

# LAW ENFORCEMENT DIGEST

## June 2022



### JUNE 2022 LED COVERS A SINGLE, PIVOTAL CASE PUBLISHED IN JUNE 2022 – STATE V. SUM TOPIC: RACE AND ETHNICITY IN SEIZURE

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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.
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- [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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State v. Sum

No. 99730-6

Washington State Supreme Court

June 9, 2022

## Facts Summary

On April 9, 2019, Pierce County Sheriff’s Deputy Mark Rickerson was on patrol through an area with some “problem houses” that he liked to “keep an eye on.” At approximately 9:15 a.m., Deputy

Rickerson noticed a Honda Civic parked near the entry gate of a church parking lot. Deputy Rickerson noted that the vehicle was not parked illegally nor was it blocking the entrance to the church, but it attracted his attention because it was parked there and four or five months earlier another deputy arrested another subject in a stolen vehicle at the same location.

Deputy Rickerson noticed Sum, who “was slumped over and appeared to be unconscious in the driver’s seat.” **The Deputy decided to conduct a “social contact”** and parked nearby, leaving enough room so as not to block the Civic or prevent it from leaving. Before exiting his patrol vehicle, Rickerson ran the Civic’s license plate and discovered a report of sale and that the car had not been reported stolen, but the name of the owner was not listed.

Rickerson approached the Civic on the driver’s side and noted another man was in the front passenger seat. Both Sum and the passenger did not appear to be conscious. Before waking up Sum, Deputy Rickerson matched the VIN on the vehicle to the one on file. The Deputy then knocked on the driver’s side window. Sum slowly woke up and rolled the driver’s side window down slightly.

**Deputy Rickerson asked Sum what he and the passenger were doing**, and Sum replied that they were waiting for a friend. **Deputy Rickerson then asked Sum who owned the Civic**. Sum responded that the Civic was not his and gave the Deputy a name. Deputy Rickerson then asked Sum and his passenger for identification. (Under the 1980 Supreme Court case of [State v. Larson](#), all investigatory detentions and all requests for identification from a passenger in a

vehicle amount to a detention for investigative purposes, and all investigative detentions constitute seizures under Article I, Section 7 of the Washington State Constitution unless other circumstances give the police independent cause to question the passengers.)

Sum asked why the deputy wanted it, and **Rickerson responded that the two men were sitting in an area known for stolen vehicles and that Sum did not know to whom the vehicle he was sitting in belonged.** Sum provided a false name and date of birth. The passenger provided his true name and date of birth.

Deputy Rickerson walked back to his patrol vehicle to run the names. While Deputy Rickerson was in his vehicle, Sum started the Civic's engine, "backed up quickly, and then took off," driving partially on the sidewalk and on some grass. Deputy Rickerson activated his emergency lights and started to pursue the Civic. Sum drove at a high rate of speed through a stop sign and multiple red lights before crashing in someone's front yard. Deputy Rickerson handcuffed Sum and read him his Miranda warnings.

A search of Sum, incident to arrest, revealed the Honda's title and registration, which showed that Sum owned the vehicle. The search also uncovered a small holster. When the Civic was later searched pursuant to a warrant, police discovered a pistol.

## The Charges

The State charged Sum with unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and making a false or misleading statement to a public servant. **The original and amended charging documents both specified Sum's race as "ASIAN/PACIFIC ISLAND[ER]."**


Sum filed a pretrial motion to suppress and argued that he was unlawfully seized without reasonable suspicion, "when Deputy Rickerson requested Sum's identification while implying that Sum was under investigation for car theft." The court denied Sum's motion to suppress, ruling that since Rickerson did not keep Sum's physical identification card while conducting his records check, Sum was not seized when Rickerson asked him to identify himself.

Sum was convicted on all three counts by a jury. **Sum's felony judgment and sentence also state his race as "Asian/Pacific Islander." His ethnicity was listed as non-Hispanic.**

Sum appealed and the Court of Appeals affirmed his conviction. The court held that “merely asking for identification is properly characterized as a social contact.”

Then, Sum petitioned the Supreme Court of Washington for review, further arguing that, “there is no justification – aside from unacceptably ignoring the issue of race altogether – for courts considering the totality of the circumstances to disregard the effect of race as one of the circumstances affecting evaluation of police contact.”

The Washington State Supreme Court granted Sum’s petition.



## When did Sum’s interaction with Deputy Rickerson rise to the level of a warrantless seizure?

### The Issue

At issue was when did Sum’s interaction with Deputy Rickerson rise to the level of a warrantless seizure? The State conceded that there was no lawful justification to seize Sum “until he drove off at a high rate of speed, over grass and the sidewalk.” And Sum did not challenge the trial court’s ruling that Deputy Rickerson’s “initial contact” with Sum was “a reasonable check on health and safety.” It was undisputed that at some point the interaction between Sum and Deputy Rickerson rose to the level of a warrantless seizure. The court, then, only had to decide when the seizure occurred. Sum asked the court to reach a threshold question: whether his race was relevant to the court’s analysis.

The court chose to answer this question. It noted that article I, section 7 of the Washington State Constitution requires consideration of “**all the circumstances**” of the interaction between law enforcement and the allegedly seized person. **The court held that an allegedly seized person’s race and ethnicity are relevant to the question of whether they were seized by law enforcement for purposes of article I, section 7.**

To demonstrate why the article I, section 7 test should include consideration of a person’s

race and ethnicity, the court needed to determine whether the unique characteristics of the state constitutional provision and its prior interpretations actually compelled that result. The court examined the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest.

The court noted that the plain language of article I, section 7 “guarantees privacy rights with no express limitations.” **Nothing indicated that the totality of the circumstances of an alleged seizure should be artificially limited to exclude race or ethnicity.**

The historical treatment of the interest at stake showed that it has evolved over the years. The court noted that many of the court’s historical opinions “concerning the civil rights and lived experiences of BIPOC (Black, Indigenous, and people of color), have been deplorable.” **The court’s recent history has made “notable strides toward recognizing and rejecting racial injustices.” It has disavowed blatantly racist precedent. It has created new standards and modified old ones. This is particularly true within criminal justice.** For example, it has singled out racially biased prosecutorial misconduct for heightened scrutiny on appeal and it has eliminated capital punishment where empirical evidence made it apparent that Washington’s death penalty was administered in an arbitrary and racially biased manner.

**The court also noted that its adoption of General Rule 37 shifted the inquiry in jury selection from purposeful discrimination to whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge (a challenge to a proposed juror, usually made without the need to provide a reason).”** In light of more recent history, the court recognized that ignoring the influence of race and ethnicity in police encounters could no longer be justified.

Finally, the court noted that it would be nonsensical to hold that a person’s race and ethnicity are irrelevant to the question of how the person was brought into the criminal justice system. Adding that recognizing the relevance of race and ethnicity is not an outlier position and it does not undermine the objective nature of the seizure inquiry.

**The court made it clear that the seizure analysis is not based on the subjective viewpoint of the seized individual.** The seizure analysis in Washington is “a purely *objective* one, looking

to the actions of the law enforcement officer.” And an objective observer in Washington “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in” many injustices against BIPOC, particularly in the criminal justice system.

## Determination

The court held that, as a matter of independent state law, race and ethnicity are relevant to the question of whether a person was seized by law enforcement.

In applying this new standard to the Sum case, the court concluded that race was relevant to the court’s determination of when Sum was seized by Deputy Rickerson. To account for all the circumstances of a law enforcement encounter, including the allegedly seized person’s race and ethnicity, the court took guidance from General Rule 37 which addresses peremptory challenges in jury selection in Washington trials.

General Rule (GR) 37 was adopted to bring increased clarity, consistency, and justice to jury selection. The court recognized that many of these same concerns arise in the context of warrantless seizures. The court adopted GR 37 in an effort “to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” GR 37 replaces the *Batson* test. The *Batson* test required a defendant show that a peremptory challenge was motivated by “purposeful discrimination.” Under GR 37, the “court need not find purposeful discrimination,” and instead, must deny the peremptory challenge if “an objective observer could view race or ethnicity as a factor.”

**Thus, GR 37 shifted the focus away from purposeful discrimination and the credibility and integrity of the attorneys, easing the accusatory strain of sustaining a *Batson* challenge. This “simplifies the task of reducing racial bias in our criminal justice system, both conscious and unconscious.”**

The court noted that similar concerns as those in jury selection are present in the context of warrantless searches. While it is “well known that BIPOC are wrongfully subject to excessive police scrutiny,” it may be that purposeful, explicit discrimination is absent or impossible to prove in individual cases because “identifying the influence of racial bias generally, and implicit racial bias specifically, presents unique challenges.” Additionally, **the rejection of the**

need to show purposeful discrimination better aligns with the objective seizure inquiry required by precedent, which holds that *“the subjective intent of police is irrelevant to the question of whether a seizure occurred unless it is conveyed to the defendant.”*

Another difference between the old *Batson* challenge and GR 37 is that *Batson* would permit a party to exercise a peremptory challenge on an apparently discriminatory basis, so long as they could “articulate a neutral explanation” to justify their actions. The list of potential “neutral explanations” is limitless and often hard to scrutinize. GR 37 addresses this concern by specifying that “allegations that the prospective juror was sleeping, inattentive, or staring, or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers,” cannot be a valid basis for a peremptory challenge without the corroboration of a judge or opposing counsel verifying the behavior because such allegations “have historically been associated with improper discrimination in jury selection in Washington State.” GR 37 provides a list of presumptively invalid reasons for a peremptory challenge, like prior contacts with or the distrust of law enforcement, “which have been associated with improper discrimination in jury selection in Washington State.”

The need for the presumptively invalid reasons list for exercising peremptory challenges reflects the fact that facially neutral standards can have a disproportionate impact on jury selection. The court believed the same to be true in the seizure context. The court noted that “BIPOC are subject to excessive police contacts, investigative seizures, and uses of force by law enforcement.” And “the BIPOC community as a whole is generally well aware of such patterns of excessive police scrutiny.” As a result, generations of children have grown up receiving “the talk” about “how to interact with law enforcement so no officer will have any reason to misperceive them as a threat and take harmful or fatal action against them.”

From this perspective, an encounter with law enforcement would feel “more pointed and coercive.” The “fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was a seizure because feeling ‘free’ to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so.”

The court made one final point of distinction between *Batson* and GR 37. Under *Batson*, a successful challenge requires that the trial judge decide that facts establish, on their face,

purposeful discrimination and that the State failed to come forward with a neutral explanation for its action. But *Batson* does not specify from whose perspective “purposeful discrimination” and “neutral explanations” are to be evaluated. This has led to a lot of confusion and misapplication of the law.

GR 37 seeks to clear up this confusion by explicitly stating that (1) the analysis must be made from the perspective of “an objective observer,” (2) the necessary showing is made if the objective observer “could view race or ethnicity as a factor in the use of the peremptory challenge,” and (3) an objective observer “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.” GR 37 is written in terms of possibilities, not actualities, and “teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution.”

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**If the person shows that there was a seizure, the burden shifts to the State to prove that the seizure was supported by a warrant or “was justified by an exception to the warrant requirement.”**



## Seizure Context in WA State

The seizure context in Washington State presents similar issues. **Our seizure test is intended to be “a purely objective one” based on what a hypothetical “reasonable person” in the defendant’s position would have believed under the circumstances. However, the perspective of the “reasonable person” is measured from the perspective of the judicial decision-maker. Judicial officers are likely to know their rights and they may also be unusually likely to believe that their legal rights would be respected when asserted. The court noted that while the perspectives of judicial officers are reasonable, it is “unrealistic to equate the perspective of a judicial officer with the perspective of a ‘reasonable person’**



**in this context.**” The court believed that following the example of GR 37 and reframing the seizure inquiry to focus on what an objective observer could believe about a person’s encounter with law enforcement provides a valuable safeguard.

Therefore, the court clarified the analysis that courts must apply when determining whether a person has been seized by law enforcement.

**“The article I, section 7 seizure inquiry is an objective test in which the allegedly seized person has the burden of showing that a seizure occurred. A person has been seized as a matter of independent state law if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement’s display of authority or use of physical force. For purposes of this analysis, *an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington.*”**

Additionally, **“in determining whether there has been a seizure in light of all the circumstances of the encounter, courts may take guidance from some of the circumstances specified in GR 37, in addition to case law and the contentions of the parties.”** *For example, the number and types of questions asked, or requests made of the allegedly seized person, and the extent to which similar law enforcement encounters are “disproportionately associated with race or ethnicity” may be relevant considerations.*

If the person shows that there was a seizure, the burden shifts to the State to prove that the seizure was supported by a warrant or “was justified by an exception to the warrant requirement.”

**The Court emphasized that its decision did not modify or clarify the warrant requirement or any of its exceptions. It only clarified the seizure analysis under Washington State’s Constitution.**

In applying this new standard to Sum’s case, the court held that Deputy Rickerson seized Sum before Sum identified himself with a false name and birth date. The court considered all of

the circumstances to determine whether an objective observer could conclude that Sum was not free to refuse Deputy Rickerson's request for identification based on the deputy's display of authority. The court noted that Sum is a person of color and was parked on a public street in a "high crime area." At 9:15 a.m., Sum was awakened by a sheriff's deputy in full uniform knocking on the window. **Deputy Rickerson did not ask about Sum's health or safety, and he did not ask if Sum or his passenger required assistance. Rather, the deputy asked what Sum was doing there, implying he was not allowed to be there.**

Sum's answer that "they were visiting a friend across the street" was not enough to satisfy Deputy Rickerson's interest in Sum. The deputy then asked Sum who owned the Civic. Sum provided a name, but this also did not satisfy the deputy's interest because he then asked for identification. When Sum asked the deputy why he wanted to see his identification, the deputy responded that "two men were sitting in an area known for stolen vehicles and that Sum did not appear to know to whom the vehicle he was sitting in belonged."

The court noted that, without deciding whether Sum had already been seized by Deputy Rickerson, the deputy's explanation for requesting Sum's identification was certainly "the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure." The court stated that at that point, it would have been clear to any reasonable person that Deputy Rickerson wanted Sum's identification because he suspected Sum of car theft. The deputy stated as much, and the court has recognized that law enforcement's subjective intent is relevant if "it is conveyed to the defendant."

**The number and types of Deputy Rickerson's questions and requests further indicated his investigative purpose, despite the lack of reasonable suspicion.** The court noted that it was, "no secret" that "suspicionless stops" are "disproportionately associated" with people of color, and that this case was not like other cases in which it has held that a seizure does not occur "merely because a police officer engages a person in conversation in a public place and asks for identification." There were far more circumstances at play in this case.

**The court held that, based on the totality of the circumstances, an objective observer could easily conclude that if Sum had refused to identify himself and requested to be left alone, Deputy Rickerson would have failed to honor Sum's request because the deputy was investigating Sum for car theft. An objective observer could conclude that Sum was not**

**free to refuse Deputy Rickerson’s request due to the deputy’s display of authority. At that point, Sum was seized.**

The State conceded that this seizure was not supported by a warrant, reasonable suspicion, or any other authority of law. That meant that the false name and birth date that Sum gave Deputy Rickerson was the product of an unlawful seizure. The court held that Sum’s false statement must be suppressed because “our state exclusionary rule requires the suppression of evidence obtained in violation of article I, section 7.”

Consequently, this Court reversed the decision of the Court of Appeals and remanded for further proceedings consistent with the ruling.

## **Training Takeaway**

The court formally recognized what has always been true: in interactions with law enforcement, race and ethnicity matter. Courts must consider the race and ethnicity of the allegedly seized person as part of the totality of the circumstances when deciding whether there was seizure for purposes of article I, section 7.

The article I, section 7 seizure inquiry is an objective test.

- The allegedly seized person has the burden of showing that a seizure occurred.
- A person has been seized as a matter of independent state law if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement’s display of authority or use of physical force.
  - a. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington.
- Additionally, “in determining whether there has been a seizure in light of all the circumstances of the encounter, courts may take guidance from some of the circumstances specified in GR 37, in addition to case law and the contentions of the parties.”

a. For example, the number and types of questions asked, or requests made of the allegedly seized person, and the extent to which similar law enforcement encounters are “disproportionately associated with race or ethnicity” may be relevant considerations.

- If the person shows that there was a seizure, the burden shifts to the State to prove that the seizure was supported by a warrant or “was justified by an exception to the warrant requirement.”
  - a. The court’s decision did not modify or clarify the warrant requirement or any of its exceptions.

**The Washington Supreme Court has instructed lower courts to look at any and all circumstances surrounding an encounter with police. This includes but is not limited to the types of questions asked by an officer, the officer’s reasons for making contact with the person, any displays of authority that might indicate the person was not free to leave, and any other factor that might lead a reasonable observer to conclude that the person was not free to leave, refuse a request, or terminate an encounter.**

**It is likely that an officer’s use of any language that indicates their interest in a crime will also be a factor in determining whether a seizure has occurred.** For example, if an officer makes contact with a person and mentions that houses in the area had recently been burgled, Sum suggests that this type of question may transform a simple encounter into a seizure.

The court also made a point to note that the deputy stated he initiated a “health and safety” check but failed to ask Sum or his passenger if they needed assistance or any other questions about their health and safety. If an officer intends to make contact with a person to check on their health and safety, it is probably a good idea to begin the encounter by asking if the person is okay and if they require the assistance of the officer.

## **Additional Takeaways**

**The Deputy said that his intention was to conduct a “social contact” but his questions did not reflect that intention.** Instead, the court reasoned that it would appear to an outside observer that the Deputy was conducting an investigation into stolen vehicles.

The Court implies that facially neutral explanations for actions that could be interpreted as

biased will no longer be accepted by the court without more substantiation. For example, in Sum, Deputy Rickerson said he was going to make a “social contact” which is a legitimate and facially neutral reason for a law enforcement officer to make contact with a person. However, he then asked questions about the Honda’s ownership and told Sum he was concerned about car thefts. Therefore, the court was unwilling to accept that the premise for the Deputy’s contact with Sum was social or a welfare check.

None of the facts cited by the court indicated that race was a factor in Sum’s stop. Instead, **the court focused on how an objective observer could view the stop. And, an objective observer would be aware, by default, that “implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington.”**

### For Consideration

- Does it matter that Sum’s charging documents, judgment, and sentence all refer to his race? Is that information useful?
- Do you think this case would have come out differently if the deputy had initiated his contact with Sum by asking if either he or his passenger were okay or needed assistance?

### Additional Info

<p>A large-scale analysis of racial disparities in nearly 100 million police stops across the United States revealed that black drivers were, on average, 20% more likely to be stopped by police and nearly twice as likely to be searched. If you’d like to read the study, including an interesting analysis on the reduction in the disparity after dark, <a href="#">please see Disparity in Police Contacts.</a></p>	<p><a href="#">WEB SITE</a></p>
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### Court Document

<p>State v. Sum No. 99730-6 Washington State Supreme Court June 9, 2022</p>	<p><a href="#">WEB SITE</a></p>
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