

LAW ENFORCEMENT DIGEST

September 2021



Covering cases published in September 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?

- 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



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.

Section 1983 Claims

The United States legal system was founded predominantly on theories and traditions from 18th Century English “common law” (law made by judges on a case-by-case basis). Under English tradition, “the king could do no wrong” was a guiding principle that granted the king, or “sovereign,” and his representatives full and complete immunity. Citizens had no cause of action or avenue for justice when the wrongdoer was or acted on behalf of the king. While the United States rejected many traditions and trappings of sovereign rule, it maintained the tradition of sovereign immunity. That meant that those acting under “the color of law” (e.g., government officials, police officers) were immune from liability for harm to citizens while acting in their capacity as government actors.

After the Civil War, there was a significant increase in violence and violation of federal constitutional and civil rights by vigilante groups against black citizens in southern states where slavery had recently been abolished. To address this, in 1868 Congress ratified the **Fourteenth Amendment (due process and equal protection clauses)** and, subsequently, enacted the Civil Rights Act of 1871 (also referred to at the time as the Ku Klux Klan Act). Part of this Act created a **right of an individual to file a civil lawsuit in federal court against government officials for violation or deprivation of an individual’s constitutional rights.** This civil action is known as a “Section 1983 claim” because the Civil Rights Act of 1871 was “codified” or numbered under the federal statute 42 U.S.C Sec. 1983.

Section 1983 claims remained relatively uncommon until the 1960s leading up to and after the Civil Rights Act of 1964. In 1961, the United States Supreme Court in *Monroe v. Pape* clarified that a **Section 1983 claim could be pursued against state officials acting “under color of state law”** even if the official’s actions had violated state law or exceeded the scope of their duties. **A Section 1983 claim cannot be brought directly against a State, but rather is brought against a state official** (often, but not always, a police officer). Typically, a **Section 1983 lawsuit is filed against state officials in their individual capacity to recover damages (money) or for “injunctive relief” (to stop a violation or enforce a right).**

While a state official can be sued individually under Section 1983 for violation of a federal right (such as excessive force in violation of the Fourth Amendment’s protection against unreasonable search or seizure), **state officials can claim “qualified immunity.”** Qualified

immunity is a judicially created doctrine that must be raised as an affirmative defense. If proven, **qualified immunity shields government officials from being held personally liable for constitutional violations—like the right to be free from excessive police force—for money damages under federal law so long as the officials did not violate “clearly established” law.**

Qualified immunity, like all affirmative defenses, must be asserted and proven by the defendant. The defendant must introduce evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts. For example, in a criminal case, the prosecution may prove every element of murder, but then the defendant can assert the affirmative defense of self-defense.

In summary, **a Section 1983 is not a cause of action but the avenue through which a citizen can file a civil lawsuit in federal court against state officials for monetary damages or other relief (such as seeking an injunction) for violation of a citizen’s federal rights (usually arising under the U.S. Constitution). So, a Section 1983 claim must assert a violation of a federal right.**

As you will see in the three Ninth Circuit Court of Appeals cases, a citizen (plaintiff) filed a Section 1983 lawsuit against individual state officials (police officers) for violations including the Fourth Amendment (unreasonable search and seizure and excessive force), the Fourteenth Amendment (Equal Protection and Due Process Clause), and First Amendment (freedom from retaliation for public speech against discrimination).

Pursuant to these cases, **Section 1983 claims can be brought by state officials against other state officials for alleged violation of a state official’s federal rights in their employment capacity. As such law enforcement officers potentially face civil liability as defendants, but also may assert claims as plaintiffs under Section 1983.**

Facts Summary

TOPICS: Section 1983 Claims/Fourth Amendment and Fourteenth Amendments

The escalating homelessness crisis in the City of Los Angeles (“the City”) forced an unprecedented number of residents to live, sleep, and store their belongings exclusively in public places. In January of 2019, there were over 35,000 homeless individuals living in the City.

Part of the City’s response to this crisis was addressed in its municipal code (“the ordinance”), which strictly limited the storage of personal property in public areas. The provision within the ordinance relevant to this case provided that “no person shall store any bulky item in a public area, and that without prior notice, the City may remove and may discard any bulky item, whether attended or unattended.” The ordinance exempts any bulky item “designed to be used as a shelter,” as well as tents, bicycles, walkers, crutches, or wheelchairs. “Bulky items” were defined as items that are too large to fit into a 60-gallon container. It is that subsection of the ordinance, which the Court referred to as either the Bulky Items Provision or the Provision throughout its opinion, that was the subject of the lawsuit.

Also, the ordinance made it a misdemeanor for anyone to “willfully resist, delay or obstruct a City employee from removing or discarding a Bulky Item.” (Citation omitted)

Acting pursuant to the ordinance, the Los Angeles Bureau of Sanitation, with the assistance of the Los Angeles Police Department, conducted cleanups of homeless encampments. These included both noticed cleanups and rapid response cleanups, which were neither noticed nor scheduled but instead triggered by resident complaints or demands by the City Council. During cleanups, City employees typically prohibited individuals from moving their Bulky Items to another location; rather, they immediately destroyed those items by throwing them in the back of a trash compactor.

A group of homeless individuals who had their personal property destroyed by the City, along with two organizations that advocate for the interests of homeless individuals, filed a civil lawsuit under Section 1983 alleging that the Bulky Items Provision, on its face, violated the Fourth Amendment's protection against unreasonable seizures and the Fourteenth Amendment's guarantee of procedural due process. Three Plaintiffs who had been specifically injured by the destruction of Bulky Items moved for a preliminary injunction to stop the City from enforcing the Bulky Items Provision.

The district court granted the requested preliminary injunction, holding that Plaintiffs were likely to succeed on both their Fourth Amendment claim and their Fourteenth Amendment claim. In discussing the Fourth Amendment's protection against unreasonable seizures, the district court reasoned that the Bulky Items Provision was likely unconstitutional under the law holding that a warrant or a recognized exception to the warrant requirement must accompany a seizure for it to be reasonable. The City appealed the granting of the preliminary injunction to the Ninth Circuit Court of Appeals. The Ninth Circuit upheld the district court's granting of a preliminary injunction.

Training Takeaway

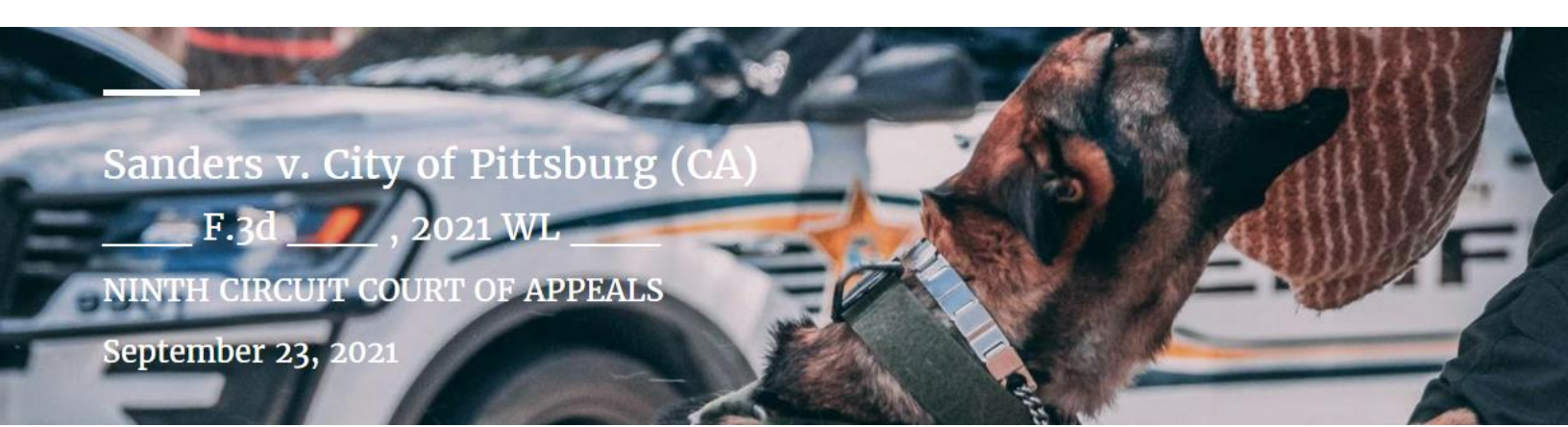
When a party asks a court to prohibit another party from acting or to order a party to act, that is called a request for “injunctive relief.” If granted, the court then issues an “injunction.” That injunction is a judicial order that restrains a person from beginning or continuing an action threatening or invading the legal right of another, or that compels a person to carry out a certain act. When the injunction is sought as part of a lawsuit that is pending, it is called a “preliminary injunction.” A court will only grant a preliminary injunction if the party requesting it can demonstrate that they will likely prevail at trial. In this case, the plaintiffs asked the court to grant their motion for a preliminary injunction to “enjoin” (stop or prohibit) the City from removing and destroying personal property under the City ordinance.

The Court recognized that **the Fourth Amendment protects individuals from unreasonable government seizures of their property, even when that property is stored in public areas. The destruction of property has long been recognized as a seizure.** The court reasoned that

because Plaintiffs demonstrated a likelihood of success on the merits of their claim that the Bulky Items Provision violated the Fourth Amendment on its face, the preliminary injunction would remain in place while the lawsuit continued.

In this instance, the court did not make the final determination that the ordinance violated the Fourth or Fourteenth Amendments, it just granted a preliminary injunction prohibiting the City from destroying Bulky Items until the district court could rule on the “merits” of the civil case filed under Section 1983 as to whether the ordinance violated the plaintiffs’ constitutional rights.

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



Sanders v. City of Pittsburg (CA)

___ F.3d ___, 2021 WL ___

NINTH CIRCUIT COURT OF APPEALS

September 23, 2021

Facts Summary

TOPICS: Section 1983 Claims/Fourth Amendment: Excessive Force

In 2017, Sanders stole a car and fled from the police. He drove 25 miles over the limit, ran several stoplights, and drove on the wrong side of the freeway. When police blocked the car, Sanders fled on foot. Officer Bryan, working with a K-9, warned Sanders that if he kept fleeing, he would “send the dog.” Eventually, Sanders was tackled by several officers in a gully. While Sanders continued to struggle, Officer Bryan ordered the dog to bite Sanders’ right calf. After the bite, the officers successfully handcuffed and arrested Sanders.

Sanders was charged with, among other counts, misdemeanor resisting arrest under California Penal Code Section 148. At the preliminary hearing, Officer Bryan testified that Sanders hindered efforts to arrest him by first fleeing in the vehicle, then fleeing on foot, and then resisting officers attempting to arrest him.

Sanders pleaded no contest to all the charges against him, including resisting arrest. At the plea hearing, Sanders stipulated that the factual basis for his plea was based on the preliminary hearing transcript (in which the officer testified in detail about Sanders’ resistance).

While Sanders’ criminal case was pending, he filed a civil action under Section 1983 alleging a violation of his Fourth Amendment rights. Specifically, he alleged Officer Bryan’s use of the police dog was excessive. The officers and the City filed a joint motion to dismiss Sanders’ Section 1983 civil complaint. The district court granted the motion. Sanders appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit denied Sanders’ appeal and upheld the lower court’s dismissal of Sanders’ civil suit filed under Section 1983 on the grounds that it was barred under precedent from the prior United States Supreme Court case of Heck v. Humphrey (the “Heck case”).

Training Takeaway

i **Refresher:** The Fourth Amendment to the U.S. Constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A civil lawsuit may be filed in federal court under 42 of the United States Code (U.S.C.) Section 1983 against a police officer for violation of a person's constitutional rights. In this case, while criminal charges for resisting arrest were pending against Sanders in state court, Sanders filed a civil lawsuit in federal court against law enforcement for use of excessive force. Commonly, use of excessive force is seen to violate one's Fourth Amendment right against unreasonable search or seizure. Sanders argued that being bitten in the leg by the K-9 officer was excessive force.

Procedurally, it may seem odd for a defendant in a criminal lawsuit brought by a governmental body to be able to sue that same governmental body in a civil lawsuit. Nevertheless, that is legal and feasible under Section 1983. To avoid abuse or misuse of Section 1983 civil lawsuits, courts will not permit a plaintiff to prevail on a Section 1983 claim for violation of a constitutional right if granting the claim would negate or nullify a conviction or challenge the legality of that conviction. [Heck v. Humphrey, 512 U.S. 477 \(1994\)](#). Essentially, a criminal defendant cannot assert a violation of a constitutional right in civil court stemming directly from a valid conviction in criminal court.

For example, in this case, Sanders pled no contest to the charge of resisting arrest and in so doing he accepted the testimony contained in the transcript from the preliminary hearing. One element of resisting arrest is proof that an officer acted lawfully in performance of duties during the arrest. For Sanders to plead no contest, he implied that the police acted lawfully and within the scope of their duties. Conversely, to prevail on a claim of excessive force that rises to the level of violating a person's Fourth Amendment rights, the plaintiff has to prove those police acted unlawfully (excessively) in the force exerted during the arrest.

If a federal civil court were to rule in favor of Sanders on the Section 1983 claim, essentially finding that police did use excessive force (acted unlawfully), that would negate or nullify the conviction in state criminal court. Rather, the proper procedural grounds for a defendant who believes they are wrongfully convicted or incarcerated to seek relief under a writ of habeas corpus not under a Section 1983 claim.

The Ninth Circuit refused to allow Sanders, first, in state criminal court to stipulate to the lawfulness of the police conduct pursuant to his conviction and plea to then bring a federal civil claim under Section 1983 alleging that that same force was excessive in order to recover monetary damages. The Ninth Circuit based its ruling upholding the lower court's dismissal of Sanders's Section 1983 claim on the Heck case, which barred a Section 1983 lawsuit on similar grounds.

Notably, if, instead, the conviction was overturned or Sanders had argued and prevailed in criminal court in challenging his arrest on the basis of excessive force, then the Section 1983 claim in civil court would not have been barred by the Heck case.

In summary, the Section 1983 civil case alleging excessive force by police was barred because the valid criminal conviction required a finding that the use of force was lawful and not excessive. **To clarify, not every lawful conviction will then bar a convicted person from filing a civil claim for damages under Section 1983.** For example, if Sanders had been convicted of burglary, and he filed a separate Section 1983 claim alleging excessive force, the Section 1983 claim would not be barred by the Heck case reasoning. Why? Because the elements necessary to prove burglary do not require that the police act lawfully during the arrest (they should, but it's not an element in the burden of proving the crime of burglary).

However, Sanders was convicted of resisting arrest, an element of which required that the arrest and use of force in making the arrest be lawful and not excessive. If Sanders did believe the force was excessive, he would first have to appeal the conviction and have the conviction overturned or otherwise invalidated. Then, Sanders would not be barred from filing a Section 1983 claim.

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

Ballou v. McElvain

____ F.3d _____, 2021 WL _____

NINTH CIRCUIT COURT OF APPEALS

September 28, 2021



Facts Summary

TOPICS: Section 1983 Claims/Fourteenth Amendment - Equal Protection - and First Amendment

Police officer Julie Ballou (the “Plaintiff”) filed a Section 1983 lawsuit against Police Chief James McElvain (the “Defendant”). Plaintiff asserted that Defendant discriminated against her because of her gender by intentionally subjecting her to internal affairs investigations to preclude her eligibility for promotion to sergeant even though she was the most qualified candidate. The Section 1983 action alleged that this conduct violated Plaintiff’s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment and freedom from retaliation for publicly speaking about alleged discrimination under the First Amendment.

Defendant filed a motion for summary judgment. Procedurally, any party may file a motion for summary judgment. The party filing the motion is called the “moving party.” The moving party, in this case, the Defendant, asked the court to rule in Defendant’s favor without the need for trial on the basis that Defendant had qualified immunity. Because of the gravity of such a motion, the court must look at all the facts in a light most favorable to the “non-moving” party, here, the Plaintiff. If granted, a summary judgment resolves all or some of the claims in a lawsuit without the need for a trial on those issues. If denied, the lawsuit customarily proceeds with additional discovery, settlement, or a trial on the merits before a judge or jury. A denial of summary judgment does not mean the moving party will ultimately be found liable at trial or that the non-moving party will ultimately prevail at trial.

Here, the district court denied Defendant’s motion for summary judgment on Plaintiff’s Equal Protection and First Amendment claims and denied Defendant qualified immunity.

Defendant appealed to the Ninth Circuit Court of Appeals. **The Ninth Circuit considered “whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff’s favor.”**

The Ninth Circuit upheld the lower courts denial of summary judgment and denial of qualified immunity and remanded back to the lower court for further proceedings and trial.

Training Takeaway



Refresher:

1. The Fourteenth Amendment of the U.S. Constitution provides in pertinent part: “**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**” Often, courts refer to this portion of the Fourteenth Amendment as the “Due Process Clause” and the “Equal Protection Clause” respectively.
2. The First Amendment provides: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. This includes the right to speak freely without retaliation.

The Ninth Circuit noted that the Equal Protection Clause under the Fourteenth Amendment to the U.S. Constitution prohibits state actors from engaging in intentional conduct designed to impede a person’s career advancement because of gender. This prohibition guarantees state employees “a clearly established constitutional right not to be refused employment because of their sex,” and to be free from “denial of a promotion, adverse alteration of job responsibilities, and other hostile treatment” in the workplace on account of sex.

The central inquiry in an Equal Protection Clause claim is whether a government action was motivated by a discriminatory purpose. A plaintiff may make out a case of discrimination by demonstrating that the person: (1) was a member of a protected class; (2) was qualified for the position; (3) experienced an adverse employment action; and (4)

similarly situated individuals outside the person's protected class were treated more favorably.

The Ninth Circuit, **considering all facts in a light most favorable to Plaintiff**, as the non-moving party, held that Plaintiff established a claim. The Court noted that Plaintiff was listed among the top three candidates on the sergeant list, she was eligible for promotion but was passed over for that promotion several times in favor of male candidates. One male officer was promoted to the same rank sought by Plaintiff—sergeant—despite having been investigated for precisely the same policy violation for which Plaintiff was investigated. The record also indicated that Plaintiff was subjected to repeated internal affairs investigations for failure to write up reports on incidents, while male officers were not routinely subjected to investigations for the same conduct, and that the investigations became a purported reason she was not promoted.

Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations so long as the officials did not violate “clearly established law.” Viewing all facts in a light most favorable to Plaintiff, the Court held that the facts supported an inference that Defendant's action violated clearly established rights under the Equal Protection Clause under the Fourteenth Amendment. Therefore, Defendant was not entitled to qualified immunity on that claim.

Finally, the Court affirmed the denial of qualified immunity to Defendant on Plaintiff's First Amendment retaliation claim. It held that Plaintiff's speech opposing sex discrimination in the workplace was inherently speech on a matter of public concern and was clearly protected by the First Amendment. Again, the Ninth Circuit did not make an ultimate decision as to Plaintiff's claims. Rather, it viewed all facts in a light most favorable to Plaintiff at the procedural stage of a motion for summary judgment (judgment in Defendant's favor without trial). The Court denied qualified immunity and returned the case to the district court for further proceedings.

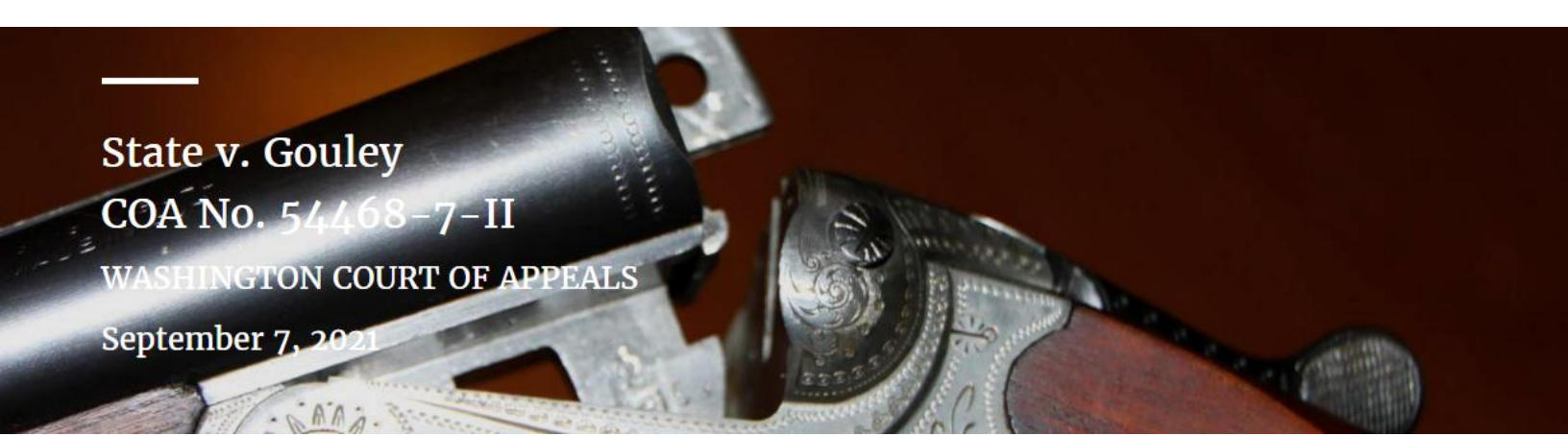
EXTERNAL LINK: <https://cdn.ca9.uscourts.gov/>

State v. Gouley

COA No. 54468-7-II

WASHINGTON COURT OF APPEALS

September 7, 2021



Facts Summary

TOPIC: Unlawful Possession of a Firearm

Gouley was convicted of a felony and was under community supervision when he missed an appointment with Russell, his community corrections officer. Because of Gouley's failure to report, the Department of Corrections issued a warrant for Gouley's arrest. Several officers, including Russell, attempted to locate Gouley at his listed residence to execute the warrant.

The officers found Gouley asleep in his bedroom. In searching the bedroom, the officers discovered a shotgun under Gouley's bed. Gouley was previously convicted of a serious offense and was prohibited from possessing a firearm. After Gouley had been placed in the squad car, he told Russell that the shotgun belonged to him and had been given to him by his great uncle.

The shotgun was a 20-gauge bolt action shotgun made by Kessler Arms. Although the company was only in business for two years during the early 1950s, the shotgun was not rare. When the shotgun was discovered under Gouley's bed, it was missing a bolt action assembly and was not operable in that condition.

The State charged Gouley with one count of first-degree unlawful possession of a firearm and one count of escape from community custody.

During trial, the State's expert witness testified that the shotgun was not operable in its present state, but to make the shotgun operable a bolt or bolt action must be inserted into the receiver of the firearm. A bolt action for that shotgun was readily available for purchase online. Aside from the missing bolt action, the expert did not observe any other defects in the firearm. Prior to trial, Gouley stipulated to the admissibility of his custodial statements that


the shotgun belonged to him and was given to him by his great uncle.

The jury convicted Gouley of first-degree unlawful possession of a firearm and of escape from community custody. Gouley appealed his conviction of first-degree unlawful possession of a firearm. The Court of Appeals denied Gouley's appeal.

Training Takeaway

Gouley was convicted of unlawful possession of a firearm under former [RCW 9.41.040\(1\)](#), which provided that a person is guilty of the crime of unlawful possession "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter." Gouley argued that the evidence was insufficient to sustain his unlawful possession of a firearm conviction because the State did not set forth sufficient evidence that the shotgun was a "firearm" as defined under former RCW 9.41.010(9) (2017) because the State did not prove that the shotgun could be made operable with reasonable effort in a reasonable amount of time.

A "firearm" as defined in former [RCW 9.41.010\(9\)](#) is a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."

 **Note:** That definition has not changed in the current RCW 9.41.010(11) which reads: "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."

According to prior cases, the court ruled that to qualify as a firearm within the meaning of former RCW 9.41.010(9), the firearm "need not be operable during the commission of a crime." Instead, the important consideration was "whether the firearm is a 'gun in fact' rather than a 'toy gun.'" The real gun need not be loaded or even capable of being fired to be a firearm. Consequently, whether a firearm can be rendered operational with reasonable effort and within a reasonable time is immaterial to whether the firearm is a "firearm" under former RCW 9.41.010(9).

Although the shotgun was missing a bolt action, the expert testified that the gun could be made operable and could fire if a bolt or bolt assembly were inserted into the receiver. Gouley did not dispute that the shotgun was a gun in fact, but he argued that was not enough for the State to meet its burden. The Court held that the fact that the shotgun was defective or inoperable when it was discovered did not mean that the shotgun was a toy, or anything other than a “gun in fact.” Whether the device was a gun in fact was the only relevant determination that the jury had to make. The evidence was sufficient to establish that the device recovered in Gouley’s bedroom was a gun in fact, meeting the definition of firearm under former RCW 9.41.010(9). NOTE: You can review the current statute at: app.leg.wa.gov

NOTE: You can review the current statute at: <https://app.leg.wa.gov/>

The definition of firearm is the same as presented in this case, but now located under RCW 9.41.010(11), not [RCW 9.41.010\(9\)](#). The changes to the RCW likely would not change this court’s decision that a firearm need only be a “gun in fact” and not proven operable at the time of the offense. But that determination will be left to the courts, and for purposes of this LED, this case, while decided under a former RCW, demonstrates how a court interprets a statute.

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