Law Enforcement Digest

MARCH 2009

637th Basic Law Enforcement Academy – September 15, 2008 through January 28, 2009

President: Curt Steinagel – Clark County Sheriff's Office
Best Overall: Erick C. Dunham – Clark County Sheriff's Office
Best Academic: Erick C. Dunham – Clark County Sheriff's Office
Best Firearms: Erick C. Dunham – Clark County Sheriff's Office
Tac Officer: Ken Henson – Lakewood Police Department

638th Basic Law Enforcement Academy – September 29, 2008 through February 11, 2009

President: Matthew Didier – Seattle Police Department
Best Overall: Jason T. Winner – Olympia Police Department
Best Academic: Jason T. Winner – Olympia Police Department
Best Firearms: Jason T. Winner – Olympia Police Department
Tac Officer: Allen Gill – Criminal Justice Training Commission

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BRIEF NOTES FROM THE U.S. SUPREME COURT

(1) ARIZONA OFFICER HAD FOURTH AMENDMENT TERRY FRISK AUTHORITY DURING TRAFFIC STOP WHILE QUESTIONING PASSENGER ABOUT POSSIBLE GANG AFFILIATION (WASHINGTON LAW LIKELY WOULD REQUIRE A DIFFERENT LOOK AT THE FACTS OF THE CASE, HOWEVER) – In Arizona v. Johnson, 129 S.Ct. 781 (2009), the U.S. Supreme Court rules unanimously that under the Fourth Amendment of the U.S. constitution a law enforcement officer had Terry frisk authority under the facts of the case. A 3-person team of gang-unit officers stopped a car for a civil infraction. One of the Tucson, Arizona gang officers asked a passenger for identification. He provided identifying information, and he volunteered that he had been in prison for burglary. By his bandana and other clothing, the officer thought that he could be a member of the Crips. She directed him to get out of the car so that she could question him in more isolation about his possible gang affiliation. For safety reasons not explored in the Supreme Court opinion in this case, the officer then conducted a Terry frisk that produced a handgun.

Johnson was convicted for being a felon in possession of the gun. The trial court rejected Johnson's argument that the officer lost her Terry frisk authority when she began questioning him about his gang affiliation because that was wholly unrelated to the traffic stop. An Arizona appellate court held that the trial court should have accepted Johnson's theory and should have suppressed the gun. The Arizona appellate court did not address whether the facts provided the officer with reasonable suspicion to believe that Johnson was armed and dangerous. The U.S. Supreme Court decision holds, based on U.S. Supreme Court precedent interpreting the Fourth Amendment, that the officer did not lose her Terry frisk authority merely because she questioned Johnson about matters unrelated to the traffic stop. Such questioning is permitted under the Fourth Amendment so long as the questioning, as here, does not measurably extend the duration of the traffic stop.

Result: Reversal of Arizona intermediate appellate court's reversal of Johnson's unlawful-possession-of-a-gun conviction; remand to Arizona appellate court for further proceedings, including resolution of the fact-based question of whether, before frisking Johnson, the officer had a reasonable belief that Johnson was armed and dangerous.

LED EDITORIAL COMMENT: We have not provided details of the U.S. Supreme Court's Fourth Amendment analysis because we believe that a different result would occur in analysis of several issues under the Washington constitution's article 1, section 7, as construed by the Washington appellate courts. While the record in this case does not explore pretext (because the Fourth Amendment does not permit a pretext argument), we

think that there is substantial chance that Washington courts would find to be pretextual under the Washington constitution a traffic stop for a civil infraction where the stop was by a 3-person gang unit team that, it appears, immediately began questioning a passenger regarding his possible gang affiliation. See State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05. Also, asking for ID documents or information and asking questions of passengers about gang affiliation or other matters unrelated to the traffic stop is generally not permitted under Washington's constitution where the passenger is not reasonably suspected of committing a violation of law. See State v. Rankin, 151 Wn.2d 689 (2004) Aug 04 LED:07; State v. Brown, 154 Wn.2d 787 (2005) Sept 05 LED:17; State v. Allen, 138 Wn. App. 463 (Div. II, 2007) July 07 LED:21. Finally, directing the passenger to get out of a vehicle at a traffic stop where the officer has no articulable "heightened awareness of danger" regarding the circumstances of the stop is not lawful under the Washington constitution. State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04.

(2) WHERE POLICE ARE MERELY NEGLIGENT IN FAILING TO UPDATE POLICE COMPUTER RE ARREST WARRANT, EXCLUSIONARY RULE OF FOURTH AMENDMENT DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED IN SEARCH INCIDENT TO ARREST (WASHINGTON LAW LIKELY DIFFERS, HOWEVER) – In Herring v. U.S., 129 S.Ct. 695 (2009), the U.S. Supreme Court rules 5-4 that the Fourth Amendment of the U.S. constitution does not require suppression of evidence that police seized in a search incident to arrest under an arrest warrant that had been recalled. The majority opinion concludes that because the police had been merely negligent – not reckless or acting intentionally – in failing to update police-maintained records to show that the arrest warrant had been recalled, the evidence should not be excluded, despite the unlawfulness of the arrest on the recalled arrest warrant.

The Herring majority opinion explains that under the federal constitution's Fourth Amendment the sole reason for applying the exclusionary rule is to deter unlawful police acts or omissions. Previously, in Arizona v. Evans, 514 U.S. 1 (1995) **May 95 LED:03**, the U.S. Supreme Court held that, where the courts make a mistake by failing to delete information showing a withdrawn arrest warrant as outstanding, it would not advance the deterrence purposes of the Fourth Amendment to exclude evidence seized by officers who rely on the incorrect information to make an arrest and a search incident to arrest. The Herring majority opinion admits that police negligence in this context is factually different. But the majority opinion concludes that the factual difference does not change the Justices' view that exclusion in this officer-good-faith circumstance will not advance the deterrence purposes of the Fourth Amendment.

Result: Affirmance of lower federal court decision rejecting defendant's suppression arguments and of defendant's convictions for (1) being a convicted felon in possession of a firearm and (2) knowingly possessing methamphetamine.

LED EDITORIAL COMMENT: We believe that the Washington Supreme Court would conclude that the exclusionary rule of article 1, section 7 of the Washington constitution does require exclusion of evidence where police (as opposed to the court system or a non-law-enforcement record-keeping agency, such as the Department of Licensing) have negligently failed to update their arrest warrant information, leading to an unlawful arrest and search incident to arrest. See discussion in State v. Gaddy, 152 Wn.2d 64 (2004) Sept 04 LED:19 (arrest based on DOL information); compare State v. Mance, 82 Wn. App. 539 (1996) Nov 96 LED:14 (arrest based on police agency "hot sheet").

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NINTH CIRCUIT, U.S. COURT OF APPEALS

CONFESSION BY INEXPERIENCED 17-YEAR-OLD SUSPECT IN MASS MURDER CASE HELD INVOLUNTARY WHERE THE 4 QUESTIONING OFFICERS: 1) CHOSE NOT TO INVOLVE HIS PARENTS, 2) DOWNPLAYED THE MIRANDA WARNINGS, 3) QUESTIONED HIM THROUGH THE NIGHT FOR 12 HOURS STRAIGHT, 4) FOR AN EXTENDED PERIOD CONTINUED ASKING HIM ESSENTIALLLY THE SAME QUESTIONS DESPITE HIS SILENCE, AND 5) TOLD HIM NUMEROUS TIMES THAT HE "HAD TO" ANSWER THEIR QUESTIONS

Doody v. Shriro, 548 F.3d 847 (9th Cir. 2008) (decision filed November 20, 2008)

Facts and Proceedings below:

LED EDITORIAL NOTE: LED space limitations do not permit a detailed description of the facts of the Doody case or a full excerpting from the fact description in the lengthy Ninth Circuit decision. We will provide in this part of the LED entry a relatively short summary of the key facts and procedural background (as described in the Ninth Circuit decision), and we will excerpt in the "Analysis" section below the Ninth Circuit panel's discussion of the facts as they relate to the voluntariness-of-confession legal issue in the case. We remind readers that, per the "internet access" information that we provide at the end of each month's LED, decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions."

After a mass murder of nine persons at a Thai Buddhist temple outside Phoenix, Arizona, a task force of local, state, and federal law enforcement officers was created. Johnathon Doody was a suspect. He was 17 years old. He had not had any previous contacts with law enforcement. He had previously been a roommate of a young man who owned a rifle that testing indicated was the murder weapon.

Task force members picked him up on a Friday night at a high school football game. They took him to a police station interrogation room for questioning. They had previously talked to his stepfather about the case, but they did not tell the stepfather that they were going to question Doody that night. The officers downplayed the Miranda warnings as they provided them to Doody at the start of questioning around 9:30 p.m. Doody told them that he knew nothing about Miranda rights, but he agreed to talk. A total of four officers participated at some point in the questioning. The officers gave him bathroom breaks and offered him food and drink; he declined any food.

About two hours into the questioning, the officers told Doody that they believed he was lying about having never been in possession of the murder weapon, and they told him that he "had to" tell them the truth. Doody admitted at that point that he had at one point in the past been in possession of the murder weapon, but he said that was before the murders occurred, and that he had returned the rifle long before the date of the time of the murders.

After about five hours of questioning and denials, Doody stopped answering all questions for an extended period. The officers continued to ask him essentially the same few questions over and over, telling him that he "had to" answer their questions. Finally, at about the beginning of the sixth hour, Doody answered "yes" to the oft-repeated question of whether he had been involved in the murders. He then fell silent for another half hour despite a continuing repetition of questions. Finally, six-and-a-half hours into the interrogation, he provided a narrative of the

mass murder. He said that he and two other people were involved. The officers believed that four others were involved – known as the "Tucson Four" – and after two more hours of interrogation got him to admit some facts that somewhat supported this theory, later abandoned by the prosecution in favor of a theory at trial that only Doody and one other person was involved.

ISSUE AND RULING: Was the confession by the inexperienced 17-year-old suspect involuntary under the totality of the circumstances where the questioning officers: 1) chose not to involve his stepfather, 2) downplayed the Miranda warnings, 3) questioned him through the night for 12 hours straight, 4) continued to question him despite his long periods of not answering repeated questions, and 5) told him numerous times that he "had to" answer their questions? (ANSWER: Yes)

Result: Reversal in part of U.S. District Court (Arizona) decision that denied habeas corpus relief to Johnathan Andrew Doody; his nine first degree murder convictions will be set aside, and the State of Arizona apparently must retry him or dismiss the charges.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) The downplaying of Miranda rights as a voluntariness factor

> The Miranda warnings given to Doody did little actually to inform him, a seventeen-year-old who had never heard of Miranda, of the importance of his rights. The officers downplayed the relevance of the warnings, and their application to the current questioning. They repeatedly told Doody that the warnings were "not meant to scare you," and that he should not take them "out of context." The context, as communicated by the explanations surrounding the formal warnings, was that the warnings were merely a formality, and that Doody need not actually consider what their content conveyed. Indeed, the officers twice told Doody that the warnings were for *their* benefit in part: "[I]t's something that's for your benefit, as well as for ours," suggesting that delivering the warnings was simply a meaningless bureaucratic step they had to take. The officers also strongly implied that Doody was not a suspect, further underscoring the overall message that he need not be careful of what he said, the warnings to the contrary notwithstanding. Doody was told, "I don't want you to feel that because I'm reading this to you that we necessarily feel that you're responsible for anything."
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> The clear message underlying these comments was that Doody need not take the warnings seriously and should waive his rights. Thus, although each required warning was technically delivered correctly, one of Miranda's primary purposes – "to make the individual more acutely aware that he is faced with a phase of the adversary system [and] that he is not in the presence of persons acting solely in his interest" – was undermined.
>
> The officers' elaboration on one of the specific warnings reinforced this general message that Doody need not take the warnings seriously. Regarding the right to an attorney, Detective Riley hedged: "[A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it [does] not necessarily mean that you are involved, but if you were, then that's what that would apply to, okay." In addition to being simply confusing, this

explanation could be construed to suggest that one would only ask for an attorney if he was guilty.

Despite the troubling subtext present throughout the warnings – that Doody should disregard the content of the warnings, not take the situation seriously, and waive his rights – we cannot conclude that the state court was objectively unreasonable in finding that the warnings satisfied the procedural requirement of Miranda. Miranda warnings need not be given "in the exact form described in that decision," as long as they "reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" . . . To be found inadequate, an ambiguous warning must not readily permit an inference of the appropriate warning.

. . .

Here, the officers interspersed the warnings with statements downplaying their significance. But the essential rights were conveyed, and . . . the oral elaborations of which Doody complains were not affirmatively misleading. Thus, although we find it a close question, we cannot conclude that the state court's decision that the warnings were adequate was "objectively unreasonable." . . .

This conclusion only means that Miranda's irrebuttable presumption of coercion may not be invoked. But the excessively casual delivery of Miranda warnings to a juvenile, seemingly designed to ensure that he would ignore the warnings and waive his rights, gives little comfort that Doody commenced the interrogation with an understanding of what was at stake. . . . [W]e consider this factor in our determination of the voluntariness of Doody's confession.

Later statements by the officers further undercut the purpose of the Miranda warnings: to ensure that a suspect fully understands his rights and the implications of waiving them. Specifically, the officers explicitly and implicitly told Doody – an increasingly sleep-deprived juvenile – that he did *not* have the right to remain silent. About five hours into the interrogation, Doody essentially stopped answering the officers' questions. In the face of his silence, three officers took turns asking the same questions again and again, sometimes dozens of times in a row, and repeatedly told Doody that he "ha[d]" to answer their questions: "You have to tell us"; "you have to let us know"; "if it's gonna take you all night to tell me two little simple things, we're gonna have a problem"; "Answer me, answer me Jonathan. Jonathan, answer me. Answer me."

With his silence, Doody gave every appearance of trying to exercise his right to remain silent in the precise fashion described earlier by the officers. [Court's footnote: *We note that Doody does not argue, either here, in the district court, or before the state courts, that his silence in the face of repeated questioning was an invocation of his right to remain silent. . . . We express no view on the matter.*] During the Miranda warnings, he was told: "You can be quiet if you, if you wish." But when Doody *was* quiet, the officers told him expressly that he *had* to answer them – in other words, that he could not remain silent. Their refusal to stop questioning him reinforced these express statements. Indeed, Doody was explicitly told that the interrogation would continue until he confessed: "I'm gonna stay here until I get an answer." As a result, the officers' original warning informing Doody of his right to remain silent, itself a casual and underplayed

message, was negated by their subsequent conduct, telling Doody he could not be silent, but rather that he must answer.

In short, although the state court's conclusion that there was no Miranda violation was reasonable, the safety net that proper, serious Miranda warnings provide – that of informing a suspect of his rights and of the gravity of the situation – was quite weak in this case, prone to give way as a protection against an involuntary confession if conditions were otherwise conducive to such a confession. As it turns out, they were.

2) Other factors supporting a determination of involuntariness of confession

We now turn to the voluntariness inquiry. At the outset, we find it notable that the officers' long lectures on how important it was for Doody to tell them the truth, which included repeated statements that they "knew" his denials of involvement were not true, did *not* alone result in his confession. Had Doody begun to confess shortly after those admonitions, it might be reasonable to assume that the officers persuaded him that confessing was in his best interests. His confession would thus be voluntary.

But Doody did not confess to any involvement in the temple murders until about 2:45 to 3:30 a.m., after Doody had been interrogated for several hours already, three officers subjected him to forty-five minutes of repeated, overwhelmingly unanswered questions, interspersed with commands that Doody "had" to answer. This timing alone strongly suggests that his will was overcome not by the interrogating officers' pleading imprecations noted by the state court, but by the officers' overall, interrelated, coercive messages that they would continue relentlessly questioning him until he told them what they wanted to hear, and that he would eventually have to do so. These messages were believable, given the officers' extraordinary persistence in the face of Doody's silence to that point, the number of hours the interrogation had already gone on, and Doody's inevitable fatigue at 2:45 to 3:30 in the morning. As Miranda noted, "[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained."

. . .

Compounding the troubling scenario in this case is Doody's particular vulnerability to the officers' tactics: his age – seventeen – and the length of the interrogation, more than twelve unbroken hours, embracing an entire night. The Supreme Court has long recognized that "admissions and confessions of juveniles require special caution." Doody's vulnerability because of his youth was enhanced by the fact that he had never been arrested before and, as he told the officers, had never heard of Miranda rights. And numerous cases recognize the coercive potential in unbroken hours of interrogation of a juvenile, particularly when they take place overnight.

Nor was Doody interrogated in the presence of any friendly adult. Instead, he faced interrogation, alone, by two, three, and four officers at a time. Even though Doody agreed at the outset to speak to the officers without his parents present, the absence of a friendly adult is a factor in assessing the voluntariness of a juvenile's confession.

> We recognize that voluntariness hinges on the perception of the suspect, so circumstances of which the suspect was unaware at the time of questioning are not relevant. Further, we express no opinion on whether the task force actively sought to ensure that Doody's stepfather would not learn of Doody's interrogation, as Doody argues. Nonetheless, it is indisputable that, despite ample opportunity requiring no special effort, the task force failed to notify a minor's guardian of the minor's impending interview with police about his possible involvement in a multiple homicide.
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> Indeed, the content of Doody's confession itself provides strong evidence that his will was overborne. Although, early in his confession, he insisted that the Tucson Four were not at the temple during the robbery and murders, the officers simply refused to accept this assertion and asked many questions about the involvement of the Tucson Four. Doody finally responded with answers consistent with the officers' insistence that the Tucson Four were at the temple with Doody: he said that about ten people – not five – were involved, two or three were black, and some of them might have been from Tucson. In other words, facing the officers' refusal to stop questioning him until they received the answers they wanted, Doody succumbed by providing some information that was suggested by the officers' questions but that the state now concedes is not true.
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> . . . .
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> A juvenile was given Miranda warnings in a downplayed manner that ensured he would not take them seriously and would waive his rights. With only a flimsy version of the protection the Miranda warnings are designed to provide, he was then interrogated for more than twelve hours, overnight, almost entirely without pause and with no friendly adult present. He was told that he had to answer the officers' questions and that the interrogation would not end until he confessed. He was finally broken down by the ceaseless questioning of two, three, and four police officers, questioning that continued despite his frequent long stretches of silence. Under these circumstances, we conclude, he did not voluntarily confess. The state court's holding to the contrary was, for the reasons we have surveyed, an "objectively unreasonable" application of clearly established federal law.

[Footnotes and some citations omitted]

LED EDITORIAL COMMENTS: In State v. Hodges, 118 Wn. App. 668 (2003) Dec 03 LED:16, Division One of the Washington Court of Appeals stated that a custodial suspect who remains steadfastly silent in the face of extended repeated questioning will at some point be deemed to have impliedly asserted the right to silence under Miranda. The Hodges Court held that no such factual situation was presented in that case. In a footnote in the Doody decision presented above, the Ninth Circuit panel stated that it was declining to address the implied-assertion issue because the defendant had not raised the issue. But our guess is that a Washington appellate court would rule that there was indeed an implied assertion of the right to silence under the Doody facts.

Note that the Doody Court was considering all of the circumstances together to determine voluntariness. Not everything that the Court considered would necessarily be problematic in isolation. For instance, while the youthfulness of the suspect is a factor, the fact of questioning the 17-year-old suspect without informing his parents was lawful, and we think the latter fact should have been given no weight in the voluntariness

analysis. On the other hand, it is very troubling that the officers (1) downplayed the Miranda warnings, (2) told the youthful suspect that he "ha[d] to answer their questions, and (3) badgered him repeatedly with questions when, for an extended period, he remained silent.

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

(1) CASE MUST GO TO TRIAL ON ISSUE OF WHETHER OFFICER VIOLATED FIRST AMENDMENT WHEN HE ORDERED VOTER-REGISTRANT/SIGNATURE-GATHERER TO MOVE HER TABLE FROM A PUBLIC SIDEWALK WHERE A SPECIALLY PERMITTED "COOK-OFF" WAS BEING HELD BY A PRIVATE BUSINESS – In Dietrich v. John Ascuaga's Nugget, 548 F.3d 892 (9th Cir. 2008) (decision filed December 1, 2008), the Ninth Circuit Court of Appeals rules that, assuming the facts alleged by the plaintiff-citizen are true, an officer violated her First Amendment right to free speech. The 3-judge panel rules that the officer should not have ordered, under threat of arrest, a political organization volunteer to move her table's location on a public sidewalk where she was gathering signatures for a recall petition, and she was also registering voters. The Court rules that the officer was not justified in giving his order to move based merely on a complaint from an employee of the private business that had obtained a special event permit to host a cook-off in a public area that included the political volunteer's sidewalk location.

The question under the First Amendment was whether the officer's directive was narrowly tailored to the government's interest in protecting the permittee-business- owner's rights. The Ninth Circuit panel notes that there was no assertion that the volunteer's activities would cause, or did cause, any safety or traffic concerns at her desired location. In addition, there was little chance, the Court says, that the public would have mistakenly viewed the volunteer's activities as having been endorsed by the permittee-business-owner. Therefore, the First Amendment was violated by the officer's order to move.

Result: Reversal in part of U.S. District Court (Nevada) grant of summary judgment on all issues to both the government and private civil defendants; case remanded for trial on one of the theories against the City of Sparks law enforcement officer.

(2) FREE SPEECH: SEATTLE'S PARADE ORDINANCE THAT LIMITS MARCHING IN THE STREET HELD TO GIVE POLICE CHIEF TOO MUCH DISCRETION – In Seattle Affiliate Of The October 22nd Coalition To Stop Police Brutality, Repression And Criminality Of A Generation v. City of Seattle, 550 F.3d 788 (9th Cir. 2008) (decision filed December 12, 2008), a 3-judge panel of the Ninth Circuit rules 2-1 that Seattle's parade ordinance violates the freedom of speech clause of the First Amendment of the U.S. Constitution because the ordinance gives too much discretion to the police chief to bar parade participants from marching in the street. The majority opinion's first paragraph summarizes the majority's ruling as follows:

> We are presented with a conflict between those who wish to conduct a parade on Seattle's city streets – a forum historically preferred by people who want to demonstrate their messages of honor, celebration or, as in this case, protest [regarding alleged police brutality and other alleged government repression] – and the city's interests in traffic safety. The City of Seattle by ordinance gives its police chief, when issuing a parade permit, the discretion to require marchers to use the sidewalks instead of the city streets. The issue is whether the ordinance violates the free speech guarantees of the First Amendment because on its face it impermissibly grants "the licensing official . . . unduly broad discretion."

Thomas v. Chicago Park District, 534 U.S. 316 (2002). We conclude that the ordinance by its terms gives the Chief of Police unbridled discretion to force marchers off the streets and onto the sidewalks, unchecked by any requirement to explain the reasons for doing so or to provide some forum for appealing the chief's decision. We therefore hold that the parade ordinance is facially unconstitutional.

Result: Reversal of U.S. District Court (Seattle) ruling that the Seattle parade ordinance is not unconstitutional on its face (other aspects of the case relating to police officer actions during a 2003 march were previously settled, so the facial constitutionality issue was the only issue on appeal to the Ninth Circuit).

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WASHINGTON STATE SUPREME COURT

EXIGENT CIRCUMSTANCES: OFFICERS AT RESIDENCE INVESTIGATING THEFT OF TANKER TRUCK CARRYING ANHYDROUS AMMONIA WERE JUSTIFIED IN WARRANTLESS RESIDENCE SEARCH FOR POSSIBLE THIRD METHAMPHETAMINE MANUFACTURING SUSPECT WHO MIGHT HAVE A DISAPPEARING GUN

State v. Smith, __ Wn.2d __, 199 P.3d 386 (2009)

Facts and Proceedings below: (Excerpted from majority opinion)

> The Tri-City Metro Drug Task Force (Task Force) received information from the Federal Bureau of Investigation (FBI) that a tanker truck containing 1,000 gallons of anhydrous ammonia had been stolen from Sprague, Washington. "Anhydrous amonia [sic] is extremely toxic. It is one of the most potential[ly] dangerous chemicals used in agriculture. It can cause severe chemical burns in victims exposed to it in small amounts. [Exposure] [r]equires immediate treatment to minimize damage." The Task Force received an anonymous tip that the stolen tanker truck was located at 203212 East State Route 397, Kennewick, Benton County.
>
> The Task Force, the Washington State Patrol, the Benton County Sheriff's Office, and the Benton County Fire Department responded to the tip and converged on the location. The property consists of a fenced acre of land containing a two-story house, a shed, and several junk cars. The tanker truck was located fewer than 75 feet from the house. According to the anonymous tip, the house was vacant.
>
> Detective [A] of the Task Force was familiar with the property, having previously responded to the property for methamphetamine-related incidents. Detective [A] and Detective [B] made the initial entry onto the property to secure the truck against the risk of leaking anhydrous ammonia. This initial entry was warrantless. Both officers wore protective gear. They secured the truck and verified it was not leaking.
>
> While the tanker was being secured, 10 other officers surrounded the house, knocked on the door, and announced their presence. While securing the house one officer saw through a window "what appeared to be a rifle . . . located in the living room area of the first floor next to a mattress." The officers also saw in the

yard between the truck and the house "a propane tank with a modified and discolored valve, which Detective [A] recognized by training and experience to be consistent with the storage of anhydrous ammonia."

Approximately 10 minutes after the officers announced their presence, [Brent Richard] Smith and Kimberly Yvonne Breuer exited the house. They told the officers they found the house open a few days prior and had been staying there since then. They told the officers they were aware of the truck but unaware of its contents. The officers handcuffed and detained Smith and Breuer.

Looking into the open door the officers noticed that the apparent rifle was no longer where they had previously seen it. The officers asked Smith and Breuer if there was anyone else in the house. They responded that no one else was there.

Detectives [A], [C], [D], and [E] entered the house to perform a "safety sweep." They searched in places where a person could be hiding, but did not look in other spaces, such as drawers. During this search, the officers seized a 16-gauge shotgun from a second floor crawl space. The officers also noticed items consistent with the manufacture of methamphetamine. No one was inside the house.

The officers later got a warrant based on the information gathered from the first search of the house. The search of the house pursuant to the warrant revealed a methamphetamine laboratory.

On November 23, 2004, the State charged Smith with one count of manufacture of a controlled substance, methamphetamine. Smith moved to suppress the evidence obtained during the warrantless search of the house. The trial court denied Smith's motion following a suppression hearing.

On February 18, 2005, a jury found Smith guilty. Smith appealed. The Court of Appeals affirmed Smith's conviction, holding the warrantless search of the house was justified under three exceptions to the warrant requirement: "community caretaking," "protective sweep," and "exigent circumstances." Smith, 137 Wn. App. 262 (Div. III, 2007) **April 07 LED:02**.

ISSUES AND RULINGS: 1) Did the combined facts of a) two persons emerging from the house, b) the disappearing gun inside and c) the stolen, loaded tanker truck outside add up to exigent circumstances (officer and public safety) justifying a non-pretextual entry of the house to search in places where another suspect might be hiding? (ANSWER: Yes)

2) Did the Court of Appeals correctly conclude that the search of the house for another suspect was also justified as an "emergency" search or a "protective sweep?" (ANSWER: The majority opinion declines to address these issues)

Result: Affirmance of Court of Appeals decision that affirmed the Benton County Superior Court conviction of Brent Richard Smith for manufacturing methamphetamine.

ANALYSIS: (Excepted from majority opinion)

1) "Exigent circumstances" exception to warrant requirement

Under one recognized exception [to the constitutional search warrant requirement], police may search without a warrant when "exigent circumstances" justify the search. State v. Cardenas, 146 Wn.2d 400, 405 (2002) **July 02 LED:07**. The rationale behind the exigent circumstances exception "is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." Washington courts have long held that "danger to [the] arresting officer or to the public" can constitute an exigent circumstance. State v. Counts, 99 Wn.2d 54 (1983).

We determine whether an exigent circumstance existed by looking at the totality of the situation in which the circumstance arose. We have set out six factors to guide this analysis:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

Cardenas. Because we analyze the totality of the situation, circumstances may be "exigent" even if they do not satisfy every one of the six listed elements.

Under the extraordinary facts of this case, the responding officers identified a legitimate threat to officer and public safety sufficient to constitute an exigent circumstance. Upon arriving at the property, they found a stolen tanker truck parked next to the house, pressure filled with 1,000 gallons of an extremely dangerous chemical. Presumably, someone hiding in the house had stolen the tanker, in a criminal act serious enough to warrant FBI involvement. The officers saw a firearm through the window of the house. By the time Smith and Breuer had emerged from the house, the firearm had disappeared, and Smith and Breuer did not have it.

The trial court made a finding of fact that Detective [A] was concerned that a person with the missing gun inside the house would shoot the pressurized tank of anhydrous ammonia, causing a grave health risk for all those in the vicinity. He was also concerned that a person hiding in the house would shoot directly at the officers.

There was no pretext here. The officers' actions were consistent with their stated purpose of preventing the risks to themselves and the public. They looked only in spaces where a person could hide, and they confiscated only the missing gun.

Under the unusual facts presented here, most notably the combination of large quantities of a toxic chemical and the missing firearm, the officers' search falls under the "officer and public safety" prong of the "exigent circumstances"

exception to the warrant requirement. The trial court was correct in refusing to suppress the evidence gained in connection with the search.

2) "Emergency" and "protective sweep" exceptions to search warrant requirement

In its discussion of exigent circumstances, the Court of Appeals quoted and applied standards related to the "emergency" exception to the warrant requirement. Smith. While some older Washington cases treat "emergency aid" as a subset of the "exigent circumstances" exception, the more recent cases analyze it under the separate "community caretaking" category, as the United States Supreme Court has always done.

Because we hold that the evidence was properly admitted under the "officer and public safety" subset of the exigent circumstances exception, we need not address whether the "community caretaking" and "protective sweep" exceptions apply.

[Some citations omitted]

DISSENT:

Justice Richard Sanders writes a strenuous dissent that is joined by justices Gerry Alexander and James Johnson. Among other things, the dissenting opinion accuses the officers of going into the house solely on a pretext to search for evidence of drug manufacturing.

BURGLARY OF MOTHER'S LOCKED BEDROOM – EVIDENCE OF IMPLIED BAR TO SON'S ENTRY OF ROOM CAN SUPPORT UNLAWFUL ENTRY OR REMAINING ELEMENT OF A BURGLARY CHARGE

State v. Cantu, 156 Wn.2d 819 (2006)

LED INTRODUCTORY EDITORIAL NOTE: Note that Cantu is a 2006 decision. We generally try to digest court decisions in a much more timely manner, but this one slipped under the LED radar.

Facts and Proceedings below: (Excerpted from Supreme Court majority decision)

Cantu's mother, Noyola Moncada, lives in Moses Lake with her boyfriend and daughter, Sophia. One morning in February 2003, Corporal Steven Miers of the Moses Lake Police Department responded to a call from the home. Sophia told Miers that [the 17-year-old] Cantu had just left after breaking into their mother's bedroom by kicking in the dead bolt-locked door. Miers saw damage to the bedroom door consistent with Sophia's account. Sophia also reported to Miers that Cantu had taken items, including his own alarm clock, out of their mother's bedroom. Shortly afterward, Moncada came home and told Miers that money, beer, and pain pills had been taken from her bedroom. Moncada testified that at the time of the incident, Cantu was not living with her, did not have her permission to enter her bedroom, and that the missing beer, money, and pills were returned by Moncada's nephew later that same day.

Cantu testified that he went to his mother's home on February 6, 2003, to pick up some clothes. Cantu explained that while he was inside the house and playing with his dogs, he ran into his mother's bedroom door and accidentally broke the

door. Cantu asserted he entered his mother's bedroom only to shut the door and did not remove anything.

Cantu was charged by information with one count each of residential burglary, theft in the third degree, minor in possession of alcohol, and possession of a legend drug. The court found Cantu guilty of residential burglary, but found insufficient evidence existed as to the other three counts.

ISSUE AND RULING: May the juvenile be prosecuted for burglary based on his disobeying of an implied prohibition – i.e., a dead-bolt-locked door – that his mother placed on entry of her bedroom? (ANSWER: Yes, this fact, plus evidence of his intent to commit a crime while entering the room or remaining unlawfully in the room would add up to burglary)

Result: Reversal, on grounds not addressed in this LED entry (related to the trial court's application of the burglary statute's inference-of-intent provision), of Court of Appeals' affirmance of Grant County Superior Court conviction of Antonio B. Cantu for residential burglary.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> [W]e must decide whether a license to enter a dwelling may be impliedly limited. . . . . Cantu argues that implied limitations are not enough; that his mother did not expressly prohibit him from entering her bedroom, and that the dead bolt-locked door did not give him sufficient notice. . . . State v. Crist, 80 Wn. App. 511 (1996) **Aug 96 LED:21**. The State argues that express limits are not required and that the locked dead bolt was sufficient. We agree with the State.
>
> As part of its proof of residential burglary, the State bore the burden of showing that Cantu entered and remained unlawfully in Moncada's home with the intent to commit a crime against a person or property. RCW 9A.52.025(1). A person "enters or remains unlawfully" when he is not licensed, invited, or otherwise privileged to enter or remain on the premises. RCW 9A.52.010(3).
>
> A juvenile is presumed to have a license to enter his parents' home. Because Cantu was 17 years old at the time, we will presume he had a license to enter Moncada's home. However, even though Cantu may have had a license to be in the home, an unprivileged entry into a locked room may still constitute unlawful entry for purposes of burglary.
>
> In Crist, Division Two of the Court of Appeals found a juvenile unlawfully entered his father's locked room when the juvenile had a license to enter certain parts of the home but was expressly told that he was not to enter his father's room.
>
> . . .
>
> While Cantu is correct that Crist [and two other decisions] all involved some sort of express limits, no Washington court has held that to find an unlawful entry, express limits on the juvenile *must* exist. The Crist court explained that the privilege could be limited either expressly or impliedly. We agree and hold that a child's license to enter the family home, or any room within, may be limited expressly or by clear implication. Since Moncada's locked bedroom door gave Cantu clear implied notice that any permission to enter the home did not extend to her bedroom, there was sufficient evidence to find an unlawful entry.

[Some citations omitted]

LED EDITORIAL COMMENT: We recently received a call from an officer regarding whether burglary or trespass could be prosecuted where one adult brother broke into another adult brother's locked bedroom in the parents' home. The Cantu analysis should apply.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

EVEN THOUGH INTERROGATING OFFICER'S PROMISE TO SUSPECT THAT THE SUSPECT WOULD NOT BE CHARGED WITH VANDALISM WAS NOT PROPER, THAT FACT ALONE DID NOT MAKE THE SUSPECT'S CONFESSION INVOLUNTARY – In State v. Unga, 165 Wn.2d 95 (2008), the Washington Supreme Court addresses a case where a detective conducting an interrogation acted outside the scope of his authority as a law enforcement officer in promising the suspect that he would not "charge" him with vandalizing a car. A majority of the Supreme Court concludes that this improper promise (because it was not made through the prosecutor's office) did not render the suspect's subsequent confession to that and other crimes involuntary under the totality of the circumstances. Therefore, the Supreme Court affirms the defendant's conviction for taking a different car without permission.

The determination of voluntariness of a confession depends on the totality of the circumstances surrounding the confession. The Supreme Court's lead opinion authored by Justice Madsen (joined by six other Justices) provides a lengthy, detailed discussion of the facts and the governing law to show that no other facts in this case would support a conclusion that the confession was procured by coercion or other improper promises. Justice Sanders writes a concurring opinion joined by Justice Chambers, arguing that the improper promise by the officer not "to charge," in and of itself, regardless of whether there are any other indicators of involuntariness, made the confession involuntary for purposes of prosecuting the matter regarding which the promise was made, but not involuntary regarding other matters. The lead opinion by Justice Madsen rejects this reasoning by Justice Sanders, asserting that the same words by a suspect cannot be involuntary as to one crime and voluntary as to another crime.

Result: Affirmance of Court of Appeals decision (see State v. L.U., 137 Wn. App. 410 (Div. I, 2007) **May 07 LED:17**); affirmance of King County Superior Court conviction of Leaa' Esola Unga (D.O.B. 2/17/89) for taking a motor vehicle without permission in the second degree.

LED EDITORIAL COMMENT: We have not provided a more detailed description of the facts and analysis in the Supreme Court's lengthy lead and concurring opinions in this case because we believe that what law enforcement officers should take from this case is quite simple, i.e., a recognition that they lack authority make "charging deals" during interrogations without involvement of the office of the prosecuting attorney. Law enforcement officers may wish to consult their local prosecutors on this subject.

****

WASHINGTON STATE COURT OF APPEALS

"FELLOW OFFICER RULE," PLUS FLIMSINESS OF SUSPECT'S CLAIM THAT SHE THOUGHT A CASINO TICKET HAD BEEN ABANDONED, ADD UP TO PROBABLE CAUSE TO ARREST HER FOR THEFT OF THE CASINO TICKET

State v. Wagner-Bennett, __ Wn.2d __, __ P.3d __, 2009 WL 224067 (Div. I, 2009)

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

> Appellant Beverly Wagner Bennett, arrested in a tribal casino for stealing a casino ticket, was convicted of possession of drugs based on evidence found during a search incident to her arrest. The issue on appeal is whether police had probable cause to arrest her for theft. Wagner-Bennett contends her conduct was equally susceptible to the innocent explanation that she picked up the ticket thinking someone had abandoned it. Considering the ticket's cash value and the short time period it was left unattended, police could reasonably infer appellant intended to steal the ticket. The trial court did not err in denying the motion to suppress.
>
> The arrest of Wagner-Bennett for alleged theft occurred at the Angel of the Winds Casino, a tribal casino in Arlington, in February 2007. In a search incident to arrest, police found methamphetamines in her purse. She was charged with possession of a controlled substance, not with theft.
>
> Wagner-Bennett filed a motion to suppress all evidence obtained as a result of unlawful arrest and subsequent search. At the suppression hearing, the only witness to testify was Officer Felix Moran, who at that time was the tribal police chief.
>
> The slot machine in question, called a “rocket machine”, accepted cash or casino tickets. After playing the machine, the customer can cash out any money that may remain in it by receiving a paper ticket with the balance. The tickets do not have any information on them showing who they belong to.
>
> The person who reported the theft was Shandra Denby. Denby cut her finger while playing and left the slot machine to get a napkin from a beverage center on the other side of the casino. There was still $17.00 in the slot machine. Denby also left behind a paper ticket with a cash value of $25.49 sitting on the slot machine. When Denby returned, she allegedly found Wagner-Bennett in the process of cashing out the $17.00 in the machine, and the $25.49 ticket was missing. Denby took the $17.00 ticket away from Wagner-Bennett. Denby then reported the alleged theft to two security officers, T.J. Fields and Caleb Dawson.
>
> Fields and Dawson notified Chief Moran of the theft allegation. Along with Sergeant Steve Hardy, Chief Moran went over to the casino. While Sergeant Hardy talked to Shandra Denby, Chief Moran talked to Fields and Dawson.
>
> Fields and Dawson told Chief Moran that Denby had reported to them the theft of the $25.49 ticket. They informed him that before being contacted by Denby, they had observed Wagner-Bennett taking a ticket from the top of the machine Denby had been playing. There was no evidence, however, to indicate that before Wagner-Bennett approached the machine, she had been watching Denby or had seen her leave.
>
> Chief Moran got on the radio with Sergeant Hardy and confirmed from Sergeant Hardy that Denby had witnessed the alleged theft. Chief Moran arrested

Wagner-Bennett and placed her in handcuffs. A search incident to arrest turned up the drugs that resulted in the conviction.

At the suppression hearing, the trial court ruled that the arrest was supported by probable cause. The court then entered written findings of fact and conclusions of law. The trial court convicted Wagner-Bennett as charged at a trial on stipulated facts.

ISSUES AND RULINGS: 1) Does the "fellow officer rule" allow the court to consider on the probable-cause-to-arrest question information that other officers in the case had gained but had not yet passed on to the arresting officer at the time of arrest? (ANSWER: Yes)

2) Does Wagner-Bennett's claim that she thought that the $25.49 casino ticket had been abandoned negate the State's probable cause theory? (ANSWER: No)

Result: Affirmance of Snohomish County Superior Court conviction of Beverly Ann Wagner-Bennett for possession of illegal drugs.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause to arrest standard

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. It is a reasonableness test, considering time, place, and circumstances, and the officer's special expertise in identifying criminal behavior. Probability, not a prima facie showing, of criminal activity, is the standard for probable cause.

2) "Fellow officer rule"

Wagner-Bennett first challenges one finding of fact as not being supported by substantial evidence. Finding of fact 9 states, "Ms. Denby told Sgt. Hardy she had left the slot machine and returned *to find the defendant attempting to take the money from the machine* and her $25.49 ticket was missing. Sgt. Hardy radioed Chief Moran with this information." (Emphasis added.) Wagner-Bennett claims there was no evidence that Chief Moran heard about her attempt to cash out the machine before he made the arrest. Therefore, she argues, that fact should not be included in the facts within the arresting officer's knowledge when assessing the issue of probable cause.

As Wagner-Bennett points out, Chief Moran acknowledged during cross-examination that at the time of the arrest, Fields and Dawson had not told him about Denby's cashing-out allegation. "That was in their report later." But a later portion of the same cross-examination brought out that Denby accused Wagner-Bennett of stealing "the tickets" (plural) when she was being interviewed by Sergeant Hardy. Under the fellow officer rule, the information known to Sergeant Hardy may be considered in deciding whether or not there was probable cause to arrest, even if it was not expressly communicated to Chief Moran. See State v. Maesse, 29 Wn. App. 642 (1981).

3) Abandoned ticket claim

Wagner-Bennett next contends that the facts known to Chief Moran at the time of the arrest do not establish probable cause to believe she committed a theft. She points out that the crime of theft is not committed unless the defendant has the intent to deprive another of her property. RCW 9A.56.020. She argues that the fact that a person takes a ticket left behind on a machine does not mean there is a probability that she has the intent to deprive the rightful owner of possession. She contends that her conduct, viewed objectively, is just as plausibly explained as the act of a person who picks up property believing that it has been abandoned.

The State claims that abandonment is an affirmative defense that negates the mental element of the crime of theft. An arresting officer has no need to possess information negating an affirmative defense like self defense. McBride v. Walla Walla County, 95 Wn. App. 33 (Div III, 1999) **Oct 99 LED:16**. Relying on McBride, the State argues that it was not necessary for Chief Moran to consider whether the suspect reasonably could have believed the ticket was abandoned.

We decline to decide whether abandonment is an affirmative defense. Wagner-Bennett's argument goes to the intent element of the offense of theft, not to any defense she might have mounted at trial. This case can be more efficiently resolved by considering what information was known to Chief Moran and applying the ordinary test for probable cause.

Chief Moran knew Wagner-Bennett had taken the $25.49 ticket off the top of the machine while Denby was gone. The security guards, Fields and Dawson told him they saw her do it. From the fact that Denby reported the incident as a theft, Chief Moran knew that Denby claimed ownership of the missing ticket. He testified that he "always" would consider the possibility that a ticket left lying around had been abandoned, but he rejected that possibility under the circumstances presented . . .

Based on Chief Moran's testimony, the trial court did not err in concluding that Chief Moran had probable cause to arrest for theft. As the court found, a casino ticket with a cash value of $25.49 is "not the type of property that someone would knowingly abandon." The time period during which the tickets were left unattended was "short". Chief Moran knew that Denby found Wagner-Bennett attempting to cash out the $17.00 in the machine and stopped her from doing so. And he knew that Wagner-Bennett, having been confronted by Denby, simply left with the $25.49 ticket and walked over to the other side of the casino. An innocent explanation for Wagner-Bennett's conduct may be possible, but under these circumstances, it is not as likely as the guilty explanation. Chief Moran could reasonably infer that Wagner-Bennett intended to steal the ticket from its rightful owner.

[Some citations omitted]

FOR WOULD-BE MEDICAL MARIJUANA CAREGIVER TO ASSERT DEFENSE, THE NECESSARY "MEDICAL USE OF MARIJUANA ACT" DOCUMENTS MUST HAVE ALREADY EXISTED AT THE TIME OF THE FIRST POLICE CONTACT, BUT THE WOULD-

BE CAREGIVER NEED NOT HAVE HAD THE DOCUMENTS ON HIS OR HER PERSON AND NEED NOT HAVE PRESENTED THE DOCUMENTS TO THE POLICE AT THE TIME OF THAT FIRST POLICE CONTACT

State v. Adams, __ Wn. App. __, 198 P.3d 1057 (Div. III, 2009)

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

> In March 2005, Kennewick police officers received a tip that Mr. Adams was growing marijuana at his house in Kennewick. On March 12, while Mr. Adams was at work, police searched his home and garage. [**LED EDITORIAL NOTE: We assume that the officers had a search warrant. Lawfulness of the search was not an issue in this case.**] A medical marijuana permit not pertinent to this appeal was posted on the door of the garage. Inside the garage, officers found approximately 40 marijuana plants.
>
> After the initial search, police officers [A] and [B] drove to Mr. Adams' workplace in Pasco. Officer [A] immediately arrested and handcuffed Mr. Adams, who explained that he had a medical marijuana permit. Officers did not ask any follow-up questions or request documentation. Mr. Adams was transported directly to the Benton County jail.
>
> At the jail, Mr. Adams told Officer [B] that he had medical use permits from two Portland doctors authorizing his medical use of marijuana. Officer [B] did not follow up on this information or ask for any documentation.
>
> The State charged Mr. Adams with maintaining a dwelling for controlled substances. Mr. Adams later filed a motion to allow the primary caregiver affirmative defense under the Medical Marijuana Act. In support of his motion, Mr. Adams submitted a November 27, 2004 letter, in which Ryan Ward appointed Mr. Adams as his medical marijuana caregiver; a verification that Dr. Thomas Orvald, Mr. Ward's authorizing physician, was licensed to practice in the state of Washington; and a 2004 medical authorization from Dr. Orvald for Mr. Ward's medical use of marijuana. The validity of these documents is not at issue.
>
> At the outset of the hearing on the motion, the court noted that Mr. Adams had a "heavy" burden of proof. Mr. Adams argued that he should be allowed to use the primary caregiver defense under the Act because he possessed valid authorizing documents at the time of his arrest, but was never allowed to retrieve them.
>
> The court initially granted Mr. Adams' motion, noting that Mr. Adams possessed the appropriate documentation prior to charging and that the Act was not clear as to when a person must provide such documents. The State moved for reconsideration of the decision, arguing that Mr. Adams' presentation of the documents was not timely and that a medical marijuana authorization is akin to a driver's license that should be carried at all times.
>
> The court reversed its previous ruling, concluding:
>
> > 1. March 12, 2005 was the date the defendant was questioned by law enforcement regarding his medical use of marijuana within the meaning of [former] RCW 69.51A.040(2)(C) and (4)(c) [1999].

> 2. March 12, 2005 was the date the defendant had the duty to present his authorization as a qualifying patient or designation as a caregiver under [former] RCW 69.51A.040(2)(C) and (4)(c).
>
> 3. The defendant at that time presented, by mentioning and directing officers to authorization documents from Doctor Dodge. Doctor Dodge was not a qualified physician, because he was not, at the time the authorization was signed, licensed to practice under RCW 18.71 as a Washington Physician. . . .
>
> 4. The documents the defendant provided approximately a year and a half after his contact with law enforcement are not admissible under RCW Chapter 69.51A, because they were not provided nor mentioned when the defendant was questioned regarding his use of marijuana.
>
> 5. The defense motion, previously granted, is reconsidered, and the medical marijuana defense is hereby stricken.

Mr. Adams was convicted on stipulated facts of maintaining a dwelling for controlled substances.

ISSUE AND RULING: Where a would-be Medical Marijuana Caregiver had the necessary paperwork, but not on his person, when law enforcement officers contacted him at his worksite regarding the 40 growing marijuana plants at his home, should the defendant be allowed to assert a medical-marijuana-caregiver defense at his trial on a charge of growing marijuana? (ANSWER: Yes)

Result: Reversal of Benton County Superior Court conviction (based on stipulated facts and judge's findings) of Timothy Earl Adams for maintaining a dwelling for controlled substances; case remanded for trial in which Adams may assert defense as alleged caregiver under Medical Use of Marijuana Act.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The Medical Marijuana Act protects people who supply marijuana to qualified patients. RCW 69.51A.005. "The Act provides an affirmative defense for patients and caregivers against Washington laws relating to marijuana."
>
> Under former RCW 69.51A.040(1):
>
> > If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established the affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter.
>
> A caregiver must satisfy the following requirements:
>
> > (a) Meet all criteria for status as a primary caregiver to a qualifying patient;

> (b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply;
>
> (c) Present a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement officer requesting such information.
>
> Former RCW 69.51A.040(4).

Here, the record establishes that Mr. Adams obtained the proper documentation designating him a primary caregiver for Mr. Ward well in advance of law enforcement contact. However, the trial court refused to admit these documents, concluding that Mr. Adams' presentation of the documents a year and a half after his contact with law enforcement was too late. Mr. Adams does not dispute that the Act requires presentment of valid documentation when requested by police, but points out that due to his arrest away from home, he was never given a chance to obtain the documents in his possession.

We agree. Given that Mr. Adams possessed the appropriate authorizing documents at the time of his arrest and was cooperative with police, we find nothing to suggest that Mr. Adams would not have provided such documents if requested by law enforcement. He simply was not given the chance to do so. Officer [A's] police report states that upon arrival at Mr. Adams' workplace, he immediately arrested Mr. Adams, who spontaneously told him that he had a medical marijuana permit. Officer [A] did not ask any follow-up questions or request any documentation. Instead, Mr. Adams was taken directly to jail. During the drive to the jail, police did not ask Mr. Adams any questions. The court faults Mr. Adams for failing to provide the documents at the time of his arrest, but fails to explain how he could have retrieved them given the fact he was arrested away from home and immediately taken to jail.

Once at the jail, Mr. Adams was not given any opportunity to retrieve his documents. In fact, the record indicates that Officer [B] was not interested in any such documents, focusing his questioning on Mr. Adams' knowledge of other suspected marijuana growers in the area. The four-page documentation of Officer [B's] interview with Mr. Adams does not once reference Mr. Adams' marijuana permits or the circumstances of his marijuana possession. The trial court faults Mr. Adams for failing to reference the marijuana permits in the written statement, but the record is clear that he was never asked about them.

The State suggests that Mr. Adams should have carried the permit at all times, but nothing in the Act indicates that this was the intent of the legislature. Former RCW 69.51A.040(4)(c) simply requires a defendant to provide a copy of the qualifying patient's valid documentation and evidence that the defendant is a primary caregiver to law enforcement upon request.

[Some citations omitted]

LED EDITORIAL NOTE: The Adams Court ruled only the defendant Adams was timely in presenting his documentation. The Court did not rule that his defense is valid. That would be determined by the fact-finder at trial.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) CONSENTING SEXUAL INTERCOURSE BETWEEN A HIGH SCHOOL TEACHER AND HIS 18-YEAR-OLD STUDENT HELD NOT CRIMINAL; COURT DISMISSES CHARGE OF FIRST DEGREE SEXUAL MISCONDUCT WITH A MINOR – In State v. Hirschfelder, __ Wn. App. __, __ P.3d __, 2009 WL 73254 (Div. II, 2009), the Court of Appeals rules that a high school teacher cannot be prosecuted under RCW 9A.44.093, the first degree sexual misconduct statute, for having consenting sexual intercourse with one of his students if he or she is 18 years old or older. Indeed, current Washington statutes do not make such conduct criminal.

After the county prosecutor charged the teacher, Matthew Hirschfelder, he filed a motion, without admitting guilt, to dismiss the charges on grounds that a high school student age 18 or older is not protected by RCW 9A.44.093. The superior court denied the motion to dismiss. Hirschfelder then obtained discretionary review in the Court of Appeals.

RCW 9A.44.093, subsection (1), addressees three separate categories of conduct that can constitute first degree sexual misconduct. Subsection (1) provides as follows:

> (1) **A person is guilty of sexual misconduct with a minor in the first degree** when:
>
> (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; **(b) *the person is a school employee who has,*** *or knowingly causes another person under the age of eighteen to have,* ***sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student;*** or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with his or her foster child who is at least sixteen.

[Bolding and underlining added for LED]

The bolded language of subsection (1) of RCW 9A.44.093 above is the statutory language under which Hirschfelder was charged. The Hirschfelder Court recognizes that the statute's use of word "minor" is ambiguous and could be interpreted as applying to sex between a high school teacher and a high school student even if she is 18, 19 or 20 years old. But the Hirschfelder

Court applies the "rule of lenity" that requires the courts to give the benefit of the doubt to the accused in interpreting ambiguous criminal statutes. The Court also finds in legislative history support for its conclusion that subsection (1)(b) does not protect high school students who are 18 years of age or older.

Result: Reversal of Grays Harbor County Superior Court order denying Matthew J. Hirschfelder's motion to dismiss charges of first degree sexual misconduct.

(2) DEAD BODY IS NOT A "HUMAN BEING" UNDER FIRST DEGREE ARSON STATUTE – In State v. Bainard, __ Wn. App. __, 199 P.3d 460 (Div. III, 2009), the Court of Appeals rejects the State's cross appeal from a superior court ruling that under the first degree arson statute, a dead body is not a "human being."

Defendant Bainard murdered his parents in their home and then set their house on fire. RCW 9A.48.020(1), as it read at the time of the crime, provided that it is first degree arson to cause a fire in a building in which there shall be at the time a "human being." The Court of Appeals agrees with the trial court that Bainard could not be convicted of first degree arson for setting fire to a building with dead bodies in it.

Result: Affirmance of Chelan County Superior Court (1) convictions of Nicholas A. Bainard for second degree murder (two counts) and (2) vacation of conviction of first degree arson; also, reversal and remand on sentencing issue not addressed in the LED.

(3) UNDER STATE v. MODICA AND CHAPTER 9.73, PRE-TRIAL DETAINEE HAD NO PRIVACY PROTECTION AGAINST COUNTY'S RECORDING OF PHONE CALL FROM KING COUNTY JAIL – In State v. Archie, __ Wn. App __, __ P.3d __, 2009 WL 80275 (Div. I, 2009), the Court of Appeals rules that under the Washington Supreme Court ruling in State v. Modica, 164 Wn.2d 83 (2008), **Sept 08 LED:05**, a pretrial inmate at the King County Jail had no expectation of privacy under chapter 9.73 RCW in his phone conversations under the King County Jail program that is structured to eliminate any such privacy expectation. As in the Modica case, the calls did not involve privileged communications with his attorney. The Archie Court concludes that it makes no difference under Modica's privacy analysis that the jail prisoner is a pre-trial detainee, as opposed to a post-conviction detainee.

The Archie Court describes the factual and procedural background of the case as follows:

> Archie was arrested and charged with first degree burglary and second degree assault. The court issued a pretrial no contact order that prevented him from contacting Bellinger even if she invited or allowed him to do so. In spite of this order, Archie made numerous phone calls to Bellinger from the King County jail.
>
> Signs posted near the jail telephones warn that telephone calls are subject to recording and monitoring. When a call is answered, a recorded message announces:
>
> > Hello, this is a call at no expense to you from . . . [name of inmate as given by inmate] [an] inmate at the King County Detention Facility. This call will be recorded and subject to monitoring at any time. To accept this call, dial three. To refuse this call, dial nine or hang up now. Thank you for using Public Communication Services. You may begin speaking now.

> After the recorded message plays, the call cannot continue until the recipient dials or presses three. This sequence occurred each time Archie called Bellinger.
>
> In several of these calls, Archie apologized to Bellinger for his actions, and repeatedly urged her to "be by [his] side" regarding the case. Recordings of these calls were admitted at trial. The jury convicted Archie as charged.

[Footnotes omitted]

Result: Affirmance of King County Superior Court convictions of Michael Eugene Archie for burglary in the first degree and assault in the second degree.

(4) DEFENDANT'S CHALLENGES TO HIS TELEPHONE HARASSMENT CONVICTIONS FOR VOICEMAIL MESSAGE TO POLICE OFFICER REJECTED – In State v. Alphonse, __ Wn. App. __, 197 P.3d 1211 (Div. I, 2008), Division One of the Court of Appeals rejects a defendant's challenge to his convictions for felony and misdemeanor telephone harassment for a message that he left on a police officer's voicemail. The message threatened great violence to the officer and his family.

The Court of Appeals previously affirmed Alphonse's convictions, but the Washington Supreme Court sent the case back for further review to assess whether the evidence showed that Alphonse had formed the intent to harass at the time that he placed the call. The Supreme Court required such review in light of the Court's ruling in State v. Lilyblad, 163 Wn.2d 1 (2008) **April 08 LED:14**.

The Court of Appeals again affirms Alphonse's convictions, ruling that the evidence was clear that Alphonse formed the intent to harass before he placed his phone call. The Court of Appeals also rejects Alphonse's claims that the following phrases in the telephone harassment statute are either unconstitutionally overbroad or vague – "intent to embarrass," and "lewd, lascivious, indecent, and obscene [speech]." The Court of Appeals does, however, agree with Alphonse that the Superior Court violated his constitutional right to travel when the Superior Court ordered broadly that he not appear in the City of Everett unless required for "legal or judicial reasons."

Result: Affirmance of Snohomish County Superior Court conviction of Edison Alphonse for one count each of misdemeanor and felony telephone harassment.

(5) IN PROSECUTION UNDER RCW 9.41.040, CORPUS DELICTI RULE DOES NOT BAR FROM EVIDENCE DEFENDANT'S ADMISSION TO POLICE REGARDING A GUN BEING IN HIS RESIDENCE – OTHER EVIDENCE SUPPORTED THE CONCLUSION THAT THE GUN WAS THERE AT THE TIME – In State v. Page, __ Wn. App. __, 199 P.3d 437 (Div. II, 2008), the Court of Appeals rejects a defendant's argument that the corpus delicti rule precluded the trial court from admitting into evidence, in a prosecution for second degree unlawful possession of a firearm under RCW 9.41.040(2)(a) his statements to police officers that he had a gun in his residence.

Thomas Page had previously been convicted of fourth degree assault against a family member. Police subsequently arrested him at his home for domestic violence. While in a holding cell, he told officers that he had a gun in the residence and that he was concerned that a child might find it. Thomas agreed with the police officers that he would call his brother, Edward, and ask Edward to retrieve the gun and bring it to the police. In the presence of the police, Thomas

called Edward, and, after giving very specific directions regarding the location of the gun, Thomas then said something that sounded to the officers like an invitation to his brother Edward to dispose of the gun.

The officers immediately hung up the phone and went to the house. When they got there, the brother, Edward, was leaving the house. Edward was unresponsive to the officers' questions regarding the gun, and they allowed him to leave. When defendant's wife arrived from a business trip later that day, the officers obtained her permission to search for the gun where defendant had told them it was located. The room was in disarray and an empty gun case was found, but no gun. The wife said, "it's not here."

By the time of trial, the wife's story had changed. She testified that her husband had probably been mistaken about the presence of a gun in the house. She testified that he was probably thinking about a .38 that she had inherited, but in fact there was no gun in the house at the time in question because she had already given the gun away. Defendant Thomas Page's counsel argued to the trial court that the corpus delicti rule precluded using the defendant's admissions in the presence of officers regarding the presence of the gun in the residence. In salient part, the analysis by the Court of Appeals in upholding the trial court's rejection of this corpus delicti theory is as follows:

> Corpus delicti means "body of the crime." State v. Brockob, 159 Wn.2d 311 (2006) **Feb 08 LED:08**. The rule of corpus delicti provides that a trial court may not admit the defendant's incriminating statements unless the State presents independent evidence that corroborates the statements. In other words, the State must present evidence independent of the defendant's incriminating statement that the crime the defendant described actually occurred. The rule stems from the recognition that juries are likely to accept confessions uncritically and from a distrust of confessions because they may be misreported, misconstrued, elicited by force or coercion, based on mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED:06**.
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> In considering whether the State has presented sufficient corroborating evidence, we view the independent evidence in a light most favorable to the State. The State is not required to prove the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. Rather, the corroborating evidence is sufficient if it supports a logical and reasonable inference that the crime occurred. Moreover such evidence must be consistent with a hypothesis of innocence. Brockob.
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> . . .
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> Construed in favor of the State, [the] evidence is sufficient to establish a reasonable and logical inference that a handgun had been in Page's bedroom, Edward searched the room for the weapon, found it, and was leaving with it when the police encountered him at the front door. We hold that the State sufficiently proved the corpus delicti by evidence independent of Page's admission in this phone call. Thus, he has not shown that counsel was ineffective for not challenging the admission of his telephone statements.

[Some citations omitted]

Result: Affirmance of Mason County Superior Court conviction of Thomas J. Page for second degree unlawful possession of a firearm in violation of RCW 9.41.040(2)(a).

(6) ACCOMPLICE LIABILITY STATUTE DOES NOT MAKE UNARMED RIOTER GUILTY OF FELONY RIOT – In State v. Montejano, __ Wn. App. __, 196 P.3d 1083 (Div. III, 2008), the Washington Court of Appeals holds that a person who participates in a riot but is not armed commits only a misdemeanor. The unarmed rioter cannot be convicted of committing a felony based on the armed status of another riot participant. The Court of Appeals summarizes its analysis as follows:

> The felony riot statute provides, "A person is guilty . . . if, acting with three or more other persons, he or she knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property" and "the actor is armed with a deadly weapon." RCW 9A.84.010(1), (2)(b). The sole issue on appeal is whether the crime can be committed by complicity under RCW 9A.08.020 when the accused was not armed and did not know that the other participants were armed. We conclude that, because the riot statute defines the nature and extent of accomplice liability and the defendant in this case was not himself armed, he cannot be convicted of felony riot. We therefore reverse and remand.

Result: Reversal of Grant County Superior Court felony riot conviction of Michael J. Montejano; remand of case to Superior Court for entry of a conviction of misdemeanor riot.

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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]