Covering cases published in FEBRUARY 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.

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LED Author: James Schacht

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.

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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.

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Note: You will see *Id* used throughout this LED. It is used to refer to the immediately preceding citation.

In re: Pers. Restraint of Arntsen, WA Supreme Court (February 29, 2024)

Factual Background

This case came before the court on a personal restraint petition (PRP). In Washington, PRPs are roughly the equivalent of habeas corpus petitions. It is a collateral attack upon a criminal conviction and or sentence and is usually brought after the direct appeal. In the Arntsen PRP, the court reviewed whether there was sufficient evidence for the defendant to have been convicted of second-degree assault with a deadly weapon.

The facts in *Arntsen* arose from a road rage incident. The incident was one of three from a crime spree during a short period of time. The other two incidents were not part of the PRP. The defendant was driving behind the victim on an arterial, two-lane roadway. He appeared to have signaled to move into the right lane and in response the female victim moved into the left lane to make way. This led to the defendant driving up on the victim's car from behind, driving along side and swerving at her, rolling down his window and gesturing at her, and ultimately pulling in front of her and stopping.

The defendant got out of his car with an assault-style rifle. He approached the victim's car with the rifle. He circled her car with the rifle but never pointed it at her. He ended up getting back in his vehicle and driving away.

The victim testified. Her testimony included what the defendant did and the effect it had upon her. She testified that she had been around guns all her life and that the defendant appeared ready to use the gun and that she feared he might do so. She also admitted during her trial testimony thinking that the defendant *might not* shoot her. "She later explained that when Arntsen got out of his car, she was afraid he was going to shoot her, though by the time he got close to her, she believed 'he was not looking to shoot me, he did . . . not raise the gun like, you know, he wanted to shoot me. He had something else in mind. I have no idea what it was. I still don't know what it was.' " Arntsen Slip Opinion, *p. 4*

The incident was witnessed by a passing motorist. The motorist testified similar to the victim. Regarding what it appeared the defendant was doing with the rifle, "According to Morrill, Arntsen ran to the driver's side of the other car 'like he was

going to shoot' the person in the car. ... Morrill testified that when Arntsen approached the car, he changed the position of the gun from a lifted position down to his waist. He never saw Arntsen actually point the gun at Koenig." *Arntsen Slip Opinion, p. 4.* The court also noted that during his testimony the passing motorist described the defendant as, " 'a pretty good-sized [B]lack man,' 'every bit of six-two, . . . maybe six-three. He was a big guy.' " *Arntsen Slip Opinion, p. 4.* He also described the defendant as scary and aggressive.

The defendant was charged with second-degree assault with a deadly weapon and felony harassment. He went to trial and was convicted of the assault charge. On direct appeal, his conviction was upheld. He brought the PRP after the appeal process was completed. The PRP is the proceeding reviewed by the Supreme Court. The Court of Appeals reviewed the petition first and reversed the assault conviction.

Analysis of the Court

The Supreme Court reversed the Court of Appeals and reinstated the assault conviction. The issues discussed in the Supreme Court's opinion included whether there was sufficient evidence for a felony assault, and whether racism tainted the trial proceedings because of language used by the passing motorist in his trial testimony. The Supreme Court held in favor of the prosecution on both issues.

The first issue turned on the definition of assault. The court noted that Washington utilizes two alternative common law definitions of assault. (These are in addition to a third alternative, which in general is an unlawful touching or injuring of a victim.) The alternative that applied to this case is the creation of reasonable apprehension and fear of unlawful or injurious touching. The court discussed this alternative of assault, saying "Under this definition, the State must prove the Defendant acted with an intent to create in [their] victim's mind a reasonable apprehension of harm. ... In other words, '[a]ssault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury.' " *Arntsen Slip Opinion, p. 9*

The court's application of the assault definition alternative began with noting that on appeal a great deal of deference is paid to a jury's decision. The court also noted that the jury instruction which was given in the trial was a correct statement of the law. Thus, the jury in *Arntsen* had properly reviewed the facts and applied the correct legal standard in reaching its verdict.

The deferential review of the jury's decision contributed to the court's decision. This points up the importance for prosecutors in getting the law right in jury instructions. As to the court's own review of the facts, testimony, and evidence, the court held that there was sufficient evidence to sustain the conviction. "Although he did not point the rifle directly at Koenig, the jury could infer from Koenig's and Morrill's testimony that he intended to make her fear he might harm her with it." *Arntsen Slip*

Opinion, p. 11. The intentional creation of reasonable apprehension and fear of injury with a deadly weapon was sufficient.

The court rejected the defendant's arguments to the contrary. He argued that prior cases had established that a perpetrator must point a firearm at a victim for there to have been sufficient evidence of the required reasonable apprehension and fear. The court rejected that argument and noted that the prior cases arose from trials in which the jury instructions were erroneous. The court noted that it had never *required* pointing of a firearm in a sufficiency case. The court stated that it had previously held that pointing a firearm at a victim is sufficient, but it had not held that it is necessary for a conviction to stand.

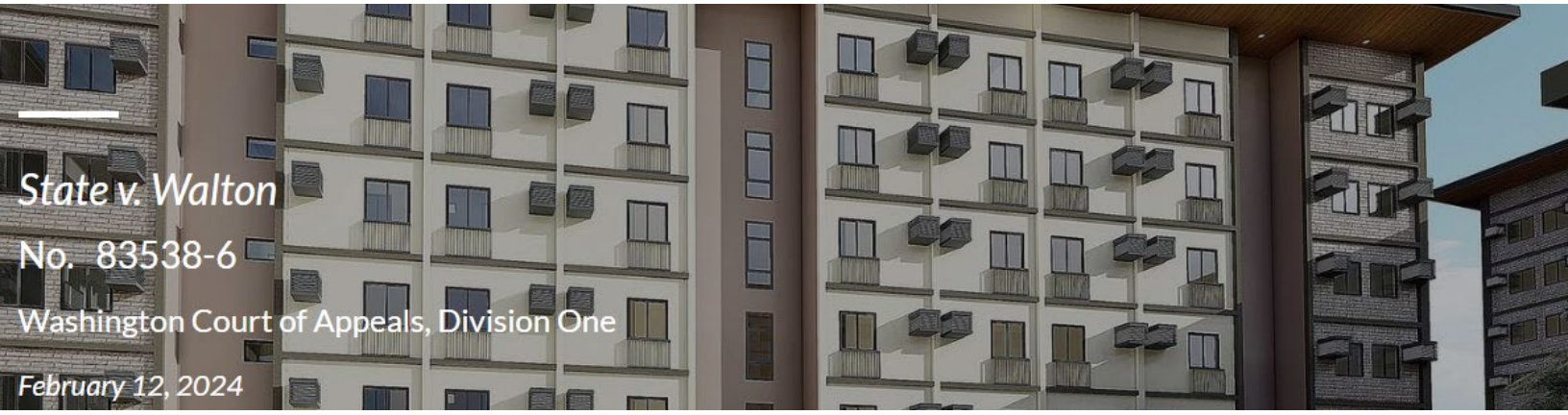
The court also rejected an argument premised on alleged racism. The court acknowledged that language referencing racial stereotypes can appeal to unconscious bias in a jury. But the court rejected the claim that it did so. The court stated, "But the conduct described by the witnesses here would be sufficient evidence of second-degree assault, regardless of the appearance of the actor. Nothing in the case shows that the witnesses' descriptions of Arntsen impacted the jury in a manner that would result in an unjust verdict." *Arntsen Slip Opinion, p. 16*

Training Takeaway

This case is well worth reading in its entirety. The common understanding of an assault as requiring unlawful or harmful physical contact or injury is incomplete. An assault can also consist of the perpetrator intentionally creating apprehension and reasonable fear of unlawful or harmful physical contact. The defendant's actions did not include pointing the rifle at the victim but the whole of the circumstances left little doubt that he was intentionally creating apprehension and reasonable fear that he might use the rifle to harm her.

The details of the victim's statements to law enforcement and her testimony on trial, which happened much later, are also particularly worth reading. It is not uncommon for the passage of time to diminish in the mind of a victim the gravity of an incident like this that did not result in actual physical injury. But as any officer knows from confronting a perpetrator with a firearm in his hand, the fear of being shot is real in the moment no matter where the muzzle is pointed. Where a victim minimizes the impact of such an event it is important to document the seriousness of the incident at the time when it was happening.

EXTERNAL LINK: View the Court Document



State v. Walton, WA Court of Appeals, Division One (February 12, 2024)

Factual Background

This case came before the court on an appeal from a conviction for second degree murder and a gross misdemeanor offense, tampering with physical evidence. The murder conviction was overturned on the basis of a race-based jury selection error. *See* GR 37. The analysis of GR 37, which applies to jury selection at trial rather than LE investigations, will not be discussed here even though it is the primary issue in the appeal. LE officers or detectives interested in that part of the case should read the slip opinion. In short, the court held that exclusion of non-"BIPOC" (Black, Indigenous, and People of Color) jurors constituted a violation of GR 37. That rule applies to jury selection and states, "The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

The gross misdemeanor issue is of greater relevance to LE. In its review of the tampering charge the court reviewed the sufficiency of the evidence and held that there had been sufficient evidence introduced during the trial to prove the elements of that charge.

The case arose from a murder of a landlord. The incident took place in March 2020. The landlord went to one of his properties and told his wife that he would return by one pm. When he did not return, she went looking for him. She made contact with the defendant, who was one of the renters. During her contact, she noticed blood on the doorstep of the defendant's unit and that the defendant was attempting to clean it up. She accused the defendant of murdering her husband and trying to conceal his blood.

Law enforcement was contacted and responded to the rental property. The officers saw what appeared to be blood and found bags with bloody clothing, cleaning supplies, and surgical gloves inside the defendant's unit. Similar evidence was found in a dumpster. A forensic officer also confirmed blood which matched the victim inside the defendant's unit.

The investigation continued at several locations away from the rental. LE found the defendant in his car near a dumpster. He was detained. In the dumpster the officers found more blood-soaked evidence and a mat from the victim's vehicle.

The defendant's statements following his detention included a claim that two suspects that, "he could definitely tell that they belong[ed] to the cartel" had abducted the victim. *Walton Slip Opinion, p. 4*

The defendant was charged with first degree murder and tampering with physical evidence. He went to trial. The trial proceedings included objections during jury selection based on GR 37. The trial court overruled the objections. The defendant was convicted of lesser included second degree murder and the tampering charge. The Court of Appeals overturned both the murder and tampering convictions on the GR 37 issue but also held that there was sufficient evidence for the tampering charge on re-trial.

Analysis of the Court

The court began its analysis of the tampering charge with a discussion of the elements of the crime. The elements included that the defendant had tampered with physical evidence at a time when he, "had reason to believe an official proceeding was pending or was about to be instituted…." Walton Slip Opinion, *p. 23*. The defendant argued that since he had engaged in his clean up and disposal actions before being arrested there was insufficient evidence that he had reason to believe an official proceeding was about to be instituted.

The court rejected the defendant's argument. The confrontation with the wife happened before the defendant had finished with the cleaning up and disposal of evidence. She had accused him of murdering her husband and then reported the incident to law enforcement. The LE investigation began shortly thereafter. The court stated, "Walton's argument erroneously assumes that the State can only prove this element when a defendant is already under arrest or investigation for a specific crime and then tampers with physical evidence in relation to that crime." *Walton Slip Opinion, p. 25*

The defendant relied upon a prior unpublished case. The court discussed that case and distinguished it from the murder investigation.

The court stated:

> Although Walton may not have been under arrest or identified by police as a suspect at the time he tampered with the physical evidence related to Howard's murder, a reasonable juror could find that he was still aware that an official proceeding, specifically a criminal investigation, would be initiated. Shortly after Howard's murder, while Walton was in the process of cleaning Howard's blood, Denise confronted Walton and accused him of murdering her husband. Under the circumstances, her assertion was sufficient for Walton to believe that an official proceeding would be forthcoming; whether it was coming at that moment or once Denise repeated those words to law enforcement is immaterial. *Walton Slip Opinion, p. 27*

The court's review of the tampering charge also included analysis of a unanimity instruction issue. This issue is of more concern to trial prosecutors but is also worth reviewing for LE. Such issues arise when several acts by themselves could constitute the charged crime. The court articulated the standard which applies to such cases where the facts show a continuing course of conduct. "To determine whether there is a 'continuing course of conduct,' the facts of the case are to be analyzed in a 'commonsense manner.' ... A variety of factors are considered, including whether the defendant committed the alleged acts within 'a small-time frame' and as part of a single, overarching criminal act." *Walton Slip Opinion, p. 28*

The court reviewed the acts of cleaning up and disposing of evidence and determined that no unanimity instruction was required. The various acts of concealment, cleaning and disposal were part of a continuing course of conduct within a small-time frame and thus met the continuing course of conduct requirement.

Training Takeaway

The most important takeaway from *Walton* for LE is the tampering charge. While the gross misdemeanor may seem insignificant stacked against the murder, such charges can be of strategic benefit because of evidence that becomes relevant, and material related to such charges. The tampering charge involves guilty knowledge on the part of the defendant. Any claim that there could be unfair prejudice in the introduction of any of the concealment evidence would have been fruitless because the evidence was directly related to a separately charged crime.

The holding from *Walton* stands for the proposition that an arrest or formal charges need not have been completed. A tampering charge can be considered during an *uncompleted* LE investigation.

EXTERNAL LINK: View the Court Document

State v. Stott, WA Court of Appeals, Division Two (February 13, 2024)

Factual Background

This case came before the court on an appeal from a conviction of three charges involving sex abuse and human trafficking. The convictions were obtained after a jury trial. The jury found the defendant guilty of attempted child rape, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes. Fortunately, the case arose from an undercover Net Nanny investigation, not from actual communication with an actual young teenage girl.

The communications between the defendant and the undercover "teenager" began when the defendant responded to the teenager's online ad in July 2018. During extensive messaging communications the defendant and the teenager discussed sexual acts and practices. The defendant was the first to bring up the topic of sex. And after he took the communications in that direction, the discussion included many discussions of various sexual practices. During the communications, the teenager's messages included repeated assertions that she was 13 years old.

The communications included discussion of meeting in person. These communications were by both the teenager and the defendant. They culminated with actual arrangements to meet. The teenager made arrangements for an Uber ride to a pizza parlor near the defendant's residence. The defendant's residence was kept under surveillance by LE. He was arrested after leaving his residence and walking in the direction of the pizza parlor for the face to face meet up.

> The court included many quotes from online chats. Officers and detectives with a need to review the nuances of the messaging may review the court's description in the linked slip opinion. *See Stott Slip Opinion.* The content is explicit and salacious, and disturbing.

The issue reviewed by the Court of Appeals came from a pre-trial motion by the defendant. The motion was based on an alleged due process violation for outrageous government conduct. The trial court denied the motion, which led to the jury trial. The jury convicted the defendant as charged.

Analysis of the Court

The Court of Appeals began its review by describing the standards and tests for outrageous government conduct. It stated, "Outrageous government conduct will be shown when the actions of law enforcement officers are 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction' . . . For the police conduct to violate due process, the conduct must shock the universal sense of fairness.' " *Stott Slip Opinion, p. 9*. As to the test to be applied to such claims, it is a five-part test announced in a prior Washington Supreme Court decision. *See State v. Lively*, 130 Wn.2d 1(1996).[1]

The five-part test from *Lively* addresses possible aspects of alleged outrageous government conduct. As with most multi-part court tests, no one factor is dispositive. The courts instead consider, "the totality of the circumstances." *Stott Slip Opinion*, p. 9. The five factors are: "(1) 'whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity;' (2) 'whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation;' (3) 'whether the government controls the criminal activity or simply allows for the criminal activity to occur;' (4) 'whether the police motive was to prevent crime or protect the public;' and (5) 'whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.' " *Id.*

The court reviewed the Net Nanny operation in light of the five-part test. It also reviewed a prior case which applied the same test under similar circumstances. See *State v. Solomon*, 3 Wn. App. 2d 895 (2018)[2]. In *Solomon,* the court had found the operation to violate outrageous government conduct.

The distinguishing features of *Stott* centered on his having steered the communications at critical stages. The court stated that the online ad had not specifically targeted Stott and that he was the one who responded to it. This supported the trial court's finding that the operation was used to "infiltrate potential criminal activity." *Stott Slip Opinion, p. 10*. The court also determined that there had not been an improper overcoming of the defendant's reluctance, nor of the detectives controlling the criminal activity. The content of the communications showed otherwise.

The last two factors involved (1) the motives of the detectives in the operation, and (2) whether such operations are repugnant to the court's sense of justice. On both factors, the court supported the investigation. It stated, "The trial court found that

[1] Free access to *Lively* and other published cases can be obtained online from the Washington Courts Public Access web page. The link to the page is here: Washington Court Opinions Public Access Page. In the citation search box, to access the *Lively* case, an officer would type in the citation to that case: "130 Wn.2d 1".

[2] Free access to *Solomon* can be obtained from the same public access web site as *Lively*. Type in the Solomon citation: "3 Wn.App. 2d 895"

the ‘Net Nanny’ operation is designed to catch would-be sexual abusers before they have a chance to sexually assault an actual child. Stott’s suggestion that he was not otherwise inclined to engage in sex with a child and only acquired that inclination in response to ‘Kaci’s’ enticements is wholly belied by the evidence that was presented to the trial court.” *Stott Slip Opinion, p. 14*

And as to “repugnant” to the court’s sense of justice, the court stated, “*Solomon* did not hold, as a matter of law, that the use of vulgar, explicit, or lewd language in undercover ‘Net Nanny’ operations is repugnant to a sense of justice. Here, the trial court determined that Stott was just as lewd and vulgar in his language as ‘Kaci,’ and the evidence presented to the court for its consideration on the motion supports that determination.” *Id.*

Training Takeaway

The support of the Net Nanny investigation in this case depended largely on the content of the messaging. Any officer or detective engaged in communicating undercover with a suspect should review the content of the communications in *Stott* and *Solomon* and other cases alleging outrageous government conduct. There is no way to anticipate how such undercover conversations will progress. However, keeping the five-part test in mind during such communications will be key to avoiding constitutional challenges based on due process and outrageous government conduct.

EXTERNAL LINK: View the Court Document

In re Pers. Restraint of Skone, WA Court of Appeals, Division Three (Feb 22, 2024)

Factual Background

This case came before the court on a personal restraint petition (PRP). The same court that heard the PRP also heard the defendant's direct appeal. The court upheld the defendant's conviction on direct appeal but granted the PRP and overturned the conviction.

The PRP concerned an issue not raised in the direct appeal, namely whether the prosecution's questioning in jury selection warranted a new trial. The court summarized its reasons for overturning the conviction as follows: "Because the prosecutor elicited the same irrelevant border security concerns during *voir dire* as educed in [a prior Supreme Court case] *Zamora*, because the prosecutor also added other irrelevant questions that inserted racially polarizing themes, because the State pursued a sentence aggravator based on Skone purportedly seeking membership in a Latino gang, and because a restraint petition should be granted when racism interferes in a fair trial, we grant the petition, vacate the convictions, and remand for a new trial." *Skone Slip Opinion, p. 3*

Ordinarily jury selection issues would not be of interest to LE. This case is different because it illustrates the degree to which our Washington appellate courts are receptive to allegations of racism in criminal trials. There are takeaways for law enforcement and prosecutors alike in the opinions filed in this case.

There are three opinions. The majority opinion includes the facts involved in the crime that was being prosecuted. The defendant was armed with a pistol and accompanied a Norteños associate to a drug meeting. During the meeting he shot the drug dealer after the drug dealer allegedly attempted to cheat the Norteño buyer. The dealer survived and testified at trial as did the dealer's girlfriend. The defendant also testified and claimed self-defense and defense of his Norteño associate.

The defendant was described by the court as a "non-Latinx Caucasian." This mattered because the challenge he brought in the PRP was based on alleged race-based misconduct of the prosecutor during jury selection. The defendant was friends with and associated with Norteño gang members.

In his statement to detectives, he admitted that his participation in the shooting earned him approval or even membership in the gang:

> [Detective] HINTZ: So, what's the next step?
>
> SKONE: (Sighs), . . . I'm not for sure, I don't know how it all works, but I mean, it's, I'm sure within' the next couple weeks or, or the next couple days or I don't know how long, but they said, give it a month or so and I would have been jumped in.

Skone Slip Opinion, p. 13

The court acknowledged the meaning of "jumped in" by acknowledging, "We assume the phrase "jumped in" means granted membership in the gang." *Id.*

The defendant was charged with first-degree assault, first-degree robbery, and two counts of unlawful possession of a firearm (UPOF), and attempted bribing of a witness. The prosecution also charged exceptional sentence aggravators for both the assault and robbery for the defendant having committed the crime "to gain or advance his position in a gang." *Skone Slip Opinion*, p. 13. At trial, the defendant was convicted of the assault, the two counts of UPOF, and the bribery charge. The jury acquitted him of the robbery and both gang sentence aggravators.

The defendant's direct appeal included a claim that the jury was biased. That claim was rejected in the direct appeal and his convictions were affirmed. The defendant then petitioned the Washington Supreme Court. That court denied review, which left the convictions affirmed and intact.

The defendant's PRP was filed after the denial of review by the Supreme Court. In the PRP, the defendant modified his jury selection challenge to claim that the prosecution had engaged in race-based misconduct during jury selection. He argued that he should be entitled to a new trial because of misconduct by the prosecutor. He made this claim even though the direct appeal resulted in the court holding that the jury selection proceedings produced a jury that was *not* prejudicially biased.

The jury selection proceedings included a ruling by the trial court in a hearing before jury selection began. The trial court ruled that the parties could inquire about U.S. border security because current events issues related to that topic could impact the jurors' beliefs or attitudes toward law enforcement. The prosecutor asked questions in conformity with the ruling but also asked about patriotism and used a highly publicized controversy concerning NFL football player Colin Kaepernick as a discussion point with the jurors.

Analysis of the Court

The three-judge panel that reviewed the PRP was bitterly divided. It granted the PRP and overturned the conviction. It accepted the defendant's argument regarding race-based misconduct of the prosecutor. The panel's decision was submitted to the Washington Supreme Court. That court let stand the panel's decision on the race-based misconduct issue.

The standards applied by the panel are mostly of interest to prosecutors rather than law enforcement. Briefly, the court noted that a PRP petitioner has a heavier burden in a PRP because the courts try not to allow a PRP to substitute for a direct appeal. In that regard the court stated, "A personal restraint petition does not substitute for a direct appeal, and different procedural rules accompany a petition from an appeal. . . These rules limit the availability of collateral relief because the relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders." *Skone Slip Opinion*, *p. 41*

Nevertheless, after reviewing a prior direct appeal case from the Washington Supreme Court (State v. Zamora), the panel determined that a looser standard should apply to race-based misconduct allegations. The usual standard had been "To obtain relief in a restraint petition based on a constitutional error, a petitioner must show two things: (1) a constitutional error occurred and (2) the error resulted in actual and substantial prejudice." *Skone Slip Opinion, p. 43*

After acknowledging the usual standard, the court spent a considerable time reviewing case law and determined that a different standard should apply in cases alleging race-based misconduct by the prosecution. It did away with the requirement of prejudice:

> We have painstakingly reviewed Washington decisions in order to discern how the Washington Supreme Court would wish this court to adjudge Zachary Skone's personal restraint petition. After reviewing Washington law and United States Supreme Court precedent, we conclude that Zachary Skone *need not establish any prejudice* because the *voir dire* questioning inserted ethnic bias into the proceeding and because the assigned error breached the right to an impartial and fair trial. The *voir dire* infected the minds of the jurors. *Skone Slip Opinion, p. 66* (italics added)

The lack of need to show any prejudice, much less actual and substantial prejudice, was quite a benefit for the defendant in *Skone.* The panel acknowledged that the jury had sided with him on the two issues that could be said to involve racial bias, namely the gang aggravators which were related to a Latin American gang set:

> We need not decide whether, in every prosecution when the prosecuting attorney employs stereotypical or harmful references to an ethnicity, the

> defendant may assert prosecutorial misconduct despite not being a member of the implicated ethnicity. Zachary Skone's case has the added circumstance that he wanted to be part of an ethnic gang, and the *voir dire* targeted the members of this ethnicity. Although Skone was not Latinx, the State submitted overwhelming evidence of Skone wanting to be part of the Norteños gang. *Slip Opinion*, p. 36-37

Training Takeaway

The main issues in *Skone* involved jury selection and personal restraint petition (PRP) appellate review. These are not directly of concern to LE. The case has been presented here because it can be viewed as an example of the degree to which alleged race-based issues will be scrutinized by our appellate courts.

There is likely no way to forecast what issues in an investigation might trigger appellate review in this area. One area that may pop up more frequently after *Zamora* and *Skone* is gang motivation cases. There is a sentence enhancement aggravator (adopted by the legislature) for committing a criminal offense in order to "gain or advance" position in a gang. *See* RCW 9.94A.535 *(3)(s).* LE officers and detectives are well aware that many gangs are self-segregated by race or ethnicity.

There are sociological reasons for this that have nothing to do with racism in the courts, LE, or on the part of prosecutors. The *Skone* court suggested that the charging of the gang aggravator was itself evidence of race-based discrimination. That bold pronouncement creates a dilemma for LE and prosecutors alike. If the bringing of a charge, for which the court admitted there was "overwhelming evidence," can be deemed race-based misconduct, it is difficult to see how the charging of any criminal offense could be deemed *not to* constitute "race-based" discrimination in light of this court's reasoning.

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.

United States v. Parkins, Ninth Circuit (February 14, 2024)

Factual Background

This case came before the Ninth Circuit on an appeal from a conviction for a federal laser pointer violation. As with all federal cases, this case should be considered with caution. Washington has departed from federal precedent in many areas of criminal law, particularly search and seizure. The holding in this case may or may not be consistent with Washington state law. Consultation with legal advisors and prosecutors is essential considering particular investigation questions.[4]

The case arose from a laser pointer having been targeted at a police helicopter. The officers in the helicopter were able to pinpoint the location where the laser originated and could observe a suspect believed to have been the culprit. The suspect was later identified as the defendant. Officers on the ground made contact with the defendant at his apartment.[3]

The defendant was detained in the parking lot for approximately 20 minutes. During

[3] Washington courts have issued many opinions concerning consent. A survey of Washington law is beyond the scope of this digest. However, two prior cases worth reviewing alongside this case are *State v. Leach, 113 Wn.2d 735 (1989)* and *State v. Morse, 156 Wn.2d 1 (2005).* Free access to *Leach* and *Morse* and other Washington cases can be obtained online from the Washington Courts Public Access web page. The link to the page is here: Washington Court Opinions Public Access Page. The WAPA Search and Seizure Manual is also worth reviewing and can be found here: WAPA Search and Seizure Manual (2015).

that time, the officers contacted his girlfriend who was a co-occupant of the apartment. They asked the permission of the girlfriend to search the apartment for the laser pointer. As they were asking, the defendant who was within earshot called out to the girlfriend and told her not to cooperate. Among other things, he said, *"Don't let the cops in, and don't talk to them."* The girlfriend consented anyway, and the officers found a laser pointer in the apartment with the defendant's first name engraved on it.

The defendant was charged in federal court with a federal offense. In the trial court, the defendant brought a suppression motion. He challenged the search as an unlawful consent search. He also challenged the lawfulness of his detention, and the admissibility of incriminating statements made during police questioning. The trial court denied the suppression motions. The defendant was convicted and appealed the search and interrogation issues to the Ninth Circuit.

Analysis of the Court

The Ninth Circuit began with the consent search issue. The issue was classified as a search consented to by a co-occupant. The court reviewed prior cases from the U.S. Supreme Court and other circuit courts and distilled the legal standard to be applied in co-occupant search cases:

> Thus, our review of the Supreme Court's co-tenant consent cases leads us to conclude that, to satisfy *Randolph*, Parkins must have both been present on the premises and expressly refused consent. . . And a defendant need not stand at the doorway to count as being physically present - presence on the premises (including its immediate vicinity) is sufficient. *Parkins Slip Opinion*, p. 16

The court applied the legal standard to the consent search of the defendant's apartment for the laser pointer. It had no difficulty holding that the defendant's objection was sufficient to invalidate his girlfriend, roommate's consent.

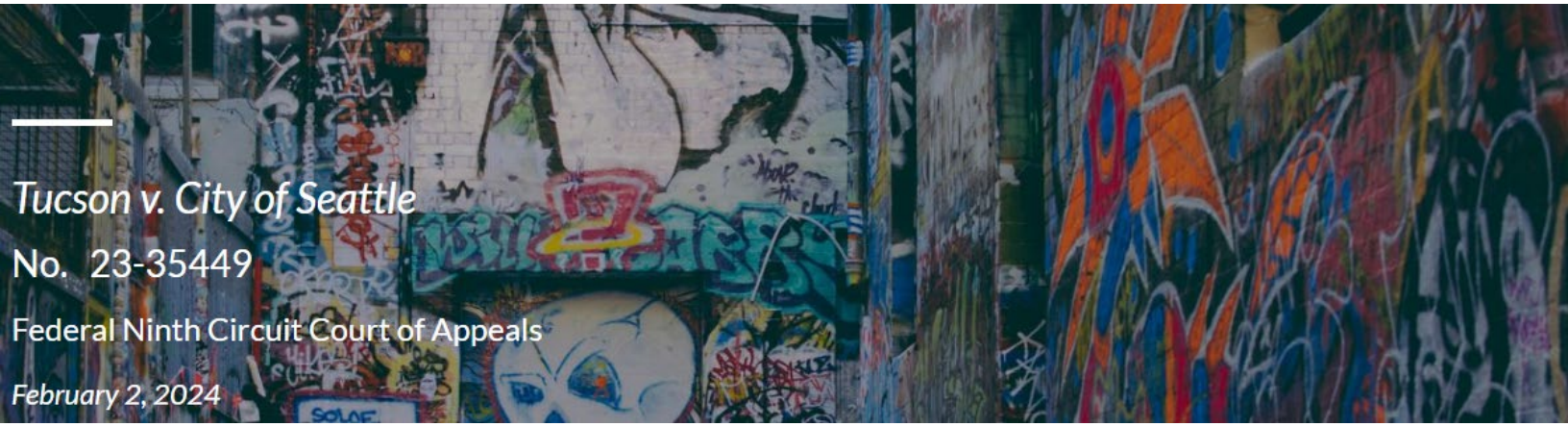
As to the other issues, the court also considered whether there was probable cause for the defendant's arrest, and whether later police questioning was fruit of the poisonous tree. As to probable cause the court held that there was sufficient evidence to support probable cause. And as to the fruit of the poisonous tree, the court determined (1) that since the defendant was not subjected to custodial interrogation by the officers at the scene, his statements were not required to be suppressed, and (2) since the officers did not confront the defendant with anything from the search during post-arrest questioning at the police station, the incriminating statements were not required to be suppressed. *Parkins Slip Opinion*, p. 20-21, and 26-27

Training Takeaway

The standards applied by the Ninth Circuit court were derived from the U.S. Constitution's Fourth and Fifth Amendments. A reason why they are not necessarily controlling in Washington is that our courts have applied the Washington Constitution to many search and seizure issues and ruled differently than the federal courts. With that having been said, the outcome of this case would likely have been the same even if state law were to have been applied.

The consent search issue is the primary takeaway from *Parkins*. In situations where one occupant of a premises is a suspect and the rest are witnesses, consent by the non-suspect occupants may or may not be valid. Consent from the suspect would be preferred but absent such consent, a search warrant would be a safer option.

EXTERNAL LINK: View the Court Document



Tucson v. City of Seattle, Ninth Circuit (February 2, 2024)

Factual Background

This case came before the court on an appeal by the City of Seattle. The city had passed an anti-graffiti ordinance which required that taggers obtain permission before tagging either public or private property. The defendant was arrested after tagging a temporary barrier outside a Seattle Police Department precinct.

The city attorney declined the case for reasons not described in the opinion. But the defendant still filed a federal lawsuit seeking a preliminary injunction against the city enforcing the ordinance. The claim in the injunction lawsuit was that the ordinance was unconstitutional under the First Amendment because it was either "overbroad" or "vague." The Seattle federal district court judge granted the preliminary injunction, which was the ruling reviewed in this case by the Ninth Circuit.

Analysis of the Court

The Ninth Circuit panel reversed the Seattle district court judge's ruling. The panel's opinion began with the constitutional standard to be applied in overbreadth claims. In general, overbreadth challenges allege that an ordinance applies too broadly in the sense that it prohibits conduct that has First Amendment, constitutional protection. Review of such claims requires: "If the challenger demonstrates that the statute 'prohibits a *substantial amount of protected speech*,' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." *Tucson Slip Opinion, p. 15* (italics added).

The Ninth Circuit's analysis of this standard invalidated the ruling of the trial court. The court had failed to apply this standard and instead "proceeded to ignore that legal standard in its analysis. . ." *Tucson Slip Opinion, p. 16.* The Ninth Circuit concluded that the Seattle ordinance was not shown to be unconstitutionally overbroad under the correct standard.

The Ninth Circuit also reviewed the ordinance for vagueness. Such challenges in general are based on claims that an ordinance is so non-specific that its reach cannot be determined by ordinary citizens. The constitutional standard is as follows: "A law is unconstitutionally vague if it does not give 'a person of ordinary intelligence fair notice of what is prohibited' or if it is 'so standardless that it authorizes or encourages seriously discriminatory enforcement.' " *Tucson Slip Opinion, p. 18*

Again, in its application of the required standard to the Seattle ordinance, the Ninth Circuit reversed the trial court for not applying the correct analysis under the correct standard. "[T]he district court instead speculated about possible vagueness in hypothetical and fanciful situations not before the Court, such as whether the Local Ordinance criminalizes 'signing a guest book,' 'drawing in the sand on a beach,' and 'marking public utilities on the street.' The district court's failure to employ the requisite analysis to sustain a facial vagueness claim is sufficient to warrant reversal." *Tucson Slip Opinion, p. 20*

Training Takeaway

Supporting the constitutionality of ordinances and statutes is the responsibility of city attorneys and prosecuting attorneys. Federal injunctions against enforcement of local laws that have been duly enacted by local or state legislative bodies present a considerable challenge for local jurisdictions seeking to address problems such as the proliferation of graffiti on both public and private property.

It is worth knowing that federal constitutional challenges should face close scrutiny by both federal trial and appellate courts. But as to whether any particular ordinance is the subject of a federal injunction, law enforcement officers must continually review department bulletins and guidance from department legal advisors in areas likely to attract First Amendment litigation.

EXTERNAL LINK: View the Court Document

Cases & Reference

1. *In re: Pers. Restraint of Arntsen*, 101635-2, Washington Supreme Court (February 29, 2024)
   - Arntsen Slip Opinion

2. *State v. Walton*, 83538-6, Washington Court of Appeals, Division One (February 12, 2024)
   - Walton Slip Opinion
   - GR 37

3. *State v. Stott*, 57114-5, Washington Court of Appeals, Division Two (February 13, 2024)
   - Stott Slip Opinion
   - Washington Court Opinions Public Access Page
     - *Lively case: "130 Wn.2d 1"*
     - *Solomon: "3 Wn.App. 2d 895"*

4. *In re Pers. Restraint of Skone*, 39087-0, Washington Court of Appeals, Division Three (February 22, 2024)
   - Skone Slip Opinion
   - *State v. Zamora*
   - *RCW 9.94A.535 (3)(s)*

5. *United States v. Parkins*, 22-50186, Ninth Circuit (February 14, 2024)
   - Parkins Slip Opinion
   - Washington Court Opinions Public Access Page
     - *State v. Leach, 113 Wn.2d 735 (1989)*
     - *State v. Morse, 156 Wn.2d 1 (2005)*
   - WAPA Search and Seizure Manual (2015)

6. Tucson v. City of Seattle, 23-35449, Ninth Circuit (February 2, 2024)
   - Tucson Slip Opinion

Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access Web site here: Free Washington Case Law Access

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 [2018-2021] | [2022-2023] [2024]