

Law Enforcement Digest



LED Case Overview

Covering cases published in July 2024

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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 cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to key Washington State prosecutor and law enforcement case law reviews and references.

The materials contained in the LED Online Training are for training purposes. All officers should continue to consult with their department legal advisor for guidance and policy as it relates to their particular agency.

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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.

WASHINGTON LEGAL UPDATES

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

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [\[2018-2021\]](#) | [\[2022-2023\]](#) [\[2024\]](#)

Case Review

The [Washington State Judicial Opinions](#) website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

Summary of July Cases

The cases included in this month's training come from both state and federal appellate courts. The cases include an opinion by the **Washington Supreme Court** arising from a federal lawsuit directed at homeless camper van enforcement. The **Washington Courts of Appeals** added three cases which addressed a broad range of topics. The issues included the marital counseling privilege, Washington's Privacy Act, detention under the Involuntary Treatment Act and cell phone search warrants.

And, finally, there were three cases from three separate panels from the **Ninth Circuit Court of Appeals**, which considered qualified immunity in federal civil rights lawsuits arising out of alleged excessive use of force claims. Not bad for summertime light reading.

Case Menu

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4. State v. Ortega, 39478-6, Division Three, Washington Court of Appeals (July 11, 2024)
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QUESTIONS?

- Please contact your training officer if you want this training assigned to you.
- Visit the ACADIS portal page for status, news and **resources** for organizations, officers and training managers news, updates, and links.

General Disclaimer: The case digests presented here are owned by the Washington State Criminal Justice Training Commission. They are created from published slip opinions^[1] and are general and may not apply to specific issues in specific cases or investigations. They are published as a research and training resource for law enforcement officers, investigators, detectives, supervisors, agencies, and other interested law enforcement-related parties.

The digests do not constitute legal advice, nor does their publication create or imply an attorney client relationship with any law enforcement agency or officer or party. All law enforcement personnel, parties, and agencies must review the actual published case opinions and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on the application of the opinions to specific issues in specific cases or investigations.

[1] Slip opinions are frequently revised after initial publication and after the creation of these case digests. In any specific case or investigation, it is necessary to review the final version of the opinion published by the Washington State Judicial Opinions website.



Potter v. City of Lacey

No. 10118-1

Washington Supreme Court

July 3, 2024

Potter v. City of Lacey, 10118-1, Washington Supreme Court (July 3, 2024)

Factual Background

This case came before the Washington Supreme Court on an issue certified by the Ninth Circuit Court of Appeals. Such certifications are used when a federal court, in a federal case, requests that the highest court in a state rule on an issue of state law. In *Potter*, the issue was whether the defendant had a state constitutional right of travel and a related right to not travel.

The federal plaintiff was a Lacey resident who began living in a travel trailer hitched to a truck. In 2019, in response to issues associated with its homeless population, the City of Lacey passed anti-camping and anti-long term parking ordinances. The city sought to enforce its ordinances against the plaintiff. In response, he filed a lawsuit in state court. The lawsuit was removed (transferred) to federal district court.

The federal trial court dismissed the lawsuit, which led to the appeal before the Ninth Circuit. In its review of the appeal, the Ninth Circuit asked the Washington Supreme Court to rule on a specific issue of Washington law.

The question was framed as follows:

Is the right to intrastate [that is within state boundaries] travel in Washington protected under the Washington State Constitution, or other Washington law? If Washington state law protects the right to intrastate travel, does the RV [(recreational vehicle)] Parking Ordinance codified in LMC [(Lacey Municipal Code)] §§ 10.14.020-[.]045 violate Jack Potter's intrastate travel rights? [Potter Slip Opinion](#), p. 1

Analysis of the Court

The Washington Supreme Court first re-framed the issue as a question of *the right not to travel*. This was because the plaintiff's lawsuit arose out of his desire to leave his truck and travel trailer parked on public streets and in

public places in the City of Lacey.

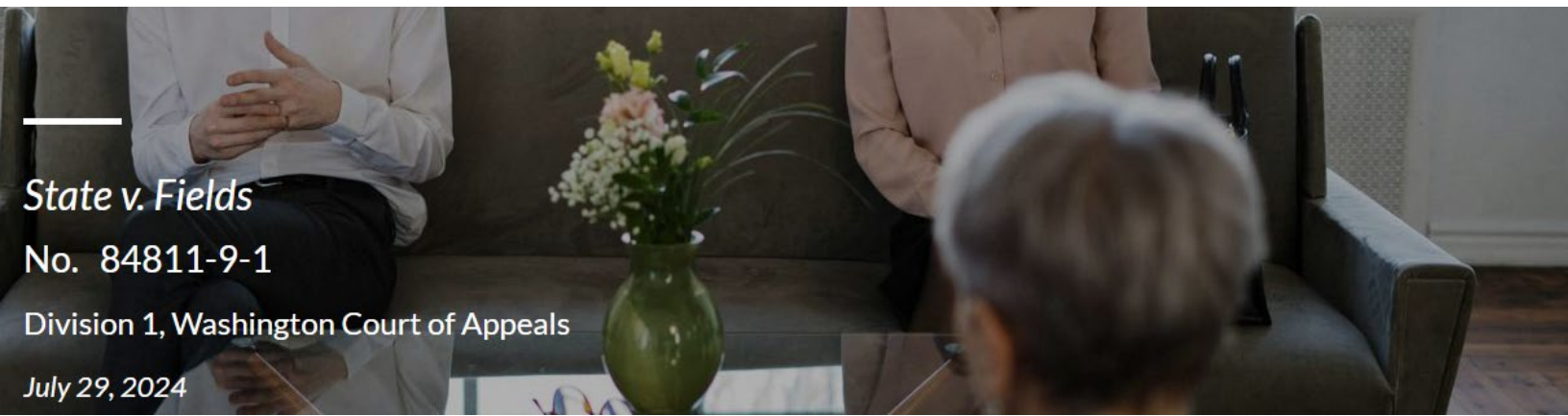
The short answer to the question was that the right to travel within the state did not inherently include a state constitutional right to park or stay in place or not travel. “The answer to that question is no. Potter has not established that his claimed right to reside inheres in a Washington state constitutional right to intrastate travel or that it protects his preferred method of residing in Lacey: by siting his 23-foot trailer on a public street in violation of generally applicable parking ordinances.” [Potter Slip Opinion](#), p. 2.

The court examined cases concerned with both federal and state constitutional claims. It found that, contrary to the arguments of the plaintiff, both federal and state cases provide for the power of states and municipalities to utilize their police power to adopt provisions of general applicability to address health and safety problems. “That state constitutional grant of authority empowers cities to enact parking ordinances ‘to keep traffic moving, to minimize congestion, and, at the same time, to afford users of the highways an opportunity to transact business with the occupants of abutting property.’ ” [Potter Slip Opinion](#), p. 11.

Training Takeaway

Anti-camping and anti-long term parking ordinances are front line provisions enacted by state and local communities to address chronic problems associated with homelessness and RV and tent encampments. This decision supports the use of such local ordinances by law enforcement to address such intractable health and safety issues.

[EXTERNAL LINK: View the Court Document](#)



State v. Fields

No. 84811-9-1

Division 1, Washington Court of Appeals

July 29, 2024

State v. Fields, 84811-9-1, Division 1, Washington Court of Appeals (July 29, 2024)

Factual Background

This case came before the court from a rape conviction. The defendant was convicted of raping his wife by having intercourse with her while she was unconscious, asleep, and unable to consent. The appeal included review of three evidentiary issues that will be of interest to sexual assault detectives and other law enforcement personnel who run into privileged and private communications. The court's analysis included the marital counseling privilege, the privacy act, and law enforcement opinion testimony concerning the demeanor of a victim.

The court's recitation of the facts included that the couple involved was married with children. The defendant husband began assaulting his wife while she was asleep in 2011 after the birth of their child. The assaults happened at night. The victim wife discovered the assaults when she noticed semen in her vagina the mornings after. She also woke to find the defendant digitally penetrating her and engaging in penile vaginal intercourse. She reported the assaults to law enforcement in May 2017.

Before reporting the assaults, the victim and the defendant attempted marital counseling with a state licensed counselor. During these sessions the defendant made disclosures that were introduced into evidence at trial. The counselor testified as a trial witness and copies of her counseling notes were admitted over the defendant's objection. The objection was based on Washington's marital counseling privilege. See [RCW 5.60.060](#). The resolution of the defendant's objection included the defendant's attorney conceding the prosecution's argument, which in turn led to an issue of ineffective assistance of counsel which was included in the court's analysis on appeal.

The victim also recorded incriminating admissions from the defendant on her cell phone. These too were admitted over the defendant's objection at trial. The defendant's objection cited Washington's privacy act. See [RCW 9.73.030](#).

The defendant claimed that the recordings were made in violation of Washington's restrictive all party consent rule.

The facts underlying the third issue concerned testimony from an officer about the victim's demeanor when she reported the sexual assaults. The defense attorney had cross examined the victim and asked her whether she was gleeful, excited, or happy when she reported the incidents. In an effort to rebut that line of inquiry the prosecution asked the detective whether the victim was gleeful, excited, or happy when she reported and disclosed the assaults to law enforcement. The trial court overruled the defendant's objection that the detective's testimony was improper opinion testimony.

Analysis of the Court

The Court of Appeals resolved the marital counseling privilege and privacy act issues against the state and reversed the defendant's conviction. The court affirmed on the opinion testimony issue.

The court reviewed the statute which provides for the marital counseling privilege. In pertinent part the statute states: "(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under [Washington State law] *may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual* in a professional capacity when the information was necessary to enable the individual to render professional services to those persons..." [RCW 5.60.060](#) (bold/italics supplied). The key issues identified by the court were whether the privilege was waived by the defendant because both the defendant and the victim were present during the sessions when the incriminating statements were made.

The court's resolution of the waiver issue included that the statute provided for joint counseling. Therefore the presence of another person in the counseling session, namely the victim, did not waive the privilege. The court stated, "[T]he legislature did not limit this privilege only to counselors treating individuals, but specifically provided privilege for a licensed 'marriage and family therapist' and that 'the legislature's specific inclusion of marriage and family therapists in the statute governing privilege, evidence an intent that the privilege encompass those seeking marriage and family therapy specifically, which often include couples and families.'" [Fields Slip Opinion](#), p. 11.

The improper admission of the marital counseling evidence also created an ineffective assistance of counsel issue. Because the defense attorney partially

conceded admission of the evidence when there was a valid objection, the concession constituted deficient performance that was prejudicial and was a further reason for overturning the conviction.

The next issue was the privacy act. The court began by observing that Washington's privacy act is "one of the most restrictive in the nation." [Fields Slip Opinion](#), p. 19. There were several violations of that act that led the court to hold that admission of the recorded statements of the defendant was error.

The first violation was that there was no announcement by the victim that the conversation was being recorded. A section of the statute provides for implied consent where such an announcement is included in the recording. No such announcement was present and thus implied consent did not apply.

Furthermore, the circumstances and content of the recordings showed that the defendant had not consented. The court applied the "reasonable expectation" of privacy standard, which includes examination of the "subjective intention" of all parties. [Fields Slip Opinion](#), p. 20. After examining the facts, and in particular the defendant's express objection to being recorded, the court had no difficulty concluding that the victim had violated the act.

Despite reversing the conviction on the marital privilege and privacy act issues, the court ruled in the state's favor on one issue. Held that the detective was properly permitted to give "opinion" testimony concerning the victim's demeanor when she reported the assaults. She was described as having emotional behaviors appropriate to a rape victim. In part the issue went in the state's favor because the defendant had cross examined her about her demeanor first.

Training Takeaway

Issues involving the marital counseling privilege and privacy act recordings are not unique to sexual assault investigations. They are likely to arise in domestic violence homicides, or child sexual abuse investigations, among others. Review of the terms of the privilege and the requirements of the privacy act should attend any attempt to gather evidence that could be impacted by those provisions. Exclusion of evidence is not a certainty, but it is a real possibility.

In regard to the marital counseling privilege, the court hinted that certain additional facts might have strengthened the prosecution's argument. One

such fact was the possibility that the counseling records may have been part of the evidence in a separate divorce case.

The court said,

The State presented no evidence beyond [the prosecutor's] own assertions before the trial court that Fields consented to releasing the challenged records to the family law court. Although the exhibit introduced at trial includes a fax cover memorandum, it does not indicate who requested the records, nor whether they were produced at the behest of a subpoena. It is similarly unclear whether these records were produced for the instant case or for a family law proceeding. The party seeking to admit evidence bears the burden of establishing its admissibility. [Fields Slip Opinion](#), pp.12-13

If the marital counseling evidence had been previously disclosed in court in a separate divorce proceeding by the defendant, the prosecutor's case for admitting in would have been greatly strengthened. As with many issues in cases involving married couples, it would have been prudent to review the family court records for additional support for the marital counseling evidence.

[EXTERNAL LINK: View the Court Document](#)



Instant is a descriptive term used to refer to the topic being discussed. The term can refer to cases, orders, motions, judgments, etc. that are before a court. Instant is often used synonymously with the terms "at bar" and "at issue." In the above quote, "instant case" means "this case."

Detention of CAA

No. 58800-5

Division Two, Washington Court of Appeals

July 30, 2024

Detention of CAA, 58800-5, Division Two, Washington Court of Appeals (July 30, 2024)

Factual Background

This case arose from a civil commitment after a court finding of mental incompetence. Such commitments are known as “felony-based commitments” or “felony flips.” The case will be of interest in cases involving detention of suspects for apparent mental disorders. The issue was whether the “true threat” mental state element, which is required to be proved as an element of harassment crimes by the First Amendment, must be proved before a defendant can be detained under the Involuntary Treatment Act (ITA). See [RCW 71.05.280](#).

The defendant had a lengthy history of mental health incarceration and treatment. During one of his many periods of release into the community, he was found sleeping in a grocery store doorway blocking foot traffic into the store. A security officer responded. The security officer confronted the defendant and sought to have him move on. The defendant responded by pulling what appeared to be a gun and threatening to shoot the security officer. He was arrested and prosecuted for harassment.

During the court proceedings the defendant was found mentally incompetent and not restorable. This led to the trial court ordering him to be detained for civil commitment. The trial court ordered the detention, and that order was appealed. The primary issue on appeal was whether the mental state element of the underlying crime (in this case, harassment) must be proved before a mentally ill suspect may be detained under the ITA.

Analysis of the Court

The court began with the express provisions of the Involuntary Treatment Act. It observed, “The statute does not require the State to prove every element of the underlying felony, just ‘acts constituting a felony,’ and it explicitly

relieves the State from having to prove any [mental] element.” [Slip Opinion Detention of CAA](#), p.5. In light of this provision, the defendant argued that the statute was unconstitutional under the First Amendment.

The First Amendment argument was based in large part on a recent U.S. Supreme Court decision. See [Counterman v. Colorado](#). That case held that a prosecution for a speech-based crime such as harassment must include a recklessness mental state element in order to comply with the First Amendment. The question for the court in CAA was therefore whether that requirement applied in the felony flip context.

The court rejected the argument. It analyzed the purposes of the ITA. Its purpose is that it is a means to detain mentally ill suspects for their own best interests and for public safety reasons. That purpose was different than the criminal prosecution and punishment purpose at issue in *Counterman*. Thus, the true threat requirement of *Counterman* did not apply to involuntary commitment under the ITA. The court also distinguished state law cases for the same reason.

One of the reasons for the mental state requirement in *Counterman* was “self-censorship.” That concern was not applicable in the ITA context where the suspect is so gravely mentally ill that he is not competent. The court observed reasonably, “Nor is self-censorship implicated by the ITA. Self-censorship presupposes that an individual is capable of making deliberate decisions, including intentionally choosing to curb the exercise of their freedoms. . . It is self-evident that the ITA is designed for people who are limited in their cognitive abilities and decision-making skills—a candidate for felony-based commitment would simply not be capable of the level of contemplation that drove *Counterman*’s concern for self-censorship.” [Slip Opinion Detention of CAA](#), p.12.

The court in CAA upheld his felony flip commitment against his First Amendment challenge. Thus, it supports the proposition that prosecutors and law enforcement officers need not show that a gravely mentally ill suspect had a particular mental state in a mental health detention under the Involuntary Treatment Act.

Training Takeaway

Specific language in the Involuntary Treatment Act specifies that mental states that are elements of criminal offenses need not be proved for civil commitments. Thus, law enforcement need only be concerned with whether

the suspect's actions were "acts constituting a felony." Law enforcement need not be concerned with whether the suspect had the mental state or mental capacity to commit a criminal offense. [Slip Opinion Detention of CAA](#), p. 6.

[EXTERNAL LINK: View the Court Document](#)



State v. Ortega

No. 39478-6

Division Three, Washington Court of Appeals

July 11, 2024

State v. Ortega, 39478-6, Division Three, Washington Court of Appeals (July 11, 2024)

Factual Background

This case came before the court on an appeal from convictions of child rape. The investigation included recovery of sexually explicit images from the defendant's cell phone via a search warrant. In the published part of the court's opinion, the court reviewed and resolved search and seizure issues concerning the cell phone warrant.

The cell phone warrant was part of an investigation of the defendant for having raped his girlfriend's two young daughters. The two girls disclosed the abuse in 2019. In her disclosure, one of the daughters stated that the defendant had recorded images of the abuse on his cell phone. The cell phone was turned over to the detectives by a family member. After it was in police custody, detectives applied for a search warrant to recover the images. "The superior court granted a warrant, authorizing police to search Mr. Ortega's cell phone and seize any images or videos depicting Mr. Ortega engaged in 'sexual contact' with [the daughter], as well as any information identifying the owner of the device." [Ortega Slip Opinion](#), pp. 2-3.

The extraction process included the making of a mirror image of all data on the defendant's cell phone. The mirror image included much more than sexually explicit images or videos. The detectives, however, did not look at or review any of the data except files that contained images or videos. As to the remaining data files, they preserved the entire mirror image and explained that "the forensic extraction process 'preserves [the cell phone] in the same format that it was at the time it was searched.'" [Ortega Slip Opinion](#), p. 4.

The cell phone search yielded a number of images of sexual abuse. These were the subject of a suppression motion brought by the defendant. He alleged (1) that the search warrant was insufficiently particular, and (2) that the search conducted by the detectives exceeded the scope of the search authorized by the

warrant. The trial court denied the suppression motion on both issues and admitted the images into evidence at trial.

Analysis of the Court

The Court of Appeals reviewed both claims from the suppression motion. It started with the claim that the warrant itself was insufficiently particular. It rejected that claim.

Under both the Fourth Amendment and the Washington Constitution a search warrant is required to “describe with particularity the place to be searched and the persons or things to be seized.” [Ortega Slip Opinion](#), p. 6. This requirement is intended to prevent law enforcement from engaging in a general rummaging of a suspect’s affairs and is especially important with cell phones because of the vast amount of private information they are capable of storing.

The court found no fault with the warrant in regard to the particularity requirement. It stated, “The terms of the warrant were sufficiently descriptive to direct the actions of law enforcement; the warrant only allowed for a search of areas of the phone where the officer might find photos or indicia of ownership. And, as set forth in the warrant, there was probable cause to believe that images of Mr. Ortega assaulting M.R. would be found on the phone and that the phone belonged to Mr. Ortega.” [Ortega Slip Opinion](#), p.7 (footnote omitted).

After determining that the warrant was sufficiently particular, the court turned to whether the detectives had exceeded the scope of the warrant. This section of the opinion included review of the mirror image extraction process and subsequent review of files categorized as containing images.

The court stated that warrant searches may include “the entire area in which the object of the search may be found.” [Ortega Slip Opinion](#), p.9. Furthermore, computer searches “may be as extensive as reasonably required to locate items described in the warrant based on probable cause.” [Ortega Slip Opinion](#), p. 8. Under these standards the search conducted by the detectives did not exceed the scope of the warrant.

The defendant argued that the mirror image process made the entire content of the cell phone “available” to the police. But testimony from the detectives during the suppression motion proved that they only opened files that contained images. Since the warrant authorized seizure

of images of sexual abuse, the detectives had reasonably confined their search to files that might contain the images authorized to be seized by the warrant.

The court therefor rejected the constitutional challenges to the warrant and the search. It affirmed the defendant's child rape convictions.

Training Takeaway

The particularity requirement for search warrants is related to the probable cause requirement. Search warrants that do not particularly describe what is being searched for invite suppression motions and scrutiny by courts. Detectives writing warrants should keep in mind what it is that they are searching for and why it may be found in the place to be searched. This is true of cell phones, computers, and other devices capable of storing images and other evidence that may be of importance in an investigation.

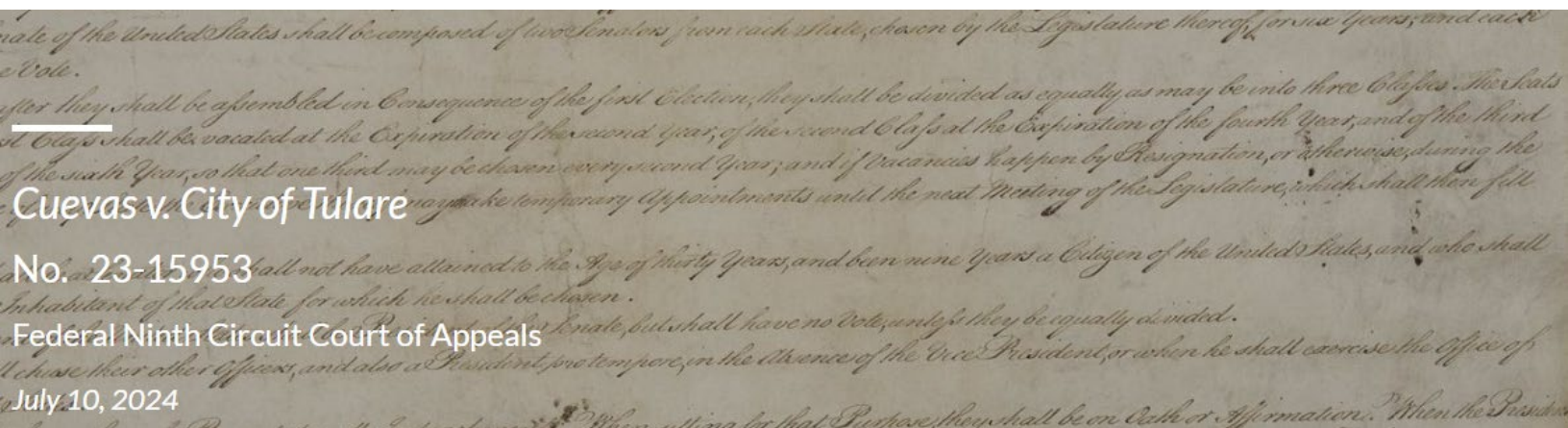
The exceed the scope of the warrant issue is also of great importance. The evidence to be seized can be seized because there is probable cause to believe it is relevant to the investigation and the crimes charged. Had the detectives in *Ortega* searched files that did not contain images, the court could well have held that the search exceeded the scope of the warrant. Instead, the detectives testified that they did not open non-image files and thus confined their search to the images that the victim had stated were on the cell phone.

[EXTERNAL LINK: View the Court Document](#)



Federal cases should be reviewed by Washington law enforcement with caution. There are many issues of interest to Washington law enforcement, to include criminal procedure, search and seizure, application of evidence rules, and uses of force, and other constitutional issues, that are decided differently by Washington courts compared to their federal counterparts.

All law enforcement personnel, parties, and agencies must review the actual published case opinions in these cases and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on whether the application of federal cases should be applied to specific issues in specific cases or investigations.



Cuevas v. City of Tulare, 23-15953, Ninth Circuit (July 10, 2024)

Factual Background

This case came before the court on an appeal from an excessive use of force lawsuit. The issues were related to federal civil claims, not criminal charges, and the court's resolution of the issues may not necessarily be consistent with Washington state criminal or civil rights law. The case is presented here for educational purposes only.

The incident started as a traffic stop. A patrol officer saw the suspect drive through several intersections without stopping. A female passenger, who was one of the excessive force plaintiffs, was in the front passenger seat. The officer attempted to stop the suspect but in response the suspect fled. The driving during the pursuit included a distance of four to ten miles, high rates of speed, and multiple near collisions with other motorists. The pursuit came to a halt when the suspect's vehicle became stuck in mud on the side of a roadway.

Multiple officers surrounded the vehicle. The suspect driver was given commands through closed windows. A sergeant broke the driver's side window to ensure the suspect was able to hear the commands. A K9 officer threw his police dog through the window into the car with a command to bite the suspect. In response, the suspect fired shots at the dog and killed it. One of the shots also hit the K9 handler. The officers then fired shots at the suspect in the car.

The suspect driver was killed during the shooting. The female front passenger was injured. The federal lawsuit was filed alleging excessive force in violation of the Fourth Amendment.

The trial court granted summary judgment and dismissed the claims. The case was heard in the Ninth Circuit by a three-judge panel. The Ninth Circuit affirmed the dismissal.

Analysis of the Court

The Ninth Circuit panel reviewed the case under the standard of review that applies to summary judgments. It considered the case in the light most favorable to the plaintiffs. The elements of the excessive force claims are that the plaintiff must have been seized as contemplated by the Fourth Amendment and the seizure must have been through excessive force.

In response to the excessive force claim, the officers asserted qualified immunity. In federal civil rights law suits, "Qualified immunity protects government officials from liability under § 1983 'unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was *clearly established* at the time.' " [Cuevas Slip Opinion](#), p. 7 (bolded italics supplied).

The clearly established issue was the primary issue analyzed by the Ninth Circuit panel. The panel held that it was clearly established that the passenger was seized under the Fourth Amendment, but not that the officers used excessive force.

The panel reviewed similar cases and came to the conclusion that they were different from this case. This meant that they did not clearly establish that excessive force had been used. "In short, none of Cuevas's cases clearly establish that officers violated her rights when they shot her while defensively returning fire during an active shooting. Cuevas has not carried her burden." [Cuevas Slip Opinion](#), p. 13.

The panel also discussed a related issue. The excessive force plaintiffs claimed that the excessive force was “obvious.” [Cuevas Slip Opinion](#), p. 14. The panel rejected this argument too. It noted that obviousness has been recognized by the U.S. Supreme Court in limited cases where a suspect posing no threat to anyone is shot and killed. Those cases differ from this case: “But the fact that officers cannot kill a man who is not a threat says little about what they can do in the myriad cases where a suspect does pose a threat. The Supreme Court has instructed us that ‘[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.’ ” [Cuevas Slip Opinion](#), p. 14-15.

Training Takeaway

The qualified immunity defense in this case was upheld under the particular facts and procedural posture of this case. That issue is an issue that depends in large measure on the facts in the particular case and how the facts and evidence are viewed by the judicial officers assigned to the case. Also, the standards at issue in *Cuevas* are standards that apply to federal civil rights liability. They may not apply in other contexts, especially criminal liability under Washington’s criminal use of force statutes, or even civil liability under Washington state civil rights law.

[EXTERNAL LINK: View the Court Document](#)



Rosenbaum v. The City of San Jose

No. 22-16863

Federal Ninth Circuit Court of Appeals

July 11, 2024

Rosenbaum v. The City of San Jose, 22-16863, Ninth Circuit (July 11, 2024)

Factual Background

This case came before the court from a federal civil rights lawsuit. The claims arose out of an alleged excessive force incident involving a municipal police K9. The issues were related to federal civil rights claims, not criminal charges, and the court’s resolution of the issues may not necessarily be consistent with Washington state criminal or civil rights law. The case is presented here for educational purposes only.

The incident began as a domestic violence call in September 2019. Officers were dispatched in response to a call from the suspect’s partner. The response included a K9 unit. Before the officers made contact with the suspect, his partner reported that he was under the influence and that he had owned firearms but that she believed they had been destroyed in a fire.

After giving commands and announcements, the K9 was released into the two-story residence. Thereafter, the officers entered and found the suspect on the second floor. He was given commands to surrender but did not. He was warned that if he failed to surrender the K9 would be deployed, and he would be bitten. He did not surrender and the K9 was released. This was approximately nine minutes after the officers had made entry.

The officers went upstairs after the K9. They found the suspect “unarmed and seated with his back against the wall and [the K9] biting his right forearm.” [Slip Opinion Rosenbaum v. City of San Jose](#), p.5. In the discovery from the lawsuit, the suspect alleged “that ‘Officer Dunn deployed his police K9 to attack and bite [him] even though [Rosenbaum] had his hands visibly raised in a surrender position, was not armed, was not trying to evade arrest, and had posed no threat to the officers.’ Rosenbaum further alleges ‘that after the K9 was deployed to bite [Rosenbaum], and while [Rosenbaum] was laying on his stomach in full surrender with his hands stretched out and surrounded by all named Defendants with their firearms trained on him, that the K9 was

allowed to continue biting [him] for over 20 seconds, before being pulled away.’ ” [Slip Opinion Rosenbaum v. City of San Jose](#), p.6.

The Ninth Circuit panel reviewed body cam footage of the incident. It included in its opinion and observation from its own review of the video that the footage “generally supports Rosenbaum’s allegations.” [Slip Opinion Rosenbaum v. City of San Jose](#), p.6.

Analysis of the Court

The procedural posture of the case was important to the court’s decision. The defendant officers and city appealed the trial court’s denial of summary judgment. The summary judgment motion relied upon qualified immunity. The trial court ruled against the officers, which left the case to proceed to trial. The Ninth Circuit affirmed the trial court’s decision.

Because the appeal was not from a final judgment after trial, the panel considered the case in the light most favorable to the suspect. Thus, his allegations were considered to be true. The legal standard applied concerning qualified immunity was whether the officers had, (1) violated a constitutional right, that was (2) clearly established by prior case law from the Ninth Circuit or the U.S. Supreme Court. The court noted that, “Although there need not be a Supreme Court or circuit case directly on point, ‘existing precedent must have placed the statutory or constitutional question beyond debate.’ ” [Slip Opinion Rosenbaum v. City of San Jose](#), p. 8.

The panel determined under these standards that summary judgment was properly denied. It summarized its reasons as follows: “Resolving all factual disputes and drawing all inferences in Rosenbaum’s favor, a reasonable jury could find that Defendants exceeded the force reasonably necessary to effectuate an arrest by allowing [the K9] to continue biting Rosenbaum for more than twenty seconds after he had fully surrendered and was under officer control.” [Slip Opinion Rosenbaum v. City of San Jose](#), p. 11.

Training Takeaway

This case did not arise from a Washington incident, nor did it involve a Washington law enforcement agency. In addition, there was no discussion or reference to the K9 deployment policies of the involved agency. Thus, its application to specific incidents or policies in our state is greatly reduced. Nevertheless, there are several aspects of the decision that should be

considered.

First, the court reviewed the body cam footage for itself and determined that it did not contradict the claims of the suspect. This lent support to the panel's conclusion that the summary judgment should not be granted. With the proliferation of body cam footage in our state and elsewhere, it is important for LE to be aware that the footage generated will be viewed and analyzed not just by law enforcement and prosecutors, but also by defense attorneys, plaintiff civil rights attorneys, and ultimately the courts. As with so many issues in court cases the significance and helpfulness of body cam footage depends on the eye of the beholder.

Second, if the case goes to trial, a jury most likely would view the footage and evaluate the suspect's and the officers' trial testimony in light of their perspective. They will be coming from a wide variety of backgrounds and perspectives and are sure to behold the footage with their own perspectives in mind. In short, body cam footage should be evaluated with discernment and caution and with the courts and juries in mind.

[EXTERNAL LINK: View the Court Document](#)



Scott v. Smith

No. 23-15480

Federal Ninth Circuit Court of Appeals

July 30, 2024

Scott v. Smith, 23-15480, Ninth Circuit (July 30, 2024)

Factual Background

This case came before the court from a civil rights, excessive force lawsuit. The trial court denied the law enforcement officer defendants' motion for summary judgment, which was based on qualified immunity. The issues were related to federal civil rights claims, not criminal charges, and the court's resolution of the issues may not necessarily be consistent with Washington state criminal or civil rights law. The case is presented here for educational purposes only.

The officer defendants were dispatched to a call from a mentally ill suspect. Upon arrival, they found the suspect suffering from psychotic symptoms. He refused to come to the door and made statements indicating that he was being attacked and that the officers should break down the door. The officers could see that no attack was happening and determined that the suspect was actively experiencing mental health symptoms.

The officers consulted a sergeant and were advised that exigent circumstances would not support forced entry. But a short time later the suspect came out of the residence. He had a pipe in his hand. Upon being commanded to do so he dropped the pipe. As he was being detained, he also acknowledged having a knife, and handed the knife to one of the officers "handle side out." [Slip Opinion Scott v. Smith](#), p. 6.

During the detention, the officers took the suspect to the ground. The suspect screamed and struggled and pleaded with the officers to leave him alone. One officer placed his body weigh on the suspect's upper torso and neck for up to two minutes. The suspect lost consciousness and couldn't be revived. Paramedics were called but the suspect died at the scene. An expert for the civil rights plaintiffs opined that the cause of death was "restraint hypoxia." [Slip Opinion Scott v. Smith](#), p.7.

The defendant officers brought a summary judgment motion based on qualified immunity. That motion involved whether the officers were entitled to qualified immunity for the claimed Fourth Amendment unlawful restraint claim, and also for a Fourteenth Amendment denial of familial association claim. The Ninth Circuit panel reviewed both claims.

Analysis of the Court

The Ninth Circuit panel first reviewed the unlawful restraint claim. Because the appeal was from summary judgment, the court considered the facts in the light most favorable to the civil rights plaintiff. Under that standard, the court considered whether the facts supported a violation of a constitutional right, and whether the violation was clearly established by prior case law.

As to the unlawful restraint claim, the court held against the defendant officers. It pointed out that, “Our precedent establishes that the use of bodyweight compression on a prone individual can cause compression asphyxia” and that therefore the restraint could constitute a use of deadly force. [Slip Opinion Scott v. Smith](#), pp. 11-12. The court then went on to analyze the government interest which the officers were enforcing and balanced that interest against the available alternatives. It determined that the balance did not weigh in the officers’ favor. “We hold that Smith and Huntsman were not justified in using deadly force against Scott, a mentally ill person who was not suspected of committing a crime and presented little or no danger.” [Slip Opinion Scott v. Smith](#), p.15.

The court also held against the officers on the clearly established issue. It stated, “Our caselaw makes clear that any reasonable officer should have known that bodyweight force on the back of a prone, unarmed person who is not suspected of a crime is constitutionally excessive.” [Slip Opinion Scott v. Smith](#), pp. 16-17.

After ruling against the officers concerning the unlawful restraint claim, the panel held in their favor on the familial association claim. That claim involved the loss of a relationship between the suspect and his family. The panel determined that although the familial association claim could support a Fourteenth Amendment violation, it was not a violation that was clearly established by prior caselaw. Thus, the defendant officers were entitled to qualified immunity as to that claim.

Training Takeaway

Restraint of a suspect through the use of bodyweight carries great risk. The *Scott* opinion was not a review of the complete facts and evidence from an appeal from a jury trial. It is not difficult to speculate about other facts that could have played a part in the death of the suspect. Nevertheless, the announcement that the force in the *Scott* case (which the court considered to be deadly force), and in similar cases, was constitutionally excessive where it was used against “a mentally ill person who was not suspected of committing a crime and presented little or no danger.” [Slip Opinion Scott v. Smith](#), pp. 16-17.

[EXTERNAL LINK: View the Court Document](#)

Cases & Reference

1. Potter v. City of Lacey, 10118-1, Washington Supreme Court (July 3, 2024)
 - [Potter Slip Opinion](#)
2. State v. Fields, 84811-9-1, Division 1, Washington Court of Appeals (July 29, 2024)
 - [Fields Slip Opinion](#)
 - [RCW 5.60.060](#)
 - [RCW 9.73.030](#)
3. Detention of CAA, 58800-5, Division Two, Washington Court of Appeals (July 30, 2024)
 - [Slip Opinion Detention of CAA](#)
 - [RCW 71.05.280](#)
 - [Counterman v. Colorado](#)
4. State v. Ortega, 39478-6, Division Three, Washington Court of Appeals (July 11, 2024)
 - [Ortega Slip Opinion](#)
5. Cuevas v. City of Tulare, 23-15953, Ninth Circuit (July 10, 2024)
 - [Cuevas Slip Opinion](#)
6. Rosenbaum v. The City of San Jose, 22-16863, Ninth Circuit (July 11, 2024)
 - [Slip Opinion Rosenbaum v. City of San Jose](#)
7. Scott v. Smith, 23-15480, Ninth Circuit (July 30, 2024)
 - [Slip Opinion Scott v. Smith](#)

Case Review

The [Washington State Judicial Opinions](#) website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

WA Legal Updates

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

[Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg

Caselaw Update by WA Association of Prosecuting Attorneys

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