

# LAW ENFORCEMENT DIGEST

## March 2021



### Covering cases published in March 2021

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

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

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## WASHINGTON LEGAL UPDATES

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

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

## QUESTIONS?

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Torres v. Madrid

No. 19-292

UNITED STATES SUPREME COURT

March 25, 2021

## Facts Summary

### TOPIC: Fourth Amendment Seizure

In July 2014 in Albuquerque, New Mexico, police went to an apartment complex to execute a warrant. In the parking lot, they encountered a woman, Torres, standing near a vehicle. The police determined Torres was unrelated to the target of the warrant. But, as the two officers approached Torres (who was later determined to be experiencing methamphetamine withdrawal), she got into the vehicle. When the police attempted to speak with her and open the vehicle door, she “hit the gas” and sped away. Torres denied driving in the direction of police, but the police fired 13 shots at the moving vehicle and struck Torres twice.

Despite her gunshot wounds, she drove away and stole another parked vehicle that was idling unoccupied nearby. She drove about 75 miles to Grants, NM. The good news was that the hospital in Grants was able to airlift Torres to another hospital where she could receive appropriate care. The bad news was that the hospital was back in Albuquerque, where the police arrested her the next day. Torres claimed that she thought she was being carjacked and did not realize the men with guns were law enforcement. Regardless, she pled no contest to aggravated fleeing from law enforcement, assault on an officer, and unlawfully taking a motor vehicle.

After pleading in state criminal court, Torres filed a civil lawsuit in federal court seeking damages from the two police officers under [42 U. S. C. Section 1983](#). A “Section 1983 claim” provides a civil cause of action against persons acting “under color of law” (such as law enforcement) for the deprivation or violation of constitutional rights. Torres claimed that the officers applied excessive force, making the shooting an unreasonable seizure under the Fourth Amendment.

The District Court granted summary judgment in favor of the officers on the grounds that no

“seizure” occurred because Torres escaped, so the force used by police never stopped her movement nor resulted in control or authority over Torres. Essentially, the absence of a seizure negates excessive force. The Court of Appeals for the Tenth Circuit affirmed the granting of summary judgment. The United States Supreme Court “granted certiorari” (agreed to review). On review, the Supreme Court vacated summary judgment and remanded (returned) the case to the federal district court for further proceedings.

## Training Takeaway


The [Fourth Amendment](#) protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” **This case concerned the seizure of a person, which can take the form of “physical force” or a “show of authority” that “in some way restrain[s] the liberty” of the person.** The Tenth Circuit upheld summary judgment in favor of the officers on the ground that a suspect’s continued flight after being shot by police negates a Fourth Amendment excessive-force claim. It relied on Tenth Circuit precedent (prior cases) providing that “no seizure can occur unless there is physical touch or a show of authority,” and that “such physical touch (or force) must terminate the suspect’s movement” or otherwise give rise to physical control over the suspect. (case citations omitted)

So, the narrow question before the U.S. Supreme Court was **whether the application of physical force is a seizure if the force, despite hitting its target, fails to stop the person.** The Court observed that the appropriate inquiry was **whether the challenged conduct “objectively manifests an intent to restrain.”** The Court noted that while a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain. It provided, for example, that a tap on the shoulder to get one’s attention will rarely exhibit such an intent. It concluded that **the conduct of the officers—ordering Torres to stop and then shooting to restrain her movement—satisfied the objective test for a seizure.**

The Court clarified that the rule it announced was narrow. In addition to the requirement of intent to restrain, **a seizure by force—absent submission—lasts only as long as the application of force.** That is to say that the Fourth Amendment does not recognize any continued seizure or arrest while the suspect remains a fugitive. **The fleeting nature of some**

seizures by force undoubtedly may inform what damages a civil plaintiff may recover, but brief seizures are seizures all the same.

Applying these principles to the facts viewed in the light most favorable to Torres (as is required in reviewing summary judgment), the Court ruled that by shooting Torres, **the officers applied physical force to Torres' body and objectively manifested an intent to restrain her from driving away despite being unsuccessful in stopping her.** It concluded that the officers seized Torres for the instant that the bullets struck her. Because the Court determined that a "seizure" had occurred, the basis for granting summary judgment – that the absence of a seizure negates excessive force – was in error. Therefore, the Court reversed the Tenth Circuit's grant of summary judgment in favor of the officers.

 **NOTE:** The Supreme Court only ruled that a seizure occurred. It did not consider or rule on whether the seizure was unreasonable based upon excessive force. That determination was left for the federal district court in further proceedings.

**EXTERNAL LINK:** <https://www.supremecourt.gov/>

Tacoma Police Department v.

\$51,657.39 United States

Currency

COA No. 54510-1-II

WASHINGTON COURT OF APPEALS

March 2, 2021



## Facts Summary

### TOPIC: Due Process - Forfeiture of Property Notice

On June 18, 2018, Tacoma Police Department (“TPD”) confiscated over \$51,000 in cash, jewelry, a 2008 Honda Odyssey, and drug paraphernalia that belonged to Zhen. Zhen was charged with unlawful manufacturing of a controlled substance. On June 19, the superior court released Zhen from custody subject to certain conditions of release. Among these conditions, the court prohibited Zhen from living at an address on E. 48th Street in Tacoma.

On June 28, TPD sent Zhen a notice of seizure and intended forfeiture of her property to the E. 48th Street address by way of regular and certified mail – the same address where the court ordered Zhen not to reside. The notice stated that Zhen had the right to a civil hearing regarding the seizure and forfeiture if she notified TPD within 45 days of the receipt of notice.

Both the regular and certified mailings were returned to TPD as “not deliverable as addressed” and “unable to forward.” Zhen failed to respond to TPD in writing within the 45-day period stated in the notice.

TPD made no further efforts to provide notice to Zhen, even after Zhen went to TPD on September 11 and October 15 to inquire about her property and provide TPD with a new address. During her visits, TPD failed to advise her of the notice and the forfeiture proceedings.

The hearing examiner subsequently entered a default order confirming forfeiture of the items seized. TPD did mail a notice of the forfeiture order to Zhen at her new address. However, the notice did not inform Zhen of her right to move to set aside the default order or to petition for judicial review.

Months later, Zhen filed a motion to set aside the default order based on a violation of due process. The hearing examiner denied the motion. Zhen petitioned for judicial review in the superior court under the [Administrative Procedures Act](#) (APA), and the superior court affirmed the hearing examiner.

Zhen then appealed to the Washington Court of Appeals. It reversed the superior court's order dismissing Zhen's petition for judicial review and returned with instructions to vacate the hearing examiner's order denying Zhen's motion to set aside the default. The Court referred the case back to the hearing examiner for further proceedings.

## Training Takeaway

[Article I, section 3 of the Washington Constitution](#) provides that “no person shall be deprived of life, liberty, or property, without due process of law.” The Fourth and [Fourteenth Amendments](#) to the United States Constitution contain similar provisions. The Washington Supreme Court has recognized that **in forfeiture cases, due process generally affords an individual notice and an opportunity to be heard.**

Specific to adequacy of notice, the United States Supreme Court stated that a “**fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.**”

The Court observed that the notices that TPD sent by both regular and certified mail were returned as undeliverable. In response, TPD did nothing. TPD made no further attempts to inform Zhen of the pending forfeiture even though it knew that notice had been ineffective.

The Court noted that TPD's inaction violated due process **if it was practicable for TPD to take “additional reasonable steps to attempt to provide notice” to Zhen before forfeiting her property.** Considering the facts, the Court said that TPD easily could have taken additional reasonable steps to give notice to Zhen, especially since Zhen appeared in person at TPD to inquire about the property that had been confiscated. TPD could have given her notice then. Zhen also provided TPD with a new address at that time. TPD could have mailed notice to that address. And Zhen returned to TPD approximately three weeks before the forfeiture, and again TPD could have given her notice then.

Additionally, the Court stated that an investigation would have revealed more than two months before the forfeiture, that Zhen had changed her address with the Department of Licensing. TPD actually discovered that additional address on October 29 prior to the forfeiture hearing.

Based upon the totality of the circumstances, the Court of Appeals held in part that TPD **violated Zhen's due process rights by not attempting to provide her with notice after the first notice was returned as undeliverable.**

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





## Facts Summary

### TOPIC: Criminal Informants

Late in the evening of August 9, 2017, Spokane Police Department officers arrested a woman named Ansbaugh on an outstanding warrant. During a search incident to arrest, officers discovered methamphetamine and heroin on Ansbaugh. Unsolicited, Ansbaugh told the officers she had just purchased the drugs from Morrell, who used the nickname “Duffles.” Ansbaugh said Morell drove a maroon Chevrolet Monte Carlo, he still had drugs on him, and he would be driving to her hotel room with more drugs. The Officer was familiar with Morrell and his nickname from prior contacts, including a past drug investigation.

One of the officers, who remained on patrol the morning after Ansbaugh’s arrest, saw Morrell driving a maroon Monte Carlo near a gas station. There is no indication the gas station was near a hotel. Intending to investigate Ansbaugh’s tip, the Officer performed a traffic stop after following Morrell for several miles.

The Officer ordered Morrell out of the vehicle and frisked him for weapons. The Officer was able to observe the interior of the car. He saw a crystal substance, sandwich bags and a blue case. The Officer obtained a search warrant for Morrell’s person and vehicle.

In Morrell’s pocket, the Officer found approximately \$250 cash. In the blue case in the vehicle, he discovered additional sandwich bags containing methamphetamine and heroin in quantities that suggested drug trafficking. The Officer also seized two cell phones from the vehicle. The Officer then released Morrell in the hopes he would cooperate with the police in locating other drug dealers.

Subsequently, the Officer obtained a search warrant for the two phones. Execution of the warrant revealed social media and text messages implicating Morrell in drug transactions. A warrant was issued for Morrell’s arrest.

On September 28, 2017, the Officer spotted Morrell driving a GMC Yukon. The Officer stopped the vehicle and arrested Morrell. During this process, he saw a crystal substance on the driver's seat of the vehicle. A narcotics dog was summoned, which alerted the officers to the presence of narcotics in the vehicle. Another search warrant was obtained. Upon executing the warrant, the Officer discovered methamphetamine, heroin, drug scales with drug residue, sandwich bags and packaging, and \$157 in cash. Morrell was then arrested for both the August and September incidents.

The State charged Morrell with drug offenses associated with the two vehicle searches. Morrell filed a motion to suppress, which the court denied. A jury subsequently convicted Morrell of four counts of possession of a controlled substance with intent to deliver. The trial court sentenced Morrell to seven years in prison. Morrell appealed. The Court of Appeals reversed the denial of the motion to suppress and overturned the conviction.

## **Training Takeaway**

On appeal, the issue was **whether Ansbaugh's tip supplied reasonable suspicion for an investigatory traffic stop. If it did not, all evidence seized by the State during both traffic stops would have to be suppressed under the fruit of the poisonous tree doctrine.**

**Article I, section 7 of the Washington State Constitution provides "[n]o person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." This provision is generally applied consistently with the Fourth Amendment to the United States Constitution in the context of investigatory stops. Because article I, section 7 provides for broader privacy protections than the Fourth Amendment, the Washington state constitution generally requires a stronger showing by the State. Warrantless seizures are presumed to be unreasonable, and the State bears the burden of showing a warrantless seizure fell under an exception to the warrant requirement.**

A "Terry Stop" is an exception to the warrant requirement. For a Terry stop to be permissible, the State must show that the officer had a 'reasonable suspicion' that the detained person was, or was about to be, involved in a crime.

The Officer's interaction with Morrell on the morning of August 10, began as a warrantless Terry stop. It was based on the information supplied by Ansbaugh, coupled with the Officer's

independent confirmation of Morrell's nickname and vehicle type. The Court had to decide **whether this level of information was sufficient to constitute reasonable suspicion.**

**Although reasonable suspicion requires less than probable cause for an arrest, an informant's tip alleging criminal activity is not always sufficient to satisfy reasonable suspicion. The informant must be reliable.**

**An informant's reliability turns on their credibility and basis of knowledge.** While Ansbaugh was a named informant and she made a statement against her penal interests, her credibility remained suspect because she was a criminal informant. The Court noted that, unlike a citizen informant calling 911, a criminal informant is not presumed to be acting out of civic responsibility.

The Court observed that Ansbaugh's statement to police was not the type of statement against interest that carried an aura of reliability. Given she was caught red-handed, Ansbaugh's willingness to admit to drug possession was not particularly impressive. Because Ansbaugh's tip was not sufficiently robust to carry an aura of reliability, the Court held that **law enforcement was required to corroborate her claims prior to conducting a warrantless stop.**

The Court reasoned that the police could have tried to corroborate Ansbaugh's specific information by following up on her claim that Morrell would be returning to her hotel with drugs, but they did not do so. Instead, The Officer simply stopped Morrell after he saw him driving near a gas station. At that point, the Officer lacked sufficient basis for an investigative stop.

All the drug evidence used against Morrell at trial was proximately connected to the Officer's initial traffic stop. As a result, the Court held that all evidence seized in the searches had to be suppressed.

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

# Burton v. City of Spokane

COA No. 37205-7-III

DIVISION III

March 18, 2021

## Facts Summary

### TOPIC: Return of Crime Victim's Property

Cecilia Burton's son, Melvin Rouse II, died of a suspected homicide in 2016. The Spokane Police Department handled the investigation. Ms. Burton lives in California. She traveled to Spokane to retrieve her son's effects, which allegedly include jewelry, a wallet, and other personal items. The police department refused to release Rouse's property, claiming his case was under investigation.

After repeated efforts to obtain her son's belongings, Burton filed suit against the City of Spokane in 2019. Her suit made a claim for conversion. [Note: Conversion is a civil tort claim when a person without authority or permission intentionally takes or retains the personal property of another.]

The City did not file an answer to Burton's complaint; it instead filed a motion to dismiss. According to the City, it had no obligation to return Rouse's property since his case was still under investigation. The superior court granted the City's motion. Burton appealed.

## Training Takeaway

Burton claimed that the City unlawfully withheld ("converted") her son's property in violation of her rights as a crime victim survivor. **Washington law grants crime victims and survivors various rights with respect to criminal proceedings.** One of the rights afforded to crime victims pertains to the return of personal property.

A crime victim has the right:

**To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence.** When feasible, all such property, except weapons, currency, contraband, property subject to

evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken. [RCW 7.69.030\(7\)](#) (the “Crime Victim’s Rights” statute)

The City argued that a crime victim’s right to return of property only applies when the property is “no longer needed as evidence.” The City claimed that because it was undisputed that Rouse’s alleged homicide remained under investigation, it was lawfully entitled to retain Rouse’s personal effects.

The Court rejected the City’s arguments for two reasons.

- **First, the City failed to individually assess the evidentiary value of the property collected at the time of death. The fact that a particular piece of property was recovered from a homicide victim does not automatically show it is “needed as evidence.”**
- **Second, the City’s argument ignored the part of the Crime Victim’s statute which provides that law enforcement should retain a photograph in lieu of the victim’s property “when feasible.” The City was required to do more to establish the evidentiary value of the property and to explain why photographs were not feasible (e.g., possible trace DNA on object recovered).**

The Court reasoned that under Washington law, **crime victims must be afforded a “significant role in the criminal justice system.”** [RCW 7.69.010](#). It said that **when it comes to property seized during a criminal investigation, law enforcement will ideally cooperate with crime victims to discern what items can be returned and what should be kept for evidentiary purposes.** In the event of a difference in opinion, the Court noted that a crime victim’s **preferences should be given dignity and respect.** But the victim’s input is not controlling. Law enforcement may retain a victim’s property so long as it complies with the requirements of RCW 7.69.030(7). On these grounds, the Court reversed the lower court’s dismissal of Burton’s claim for conversion and remanded for further proceedings.

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

## Facts Summary

### TOPIC: Showup Identification

Huff left his car running in his driveway early one mid-November morning. From inside his house, he saw his car backing away, so he hurried outside and saw a woman inside his car. The woman backed into a telephone pole and could not drive away.

Huff was able to get into his car and yelled for the woman to get out. He also noticed a dark tattoo on the top of her left hand. The woman then left, walking very fast down the road, then turning out of sight. Huff called 911, and a Sergeant responded within minutes. Huff described the woman as a Hispanic female with long dark hair, wearing a black coat and carrying two backpacks. The Sergeant forwarded this description to other officers, who were in the area.

A few minutes later, Officer Dunsmore saw a woman running and looking behind her. She was wearing basketball-style shorts, no coat, and open toe sandals. Because she was not properly clothed for the near freezing temperature and because her shoes did not suggest she was exercising, Officer Dunsmore stopped her and alerted the Sergeant that he had a woman who might be the suspect.

Huff accompanied the Sergeant to Officer Dunsmore's location. While enroute, the Sergeant said, "just because [you are] going to look at a female suspect, it doesn't necessarily mean it [is your] suspect."

When they arrived, Huff saw a woman in handcuffs standing next to an officer, who were both 30 to 40 feet away. Even though the woman was not wearing the same clothes, did not have any backpack, and her hair was up instead of down, Huff identified the woman with "100 percent" confidence as the one who had tried to steal his car. Huff also said the woman should have a tattoo on the top of her hand. Officer Dunsmore looked at the woman's hand and said she did.



The woman, Scabbyrobe, identified as Native American, not Hispanic. She also had a smaller-than-pupil-sized green heart tattoo under her right eye, and a nearby small mark that might have been an old tattoo.

The State charged Scabbyrobe with theft of a motor vehicle. During the State's case-in-chief, Huff again identified Scabbyrobe as the woman who tried to steal his car. Defense counsel elicited from Huff that he had not noticed anything distinctive about the thief's face.

During closing, defense counsel argued Scabbyrobe was not the same woman Huff had seen in his car. The defense emphasized that Scabbyrobe was wearing different clothes than the thief, she was not carrying two backpacks, and she had a distinctive tattoo on her face. The State argued that Scabbyrobe, trying not to be caught, may have discarded or hidden her coat, pants, and backpacks before she was seen by Officer Dunsmore.

The jury returned a guilty verdict. Defendant appealed challenging her identification and claiming ineffective counsel.

## **Training Takeaway**

The Court noted that a due process challenge to a pretrial identification procedure is a two-step inquiry. **A defendant asserting that a police identification procedure denied him or her due process must first show that the procedure was unnecessarily suggestive. If such a showing is made, the court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification.**

Scabbyrobe argued the showup procedure used was impermissibly suggestive because it focused on one person. But the Court said the procedure used did not run afoul of what courts have generally recognized to be impermissibly suggestive procedures.

**The Court had previously recognized that a prompt identification procedure frequently demonstrates good police procedure because it best guarantees freedom for innocent subjects.** It added that a showup identification was a proper procedure to protect Scabbyrobe's constitutional right from an unconstitutional seizure and to ensure her prompt release had Huff not identified her as the thief.

Scabbyrobe argued that Officer Dunsmore could have taken her picture, released her, and sometime later shown Huff her picture in a photomontage with other women. The Court agreed that Officer Dunsmore could have done that but said that **simply because a different procedure could have been used does not mean the procedure actually used was impermissibly suggestive**. It quoted the 1972 U.S. Supreme Court case of Neil v. Biggers (often referred to just as “Biggers”) that said, “admission of evidence of a showup without more does not violate due process.” [Neil v. Biggers, 409 U.S. 188](#) (1972).

The Court concluded that **the showup procedure used was not unnecessarily suggestive**. Therefore, it shifted to the second prong to **determine whether the suggestiveness created a substantial likelihood of irreparable misidentification**.

In determining this prong, the Court applied the **Biggers factors**. These included

1. the opportunity of the witness to view the criminal at the time of the crime,
2. the witness’s degree of attention,
3. the accuracy of the prior description of the criminal,
4. the level of certainty demonstrated at the confrontation,
5. the time between the crime and the confrontation.

In applying the Biggers factors, the court considered the following. First, Huff had the opportunity to view the thief up close during the crime. Second, Huff paid attention to the thief. He focused on her and only her for a couple of minutes. Third, Huff’s description of the thief differed somewhat from Scabbyrobe. He identified her as Hispanic, but Scabbyrobe identifies as Native American. He said she would have a tattoo on the top of her hand, and she did; but he did not notice the very small tattoo under her right eye. Fourth, Huff identified Scabbyrobe as the thief and was 100 percent sure. Finally, less than 10 minutes passed between the time of the crime and the confrontation. The Court determined that the Biggers factors supported admitting the showup identification.

Based upon those factors, the Court concluded the trial court likely would have denied a motion to suppress had one been filed, and, therefore, rejected Scabbyrobe’s ineffective assistance of counsel claim.

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