COVERING CASES PUBLISHED IN APRIL 2024

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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 cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to key Washington State prosecutor and law enforcement case law reviews and references.

The materials contained in the LED Online Training are for training purposes. All officers should continue to consult with their department legal advisor for guidance and policy as it relates to their particular agency.

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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.

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] | [2022-2023] [2024]

Case Menu

The cases this month include two from Washington State courts and seven from the 9th Circuit federal court. The issues in the two state cases are from DUI and burglary cases. The issues in the seven federal cases include evidence issues, search and seizure issues, and use of force issues. These issues in particular are unlikely to be controlling in cases investigated by Washington law enforcement and prosecuted in Washington state courts. They are presented for general information and educational purposes only.

CASES

1. *State v. Keller*, Washington Supreme Court, April 4, 2024, Case No. 101171-7
2. *State v. Azevedo*, Washington Court of Appeals, Division II, No. 57910-3 (April 30, 2024)
3. *United States v. Blackshire*, 9th Circuit, No. 21-10230 (April 19, 2024)
4. *United States v. Sapalasan*, 9th Circuit, 21-30251 (April 1, 2024)
5. *Perez v. City of Fresno*, 9th Circuit, 22-15546 (April 15, 2024)
6. *Hart v. City of Redwood City*, 9th Circuit, 22-17008 (April 19, 2024)
7. *United States v. Ramirez*, 9th Circuit, 22-50045(April 18, 2024)
8. *United States v. Payne*, 9th Circuit, 22-50262 (April 17, 2024)
9. *Meinecke v. City of Seattle*, 9th Circuit, 23-35481 (April 18, 2024)

QUESTIONS?

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- Visit the ACADIS portal page for status, news and **resources** for organizations, officers and
- training managers news, updates, and links.
- Send Technical Questions to lms@cjtc.wa.gov or use our Support Portal.

Factual Background

This case involved a challenge in Keller's DUI case to the **admissibility of a Drager breath test ticket**. The case originated in Kitsap County and was originally heard by the Kitsap County District Court. That court applied its ruling to all DUI cases in Kitsap County.

Keller was arrested for DUI after an accident investigation. He consented to field sobriety tests (FST) and was found to show signs of intoxication during the Horizontal gaze nystagmus test (HGN) and slight signs of intoxication during several other tests. He also consented to a preliminary breath test (PBT), which showed .132 blood-alcohol content (BAC). He was arrested after the PBT and transported. He submitted to a Drager breath test, which reported .117 and .116 on both the first and second samples.

In court, Keller's attorneys challenged admissibility of the Drager result. **The challenge was based on the failure of the Drager machine to perform a statistical calculation required by the relevant statutory and WAC provisions that were in effect at the time**. *(Those requirements have since been amended to reflect the actual capabilities of the Drager instrument.)*

In response to the challenge, Kitsap County prosecutors offered evidence that the actual statistical calculation, when performed by an expert, in fact met the WAC requirement.

The primary issue then decided by the district court and reviewed by the Supreme Court was whether breath tickets in Keller's case and similar cases could be admitted into evidence even though the Drager machine itself did not perform the required statistical calculation.

Analysis of the Court

In its opinion the court reviewed the history of Washington's DUI breath test program. That history included passage of RCW 46.61.506 (4) and former WAC 448-16-060. **The primary issue of interest to law enforcement was whether the statistical calculation required by the RCW and the WAC must have been performed by the machine, or whether the prosecution could prove the breath test was valid by other means.**

The court's answer was that the statute and WAC do not require the Drager machine to perform the calculation.

The court stated:

> The district court ruled that the breath test results were invalid under RCW 46.61.506(3) and inadmissible under RCW 46.61.506(4)(a)(vi) because the Drager machine did not comply with the state-toxicologist-approved methods for analysis of breath alcohol. The district court based this ruling on its conclusion that the applicable statutes and regulations require the Drager machine itself to compute, at the time of the test, whether the breath test results fall within plus or minus 10 percent of their mean following the formula in former WAC 448-16-060—and the Drager machine was simply not programmed to do that. All of the district court's evidentiary rulings rely on this premise.
>
> But, as the State contends, the applicable statutes and regulations do not require the Drager machine to perform that calculation itself at the time of the test.
>
> In fact, the district court here did not really find that supposed requirement in any statute or regulation. Instead, the district court found that supposed requirement in certain other documents. We disagree with the district court's conclusion that those other documents require the Drager machine itself to compute the math at issue here at the time it takes the breath samples.

After resolving the primary issue, the court went on to hold that the breath test result was admissible under the statute, the WAC, and in-court evidentiary rules.

It is worth noting that this was a seven to two decision. Two justices, Whitener and Johnson, joined in a lengthy dissent. In the view of the two dissenting justices, the statute and WAC were ambiguous concerning whether the Drager machine must have performed the correct calculation. They further were of the opinion that lack of capacity to do so calls into question the accuracy of the results from a printed breath ticket.

The following reasoning offered by the dissent is important to be aware of when future challenges to the breath test are heard by trial and appellate courts.

> When the Alcotest 9510 and those tasked with maintaining and operating it do not follow proper standards and procedures, the Alcotest 9510 can produce unreliable and inaccurate results, which in turn produce wrongful convictions. This case was brought before this court prematurely, and the state toxicologist failed in following their prescribed standards and procedures for the Alcotest 9510. These standards and procedures are central to the reliability and accuracy of the results. I respectfully dissent. Slip Opinion, Dissent, p. 1-2

Training Takeaway

Any officer regularly called to testify about DUI arrests is no doubt aware of the complexity of admitting the DUI breath ticket into evidence. The statistical calculation requires access to data within the Drager machine's programming, which can be accessed by Drager technicians or other experts.

The Keller opinion included a reference to evidence presented at the suppression hearing that indicated the machine would not produce a result if the statistical calculation would show an invalid test. Be that as it may, **the breath ticket is rarely the only evidence of intoxication**. An officer's observations and reporting of the results of FSTs can be enough by themselves to prove intoxication.

It is crucial that DUI arresting officers accurately and descriptively articulate and document the behavior and physical impact of intoxication in an arrest report no matter what challenge may be brought later to the admissibility of the breath ticket.

EXTERNAL LINK: View the Court Document

Factual Background

This case arose from a burglary investigation. The defendant and an accomplice burglarized a shop and were arrested a short time later by the responding patrol officer. **The issue of interest to law enforcement concerned the specific intent element of burglary.**

Analysis of the Court

This specific intent issue was reviewed in the context of an alleged prosecutorial error issue from the trial prosecutor's closing argument. In short, the prosecutor's argument could have been interpreted as stating that there was sufficient evidence of "intent to commit a crime against persons or property" in a building, if there was information that would lead a reasonable person to have knowledge that a crime was intended. This argument would have been erroneous.

The court discussed that **the specific intent element requires that there be proof that the defendant actually had the specific intent**. And more specifically **there must be sufficient evidence that the defendant had actual intent regardless of what information was available to the defendant.**

The court's analysis relied on a prior Washington Supreme Court case, *State v. Allen*, 182 Wn.2d 364 (2015). In that case, the conviction of Maurice Clemmons' getaway driver accomplice was overturned on the basis of an improper prosecution argument similar to the argument in *Azevedo*. That argument suggested that the evidence was sufficient if the defendant's knowledge would have caused a reasonable person to know that he had acted as an accomplice.

In burglary cases, there must be **proof that the defendant in fact had intent to commit a crime**. The reasonable person standard, which appears in the definition of knowledge, is not applicable:

> The prosecutor's statements in closing describing a reasonable person standard were improper because they were a misstatement of the law. To find Azevedo guilty of burglary as a principal, the State was required to prove beyond a reasonable doubt that Azevedo had the "intent to commit a crime against persons or property . . . in a building." RCW 9A.52.030. Intent may be inferred by "any person who enters or remains unlawfully in a building." RCW 9A.52.040. The jury was so instructed in jury instruction 11. But the prosecutor imputed into this principle the reasonable person standard from instruction 13, when he argued that "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact

exists, you can infer that they had actual knowledge of what was going on." RP (Aug. 24, 2022) at 265. Because burglary requires "intent to commit a crime against a person or property therein," an element subject to a permissible inference by mere presence in a building as set forth in instruction 11, the prosecutor's comment on the reasonable person standard was a misstatement of the law. RCW 9A.52.040. Slip Opinion, p. 7

Training Takeaway

The specific intent element of burglary requires proof that the defendant in fact had intent to commit a crime against persons or property in a burglarized building. Documenting the obvious facts that would cause a reasonable person to know that a crime was intended or being committed is only part of conducting a solid investigation.

The officer in *Azevedo* was wearing a body camera which captured the two burglary suspects admitting that they did not own the shop and did not have permission to be in it. A further admission that they were in fact stealing from the store would have provided important evidence of their actual intent to commit a crime inside the store.

EXTERNAL LINK: View the Court Document

Disclaimer Concerning Federal Cases

Federal cases should be reviewed by Washington law enforcement with caution. There are many issues of interest to Washington law enforcement, to include criminal procedure, search and seizure, application of evidence rules, and uses of force, and other constitutional issues, that are decided differently by Washington courts compared to their federal counterparts.

All law enforcement personnel, parties, and agencies must review the actual published case opinions in these cases and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on whether the application of federal cases should be applied to specific issues in specific cases or investigations.

Factual Background

This case arose from a federal domestic violence (DV) case in Indian Country in Arizona. As is common in DV cases no matter where they occur, the alleged victim became unavailable for trial. The prosecution therefore offered her statements to investigators along with evidence that the defendant procured her absence by directly and indirectly having messages delivered to the victim.

The court described the evidence as follows:

> Despite multiple attempts, the government was unable to locate C.S. to call her as a witness at trial. In her absence, the government offered her recorded interviews with tribal police providing details of the assault and identifying Blackshire as the perpetrator, arguing that these out-of-court statements were admissible under the forfeiture by wrongdoing exception.
>
> In support of its proffer, the government submitted three recordings of conversations Blackshire had while in jail.
>
> In the first, Blackshire told his new girlfriend in a phone call that he would "be just fine" at trial because "*[t]here are no victims. They can't find s---.*" He said no one would find any "victims" because "I *already f------ made peace with everybody and s---, everything's f------ cool, and we already discussed the whole f------ not showing up to court thing.*" In a phone call recorded a

few days later, Blackshire asked a woman to tell C.S. that "*if the Feds get a hold of her, just play dumb, whatever. Not show up, whatever.*" In the third recording, he told his new girlfriend during an in-person visit that "*people are gonna be lookin' for her. So you need to tell [C.S.'s ex-boyfriend] there he don't know nothing about nothin*." Blackshire asked his girlfriend to "f*ind her and tell her – make sure . . . make sure she does not f-----' . . . no matter what the f--- they tell her they can't f-----' – they can't force her to go*."

The district court found that these recordings established "by a preponderance of the evidence that Mr. Blackshire acted intentionally to cause [C.S.'s] unavailability," and admitted the recorded interviews of C.S. by law enforcement under the "forfeiture by wrongdoing" exception to the hearsay rule and Confrontation Clause. Slip Opinion, pp. 5-6.

The issue was brought before the 9th Circuit after the trial court ruled that the statement and communications could be admitted under the forfeiture by wrongdoing doctrine. **That doctrine is an exception to the constitutional Confrontation Clause of the Sixth Amendment, and the hearsay evidence rule.**

Analysis of the Court

The 9th Circuit panel articulated what must be proved before the forfeiture by wrongdoing exception can be applied. The doctrine states that " 'forfeiture by wrongdoing' rule 'permit[s] the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant.'"

In jail calls the defendant was recorded asking several people to tell the victim not to appear in court. The entirety of the calls were sufficient to show that her absence was the result of the defendant's acts and the 9th Circuit panel held that they were admissible.

The court's discussion of the issue included the following detail concerning the defendant's wrongful conduct:

Blackshire argues that there is a third element to forfeiture by wrongdoing in addition to intent and causation—the actual wrongdoing—and simply "causing a person not to testify at trial cannot be considered the 'wrongdoing' itself." . . . That is true. Wrongful action is a separate requirement from causation and intent in the Rule, as well as in the traditional hearsay exception. But the government need not show that Blackshire engaged in criminal wrongdoing that caused C.S.'s unavailability. . . . Instead, the doctrine acknowledges the principle that, "[w]hile defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." Slip Opinion, pp 8-9 (citations omitted)

Training Takeaway

Forfeiture by wrongdoing is a doctrine that has been recognized by Washington courts.

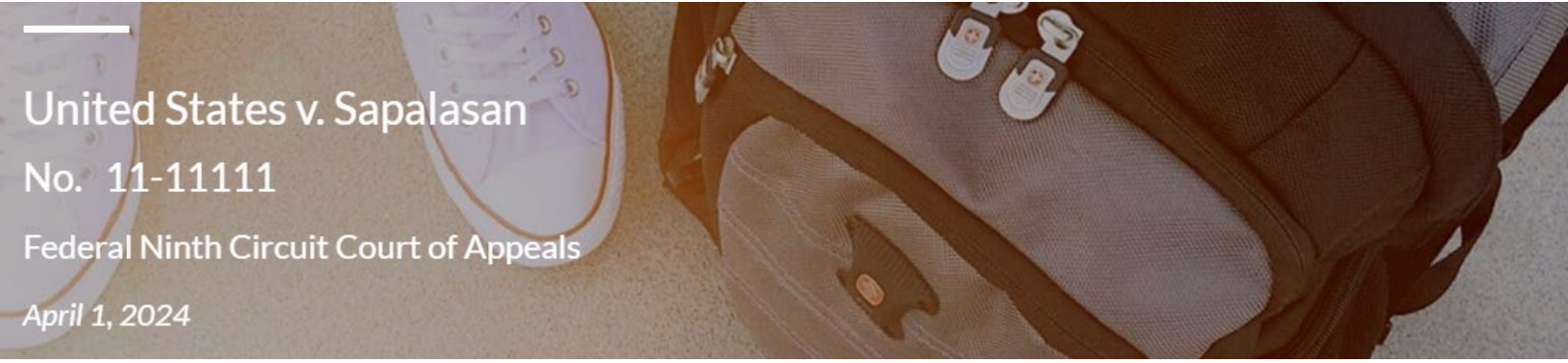
> See *State v. Dobbs*, 180 Wn.2d 1, (2014). To access the *Dobbs* case, or any other Washington judicial opinion, type in the citation in the search box. For *Dobbs*, an officer would type in "180 Wn.2d 1"

In Dobbs, our Supreme Court stated the reasons for the rule as follows:

> In this case, Timothy John Dobbs engaged in a campaign of threats, harassment, and intimidation against his ex-girlfriend, C.R., that included a drive-by shooting at her home and warnings that she would "'get it'" for calling the police and she would "regret it" if she pressed charges against him. . . As C.R. reported the increasingly violent activities of Dobbs against her, she explained to the police that she was terrified that she was going to wind up dead.
>
> After Dobbs was arrested, he made yet another intimidating phone call to C.R., threatening that if she went forward and pressed charges against him, she would regret it. When C.R. failed to show up to testify at trial, the trial judge found that there was clear, cogent, and convincing evidence that Dobbs was the cause of her absence and thus had forfeited his confrontation right. We agree.
>
> While Dobbs has the right to confront witnesses against him, he forfeited his right to confront C.R. when he chose to threaten her with violence for cooperating with the legal system. "To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause." *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976)

DV investigators and others who regularly investigate DV offenses may find valuable evidence that can support a DV prosecution even if the victim disappears and is not available for trial. Jail calls in particular are a fertile source of wrongdoing by DV perpetrators.

EXTERNAL LINK: View the Court Document



Factual Background

This case concerned the lawfulness of a booking inventory search of a backpack. The defendant had been arrested with the backpack during a murder investigation. He was transported to the police station and questioned about the murder. He was released after questioning but his backpack remained in police custody. One of the arresting officers inventoried the backpack sometime later at the end of his shift. Methamphetamine was found in the backpack which led to a prosecution for possession with intent to distribute.

The defendant moved to suppress the methamphetamine on the basis of a claimed unlawful inventory search. The motion was denied by the trial court. After conviction the defendant appealed to the 9th Circuit.

Analysis of the Court

Under federal law inventory searches are lawful because "it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect." Slip Opinion, p. 7, citing *Illinois v. Lafayette*, 462 U.S. 640(1983)

The issue resolved by the 9th Circuit in *Sapalasan* was whether the delay of the search, until after the defendant was not booked but released and with a significant delay, rendered it unlawful. The short answer is no, and a key reason why is that the search was conducted substantially in compliance with the department's inventory search policy.

It is worth noting that inventory searches of a suspect's personal belongings have been recognized by Washington courts [3]. An example is *State v. Dugas*, 109 Wn. App. 592 (2001) (holding that while police could inventory arrestee's jacket, they could not search the closed container within the jacket when there was no indication of dangerous contents or illegal drugs).

[3] Search and seizure jurisprudence is an area that frequently differs between Washington state courts and the federal courts. Caution and specific advice from an officer's legal advisor is warranted before relying on federal cases for state search and seizure issues.

Training Takeaway

Arrests of individuals and subsequent searches of their belongings frequently lead to unexpected evidence of criminal activity. Officers involved in the arrest and booking of criminal suspects should **be familiar with policies concerning inventory searches and should be prepared to articulate and document the reasons for such searches** in accordance with the applicable policies.

EXTERNAL LINK: View the Court Document

Perez v. City of Fresno

No. 22-15546

Federal Ninth Circuit Court of Appeals

April 15, 2024

Factual Background

This case arose from a civil lawsuit by the family of an individual who asphyxiated and died during a detention for transport for mental health treatment. The officers applied pressure to the decedent while he was prone both before and after an ambulance paramedic arrived at the scene. The paramedic requested that the officers apply additional pressure via a backboard, which the trial court found was a significant increase in the level of force.

The case was resolved by the trial court at summary judgment in favor of the officers and their department on the basis of qualified immunity.

Analysis of the Court

The case came before the 9th Circuit on appeal from the federal civil lawsuit. It was not before the court from a criminal case. The 9th Circuit panel affirmed the trial court and held that the officers and their department were entitled to qualified civil immunity.

> The court stated that the "qualified immunity doctrine shields police officers from § 1983 liability unless (1) the officers 'violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time' of the violation." Slip Opinion, p. 10

The court then held that the unlawfulness of the officer's conduct was not clearly established by federal precedent at the time because it was factually distinguished from previous federal civil cases.

The *Perez* case was not a criminal case. The officers in *Perez* conceded for purposes of civil liability that their use of force constituted a constitutional violation. Their defense to civil liability relied solely on a clearly established precedent element that applies in civil cases.

Criminal and civil jurisprudence in use of force cases in Washington has recently undergone significant changes. It continues to evolve and change even after the passage of I-940 as a result of subsequent legislative and judicial policy decisions that have been adopted during Washington's police reform movement.

The current use of force statute includes a provision which states:

> (1) Homicide or the use of deadly force is justifiable in the following cases:
>
> * * * *
>
> (b) When necessarily used by a peace officer meeting the good faith standard of this section to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. . . .[RCW 9A.16.040]

Considering the seriousness of the consequences, it is crucial for officers, supervisors, and other law enforcement personnel to consult their legal advisors concerning the application of federal precedent such as the decision in this case, which involve qualified immunity in a civil litigation context but not criminal responsibility.

Caution should attend any reliance on this case and other federal cases in use of force incidents.

Training Takeaway

The actions of the officers in *Perez* were conceded to have been a constitutional violation. While the qualified immunity doctrine was applied for the officers' benefit in this particular California federal lawsuit, ***Perez* does not stand for the proposition that the officers' actions were lawful.**

Plus, **in Washington lawfulness of a use of deadly force would be reviewed criminally under self-defense statutes** that have been amended after the passage of I-940 and as a result of subsequent legislative and judicial policy decisions that have been adopted during Washington's police reform movement. See RCW 9A.16.040.

EXTERNAL LINK: View the Court Document

Factual Background

This case arose from a civil lawsuit by the family of a suicidal individual who was attempting suicide by knife in his backyard. The officers made contact first with the man's wife, and then at her urging went to the backyard. They gave commands but the suicidal husband came at them with the knife. One officer deployed a taser and the other a firearm. The husband suffered fatal gunshot wounds and later died at the hospital.

The court's description of the facts included an acknowledgement that there were discrepancies in the evidence:

> While there are some discrepancies regarding the details of the incident, the material facts are not in dispute. When Officers Gomez and Velez arrived at Hart's residence, Plaintiff was covered in blood and frantic. At her urging, the officers went along the side of the house to the backyard, where they found Hart holding a knife. Gomez told Hart to *"drop the knife."* Instead of complying, Hart began moving towards the officers while still holding the knife.
>
> As corroborated by the officers' testimony, Plaintiffs' expert, and the 911 call recording, Hart crossed the backyard to within a few feet of the officers in less than 5.9 seconds. Viewing Hart—who advanced on them with a knife—as an imminent threat, Velez fired her taser, but this was ineffective because only one probe made contact with Hart. Gomez fired five shots, striking Hart three times in the upper torso. Hart fell to the ground near the officers, was provided emergency medical assistance, but was pronounced deceased upon arrival at an emergency room. Slip Opinion, pp.7-8 (footnote omitted)

Analysis of the Court

The court determined that for federal civil liability purposes the actions of the officer who fired the gun were objectively reasonable. **The test applied included three elements:**

> The Supreme Court has provided three factors for determining the strength of the government's interest: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." Slip Opinion, p. 12, (citation omitted)

Most of the court's analysis addressed the **threat of safety** issue. The discussion included a number of disputed facts, including a concession by the plaintiffs' expert that the suicidal individual was "a non-responsive individual approaching while holding out a knife [and] is *unarguably* an immediate threat." Slip Opinion, p.18 (emphasis in the original)

As in the discussion of the *Perez* case, and for the same reasons, great caution should be exercised before relying on this decision in a Washington use of force case.

Training Takeaway

The *Hart* case was not a criminal case. Criminal and civil jurisprudence in use of force cases in Washington has undergone significant changes. Lawfulness of a use of deadly force as a criminal issue would be reviewed under the self-defense statutes as they have been amended after the passage of I-940 and as a result of subsequent legislative and judicial policy decisions that have been adopted during Washington's police reform movement.

It is crucial for officers, supervisors, and other law enforcement personnel to consult their legal advisors concerning the application of federal precedent such as the decision in this case.

EXTERNAL LINK: View the Court Document

Factual Background

This case arose from a federal firearm prosecution. The investigation was conducted by municipal officers in California. Two officers stopped the defendant in a residential neighborhood. One of the officers recognized the defendant as a gang member. The officer who contacted the defendant asked him whether he was on parole.

At a suppression hearing the defendant claimed the question about parole status violated the Fourth Amendment. The trial court ruled that the question did not, and the defendant was subsequently convicted of federal firearm and ammunition charges.

Analysis of the Court

The 9th Circuit panel affirmed the trial court's ruling. The court noted that police may extend the scope of a traffic stop in order to attend to officer safety concerns. "[A]n officer may extend a traffic stop to conduct 'a criminal history check' because it 'is a negligibly burdensome precaution required for officer safety'" Slip Opinion, p.7, quoting *United States v. Hylton*, 30 F.4th 842(9th Cir. 2022)

The court held that the question about parole status is reasonably related to officer safety and likewise constituted a negligible burden.

Training Takeaway

This case like other federal cases should be viewed with caution. Washington Courts have charted a distinct path in search and seizure by applying the Washington Constitution. In this case, testimony from one of the officers indicated that he knew the defendant was a gang member and was driving through a rival gang's territory and would be unlikely to do so unarmed. **In a Washington suppression hearing such facts could easily trigger a claim that the stop was a pretext and therefore unlawful.**

The *Ladson* case included this statement, which if applied in *Ramirez*, might well have led to a different result:

> We have observed that ultimately our state constitutional provision is designed to guard against "unreasonable search and seizure, made without probable cause." *State v. Fields*, 85 Wn.2d 126, 130, 530 P.2d 284 (1975).
>
> However, the problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason. *State v. Ladson*, 138 Wn.2d 343(1999)

Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access website. To access the Ladson case, or any other Washington judicial opinion, type in the citation in the search box. For *Ladson*, an officer would type in "138 Wn. 2d 343".

EXTERNAL LINK: View the Court Document

United States v. Payne

No. 22-50262

Federal Ninth Circuit Court of Appeals

April 17, 2024

Factual Background

This case arose from a federal drug prosecution. The investigation was conducted by violent crime task force officers who were working on patrol. They stopped the defendant for unlawfully tinted windows. They asked about his parole status and in response the defendant admitted he was on parole.

A California parole statute and parole conditions (which are quite different compared to Washington conditions) permitted the officers to seize and search cell phones of parolees. The defendant at first admitted that he had a cell phone but later changed his mind and denied that the phone recovered by the officers was his. He refused to open it, which was also a requirement of his parole conditions. In response, one of the officers grabbed his hand and used his finger to open the biometric function on the phone. Evidence of drug dealing was found on the phone.

Analysis of the Court

The general suspicion-less search of the cell phone was held not to violate the Fourth Amendment. Under California law the parole conditions authorizing the search were sufficient to support the warrantless search of the cell phone.

The parole search condition provided that police could "subject all 'property under [Payne's] control' to 'search or seizure . . . at any time of the day or night, with or without a search warrant, with or without cause.'" Slip Opinion, p.16

Such conditions were sufficient to justify warrantless searches under federal and California law.

Training Takeaway

This case would have resulted in a different outcome under Washington law. **Warrantless searches of cell phones are generally not permitted**. For example, in *State v. Hinton*, a case involving warrantless search of a cell phone for text messages, our Supreme Court resolved the search issue against lawfulness of the search despite federal cases to the contrary:

The state constitution "'clearly recognizes an individuals' right to privacy with no express limitations.'" . . . Protecting the privacy of personal communications is essential for freedom of association and expression. . . This court noted in *Rhinehart v. Seattle Times Co*. that the right to privacy has been described as "'the most comprehensive of rights,'" protecting citizens "'in their beliefs, their thoughts, their emotions and their sensations.'" . . . The use of text messaging for raw and immediate communications about private subjects is widespread and growing. To forgo sending text messages or to limit the use of text messaging to completely inconsequential matters is not only "unpalatable, [but] untenable, and disadvantageous relative to participating within our technologically dependent culture."

We reverse the Court of Appeals and vacate the conviction without prejudice. *Hinton's* private affairs were disturbed by the warrantless search of Lee's cell phone. Article I, section 7 protects Washington citizens from governmental intrusion into affairs that they should be entitled to hold safe from governmental trespass, regardless of technological advancements. *State v. Hinton*, 179 Wn.2d 862 (2014) (citations omitted)

Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access website. To access the Hinton case, or any other Washington judicial opinion, type in the citation in the search box. For *Hinton*, an officer would type in "179 Wn. 2d 862".

EXTERNAL LINK: View the Court Document

Factual Background

This case arose from a federal civil rights law suit and injunction against Seattle Police. In two separate incidents the plaintiff sought to deliver a gospel message at protest rallies where the rally participants were hostile to his message.

The court's introduction described the salient facts as follows:

> Appellant Matthew Meinecke's speech was not well received by his audience. On two separate occasions in June 2022—an abortion rally and an LGBTQ pride event—Meinecke sought to read Bible passages to attendees gathered in the city of Seattle. When those attendees began to abuse and physically assault Meinecke, Seattle police officers asked Meinecke to move and ultimately arrested him when he refused, rather than deal with the wrongdoers directly.
>
> Meinecke sued the City of Seattle and certain Seattle Police Department officers (together, "the City"), seeking, inter alia, preliminary injunctive relief. The district court denied the motion, surmising that the officers' actions were content neutral. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citation omitted).
>
> Consequently, "[i]f speech provokes wrongful acts on the part of hecklers, the government must deal with those suppressing the speech." S*anta Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015).
>
> We reverse. Slip Opinion, p.1

The protest rallies were focused on abortion rights and gay rights. Rally participants, "some clad in all black and wearing body armor" and described as "Antifa," assaulted and physically removed the plaintiff from the area of their protest. This in turn led the police to direct the plaintiff to move for his own safety, and to arrest him for obstructing when he refused to comply. The police response to the conflicting protests formed the basis for the civil rights lawsuit against the police.

Analysis of the Court

The 9th Circuit panel reviewed the trial court's decision denying the motion for a preliminary injunction against the police. In its analysis it applied **strict scrutiny rather than lesser reviews of the police actions**. The court characterized the police actions as "content-based heckler's vetoes".

"The prototypical heckler's veto case is one in which the government silences particular speech or a particular speaker 'due to an anticipated disorderly or violent reaction of the audience.'" Slip Opinion, p. 13-14

Such police responses are considered an impermissible response to force or violence in counter protest circumstances. Nor are such actions permissible time, place, and manner, restrictions because they are considered to be content-directed, or motivated.

Training Takeaway

Demonstrations and counter demonstrations are fraught with not only violence but also civil rights liability. Officers on the front lines should be meticulous in following their department's policies, and department policy makers should be conservative in approving any action whereby front-line officers could be deemed to favor one side over another.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – April 2024
Cases & References

State v. Keller, Washington Supreme Court, April 4, 2024, Case No. 101171-7

- RCW 46.61.506
- WAC 448-16-060

State v. Azevedo, Washington Court of Appeals, Division II, No. 57910-3 (April 30, 2024)

- 9A.52.030
- RCW 9A.52.040

United States v. Blackshire, 9th Circuit, No. 21-10230 (April 19, 2024)

- *State v. Dobbs*, 180 Wn.2d 1, (2014)
  To access the Dobbs case, or any other Washington judicial opinion, type in the citation in the search box. For *Dobbs*: "180 Wn.2d 1"

United States v. Sapalasan, 9th Circuit, 21-30251 (April 1, 2024)

Perez v. City of Fresno, 9th Circuit, 22-15546 (April 15, 2024)

- I-940
- RCW 9A.16.040

Hart v. City of Redwood City, 9th Circuit, 22-17008 (April 19, 2024)

United States v. Ramirez, 9th Circuit, 22-50045(April 18, 2024)

- *State v. Ladson*, 138 Wn.2d 343(1999)
  To access the Ladson case, or any other Washington judicial opinion, type in the citation in the search box. For *Ladson*: "138 Wn. 2d 343"

United States v. Payne, 9th Circuit, 22-50262 (April 17, 2024)

- *State v. Hinton*
  To access the Hinton case, or any other Washington judicial opinion, type in the citation in the search box. For *Hinton*: "179 Wn. 2d 862"

Meinecke v. City of Seattle, 9th Circuit, 23-35481 (April 18, 2024)

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] | [2022-2023] [2024]