COVERING CASES PUBLISHED IN AUGUST 2023

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

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

TOPIC INDEX

CASES

WASHINGTON LEGAL UPDATES

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

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022]

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- Author: Linda J. Hiemer, JD| Program Administration Manager Legal Education Consultant/Trainer

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

Washington v. Thompson

No. 84366-4-I

Washington Court of Appeals, Division I

October 3, 2023

TOPIC: Indecent Exposure

Factual Background

Thompson lived in a ground level apartment complex in Mount Vernon. His unit had a sliding glass door with a direct view of the outdoor yard and playground. Sometime between May and July 2019, three minors playing outside saw Thompson sitting in his doorway wearing shorts and a t-shirt "touching his privates" while looking at them. One female minor described "seeing it but not seeing" Thompson's penis which he was rubbing through his clothing while watching them play. The minor described a visible erection through Thompson's clothing. Mount Vernon Police Department investigated. Thompson had a prior conviction for Indecent Exposure. The State then charged Thompson with one count of felony indecent exposure.

Thompson filed a Motion to Dismiss on the grounds that RCW 9A.88.010, the Indecent Exposure statute, was unconstitutionally vague as applied to him. He argued that the statute failed to define sufficiently the proscribed conduct and "the meaning of exposure means that it's open and that it's visible," while Thompson was fully clothed. The trial court agreed and granted his Motion to Dismiss. The State timely appealed.

Analysis of the Court

The relevant statute for Indecent Exposure, RCW 9A.88.010(1) provides: A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. On appeal, the Court of Appeals, Division I (the "Court") analyzed the law in two parts: Vagueness and Principles of Statutory Interpretation.

Unconstitutional Vagueness

A statute is presumed to be constitutional, and a person challenging it must prove that the law is unconstitutional beyond a reasonable doubt. The standard for finding a statute "unconstitutionally vague" is high. Washington recognizes that a criminal statute must "give fair warning of the conduct that makes it a crime." Essentially, this standard protects people from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand is prohibited. A statute is sufficiently definite is based upon "common intelligence." Disagreement about the meaning does not make a statue vague. To evaluate a challenge to a statute for being

vague as applied, courts look at the actual conduct of the person challenging the statute, not to any hypothetical scenario.

Statutory Interpretation

In determining the meaning to apply to a statute, the Court seeks to determine and then carry out the legislative intent. Any undefined termed is given "its plain and ordinary meaning." "Plain meaning" is discerned from all the Legislature has said in the statute and related statutes.

On appeal, Thompson said that the dictionary defines "exposure" to include "open to view" or "not shielded or protected." Thompson argued that the plain and ordinary meaning of the Indecent Exposure statute required actual nudity. Because his genitalia remained covered by his shorts, he could not be nor could not have known he could be found guilty of that crime. Additionally, he claimed that to the extent the statute permitted prosecution for anything else but nudity, the statute was, therefore, unconstitutionally vague. The Court disagreed with Thompson's argument.

First, the Court observed that the terms "nudity," "clothed," or "unclothed" did not appear anywhere in the statute. Second, the Court disputed Thompson's choice to isolate the word "exposure." Instead, the Court determined that the phrase "obscene exposure" could not be broken down. The Court reasoned that "obscene exposure" is a "legal term of art; it is the 'exhibition' of something customarily kept private" to include "genitals which are exhibited for lascivious reasons." The Court defined lascivious as "filled with or showing sexual desire." Essentially, it decided that "obscene exposure" does not require nudity, but merely a wrongful exhibition.

The Court framed the issue as whether "our common shared sense of societal decency would judge a given lascivious exhibition of a sexual organ as indecent or improper." Nudity is not required; the "key is if the person is 'displaying' his genitalia in a certain way, i.e., sexually and contrary to our common sense of decency." In this instance, the Court noted that, although Thompson was clothed, he exhibited "a barely veiled erect penis . . . in a sexualized and unwelcome manner." That, it concluded, constitutes indecent exposure.

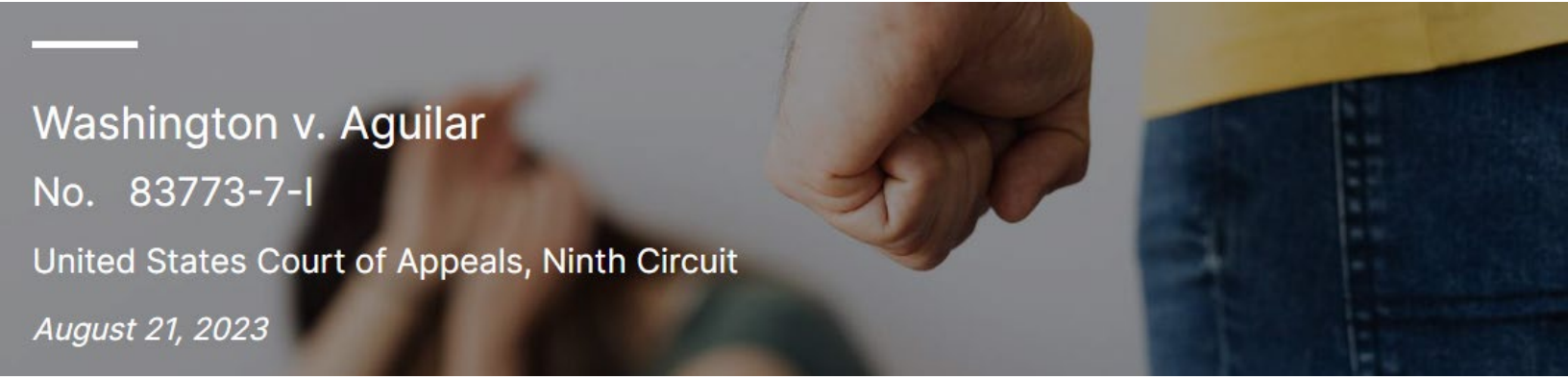
Training Takeaway

While the defendant tried to argue of the dangers and slippery slope of this decision such that athletes in tights or swimsuits would violate this law, the Court found this argument absurd. It distinguished art and sports from the sexualized behavior Thompson displayed (an erection that he stroked through his clothing while watching minor girls at play). This is a case that has the potential to be appealed to the Supreme Court.

While unclear from the Court's reasoning, its interpretation of this statute may have been motivated, in part, by the defendant's prior conviction and the fact that the three victims of his

display were all under 14 years old. The defendant was in his home and clothed, but his apparent sexual arousal and masturbatory-like motions performed in front of a glass patio door visible to a playground did satisfy the elements of the statute requiring "open and obscene exposure."

EXTERNAL LINK: View the Court Document



Washington v. Aguilar

No. 83773-7-I

United States Court of Appeals, Ninth Circuit

August 21, 2023

TOPIC: Rape 1st Degree

Factual Background

Aguilar and A.B. dated for 17 years. Their relationship was volatile, and Aguilar was sometimes violent. Aguilar became addicted to prescription painkillers, and eventually admitted to using heroin. A.B.'s efforts to find Aguilar effective addiction treatment were unsuccessful. A.B. told Aguilar that she wanted to split up.

In April 2018, she found an apartment for herself. Aguilar's drug use worsened. The two stayed in touch, texting from time to time. A.B. continued attempting to find resources for Aguilar. However, Aguilar's messages began to fixate on A.B.'s dating life. They took on an ever more threatening tone, indicating that he was observing her and implied that he was suicidal. Several times, he showed up unannounced at her apartment. At various points, she responded by emphasizing that she felt unsafe around him, telling him to stay away.

On September 11, 2018, the two exchanged a series of escalating messages. Then, that evening, A.B. returned to her home to find Aguilar had entered unlawfully. She did not know how he had gained access. A.B. testified that, Aguilar rushed at her with a baseball bat and shoved her against the wall. He maneuvered her onto her couch and began "a barrage of name calling and . . . swearing." He told her that he intended to kill himself in front of her. A.B. noticed that her apartment was "completely torn apart."

Aguilar took A.B.'s phone, demanded the password, and, seeing that she had dating apps downloaded, punched her in the side of the head. Then, with the baseball bat, he struck her several times on her side, hand, and legs. He yelled angrily throughout, often using sexually demeaning terms. Still verbally demeaning and threatening her, he alternated between raping her and, having grabbed one of her kitchen knives, stabbing the furniture and walls, including the couch cushions next to A.B. After, he searched for drugs, used drugs, and then brought her into the bedroom. There, he raped her again. In the process he choked her, "clawed" at her breasts, repeatedly slapped her, and punched her in the stomach

Aguilar had A.B. make him a sandwich as a "last meal." Compelling A.B. into her car by knifepoint, he drove her to a nearby convenience store and used her bank card to withdraw cash. A.B. recalled leaving the store at around 1:49 a.m. Aguilar then drove them to purchase heroin. He threatened her with death if she attempted to escape and continued to scream at her and strike her. Aguilar found a

place to park near Airport Way, where they would remain through the rest of the night as he used drugs, continued to verbally and physically assault A.B., and drift in and out of sleep.

He tried unsuccessfully to make A.B. use drugs. A.B. was able to escape the car. She made it to a nearby building, knocked on the door, and screamed for help. Aguilar caught up with A.B. and pepper sprayed her but then ran, apparently at the sight of two men inside. The police arrived shortly afterward.

> Aguilar was charged with first degree rape, first degree burglary, first degree robbery, second degree assault, and first-degree kidnapping. The State also charged deadly weapon enhancements, intimate partner enhancements, and sexual motivation enhancements.

At trial, Aguilar's defense consisted of a general denial. In the words of his counsel at closing argument: *"Folks, Al didn't do it. He did not commit burglary. He did not commit rape. He didn't rob [A.B.] He didn't kidnap her. There was not assault in the second degree."* Aguilar did not deny drug use, his presence in A.B.'s apartment, or that they had had sexual relations. Instead, he told a story that was minimally consistent with the physical evidence and presented the case as a credibility contest between him and A.B.

Aguilar testified that though their relationship had been rocky, he and A.B. had been reestablishing communication. He testified that he waited for A.B. outside her apartment, where he had met her when she returned home. In his telling, she invited him in, and their discussion transformed from a quarrel into consensual sex that began on the couch and migrated to the bedroom. He admitted their intercourse included his "hands on her neck," but asserted that she consented.

He explained the apartment's condition as having been caused when they quarreled again after having sex and destroyed each other's possessions out of anger. Once they had cooled down, he testified, she agreed to loan him cash to pay for drugs. However, he denied that he had assaulted her until late in the evening, after they had left her apartment, when he testified that she insulted him and he snapped, striking her with his fists and steel toed boots, which explained her physical injuries. He correspondingly asked the jury to find him guilty of assault in the fourth degree but acquit on the other charges.

The jury found Aguilar guilty of the crimes charged. It also found that the State had proven its deadly weapon enhancements for all crimes but robbery, and its intimate partner enhancements for all crimes. It did not return a verdict on whether he had committed the crimes with sexual motivation. Nor, because the verdict forms were general, did the jury indicate what violent act it considered assault. And though it was instructed that it could rely on any of a number of means to elevate each of the charged crimes, the verdict forms did not provide the jury with a means to specify the specific basis for elevating the charges.

Aguilar appealed.

Analysis of the Court

Aguilar raised four issues on appeal, two of which are most pertinent to law enforcement. These concern his right to a unanimous jury verdict. Aguilar contended that this right was violated (1) because some of the bases on which the jury was instructed it could elevate his rape conviction to the first degree were not supported by substantial evidence, and (2) because multiple acts of sexual intercourse occurred but it was unclear which act or acts the jury relied on to find him guilty of rape.

Most relevant is that the Court agreed with Aguilar that the State failed to prove one of the alternative means that might have elevated his rape charge: that A.B. was "situated" in the apartment at the time of Aguilar's felonious entry. Aguilar is also correct that the two acts that might have supported his rape charge—intercourse on the couch and an uncertain time later in the bedroom—were not one continuous course of conduct, and the Court said it could not conclude beyond a reasonable doubt that the jury would have found him guilty of both. Therefore, it vacated his rape offense and its related enhancements. Because the Court vacated his rape offense, it also vacated his kidnapping offense. One of the means by which the jury could elevate kidnapping to the first degree was that Aguilar committed it with intent to facilitate rape. Because the rape and kidnapping charges were factually intertwined, it was no longer appropriate to conclude that the jury determined Aguilar had such an intent. The Court's ruling is explained more fully below.

Jury Unanimity Concerning Alternative Means

Aguilar first argued that his right to a unanimous jury decision was violated because the jury was instructed on numerous means to elevate his rape offense to the first-degree, but sufficient evidence did not support each of those means. Specifically, the first-degree rape statute requires the victim to be "situated" in the building or vehicle feloniously entered, but A.B. was not in her apartment when Aguilar broke in. RCW 9A.44.040(1)(d). But though Aguilar certainly injured A.B., he did not do so during the robbery itself, which was his use of A.B.'s bank card to withdraw money from an ATM.

Our state constitution protects a criminal defendant's right to be convicted only by a unanimous jury. Usually, the right to a unanimous verdict is straightforward in that the jury must agree that the State proved each element of a crime beyond a reasonable doubt. A variety of offenses is known as "alternative means" crimes. Often, the State may attempt to elevate an offense to a higher degree by presenting evidence to the jury of one or more conditions present in addition to the essential elements of the crime. For example, Murder in the second degree can be elevated to the first degree if the perpetrator also committed certain other felonies, such as rape or robbery, in the course of the murder. RCW 9A.32.030(1)(c). If the State presents the jury with more than one of these factors as a means to elevate the offense's degree, it is an "alternative means" case.

The constitutional right to jury unanimity functions uniquely in the alternative means context. When more than one means of elevating the degree of a crime is present, the State may instruct the jury on each of the means that is potentially available. So long as each means is supported by sufficient evidence, the jury does not need to be unanimous as to which means it relies on to elevate the crime to a higher degree. But, under the Washington constitution, if even one of the alternative means on which the jury is instructed is unsupported by sufficient evidence, the conviction will not be affirmed.

This standard is more protective than the federal constitution's jury unanimity right, which requires only that one of the alternative means be supported by sufficient evidence.

Aguilar's first-degree rape conviction was alternative means crimes because it was potentially elevated by one of several means. He asserts that at least one of the alternative means on which the jury was instructed for each offense was unsupported by sufficient evidence.

Elevation to First Degree Rape

Second degree rape, in part, requires proof that (1) sexual intercourse occurred (2) by forcible compulsion. RCW 9A.44.050(1)(a). "Sexual intercourse" is defined to have "its ordinary meaning, and occurs upon any penetration, however slight," but also includes "any penetration of the vagina or anus however slight, by an object, when committed on one person by another." RCW 9A.44.010(14).

The four alternative means that may elevate second degree rape to first degree rape include if the perpetrator:

> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
>
> (b) Kidnaps the victim; or
>
> (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or
>
> (d) Feloniously enters into the building or vehicle where the victim is situated.
>
> RCW 9A.44.040(1)

The jury was instructed on each of these four-alternative means. As a result, for Aguilar's first-degree rape conviction to be affirmed, each alternative mean had to be supported by sufficient evidence. The Court focused its analysis on the fourth, the felonious entry means.

While the Court agreed that Aguilar did "feloniously" enter A.B.'s apartment, A.B. was not "situated" within her apartment at the time of his felonious entry because she was not present at the time of his entry, arriving only after Aguliar's entry was complete. The Court noted that "Situated" was not statutorily defined. So, the Court said that the question was whether "situated," as used in RCW 9A.44.040(1)(d), requires the victim to be physically present in the building or vehicle into which the perpetrator feloniously enters at the time of the entry. Or whether, in the alternative, "situated" might have some broader meaning such as "resides" or "is habitually present." That A.B. was not present was uncontested.

Courts routinely look to the dictionary for guidance on the plain meanings of words, but only if language in the statute is ambiguous do courts engage in statutory construction, attempting to discern the legislature's intent by looking to legislative history. In this Case, the Court held that "situated" unambiguously means "is physically present at the time of the felonious entry" for the purposes of RCW 9A.44.040(1)(d).

The State argued that even when the victim was not present at the time of the felonious entry, RCW 9A.44.040(1)(d) is satisfied if the perpetrator remains until the victim arrives. The Court disagreed, providing that the State's interpretation was contradicted by the use of the present tense "is"

situated. Therefore, the State failed to provide sufficient evidence to support the felonious entry prong. The evidence did not indicate that A.B. was present at the time of Aguilar's entry. As a result, Aguilar's first-degree rape conviction violated his right to a unanimous jury verdict.

Jury Unanimity Concerning Multiple Acts

Aguilar made another argument under his right to a unanimous jury. He asserted that A.B.'s testimony described two distinct instances of rape—his sexual assault of A.B. on the couch and the later sexual intercourse in the bedroom—but the jury was not instructed that it had to unanimously agree as to which act constituted his single charged rape offense, constituting error

Aguilar further argued that the error was not harmless beyond a reasonable doubt. The Court agreed and concluded that his rape conviction could not stand. The Court advised that the constitutional right to a unanimous jury verdict speaks to the validity of convictions in "multiple acts" cases as well as alternative means crimes (discussed previously in this analysis). These are cases in which "the prosecution presents evidence of several acts that could form the basis of one count charged."

To avoid error and ensure jury unanimity in a multiple acts case, one of two things must occur: either

1. the State may tell the jury on what act to rely in its deliberations, or
2. the court may instruct the jury that it must unanimously rely on a specific criminal act to support its conviction.

The former is known as "election," the latter is known as giving a "Petrich" instruction, after the case in which the instruction originated. To avoid constitutional error, any election must "clearly identify" the act on which the charge in question is based. A constitutional error occurs in a multiple acts case in which no Petrich instruction was given, and no election was made, but reversal is not warranted if the error was harmless, a standard the Court addressed in detail, but is beyond the scope of this Analysis.

The jury in Aguilar's trial was not given a Petrich instruction concerning rape. Nor did the State make a clear election. It instead did the opposite; the State opined at multiple points throughout trial that more than one rape occurred. During opening statements, the prosecutor said that sexual intercourse "was not an option for [A.B.] both on the couch or in the bedroom. They are both rape in the first degree." This was followed by two similar statements in closing. First: "after he raped her on the couch . . . [h]e took her to the bedroom, closed the door, she said no, she said stop, and he raped her."

Aguilar asserted that this was a multiple acts case. The State countered that while there may superficially have appeared to be two distinct instances of rape, the acts in fact constituted a "continuing course of conduct." The Court concluded that this was a multiple acts case. A Petrich instruction is unnecessary, and the State need not elect where what appear to be multiple acts are in fact a "continuing course of conduct."

Generally, a continuing course of conduct is an ongoing enterprise with a single objective but where evidence involves conduct at different times or places, or concerning different victims, then multiple acts have occurred, and the jury unanimity right may be implicated. According to A.B.'s testimony,

Aguilar first raped her on her couch. During this period, while he was threatening A.B. and berating her for dating other men, Aguilar "would get distracted and do other things." Holding a knife, he paced around her apartment, stabbed the couch cushions near A.B., stabbed the wall, broke her belongings, and shredded her underwear close to her face. A.B. testified that they perhaps lasted for five to ten minutes. Aguilar eventually became distracted enough that he "was in and out of the kitchen" and "in and out of . . . [A.B.'s] view," and ate food and drank wine.

A.B. testified, "I don't know the timeframe, again, but at another point, he had forced me to go into the bedroom from the couch." Aguilar then forcibly undressed A.B. and raped her on the bed.

The Court concluded that the facts here were consistent with multiple acts rather than a continuing course of conduct. The relevant conduct occurred in A.B.'s apartment and A.B. was the only victim, facts that admittedly indicate a continuing course of conduct rather than multiple acts. But the timeline of events, although uncertain, indicated that numerous activities may have intervened between the events on the couch and in the bedroom.

Some of these activities—searching for and doing drugs, pretending to sip wine—appear to have been somewhat prolonged endeavors. And Aguilar's state of mind did not demonstrate the existence of "an ongoing enterprise with a single objective." Instead, he acted erratically under the influence of intoxicants, his focus shifting rapidly from one thing to another. The Court reasoned that these were not the qualities of a continuing course of conduct. Therefore, multiple acts had occurred, and the State committed error in failing to advise the jury of the appropriate "election" or to have the Court give a Petrich instruction.

Training Takeaway

This case hinged primarily on the inadequacy and general nature of the Jury Instructions presented, not law enforcement error. If the jury instructions more clearly delineated the alternative means proffered by the State through the evidence and ensured unanimity for the alternative mean selected to elevate to first degree Rape, likely, Aguilar's conviction would not have been vacated. Also, it is unclear from the opinion why the State did not also charge Second Degree Rape as a lesser included offense, except presumptively the State was confident that the evidence supported first degree rape.

Similarly, at various points during the trial, the State alluded to two distinct acts of sexual assault by Aguilar against A.B. But the State failed to instruct the jury appropriately. For law enforcement engaged at any stage of a sexual assault investigation, documenting any and all evidence that may help prove or disprove one or more alternative means to rape (or any alternative means crime) and mapping that evidence to the pertinent alternative means may be helpful.

Most importantly from this case is to recognize that the elements of burglary or vehicle prowl (unlawfully entering into a building or vehicle, respectively, with an intent to commit a crime therein) is not sufficient to elevate to first degree rape. Rather, the victim must be "situated" (presently located) in the building or vehicle at the time the perpetrator feloniously enters the building or

vehicle. "Lying in wait" for a victim to return home or enter their vehicle is not enough to satisfy this alternative means.

Because this means was not supported by sufficient evidence, even if another alternative means prong were supported by evidence, a unanimous jury verdict could not be rendered.

Finally, in investigations where multiple acts of sexual assault occur a clear documentation of acts and any intervening conduct (including timelines) would assist in determining if the sexual assault was a continuous course of conduct or multiple acts. Experienced investigators may appreciate the challenges in such documentation recognizing the impact of trauma on a victim.

For law enforcement interested in training on trauma-informed response in Sexual Assault Investigations, you are encouraged to enroll in CJTC's SAI VCERT.

EXTERNAL LINK: View the Court Document

TOPICS: Familial DNA Evidence

Factual Background

In 1986, MW, a 12-year-old girl, was raped and murdered in a Tacoma park. The killer left semen on MW's body, but his DNA did not match that of any suspects or anyone in police databases for the next 30 years. In 2018, police enlisted Parabon Nanolabs, a DNA technology company, to analyze the killer's DNA and to upload it into GEDmatch, a consumer DNA database, looking for partial familial matches that would help identify the killer. Police did not secure a warrant to analyze the abandoned DNA or to compare it with DNA in the GEDmatch database. Parabon learned that several of the killer's cousins had DNA in the GEDmatch database. Parabon used information from the database and public records to construct family trees. Parabon then directed police to try to obtain a DNA sample from Gary Charles Hartman.

Police obtained a discarded napkin containing Hartman's DNA, and it matched the DNA from semen on MW's body. The State charged Hartman with first degree felony murder. Before trial, Hartman moved to suppress the DNA evidence, arguing that Parabon's comparison of the DNA sample from the crime scene to the GEDmatch database was unconstitutional. He also asserted that the DNA later collected from the napkin directly linking him to the murder was inadmissible as fruit of the poisonous tree. Hartman did not argue that he had any privacy interest in DNA left at the crime scene, nor did he challenge the collection and testing of DNA from the discarded napkin.

The trial court ruled that Hartman did not have standing to challenge the comparison of the DNA from the crime scene to DNA in the GEDmatch database because he did not have a privacy interest in his cousins' DNA in the database. In addition, Hartman's relatives had voluntarily uploaded their DNA into the GEDmatch database, and the DNA that Hartman left at the crime scene was abandoned and not private. The trial court denied the motion to suppress.

After a bench trial on stipulated facts, the trial court convicted Hartman. Hartman appealed his conviction. He argued that analyzing the DNA sample from the crime scene and comparing it with the GEDmatch database to look for his relatives' DNA disturbed his private affairs in violation of article I, section 7 of the Washington Constitution. Thus, he claimed that he had standing to challenge the DNA comparison.

The Court of Appeals (the "Court") held that there is no privacy interest in commonly held DNA that a relative voluntarily uploads to a public database that openly allows law enforcement access. And there is no privacy interest in DNA that one abandons at a crime scene. Absent a privacy interest,

Hartman did not have standing to challenge the comparison of the crime scene DNA with the GEDmatch database.

Analysis of the Court

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." CONST. art. I, § 7. Hartman argued that he had "a personal privacy interest" in the DNA he had in common with his family members and the information gleaned from the analysis of the consumer databases, rendering the analysis unconstitutional. As a result, he asserted that he had standing to challenge Parabon's investigation involving the consumer DNA databases because his private affairs were disturbed. Thus, he claimed that the trial court abused its discretion by ruling that the DNA evidence secured as fruit of that investigation was admissible.

The central question raised in Hartman's appeal—whether Hartman had a privacy interest in the segments of his DNA that he has in common with his relatives, giving him standing to challenge the analysis of the GEDmatch database—was an issue of first impression in Washington. To raise a constitutional challenge, a defendant must have standing. Proving standing to challenge a search or seizure requires a defendant to show that a private affair is implicated under article I, section 7, meaning that they "possess a legitimate expectation of privacy in the place searched or the thing seized."

Standing is a two-part inquiry into whether "the claimant manifest[ed] a subjective expectation of privacy in the object of the challenged search" and whether "society recognize[s] the expectation as reasonable." In particular, a defendant has to show that the challenged action violated the defendant's own rights, rather than the rights of a third party. Thus, if the analysis of the GEDmatch database disturbed Hartman's privacy interest in the segments of his DNA that his relatives had in common with him, then Hartman had standing to challenge this aspect of the investigation because he had a subjective expectation of privacy that society recognizes as reasonable.

The Court recognized that DNA inherently contains intimate and discrete details of a person's life, including information related to intimate family connections and the likelihood of experiencing medical conditions. Because GEDmatch analyzes many more alleles than government databases, its database can be used to identify relationships between third cousins—people whose last common ancestors were their great-great grandparents. Some legal commentators assert that people should have a reasonable expectation of privacy in their own DNA in consumer databases, based on the scope of health information contained therein and the fact that we constantly leave behind DNA everywhere we go.

Here, Parabon uncovered intimate personal information about Hartman and his family during their analyses of the GEDmatch database. These facts included his racial background and ancestry information that revealed a misattributed paternity. Hartman argued that this information makes DNA analogous to cell site location information, even though the GEDmatch database is made up of

DNA profiles that contributors have voluntarily shared with the public by uploading it onto an Internet site that is publicly available. Hartman asserted that a warrant was required to analyze those public profiles by comparing them with DNA left behind by an unidentified killer. But the Court determined that consumers frequently upload their DNA to consumer databases like GEDmatch for the very purpose of learning and sharing with strangers the exact private information—details about their ancestry and familial relations—at issue here.

The Court added that cell site location information is distinguishable from DNA. Both are deeply revealing and can be used to determine whether a person was at a particular crime scene. But identifying whether the DNA sample from this crime scene had DNA in common with the genetic profiles Hartman's relatives loaded onto GEDmatch was a limited inquiry targeted only at identifying MW's killer. And those family members voluntarily uploaded their DNA profiles and the comparison occurred at times when GEDmatch allowed sharing of information with law enforcement. What was done with the relatives' DNA profiles—limited DNA comparison for the purposes of identification—was beyond the relatives' control once they uploaded the information to the public database under GEDmatch's policy at the time. And no relative of Hartman challenged the analysis of their DNA.

Hartman claimed a privacy interest in the segments of his DNA that his relatives had in common with him. But all that police learned from the GEDmatch analysis was the killer's familial relations, which brought them closer to learning the killer's identity. And identifying unknown family members is the exact reason that users of consumer databases, like Hartman's relatives, post their genetic material on those databases. The Court decided that the limited nature of the identification information learned from the GEDmatch analysis did not support concluding that Hartman had a privacy interest in the genetic information his relatives had in common with him.

In conclusion, the Court held that Hartman did not have a valid privacy interest in the segments of his DNA that he had in common with his cousins when his cousins voluntarily posted the genetic information on a public website. Thus, Parabon's investigation of GEDmatch's database did not violate article I, section 7 because it did not disturb Hartman's private affairs. Because there was no intrusion on Hartman's private affairs, he had no standing to challenge the DNA comparison of DNA collected at the crime scene with the GEDmatch database.

Training Takeaway

The Court noted that the legislature could adopt statutory restrictions. Interestingly, the Washington legislature recently considered but failed to adopt a law that required either consent or "valid legal process" before law enforcement could access genetic information held in a consumer genetic database "without a consumer's express consent." H.B. 2485 § 2(1)(c), 66th Leg., Reg. Sess. (Wash. 2020).

Additionally, the Court said that the companies that run consumer DNA databases could adopt policies limiting law enforcement access to genetic information in those databases without a warrant.

In fact, GEDmatch did just that in 2019 after the investigation at issue in this case. It altered its privacy settings so that users had to choose to opt into allowing law enforcement to access their DNA for forensic genealogy comparisons. Interestingly, only 185,000 of 1.3 million users chose to opt-in.

As of mid-2022, Washington law enforcement had used forensic genealogy in only about two dozen cases, with the technology reserved for unsolved cold cases.

See Multiple cold cases solved with assist from Attorney General's DNA forensic genetic genealogy program | Washington State
See also Idaho murders suspect Bryan Kohberger wins genetic genealogy legal battle as judge allows his lawyers to review evidence (msn.com)

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – August 2023

TOPICS

1. Indecent Exposure
2. Rape 1st Degree
3. Familial DNA evidence

CASES & REFERENCES

Washington v. Thompson No. 84366-4-I (October 3, 2023)

- RCW 9A.88.010

Washington v. Aguilar No. 83773-7-I (August 21, 2023)

- RCW 9A.44.010
- RCW 9A.32.030
- RCW 9A.44.040
- RCW 9A.44.050

Washington v. Hartman No. 56801-2-II (August 22, 2023)

- CONST. art. I, § 7
- H.B. 2485 § 2(1)(c), 66th Leg., Reg. Sess. (Wash. 2020).
- Multiple cold cases solved with assist from Attorney General's DNA forensic genetic genealogy program | Washington State
- Idaho murders suspect Bryan Kohberger wins genetic genealogy legal battle as judge allows his lawyers to review evidence (msn.com)

WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [2018-2021] | [2022-present]