LAW ENFORCEMENT DIGEST
July 2022

COVERING CASES PUBLISHED IN JULY 2022

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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]

QUESTIONS?

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United States v. Willy

No. 21-30006

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

July 26, 2022

TOPIC: Brandishing a Weapon. Probable cause, exclusionary rule, and warrant severability.

Factual Background

On May 12, 2019, the Yakima County Sheriff's office received a call from a witness (Witness 1) stating that a man had pulled up outside their home and displayed a firearm. Deputy Curtis Thaxton was dispatched to the residence and interviewed the witness. Witness 1 told Deputy Thaxton that a man in a green truck pulled in front of his house and said that he had been abducted and kept somewhere nearby. The man said that he was trying to find the place he was kept. During the conversation, **the man pulled out a semiautomatic pistol, racked the slide, and then put the gun down.** Witness 1 was concerned about the man's mental state and provided Deputy Thaxton with the man's license plate.

Deputy Thaxton ran the license plate and learned the truck was registered to Marc Willy. Deputy Thaxton showed Witness 1 Willy's photo, and the witness identified Willy as the man who had spoken to him. **Witness 1 said that Willy made no threats to him, nor had Willy pointed the pistol at him at any time.**

Ten minutes later, Deputy Thaxton spoke to a second witness (Witness 2) over the phone. Witness 2 said that a man with a name like "Willis" pulled up to her home in a green truck. The man told her that he had been kidnapped and held in a camouflaged trailer or van nearby and that he was trying to find it. **The man told her he was armed and displayed a pistol before putting it away.** Witness 2 told the man they did not know the place he was looking for and the man left. **Witness 2 said that they were not directly threatened nor was Willy argumentative.**

Deputy Thaxton resumed patrol and testified that **he was concerned that Willy was a danger to himself or others in the area**. Thaxton believed Willy **had already committed the violation of RCW §9.41.270 ("brandishing" statute), carry, exhibit, draw a dangerous weapon or firearm with an intent to create an affront or an alarm to another.** Deputy Thaxton located the green truck at a gas station and confirmed it had the same license plate as the one given to him by Witness 1. Thaxton turned on his emergency lights and conducted a "high risk stop" with his firearm drawn. Deputy Thaxton ordered Willy out of the truck. **Willy complied with all of Thaxton's orders. Deputy Thaxton saw a pistol holstered to Willy's hip.** Thaxton removed the gun, placed Willy in handcuffs, and escorted him to the back of the police vehicle.

While securing Willy's pistol, Deputy Thaxton noticed the serial number was scratched off. Thaxton read Willy his *Miranda* warnings, and Willy agreed to talk. Willy told Deputy Thaxton that he had been abducted and kept somewhere for several days. He said he escaped but police didn't do anything to help. Willy also told Deputy Thaxton that the serial number was already scratched off of the gun when he bought it at a gun show four years earlier.

Willy consented to a search of his truck and observed from the side of the patrol car. When Deputy Thaxton moved to the passenger side of the truck, Willy told him that there was a sawed-off shotgun on the rear floorboard of the truck. Deputy Thaxton recovered a non-functional short-barreled shotgun. After the search of the truck, Willy was taken to Yakima County Jail for booking. There, Thaxton searched Willy and recovered a modified CO2 cartridge that the ATF later determined qualified as a destructive device under the National Firearms Act (26 U.S.C. §5845(f)).

Deputy Thaxton spoke with the prosecutor's office and told them his reasons for arresting Willy. The prosecutor recommended charging Willy with possession of an altered-number pistol and a short-barrel shotgun. Deputy Thaxton's Declaration of Probable Cause read, in part, "**Willy displayed a black semi auto pistol to (Witness 1) and loaded it (racked the slide). [Willy] never threatened anyone with it and didn't point it towards him**." Thaxton also wrote that Witness 2 said, "**[Willy] told her he was armed and displayed a black pistol**" and that, "**[Willy] never threatened her with it or pointed it at her.**" Willy was charged with RCW §9.41.270 and altering the serial number on the pistol (the state charges were not the subject of this case).

A federal grand jury indicted Willy, charging him with receiving and possessing an improvised explosive device, receiving and possessing an explosive device that was not registered to him, and making an improvised explosive device, all violations of the National Firearms Act (26 U.S.C. §5861(c),(d),(f)). Willy filed a motion to suppress the evidence. A hearing on the motion was held, during which Deputy Thaxton testified. The district court granted the motion, finding that **although Deputy Thaxton had reasonable suspicion to conduct an investigatory stop, Thaxton lacked probable cause to make the arrest**. The evidence was **tainted by the illegality of the arrest**. The government filed a timely appeal.

Analysis of the Court

The Ninth Circuit Court of Appeals (the Court) noted that the Fourth Amendment of the U.S. Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The Fourth Amendment also provides that a warrant for arrest **shall not issue, but upon probable cause**. Willy was arrested for violating RCW §9.41.270 and was only later charged with altering the serial number on the pistol or possession of a destructive device (the basis for Willy's federal charges). The evidence supporting the federal charges was seized after Willy's arrest during a search at the county jail. **Therefore, the constitutional validity of the search depended on the constitutional validity of Willy's arrest.**

The validity of Willy's arrest turned upon whether, at the moment of the arrest, Deputy Thaxton had probable cause to make it. That is, whether at the moment of the arrest the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Willy had committed or was committing an offense.

Deputy Thaxton testified that, **even before he found Willy at a service station and activated his emergency lights, he had determined that Willy had violated Washington law and that he was going to arrest Willy**. Since Thaxton did not observe any suspicious conduct by Willy, the question is whether he had probable cause to arrest Willy based only on the two reports.

Thus, the Court needed to determine if Deputy Thaxton had grounds to arrest Willy for violating RCW

§9.41.270. The Court observed that **Washington is an open carry state**. **It is presumptively legal to carry a firearm openly**. Washington is also a **shall issue** state. That means that local law enforcement must issue a concealed weapons license if the applicant meets the qualifications. **The fact that Willy displayed a weapon would not be sufficient to stop Willy because there is no evidence that he was carrying a concealed weapon.** The Witness statements created a very weak inference that Willy was unlawfully carrying a concealed weapon without a license. Moreover, Thaxton acquired no additional reasons for arresting Willy. This is because when Thaxton ordered Willy to leave his truck and turn around, **Willy was open carrying his pistol in a holster on his hip**.

Even though Washington is an open carry state, **it is still a gross misdemeanor for a person to "carry, exhibit, display, or draw any firearm… in a manner, under circumstances, and at the time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons**." RCW §9.41.270(1). Washington courts have narrowed the scope of this statute by holding that **the act must warrant alarm in a reasonable person for the safety of others.**

The Court reviewed Washington case law involving charges or convictions under §9.41.270 and found that **they all involved palpable threats with a weapon**. Some examples of actions that were found to warrant alarm in a reasonable person for the safety of others are:

- Leaning out of a car with a rifle
- Pointing a rifle at an officer
- Pointing a weapon at a pedestrian
- Waving a gun at someone
- Flashing a gun in the context of a "rolling fight" between gangs
- Making threats and waving a weapon in the air
- Carrying a firearm and then tossing it when in the presence of law enforcement

The Court also noted that **Washington courts have refused to enforce §9.41.270 when the threats are not sufficiently direct or imminent**. For example:

> Police saw a man "fluff" his sweatshirt when he saw an approaching patrol car. The man did not respond to the officers' instructions, and the officers tased and shot him. The man was carrying an unloaded pistol in his waistband. The Washington Court of Appeals suppressed the evidence of the firearm because there was no evidence that anyone reported being intimidated or alarmed at seeing the gun and the man did not discharge or point the gun at anyone.
>
> A 911 call reported seeing a man walk down a street with a rifle in a towel. Police made contact at 2 p.m. and the man explained he had two unloaded rifles, pointed downward, that he was taking to a pawn shop. The man had a felony record and was arrested for unlawful possession of a firearm. The Superior Court held that police lacked grounds to conduct a *Terry* stop and suppressed the evidence as fruit of an unlawful detention. The Court of Appeals affirmed, holding that the man could not be stopped even to investigate a potential violation of §9.41.270, given the time of day, the location, and the responsible manner in which the man was carrying the firearms. "The court stated it was not unlawful… even if this action would shock some people."

> An anonymous tip that a man had a gun was found to be a very weak inference that the man was unlawfully carrying a gun without a license and was not enough to support a *Terry* stop. There was no evidence that the tipster was alarmed at the time of seeing the gun, and it is presumptively legal to carry a concealed firearm in Washington. The tip alone did not create a reasonable suspicion that the man was engaged in any criminal activity.

In Willy's case, Deputy Thaxton's suspicion that Willy violated §9.41.270 arose not from his own observations but from two witnesses. The witnesses identified themselves, provided Thaxton with detailed reports, and provided consistent details of their recent encounters with Willy. It would be reasonable for Deputy Thaxton to rely on this information.

> Thought: on the basis of these two reports, do you think Deputy Thaxton had probable cause to arrest Willy without further inquiry? Could Deputy Thaxton have arrested Willy at his home or place of employment, or procured a warrant to arrest Willy the following day or week?

The court held that Deputy Thaxton did not have probable cause to arrest Willy.

First, it was clearly not erroneous for the district court to conclude that neither reporting party indicated to Deputy Thaxton that Willy displayed his firearm in a threatening manner. **The witnesses reported that Willy did not display the gun in a threatening manner and did not threaten anyone, including his alleged kidnappers, or point the gun at anyone.** Deputy Thaxton testified that **he understood Willy was not especially hostile or argumentative with the witnesses**. Willy only appeared to want information the witnesses might have about his alleged kidnapping and left peacefully when they indicated they knew nothing. **Thaxton confirmed there was no direct threat with a firearm**. While Willy did rack the slide of his gun, he placed it back on the truck seat and it remained in the truck during the entire encounter with the witness. Deputy Thaxton did have reasonable suspicion to detain Willy to inquire further whether his unusual interactions with the witnesses amounted to a criminal violation or were an indication that he was about to commit a crime, but not to arrest him.

Second, **§9.41.270 requires more than a mere display of a firearm.** At the time Deputy Thaxton located Willy, he did not have sufficient information to reasonably believe that Willy had displayed his gun in a manner that warrants alarm. A reasonable officer would have needed additional information before believing a violation of the statute occurred. The type of weapon Willy had was the same type a person might keep in their car or on their person for self-defense. Willy was in a rural community where firearms were common. Willy introduced himself by name to one of the witnesses. Even though Willy displayed the firearm rather than just carried it, this did not create enough of a possibility of criminal activity that Willy was subject to immediate arrest. **"In a state where carrying a firearm openly is lawful, there is very little room between carrying a firearm and displaying it."**

The Court noted that it did not take lightly Deputy Thaxton's concern that Willy could have been a danger to himself or others and that he did not want to place himself in possible jeopardy by approaching Willy's vehicle to gather more information. Deputy Thaxton had reasonable suspicion to stop Willy and make further inquiries. But Deputy Thaxton had a range of options short of arrest for inquiring whether Willy had violated or was about to violated §9.41.270 or another statute. Deputy Thaxton should have conducted a *Terry* stop to see whether Willy was a potential threat.

The Court concluded that Deputy Thaxton could not, consistent with Washington law and the Fourth

Amendment, arrest Willy on the spot without further inquiry into whether he had or was about to violate §9.41.270.

Under the fruits of the poisonous tree doctrine, also known as the exclusionary rule, **evidence seized subsequent a violation of the Fourth Amendment is tainted by the illegality and subject to exclusion unless it has been sufficiently purged of the primary taint**. The Court affirmed the district court's application of the exclusionary rule to suppress Willy's statements, the altered handgun, the short-barreled shotgun, and the destructive device as the fruits of the illegal arrest.

The Court affirmed the district court's order granting Willy's motion to suppress.

Training Takeaway

Probable cause for an arrest is a higher standard than the reasonable suspicion required to conduct a *Terry* stop. In determining the existence of reasonable suspicion to conduct a *Terry* stop or probable cause for arrest, **courts must examine whether the facts and circumstances with the police officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime**.

Openly carrying a firearm is presumptively lawful in the State of Washington. However, RCW §9.41.270 makes it a misdemeanor for a person to **carry, exhibit, display, or draw any firearm… in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons if a reasonable person would believe the conduct poses a threat to themselves or other persons.**

The "warrants alarm" prong does not apply broadly to all conduct that might raise concern. The **warrants alarm prong is best read as capturing the scenarios where someone is not directly threatening a person who is present but is handling their firearm in such a way that it presents a danger to others**.

The mere displaying of a semi-automatic pistol does not support probable cause for an arrest. **An individual would have to act in a manner that warranted alarm in a reasonable person for the safety of others or in a way that demonstrated an intent to intimidate**.

Actions that past courts have determined warranted alarm:

- Leaning out of a vehicle with a firearm
- Pointing a firearm at someone
- Making threats and waving a gun around
- Flashing a gun in the context of an ongoing dispute
- Tossing a firearm when confronted by police

Under the fruits of the poisonous tree doctrine, **evidence seized subsequent a violation of the Fourth Amendment is tainted by the illegality and subject to exclusion, unless it has been sufficiently purged of the primary taint**.

EXTERNAL LINK: View the Court Document

TOPIC: Probable cause, exclusionary rule, and warrant severability.

Facts Summary

On February 11, 2017, Officers of the Arlington Police Department made contact with a suspicious SUV parked near a known drug house. Officer Molly Ingram first saw Moses sitting in the front passenger seat with a black backpack between his legs. Moses provided Officer Ingram with a false name and date of birth. Officer Ingram returned to her patrol vehicle and ran a records check. After the search confirmed the information Moses provided her was untrue, she returned to the SUV. Upon her return, she noticed that someone had moved the backpack into the back seat of the vehicle. Moses admitted that he had provided a false name, and Officer Ingram arrested him on an outstanding felony warrant. While handcuffing Moses, Ingram noticed an open wound on his forearm. Moses admitted the wound was from injecting heroin, and upon further questioning, Ingram learned that Moses and the driver of the SUV often used drugs.

When the driver of the SUV got out of the vehicle, **Officer Ingram saw a plastic tube with burnt residue on the driver's seat**. **Officer Ingram recognized this device as "drug paraphernalia used to smoke illegal narcotics."** Officer Ingram then deployed K-9 Tara, who alerted to the presence of drugs at both the front passenger and driver's side doors of the SUV. Officer Ingram impounded the vehicle and applied for a warrant to search it.

From the affidavit submitted in support of Officer Ingram's request for a warrant, a judge determined that probable cause existed for the crimes of Violation of the Uniform Controlled Substances Act and possession of drug paraphernalia. The warrant issued by the judge authorized a search of the SUV for:

> Illegal drugs including but not limited to heroin, methamphetamine, drug paraphernalia including tin foil, smoking devices, and other items used to ingest illegal drugs, measuring devices including scales, letters or items showing ownership or occupancy of the vehicle, all locked and unlocked containers, all drug proceeds, ledgers showing drug activity.

The search of the SUV recovered a loaded Ruger .45 caliber handgun in the backpack that Officer Ingram saw between Moses' feet. Paperwork belonging to Moses was also found in the backpack. Because Moses had a prior felony conviction, he was charged with unlawful possession of a firearm in the first degree, committed while on community custody. The state later added one count of criminal impersonation in the first degree, also committed while on community custody.

During trial, the defense moved to suppress the firearm evidence. Moses argued that the warrant lacked probable cause because it authorized a search for evidence of possession of a controlled substance under RCW §69.50.4013, which had then recently been found unconstitutional by the Washington Supreme Court in

Blake. The State argued that *Blake* did not apply and that, standing alone, probable cause to search for evidence of unlawful use or possession of drug paraphernalia supported the warrant.

The trial court agreed with Moses that, at the time of his arrest, the crime of possession of a controlled substance was unconstitutional and void. Because the State could not prosecute him for that offense, and because the crimes of possession of a controlled substance and possession or use of drug paraphernalia were so "intertwined," the warrant was deficient. Over the State's objection, the trial court suppressed the evidence of the firearm and dismissed the charge without prejudice.

The State appealed.

Analysis of the Court

On appeal, the State argued that the trial court made an error when it suppressed the evidence of the handgun found while searching the SUV because a lawfully issued warrant supported by probable cause authorized the search. Or, if the court didn't buy that, the State argued that probable cause supported searching for evidence of drug paraphernalia, which would have led the police to the same firearm.

The court noted that it **evaluates search warrants in a commonsense, practical manner and not in a hyper-technical sense**. The Fourth Amendment of the U.S. Constitution requires a warrant to **show probable cause** and **be supported by an oath or affirmation**, and **particularly describing the place to be searched, and the persons or things to be seized**. Article 1, Section 7 of the Washington Constitution guarantees that, "**no person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law**." Probable cause will support a warrant **where the officer's affidavit sets forth facts sufficient for a reasonable person to conclude that the defendant is involved in criminal activity**. And, in examining a probable cause determination, the Court of Appeals will only consider what was before the judicial officer that issued the warrant. Finally, the Court noted that **it resolves any doubts over the existence of probable cause in favor of issuing the warrant.**

Moses responded to the State by arguing that the *Blake* decision declared the portion of former RCW 69.50.4013 (criminalizing the possession of a controlled substance) as unconstitutional, which essentially invalidated the determination of probable cause supporting the warrant to search for evidence of that crime in his 2017 case. However, the court noted that **a later determination that a statute is unconstitutional does not necessarily invalidate an earlier finding of probable cause** that a person violated the statute. This would be true unless the law was "**so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws**."

The U.S. Supreme Court case *Michigan v. DeFillipo* offers some guidance on the issue. In that case, the Supreme Court stated that a statute that is later deemed invalid does not undermine an arrest because a probable cause determination **does not depend on whether the suspect actually committed a crime**. **Probable cause turns on whether a reasonable officer believes a person has committed or is committing a crime**. To illustrate, the fact that a suspect is later acquitted of the offense they were arrested for is irrelevant to the validity of the arrest.

In Moses' case, Officer Ingram relied on former RCW 69.50.4013 **because it was one of the facts and circumstances supporting probable cause to search the SUV**. And, **Officer Ingram's reliance on the statute**

was reasonable because it was presumptively valid at the time of Moses' arrest. **Because Moses' backpack was searched pursuant to a lawfully issued warrant that was supported by probable cause, it should not have been excluded at trial**. The Court of Appeals reversed the trial court, finding that it made an error in suppressing the firearm evidence.

The Court of Appeals also addressed the issue of severability. A warrant can be overbroad if probable cause supports some portions of it, but not others. But, even if a search warrant is overbroad, under the **severability doctrine**, **infirmity of part of a warrant requires the suppression of evidence seized *pursuant to that part of the warrant* but does not require the suppression of evidence seized pursuant to the valid parts of the warrant**.

To be severable, there **must be some logical and reasonable basis dividing the warrant into parts that a court can examine independently.** The court considers five things, referred to as ***Maddox* requirements**, when determining whether a court can sever invalid parts of a warrant:

1. The warrant must lawfully have authorized entry into the premises
2. The warrant must include one or more particularly described items for which there is probable cause
3. The part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole
4. The searching officers must have found and seized the disputed items while executing the valid part of the warrant, and
5. The officers must not have conducted a general search, i.e., one in which they flagrantly disregarded the warrant's scope.

The Court applied these five factors to the warrant at issue. First, the court noted **that probable cause did support the portion of the warrant authorizing a search for drug paraphernalia** and **officers were lawfully authorized to search the backpack**. Second**, the warrant described with particularity the items related to unlawful possession of paraphernalia**, "including tin foil, smoking devices, and other items used to ingest illegal drugs." Third, **the valid portion of the warrant was significant compared to the warrant as a whole**. Fourth, **the officers discovered the handgun in Moses' backpack within the scope of their valid search for drug paraphernalia**. Finally, **the officers did not engage in a general search**.

The court found that the search warrant relating to the unlawful possession or use of drug paraphernalia was severable from the provisions related to the unlawful possession of drugs because it met all five *Maddox* requirements.

The court held that because the 2021 *Blake* determination did not invalidate the 2017 finding of probable cause to believe that Moses unlawfully possessed controlled substances, and that the former statute was not so grossly and flagrantly unconstitutional at the time Officer Ingram determined probable cause existed, the trial court erred in suppressing the evidence of the firearm.

The court also held that, **even if probable cause did not support the search for evidence of unlawful possession of drugs, it did support the search for evidence of unlawful use or possession of drug paraphernalia and the search warrant was severable, so officers would have lawfully found the same gun**.

Accordingly, the Court of Appeals reversed the trial court's order dismissing the charge of unlawful possession of a firearm and remanded (sent back) the case for trial.

Training Takeaway

The Court of Appeals evaluates search warrants in a commonsense, practical manner and not in a hyper-technical sense. **Probable cause will support a search warrant if the officer's affidavit sets forth facts sufficient for a reasonable person to conclude that the defendant is involved in criminal activity**. When examining a probable cause determination, the Court of Appeals will only consider the information that was before the issuing judicial officer. And, the Court generally resolves any doubts over the existence of probable cause in favor of issuing the search warrant.

The search of Moses' backpack was supported by probable cause, and suppression of the evidence of the handgun by the trial court was improper. Officer Ingram relied on the statute criminalizing possession of a controlled substance only as much as it contributed to the facts and circumstances supporting probable cause to search the SUV. This reliance was reasonable because the statue was presumptively valid at the time of the search. **A later determination that a statute is unconstitutional only invalidates an earlier finding of probable cause if the law is so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.**

Even though probable cause does exist, **a search warrant can be overbroad if it authorizes a search for which probable cause exists but fails to describe those items with particularity, or if it authorizes a search for items for which probable cause does not exist**. In other words, a search warrant is overbroad if probable cause supports some portions of the warrant but not others. But, **even if a search warrant is overbroad, the severability doctrine allows for the suppression of evidence seized pursuant to the defective part of the warrant and admission of evidence seized pursuant to the valid parts of the warrant.**

For the valid portion of a search warrant to be severable, there must be a meaningful separation between the valid and invalid portions of the search warrant. This means that there must be some logical and reasonable basis for dividing the warrant into parts that the court can examine independently. To make this determination, the court considers five factors, often referred to as the *Maddox* factors (listed in the section above).

EXTERNAL LINK: View the Court Document

TOPIC: Robbery. Statutory interpretation.

Facts Summary

On September 5, 2018, Thomason walked into a Yoke's Fresh Market grocery store in Spokane, WA. He was followed by a plainclothes security guard, Daniel Swartz, for a while before Swartz saw him pick up about $15 worth of meat and cheese, walk to another part of the store, and tuck down his pants. Thomason then left the store without paying.

Swartz followed Thomason outside and confronted him by grabbing his arm, displaying his badge, and asking Thomason to come back inside. Thomason attempted to pull free, and Swarz tried to detain him. During the exchange, Thomason swung at Swartz's face two times with a closed fist. The second swing was a glancing blow. Swartz tried to take control of Thomason by pulling his sweatshirt over his head but Thomason swung a third time, striking Swartz in the face. Thomason pulled out of his sweatshirt and ran away.

Swartz followed in his car and saw Thomason enter a house. Later, a car arrived at the house and Thomason got in the passenger seat before the car drove away. Swartz reported the license plate to law enforcement.

Eventually, Thomason was charged and convicted of Second-Degree Robbery, in violation of RCW 9A.56.210. At sentencing, the parties agreed that Thomason's offender score was 10, which implicated a 63-84 month sentence. Both the State and the defense recommended a 63-month sentence. During Thomason's allocution he sought an exception sentence below this standard range. Thomason argued for a 12-month sentence – the same sentence that he would receive were he eligible for drug court. The trial court explained that it could not impose an exceptional sentence based on a program that Thomason did not qualify for.

The trial court, however, raised on its own another argument for imposing an exceptional sentence: that Thomason's crime was nothing more than a "glorified shoplifting charge" that should have been treated as a misdemeanor. The trial court then rejected its own argument for imposing an exceptional sentence, reasoning that it lacked the statutory authority to do so. The trial court noted:

> I don't – I don't like these charges. I'm not faulting the State; that's not what I mean. But this is a particular charge I – I – and some of my judicial colleagues call it the glorified shoplifting charge where someone shoplifts and it ends up turning into a robbery because of a chain of events with security personnel generally, just like what happened here. So I agree with Mr. Zeller that it's a pretty significant punishment for what happened.

Unfortunately, and I know the State agrees with me, I don't have much discretion here. The only discretion I have is the time period between 63 and 84 months. That's all I've got. I wish I had more.

The trial court then imposed a sentence of 63 months because it did not have the discretion to go lower than that.

Thomason appealed, but the Court of Appeals affirmed the trial court. The Court of Appeals reasoned that the trial court **lacked authority to impose a special sentence because Thomason did not put forth factors that would justify a sentence outside the standard range.**

The Washington Supreme Court granted review based solely on the sentencing issue.

Analysis of the Court

The Washington Supreme Court (The Court) noted that it fell to the legislature to define crimes and their punishment. The task of choosing which crime to charge falls to the executive branch, acting through a prosecutor. And finally, the task of interpreting statutes that define crime and their punishments and then measuring them against constitutional protections is entrusted to the judiciary.

The Court took up the issue of whether the trial court correctly concluded that it lacked the discretion to impose an exceptionally low sentence under the second-degree robbery statute, RCW 9A.56.210, and the statute governing departures from the sentencing guidelines contained within the Sentencing Reform Act (SRA), RCW 9.94A.535.

The Court began its analysis by noting that statutory interpretation is a question of law and the main goal of the Court's inquiry is to implement the legislature's intent. The Court determines the legislature's intent by looking to the plain language of the statute in question and consider the meaning of that language in the context of the whole statute.

The Court noted that **the plain language of the sentencing statute … gives the trial court power to impose an exceptional sentence below the standard range based on unlisted mitigating factors, of which the de minimus (minor) nature of a defendant's conduct can constitute such a factor.** The SRA **structures, but does not eliminate, discretionary decisions affecting sentences** by providing a grid, based on the seriousness of the crime and the offender's criminal history, to calculate the standard sentencing range.

The sentencing court must impose a sentence within that range, unless it finds a mitigating or aggravating factor that provides a **substantial and compelling reason to depart from the range imposed by the SRA and instead impose an exceptional sentence.** The SRA provides a nonexclusive list of mitigating circumstances that may support an exceptional sentence below the standard range. The de minimis nature of the acts constituting a particular crime is not listed, but the SRA states that its list is **illustrative only and [the listed factors] are not intended to be exclusive reasons for exceptional sentences.**

The Court noted that it had held in a previous case that the de minimis nature of a crime *can* constitute such a non-listed mitigating factor sufficient to support an exceptional sentence below the range imposed by the SRA. In *State v. Alexander*, the defendant facilitated a drug purchase to an undercover officer for 0.03 grams of cocaine – an amount that was too small to measure. The trial court imposed an exceptional sentence below the minimum range because of the minor nature of the offense. In affirming this result, the Washington Supreme Court applied the *Grewe* test.

Under the *Grewe* test, **(1) the non-listed mitigating factor cannot support an exceptional sentence if the legislature necessarily considered that factor when it established the standard range,** and **(2) the factor cannot support an exceptional sentence unless it is substantial and compelling enough to distinguish the crime in question from others in the same category.**

Thomason argued that his crime is de minimis because it was, as the trial judge said, glorified shoplifting. However, the Court noted that Thomason failed the first part of the *Grewe* test. **The plain language of the robbery statute shows that the legislature did consider a defendant's minimal use of force when it defined the crime of second degree burglary**. The second-degree burglary statute, RCW 9A.56.210, incorporates the elements listed in RCW 9A.56.190's definition of robbery. That definitional statute provides that a person commits robbery when he or she:

> [U]nlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, *or fear of injury* to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking***; in either of which cases the degree of force is immaterial.*** Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The court noted that the language of the statute shows that the legislature clearly considered whether the crime of second-degree robbery should punish a taking combined with a minimal showing of force. **It criminalizes a taking with either force, or even *no* force, as is the case when the taking is accomplished by the use of *fear*.** The legislature even said that "the degree of force is immaterial" when used to obtain or retain possession of the property or to prevent or overcome resistance to the taking. This meant that the de minimis nature of the force used by Thomason was necessarily considered by the legislature when establishing the elements of second-degree robbery.

The legislature considered and criminalized even a minimal use of force to take or retain property when it enacted the second-degree robbery statute. It declared the amount of force used was *immaterial*. The de minimis nature of the crime cannot support an exceptional sentence downward.

The Supreme Court of Washington affirmed the Court of Appeals and Thomason's sentence.

Training Takeaway

The task of defining crimes falls to the legislature. The task of choosing which crime to charge falls to the executive. Finally, the task of interpreting statutes defining crimes and punishments, and measuring them against constitutional protections, is entrusted to the judiciary.

When the Supreme Court interprets a statute, its main goal is to implement the legislature's intent. It first looks to the plain language and the context of the statute as a whole. In Thomason's case, the Supreme Court had to look to the Sentencing Reform Act (SRA) and the second degree robbery statute.

Under the SRA, a trial court has the power to impose an exceptional sentence below the standard sentencing range based on a mitigating factor. The de minimis nature of a crime can be a mitigating factor and support an

exceptional sentence below the standard range if it passes the *Grewe* test. Under the *Grewe* test, the de minimis nature of the crime must:

1. Be a factor that the legislature did not necessarily consider when it enacted the elements of the crime or the standard sentence range, and
2. Be a factor that is substantial and compelling enough to warrant a downward departure.

The use of a de minimis amount of force cannot be a mitigating factor that would support a sentence below the standard range because it is a factor that was considered by the legislature when it enacted the elements of the crime of robbery.

A person commits robbery when they:

1. Take personal property from the person of another or in their presence against their will.
2. By the use or threatened use of immediate force, violence, or fear of injury to that person or their property or the property of anyone.
3. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking – in either of which cases the degree of force is immaterial.
4. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

To support a charge of robbery, the State must also prove the non-statutory element of specific intent to steal.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – July 2022

TOPICS

- Brandishing a Weapon
- Probable cause, exclusionary rule, and warrant severability
- Robbery
- Statutory interpretation

CASES

1. United States v. Willy 21-30006 (July 26, 2022)
2. Washington v. Moses 82734-1-I (June 27, 2022)
3. Washington v. Thomason 99865-5 (July 7, 2022)

URLS

- RCW 9A.56.190 Robbery—Definition.
- RCW 9A.56.210 Robbery in the second degree.
- RCW 9.41.270 Weapons apparently capable of producing bodily harm—Unlawful carrying or handling—Penalty—Exceptions.
- RCW 9.94A.535 Departures from the guidelines.
- RCW 69.50.4013 Possession of controlled substance—Penalty—Possession of useable cannabis, cannabis concentrates, or cannabis-infused products—Delivery. (Effective until July 1, 2023.)