LAW ENFORCEMENT DIGEST – July 2021

This information is for REVIEW only. If you wish to take this course for CREDIT toward your 24 hours of in-service training, please contact your training officer. They can assign this course in Acadis.

Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- Washington Courts of Appeal
- Washington State Supreme Court
- Federal Ninth Circuit Court of Appeals
- United States Supreme Court

Cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

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.

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CASES

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2. State v. Denham, No. 98591-0 (Jul. 1, 2021)
3. State v. Meredith, COA No. 81203-3-I (Jul. 26, 2021)
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WASHINGTON LEGAL UPDATES

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

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- Caselaw Update authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

QUESTIONS?

- Please contact your training officer if you need to have this training reassigned to you.
- If you have questions/issues relating to using the ACADIS portal, please review the FAQ site.
- Send Technical Questions to lms@cjtc.wa.gov or use our Support Portal.
- Author: Linda J. Hiemer, JD| Legal Education Consultant

Gordon v. County of Orange

No. 19-56032, __F.3d__, 2021 WL__

Ninth Circuit Court of Appeals

July 28, 2021

Facts Summary

TOPIC: Detainee Constitutional Right to Safety Checks

On September 8, 2013, the Placentia California Police arrested Gordon on heroin-related charges and booked him into jail. During his intake at approximately 6:47 p.m. that day, Gordon informed defendant Finley, a registered nurse, of his 3-grams-a-day heroin habit. Finely and a doctor assessed Gordon. The physician ordered a daily assessment for 4 days using a Clinical Institute Withdrawal Assessment for Alcohol ("CIWA") protocol, rather than a Clinical Opiate Withdrawal Scale ("COWS"), despite Gordon reporting his heroin usage.

After his intake assessment, Gordon began the "loop" phase of the booking process and he waited nearly ten hours to enter the general population. During this period, another inmate had observed Gordon vomiting for 45 minutes. Nurse Finley testified that she did not assess Gordon at that time. Gordon exited the loop at approximately 8:30 a.m. the next day, September 9, when he was transferred to Tank 11 in Module C of the jail.

There, he presented his identification card which stated: "*Medical Attention Required*." Gordon was administered his detoxification medications three times over the course of his first day in Module C. However, no assessment or other evaluation of Gordon occurred that day, despite the ordered daily assessment.

Pursuant to Department policies, deputies were responsible for conducting safety checks of the inmates in Module C at least every 60 minutes. Based on the safety check log, at approximately 6:47 p.m., Deputy Denney and another deputy conducted a check that included a physical count of all inmates. Additional safety checks were conducted at approximately 8:03 p.m., 8:31 p.m., 9:29 p.m., and 10:10 p.m., as indicated by the log.

The two safety checks conducted by Deputy Denney at 8:31 p.m. and 9:29 p.m. allegedly did not comply with applicable law. Specifically, Section 1027 of Title 15 of the California Code of Regulations, in effect at the time, required that "[a] sufficient number of personnel shall be employed in each local detention facility to conduct at least hourly safety checks of inmates through **direct visual observation of all inmates**." *(citation omitted*)

The County Sheriff's Department had a policy that correctional staff "will conduct safety checks from a location which provides a clear, direct view of each inmate"; "observe each inmate's presence and apparent condition and investigate any unusual circumstances or situations"; and "pay special attention to areas with low visibility." None of the deputies could account for who conducted the 10:10 p.m. safety check.

Deputy Denney testified that he was aware that Gordon required medical attention based on the module identification card, though he did not know his specific ailment. Deputy Denney conducted his safety check of Gordon from a corridor that was approximately six feet elevated from the tank floor and 12 to 15 feet away from the foot of Gordon's bunk. Deputy Denney admitted that, from his vantage point, he was unable to ascertain whether Gordon was breathing or had any potential indicators of a physical problem.

At approximately 10:45 p.m. that evening, deputies heard inmates from Tanks 11 and 12 yelling "man down." Deputies summoned jail medical staff immediately, and they responded within minutes. Deputy Denney testified that upon his arrival on the scene, he observed that Gordon's "face was blue, he was unresponsive, and his skin was cold to the touch." Paramedics arrived at approximately 11:00 p.m. and transported Gordon to a local hospital where he was pronounced dead.

Shortly thereafter, in October 2013, the Department issued a new policy referencing the use of COWS that required jail medical staff to screen "inmates who may be at risk for developing drug or alcohol related problems." Then, at some point between late 2014 and early 2015, policy changed to require deputies to conduct safety checks from an area immediately adjacent to the module for a more direct visual observation of the inmates. At the time of Gordon's death, these policies did not exist.

After Gordon's death, his mother, Mary Gordon, sued the County and Nurse Finley and Deputy Denney, individually, alleging claims of inadequate medical care under the due process clause of the Fourteenth Amendment. The lower court granted summary judgment for the individual defendants based on qualified immunity. Plaintiff Gordon appealed.

> [For the purpose of this training, the Takeaway will focus on the actions and legal holdings related to the individual deputy, not medical staff or the County.]

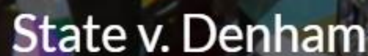
The Ninth Circuit agreed with and affirmed the lower court's decision granting a judgment in favor of Deputy Denney because, although the Ninth Circuit now recognizes that Gordon had a constitutional right to direct-view safety checks, that right was not clearly established at the time of the incident and his death.

Training Takeaway

The Ninth Circuit needed to determine whether Gordon, as a pretrial detainee, had a constitutional right to direct-view safety checks when he was known to require medical attention. The Court recognized that prior case law established that "a prison official who is aware that an inmate is suffering from a serious acute medical condition violates the Constitution when he stands idly by rather than responding with reasonable diligence to treat the condition." But, the Court was not aware of any prior case expressly recognizing a detainee's right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment.

The Ninth Circuit ruled that Deputy Denney was entitled to qualified immunity because the due process right to an adequate safety check for pretrial detainees was not clearly established at the time of the incident. However, the Ninth Circuit held that "**pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment**." According to the facts, it was undisputed that upon admission into the general population, Gordon's identification card notified jail officials that he required medical attention. While Deputy Denney received qualified immunity in this instance, the Ninth Circuit stated, "**law enforcement and prison personnel should heed this warning because the recognition of this constitutional right will protect future detainees**."

EXTERNAL LINK: https://cdn.ca9.uscourts.gov/



State v. Denham

No. 98591-0

Washington Supreme Court

July 1, 2021

Facts Summary

TOPIC: Cell Phone Records – Sufficient Nexus to Crime

Someone burgled Mallinak Designs Jewelers over a weekend in 2016. The burglar stole an extensive collection of jewels and jewelry, including a 5-carat diamond with certification papers. No suspect fingerprints were left, but Frank Mallinak, the store owner, did find a small piece of plastic that he did not recognize.

O'Neill, a Kirkland police detective, ran a search through a database that tracked sales at pawn shops and saw Denham had been pawning jewelry stolen from Mallinak Designs. Within days, Defendant Denham sold the stolen 5-carat diamond, along with its certification papers. Denham used one of his own cell phones several times to negotiate the sale of the diamond. Over the next few weeks, Denham pawned or sold jewels and jewelry stolen from Mallinak Designs at various jewelry and pawn shops and purchased a new Range Rover with a large cash down payment. He also began wearing a huge blue stone gem necklace that matched one taken in the burglary.

Based on discussions with the shop owner and one of Denham's probation officers, Detective O'Neill successfully applied for a search warrant for Denham's registered address in Tacoma. The original warrant application was very detailed about the burglary and the sale of stolen jewels. Detective O'Neill also successfully sought authority to seize the Range Rover and to seize and image cell phones for a later search.

Denham was not home when the warrant was served. Police found drawings and schematics of safes, and new headlamps, one of which was missing a plastic piece like that found at Mallinak Designs. They also seized the Range Rover. They did not find any cell phones.

After the search, the detective wrote an addendum to the warrant affidavit seeking **five months of records associated with two phone numbers Denham had given to his probation officers and to the purchaser of the diamond. According to the original affidavit, the purchaser of the diamond had reached Denham at one of those numbers. The addendum sought subscriber information, payment details, billing records, inbound and outbound call records, stored communications, stored images, location data, physical addresses of cell towers used by the phones, connection logs, and much more.**

The State acknowledges, correctly, that this was overbroad both in time and scope. Both the original warrant application and the addendum contained what appeared to be boilerplate language describing the role of cell phones in people's lives and the information that can be gleaned from the phones and the phone records.

The expanded warrant was granted. The phone company's records included cell site location information that established multiple calls to or from Denham's phone were relayed through a cell phone tower that was about 550 feet from Mallinak's store around the time of the burglary. Denham lived in Tacoma, some distance away.

Denham was arrested and subsequently convicted of second-degree burglary and first-degree trafficking in stolen property at a bench trial. The trial judge specifically cited the fact that Denham had made phone calls that were routed through the cell tower in the parking lot of Mallinak Designs around the time of the burglary.

On appeal, Denham challenged **the sufficiency of the nexus between the cell phone and the crimes. The Court of Appeals found that the warrant applications did not establish a sufficient nexus between the phone records and the crime. It found the errors were not harmless and reversed Denham's convictions.**

The Washington Supreme Court granted review and reversed the decision of the Court of Appeals. In part, the Washington Supreme Court held: "The judge did not abuse her discretion in approving the warrant. Reading the affidavits as a whole, the judge could reasonably infer that evidence of the burglary would be found in Denham's cell site location information."

Training Takeaway

Our federal and state constitutions protect individual privacy against state intrusion. U.S. CONST. amend IV; WASH. CONST. art. I, § 7. State agents must have either the authority of a warrant or a well-established exception to the warrant requirement to lawfully intrude into an individual's private affairs. **This constitutional protection extends to cell phone location information held by cell phone companies.**

The United States Supreme Court has observed that with cell phones, "[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" (citations omitted)

In this case, Officers had a search warrant. Denham challenged the adequacy of the affidavits supporting the application for that warrant. He said the affidavits were **based on generalizations and did not establish that evidence of wrongdoing would likely be found in his phone records**. The Supreme Court warned that **"A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched**." The Court added that there must be **"a nexus between criminal activity and the item to be seized and between that item and the place to be searched."** The warrant must also describe with particularity the place to be searched and the things to be seized.

Denham argued that the search warrant affidavits supporting the seizure of Denham's phone records relied on generalizations like those that were rejected in the 1999 case of State v. Thein. In the Thein case, the Washington Supreme Court held that **"search warrants may not be based only on generalizations**. . . . Blanket inferences substitute generalities for the required showing of reasonably specific 'underlying circumstances' that establish evidence of illegal activity will likely be found in the place to be searched in any particular case."

The Supreme Court disagreed with Denham and distinguished the facts in the Thein case holding:

> These affidavits present **reasonable grounds** to believe that the phones associated with the phone numbers belonged to Denham based on Denham's own use of the numbers with his probation officers and with various businesses, that Denham had the phones around the time of the burglary because of specific facts suggesting he had the phones days before and after the date in question, that Denham burgled the store, and that Denham trafficked distinctive pieces stolen from the store. They also allege that Denham had both phones at the time of the burglary and used one to arrange the sale of the diamond that was the basis of the trafficking charge. Taken together, this is **sufficient to raise a reasonable inference that evidence of burglary would be found in the cell site location information . . . . The fact that there are some generalizations in the inferential chain does not defeat the reasonableness of the inference.**

The judge did not abuse her discretion in approving the warrant. Reading the affidavits as a whole, the judge could reasonably infer that evidence of the burglary would be found in Denham's cell site location information.

> **TRAINING NOTE:** The State conceded that the warrant was overbroad because there was no probable cause supporting the conclusion that evidence of a crime would be found in all the categories of information listed. There was nothing in the affidavits that suggested billing records, pictures, or location data acquired after the charging period, for example, would be germane to any criminal activity. **But Denham did not challenge the warrant as overbroad and did not claim that evidence seized under the overbroad portions of the warrant was admitted. If it had been, the remedy would have been suppression of any evidence seized due to the overbreadth.**

EXTERNAL LINK: https://www.courts.wa.gov/

State v. Meredith
COA No. 81203-3-I

Washington Court of Appeals

July 26, 2021

Facts Summary

TOPIC: Consent to Warrantless Seizure on Public Transit

Meredith was riding the Swift regional transit bus in Everett one morning when two officers from the Snohomish County Sheriff's Office boarded to conduct fare enforcement. Officer Dalton requested proof of payment or ORCA card from Meredith, who began to check his pants and backpack. The bus continued along its route, and Meredith searched for about five minutes without producing proof of payment. Officer Dalton ordered him to disembark at the next stop, and they left the bus together.

Officer Dalton asked Meredith for his name and identification. Meredith failed to provide any and gave a name that Officer Dalton suspected was fake. Another Officer arrived to help determine Meredith's identity with a mobile fingerprint reader. After scanning Meredith's prints, Officers learned Meredith's real name and that he had two outstanding felony warrants. Meredith was arrested on the outstanding warrants and on probable cause of having committed third degree theft of services for nonpayment of fare.

He was charged with making a false statement to a public servant. Pretrial, Meredith moved to suppress evidence resulting from Officer Dalton's fare enforcement. Meredith argued the fare enforcement statute for regional transit authorities was unconstitutional under both article I, section 7 of the state constitution and the Fourth Amendment of the U.S. Constitution because the demand for proof of payment of fare authorized a **warrantless seizure without lawful justification**.

The trial court denied the pretrial motion. A jury found Meredith guilty of making a false statement.

The Court of Appeals granted review to consider the constitutionality of the fare enforcement statute set forth in RCW 81.112.210, (called "the Statute" below) related to Officer Dalton's initial contact with Meredith by requesting proof of payment or an ORCA card.

Training Takeaway

Typically, article I, section 7 of the Washington Constitution provides greater protection against seizures than the Fourth Amendment of the United States Constitution. But when determining whether a public transportation passenger was seized, they provide the same degree of protection.

The critical question the Court posed was **whether, viewed objectively, a reasonable, innocent person approached by law enforcement "'would feel free to decline the officers' requests or otherwise terminate the encounter.'"** If no, then a seizure has occurred. The Court assumed that Officer Dalton's initial request constituted a warrantless seizure, which the Court said could only be authorized by one of the few exceptions to the warrant requirement. **One such exception is consent. The State had the burden of proving the consent exception applied.**

The Court determined that as a reasonable passenger choosing to ride the public bus, **Meredith voluntarily entered a contract with public transit that he would follow the applicable rules of ridership in return for transportation. Those conditions as set forth by the Statute included paying bus fare and complying with a fare enforcement officer's request for proof of payment. It was this contractual arrangement that created the requisite consent.**

The Court concluded that Meredith was seized when the officer requested that he provide proof of payment. **But the officer's request remained within the scope of Meredith's consent.** Because Meredith consented to the conditions of ridership and failed to provide proof of payment when requested, the Court ruled that the trial court did not err by denying Meredith's motion to suppress evidence gathered by the officer conducting fare enforcement. **Riding the public transit voluntary resulted in the requisite consent to seizure in relation to determining/enforcing payment of fare and did not violate Meredith's constitutional rights against warrantless seizures.**

EXTERNAL LINK: https://www.courts.wa.gov

State v. Sullivan

COA No. 81254-8-I

Washington Court of Appeals

July 6, 2021

Facts Summary

TOPIC: Sufficiency of Evidence of Armed with Deadly Weapon

On August 18, 2017, King County Sheriff's deputies responded to multiple 911 reports indicating that gun shots had been fired at Skyway Park Bowl. After the deputies arrived at the bowling alley, they found the bodies of Robinson and Gantz in an outdoor smoking area accessible from the bowling alley's lounge. Robinson had been shot in the head by a 9 mm bullet. Deputies found a 9 mm pistol and magazine at the scene. Gantz had also been shot by a .40 caliber bullet. The police did not find a .40 caliber firearm at the scene.

No video camera captured the shootings, and no witnesses to the shootings provided a statement to the police. Accordingly, the police were not able to determine how, exactly, the shootings in the smoking area had transpired. However, a bystander took video footage near the entrance to the bowling alley of an incident which occurred about 25 minutes before the shootings, involving Robinson and two other men, including Defendant Sullivan. Robinson is seen kicking and punching an unidentified man and taking his wallet. Sullivan stood next to Robinson and loomed over the robbery victim during the encounter.

An enlarged image from that video depicts Sullivan pressing an object, located on the exterior of his shirt, against his stomach and under his crossed hands. Additionally, approximately one minute after the robbery, video footage from inside the bowling alley captured the outline of an object that was underneath Sullivan's shirt and located at his right hip.

Then, approximately 25 minutes after the robbery, video footage from inside the bar lounge at the time of the shooting captured Sullivan, with his right arm extended forward, holding an object, which resembled a pistol, in his right hand.

Five days after the shooting, police officers conducted a search of the apartment of Sullivan's girlfriend. Inside, officers found a garbage bag containing three .40 caliber Hornady bullets, an empty box of ammunition, and mail addressed to Sullivan.

Although the State did not have enough evidence to charge a suspect for the murders, the State charged Sullivan with robbery in the first degree.

The jury found Sullivan guilty. Sullivan asserted that sufficient evidence did not support a finding that either he or Robinson was armed with a deadly weapon during the robbery. Sullivan claimed, therefore, that the State failed to prove one of the alternative means of robbery in the first degree. The Court disagreed.

Training Takeaway

A person commits robbery in the first degree when the defendant or an accomplice was armed with a deadly weapon or the defendant or an accomplice inflicted bodily injury. See RCW 9A.56.200. Sullivan did not contest that sufficient evidence supported a finding that Robinson inflicted bodily injury on the robbery victim. So, the only thing the court needed to determine was whether sufficient evidence existed to support a jury determination that either Sullivan or Robinson was armed with a deadly weapon during the robbery.

"To prove that a defendant is 'armed,' the State must show that 'he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and [that] a nexus is established between the defendant, the weapon, and the crime.'" "Such a nexus exists when the defendant and the weapon are 'in close proximity' at the relevant time." "One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found. In this case, the weapon was never found.

Considering all evidence, the Court reasoned that a rational juror could have concluded from the video footage that the object located under Sullivan's crossed hands during the robbery was a firearm, which was also a deadly weapon. Second, the Court concluded that sufficient evidence established a nexus between the weapon and the robbery such that a reasonable juror could have concluded that the firearm was used by Sullivan to intimidate the victim or provide backup for the crime should Robinson have needed it. Therefore, the Court upheld the conviction.

EXTERNAL LINK: http://www.courts.wa.gov/