trooper] arrested Snapp for escape; driving while license suspended; and, most relevant to this analysis, drug paraphernalia.

The use of drug paraphernalia is prohibited under RCW 69.50.412. That statute states in relevant part:

> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

RCW 69.50.412(1). RCW 69.50.102 provides a detailed definition of the various types of drug paraphernalia. Subsection (b) of that statute lists a series of factors that may be considered in determining whether an object is drug paraphernalia:

> b) In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:
>
> (1) Statements by an owner or by anyone in control of the object concerning its use;
>
> . . .
>
> (4) The proximity of the object to controlled substances;

As [the trooper] had pulled Snapp over, he observed Snapp lean forward as if hiding something under his seat. [The trooper] suspected that Snapp was under the influence of drugs because of Snapp's fidgety, restless, quick, and jerky movements. When Snapp reached into his glove compartment, [the trooper] noticed a baggie containing a white substance that he suspected was drugs. Snapp admitted that a methamphetamine pipe was in the car, and [the trooper] found one under the driver's seat where Snapp had appeared to hide something. Based on Snapp's movements as if he were hiding something under the driver's seat, Snapp's odd behavior, the location of the methamphetamine pipe, and the plastic baggie containing the white substance, [the trooper] could have reasonably suspected that Snapp had used drug paraphernalia. See State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) **Nov 02 LED:05** (the timing and location of the appellant's car, her physical behavior, and the drug paraphernalia

lying on the passenger seat, raised a reasonable inference that she used the paraphernalia to ingest a controlled substance); State v. Lowrimore, 67 Wn. App. 949 (Div. II, 1992) **March 93 LED:15** (holding that possession of paraphernalia, coupled with bizarre and emotionally unstable behavior gives rise to probable cause to arrest for violation of RCW 69.50.412(1)).

[The trooper] stated at the CrR 3.6 hearing that he searched the car for drugs. As proximity of the object to a controlled substance would help determine whether the pipe was drug paraphernalia, [the trooper] could search Snapp's vehicle for drugs. RCW 69.50.102(b)(4). [The trooper] therefore searched for evidence related to the crime for which he had arrested Snapp. We hold that although Gant applies, [the trooper]'s search falls under the exception laid out in Gant because [the trooper] searched Snapp's vehicle for evidence related to the crime for which he arrested Gant. Gant does not warrant suppression of evidence.

The State urges us to hold that the trooper acted in good faith and that the "good faith" exception to the exclusionary rule should be applied. Because applying Gant does not result in the suppression of any evidence, we do not address whether the good faith exception to the exclusionary rule applies, noting only that this state has not adopted the good faith exception. State v. Kirwin, 165 Wn.2d 818 (2009) **May 09 LED:13** (State of Washington has not adopted the good faith rule for arrests made under an unconstitutional statute); State v. Crawley, 61 Wn. App. 29 (1991) (Washington Supreme Court has not adopted the good faith rule allowing admission of evidence obtained by police acting in good faith upon a defective search warrant).

[Some citations omitted]

LED EDITORIAL COMMENTS: In the final paragraph of the excerpted text above, the Court of Appeals states that the "Washington Supreme Court has not adopted the good faith rule allowing admission of evidence obtained by police acting in good faith upon a defective search warrant." The Court of Appeals would have been a bit more informative if it had said that the Washington Supreme Court has neither adopted nor rejected such a rule under article 1, section 7 of the Washington constitution.

SEARCH OF PERSON INCIDENT TO ARREST HELD LAWFUL UNDER OBJECTIVE STANDARD FOR "CUSTODIAL ARREST"; COURT REJECTS DEFENDANT'S ARGUMENT THAT JAIL WOULD NOT HAVE TAKEN HIM ON DWLS ARREST

State v. Gering, 146 Wn. App. 935 (Div. III, 2008)

LED EDITORIAL INTRODUCTORY NOTE: We inadvertently failed to timely digest this 2008 Court of Appeals decision at the time it was issued. No further review was sought in this case, so the Court of Appeals decision is final.

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

On August 6, 2006 Mr. Gering was driving on Mullan Road between Appleway Boulevard and Sprague Avenue in Spokane Valley, [a] Washington. Spokane County Sheriff's Deputy ran a check on Mr. Gering's license plate. The Department of Licensing records showed that Mr. Gering was the registered owner and that his license was suspended in the third degree. [The deputy] also

> accessed an electronic image of a booking photograph of Mr. Gering from October 2005 in order to verify the identity of the driver.
>
> Mr. Gering parked his car in front of a business and walked inside. [The deputy] followed Mr. Gering inside, tapped him on the shoulder, and asked him to step outside. Once outside, [the deputy] arrested Mr. Gering for driving while license suspended (DWLS) in the third degree. Mr. Gering was handcuffed and searched incident to his arrest.
>
> A clear sandwich bag containing a crystalline substance was found in his front pocket. A field test indicated the presence of methamphetamine. [The deputy] informed Mr. Gering of his constitutional rights, which Mr. Gering indicated he understood and waived. Mr. Gering admitted he obtained the methamphetamine earlier that day.
>
> The State charged Mr. Gering with possession of a controlled substance (methamphetamine). Mr. Gering filed a motion to suppress. He argued that because the Spokane County Jail was on emergency status on the day of his arrest and the deputy knew that Mr. Gering would not have been accepted for booking for a DWLS charge, the deputy did not intend to undertake a custodial arrest. The trial court disagreed. After finding substantially the same facts as set forth above, the trial court concluded that the deputy manifested an objective intent to arrest Mr. Gering when the deputy followed Mr. Gering into the store, touched him on the shoulder, asked him to leave the store, arrested him, and placed him in custody by handcuffing him.
>
> Mr. Gering agreed to a stipulated facts trial. The judge found Mr. Gering guilty of possession of a controlled substance.

ISSUE AND RULING: A law enforcement officer observed Gering driving while his license was suspended (DWLS). Gering parked his vehicle. The officer followed Gering into a store and asked him to step outside. Once outside, the officer handcuffed defendant and searched his person (the record is not clear whether the officer told Gering he was "under arrest" before searching his person). Was the defendant under custodial arrest at the time of the search, as constitutionally required for search of his person incident to arrest under the rationale that there was at that point nothing left for the officer to investigate, and there was no indication that the officer told defendant he was free to leave before searching him incident to arrest? (ANSWER: Yes, defendant was under custodial arrest the time of the search of his person)

Result: Affirmance of Spokane County Superior Court conviction of Robert A. Gering for possession of a controlled substance.

ANALYSIS: (Excepted from Court of Appeals opinion)

> [The deputy] had probable cause to believe that Mr. Gering had violated RCW 46.20.342(1), by driving with a suspended license. The deputy therefore had the authority to make a full custodial arrest. RCW 10.31.100(3)(e). But the deputy could have also elected to arrest Mr. Gering by a temporary detention while the deputy issued a citation. RCW 46.64.015. The search incident to arrest was lawful only if the arrest was custodial. State v. Craig, 115 Wn. App. 191 (Div. II, 2002) **March 03 LED:12**.

> A lawful, actual custodial arrest is a " 'constitutionally required prerequisite to any search incident to arrest.' " State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**.
>
> "[T]he determination of custody hinges upon the 'manifestation' of the arresting officer's intent." State v. Radka, 120 Wn. App. 43 (Div. II, 2004) **March 04 LED:11** (citing State v. Clausen, 113 Wn. App. 657 (Div. II, 2002) **Dec 02 LED:17** and Craig. A suspect is in custody if a reasonable person in the suspect's circumstances would believe his movements were restricted to a degree associated with "formal arrest." "[T]he test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest." When a suspect is handcuffed, placed in a patrol car, and told he or she is under arrest suggests custodial arrest, unless the suspect is told he or she will be free to go after the citation is issued.
>
> Here, [the deputy] asked Mr. Gering out of the store, arrested him, and handcuffed him. While the record does not state that Mr. Gering was told he was under arrest, there is no indication that the deputy told Mr. Gering he was free to leave before searching him incident to arrest.
>
> Mr. Gering argues that handcuffing can also be indicative of mere investigative detention. But, as the State correctly points out, nothing remained to investigate. All of the elements of the crime were known and Mr. Gering's identity was confirmed.

[Some citations omitted]

LED EDITORIAL COMMENTS: 1. Search of person incident to arrest is not subject to the special restrictions of Arizona v. Gant. This case involved a search of the person incident to arrest, so it does not implicate Arizona v. Gant (see June 2009 LED), which requires the government to establish reasonable belief that evidence of the crime of arrest will be found in a vehicle search incident to arrest. Such reasonable belief for a vehicle search would be difficult to establish for a DWLS arrest. But, at least for now, no such showing is required for a search of the person incident to arrest.

2. There may (or may not) be some circumstances where custodial arrest is not permitted for DWLS. For a discussion of whether there are limits on making a custodial arrest for DWLS, see the discussion in the March 2003 LED at 2-6.

3. It is best to tell arrestees that they are under arrest. Finally, while the Court made a pro-State ruling here despite some ambiguity in the record, it is always best for officers to tell persons that they are under arrest before searching them incident to arrest.

VEHICLE STOP HELD NOT PRETEXTUAL; OPEN VIEW OF METHAMPHETAMINE MANUFACTURING MATERIALS PROVIDES EXIGENT CIRCUMSTANCES SUPPORTING VEHICLE ENTRY TO SECURE THE MATERIALS

State v. Gibson, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3710656 (Div. II, 2009)

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

On February 22, 2007, several Pierce County Sheriff Department deputies visited a residence located in Pierce County, Washington, near the Pierce-King County line, in an attempt to serve an arrest warrant on an individual not involved in this action. The deputies were unsuccessful in locating the named individual and began to leave the property.

[Deputy A] was the first to leave. As he neared the end of the driveway, [Deputy A] saw a vehicle, about 100 feet away, turn from State Route 165 into a driveway without signaling the turn. [Deputy A] stopped the vehicle, learned that Gibson was the driver, obtained Gibson's driver's license, and ran a check for warrants. He learned that Gibson had an outstanding Auburn arrest warrant for third degree theft.

After confirming the arrest warrant, [deputy B] arrested Gibson, handcuffed him, and placed him in the back of a patrol vehicle.

[Deputy B] proceeded to walk around Gibson's locked vehicle, looked through the windows, and immediately saw a few items inside that caught his attention: a bottle of "Drano," a bottle of "Drain Out," and a bag of ammonia sulfate. [Deputy B] had extensive experience in identifying various narcotic-related crimes, particularly methamphetamine manufacturing. Based on his training and experience, [Deputy B] recognized that the drain cleaners and ammonium sulfate were chemicals commonly used to manufacture methamphetamine. [Deputy B] then pushed open the wing window of Gibson's vehicle, reached in to unlock the door, and entered to secure the items used to manufacture methamphetamine.

Inside Gibson's vehicle, [Deputy B] found a 20-pound bag of ammonium sulfate, drain cleaner, dry ice, toluene, coffee filters, a funnel, used coffee filters with white powder, a small bag of white powder, and a coffee grinder that had white residue on the inside. The white residue was later found to be pseudoephedrine. [Deputy B] also found a receipt for a 20-pound bag of ammonium sulphate when he searched Gibson's person.

[Deputy B] had entered Gibson's vehicle to ensure that the items were secure, as he knew that moving items used to manufacture methamphetamines without proper safety equipment could pose health risks to him and other officers. Once he determined they were secure, he left the items in place, until [Deputy C] obtained a warrant to search and seize the evidence of methamphetamine manufacturing.

[Deputy A] cited Gibson for failing to signal turn (RCW 46.61.305), no splash apron/fenders (RCW 46.37.500), and unsafe tire tread (RCW 46.37.425). He put the citation in Gibson's pocket. Gibson was transported to Pierce County jail.

On February 23, 2007, Pierce County charged Gibson with one count of unlawful manufacture of a controlled substance. Gibson filed a motion to suppress the evidence under CrR 3.6, claiming that the evidence was unlawfully obtained. During the CrR 3.6 hearing, Gibson argued that the evidence was illegally seized because the initial stop was pretextual, the arrest was invalid, and, due to the invalid arrest, the search incident to arrest was unlawful. The trial court rejected

Gibson's arguments and denied his motion for suppression. It entered findings of fact and conclusions of law as to the CrR 3.6 ruling on March 28, 2008.

Gibson waived his right to a jury and proceeded to a bench trial. The trial court found Gibson guilty as charged.

ISSUES AND RULINGS: 1) Where there is no evidence that the deputy sheriff stopped Gibson for a traffic violation in order to investigate a possible criminal offense, should the Court of Appeals nonetheless reverse the trial court and hold the stop to be pretextual? (ANSWER: No)

2) Where the deputy looked through the vehicle's windows and saw methamphetamine manufacturing materials, did the deputy have exigent circumstances justifying entry of the vehicle to secure the materials to reduce health risks posed by the materials? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court conviction of David Gibson for unlawful manufacture of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No pretextual stop

Pretextual traffic stops are warrantless seizures that violate article I, section 7 of the Washington State Constitution. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. A pretextual traffic stop occurs when an officer does not stop a citizen to enforce the traffic code but rather to investigate suspicions unrelated to driving. When the officer stops to actually enforce the traffic code, however, the stop is not pretextual even if the officer also suspects other criminal activity. State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) **Nov 2000 LED:08**. In determining whether a traffic stop is pretextual, we consider the totality of the circumstances of the stop, including the officer's subjective intent and the objective reasonableness of the officer's behavior.

Gibson relies on Ladson, State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) **Nov 99 LED:12**,and State v. Myers, 117 Wn. App. 93 (2003) **Aug 03 LED:18**, to support his pretext argument. These cases are factually distinguishable.

. . .

Unlike in each of these cases, in which the officers suspected criminal activity and followed the vehicles looking for an opportunity to stop them for a traffic violation, the deputies here did not follow Gibson's vehicle waiting for him to commit a traffic violation. Instead, the deputies were leaving a residence after unsuccessfully attempting to serve an arrest warrant on another named individual when [Deputy A] observed a driver, later identified as Gibson, turn without signaling. Further, [Deputy A] routinely patrols the area in which he stopped Gibson and he regularly writes infractions for failing to signal turns. These findings are unchallenged and are verities on appeal. Therefore, unlike Ladson, DeSantiago, and Myers, [Deputy A] did not state, nor can it be inferred, that he intended to use a traffic violation as an excuse to investigate suspected criminal activity.

Moreover, the trial court considered all the testimony and found that the deputies' testimonies were more credible than Gibson's testimony.

2) Open view and exigent circumstances

In contrast, the "open view" doctrine applies when an officer observes an item of evidence from a nonconstitutionally protected area. A person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place. Thus, "if an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car." This is true even if the officer uses a flashlight to view the interior.

. . .

Here, [Deputy B], while walking around Gibson's vehicle, looked inside and immediately saw a bottle of "Drano," a bottle of "Drain Out," and a bag of ammonia sulfate. Because [Deputy B] was outside Gibson's vehicle, which was parked in public, the "open view" doctrine applies, and merely looking through the vehicle's windows at the drain cleaners and bag of ammonia sulfate did not constitute a search. . . . [W]e hold that Gibson had a diminished expectation of privacy of the observable contents of his vehicle.

But to justify the warrantless seizure, the deputies must have had probable cause to believe that the contents of Gibson's vehicle were evidence of a crime and must have been faced with "emergent or exigent circumstances regarding the security and acquisition of incriminating evidence" that made it impracticable to obtain a warrant.

Here, [Deputy B]'s training and experience reasonably led him to identify the drain cleaners and ammonium sulfate as ingredients commonly used to manufacture methamphetamine. [Deputy B] was a narcotics investigator for the special investigations unit, was trained in identifying various narcotic-related crimes, and was a certified member of the Pierce County's clandestine lab team. To become certified with the clandestine lab team, [Deputy B] had to undergo a 40-hour course that, among other things, involved coursework on methamphetamine manufacturing. Indeed, [Deputy B]'s testimony demonstrated his firm grasp on the complexities of manufacturing methamphetamine. Based on his training and experience, [Deputy B] recognized drain cleaners and ammonium sulfate to be ingredients typically used in manufacturing methamphetamine; therefore, he had probable cause to believe that they were evidence of a crime.

Here, the determinative question is whether there were sufficient exigent circumstances to justify the seizure without a warrant. Although no precise guidelines exist as to what constitutes exigent circumstances, courts have upheld warrantless seizures from vehicles under more broadly defined exigent circumstances than those permitted for buildings. "Washington courts have long held that 'danger to [the] arresting officer or to the public' can constitute an exigent circumstance."

We look at the totality of the circumstances to determine whether exigent circumstances exist.

Here, [Deputy B], based on his training and experience, understood the dangers of chemicals used to manufacture methamphetamine. In particular, he knew that moving them around without proper safety equipment posed health risks to him

and other officers. Without further searching Gibson's vehicle, [Deputy B] could not have ensured that it did not contain open containers of chemicals that would spill and become hazardous to either the tow truck operator or the officers who subsequently searched the vehicle. Further, leaving such chemicals in Gibson's vehicle, which was parked in a public area, also posed a potential threat to passersby. Accordingly, once [Deputy B] confirmed his suspicions that the chemicals he saw were used to manufacture methamphetamines, he entered Gibson's vehicle only to ensure that they were secure. After determining that the chemicals were secure, [Deputy B] left them in place. Although exigent circumstances permitted [Deputy B] to seize and remove the offending chemicals at the scene, [Deputy B] chose not to remove the chemicals for safety reasons, and Gibson's vehicle was towed to a secure impoundment lot where [Deputy C] obtained a warrant to search and seize the chemicals.

Combining the minimal expectation of privacy that Gibson had in the contents of his vehicle displayed in open view with the exigencies of safety to officers and to the public, we hold that the search was reasonable under the Fourth Amendment. Even though the trial court held that the search was valid under the doctrine of search "incident to arrest" that Gant now modifies, we can affirm the trial court on any ground. Thus, we hold that the deputies' initial search of Gibson's vehicle was reasonable under the "open view" exception and exigent circumstances. We also hold that the deputies' observing chemicals used to make methamphetamine during the initial search was sufficient probable cause for the subsequent search warrant.

[Some citations omitted]

TRIAL COURT ORDER RESTORING RIGHT TO POSSESS FIREARMS VACATED BY COURT OF APPEALS BECAUSE TEN YEARS HAD NOT PASSED SINCE ENTRY OF CLASS B FELONY CONVICTION

State v. Mihali, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3586621 (Div. II, 2009)

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

On June 27, 2000, the superior court sentenced Mihali to one day in jail following her October 21, 1999 plea to one count of conspiracy to manufacture a controlled substance. On October 13, 2004, Mihali obtained a certificate and order of discharge, which declared that she had met all her sentencing requirements, discharged her from DOC supervision, and restored all her civil rights except her right to possess a firearm.

On May 22, 2008, Mihali filed a petition for firearms restoration. In her petition, she disclosed the 2000 conviction, declared that she had no other pending criminal charges in any court, that she had no other prior felony convictions that prohibit possessing a firearm, and she declared:

> I have spent five (5) or more years in the community following the conviction without having been convicted of or found not guilty by reason of insanity or charged with any other crime(s)[.]

She also declared that she had never been convicted of a felony where a firearm was used, was not under a civil or criminal court of order prohibiting possession

of a firearm, was not a party to any domestic violence or restraining orders that would restrict firearm possession, and that she has never been involuntarily committed for mental health treatment.

The State opposed Mihali's petition, arguing that ten years needed to elapse before Mihali could petition the court because hers was a class B felony and it needed to wash out of her criminal history before she qualified for reinstatement. The trial court disagreed, ruling that Mihali qualified because she simply needed five consecutive years in the community without another conviction following her 2000 conviction. It granted the petition . . .

ISSUE AND RULING: Under RCW 9.41.040(4)'s time bar on restoration of firearms rights, does one look to A) conviction(s) prior to the time of the petition, or does one look to B) conviction(s) prior to the time of the conviction that disqualified the petitioner from possessing a firearm? (ANSWER: The answer is "A," convictions prior to the time of the petition.)

Result: Reversal of Pierce County Superior Court order restoring Sara Marie Mihali's right to possess firearms.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9.41.040(4) provides that a person with no sex offense or class A felony convictions may petition for restoration of her firearm rights:

> (b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(Emphasis added.)

The State argues that the plain language of RCW 9.41.040(4)(b)(i) allows Mihali to petition the court to reinstate her firearm rights if two conditions exist: (1) she has five or more consecutive years in the community without being convicted or currently charged with a crime since her conviction; and (2) she has no prior felony convictions in her criminal history that would be included in her offender score calculation that prohibit possessing a firearm. Absent both conditions, she may not petition the court for reinstatement. Applied here, the State argues, Mihali's 2000 class B felony will not wash out of her offender score until 2010. Thus, even though she meets the first criterion, she does not satisfy the second and is ineligible for reinstatement of her privilege to possess a firearm.

The State and the trial court disagreed on which date applies in determining eligibility under this statute. The trial court looked at Mihali's criminal history on the date she was sentenced in 2000 and found no prior disqualifying offenses. The State looked at Mihali's criminal history on the date she petitioned for restoration and found that her 2000 conviction disqualified her.

Graham v. State, 116 Wn. App. 185 (Div. II, 2003) **Jan 09 LED:25**, and State v. Hunter, 147 Wn. App. 177 (Div II, 2008) **May 03 LED:15**, resolve this issue, both holding that the relevant date is the date the defendant petitions for restoration and not the date of the disabling offense. In Graham, we interpreted the phrase "has not previously been convicted":

> Here, the statutory language, coupled with the legislature's express intent, leads us to conclude that the reference to "previous convictions" in the second sentence of RCW 9.41.040(4) means any conviction prior to the time of the petition, not a conviction prior to the one that disabled the petitioner's firearm rights. Such a construction is consistent with statutory intent of stigmatizing the use and possession of firearms and discouraging criminals from possessing and using firearms to commit crimes.

In Hunter, the court considered this same phrase as well as the phrase pertinent here in RCW 9.41.040(4)(b)(i) that the defendant "has no prior felony convictions" and concluded that legislative interpretation has consistently held that the statute refers to the petitioner's criminal history at the time she files her petition not at the time of the disabling offense.

While neither case directly addresses the question presented here, the reasoning in both is sound and persuasive that the same interpretation applies to the language in RCW 9.41.040(4)(b)(i).

Reading this provision as a whole, it is plain that the legislature intended for the court to look at the petitioner's status at the time she filed her petition. First, the legislature begins the relevant portion of this statute with the phrase "after five or more years in the community," clearly requiring that at least five crime-free years lapse before a felon may petition. Second, in the same sentence, the statute contains this dependent clause: "if the individual has no prior felony convictions." Reading these provisions together can only mean that after five crime-free years, and if the person has no "prior" felony convictions, she may petition. This latter dependent clause is further limited to those prior convictions "that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525." Finally, the legislature's use of the word "prohibit" in the present tense in this clause clearly refers to the petitioner's criminal history at the time one files the petition.

After five years, Mihali's 2000 conviction is still part of her offender score and will remain so until she spends 10 years in the community without committing an offense. See RCW 9.94A.525(2)(b) ("ten consecutive years in the community without committing any crime that subsequently results in a conviction"). The legislature clearly intended for the trial court to look at the petitioner's criminal history when the petition was filed and not at the time of the disabling conviction.

We also note that our interpretation is consistent with stated legislative intent. In its 1996 Final Bill Report, the legislature expressly stated:

> In some cases, after five years in the community without a conviction or current charge for any crime, a person whose right to

> possess a firearm has been lost because of a criminal conviction may petition a court of record for restoration of the right. However, the person must also have passed the "washout" period under the Sentencing Reform Act before he or she may petition the court. Effectively, this means that a person with a conviction for a class A felony or any sex offense can never seek restoration of the right. Generally, in the case of a class B felony the washout period is 10 years, and in the case of a class C felony it is five years.
>
> Final Bill Rep. on Substitute H.B. 2420, at 2, 54th Leg., Reg. Sess. (Wash. 1996) (emphasis added).
>
> We reverse and remand for the trial court to vacate its order restoring Mihali's right to possess firearms.

[Footnote, some citations omitted]

WORDS ALONE CAN CONSTITUTE OBSTRUCTING UNDER RCW 9A.76.020(1)

State v. Williams, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3720661 (Div. II, 2009)

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

> On December 3, 2007, Williams asked Les Schwab Tires in Fife to install new tires and rims on his girlfriend Chelsey Pierce's Jeep Cherokee. Les Schwab installed the tires and rims, balanced the tires, and cut siping into the treads. The tires and rims cost $1,533.96. The total pre-tax cost of all products and services was $1,694.96.
>
> Williams tried to pay with a check, but Les Schwab's check verification system declined the check. Williams then offered to get cash from the bank, stating that "he would be right back." Les Schwab's accountant, Heather Crawford, told Williams to leave the car and key with her until he returned. Williams gave Crawford the key, but he drove off in the car.
>
> Several hours later, Crawford realized that the vehicle was missing. She called the police after attempts to contact Williams were unsuccessful. [Officer A] of the Fife Police Department responded. He obtained Pierce's address in Federal Way and asked the Federal Way police to investigate.
>
> [Officer B] of the Federal Way Police Department went to Pierce's residence, where he found Williams. They spoke in the doorway of Pierce's home. Williams informed [Officer B] that his name was "Eric R. Williams," which is his brother's name, and he gave a false birth date. Williams told [Officer B] that he "didn't have any identification on him," even though he had identification in Pierce's home.
>
> When [Officer B] asked Williams whether there was another way to determine his identity, Williams replied that his mother, grandmother, and aunt lived "down the street." [Officer B] asked Williams to accompany him to a relative's house to

> verify his identity, but Williams stated that he did not know the addresses. At trial, Williams stated, "I had to, like, think about it for a second. No, if we go there then I can't be Eric Williams if we go there [sic] because they know what my name is, so I just was evasive with all their questions and my identity." Williams testified that he was evasive about his identity because he had an outstanding arrest warrant for violating community custody.
>
> Williams admitted to [Officer B] that he had taken the car from the Les Schwab lot. He then showed [Officer B] the car. Williams stated that errands had prevented him from returning to pay Les Schwab before it closed. Williams said that he had left Les Schwab a voice message about being late. Les Schwab, however, did not have a voice messaging system that allowed a person to leave a message.
>
> [Officer B] informed [Officer A] that he found the car and spoke to Williams. [Officer A] drove to Federal Way to speak to Williams. Williams again identified himself as "Eric Williams" and gave a false birth date. He told [Officer A] that he did not know his address or Social Security number and had no identification. He stated that Michael Williams was his brother. [Officer A] ran a license check and determined that the physical description of "Eric Williams" did not match Williams.
>
> [Officer A] arrested Williams and transported him to Fife City Jail. [Officer A] asked the county jail staff to complete an "administrative booking" since there was a discrepancy in identity. This booking method uses names, fingerprints, and photographs to identify suspects.
>
> After being held in a cell "for a while," Williams admitted his true name and birth date to a police officer. The officer relayed this information to [Officer A], who discovered "Michael Williams" in the police records and noted that Williams had an outstanding warrant. [Officer A] asked jail officials to email Williams's booking photo, which he matched to the police records, thus enabling him to finally verify Williams's identity.
>
> The State charged Williams with first degree theft, making a false or misleading statement to a public servant, and obstructing a law enforcement officer. Following a bench trial on January 31 and February 4, 2009, the trial court convicted Williams on all charges. The court imposed standard range sentences of 25 months for theft and 365 days for each of the other two counts, all sentences to run concurrently. Williams now appeals his obstructing a law enforcement officer conviction.

[Footnotes omitted]

ISSUE AND RULING: Can words alone constitute obstructing? (ANSWER: Yes, and the words here constituted obstructing)

ANALYSIS: (Excerpted from Court of Appeals opinion)

> A person is guilty of obstructing a law enforcement officer if the person "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1). A "[l]aw enforcement officer" includes city police officers. See RCW 9A.76.020(2); RCW 10.93.020(3).

> "Hinder" means "to make slow or difficult the course or progress of." Webster's Third New Int'l Dictionary 1070 (2002). "Delay" means "to stop, detain, or hinder for a time . . . to cause to be slower or to occur more slowly than normal." Webster's at 595. "Obstruct" means "to be or come in the way of: hinder from passing, action, or operation." Webster's at 1559.
>
> Williams argues that the crime of obstruction applies only to conduct that hinders, delays, or obstructs law enforcement. Williams's reading of the obstruction statute is inconsistent with the statute's ordinary meaning. The plain language of RCW 9A.76.020(1) does not treat conduct and speech differently. Rather, the statute criminalizes any willful act – verbal or nonverbal – that hinders, delays or obstructs a law enforcement officer acting within his or her official powers. A false statement to a police officer is as capable of hindering or delaying an officer's ability to investigate a crime as a physical act, such as fleeing the scene of a crime.
>
> Indeed, Williams's false statements to Fife and Federal Way police officers illustrate that speech may obstruct an investigation as much as nonverbal conduct. Williams pretended to be his brother in order to avoid arrest on an outstanding warrant, and he falsely stated that he left a voice message with Les Schwab. Some of Williams's other assertions – such as that he did not know where nearby relatives resided – strain credulity, especially in light of Williams's open admission that he intended to be evasive in answering officers' questions. Williams's false statements delayed the officers' ability to identify him, the primary subject of a suspected theft, and to determine whether he intended to deprive Les Schwab of its products and services, necessary mens rea for theft. The statements forced [Officer A] to engage in additional law enforcement steps in order to identify Williams, including requesting an administrative booking and a booking photo. As a result, Williams's false statements hindered, delayed, and obstructed the criminal investigation.

[Footnote omitted]

LED EDITORIAL COMMENT: Based on the former obstructing statute, State v. Williamson, 84 Wn. App. 37 (Div. II, 1996) April 1997 LED:19 held that the only appropriate charge for lying to an officer was under RCW 9A.76.175, which prohibits providing a false or misleading material statement to a public servant. Under the current versions of the statutes, however, the person providing false or misleading material statements to an officer generally can be charged under either the obstructing statute or RCW 9A.76.175.

TRACKING DOG'S SNIFF THROUGH OPEN WINDOW OF CAR LOCATED IN DRIVEWAY WAS NOT A "SEARCH" SUBJECT TO STATE CONSTITUTIONAL RESTRICTION

State v. Hartzell and Tieskotter, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3807645 (Div. I, 2009)

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

> According to testimony at trial, Michael Vernam was awakened by gunshots outside his home on Trailblazer Road in Thurston County early in the morning of April 7, 2007. He looked outside and saw someone shooting from what he

thought was the sunroof of a red car. The car moved as shots were fired, so Vernam concluded that more than one person was in the car.

The gunshots also woke Kimberly Hoage, but she thought someone was banging on the wall outside her apartment. Later in the day, however, Hoage discovered bullet holes in the headboard of the bed where she and her daughter had been sleeping. Sheriff's deputies found a bullet and bullet fragments in the apartment and shell casings or cartridges from .9 mm and .357 mm caliber bullets outside.

Four days after the shooting at Hoage's apartment in Thurston County, police officers in Pierce County interviewed Jeremy Tieskotter in response to a report of him firing a .9 mm semi-automatic handgun in Lakewood. Tieskotter admitted firing the gun. Ballistics analysis showed that the bullets fired into Hoage's apartment had come from the same .9 mm weapon.

The next month at about 10 o'clock in the evening [a] Kitsap County Sheriff's deputy was dispatched to a house in a rural area of Kitsap County in response to a call of a man with a gun. The suspect had been described as a "skinhead." While the officer was waiting outside the house for backup to arrive, a RAV4 compact SUV pulled into the driveway and a man later identified as Hartzell got out. Hartzell gave a false name and claimed to be looking for his girlfriend, Sarah Dodge, who he said had been given a pill "by a guy named Randy," was acting "crazy," and had gotten out of the car somewhere in the area. When backup arrived, [the deputy] went inside where he found Sarah Dodge. After interviewing her, he took Hartzell into custody, and then discovered there was a bullet hole through the passenger door of the RAV4.

Inside the vehicle, [the detective] found a .357 SIG cartridge on the front passenger-side floor, several boxes of .357 SIG ammunition in the rear, and a .357 SIG bullet in the seam of Hartzell's jacket.

A K-9 officer was called to look for the gun that shot the bullet through the passenger door of the RAV4. The dog jumped up on the door, sniffed, then went south on the shoulder of Sidney Road. Less than 100 yards from where the RAV4 was parked, the dog found a .357 semi-automatic handgun, several rounds short of being fully loaded. A ballistics expert later determined that this was the same gun that had fired .357 bullets into Hoage's apartment in Thurston County.

Officers learned that Tieskotter and Hartzell were good friends. They also found out that Hartzell and his girlfriend, Sarah Dodge, had been staying with Hoage days before the shooting at Hoage's apartment. Hartzell and Dodge were forging checks, and Hoage had threatened to call the police if they did not leave. After he and Dodge left, Hartzell called Hoage to demand that she return his laptop. Hoage ignored the message because she had seen Hartzell leave with the laptop. But after the shooting she became fearful because she received a threatening text message from Hartzell that led her to believe he was the one who shot at her apartment.

Hartzell and Tieskotter were each charged in Thurston County Superior Court with assault in the second degree while armed with a deadly weapon (a firearm)

(Count 1), drive-by shooting (Count 2), and unlawful possession of a firearm in the first degree (Count 3). The two cases were joined for trial. Both defendants were convicted on Counts 1 and 3. The jury returned special verdict forms finding that each defendant was armed with a deadly weapon during the assaults. The court imposed 36-month firearm sentence enhancements. The appeals of Hartzell and Tieskotter have been consolidated.

ISSUE AND RULING: Under article 1, section 7 of the Washington constitution, was it a "search" for the tracking dog to jump up on the car door and to sniff the air in the area of the open car door window? (ANSWER: No, while a dog sniff can in some circumstances be a "search," the minimally intrusive activity of the dog in this case does not rise to the level of a "search.")

Result: Affirmance of Thurston County Superior Court convictions of Charles Hartzell and Jeremy Tieskotter for assault in the second degree with a firearm and unlawful possession of a firearm in the third degree; cases remanded to Superior Court to correct a minor error in sentencing (under an issue not addressed in this **LED** entry).

ANALYSIS: (Excepted form Court of Appeals opinion)

Const. art. 1, § 7 protects a person's home and his private affairs from warrantless searches: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article 1, § 7 is not implicated if search occurs. State v. Young, 123 Wn.2d 173 (1994) **April 94 LED:02**. To determine if there was a search, the court asks whether the State unreasonably intruded into a person's "private affairs." Young. If it did, a warrant was required unless the circumstances fell into one of the recognized exceptions to the warrant requirement. None of those exceptions is present in this case.

The inquiry whether the State unreasonably intruded into a person's private affairs focuses on the privacy interests that "citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506 (1984). In general, a search does not occur if a law enforcement officer is able to detect something using one or more of his senses from a non-intrusive vantage point. State v. Seagull, 95 Wn.2d 898 (1981).

Such observation does not violate Washington's constitution because something voluntarily exposed to the general public and observable without an enhancement device from a lawful vantage point is not considered part of a person's private affairs. Young. An observation may constitute a search, however, if the officer substantially and unreasonably departs from a lawful vantage point or uses a particularly intrusive method of viewing. Young. What is reasonable is determined from the facts and circumstances of each case. Seagull.

Whether or not a canine sniff is a search depends on the circumstances of the sniff itself. State v. Boyce, 44 Wn. App. 724 (1986). In Boyce, this court held that as long as the canine "sniffs the object from an area where the defendant

> does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." Boyce.
>
> The trial court correctly concluded that Hartzell did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle. Hartzell was not in the SUV when the dog sniffed from a lawful vantage point outside the vehicle. The sniff was only minimally intrusive. The trial court did not err when it denied Hartzell's motion to suppress the evidence.

[Some citations omitted]

LED EDITORIAL COMMENTS: This "no search" ruling is a narrow ruling focused on the particular facts of this case (unoccupied car, open window, car parked in a non-private area). A closer question would have been presented if the car had been occupied at the time of the dog sniff. Washington courts have not yet addressed warrantless dog sniffs of occupied vehicles. Past LED entries that may be of interest on the dog-sniff search question include:

State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov 98 LED:06 (Holding that use of drug-sniffing dog at a residence required a search warrant; distinguishing prior packages-in-transit cases where Washington courts have consistently held the dog sniffs of the packages, and in one case a safety deposit box at a bank, not to be a search);

B.C. v. Plumas Unified Sch, Dist., 192 F.3d 1260 (9th Cir. 1999) Dec 99 LED:12 (Using drug-dog to randomly sniff students at high school violates Fourth Amendment);

Illinois v. Caballes, 125 S.Ct. 834 (2005) March 05 LED:03, April 05 LED:02 (United States Supreme Court rules that using a drug-sniffing dog to sniff the exterior of an occupied car during a traffic stop that is not prolonged by the dog sniff does not violate the Fourth Amendment of the U.S. Constitution as an unlawful seizure and also does not violate privacy interest because of the focused nature, i.e., a focus exclusively on detecting contraband, of the use of the dog).

DESCRIPTION OF MV OWNER IN MV REGISTRATION RECORDS CHECK, PLUS OBSERVATION, PROVIDES REASONABLE SUSPICION TO STOP MV FOR ARREST WARRANTS; BUT CASE MUST BE REMANDED FOR FACT HEARING ON SEARCH INCIDENT AND MAYBE OTHER ISSUES

State v. Bliss, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3823332 (Div. II, 2009)

Facts: (Excerpted from Court of Appeals opinion)

> Shortly after midnight on June 23, 2007, [a] Gig Harbor Police Officer . . . was patrolling when he observed a white Plymouth van, illuminated by his headlights, driven by a white or light-skinned female with light-colored hair. [The officer] followed the white van and ran a registration check, which revealed that Charlotte Bliss was the registered owner, that she had outstanding felony and misdemeanor arrest warrants, and that she was a white female, 5 feet 6 inches tall, 140 pounds, with blond hair. Believing that the van's driver fit Bliss's description, [the officer] stopped the van, verified that Bliss was the driver, arrested Bliss, and searched the van about 10 to 15 minutes after arresting Bliss.

> Behind the van's front passenger seat, [the officer] discovered a tan handbag which contained: (1) a glass pipe that appeared to have been used to smoke narcotics, and (2) two small baggies containing a white powdery substance that field tested positive for methamphetamine. [The officer] completed a property inventory before having the van towed.

Procedural background: The State charged Bliss with possession of methamphetamine. The trial court denied her motion to suppress the evidence. She was convicted.

ISSUES AND RULINGS: 1) Did the officer have reasonable suspicion justifying a stop of the car based on what the officer could see of the driver, and based on the description of the car's registered owner that the officer obtained through a records check? (ANSWER: Yes)

2) Was the car search a lawful search incident to arrest under the rule of Arizona v. Gant, or was the car search lawful under some other exception to the Fourth Amendment search warrant requirement? (ANSWER: The Court concludes that the record is inadequate to answer this open-ended question, and the Court directs the Superior Court to hold a new suppression hearing. Therefore, this **LED** entry will not address the second issue.)

Result: Remand to Pierce County Superior Court for a new suppression hearing in the case of State v. Charlotte June Bliss.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> [A]n officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the "reasonable suspicion" standard under Terry v. Ohio, 392 U.S. 1 (1968). To justify a Terry stop under the state and federal constitutions, there must be some suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good. The officer must have an "articulable suspicion," meaning "a substantial possibility that criminal conduct has occurred or is about to occur." The officer must be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. In determining whether the officer's suspicion was reasonable, courts look to the totality of the circumstances.
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> When [the officer] stopped the van, (1) he knew there were outstanding arrest warrants for the van's registered owner, Bliss; (2) he knew that the van's registered owner, Bliss, was a white woman with blond hair; and (3) he had observed that the van's driver was a white or light-skinned female with light-colored hair, which fit the physical description accompanying Bliss's vehicle registration. These facts were sufficient to create a substantial possibility that it was Bliss driving the van and to justify an initial brief detention to verify her identity.8 After verifying that the van's driver was Bliss, [the officer] acted lawfully in arresting her on the outstanding warrants.
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> Bliss's reliance on Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996), does not persuade us that the stop here was unlawful. In Lambert, a 42 U.S.C. § 1983 civil rights action against police officers, police stopped and arrested two African-American men who resembled "exceedingly vague" general descriptions of two men involved in a series of 19 armed robberies. The officers ordered the two men out of their car at gunpoint, handcuffed them, and placed them in separate

police cars for five to 25 minutes before checking their identification and releasing them.

Aside from being African-American males, the two men did not fit the robbers' descriptions in numerous ways. Moreover, although the two detained men were driving a white car and a white car had been used in one of the 19 robberies, the officers were aware that (1) the detained men's car was a rental car, (2) but the white car the robbers had used was a stolen car, and (3) the car the robbers had used was a different make and model.

The Ninth Circuit held (1) the detention of the two men was an arrest rather than a Terry stop; and (2) that the two men had generally fit the vague physical descriptions of the robbers did not justify such an intrusive and aggressive stop, even though the two men were in a white car. The court rejected as "just plain absurd" that observing two men in a white car created a reasonable suspicion justifying the stop when the officers knew that the car used in the robbery was a different make and model and there was no information indicating that the robbers had ever used a rental car.

The first distinction between Bliss's case and Lambert is that the Lambert court was evaluating an arrest, rather than a Terry investigative stop. Thus, the Ninth Circuit was addressing whether the officers had probable cause to arrest the two men, not whether they had a reasonable articulable suspicion to justify a Terry stop, at issue here.

The second distinction is that, although [the officer] may have relied on the van driver's resembling a general description of the van's registered owner, unlike the situation in Lambert, here (1) there was no evidence that distinguished the person [the officer] saw driving the van from the registered owner's description, on which he relied; and (2) because the arrest warrants were for the registered owner of the van that he observed, there were direct connections among the van, the owner's description, the suspected criminal activity, and the driver.

We hold, therefore, that the trial court did not err in ruling that [the officer's] stop of Bliss's van was reasonable and in denying her motion to suppress on this ground.

[Footnotes, some citations omitted]

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NEXT MONTH

The **February 2010 LED** will include entries regarding three recent decisions from the Washington Supreme Court:

State v. Magee (decided December 3, 2009), holding that a law enforcement officer may not issue a traffic citation for second degree negligent driving when the offense did not occur in the officer's presence; the Supreme Court therefore reverses a decision of the Court of Appeals reported at 143 Wn. App. 690 (Div. II, 2008) (not reported in the **LED**); Justice Madsen authors a concurring opinion explaining that a city attorney or deputy prosecutor may issue a notice of infraction under the circumstances presented in Magee;

State v. Winterstein (decided December 3, 2009), holding that a probation officer must have probable cause (not mere reasonable suspicion) to believe that a probation violator resides at a particular residence before searching that residence. The lead opinion for the Court in Winterstein also declares that the doctrine developed under the federal constitution providing an inevitable discovery exception to the exclusionary rule does not apply under article 1, section 7 of the Washington constitution; the Supreme Court therefore reverses a decision of the Court of Appeals reported at 140 Wn. App. 676 (Div. II, 2007) and discussed at page 15 of the **October 2008 LED** entry regarding a Ninth Circuit, U.S. Court of Appeals decision; Justice Jim Johnson authors a concurring opinion contending, among other things, that the inevitable discovery doctrine discussion in the lead opinion is mere dictum (i.e., discussion not necessary to the result reached and not of precedential effect);

State v. Harrington (decided December 10, 2009), holding that an officer's social contact developed into a seizure of a person before the officer developed reasonable suspicion that would have justified the seizure; the Supreme Court therefore votes to reverse the decision of the Court of Appeals reported at 144 Wn. App. 558 (Div. III, 2008) **July 08 LED:17**.

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

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

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

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

Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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

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