LAW ENFORCEMENT DIGEST
October 2021

COVERING CASES PUBLISHED IN OCTOBER 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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- 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.
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In re Personal Restraint of Williams

No. 99344-1

WASHINGTON SUPREME COURT

October 7, 2021

Facts Summary

TOPIC: Personal Restraint Petition – Cruel Punishment

In 2009, Williams was convicted of multiple offenses, including the brutal assault of his ex-girlfriend. Williams was sentenced to 22 years of confinement. During the initial stage of the pandemic, Williams was 77 years old and incarcerated at Coyote Ridge Corrections Center. Williams, a Black man, suffered from diabetes and hypertension. Years earlier, Williams had experienced a massive stroke that immobilized the right side of his body and required him to use a wheelchair. Williams relied on therapy aides to push his wheelchair and assist him with daily tasks.

At Coyote Ridge, Williams shared a cell with three other inmates. Because that cell was dry—lacking a sink or toilet—Williams had to wait for prison staff to unlock his cell and move him to an accessible bathroom facility equipped to accommodate his needs. Williams often waited long periods of time for assistance to the bathroom. As a result, he was forced to relieve himself in bottles and was unable to keep himself clean.

In April 2020, Williams sought an extraordinary medical placement with his sister in Florida. Department of Corrections ("DOC") denied the request, determining that Williams failed to satisfy the requisite community safety criteria. A week later, Coyote Ridge reported its first case of COVID-19 within the prison population.

On May 15, 2020, Williams petitioned for relief from unlawful restraint in this court. This is referred to as a Personal Restraint Petition ("PRP"). Williams argued that his conditions of confinement were cruel punishment in violation of article I, section 14 of the Washington State Constitution and the Eighth Amendment to the United States Constitution. He asked the court to order his immediate release to live with his sister in Florida.

In December 2020, the Court of Appeals denied Williams's PRP and motion for release. Williams sought review by the Washington Supreme Court (the "Court"), which was granted. As a severely disabled Black man with advanced diabetes and hypertension, Williams argued that his confinement during the COVID-19 pandemic was cruel.

On review, the Court concluded William's conditions of confinement—specifically the lack of reasonable access to bathroom facilities and running water, as well as DOC's failure to provide Williams with appropriate assistance considering his disabilities—constituted cruel punishment pursuant to article I, section 14 of our state constitution. Therefore, the Court granted Williams's PRP and directed DOC to remedy the cruel conditions, either at Coyote Ridge or an alternative placement, or to release Williams. DOC remedied the unconstitutional conditions of confinement at Coyote Ridge, where Williams remained. The Court then explained its reasons for agreeing with Williams that the challenged conditions of confinement constituted cruel punishment under article I, section 14 of the Washington State Constitution in detail.

Training Takeaway

NOTE: The case provides history of the prison system and poor prison conditions during Washington's territorial days that you may find interesting.

PERSONAL RESTRAINT PETITION (PRP)—GROUNDS FOR REMEDY (a) Generally. . . . (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is **under a "restraint"** as defined in section (b) and the petitioner's **restraint is unlawful** for one or more of the reasons defined in section (c). (b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, **the petitioner is confined**, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case. (c) Unlawful Nature of Restraint. **The restraint must be unlawful for one or more of the following reasons: . . . (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.**

See Rule of Appellate Procedure 16.4: Grounds for Personal Restraint Petition

Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." This is like but distinct from the Eighth Amendment of the United States Constitution, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Washington's provision omits the words "and unusual," prohibiting punishments that are cruel without the additional requirements that they also be unusual.

In the past, Washington courts evaluated state and federal constitutional challenges to prison conditions by requiring a petitioner to show "a substantial risk of serious harm and deliberate indifference to that risk." Essentially, that analysis is subjective and requires a showing that corrections officers were deliberately indifferent or somehow malicious or intentional in their actions or inactions in response to conditions and the risks posed to a prisoner. Washington courts applied the federal deliberate indifference standard largely because the parties in those cases did not seek an independent state constitutional analysis.

By contrast, Williams argued, and the Court agreed, that article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment of the U.S. Constitution in relation to prison conditions. The Court concluded that because Washington's cruel punishment clause is more protective of the health and safety of prisoners than the U.S. Constitution, the federal deliberate indifference standard is inadequate to address claims arising under article I, section 14.

The Court recognized that unconstitutionally cruel conditions of confinement can arise from institutional policies and practices just as readily as from the malicious actions of individual prison officials. Whether prison conditions deprive prisoners of basic human dignity intentionally or incidentally, Washington's constitution prohibits such treatment.

In sum, article I, section 14 of Washington's constitution prohibits the State from imposing cruel conditions of confinement on prisoners. Whether conditions of confinement are cruel does not depend on the subjective intent (e.g., "deliberate indifference") of individual actors within the prison system but on the proportionality of those conditions to legitimate penological justifications.

In applying a new test, the Court held that to prevail on a PRP challenging conditions of confinement, a petitioner must demonstrate that (1) those conditions create an objectively significant risk of serious harm or otherwise deprive the petitioner of the basic necessities of human dignity and (2) those conditions are not reasonably necessary to accomplish any legitimate penological goal.

As to the first requirement, the Court concluded that the conditions of Williams's confinement exposed him to a significant risk of serious harm by depriving him basic hygienic necessities. Williams was required to use a wheelchair and had minimal use of one side of his body. The lack of access to bathroom facilities and running water, resulted in Williams frequently soiling himself. The Court held that those conditions were objectively cruel.

Turning to the second requirement, the Court concluded that these conditions were not reasonably necessary to achieve any legitimate penological goal. The Court determined that Williams's violent offense and risk to the community weighed in favor of continuing to confine him in DOC custody. They did not, however, justify housing Williams in severely unhygienic conditions. DOC's failure to meet Williams's basic sanitary needs considering his physical disabilities did not sufficiently further the goals of deterrence, incapacitation, and rehabilitation.

Therefore, the Court found that the conditions of Williams's confinement violated our state's cruel punishment clause. It acknowledged the challenges faced by prison administrators, especially during the COVID-19 pandemic, and recognized that DOC had taken significant steps to mitigate the associated risks. Nevertheless, because DOC deprived Williams of basic hygiene and such conditions were not necessary to accomplish a legitimate penological interest, the Court held Williams's conditions of confinement violated Washington state's prohibition on cruel punishment.

EXTERNAL LINK: View the Court Document

Facts Summary

TOPIC: Net Nanny and Washington Privacy Act

Detective Pohl, working with Washington State Patrol's (WSP) Missing and Exploited Children's Task Force (MECTF), posted an advertisement on Doublelist, a website like Craigslist where people advertise for sexual encounters, as part of MECTF's thirteenth "Net Nanny" operation. The Net Nanny operation is a proactive undercover operation that seeks people who are offering children for sex, or any type of exploitation, or people seeking to have sex with kids, or sexually exploited children. The advertisement asked, *"where is the hook up spots in Puyallup that a yung [sic] hot guy could go?"*

When Pohl answered messages directed to this advertisement, she assumed the persona of a fictitious 13-year-old boy named "Jake." Bilgi responded to Pohl's advertisement with an e-mail message that said, *"hey did you find your guy or spot yet? hit me up and we can have some fun together."* He attached a picture of an erect penis. Bilgi soon mentioned the possibility of meeting people at dive bars, but Jake responded that he was not old enough to go to bars. When Bilgi asked how old Jake was, Pohl said, "13." After expressing surprise, Bilgi responded, *"so what do you wanna do?"*

After about a week of sending e-mail messages, Bilgi and Pohl switched to communicating through text messages. Bilgi texted using Google Voice, a voiceover internet number that was not connected to his cell phone. He told Jake that he was 27 years old. Bilgi and Jake communicated periodically over the next month, with most of their conversations involving sexual content.

Eventually, Bilgi arranged to meet Jake at a park. Prior to arriving at the park, Bilgi texted a picture of his face and a description of his car. When Bilgi arrived, Pohl texted asking Bilgi to

roll down his window and wave. Officers arrested Bilgi after they saw him comply and wave. Officers later recovered condoms and personal lubricant from Bilgi's car.

The State charged Bilgi with attempted rape of a child in the second degree and communication with a minor for immoral purposes.

During an interview with defense counsel, Detective Pohl disclosed that she used a software named Callyo to send text messages to Bilgi from her computer. Pohl explained that Callyo allows MECTF to sort messages by the phone number they are using and by the suspects' phone numbers. It also allows the detectives to download all the messages associated with a particular suspect's phone number in a zip file and to open those messages in a spreadsheet.

After this interview, Bilgi moved to suppress all evidence relating to the e-mail and text communications of the defendant under Washington's Privacy Act. At hearing, Bilgi argued that his text messages were unlawfully intercepted and recorded by law enforcement using specialized computer surveillance software called 'Callyo.' The trial court denied Bilgi's motion to suppress his communications. At trial, the State admitted Bilgi's text messages to Jake. The jury found him guilty as charged.

Bilgi appealed his convictions to the Court of Appeals (the "Court"). The Court held that law enforcement did not intercept Bilgi's text messages in violation of the privacy act because Bilgi intended to send messages to a fictitious child, and his messages were received by the account behind that fictitious child. Essentially, no "intercept" occurred.

Training Takeaway

Under Washington's privacy act, it is unlawful "to intercept, or record any . . . [p]rivate communication . . . by any device electronic or otherwise designed to record and/or transmit said communication . . . without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1)(a). Information obtained in violation of the privacy act is inadmissible in a criminal trial.

The Washington Supreme Court has identified four factors of a privacy act violation: (1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the

private communication. Bilgi's challenge involves the second factor: whether Bilgi's communications were intercepted.

Bilgi contended that his communications were unlawfully intercepted by officers who were not the intended recipients. He argued that his implied consent to the recording was not an implied consent to the interception.

The Court determined that both, Rodriguez, who was the task force lead and Pohl's supervisor, and Pohl consented to other members of the Net Nanny operation reading their text messages.

The Court rejected Bilgi's argument that his consent was limited to the intended recipient, 'Jake' (Det. Pohl), so that any other officer who read his messages intercepted them. The Court reasoned that the viewing of the electronic communications by other officers who, like Pohl, made up the law enforcement team in control of the account posing as Jake did not constitute an unlawful interception of Bilgi's communications. The officers did not covertly receive messages that were directed elsewhere. Nor is there evidence that other officers "manipulated" Pohl's device or opened the messages before they were received by Pohl.

The Court said that Bilgi sent messages to a fictitious child, and his messages were received by the account behind that fictitious child. It noted that when an account is held by multiple people, the account holders do not violate the privacy act by simultaneously receiving messages sent to that account. Jake's phone number, which was associated with MECTF's Callyo account, was Bilgi's intended recipient. The messages were received by the intended recipient. The fact that multiple officers were authorized to access the account did not change this conclusion.

The Court observed that Washington courts have primarily analyzed interception in the context of oral communications. Washington courts have held that a person impliedly consents to the recording of their communications on an electronic device when they communicate through e-mail, text messaging, and some online instant messaging software. When the sender of a written electronic message impliedly consents to the message's recording, they bear the risk that the intended recipient will share the message with others. In the Court's view, it was logical to assume they do so with the additional understanding that

the messages will be available to the receiving party for forwarding or sharing electronically.

Therefore, Det. Pohl did not violate the Privacy Act by allowing other members of MECTF to read her communications with Bilgi. The Court distinguished verbal communications that may be intercepted by use of a recording device from written communications, such as text message, that may be captured or recorded by a recipient's device. With text messages, there is a general understanding that the recipient could share it.

> **NOTE**: What was critical to the court's reasoning in this case was the "implied consent" that one gives (and thereby privacy rights one gives up) in using text messaging and e-mail for communication that does not exist in face-to-face communications or even telephonic communications where an expectation of privacy is high and interception by a recording or listening device requires consent of all parties or a court order.

EXTERNAL LINK: View the Court Document

State v. Jones
No. 81901-1-I
WASHINGTON COURT OF APPEALS – DIVISION I
October 15, 2021

Facts Summary

TOPIC: Extreme Risk Protection Order (ERPO)

Demetrius Jones worked as a hot dog vendor in the Pioneer Square area of downtown Seattle from 2013 to 2018. He worked Friday and Saturday nights and his job required frequent contact with inebriated customers leaving nearby bars and clubs. Because Jones was concerned about aggressive customers, he obtained a concealed pistol license in 2017.

Seattle police officers in the area had frequent interactions with Jones and knew he often carried a firearm while working. Officer Brian Hewitt identified Jones as a "source of disturbances and contention" in the area based on several incidents in which Jones brandished and recklessly handled firearms while working at his hot dog stand. Because of these incidents, as well as the fact that SPD was aware of five firearms registered to Jones, Officer Hewitt filed a petition for an ERPO on behalf of SPD on June 21, 2018. The trial court issued a temporary ex parte ERPO the same day and set a hearing date for July 3, 2018.

The trial court granted SPD's petition and entered an ERPO for one year. The court found (1) Jones had unlawfully or recklessly used, displayed, or brandished a firearm; (2) he had recently committed or threatened violence; (3) he had shown within the previous 12 months a pattern of acts or threats of violence; and (4) he had a history of use, attempted use, or threatened use of physical force against another person.

As a condition of the ERPO, the court ordered Jones to surrender all firearms in his possession to law enforcement. It also found that a mental health evaluation was appropriate and ordered Jones to obtain one within 60 days and to file proof with the court within 15 days of the evaluation's completion. At Officer Hewitt's request, the court asked Jones about the whereabouts of his five registered firearms. Jones denied having any firearms, claiming they had been sold, gifted, stolen, or confiscated by police. After the ERPO hearing, when

Jones failed to surrender any weapons, Officer Hewitt obtained a search warrant for his apartment. On July 14, 2018, officers found four firearms, some of which were in his bedroom, as well as rifle scopes, ammunition including highcapacity magazines, and papers indicating Jones's dominion and control over the firearms. Officers then arrested Jones while he was working at his hot dog stand, where they recovered an additional firearm in a backpack at his feet. None of the recovered firearms were registered to Jones.

SPD filed a motion to renew the ERPO. SPD alleged Jones had violated the ERPO, had demonstrated a pattern of acts or threats of violence within the prior 12 months, has a history of the use, attempted use, or threatened use of physical force against others, and has a dangerous mental health issue.

The court held a renewal hearing on September 4, 2020.

On September 14, 2020, after the renewal hearing, Jones filed a pleading entitled "Mental Health Evaluation." Jones's counsel represented that the documents supported a finding that Jones had completed a mental health evaluation. However, the attached discharge summary that indicated Jones had presented for a mental health intake assessment, but then "declined services leading the provider to conclude it had "insufficient information at assessment to make a diagnosis."

The trial court granted the renewal of the ERPO through March 30, 2021. The court found that Jones had access to firearms. The court also found that Jones violated the ERPO by possessing guns on his person and in his apartment. And the court found that Jones still had not accounted for five firearms registered in his name. For these reasons, the court found that Jones's behavior "presents an imminent threat of harm to others." Jones appealed the renewal of the ERPO. The Court of Appeals affirmed the trial court's ruling that renewed the ERPO.

Training Takeaway

NOTE: Because this is the first case of a renewal of a ERPO that the Court of Appeals of Washington has reviewed this LED summary will provide significant detail and background. The Extreme Risk Protection Order (ERPO) Act is located at: Washington ERPO Act.

In November 2016, Washington voters passed the Extreme Risk Protection Order (ERPO) Act, which was repealed and recodified in January 2021 (but all portions of the Act relevant to this case remain unchanged). The purpose of an ERPO is to temporarily prevent individuals who are at high risk of harming themselves or others from accessing firearms. Family members or the police may petition a court for an order prohibiting a person from purchasing or possessing any firearm for a one-year period. The person requesting the ERPO is referred to as the Petitioner. The person against whom an ERPO is sought is referred to as the Respondent. After a hearing, an ERPO will issue if the court finds by a preponderance of the evidence "that the respondent poses a significant danger of causing personal injury to self or others" by having a firearm in his or her custody.

Pursuant to the Act, in determining whether grounds for an ERPO exist, the court may consider any relevant evidence including, but not limited to the following:

(a) A recent act or threat of violence by the respondent against self or others, . . . ;

(b) A pattern of acts or threats of violence . . . within the past twelve months . . . against self or others;

(c) Any behaviors that present an imminent threat of harm to self or others;

(d) A violation by the respondent of a protection order or a nocontact order (sexual assault and/or domestic violence Foreign Protection Orders, etc.);

(e) A previous or existing extreme risk protection order issued against the respondent;

(f) A violation of a previous or existing extreme risk protection order issued against the respondent;

(g) A conviction of the respondent for a crime that constitutes domestic violence;

(h) A conviction of the respondent under [Hate Crimes];

(i) Ownership, access to, or intent to possess firearms;

(j) The unlawful or reckless use, display, or brandishing of a firearm by the respondent;

(k) The history of use, attempted use, or threatened use of physical force . . . against another person, or history of stalking another person;

(l) Any prior arrest of the respondent for a felony offense or violent crime;

(m) Corroborated evidence of the abuse of controlled substances or alcohol by the respondent; and

(n) Evidence of recent acquisition of firearms by the respondent.

See: Grounds for ERPO Issuance

The statute makes clear that the above relevant evidence is non-exhaustive, giving wide latitude for issuance of an ERPO.

If the court issues an ERPO, it shall order the respondent to surrender to the local law enforcement agency all firearms in the respondent's custody, control, or possession and any concealed pistol licenses. The statute sets out a procedure for conducting compliance review hearings to verify that a respondent has fully complied with the court's order. Law enforcement may seek a search warrant if there is probable cause to believe a respondent has failed to surrender all firearms as required by the ERPO.

It is a gross misdemeanor for a person to possess a firearm with knowledge that he or she is prohibited from doing so by an ERPO.

The respondent may submit one request to terminate the ERPO during any 12-month period the ERPO is in effect. If the respondent seeks to terminate, he or she has the burden of proving by a preponderance of evidence that he or she does not pose a significant danger of causing personal injury to self or others.

The court may consider any relevant evidence, including the considerations listed in (a)-(n) above. Before the ERPO is due to expire, the court must notify the petitioner of the impending expiration of the order. The petitioner may move to renew the ERPO any time within 105 days of its expiration. If the court finds by a preponderance of the evidence that the requirements for issuance of an extreme risk protection order continue to be met, the court shall renew the order.

But in this appeal, Jones challenged the sufficiency of the evidence supporting the trial court's determination that "the requirements for issuance of an extreme risk protection order as provided in RCW 7.94.040 continue to be met" justifying renewal of the ERPO.

The Court of Appeals noted that in deciding whether a respondent "poses a significant danger of causing personal injury to self or others" by having a firearm in his or her custody or control, the trial court "may consider" a lengthy set of factors, none of which is dispositive and all of which need not be established, to justify such a finding. The Court said that the provision "may" (not "shall" or "must") consider conferred discretion on the trial court in weighing the evidence to reach its decision. Similarly, the Court noted that the statute appears to give the court discretion to decide whether a mental health evaluation is appropriate.

The Court of Appeals agreed with Jones that the trial court erred in ruling Jones posed an imminent threat of harm. But the Court observed that the ERPO Act does not require the court to make a finding that Jones presented an imminent threat of harm before issuing or renewing an ERPO. It required only that the court find by a preponderance of the evidence that Jones continues to pose a significant danger of causing personal injury by having access to firearms, which it found.

Jones argued the evidence did not support this finding because there was no evidence he engaged in any violent acts in 2019 and 2020. He argued the evidence of his threatening behavior was too remote in time to support renewal of the ERPO.

The Court disagreed on the following grounds:

The unchallenged facts establish that Jones willfully violated a court order and remained in possession of at least five firearms after the court ordered him to surrender any weapons in his custody or control. He used his roommate to purchase firearms after the entry of the ERPO as a way of circumventing the restrictions.

The ERPO Act permits the court to consider "[t]he history of use, attempted use, or threatened use of physical force by the respondent against another person," without any time limitation attached to that factor. The court's unchallenged findings from the July 2018 ERPO establish that Jones had a history of violent, threatening, and impulsive behavior and had brandished firearms when threatening others.

Jones was angry, agitated, disruptive of the court proceedings, and disrespectful to the court

and the other parties demonstrating that he remained impulsive with a lack of behavioral control.

Based upon these considerations, the Court said the evidence sufficiently supported the trial court's conclusion that Jones continued to be a significant danger of causing personal injury to others.

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