Law Enforcement Digest

MARCH 2013

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

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HONOR ROLL

686th Basic Law Enforcement Academy – September 18, 2012 through January 31, 2013

President:	Joshua L. Bryan, Enumclaw PD
Best Overall:	Jerad R. McLagan, Lincoln County SO
Best Academic:	Lucas W. Tarp, King County SO
Best Firearms:	John E. Raby, Everett PD
Patrol Partner Awards:	Christopher W. Oakes, Cheney PD
	Scott P. Ray, Anacortes PD
Tac Officer:	Officer Raphael Park, Bellevue PD

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ANNOUNCEMENT: Section 21 of Initiative 502, which prohibits certain conduct relating to opening a package of marijuana or consuming marijuana in view of the general public, has now been codified as RCW 69.50.445.

ANNOUNCEMENT: The Criminal Justice Training Commission has revised its Narcotic Detection Canine Performance Standards to remove marijuana as a required odor. The CJTC adopts standards that must be met in order for a narcotic detection canine and handler to be certified as a team pursuant to WAC 139-05-915. Although CJTC will no longer require marijuana for a team to be certified, agencies may continue to train their canines on marijuana if they choose. The revised standards are available on the CJTC website by clicking on "certification", then "K-9".

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) HABEAS CORPUS REVIEW: BECAUSE THE RULE FOR HABEAS CORPUS REVIEW DOES NOT ALLOW PRISONER TO RAISE THE 2004 MISSOURI V. SEIBERT DECISION REGARDING USE OF AN IMPROPER TWO-STEP MIRANDIZING PROCESS, NINTH CIRCUIT PANEL REVISES ITS EARLIER RULING THAT WAS BASED ON SEIBERT – In Thompson v. Runnels, ___ F.3d ___, 2013 WL 263909 (9th Cir., Jan. 24, 2013), a three-judge Ninth Circuit panel votes 2-1 to reverse its ruling granting a new trial to a murderer in a habeas corpus case previously reported in the LED (previous LED reports of the Ninth Circuit ruling in favor of the prisoner appeared in the **March 2011 LED** at pages 6-11 and the **December 2011 LED** at pages 18-19).

In interrogating murder suspect Thompson in 1998, California officers deliberately used a two-step (cat-out-of-the-bag) interrogation method. The first step of the interrogation involved custodial questioning without Miranda warnings. The second step involved Mirandizing, but it

did not involve curative measures such as an explanation to Thompson that his earlier statement would not be admissible. Thompson's suppression motion regarding his confession was denied at his trial, and he failed to obtain reversal on the Miranda issue in his direct appeal in the California appellate courts. The direct appeal process was completed as of April 21, 2004 when the California Supreme Court denied review of a Court of Appeals decision.

On June 28, 2004, the U.S. Supreme Court issued its ruling in Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**, holding that an intentional two-step interrogation process such as that used by the interrogating officers in the Thompson case violates requirements of Miranda for obtaining valid waiver of the constitutional rights to silence and counsel. Thompson did not seek further direct review in the U.S. Supreme Court, nor did he ask the California appellate courts to reconsider in light of the Seibert decision. Instead, he waited until 2005 and then filed in a federal district court for habeas corpus relief based on the Seibert decision.

After the Ninth Circuit ultimately granted Thompson's habeas corpus request for a new trial based on Seibert (as we reported in the March and December 2011 **LEDs**), the State of California obtained review in the U.S. Supreme Court, which remanded the case to the Ninth Circuit to reconsider whether Thompson should be allowed to make a Seibert argument in light of a recent U.S. Supreme Court ruling in another habeas corpus case, Greene v. Fisher, ___U.S. ___, 132 S. Ct. 38 (2011). The Greene rule does not allow defendants in federal habeas corpus petitions to base their arguments on Supreme Court decisions "that are announced after the last adjudication of the merits in state court but before the defendant's conviction becomes final."

Now the Ninth Circuit has concluded that Thompson is not entitled to a new trial under his federal habeas corpus petition because his argument is based on Seibert, a decision that the Greene rule does not allow him to use in support of his habeas petition.

Result: Affirmance of order of U.S. District Court (Northern District California) that denied the habeas corpus petition of Antwion E. Thompson.

(2) CIVIL RIGHTS ACT LAWSUIT: COURT MAKES MINOR AMENDMENTS TO OPINION BUT CONTINUES TO DENY QUALIFIED IMMUNITY TO OFFICER IN WARRANTLESS ENTRY INTO CURTILAGE IN HOT PURSUIT OF MISDEMEANANT – In Sims v. Stanton, ___ F.3d ___, 2013 WL 174448 (9th Cir., Jan. 16, 2013), a three-judge Ninth Circuit panel makes several very minor amendments to its December 3, 2012 opinion that we reported in the **February 2013 LED** at pages 3-7 (Civil Rights Act lawsuit: warrantless entry into curtilage in gang neighborhood in hot pursuit of suspect where arrest probable cause was only for disobeying order to stop was not justified under either exigent circumstances or emergency exceptions to the warrant requirement). The panel, however, does not change its basic analysis or its ruling that denies qualified immunity to the law enforcement officer who kicked open the gate to a six-foot-fence-enclosed front yard in pursuit of a fleeing individual where the officer had probable cause to arrest only for the misdemeanor of disobedience of an order to stop for police.

(3) NO FIRST AMENDMENT PROTECTION FOR FALSE ANTHRAX MAILINGS – In United States v. Keyser, ___ F.3d ___, 2012 WL 6052248 (9th Cir., Dec. 6, 2012), a three-judge Ninth Circuit panel rejects the defendant's argument that his mailing of false anthrax is entitled to First Amendment protection. The Court summarizes the case as follows:

> In an effort to drum up publicity for a self-published book on the dangers of anthrax, Marc Keyser feigned multiple acts of biological terrorism. After mailing

hundreds of packets of powder labeled "Anthrax"—which were actually full of sugar—Keyser was convicted on two counts of mailing threatening communications under 18 U.S.C. § 876(c) ("threat" counts) and three counts of communicating false or misleading information regarding the presence of a biological weapon under 18 U.S.C. § 1038(a) ("hoax" counts). He was sentenced to 51 months in prison. He now appeals his conviction and sentence.

Keyser contends that all of his convictions should be overturned because his communications were protected expression under the First Amendment. We disagree, concluding that his statements fall into categories of speech that do not enjoy constitutional protection. He also argues that he cannot be convicted under the threat statute, because his statements were addressed to a generic "manager," not to specific natural persons. The title of "manager," however, sufficiently indicates that the mailings were addressed to natural persons, which is all the statute requires. *See* United States v. Havelock*,* 664 F.3d 1284, 1293 (9th Cir. 2012) (en banc). In addition, Keyser raises multiple challenges to the jury instructions and alleges prosecutorial misconduct during closing arguments, but these claims are unpersuasive. We affirm his convictions.

Result: Affirmance of United States District Court (Eastern District California) conviction of Marc McMain Keyser for mailing threatening communications and communicating false or misleading information regarding the presence of a biological weapon. (Vacation of sentence on grounds not addressed in this LED entry; remanded for resentencing.)

(4) CIVIL RIGHTS ACT LAWSUIT: QUALIFIED IMMUNITY DENIED TO OFFICERS WHO BROKE OUT DRIVER'S SIDE WINDOW OF CAR REPORTED STOLEN AND PULLED THE SUSPECT OUT THROUGH IT; THE JURY MUST DECIDE WHOSE STORY TO BELIEVE AS TO WHETHER PLAINTIFF WAS TRYING TO FOLLOW THE OFFICERS' ORDERS – In Coles v. Eagle, ___ F.3d ___, 2012 WL 6054760 (9th Cir., Dec. 5, 2012), a three-judge Ninth Circuit panel rules that a U.S. District Court judge erroneously granted qualified immunity to law enforcement officers on the question of whether the officers acted reasonably in breaking a driver's side car window and pulling the suspect out through the window. Under the standard for granting law enforcement motions seeking qualified immunity, courts must generally assume the truth of the plaintiffs' fact claims and view those fact claims in the best light for the plaintiffs. Based on that standard, this case must go to a jury on the question of whether the officers' smash-and-grab arrest actions were reasonable, the Ninth Circuit panel rules.

A patrol officer received a report that a car on the roadway in front of him had been reported stolen. The officer signaled the driver to stop. The driver, Coles, did not immediately pull over, but he did not try to speed away, and he eventually stopped his car close to and in front of a concrete barrier in a parking lot. The patrol officer parked so as to sandwich or box in Coles' car. Another officer arrived, and the two officers soon were located on both sides of Coles' car on foot. One of the officers pointed a gun at Coles. The officers ordered Coles to simultaneously (1) exit the vehicle and (2) keep his hands on the wheel. Coles claimed that this order was confusing, and that he initially moved his hands in an effort to open the car door, but that he failed in that effort because he was unfamiliar with the door mechanism for the car he had stolen, so he gave up on his effort to open the door and placed his hands on the steering wheel. **[LED EDITORIAL NOTE: The Ninth Circuit opinion suggests that a less confusing order should be used in this situation, such as saying something along the lines of: "Put your right hand on top of the steering wheel and use your left hand to find the door lock."]**

Both officers deny that Coles ever made his hands visible. Without warning, one of the officers smashed the driver's side window with his baton, and the two officers together pulled the stocky Coles out of the car through the window with a struggle. The district court held that the force used to break the car window and pull Coles from the car was reasonable and granted the officers qualified immunity on that aspect of the case.

The Ninth Circuit panel reverses the district court and holds that the officers were not entitled to qualified immunity for breaking the car window and removing Coles from the car. That is because there is a material factual dispute as to whether Coles' hands were on the steering wheel when the officers broke the window and pulled Coles from the car. Accordingly, the district court improperly granted the officers qualified immunity because a reasonable jury could believe Coles' version of the event and find the officers' use of force was not reasonable under the circumstances. The Ninth Circuit panel in Coles summarizes its analysis as follows:

> We "balance the gravity of the intrusion on [Coles] against the government's need for that intrusion to determine whether it was constitutionally reasonable." [Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003).] Here, the scale tips in favor of Coles. A reasonable jury could conclude that the officers' force was not justified against an individual: (1) who was suspected of a nonviolent felony and did not appear armed; (2) who did not actively resist or evade arrest and, in any event, had no real chance of escape; (3) who was given conflicting orders by two officers, one of whom had a gun trained on him; and (4) whose hands were on the steering wheel just before officers shattered the driver's side window and proceeded to drag him through it. Thus, the district court erred in concluding on summary judgment that defendants did not employ excessive force as a matter of law when they broke the car window and dragged Coles through it.

Result: Reversal of qualified immunity ruling; case remanded for trial in U.S. District Court (Hawaii).

LED EDITORIAL NOTE: This brief LED entry on the Coles case does not address all of the many disputed facts in the case, nor does it address all of the Ninth Circuit panel's lengthy analysis. We remind readers who want all of the factual and analytical details on Ninth Circuit rulings that, as we note at the close of each month's LED, the full text of Ninth Circuit decisions can be easily accessed at http://www.ca9.uscourts.gov/.

In a footnote on a point of possible reader interest, though it has no relevance to resolution of this Civil Rights Act case, the Ninth Circuit opinion notes that Coles was convicted of stealing the car in question in the Hawaii state criminal courts, and that he lost his state court appeal in that criminal case.

(5) MASSACHUSETTS PROSECUTOR AND OTHER STATE OFFICIALS ENTITLED TO ABSOLUTE IMMUNITY FOR DECISION NOT TO EXTRADITE OFFENDER WHO SUBSEQUENTLY COMMITS MURDERS IN WASHINGTON – In Slater v. Clarke, 700 F.3d 1200 (9th Cir., Nov. 19, 2012), a three-judge Ninth Circuit panel holds that because "the decision whether or not to extradite a criminal defendant is intimately associated with the criminal phase of the judicial process, government officials are absolutely immune from suits arising out of their performance of this function."

The facts are summarized by the Court as follows:

> Daniel Tavares was released from prison by the Massachusetts Department of Corrections in June 2007 after serving over fifteen years in prison for murdering his mother. While in prison in Massachusetts, Tavares joined a white supremacist gang, assaulted and threatened staff and inmates, and made threats against the life of then-Governor Mitt Romney and then-Attorney General Thomas Reilly. Just prior to Tavares's release date, he was arraigned for two incidents involving violent assaults on prison staff. Tavares was subsequently released on his own recognizance. He did not appear for a hearing on the new charges and two warrants for his arrest were issued.
>
> Tavares had traveled to Washington state. Officials from Massachusetts contacted their law enforcement counterparts in Washington and asked them to locate Tavares. The defendant officials, . . . knew about Tavares's violent history, his pending criminal charges, and his whereabouts in Washington. The complaint alleges that, after Tavares was found, [the officials] decided to request a limited extradition warrant that authorized extradition only from New England states, not from Washington, where they knew Tavares to be located.
>
> In November 2007 Tavares murdered Beverly and Brian Mauck in their home in Washington state. The parents and personal representatives of the victims brought suit against several Massachusetts officials allegedly responsible for not extraditing Tavares in the months prior to the murders.

Result: Reversal of United States District Court (Western District Washington) order denying absolute immunity to officials.

(6) CONVICTION OF USE OF DRUG PARAPHERNALIA, RCW 69.50.412, IS A DEPORTABLE OFFENSE UNDER FEDERAL LAW – In United States v. Oseguera-Madrigal, 700 F.3d 1196 (9th Cir., Nov. 19, 2012), a three-judge Ninth Circuit panel holds that conviction for use of drug paraphernalia, in violation of RCW 69.50.412, is a deportable offense because it is a "violation . . . relating to a controlled substance," under 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Result: Affirmance of United States District Court (Eastern District Wash.) conviction of Marcelino Iseguera-Madrigal for being an alien in the United States without permission after deportation.

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WASHINGTON STATE SUPREME COURT

NO PRETEXT IN "MIXED MOTIVE" TRAFFIC STOP WHERE THE PRIMARY MOTIVE IS THE OFFICER'S DESIRE TO INVESTIGATE A POSSIBLE DUI, BUT OFFICER ALSO CONSCIOUSLY DECIDES TO MAKE STOP TO ADDRESS MINOR TRAFFIC VIOLATION

State v. Arreola, ___ Wn.2d ___, 290 P.3d 983 (Dec. 20, 2012)

Facts and Proceedings below: (Excerpted from the majority opinion)

> On October 10, 2009, [a police officer] responded to a report of a possible DUI (driving under the influence) in progress. Upon arrival, [the Officer] located a vehicle matching the description from the report. [The Officer] followed behind the vehicle for approximately half of a mile, which took approximately 30 to 45

seconds. [The Officer] did not observe any signs of DUI but did observe that the vehicle had an altered exhaust in violation of RCW 46.37.390. Still without any signs of intoxicated driving, [the Officer] then activated his overhead lights and pulled over the car.

The trial court found that [the Officer's] "primary motivation in pulling the car over was to investigate the reported DUI," but this "was not the sole reason for the stop." The muffler violation was also "an actual reason for the stop," and [the Officer] "would have stopped the vehicle, once following it, even if he wasn't suspicious of a DUI, and even though his primary purpose for stopping the vehicle was to further investigate a possible DUI." [The Officer] testified that he would sometimes commence a traffic stop for an altered muffler because, as a member of the community, he appreciates concerns about the excessive noise that such mufflers emit. He explained that whether he commences a traffic stop for that particular infraction depends on what else he is doing at the time. Although [the Officer] would not go out of his way to chase down a car with an altered muffler, he often would commence a traffic stop if already on the road and behind such a vehicle, so long as conducting the stop would not hinder a more pressing investigation. [The Officer] testified about a recent example in which he was on the road and pulled over a car due to an altered muffler and also testified that he had pulled over vehicles for that reason on numerous occasions. [The Officer] testified that in this case he made a conscious decision to make the traffic stop because of the altered muffler.

The trial court found [the Officer] to be credible as a witness. The trial court thus found that [the Officer] "commonly stops vehicles for exhaust violations" and "would have stopped the vehicle anyway for the exhaust infraction even without the previous [DUI] report." At the same time, [the Officer] was relatively more interested in the potential DUI in this particular case, and he admitted that he was motivated to conduct the traffic stop primarily to detect further signs of DUI.

After pulling over and approaching the car, [the Officer] recognized Respondent Gilberto Chacon Arreola as the driver, detected an "odor of alcohol," observed that Chacon's "eyes were red and watery," and saw "two passengers and several open containers of alcohol in plain view inside the vehicle." Up to that point, [the Officer] had "treated the stop just like any other traffic stop." [The Officer] eventually cited Chacon for the exhaust infraction and for failure to provide proof of insurance and arrested him based on outstanding warrants.

Chacon was charged with DUI and driving while license revoked in the first degree. Chacon argued that the traffic stop was pretextual and sought to suppress all evidence related to the stop, but the trial court concluded that the "stop was not unconstitutionally pretextual" because the muffler infraction "was an actual reason" for the stop. Chacon was convicted of DUI and driving while license revoked in the first degree.

On appeal, the Court of Appeals upheld the trial court's findings of fact from the suppression hearing but disagreed with the trial court's resulting conclusion that the traffic stop was constitutional. State v. Arreola, 163 Wn. App. 787, 796–97 (2011) **Nov 11 LED:08**. The Court of Appeals acknowledged that the muffler infraction was an actual reason for the stop but held that because "it was clearly subordinate to the officer's desire to investigate the DUI report," and "only a

secondary reason," the muffler infraction could not provide authority of law for the traffic stop. Id. at 797.

[Some citations omitted]

ISSUE AND RULING: "[W]hether a traffic stop motivated primarily by an uncorroborated tip [of a DUI violation], but also independently motivated by a reasonable articulable suspicion of a traffic infraction, is unconstitutionally pretextual under article I, section 7 of the Washington State Constitution and State v. Ladson, 138 Wn.2d 343 (1999)". (ANSWER BY SUPREME COURT: No, "[s]o long as a police officer actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual in violation of article I, section 7, despite other motivations for the stop.")

Chief Justice Madsen concurs in the result only.

Dissent: Justice Chambers dissents, arguing that the spirit of Ladson will not survive the Arreola opinion. He is joined by Justice Stephens.

Result: Reversal of Court of Appeals opinion which had reversed the Grant County Superior Court convictions of Gilberto Chacon Arreola for Driving Under the Influence and Driving While License Suspended in the First Degree.

ANALYSIS: (Excerpted from the majority opinion)

Pretextual Traffic Stops

> Pretextual traffic stops are unconstitutional under article I, section 7. See State v. Ladson, 138 Wn.2d 343, 358 (1999) **Sept 99 LED:05**; see also State v. Snapp, 174 Wn.2d 177, 199 (2012) **May 12 LED:25**; State v. Nichols, 161 Wn.2d 1, 8-9 (2007) **Sept 07 LED:10**. A pretextual traffic stop occurs when a police officer relies on some legal authorization as "a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement." Ladson, 138 Wn.2d at 358. Because the right to privacy in such cases is disturbed without reasonable necessity and only in furtherance of some illegitimate purpose, pretextual stops "are seizures absent the 'authority of law'" required by article I, section 7. Id.
>
> A pretextual traffic stop violates article I, section 7 because it represents an abuse of a police officer's wide discretion in determining the reasonable necessity of a traffic stop in a given case. It is commonly accepted that full enforcement of traffic and criminal laws by police officers is both impossible and undesirable. . . . As we recognized in Ladson, the traffic code is extensive and complicated, and "'virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.'" Ladson, 138 Wn.2d at 358 n. 10 (quoting Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States, 24 AM. J.CRIM. L. 627, 633 (1997)); see generally ch. 46.16A RCW ("Registration"); ch. 46.37 RCW ("Vehicle lighting and other equipment"); ch. 46.61 RCW ("Rules of the road"). Accordingly, police officers must exercise wide discretion in deciding which traffic rules to enforce, and when to enforce them, in furtherance of traffic safety and the general welfare; the same need for discretion is true of criminal law enforcement generally. . . . Given the complexity of police

work and the fact that police departments serve varied communities with distinct needs and values, "'courts are reluctant to substitute their judgment for that of police officers in the field.'"

. . .

Since Ladson, Washington courts have prohibited pretextual stops. We have instructed lower courts to "consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior," in determining whether a given stop was pretextual. Ladson, 138 Wn.2d at 359. This inquiry has not been toothless. See, e.g., State v. Montes–Malindas, 144 Wn. App. 254 (2008) **July 08 LED:21** (traffic stop was pretextual); State v. Canaday, 2004 WL 2095390 (unpublished) (same); State v. Capshaw, 2003 WL 21964788 (unpublished) (same); State v. Myers, 117 Wn. App. 93 (2003) (same) **Aug 03 LED:18**. Although there are concerns that some police officers will simply misrepresent their reasons and motives for conducting traffic stops, cf. SAMUEL WALKER, TAMING THE SYSTEM 45–46 (1993) (exclusionary rule led to increase in "number of officers claiming that the defendant had dropped the narcotics on the ground"), the possibility that police officers would engage in such wrongdoing only heightens the need for judicial review of traffic stops. Further, our test for pretext incorporates both an objective and a subjective component, see Ladson, 138 Wn.2d at 359, and officers are expected to adjust their practices to be consistent with the law, cf. WALKER, supra, at 15, 49–50 (some research "suggests that police officers [do] comply with restrictive rules"). Washington courts will continue to review challenged traffic stops for pretext.

Mixed Motive Traffic Stops

This case now requires us to determine whether a mixed-motive traffic stop—that is, a traffic stop based on both legitimate and illegitimate grounds—is a pretextual stop in violation of article I, section 7. We hold that a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop. In other words, despite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

We have not previously addressed the legality of mixed-motive traffic stops. In Ladson, a police officer recognized a driver from "an unsubstantiated street rumor," then was "motivat[ed] in finding a legal reason to initiate the stop," and noticed that the car's license plate tabs were expired. The trial court found that the investigating officer "selectively enforce[d] traffic violations depending on . . . the potential for intelligence gathering," and the officer admitted that the traffic stop challenged in that case was entirely pretextual. In other words, the officer's proffered legal justification for the stop—expired tabs—was admittedly "a false reason used to disguise a real motive." . . . The officer in Ladson would not have conducted the stop had there been no street rumor, and the officer abused his discretion by conducting the stop without deeming it reasonably necessary to enforce license plate tab regulations. In contrast, the trial court in this case found

that Chacon's exhaust infraction was an actual reason for the stop and also that [the Officer] would have stopped Chacon for the exhaust infraction even without the previous DUI report. Thus, unlike the stop in Ladson, the stop in this case was a mixed-motive stop.

A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless. The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. Cf. Nichols, 161 Wn.2d at 11 ("'[E]ven patrol officers whose suspicions have been aroused may still enforce the traffic code . . . . '" (quoting State v. Minh Hoang, 101 Wn. App. 732, 742 (2000) **Nov 00 LED:08**)). In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.

A trial court's consideration of a challenge to an allegedly pretextual traffic stop should remain direct and straightforward. The trial court should consider both subjective intent and objective circumstances in order to determine whether the police officer actually exercised discretion appropriately. The trial court's inquiry should be limited to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop. The presence of illegitimate reasons for the stop often will be relevant to that inquiry, but the focus must remain on the alleged legitimate reason for the stop and whether it was an actual, conscious, and independent cause.

In this case, [the Officer] testified that he made a conscious decision to pull over the vehicle for the muffler violation. The trial court's unchallenged finding was that Chacon's muffler infraction was "an actual reason for the stop," and that [the Officer] "would have stopped the vehicle . . . even if he wasn't suspicious of a DUI, and even though his primary purpose for stopping the vehicle was to further investigate a possible DUI." In sum, [the Officer] had a reasonable articulable suspicion that Chacon was violating RCW 46.37.390 and decided that a traffic stop was reasonably necessary to address that suspected traffic infraction and to promote traffic safety and the general welfare. The fact that [the Officer] was also interested in and motivated by a related investigation is irrelevant, even if

that investigation could not provide a legal basis for the traffic stop. Cf. State v. Lesnick, 84 Wn.2d 940 (1975) (anonymous tip without indicia of reliability insufficient for a traffic stop). Because the suspected traffic infraction was an actual, conscious, and independent cause of the traffic stop, the trial court was correct in concluding that the stop was not pretextual.

[Some citations omitted; some modified]

LED EDITORIAL COMMENT: In his dissent Justice Chambers predicts that the "spirit" of Ladson will not survive Arreola. In some respects we hope he is correct. Not because we encourage officers to conduct pretextual traffic stops – we do not. But we do think that Ladson has resulted in suppression of evidence in many cases where officers have made stops to legitimately enforce the traffic code, but evidence has been suppressed because there might also have been an underlying reason to suspect criminal activity.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

STATE SUPREME COURT DECLINES TO ADOPT A BLANKET RULE REQUIRING CROSS-RACIAL EYEWITNESS IDENTIFICATION INSTRUCTION – In State v. Allen, ___ Wn.2d ___, 2013 WL 259383 (Jan. 24, 2013) in a plurality opinion, the State Supreme Court declines "to adopt a general rule requiring the giving of a cross-racial eyewitness identification instruction in all cases where cross-racial identification is at issue" and holds that "the trial court did not abuse its discretion by refusing to give a cautionary cross-racial jury instruction under the facts of this case."

Result: Affirmance of Court of Appeals decision affirming King County Superior Court conviction of Bryan Edward Allen for felony harassment.

LED EDITORIAL NOTE: Four justices sign the lead opinion in this case, Chief Justice Madsen concurs separately, Justice Chambers (who is serving as a justice pro tem on cases that he heard while he was on the Court) and Fairhurst concur, and Justices Wiggins and Gonzales dissent. All members of the Court seem to agree that a cross-racial jury instruction, explaining the potential fallibility of identification of individuals of a different race, is appropriate in certain cases involving cross-racial eyewitness ID testimony, but there is not a majority for the view that such an instruction is needed in every such case.

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WASHINGTON STATE COURT OF APPEALS

SPLIT COURT HOLDS THAT THERE WAS NO ENTICEMENT – AND THEREFORE IT WAS NOT LURING UNDER RCW 9A.40.090 – FOR MAN RIDING BY ON BICYCLE TO SAY TO 9-YEAR-OLD: "DO YOU WANT SOME CANDY? I'VE GOT SOME AT MY HOUSE"

State v. Homan, ___Wn. App. ___, 290 P.3d 1041 (Div. III, Dec. 18, 2012)

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

> Early one summer evening, nine-year-old C.C.N. went to the store to buy some milk for his mother. He was walking along the road toward the general store when Homan rode a child's Superman BMX bicycle past him. As Homan rode by, he said, "Do you want some candy? I've got some at my house." C.C.N. said nothing and continued walking; Homan rode on without slowing, stopping, or looking back. There were two other children nearby, but Homan was closest to C.C.N. when he spoke.
>
> C.C.N. did not know Homan and told his mother about the incident when he got home. She drove him back into town where they saw Homan on his Superman bicycle. C.C.N.'s mother called the sheriff's office, and [an officer] spoke with Homan, who admitted riding his bicycle in the general store's vicinity.
>
> The State charged Homan with one count of luring. During his bench trial, Homan moved for dismissal based on insufficiency of the evidence. The trial court denied his motion and found Homan guilty as charged.

ISSUE AND RULING: Did Homan engage in invitation and enticement for purposes of the luring statute, RCW 9A.40.090, when he said, as he rode his bicycle by the 9-year-old boy: "Do you want some candy? I've got some at my house."? (ANSWER: No, rules a 2-1 majority composed of Judges Bridgewater and Van Deren; Judge Hunt dissents)

Result: Reversal of Lewis County Superior Court conviction of Russell D. Homan for luring; dismissal of luring charge with prejudice.

Status: The Lewis County Prosecutor has petitioned the Washington Supreme Court for discretionary review.

ANALYSIS:

RCW 9A.40.090, with emphasis added, provides that a person commits the crime of luring if the person:

> (1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.
>
> (2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.
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> . . .

In key part, the analysis in the Court of Appeals majority opinion is as follows:

> As pertinent here, RCW 9A.40.090 is intended to prohibit a defined class of persons (one unknown to the minor and without the consent of the minor's parents) from enticing or attempting to entice the minor into a nonpublic structure. State v. Dana, 84 Wn. App. 166 (1996) **June 97 LED:13**. "Because of the vulnerability of children . . . strangers are prohibited from luring them out of public view." Dana. To prove the crime of luring, the State must establish "more than an invitation alone; enticement, by words or conduct, must accompany the invitation." State v. McReynolds, 142 Wn. App. 941 (2008) **May 08 LED:20**.
>
> In McReynolds, the defendant's act of slowing his truck beside a child walking along a road and signaling her to come over was insufficient to prove that he was attempting to get her into the truck, and Division Three of this court reversed his conviction for luring. In Dana, by contrast, the defendant stopped his car near two girls and asked them to get into his car while exposing his genitals. That the girls were upset rather than enticed did not undermine the sufficiency of the evidence supporting the defendant's luring conviction.
>
> . . . .
>
> We disagree with the State that Homan's statements demonstrate both an invitation and an enticement to lure C.C.N. into a nonpublic structure. Rather, they show an offer of candy and a statement regarding its location. Furthermore, there is no conduct that elevates these statements to either an invitation or an enticement. Homan was riding by C.C.N. as he made the statements, and he did not slow or stop as he made them or even look back afterward. While Homan's statements were ill-advised, they did not constitute a felony, and we remand to the trial court to reverse his conviction with prejudice.

[Citations shortened, revised or omitted for style reasons]

Judge Hunt dissents, summing up the content of her dissenting opinion with the following opening paragraph:

> I respectfully dissent from the majority's holding that the evidence is insufficient to support Homan's conviction for luring. Looking at the facts in the light most favorable to the State post conviction, as we must, (1) Homan, a stranger, attempted to lure a nine-year-old child to his house; (2) he enticed this child, walking home from the store without an adult, with an offer of candy; (3) this conduct meets the requirements of luring under RCW 9A.40.090. I would affirm.

LED EDITORIAL COMMENT: We agree with Judge Hunt's common sense analysis in her dissent. We hope that the Washington Supreme Court will accept review and reverse the Court of Appeals.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DETECTIVE'S CONDUCT IN LISTENING TO SEVERAL TELEPHONE CONVERSATIONS BETWEEN A DEFENDANT AND HIS ATTORNEY WAS EGREGIOUS MISCONDUCT GIVING RISE TO A PRESUMPTION OF PREJUDICE; HOWEVER, UNDER THE UNUSUAL CIRCUMSTANCES OF THIS CASE, THE PRESUMPTION IS OVERCOME – In State v. Fuentes, ___ Wn. App. ___, 2013 WL 149862 (Div. I, Jan. 14, 2013) the Court of

Appeals holds that a detective's "plainly egregious misconduct" in listening to several recorded telephone calls between a defendant and his attorney gives rise to a presumption of prejudice. However, because the misconduct occurred after the defendant had been convicted it had no effect on the fairness of the trial itself. Accordingly, in these circumstances the presumption of prejudice is rebutted and the convictions may stand, rules a 2-1 majority (in dissent, Judge Becker argues that the presumption of prejudice is not rebutted and the convictions should be reversed).

After the defendant in this case had been convicted, as grounds for a new trial, new counsel submitted a video of a half-sister of the victim recanting her trial testimony. Concerned about the circumstances surrounding the video, the prosecutor asked the detective to investigate possible witness tampering. The majority opinion in Fuentes notes: "Specifically, the prosecutor asked him to obtain the recordings of Pena Fuentes' phone calls from the jail. By great misfortune, the recordings provided by the jail to the detective included calls between Pena Fuentes and his attorney, Richard Hansen." Two days later, the half-sister signed a declaration prepared by the prosecutor recanting her statements in the video.

Eleven days after receiving the recordings from the jail and nine days after the victim's declaration, the detective disclosed to the prosecutor that he had listened to calls between Pena Fuentes and attorney. He did not reveal the content of the attorney-client conversations. The majority opinion in Fuentes analyzes the circumstances as follows:

> . . . Where intrusion upon the attorney-client relationship is purposeful and without justification, prejudice may be presumed. [The Detective] knowingly listened to six separate conversations between defendant and his counsel. He lacked any conceivable justification. This is egregious misconduct and gives rise to a presumption of prejudice.
>
> Even where prejudice is presumed, however, dismissal is not automatic. In State v. Granacki, [90 Wn. App. 598 (1998) **Aug 98 LED:19**] for example, a detective read some of defense counsel's notes during a trial recess. The notes reflected trial strategy and confidential communications with the defendant. Although the detective did not tell the prosecutor what he had seen, the trial court dismissed the charges. We affirmed, noting that "dismissal not only affords the defendant an adequate remedy but discourages 'the odious practice of eavesdropping on privileged communication between attorney and client.'" But we also observed that dismissal was not the only permissible remedy:
>
> > Normally misconduct does not require dismissal absent actual prejudice to the defendant. Even then, the court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban [the Detective] from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of discretion. But, based on the trial judge's evaluation of all the circumstances and [the Detective's] credibility, the sanction he imposed was also within his discretion.
>
> Pena Fuentes relies upon State v. Cory, [62 Wn.2d 371 (1963)] and State v. Perrow, [156 Wn. App. 322 (2010) **July 10 LED:26**]. Both cases involve situations in which the intrusion on the attorney-client relationship occurred

before and/or during trial, leaving the court with no way to isolate the resulting prejudice.

In Cory, sheriff's officers used a microphone to eavesdrop on the defendant's conversations with counsel "from the time of his arrest throughout trial and thereafter." Reasoning that "[t]here is no way to isolate the prejudice" from such eavesdropping, our Supreme Court held that the only adequate remedy was to vacate the convictions and dismiss the charges.

In Perrow, a detective executing a search warrant seized the defendant's writings. Despite knowing the documents were prepared for the defendant's attorney, the detective examined and copied the documents and delivered them to the prosecutor, who later filed charges. Division Three of this court held that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation," and the trial court did not abuse its discretion by dismissing the charges.

In this case, however, it is possible to isolate the potential prejudice resulting from the intrusion. The detective's odious conduct had no effect on the fairness of the trial itself because it occurred afterward. Any prejudice therefore occurred during the posttrial motions proceedings.
. . .

The trial court found the videotape itself not credible, and disregarded [the victim's] declaration recanting it. The court therefore concluded that the detective's intrusion upon Pena Fuentes' right to counsel could not have caused prejudice to Pena Fuentes on these charges. Under these circumstances, the presumption of prejudice was rebutted.

This is a very unusual situation. Deliberate intrusion upon the attorney-client relationship by a police officer cries out for a strong judicial response - such as dismissal of all charges - as a means of discouraging such "odious practices." But it is nonetheless true that by happenstance, [the Detective's] egregious misconduct did not actually cause prejudice to Pena Fuentes.

It is also true that the appropriate remedy is left to the court's discretion. As offensive and unscrupulous as the detective's actions were, they occurred after the trial and did not affect the posttrial proceedings. The court did not abuse its discretion in refusing to dismiss the charges already tried.

[Footnotes omitted]

Result: Affirmance of King County Superior Court convictions of Jorge Pena Fuentes for two counts of first degree child molestation; reversal of Superior Court's dismissal of first degree child rape [not addressed in this LED entry].

LED EDITORIAL COMMENT: We are not familiar with the facts of this case beyond those contained in the Court's opinion. However, we think it reasonable to assume that where an officer is asked to review recordings of jail telephone calls that the officer would not know until beginning to listen to a call that it is an attorney-client telephone call. However, at that point the officer should immediately cease listening to the call (and any further calls) and advise the prosecutor. We do not know the facts that resulted in the

detective listening to six telephone calls, but the number of calls no doubt explains why the Court was so upset.

The February 2013 LED included, at page 2, a short article titled "Inadvertent Recording of Attorney Telephone Calls in Violation of Attorney-Client Privilege."

(2) SEARCH INCIDENT TO ARREST: OFFICER SAFETY CONCERNS JUSTIFY THE SEARCH OF DEFENDANT'S BACKPACK, WHICH WAS BETWEEN HIS FEET AT POINT OF SEIZURE AND WAS ACCESSIBLE TO THE CUFFED ARRESTEE AT POINT OF SEARCH; ARIZONA V. GANT DOES NOT DICTATE A DIFFERENT RESULT; DIVISION TWO DISTINGUISHES BYRD ON FACTS OF THIS CASE – In State v. Ellison, ___ Wn. App. ___, 2013 WL 80151 (Div. II, Jan. 8, 2013) the Court of Appeals holds that officers were justified in searching a defendant's backpack incident to arrest and that the United States Supreme Court decision in Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13** does not require a different result. The Court also distinguishes Division Three's opinion in State v. Byrd, 162 Wn. App. 612, review granted, 173 Wn.2d 1001 (2011) **Oct 11 LED:21**, on the facts.

The Court of Appeals describes the facts as follows:

> Shortly after midnight on June 4, 2010, Tacoma Police Officers . . . responded to a 911 call from a female homeowner reporting that her estranged boyfriend, Ellison, was outside her home and refusing to leave. While searching a patio area around the exterior of the home, [an officer] observed "a blanket covering several items on the back patio." [The officer] lifted the bottom of the blanket on the off chance Ellison might be hiding there and saw "a pair of human feet . . . with a backpack in between them." After identifying himself as a police officer, [the officer] asked multiple times that the individual come out and show his hands. The suspect did not respond. [A second officer] came to assist [the first officer] and after fully removing the blanket, the officers confirmed that the suspect matched the description of the unwanted person given by the homeowner.
>
> [The first officer] handcuffed the suspect and, shortly thereafter, the suspect provided [the officers] with his name and date of birth. The officers confirmed that the suspect was Ellison and, further, that he had multiple outstanding warrants including a warrant for domestic violence assault. [The first officer] arrested Ellison on the outstanding warrants. During a pat-down search of Ellison, the officers found two cellular phones and a glass pipe containing what appeared to be marijuana residue. [The officer] then searched the backpack originally located between Ellison's feet to ensure that it did not contain weapons. Ellison was still present, on the patio, when [the officer] searched the backpack. In the backpack, officers found drug paraphernalia and a gallon-sized plastic bag containing numerous financial documents, including personal checks. The officers also found a copy of a warrant in the backpack with Ellison's name on it. Police later confirmed that most of the recovered financial documents had been stolen or reported missing.

The Court rejects the defendant's argument that Arizona v. Gant should apply to prohibit the search of his backpack. The Court's analysis is as follows:

> Although the precise contours of the Washington Constitution's article 1, section 7 jurisprudence (and the United States Constitution's Fourth Amendment

jurisprudence) have shifted since [Chimel v. California, 395 U.S. 752 (1969)] was decided, Chimel still provides the starting point for determining whether a warrantless search is justified. As the [Arizona v. Gant, 556 U.S. 332 (2009)] Court itself explained,

> In Chimel, we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." [Chimel, 395 U.S. at 763]. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See ibid. (noting that searches incident to arrest are reasonable "in order to remove any weapons [the arrestee] might seek to use" and "in order to prevent [the] concealment or destruction" of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.
>
> 556 U.S. at 339 (emphasis added) (some alterations in original).

Even assuming that Gant can be extended to searches outside the automobile context, Gant has not eliminated the officer safety exception to the warrant requirement or the validity of a protective search of the person, objects, and area in the "immediate control" of the arrestee at the time of arrest as allowed by Chimel and Fladebo.

Here, Ellison's involvement with police did not begin with a traffic violation. Instead, the officers were responding to a potentially dangerous situation involving an estranged boyfriend, Ellison, refusing to leave his ex-girlfriend's property. Moreover, when [the officer] first made contact with Ellison, Ellison refused to comply with [the officer's] commands that Ellison show his hands. Accordingly, concern for officer safety (and the safety of Ellison's ex-girlfriend) was heightened in this situation and the search of the backpack Ellison guarded incident to arrest was justified. Moreover, although handcuffed at the scene, unlike the defendant in Gant, Ellison was not securely placed in the officer's patrol car before the search of his backpack. It is possible that despite his restraints, Ellison could have escaped and procured a potential weapon from the backpack. See United States v. Sanders, 994 F.2d 200, 209–10 (5th Cir. 1993) ("The limitations of handcuffs' effectiveness are widely known to law enforcement personnel. . . . Despite this widespread knowledge, in 1991 alone . . . at least four police officers were killed by persons who had already been handcuffed.") (footnotes omitted), cert. denied, 510 U.S. 955 (1993). Last, [the officers] clearly articulated at Ellison's CrR 3.6 hearing that they searched his bag in light of officer safety concerns—a valid exception to the warrant requirement. The officers' biggest concern was that the backpack might contain a live firearm (loaded with the safety off) and that leaving it at the scene or transporting it to the jail in the trunk of their patrol car presented an unacceptable safety risk. . . .

> Thus, irrespective of Gant's applicability to situations outside the context of automobile searches, officer safety concerns justified searching Ellison's backpack in this case.

The Court then distinguishes State v. Byrd, reasoning as follows:

> Ellison contends that Division Three's recent opinion in State v. Byrd, 162 Wn. App. 612, review granted, 173 Wn.2d 1001 (2011), dictates a different result. But the Byrd decision, whether rightly or wrongly decided, does not control.
>
> Division Three of this court has twice addressed whether Gant applies outside the context of an automobile search incident to arrest, with contradictory results. First, in State v. Johnson, 155 Wn. App. 270, 281–82, review denied, 170 Wn.2d 1006 (2010) **June 10 LED:18**, Division Three concluded that where a defendant was arrested while exiting her vehicle with her purse, police were justified in searching the purse incident to arrest because they "did not obtain her purse by searching the vehicle" and Gant only "applies to warrantless searches of vehicles incident to arrest." But "a divided panel of Division Three (comprising all three" judges who signed Johnson) abrogated the decision a year later in Byrd.
>
> In Byrd, a police officer stopped a vehicle for using stolen license plates and arrested the driver on an outstanding warrant. The driver told the officer that the car belonged to the vehicle's passenger, Lisa Byrd. Byrd, 162 Wn. App. at 614. The officer approached Byrd—who was still seated in the car's passenger seat—removed the purse from her lap, placed it on the ground outside of the vehicle, and arrested her. Id. The officer then secured Byrd in his patrol car and searched her purse finding methamphetamine and a glass pipe. Id. At a pretrial suppression hearing, Byrd successfully argued that the "search of her purse violated Gant " and that "the search incident to arrest exception did not authorize the warrantless search of [her] purse." Id.
>
> On appeal, the State argued that Johnson was controlling and the search was a valid search incident to arrest. A majority of the panel disagreed stating, "In Johnson, we indeed held that Gant controls the search of a vehicle incident to arrest but not the search of a purse incident to arrest. . . . We now conclude that we were wrong." Byrd, 162 Wn. App. at 615. . . . .
> . . .
>
> Whether or not the Byrd decision is correctly decided, it is distinguishable from the facts of this case. First, in Byrd, the defendant was handcuffed in a patrol car at the time the officer searched her purse, making it impossible for her to access any potential weapons in the purse. Here, however, officers searched Ellison's bag within five minutes of arresting him and he was not secured in a police vehicle at the time. And although handcuffed, it is at least possible that Ellison could have escaped his restraints and procured a potential weapon from the backpack. Second, unlike in Byrd, [the officers in this case] clearly articulated at Ellison's CrR 3.6 hearing that they searched his bag in light of officer safety concerns that it could contain a live firearm—a valid exception to the warrant requirement. Third, Ellison's contact with police did not begin with a traffic infraction but, instead, while officers were responding to a potentially dangerous situation involving a domestic violence/unwanted person call at Ellison's

> estranged girlfriend's residence. The concern over officer safety was heightened in this situation and the search of the backpack incident to arrest was justified.
>
> Nothing in Chimel or Gant dictates that officers may no longer protect the public and themselves by searching the area and objects within the immediate control of a suspect at the time of his arrest. And whether rightly decided or not, the facts in Byrd are distinguishable from those addressed here. Accordingly, Ellison's contention that the trial court erred in failing to suppress the evidence seized from his backpack fails, and we affirm his convictions.

[Footnotes and some citations omitted]

Result: Affirmance of Pierce County Superior Court conviction of Michael Allyn Ellison for seventeen counts of second degree identity theft, six counts of second degree possession of stolen property, and one count of unlawful possession of payment instruments.

LED EDITORIAL COMMENT: As the Court of Appeals notes, the State Supreme Court is currently reviewing the Byrd decision.

(3) EVIDENCE SUFFICIENT TO ESTABLISH FIRST DEGREE BURGLARY WHERE ONE OF THE DEFENDANTS CARRIED A SHOTGUN, STOLEN FROM THE VICTIM, TO A WAITING VEHICLE – In State v. Hernandez/Rivera/Delacruz, ___ Wn. App. ___, 290 P.3d 1052 (Div. II, Dec. 26, 2012) the Court of Appeals concludes that the evidence is sufficient to convict defendants of first degree burglary where one of the defendants carried a stolen shotgun to a waiting vehicle.

The defendants in this case were charged with, among other crimes, burglary in the first degree:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1).

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

The Court rejects the defendants' argument that the shotgun was simply "loot" from the crime, explaining:

> . . . This definitional statute creates two categories of deadly weapons: deadly weapons per se and deadly weapons in fact. A firearm, whether loaded or unloaded, is a deadly weapon per se. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 365 (2011).

> When first degree burglary involves deadly weapons per se, specifically firearms taken in the course of a burglary, "'no analysis of willingness or present ability to use a firearm as a deadly weapon'" is necessary. Id. at 367 (quoting State v. Hall, 46 Wn. App. 689, 695 (1987)). For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. State v. Brown, 162 Wn.2d 422, 431 (2007) **Aug 08 LED:04**. When the defendant had actual possession of a firearm, sufficient evidence supports a first degree burglary conviction despite the firearm being unloaded and no evidence showing that defendant intended to use it. State v. Faille, 53 Wn. App. 111, 114–15 (1988).
>
> Here, Hernandez, Rivera, and Delacruz had actual possession of Menza's loaded, fully functional, 20–gauge shotgun, when one of them carried the shotgun out of Menza's house and placed it into the back of their vehicle. Where defendant was in actual possession of the firearm, sufficient evidence supports a first degree burglary conviction, despite no evidence showing that defendant intended to use it. Hall, 46 Wn. App. at 695. . . .

Result: Affirmance of Pierce County Superior Court convictions of Nelson Hernandez, Enrique Rivera, and Jason Delacruz for first degree burglary.

(4) SPLIT COURT HOLDS: (1) AFFIDAVIT FOR SEARCH WARRANT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH BECAUSE, AMONG OTHER THINGS, CIVILIAN SOURCE WAS NOT SHOWN TO BE ABLE TO IDENTIFY MARIJUANA PLANT; AND (2) ALTERNATIVELY, MEDICAL MARIJUANA STATUTE DEFENSE BY COMMERCIAL DISPENSER IS VALID UNDER FORMER STATUTORY SCHEME APPLICABLE TO FACTS OF THIS CASE – In State v. Shupe, ___Wn. App. ___, 289 P.3d 741 (Div. III, Dec. 11, 2012), a 2-1 majority of the Court of Appeals rules for the operator of a commercial "medical marijuana" drug dispensary in reversing his convictions for conduct in 2009 for growing and selling marijuana. The majority opinion rules: (1) that the superior court should have ruled that the search warrant in the case was not supported by probable cause; and (2) alternatively, that the convictions cannot stand because, under the Washington medical marijuana statutes in effect at the time of the conduct in 2009 (statutes that have since been materially amended - - see our LED EDITORIAL COMMENT below), the defendant was acting lawfully as the "designated provider" of marijuana for many, many customers so long as he dealt with the customers one transaction at a time.

Probable cause for search

This LED entry will not address all of the facts and sub-issues in the case regarding probable cause. Instead, this entry will focus on just one of the probable cause issues.

A neighbor reported to police that she had seen a marijuana plant growing in the neighbor's garden. The affidavit for a search warrant in the case did not explain how the neighbor-informant reached her conclusion that the plant was marijuana, nor did the affidavit otherwise provide details as to the appearance of the plant such as to support her conclusion. No other person's observation of the plant was reported.

The Washington constitution, article I, section 7, uses a two-pronged test for informant-based probable cause. The test asks: (1) Is the informant a credible person? and (2) Is the basis for

the informant's conclusion grounded in first-hand observation that the informant was able and qualified to make? The second prong is problematic for the prosecution in this case.

The majority opinion rules that a citizen-informant's report that a plant is marijuana will not establish probable cause without a showing that the information source is qualified to identify the plant as marijuana. Because the affidavit in this case did not provide such an explanation, it did not establish probable cause that the plant was a marijuana plant, the majority opinion concludes.

Judge Kevin Korsmo dissents, arguing that because essentially all of society has been exposed to media and other depictions of marijuana, the majority opinion should not have required a showing of the neighbor-informant's expertise. Judge Korsmo does not cite any case-law authority to support this part of his dissent.

Medical marijuana statute

As noted above, the majority opinion concludes in the alternative that the defendant, in any event, is entitled to an affirmative defense under the Washington medical marijuana statutes in effect in 2009 on grounds that he was acting lawfully as the "designated provider" of marijuana for many, many customers. That is because, the majority opinion concludes, the defendant dealt with the customers one transaction at a time. The majority opinion concludes that the phrase in RCW 69.51A.010(1)(d) that limits a person to being a designated provider "to only one patient at any one time" limits a provider only in the sense that he is limited to engaging in "one transaction after another so that each patient gets individual care." Judge Korsmo's dissent argues that, for the reason that the Court's ruling on the search warrant issue resolved the case and for other reasons, the Court should have deemed the medical marijuana issue moot and should not have addressed it.

Result: Reversal of Spokane County Superior Court convictions of Scott Que Shupe for the marijuana crimes of manufacture, delivery, and possession with intent to deliver; dismissal of charges with prejudice.

Status: The Spokane County Prosecutor has filed a petition seeking discretionary review in the Washington Supreme Court.

LED EDITORIAL COMMENT ON MEDICAL MARIJUANA ISSUE: The analysis of the medical marijuana statute by the majority opinion is debatable. More importantly, under section 404, chapter 181, Laws of 2011, the Washington Legislature added RCW 69.51A.100(2), reading: "A person may stop serving as a designated provider to a given qualifying patient at any time. However, that person may not begin serving as a designated provider to a different patient until fifteen days have elapsed from the date the last qualifying patient designated him or her to serve as a provider." For conduct occurring after the effective date of the 2011 legislation (July 22, 2011), chapter 181's section 404, together with its section 401 amendment to RCW 69.51A.040 referencing the 15-day gap required by RCW 69.51A.100(2), appear to negate the Shupe Court's "one transaction after another" interpretation of RCW 69.51A.010(1)(d). As always, officers are urged to consult their legal advisors and/or local prosecutors on issues addressed in the LED.

(5) DRUNKEN TIRADE THAT INCLUDES EXPLETIVES AND THREATS TO OFFICER IS INSUFFICIENT UNDER FACTS OF THIS CASE TO ESTABLISH INTIMIDATING A PUBLIC SERVANT BECAUSE IT FAILS TO ESTABLISH ATTEMPT TO INFLUENCE HIS ACTION –

In State v. Moncada, ___ Wn. App. ___, 289 P.3d 52 (Div. III, Dec. 11, 2012) the Court of Appeals holds that an individual's drunken tirade that includes numerous expletives and threats against the officer, including "tase me or I will f---ing kill you," are insufficient to establish intimidating a public servant under RCW 9A.76.180.

> Intimidating a public servant requires that the State show (1) an attempt to influence a public servant's vote, opinion, decision, or other official action of a public servant (2) by use of a threat. RCW 9A.76.180(1). The attempt to influence element requires some evidence independent of the threat itself and the defendant's generalized anger. State v. Montano, 169 Wn.2d 872, 878 (2010) **Nov 10 LED:09**. The defendant's anger and threats must have "some specific purpose." State v. Burke, 132 Wn.2d 415, 422 (2006) **May 06 LED:20**. The State contends that this statement evidences Mr. Moncada's intent to get [the trooper] to stun him. If the statement is taken literally, "tase me" might show that Mr. Moncada wanted the trooper to stun him.

The Court rejects the State's argument.

Result: Reversal of Grant County Superior Court conviction of Teodoro Moncada of intimidating a public servant.

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NEXT MONTH

The **April 2013 LED** will include an entry digesting the Washington Supreme Court decision on law enforcement civil liability in Robb v. City of Seattle, ___Wn.2d ___, 2013 WL 363189 (Jan. 31, 2013). The Supreme Court reverses a decision of Division One of the Court of Appeals, adverse to the City of Seattle, reported in the **February 2011 LED**. The Supreme Court holds in Robb that the City of Seattle cannot be held civilly liable for officers' mere failure to pick up shotgun shells left on the ground by persons unknown. The officers saw the shotgun shells lying on the ground nearby while talking to a young man, known by the officers to be disturbed, in investigation of a burglary in the area. Several hours later, one of the shotgun shells was used by the young man in a random, fatal shooting victimizing an unsuspecting motorist. The Supreme Court distinguishes between law enforcement omissions to act (which cannot by themselves be the basis for establishing a duty to act for civil liability purposes in this factual context) and affirmative actions (which can be the basis for establishing such a civil liability duty to act). The Robb Court rules that the officers did not engage in an affirmative act in this case, because they "did not create a new risk of harm but instead failed to eliminate a risk when they failed to pick up bullets left at the scene by another."

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

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city

and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

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

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

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

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