

Law Enforcement Digest – May 2023

COVERING CASES PUBLISHED IN MAY 2023

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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.

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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** - WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022](#)]

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Estate of Strickland v. Nevada

County

No. 22-15761

United States Court of Appeals for the Ninth

Circuit

May 31, 2023

TOPIC: *Use of force*

In December 2019, Gabriel Strickland was arrested by the Nevada County Sheriff's Office and placed in a correctional facility in Nevada City, California. Strickland underwent a physical and mental assessment, conducted by the Sheriff's Office and Wellpath Management, Inc., the medical services contractor at the facility. The assessment indicated the need for an urgent mental health evaluation. Despite displaying active mental health issues and being uncooperative and angry, Strickland was not given a mental health evaluation during his time in custody.

This was not the first encounter between Strickland, the Sheriff's Office, and Wellpath Management. Strickland had been held at the facility multiple times before, and a Wellpath doctor had previously diagnosed him with bipolar disorder, PTSD, and anxiety disorder in 2016. Despite the diagnoses, the Sheriff's Office and Wellpath did not refer Strickland to outside providers for further evaluation and did not involuntarily hold him. On December 30, 2019, the Nevada County Superior Court released Strickland after a pretrial hearing.

Two days later, on January 1, 2020, the Nevada County Region Dispatch received reports of a man walking with what appeared to be a shotgun on a residential road near Grass Valley, a neighboring town. Officer Conrad Ball from the Grass Valley Police Department responded to the call and found Strickland carrying a black plastic airsoft rifle with an orange tip, indicating that it was a replica firearm. Officers from the Grass Valley Police Department and the Nevada County Sheriff's Office also arrived at the scene. The officers recognized Strickland as a homeless individual with mental health issues who had recently been released from custody. As a result, the officers would have known that Strickland was likely experiencing a mental health episode and was unlikely to respond to commands in a typical manner.

The officers positioned their patrol vehicles around Strickland, drew their guns and yelled at him to drop his gun. Strickland held the gun away from his body and said, "*it's a BB gun.*" Strickland then slapped the gun, making a noise that sounded more like plastic than metal. Despite his explanation and pointing to the orange tip on the barrel, the officers continued shouting commands. One officer said, "*we don't know that's a fake gun... you could have painted that... we don't want to kill you.*" Strickland responded, "*I'm not doing nothing wrong.*" Up until this point, Strickland stood with the barrel pointing at the ground.

At no time during Strickland's interaction with police did the officers seek advice from their supervisors, request help from crisis-trained officers, or involve negotiators or mental health professionals. Officer Brandon Tripp approached Strickland with Officers Brian Hooper and Conrad Ball, while Officer King covered them. Officer Tripp told dispatch, "tell Grass Valley [police department] units to get out of [the] crossfire." As the officers approached, Strickland dropped to his knees.

At this point, Strickland began pointing the gun in the direction of the officers. At other times, he pointed it up toward the sky. Officer Hooper attempted to deploy a taser, but it failed to disarm Strickland. Within seconds, Strickland lowered the barrel towards the officers. Officers Tripp, King, and Hooper opened fire, shooting him multiple times. Strickland was transported to a nearby hospital where he was pronounced dead.

One year later, Strickland's estate (the Estate) sued on his behalf. The Estate brought excessive force claims against the five officers and their respective law enforcement agencies. The Estate also argued that Nevada County, Wellpath, and their personnel deliberately disregarded Strickland's mental health needs during his incarceration in the days before the shooting. The district court dismissed the case for failure to state a claim upon which relief could be granted.

The Estate timely appealed.

Analysis of the Court

The United States Court of Appeals for the Ninth Circuit (the Court) noted that the Fourth Amendment to the United States Constitution prohibits unreasonable seizures of people. Moreover, even if a seizure is reasonable, it must be conducted in a reasonable manner. This means that the Fourth Amendment prohibits the use of excessive force.

In this case, the Court needed to determine whether the officers employed an "objectively reasonable" amount of force under the "totality of the circumstances." To answer this question, the Court was required to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." In a prior case, the Supreme Court has looked to several factors to make such a determination: (1) the type and amount of force inflicted, (2) the severity of the crime at issue, (3) whether the suspect posed an immediate threat to the safety of officers or others, and (4) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. (See [Graham v. Connor](#) for the Supreme Court's analysis of the use of force by law enforcement).

The Court noted that this list of factors was not exclusive, and other factors may also be considered, such as (5) "the availability of less intrusive alternatives to the force employed," (6) "whether proper warnings were given," and (7) "whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (Established by [S.B. v. County of San Diego](#) (9th Cir. 2017)).

In this case, the Court noted that many of these factors supported Strickland's appeal. Strickland was known to officers as homeless and mentally ill. During the incident, it was obvious that Strickland was suffering a mental health crisis. Strickland was not under suspicion for committing a serious or dangerous crime and Strickland was not brandishing the gun at anyone or threatening the life or property of others. Additionally, the officers failed to try to de-escalate the situation or wait for supervisors or call for backup that had crisis or mental health training. Finally, the officers seemed to exacerbate the situation by aggressively shouting directions at Strickland. In the end, the officers employed "deadly force" by firing several rounds at Strickland, killing him.

The Court found that the bulk of these factors, referred to as *Graham* factors, supported Strickland. However, the Court noted that of all the use of force factors, the most important is whether the suspect posed an "immediate threat." To show an immediate threat, there must be objective factors to justify an officer's fear for [their] safety or the safety of others.

The Court observed that there are no hard and fast rules for evaluating the reasonableness of lethal force in response to a threat. At one end of the spectrum, when a suspect points a gun in an officer's direction, "the Constitution undoubtedly entitles the officer to respond with deadly force." **Lethal force is justified if an officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others.** Moreover, reasonableness doesn't always require officers to delay their fire until a suspect turns their weapon on them. If a person is armed or reasonably suspected of being armed, a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. (See [George v. Morris](#) where an officer's use of force was justified when "fellow officers radioed that [the suspect] was yelling threats at them and then radioed that [she] was shooting at them).

At the other end of the spectrum, the Constitution does not tolerate the use of force to seize an unarmed, non-dangerous suspect by shooting them dead in absence of probable cause of a threat of serious physical harm. It is clearly established that shooting a non-threatening suspect violates the suspect's constitutional rights.

These principles apply even if an officer is reasonably mistaken about the nature of a threat. Officers can have reasonable, but mistaken, beliefs about the existence of an immediate threat, and in those situations, the courts will not hold that they have violated the Constitution. **When an officer's use of force is based on a mistake of fact, we ask whether a reasonable officer *should* have accurately perceived that fact.**

In this case, the officers responded to a tense, uncertain, and rapidly evolving situation. They found Strickland on a residential street carrying what appeared to be a firearm. The pivotal moment came when Strickland began pointing the replica gun in the officers' direction. The Court reasoned that at that point, the officers had probable cause to believe that Strickland posed a significant threat of death or serious physical injury, and it became objectively reasonable for them to use lethal force. **When a suspect points a gun in the direction of officers, they would be justified to use deadly force.**

In this case, it didn't matter that the weapon turned out to be a replica gun. The only indications that Strickland's gun was a replica were the orange-painted tip and Strickland's attempts to convince the officers that the object was "a BB gun." The officers were reasonably justified in not taking Strickland's assurances at face value. After all, the Court opined, misplaced trust in this circumstance could be fatal for the officers.

The Court concluded that it was objectively reasonable for the officers to believe that Strickland posed an immediate threat. He was carrying a replica gun, disregarded multiple warnings to drop it, and pointed it at the officers. The Court noted that, while the misidentification of the replica gun added to the tragedy of the situation, it did not render the officer's use of force objectively unreasonable. Given the immediacy of the threat, the Estate could not state a plausible claim for excessive force.

The Court affirmed the district court's dismissal of the Strickland Estate's claim.

Training Takeaway

Courts will always look to the totality of the circumstances when determining whether law enforcement used excessive force when seizing an individual. It considers **(1) the type and amount of force inflicted, (2) the severity of the crime at issue,** (3) **whether the suspect posed an immediate threat to the safety of officers or others, and (4) whether the suspect was actively resisting arrest or attempting to evade arrest by flight,** (5) **"the availability of less intrusive alternatives to the force employed,"** (6) **"whether proper warnings were given,"** and (7) **"whether it should have been apparent to officers that the person they used force against was emotionally disturbed."**

That being said, the most important factor is whether the suspect posed an immediate threat to the safety of officers or others. And while there must be objective factors to justify an officer's fear for their safety or the safety of others, courts will not "require that officers wait until a gun is pointed at them before they are entitled to take action." But shooting a nonthreatening suspect violates the suspect's constitutional rights.

These principles apply even if officers are reasonably mistaken about the nature of the threat. When an officer's use of force is based on a mistake of fact, courts ask whether a reasonable officer would have or should have accurately perceived that fact.

In this case, the officer's mistaken belief that Strickland possessed a dangerous weapon was reasonable and they were justified in the use of deadly force when he pointed the airsoft gun at them because: Strickland was carrying a toy gun that resembled a real firearm, he ignored multiple commands to drop it, and he pointed it at the officers during a tense confrontation. When he pointed the airsoft gun at the officers, they were left with only an instant to react. They were not required to delay their fire until they learned whether the gun was real.

[EXTERNAL LINK: View the Court Document](#)

Porter v. Martinez

No. 21-55149

United States Court of Appeals for the Ninth

Circuit

April 7, 2023; rehearing denied May 22, 2023

TOPICS: *Freedom of expression, motor vehicles*

Factual Background

In 2017, Susan Porter attended a protest outside a government official's office. After leaving, Porter drove by the active protest and honked her horn in support of the protesters. A sheriff's deputy pulled Porter over and gave her a citation for misusing her vehicle horn under Section 27001 of the California Vehicle Code. The citation was dismissed after the deputy failed to attend the traffic court hearing. Subsequently, Porter brought an action challenging the constitutionality of Section 27001.

Porter argued that Section 27001 violates the First and Fourteenth Amendment as content-based regulation that was not narrowly tailored to a compelling government interest. In the alternative, Porter argued that even if the law was not content based, it was a content-neutral regulation that burdens substantially more speech than necessary to protect a legitimate government interest.

In support of her argument, Porter alleged that she drives by rallies, protests, and demonstrations and would like to express her support for these events by honking. She alleged that she no longer honks her horn for such purposes because she fears enforcement of Section 27001. Porter argued that expressive horn honks include support for candidates and causes as well as greeting friends or neighbors, summoning children or co-workers, or celebrating weddings or victories.

The State moved to dismiss Porter's First Amendment Claim, arguing that even if Section 27001 governed expressive activity, the law was content neutral and reasonably furthered California's interest in promoting traffic safety and reducing noise pollution.

In support of the traffic safety rationale, the State relied on the testimony of Sergeant William Beck, a twenty-four-year veteran of the California Highway Patrol. Beck testified that "when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others," and that, "the vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Vehicle Code section 27001.

In support of the noise-control rationale, the State submitted numerous government reports and scientific articles that discussed the contributions of honking and other traffic sounds to noise pollution and the dangers noise pollution poses to human health.

The trial court excluded the government and scientific reports, but entered summary judgment in favor of the State because, “history, consensus, common sense, and the declaration of Sergeant Beck support[ed] the State’s proffered justifications.” The court concluded that California’s interests in maintaining traffic safety and reducing noise pollution were significant and that Section 27001 was narrowly tailored to serve those interests.

Porter timely appealed.


Analysis of the Court

In this case, the Ninth Circuit Court of Appeals (the Court) considered Porter’s First Amendment challenge to California’s law that prohibits honking a vehicle’s horn except when reasonably necessary to warn of a safety hazard.

The relevant portion of California’s Vehicle Code provides:

1. The driver of a motor vehicle when reasonably necessary to ensure safe operation shall give audible warning with his horn.
2. The horn shall not otherwise be used, except as a theft alarm system.

California Vehicle Code § 27001

 (Washington State’s version of this law can be found in [RCW §46.37.380\(1\)](#), which reads, “The driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with his or her horn but shall not otherwise use such horn when upon a highway”).

At the beginning of its analysis, the Court accepted that at least some honking prohibited by Section 27001 was expressive for First Amendment purposes. The Court pointed to the facts in Porter’s case to prove this premise. It noted that Porter attended a protest and, while she left in her car, she honked her horn fourteen times intending to show support for the protest. The crowd then cheered, indicating that the group understood Porter’s intended message. The Court did not examine the full scope of expressive honking but held that Section 27001 did prohibit some expressive conduct.

Having established that honking could be expressive, the Court needed to determine whether Section 27001 was content-based regulation of expressive honking. **The Court noted that Section 27001 did not distinguish between honks intended to convey warnings and honks intended to convey other messages.** Instead, the law prohibited all honking except when such use was “reasonably necessary to ensure the safe operation” of the vehicle. Thus, while the prohibition of Section 27001 might prohibit some expressive conduct, the primary distinction the statute makes does not depend on the message that

might be conveyed. Section 27001 does not single out political honking, ideological honking, celebratory honking, et cetera. Instead, the law **applies evenhandedly to all who wish to use the horn when a safety hazard is not present**. Section 27001 draws a line based on the surrounding factual situation, not based on the content of expression.

Having determined that Section 27001 was content-neutral, the Court applied intermediate scrutiny to determine whether it was constitutional.

To survive intermediate scrutiny, a content-neutral regulation must further an important or substantial governmental interest, that interest must be unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

The State argued that Section 27001 furthered its interests in traffic safety. The Court noted that there could be no doubt that the State's interest in traffic safety was substantial. Moreover, California's interest in traffic safety was unrelated to the suppression of free expression. However, when a government seeks to regulate expression, even incidentally, to address anticipated harms, it must demonstrate that the law actually furthers the State's asserted interests.

In this case, the asserted interest of traffic safety appeared in the face of the statute itself. Section 27001 provides that the driver of a motor vehicle shall, "when reasonably necessary to ensure safe operation," "give audible warning with his horn," and, "the horn shall not otherwise be used, except as a theft alarm system." The Court believed these provisions made logical sense: **For the horn to serve its intended purpose as a warning, it must not be used indiscriminately.**

The Court noted that the traffic safety justification was not a novel one for laws like Section 27001. Since the advent of the motor vehicle, similar laws have been on the books in California and other jurisdictions. The Court reasoned that the long history and consensus, coupled with the common-sense inference that the horn's usefulness as a warning tool would decrease the more drivers use it for any other function, supported the State's asserted interest in traffic safety.

Accordingly, the Court concluded that Section 27001 furthered an important or substantial governmental interest that was unrelated to the suppression of free expression.

The Court was also persuaded that Section 27001 was narrowly tailored to further California's interest in traffic safety. **The Court reasoned that the statute encourages the use of a vehicle's horn when reasonably necessary to ensure the safe operation of the vehicle and prohibits honking in all other circumstances because honking when there is no hazard reduces the effectiveness of the horn as a safety device and creates dangers of its own. By banning horn use in all other circumstances, the State did no more than eliminate the exact source of the evil it sought to remedy.**

The Court noted that Section 27001 leaves open ample channels for people to communicate their ideas and messages from their cars. Drivers can park and attend political

demonstrations on foot. They can wave, give thumbs up, raise their fist as they drive by, or place bumper stickers on their car. The Court reasoned that while some people might find it more satisfying to honk their horn in certain circumstances, “we will not invalidate a regulation merely because it restricts the speaker’s preferred method of communication.”

The Court held that Section 27001 was narrowly tailored to advance California’s substantial interest in traffic safety, and therefore passed intermediate scrutiny.

The Court affirmed the district court’s summary judgment in favor of the State.

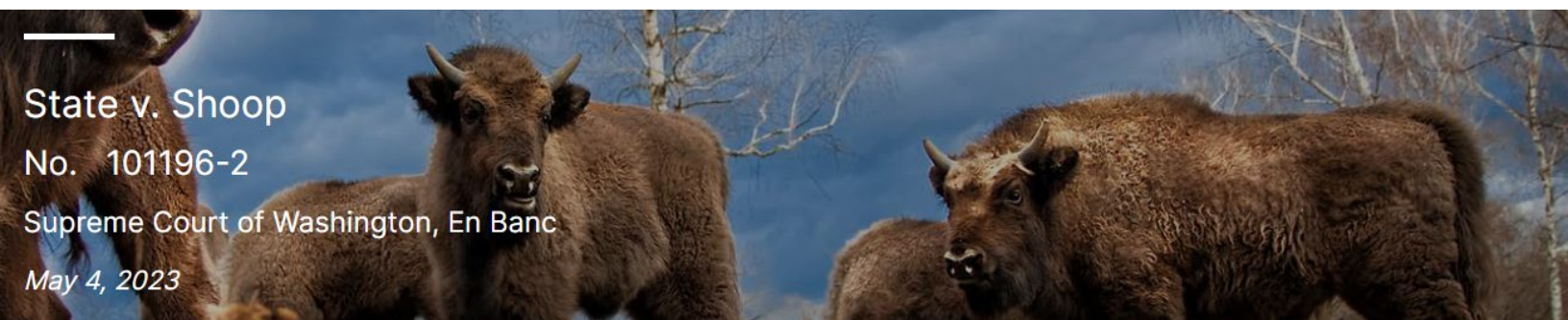
Training Takeaway

In Washington State, RCW §46.37.380(1) states that, “the driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with his or her horn but shall not otherwise use such horn when upon a highway.” The Ninth Circuit noted that such restrictions could incidentally regulate expression. However, such regulation was content-neutral, and therefore only needed to survive an intermediate scrutiny analysis.

To survive intermediate scrutiny, a content-neutral regulation must further an important or substantial governmental interest, that interest must be unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

In this case, the State of California had a substantial governmental interest in traffic safety. And because any use of a horn, other than to warn others of a hazard, would diminish the effectiveness of the horn as a traffic safety device, Section 27001’s prohibition on using a horn for any other purpose was narrowly tailored to fit that interest. Finally, the restriction on using a horn only as a warning was not related to the suppression of free expression. Indeed, there are multiple ways that people can express themselves from their vehicles, and courts will not invalidate a regulation merely because it restricts a speaker’s preferred method of communication.

[EXTERNAL LINK: View the Court Document](#)



State v. Shoop

No. 101196-2

Supreme Court of Washington, En Banc

May 4, 2023

TOPICS: *Animal cruelty, alternative means*

Factual Background

Denver Lee Shoop owned eight bison and kept them on his property in Chimacum, Washington. In April of 2018, an animal control officer responded to a complaint about the health of the bison. The animal control officer investigated the complaint and determined that the bison needed immediate feeding. The animal control officer obtained a warrant to seize the bison. After their seizure, experts confirmed that the bison were emaciated.

Shoop was charged with eight counts of animal cruelty in the first degree, a violation of RCW §16.52.205(2). Each count was related to a different bison, and each count alleged that Shoop had mistreated that individual bison in one of the three ways prohibited by RCW §16.52.205(2): by criminally negligent starvation, by criminally negligent dehydration, or by criminally negligent suffocation.

The jury instructions each pertained to a different bison, and each instruction stated that the jury had to find that “on an occasion separate and distinct from the act alleged in the other counts,” Shoop, “with criminal negligence, starved, dehydrated, or suffocated an animal” and as a result “caused substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering.”

Shoop’s first trial ended in a mistrial. The State retried Shoop and he was convicted on all eight counts.

Shoop timely appealed.

On appeal, Shoop argued that RCW §16.52.205(2) created three separate crimes, or alternative means of committing animal cruelty in the first degree. He argued that his convictions should be reversed because the jury did not unanimously agree on which of the three means the State proved and the State did not provide sufficient evidence to support each alternative means.

The Court of Appeals affirmed, and the Washington Supreme Court (the Court) granted review to determine whether RCW §16.52.205(2) defined an alternative means crime and, if so, whether the State provided sufficient evidence of each charged means.

Analysis of the Court

The Court began its analysis by noting that criminal defendants have the right to a unanimous jury verdict. **In alternative means cases, where the criminal offense can be**

committed in more than one way, [the court has] announced a rule that an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence. But when insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed.

Because there was no evidence of suffocation, the Court needed to determine whether the statute Shoop was alleged to have violated defined multiple crimes, or defined a single crime that can be committed in more than one way.

Under RCW §16.52.205(2), a person is guilty of animal cruelty in the first degree when... [they], with criminal negligence, starves, dehydrates, or suffocates an animal... and as a result causes: (i) substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (ii) death.

The Court needed to determine whether the language “negligently starves, dehydrates, or suffocates” describes distinct acts or similar acts. If it describes distinct acts, then each distinct act constitutes a separate means and, therefore, a separate crime. If it contains only different definitions or descriptions of one overall criminal act, then that one overall criminal act constitutes the single “means” and, therefore, a single crime.

The Court noted that in 2021, the Court of Appeals held that **RCW §16.52.205(2) defined a single crime, reasoning that subsection (2) criminalized depriving an animal of the necessities of life and that starving, dehydrating, suffocating, or exposing the animal to excessive heat or cold were simply different ways of committing that general overall crime.** (See [State v. Jallow](#)).

When courts need to distinguish between distinct acts and minor nuances inhering in the same act, they consider: (1) the title of the statutory act, (2) whether there is a readily perceivable connection between the various acts set forth, (3) whether the acts are consistent with and not repugnant to each other, and (4) whether the acts may exist essentially in the same transaction.

In this case, the Court found that starvation, dehydration, and suffocation have a readily perceivable connection (describing animal cruelty), they are consistent with and not repugnant to each other (describing a negligent course of conduct that results in deprivation of food, water, and air), and the acts may exist in essentially the same transaction (deprivation of sufficient nourishment or space). Additionally, starvation, dehydration, and suffocation constitute facets of the same criminal conduct – ignoring the animal’s bodily needs – over what could be the same period of time.

The Court compared RCW §16.52.205(2) with the State’s former DUI statute, RCW §46.61.502 (2008). That statute made it a crime to drive under the influence of alcohol, under the influence of drugs, or under the combined influence of alcohol and drugs. In [State v. Sandholm](#), the Washington Supreme Court held that the statute created a single crime of driving under the influence, not alternative means of driving under the influence. The Court explained that the DUI statute criminalized one type of conduct – driving under the influence of certain substances that cause impairment. The statute described facets of the same conduct, not distinct criminal acts.

The Court concluded that the language of RCW §16.52.205(2), similar to the former DUI statute, defined a single crime, not three alternative means of committing essentially three separate crimes. Because RCW §16.52.205(2) defines a single crime, the State did not need to provide sufficient evidence to prove each of the alleged means (starvation, dehydration, or suffocation) beyond a reasonable doubt.

The Court affirmed the Court of Appeals and Shoop's eight convictions for animal cruelty in the first degree.

Training Takeaway

In this case, the Court considered whether RCW §16.52.205(2) created a single crime of animal cruelty in the first degree, or three separate crimes of animal cruelty in the first degree.

The Court concluded that starvation, dehydration, and suffocation had a readily perceivable connection to animal cruelty and were consistent with each other. Moreover, the three listed acts could be the same course of action or inaction that causes all three harms – the continuous neglect of an animal's physical needs. In the context of animal cruelty, starvation, dehydration, and suffocation were each facets of the same criminal conduct – ignoring the bodily needs of an animal – and constituted three separate ways to commit animal cruelty.

The Court reasoned that the three separate ways of committing animal cruelty in the first degree by means of negligence were no more varied than the separate ways of committing DUI.

[EXTERNAL LINK: View the Court Document](#)

TOPICS: Search and seizure – consent exception, search and seizure – abandonment exception

Factual Background

An officer on patrol suspected that the driver of a vehicle had a suspended license. The officer conducted a traffic stop. Upon approaching the car, the officer saw Garner in the front passenger seat. The officer recognized Garner and knew that there was an outstanding warrant for his arrest.

The officer ordered Garner to stay seated and called for backup. Garner got out of the car and began “digging around in his pockets.” The officer drew his gun and “continued to give [Garner] verbal commands.” Garner explained that he was trying to smoke a cigarette, but then fled on foot. The officer gave chase, caught Garner and placed him in handcuffs. The officer searched Garner's pockets and found a pipe, \$1,306 in cash, and a small amount of a substance the officer suspected to be heroin.

After the search, the officer placed Garner in the back of his patrol car. A different police officer stood with Garner while the first officer went to speak with the driver of the pulled over vehicle. The driver told the officer that when his patrol car was following behind her vehicle, Garner had asked her to pull into a gas station. Garner then “tried to hide something under her seat” and moved bags to the vehicle's back seat. The driver identified two backpacks on the rear floorboard and a third backpack “on the floorboard of the front passenger seat” as belonging to Garner. She then gave the officer permission to search the car “without limitation.”

The officer searched the backpacks and found an insurance card with Garner's name on it, “a Ziploc bag with a variety of suspected narcotics, a scale, a folding knife with suspected drug residue, a plastic scoop with suspected drug residue, and sandwich baggies.” The officer informed Garner of his Miranda rights and then Garner admitted that “the suspected drugs in question belonged to him.” Garner also “indicated he was homeless.”

Subsequent testing established that the controlled substances found in the backpacks were 86.9 grams of methamphetamine and 3.8 grams of heroin.

Garner was charged with two counts of possession of a controlled substance with intent to deliver.

Before trial, Garner moved to suppress all the evidence obtained from his arrest. Garner raised three arguments: (1) that he had standing to challenge the traffic stop, (2) that the officer unlawfully extended the traffic stop to search the car, and (3) that the officer did not execute a lawful search incident to arrest.

The State countered that “Garner’s own actions expanded the original traffic stop into a drug investigation, contending that the officer spoke to the driver as part of the drug investigation and that the driver gave consent to search the whole car.”

The trial court agreed that Garner had standing but concluded that the officer did not unlawfully extend the traffic stop because he only extended it based on Garner’s decision to flee. The trial court also concluded that the search was not permitted by a search incident to arrest but was permitted by the vehicle owner’s consent to search the vehicle. The trial court denied Garner’s motion to suppress.

After a bench trial, the trial court found Garner guilty of both counts of possession of a controlled substance with the intent to deliver.

Garner timely appealed.

Analysis of the Court

The thrust of Garner’s arguments on appeal were that the trial court should have suppressed the evidence seized by police from his backpacks because the driver’s consent to search their car did not extend to a search of his backpacks. Division 2 of the Washington Court of Appeals (the Court) considered Garner’s appeal.

The Court began its analysis by noting that the facts concerning what happened during the traffic stop and how the search came about were not in dispute.

The Court reiterated that article I, section 7 of the Washington constitution states that, **“No person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law.”** Consequently, a warrantless search is by itself unreasonable unless it falls within one of the carefully drawn and jealously guarded exceptions to the warrant requirement. Moreover, under [Washington’s] state constitution, automobile passengers receive heightened protection. In the context of a vehicle search, a passenger’s rights are independent of the driver.

The Court noted that, in the past, Washington courts have given a person’s bag or closed container heightened protection. And the Washington State Supreme Court has also recognized an expectation of privacy in purses, briefcases, and other traditional containers of personal belongings.

Here, the Court addressed three exceptions to the warrant requirement: consent, abandonment, and the inevitable inventory search.

Consent

The Court noted that one of the exceptions to the warrant requirement for a search is consent. This exception requires the State to show that the consent to search is voluntary, the consenting party has authority to consent, and the search did not exceed the scope of the consent.

The Court observed that it recently held that a motel room occupant's consent to search his room did not extend to the grocery bags left there by the occupant's guest. (See [Giberson](#), detailed in April 2023's Law Enforcement Digest). In that case, the court reasoned that the motel occupant's consent did not extend to the guest's bags because the guest had a reasonable expectation of privacy in [their] grocery bags and that the occupant of the motel room had informed officers that the bags were not theirs.

In another case, Division One of the Washington State Court of Appeals held that a driver's consent to search his car's trunk did not extend to the locked safe in the trunk, reasoning that **the driver did not explicitly consent to the search of the safe because he did not give the officer permission to open it, and the driver did not impliedly consent to the search because the record lacked evidence that he saw the officer unlock it.** (See [State v. Monaghan](#)).

In this case, like Monaghan, Garner did not give explicit consent to search his backpacks, and there is no evidence that he implied consent. Moreover, as a passenger in the driver's car, Garner occupied a similar position to the guest in *Giberson*. In keeping with the notion that exceptions to the warrant requirement are "narrowly drawn," the Court held that the driver's consent to search her car did not extend to Garner's backpacks. Accordingly, the officer was required to ask for Garner's consent to search the backpacks or obtain a warrant before doing so.

Abandoned Property

The Court next addressed another exception to the warrant requirement: Abandonment. Generally, officers may retrieve and search voluntarily abandoned property without implicating an individual's Fourth Amendment or article I, section 7 rights. **A person voluntarily abandons property where, in leaving the property, they relinquish their reasonable expectation of privacy in it.** To determine whether relinquishment has occurred, courts consider **the status of the area where the searched item was located.** Courts will generally decline to find abandonment if a defendant left the item in an area where they had a privacy interest, such as the interior of a car.

In a prior case, the court held that a defendant did not abandon a briefcase in his truck because he had a privacy interest in the area searched, the briefcase was locked, and the defendant objected to its seizure. This remained true even though the defendant disclaimed ownership of the briefcase. (See [State v. Evans](#)).

However, courts will find abandonment if the defendant had **no privacy interest in the area where the searched item was located.** For example, in [State v. Reynolds](#), a passenger was found to have voluntarily abandoned their coat when an officer found the coat on the ground and stuffed underneath the passenger side of the vehicle. In another case, the court

found abandonment of a cell phone when it was left in a stolen vehicle while the defendant was fleeing from police. (See [State v. Samalia](#)).

Courts will also consider whether a defendant demonstrated an intent to recover the property. If they did, courts will generally find no relinquishment of a reasonable expectation of privacy. For example, in a previous case, the Court held that a defendant mislaid, not abandoned, their purse when they left it on a department store couch and returned to the store five minutes later to look for it. (See [State v. Kealey](#)).

In this case, unlike in *Samalia*, Garner left his backpacks in a car he had occupied with the driver's permission. And unlike Reynolds, he did not remove the backpacks from the car and place them on the road. Instead, Garner left his belongings with a person he knew. He never disclaimed ownership, and he took the time to place them on the vehicle's floorboards. These circumstances indicate that Garner intended to safeguard the backpacks until he could recover them. Given Garner's reasonable expectation of privacy in his backpacks, and his attempts to safeguard them, the Court held that the abandoned property exception to article I, section 7 did not apply. The Court reiterated that this holding conformed with the notion that exceptions to the warrant requirement should remain carefully drawn and jealously guarded.

Inevitable Inventory Search

Finally, the Court addressed the State's argument that, even if the search was improper, it did not violate Garner's constitutional rights because the officers would have conducted an inventory search of the bags if they were taken to the jail with Garner. However, the Court recognized that in *State v. Winterstein* the Washington State Supreme Court held that the inevitable discovery doctrine was incompatible with article I, section 7 of the Washington State Constitution. Thus, it could not justify the admission of the evidence from the backpacks.

The Court concluded that the trial court should have granted Garner's motion to suppress the evidence obtained from his backpacks.

The Court reversed Garner's convictions and remanded the case for proceedings consistent with its opinion.

Training Takeaway

It is well established that Washington's more protective article I, section 7 prohibits warrantless searches and seizures. This prohibition is subject to a few well defined and jealously guarded exceptions. Two of those exceptions are the consent exception and the abandoned property exception.

The consent exception requires the State to prove that (1) the consent to search was voluntary, (2) the consenting party had authority to consent, and (3) the search did not exceed the scope of the consent. **The driver of a vehicle or the tenant of a dwelling does not have the authority to consent to the search of a guest's or passenger's personal**

containers. This is because people have a reasonable expectation of privacy in the containers of their personal belongings.

In this case, the driver of the vehicle Garner was in did not have the authority to consent to the search of Garner's backpacks. The backpacks were closed containers in which Garner had a legitimate expectation of privacy. Moreover, the officer searched the bags even though they knew that they did not belong to the person who gave consent to the search.

The abandonment exception allows officers to retrieve and search voluntarily abandoned property without implicating an individual's article I, section 7 privacy rights. A person voluntarily abandons property when they leave the property in a place where they have no privacy interest and they do not demonstrate an intent to recover the property.

In this case, Garner attempted to safeguard his backpacks by placing them on the floorboards of the vehicle he occupied with the driver's permission. He placed them in a location where he might later retrieve them, not in an area where he had no expectation of privacy. Therefore, they were not abandoned.

Lastly, the Court reaffirmed the Washington Supreme Court's holding that the inevitable discovery doctrine is incompatible with article I, section 7 of the Washington State Constitution.

[EXTERNAL LINK: View the Court Document](#)

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TOPICS

1. Use of force
2. Search and seizure – Consent exception
3. Search and seizure – abandonment exception
4. Search and seizure – inevitable discovery doctrine
5. Freedom of expression
6. Motor vehicles
7. Animal cruelty
8. Alternative means

CASES & REFERENCES

1. [Estate of Strickland v. Nevada County](#) 22-15761 (May 31, 2023)
 - a. [Graham v. Connor](#)
 - b. [S.B. v. County of San Diego](#)
 - c. [George v. Morris](#)
2. [Porter v. Martinez](#) 21-55149 (April 7, 2023; rehearing denied May 22, 2023)
 - a. [RCW § 46.37.380\(1\)](#)
3. [State v. Shoop](#) 101196-2 (May 4, 2023)
 - a. [State v. Jallow](#)
 - b. [State v. Sandholm](#)
4. [State v. Garner](#) 56861-6-II (May 31, 2023)
 - a. [State v. Giberson](#)
 - b. [State v. Monaghan](#)
 - c. [State v. Evans](#)
 - d. [State v. Reynolds](#)
 - e. [State v. Samalia](#)
 - f. [State v. Kealey](#)

WA Legal Updates

For further reading, 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** by WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022-present](#)]