

LAW ENFORCEMENT DIGEST

April 2021



Covering cases published in April 2021

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals.** The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court.** The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

TOPIC INDEX

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- Public Policy against Excessive Use of Force
- Necessity Defense
- Right to Bear Arms
- Intercept Orders & Privacy Act

CASES

1. Tobias v. Arteaga, ___ F.3d ___, 2021 WL ___ (9th Cir., April 27, 2021)
2. City of Seattle v. Seattle Police Officers' Guild, COA No. 80467-7-I (Apr. 5, 2021)
3. Zaitzeff v. City of Seattle, COA No. 80436-7-I (Apr. 5, 2021)
4. State v. Gonzalez, COA No. 36412-7-III (Apr. 6, 2021)

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- [Caselaw Update](#) authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

QUESTIONS?

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The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

Tobias v. Arteaga

____ F.3d _____, 2021 WL _____

NINTH CIRCUIT OF THE UNITED STATES

COURT OF APPEALS

April 27, 2021

Facts Summary

TOPIC: Section 1983 Claims – Fifth Amendment & False Confession of Minor

Briefly, thirteen-year-old Art Tobias confessed to the murder of Alex Castaneda—a murder he did not commit—after an interrogation in which Los Angeles Police Department (LAPD) Detectives ignored his request for an attorney, told him that he would look like a “cold-blooded killer” if he did not confess, and suggested that if he were to exercise his right to remain silent, he would receive harsher treatment by the court.

The pertinent facts are that detectives arrested Tobias at his school and brought him to the police station. At the station, Tobias was brought into an interview room with two detectives. After several background questions and approximately 20 minutes into the interrogation, they read Tobias his Miranda rights. Tobias stated that he understood his rights.

The detectives then showed Tobias the security camera video of the shooter. Tobias asked, “Who is that?” and Detective One responded, “That, my friend, would be you.” Tobias immediately and repeatedly denied that he was the person in the video. When the officers told him that the shooting had taken place near downtown Los Angeles around midnight, Tobias explained that he had been miles away in Arcadia with a friend that night and that his friend’s mother had dropped him off at home before midnight.

The detectives persisted in accusing Tobias of the shooting, falsely telling him, “Somebody gave you up.” Then the following exchange took place:

Det. One: Okay. Well, I—you know what? We’re here to speak to you to get your statement. Now, if your statement is that that’s not you, don’t worry. We’re going to

write it down just the way you said.

Tobias: **Could I have an attorney?** Because that's not me.

Det. One: But—okay. No, don't worry. You'll have the opportunity.

Detective Two quickly jumped in with another question and the interrogation continued with no further acknowledgement of Tobias's request for an attorney, even though the detectives had previously told him that he "ha[d] the right to the presence of an attorney before and during any questioning." Tobias adamantly continued to deny he was the shooter.

A third detective participated in the interrogation, and at times all three took turns individually. There was a viewing room just down the hall from the interrogation room, where officers could watch a video feed of the interrogation. Detectives re-entered the interrogation room after Tobias confessed to Detective Two, without being called in.

Tobias was convicted in juvenile court and sentenced to 25 years' imprisonment. The California Court of Appeal reversed the conviction, concluding that Tobias's confession should have been suppressed by the juvenile court because the detectives failed to respect his unambiguous request for an attorney.

After conviction, all parties agreed that Tobias did not murder Castaneda. Subsequently, Tobias filed a [42 U.S.C. Section 1983](#) civil action in federal court against the three LAPD Detectives who conducted the interrogation in which he confessed to the killing. Tobias asserted violations of his [Fifth Amendment](#) rights.

The LAPD detectives filed a motion for summary judgment based on qualified immunity for their interrogation tactics. The federal district court denied the motion. The LAPD officers appealed to the Ninth Circuit Court of Appeals (the "Court"). The Court affirmed the denial of qualified immunity on the Fifth Amendment claims that the officers continued to question Tobias after he invoked his right to silence and that they engaged in unconstitutional coercive questioning tactics.

Training Takeaway

i **General Legal Background:** A Section 1983 claim is not a cause of action but the avenue through which a citizen can file a civil lawsuit in federal court against government actors (such as police officers) individually for violation of a citizen's federal rights (usually arising under the U.S. Constitution). So, a Section 1983 claim must assert a violation of a federal right. Government actors can assert "qualified immunity."

Qualified immunity is a judicially created doctrine that must be raised as an affirmative defense. If proven, qualified immunity shields government officials from being held personally liable for constitutional violations so long as the officials did not violate "clearly established" law.

Summary judgment is when the court, upon motion by a party, grants judgment in favor of the party without the need for a trial on the grounds that no genuine issues of material fact exist for a trier of fact (judge or jury) to consider or weigh and, therefore, the party is entitled to judgment as a matter of law.

The Court observed that the detectives would be entitled to qualified immunity under Section 1983 unless (1) they violate a federal constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. It applied these two prongs to the facts as follows.

First, the Court recognized the Fifth Amendment right against self-incrimination and the right to counsel. Second, Tobias's statement — "*Could I have an attorney? Because that's not me*" — was an unequivocal invocation of his right to counsel under clearly established law. Because the detectives violated Tobias' Fifth Amendment rights by denying his unambiguous request for counsel, the detectives were not entitled to qualified immunity from the Section 1983 civil claim for damages.

Importantly, the Court denied qualified immunity to all three detectives, even though all three were not present when the alleged violation of federal rights occurred. The Court said, "police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." The Court noted that the duty to intercede requires evidence that the officer was aware of the constitutional violation as it occurred. Based upon the facts, the Court presumed that all three detectives, when not in

the room, were taking turns watching from another room. But the Court referred that back to the lower court for further evidence.

EXTERNAL LINK: <https://cdn.ca9.uscourts.gov/>

City of Seattle v. Seattle Police Officers' Guild

COA No. 80467-7-I

WASHINGTON STATE COURT OF APPEALS

April 5, 2021

Facts Summary

TOPIC: Public Policy against Excessive Use of Force

In June of 2014, three officers with the Seattle Police Department (SPD) responded to a domestic violence call. A mother had called expressing concerns about her son, with whom she resided, and his girlfriend, Durden (“Durden”) who lived within walking distance. Officer Shepard questioned Durden outside. Durden was intoxicated, belligerent, insulting, and threatening. Things escalated to a point where Shepard arrested Durden.

Shepherd had his hand on the top of Durden’s head and pushed her head down to get her into the patrol car. Durden then spun around, fell backward onto her back on the seat, brought up her right leg, and kicked Shepherd in the face with her boot, while yelling profanities. After being kicked, Shepherd felt a little off balance and stepped back. In response, Shepherd partially entered the vehicle and punched Durden in the right eye. Approximately two seconds elapsed between the kick and the punch in response. Both Shepherd and Durden were transported to the hospital for treatment. Durden suffered a serious, but not permanent, injury to her right eye.

Following investigations by multiple agencies and two hearings, Officer Shepherd was terminated for violating the use-of-force policies of the SPD. The [Seattle Police Officers’ Guild](#) (SPOG) requested that a disciplinary review board (DRB) be convened to challenge Shepard’s termination.

The City’s use-of-force policy at issue prohibited the use of physical force “[o]n handcuffed or otherwise restrained subjects except in exceptional circumstances when the subject’s actions must be immediately stopped to prevent injury, escape, or destruction of property.”

The DRB concluded that Shepherd violated SPD's policy restricting the use of force on handcuffed subjects when he punched a handcuffed woman in the face hard enough to cause an orbital fracture despite having had time to consider and execute other alternatives. It also found that the policy was clear and specific and required officers to use only what force was reasonable, necessary, and proportional. The DRB acknowledged that the penalty imposed should send a clear message that alternatives to the use of force on a handcuffed person should be utilized when circumstances permit.

Despite its findings, the DRB reinstated Shepherd with a 15-day suspension and duty modifications, finding that the seriousness of Shepherd's offense was mitigated by the fact that Shepherd used force "perhaps reflexively" after the woman kicked him two seconds earlier causing "stinging pain" and that Shepherd's "patience was being tried." The DRB also observed that Shepherd was insistent he did nothing wrong, and several of his co-workers agreed with him.

The City successfully moved the superior court to vacate the DRB's decision. The SPOG appealed the decision vacating the DRB's reinstatement to the Court of Appeals. The Court of Appeals upheld the superior court's decision.

Training Takeaway

Normally, proceedings, such as conducted by the DRB, are final and not subject to appeal unless the decision violates public policy. Thus, the Court of Appeals limited its review to the issue of **whether the DRB's decision reinstating the Officer violated public policy.**

The Court recognized that a citizen's right to be **free from excessive force is protected under the Fourth Amendment and enforceable against states via the Fourteenth Amendment.** It added that that right is **explicit, dominant, and well-defined.** Also, it held that the **public policy against the excessive use of force in policing imposed on the City an affirmative duty to sufficiently discipline officers.**

The Court stated:

In short, the DRB reinstated an officer who—despite being adequately trained on SPD's clear and specific policies regarding the use of force—**violated those policies by punching**

a handcuffed, intoxicated, subject even though she was not much of a flight risk and other alternatives were available to him, and who then adamantly denied doing anything wrong.

The DRB did so by considering, as mitigating, circumstances that were not properly considered as mitigating in the context of the public policy against the use of excessive force, and without making any other findings that would properly have been considered mitigating with regard to Shepherd's decision to punch Durden-Bosley.

Under these circumstances, which are based on the DRB's own findings, **the DRB's decision to reinstate Shepherd runs directly counter to the policy requiring the City to impose sufficient discipline to deter future instances of misconduct.** For these reasons, the superior court did not err by vacating the DRB's decision on public policy grounds.

EXTERNAL LINK: <https://www.courts.wa.gov/>

Zaitzeff v. City of Seattle

COA No. 80436-7-1

WASHINGTON STATE COURT OF APPEALS

April 5, 2021

Facts Summary

TOPIC: Necessity Defense and Right to Bear Arms

In May 2018, Zaitzeff walked around Green Lake Park in Seattle with a sheathed sword hanging from his neck. A citizen called 911. The caller said Zaitzeff was wearing a thong, approaching women, and taking photos of them. When police officers arrived, they confirmed he had a sword, which measured about 24 inches long. Zaitzeff acknowledged he was aware of the ordinance against fixed blade knives and that he was not hunting, fishing, or going to or from a job requiring a sword. The officers took the sword and cited him.

The City of Seattle charged him with violating Seattle Municipal Code (SMC) 12A.14.080(B) for carrying a “dangerous knife.” Pre-trial, Zaitzeff moved to dismiss the charge by **challenging the constitutionality of this ordinance under article I, section 24 of the Washington Constitution and the Second Amendment to the United States Constitution** and asserted the **affirmative defense of necessity**.

The municipal court rejected Zaitzeff’s motion to dismiss, ruling that the sword was not a constitutionally protected arm, but reserved ruling on his necessity defense, suggesting that it was denying the defense unless more proof came to light during trial.

The municipal court found Zaitzeff guilty. He appealed to superior court.

The superior court denied his appeal. First, it determined that Zaitzeff had not met his burden of showing that the ordinance violated his constitutional rights under either Washington or United States constitution. It noted that there was insufficient evidence to support a finding that a sword is traditionally or commonly used as a weapon of self-defense. Second, it determined that the trial court correctly decided that Zaitzeff’s offer of proof did not support a necessity defense. Third, it concluded that sufficient evidence supported the conviction.

Zaitzeff then petitioned the Court of Appeals (the “Court”) for discretionary review. The Court held that while Zaitzeff’s sword was constitutionally protected, the ordinance did not violate either the state or federal right to bear arms. It also held that the municipal court did not violate Zaitzeff’s Sixth Amendment right in denying his necessity defense due to insufficient evidence.

Training Takeaway

The Court of Appeals addressed the following:

1. Whether a sword is protected under the Washington state and U.S. Constitutions,
2. If so, whether the Seattle ordinance restricting knives violated either or both constitutions, and
3. Whether Zaitzeff’s Sixth Amendment rights were violated by the court’s refusal to allow his affirmative defense of necessity.

Constitutional Right to Bear Arms

Under article I, section 24 of the Washington Constitution, “[t]he right of the individual citizen to bear arms in defense of [themselves], or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.” Under the Second Amendment to the United States constitution, “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

The Court noted that Article I of the Washington Constitution and the Second Amendment to the U.S. Constitution **do not protect the rights of citizens to keep and bear any and all weapons**. Rather, with guidance from prior cases, the Court determined that “arms” were **more appropriately defined as a class of weapons traditionally used for defense at the time the “founders” of our nation drafted and ratified the Second Amendment (1791).**

Zaitzeff claimed that a sword is constitutionally protected because it is a traditional arm. He asserted that a sword has been historically used for self-defense. The City argued that a sword is an offensive tool of war, not one commonly used for self-defense. The Court concluded that the federal and state constitutions did protect Zaitzeff’s sword as an “arm”

because law-abiding citizens traditionally used swords for self-defense.

After deciding that Zaitzeff's sword was a protected "arm," the Court addressed whether the ordinance violated his constitutional rights to keep and bear that sword. It observed, **"The right to bear arms under the constitution is not absolute but is instead subject to reasonable regulation."**

When determining if a law unreasonably restricts a constitutional right, courts apply what is called a **"scrutiny test."** In determining the appropriate level of scrutiny in Second Amendment cases, courts examine (1) how closely the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right. The result of that inquiry is a sliding scale.

The scrutiny is lesser or greater depending on the constitutional right and the public need. For example, freedom of speech under the First Amendment would likely not be violated by a local ordinance prohibiting a person from shouting "fire" in a crowded movie theater, when balancing a citizen's individual rights against the right of all citizens to be safe. However, a court would scrutinize more strictly an ordinance that restricted a citizen from speaking negatively about a city mayor.

The Court said that a **"law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny."** In this instance, the ordinance provided, in part: **"It is unlawful for a person to: . . . B. Knowingly carry concealed or unconcealed on such person any dangerous knife or carry concealed on such person any deadly weapon other than a firearm."** Exceptions applied for using a knife for fishing, hunting, or occupational purposes, and carrying a knife to one's home or work in a secure wrapper.

The Court reasoned that an ordinance prohibiting the carrying of 24-inch swords in a public park in Seattle is **reasonably necessary to protect public safety and welfare and is substantially related to the goal of preventing sword-related injuries and violence.**

Additionally, it determined that the ordinance does not strike close to the core of the Second Amendment right. The core of the Second Amendment right is the right to possess arms in the home for self-defense. While the ordinance did affect the ability of law-abiding citizens to carry dangerous knives for self-defense in public, it did not apply within the home.

Secondly, the Court noted that the ordinance did not impose a severe burden on Zaitzeff's Second Amendment rights. Zaitzeff says the ordinance served as a sweeping ban on his right to bear arms because it contained no self-defense exception or a permitting or licensing scheme. But, the Court reasoned, the ordinance did not completely ban the possession of swords. Most importantly, it did not apply within the home. Consequently, the Court held that prohibiting Zaitzeff from carrying his sword in Green Lake Park did not severely burden his Second Amendment rights.

Finally, the Court recognized that preventing crime and ensuring public safety are important government interests and the ordinance was substantially related to crime prevention and public safety. It added: **"Swords are weapons. Carrying one around a public park can lead to violence or injuries. Prohibiting people from carrying swords around public parks addresses such risks."** It concluded that the ordinance operated within the bounds of constitutionality because it was a reasonable regulation and satisfied intermediate scrutiny.

Necessity Defense

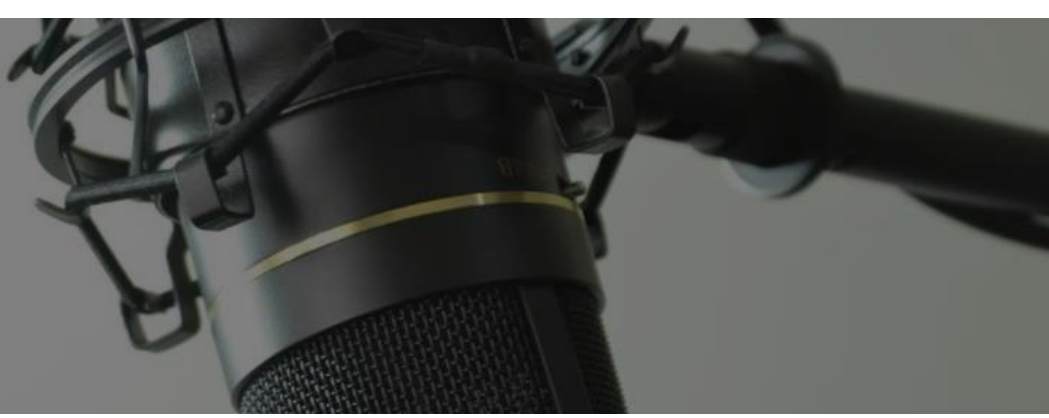
The Court then addressed Zaitzeff's objection to the lower court's refusal to allow his necessity defense to carrying a sword. The Court advised that the defense of necessity requires a defendant to prove, by a preponderance of the evidence, that (1) they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.

When a defendant asserts the necessity defense in response to a charge of unlawful possession of a firearm, **they must prove that they reasonably believed that they were facing some imminent threat of violence.** Prior to this case, Washington courts had not addressed this rule in cases involving the unlawful carrying of dangerous knives, only

firearms, but it decided to apply the same rule, given the similarity of the crimes.

Zaitzeff claimed that in the past he had been assaulted, so he carried the sword in self-defense. But he admitted that he was not facing an imminent threat of harm on the day of the incident. Therefore, the Court ruled that he did not satisfy a requirement for the necessity defense, so the trial court's refusal to consider his necessity defense did not violate his rights under the Sixth Amendment.

EXTERNAL LINK: <https://www.courts.wa.gov/>



Facts Summary

TOPIC: Intercept Orders & the Privacy Act

This case revolved around four controlled drug buys that took place inside defendant Gonzalez’s home. A confidential informant (“CI”) facilitated the buys. After the first controlled buy, law enforcement obtained two intercept orders, allowing them to place a wire on the CI and record the CI’s interactions with Gonzalez.

The two applications for intercept orders were authored by a detective working with the CI. **Both applications explained that Gonzalez had a practice of selling drugs from inside his home and access to at least two firearms within the home.** The second application disclosed the CI had a pending drug case as well as several prior convictions. According to the applications, **the plan was for the CI to make additional controlled buys from Gonzalez inside of Gonzalez’s home.**

After the CI participated in three additional controlled buys while using a body wire, officers obtained a search warrant for Gonzalez’s home. Upon executing the warrant, officers found heroin along with paraphernalia related to drug use and drug trafficking, and three firearms.

The State charged Gonzalez with several felony offenses, including four counts of unlawful delivery of a controlled substance (one for each undercover sale) and unlawful possession of a firearm.

After unsuccessfully moving to suppress the fruits of the intercept orders and search warrant, Gonzalez was convicted on all but two counts. He appealed on the grounds that the intercept order was invalid because it was not based on a particularized showing of need. The Court of Appeals affirmed the trial court’s denial of Gonzalez’s motion to suppress.

Training Takeaway

Washington's Privacy Act, chapter [9.73 RCW](#) (the "Act"), generally **prohibits law enforcement from intercepting or recording private conversations without full consent of all parties or one-party consent and a court order**. See [RCW 9.73.090](#)(2) Evidence obtained in violation of the Act is subject to suppression and inadmissible at trial. [RCW 9.73.050](#).

When the issue on appeal is the legitimacy of a privacy act order (also referred to as an "intercept order"), the Court's focus is somewhat unique. The Court does not defer to the trial judge who ruled on a motion to suppress the fruits of the order, which is the common procedural route for motions. Rather, **the Court focuses on the decision of the judicial officer who initially authorized the intercept order. Courts give "considerable discretion" to the initial intercept decision. So long as the authorizing judge used the correct legal standard, a court will uphold an intercept order based on minimally sufficient facts.**

Applications for intercept orders are governed by RCW 9.73.130. The Act identifies several factual prerequisites. Relevant in this case, an intercept application must include "[a] **particular statement of facts showing that other normal investigative procedures with respect to the offense** have been tried and have failed or **reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.**" [RCW 9.73.130](#)(3)(f). That subsection is known as the particularity requirement.

As a matter of constitutional law, law enforcement officers enjoy broad discretion to decide whether to record undercover conversations through devices such as body wires.

Washington's Privacy Act was designed to limit that discretion. **The Privacy Act does not require a showing of absolute necessity to obtain an intercept order. Instead, what is contemplated is a flexible, practical assessment of whether law enforcement has shown an intercept warrant is justified in a particular case. It must consist of something more than a "boilerplate" showing of need. To meet the terms of the privacy act, an intercept application must make a case-specific showing of need to guard against orders being made available in all cases as a matter of course.**

The Court said that **the totality of the facts alleged were sufficient to meet the Act's particularity requirement**. The intercept applications did not simply contain standard, boilerplate information. Law enforcement did not merely recite the truism that testimony

from a CI would be enhanced by corroboration. Instead, **the applications made clear safety was also a significant concern.** The facts set forth in the intercept applications reveal the **CI reported seeing firearms in Gonzalez's home**, including a sawed-off shotgun. **Given the undercover purchases were to take place inside of the home, standard law enforcement surveillance methods were insufficient to address the CI's safety. Officers needed an intercept order to listen and be prepared to move in if necessary.** Therefore, the issuing judge had a justifiable factual basis to issue the intercept orders. So, the motion to suppress on the grounds that the intercept orders were invalid was properly denied.

EXTERNAL LINK: <https://www.courts.wa.gov/>