Law Enforcement Digest

Covering cases published in September 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.

Case Menu

SEPTEMBER 2024 CASE MENU

1. *State v. Gardner, 38826-3, Washington Court of Appeals, Division Three (September 24, 2024)*
2. *State v. Kelly, 39411-5, Washington Court of Appeals, Division Three (September 10, 2024)*
3. *State v. Balles, 39733-5, Washington Court of Appeals, Division Three (September 27, 2024)*
4. *Frye v. Broomfield, 22-99008, Ninth Circuit (September 10, 2024)*
5. *Hyer v. City of Honolulu, 23-15335, Ninth Circuit (September 23, 2024)*

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.

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.

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

State v. Gardner

No. 38826-3

Washington Court of Appeals, Division Three

September 24, 2024

State v. Gardner, Washington Court of Appeals

Factual Background

This case came before the court on an appeal from a conviction for first-degree murder and several other related offenses. The primary issue on appeal concerned custodial interrogation after *Miranda* warnings. The trial court had ruled that the last round of questioning by detectives did not violate *Miranda.* On appeal the court of appeals disagreed, reversed the convictions, and remanded for re-trial. Any officer or detective regularly engaged in administering *Miranda* rights and questioning suspects would do well to read the case in its entirety.

The murder arose from a troubled domestic relationship. The parties involved were the defendant, his wife, and two male guests who stayed with the couple at a property in the Yakima area. The property was owned by the wife's mother, a Ms. Reno, and she too had problems with the defendant. One of the live-in guests, a Mr. Wabinga, was the murder victim. The other live-in guest, a Mr. Irwin, and the wife were eyewitnesses to the murder.

The defendant and his wife had a quarrelsome relationship. The defendant accused her of infidelity. His accusations included that she had an affair with Wabinga. In August 2017, the defendant shot and killed Wabinga with a gun that belonged to his wife. The shooting took place in the presence of the wife and Irwin. Afterward the body was buried in a barn. The murder was not immediately reported to law enforcement.

The murder did not end the trouble between the defendant, the wife, and the surviving house guest, Irwin. In apparent retaliation, the defendant reported the murder to law enforcement and blamed it on Irwin. The defendant had gone to jail on unrelated charges. While he was in jail the defendant contacted the police and reported that he "believed" Irwin had killed Wabinga and buried him on the property in a barn. Law enforcement took a statement from the defendant and investigated the scene but did not find a body. The case was therefore put on hold.

The statement was taken on November 17, 2017. During the statement the defendant claimed that Wabinga was accused by Reno of having stolen jewelry from her. He stated that after the accusation, Irwin had killed Wabinga and buried him in the barn. The statement was given in the first of three interviews. It was introduced into evidence at trial without objection. On appeal there was no claim that the November 17 interview was a violation of the defendant's rights.

The defendant was released from custody in June 2018, some ten months after the murder. He made his way back to the property and again contacted law enforcement to report a body in the barn. He led the officers to a location in the barn and dug up Wabinga's body. The unearthing of the body was videotaped. The footage captured the defendant making statements while he was digging up the body. In one statement he said that his wife had *told him* about the shooting and burial of Wabinga, which indicated that he was not present and not an eyewitness. But in part of the digging up the body video footage, an officer asked how deep the body was and the defendant responded, "Probably a foot and a half." *Gardner Slip Opinion, p. 14.* After the body was exposed, the defendant was transported and gave a taped interview statement. This was the second round of interrogation.

In the second interview, the defendant was interviewed by two detectives. The interview took place on June 5, 2018, and was recorded. In the interview, the defendant blamed his wife and Irwin for the murder. He claimed that Wabinga had stolen jewelry from Reno, and that Wabinga had been stalking his wife, that Wabinga had found out about the wife having an affair with another man, and that Wabinga had maybe seen something he shouldn't have seen. The defendant also claimed that Wabinga had been bullying the defendant's child. The defendant stated that Irwin had admitted killing Wabinga saying that he had "smoked that fool." Irwin then threatened the defendant if the defendant were to report the murder. *Gardner Slip Opinion, p. 16.* The defendant also stated that the wife had told him there was a "cold spot" in the barn where the body was. *Id*

Again, in the second statement the defendant indicated that he was not an eyewitness but had been told about the murder and the burial of the body in the barn. He also claimed that he tried to protect Wabinga by encouraging him to leave. He claimed that his wife handed him her gun and that she wanted him to get Wabinga to leave. The defendant did not comply and claimed that he left for a job. When he got back, the wife and Irwin told him that Wabinga had "walked off."

The defendant claimed that he was suspicious that Wabinga was buried in the barn "because [the wife and Irwin] were at the back side of the barn stomping on dirt in the area where Wabinga was buried when Gardner returned from the job." *Gardner Slip Opinion, p. 17*

The second interview was also not part of the suppression motion. The court's descriptions of it did not include any discussion of the defendant invoking either his right to remain silent or to have an attorney. It was introduced into evidence at trial and presumably will be available to be introduced at the re-trial of the case.

The third interview took place on June 13. Although the interview was recorded, the appellate court did not include Q and A quotations from a transcript. Instead, it included references to the actual video footage and cited the locations on the recording where the quotations can be found. It then paraphrased the claimed *Miranda* violation and included the trial court's findings from the suppression motion.

The court's account of the *Miranda* violation is as follows:

> The June 13 interview itself was played during the hearing. The video shows that after Gardner was advised of his Miranda rights and waived them, Detective Reyna started out the interview by asking, *"So, just so we can clear up some . . . additional stuff, you stated you wanted . . . to come over with an attorney?"* (Ex. 32 at 16 hrs., 22 min., 19 sec.) Gardner responded that he had heard he was a suspect in the case from the Internet. Detective Cypher told him, *"You know how the media is."* (Ex. 32 at 16 hrs., 22 min., 50 sec.) The detectives then distracted Gardner with additional conversation, and the interview continued.
>
> During its oral ruling, the trial court found that police had arrived at Gardner's parents' house and handcuffed him. The court found that Gardner told Detective Reyna that if he was a suspect, he wanted an attorney, at which point Detective Reyna ordered the handcuffs removed. Gardner was then taken to the sheriff's office where he was placed in a small room with no windows. He sat in a corner on a chair at a table. Detectives Cypher and Reyna were both present and placed themselves between Gardner and the door. Both officers were in plain clothes and although they were carrying their duty weapons, they did not display them. At no time was Gardner advised that he was free to leave. *Gardner Slip Opinion, p. 5*

The arrest and third interview took place twelve days after the date of the unearthing of the body and the second interview. During the twelve days the detectives interviewed the wife, Irwin, and Reno, and obtained incriminating letters and conversations from when the defendant was in jail. They confronted the defendant with that evidence toward the end of the interview.

This prompted another reference to a lawyer:

> At the end of the interview, one of the detectives began making accusations against Gardner, telling Gardner that he read Gardner's letters and thought the letters spoke volumes. He went on to accuse Gardner of being a "control freak" and using his kids as pawns. (Ex. 32 at 17 hrs., 8 min., 57 sec.) When the detective suggested that Gardner admitted killing Wabinga in the letters, Gardner said, "we're done until I have an attorney here." (Ex. 32 at 17 hrs.,10 min., 46 sec. through 17 hrs., 11 min., 47 sec.) Even after making this statement, the detective continued to talk to Gardner as they collected their stuff to leave the room. One of the detectives even commented, "we're trying to clear some stuff up but you want to talk to an attorney . . . and that's a shame." (Ex. 32 at 17 hrs., 12 min., 4 sec.) *Gardner Slip Opinion, p. 19*

At trial, the wife, Irwin and Reno testified. Their account of the murder was that a disagreement with Wabinga about the defendant's truck having been impounded led to the defendant confronting Wabinga and shooting him with the wife's pistol. The wife also introduced incriminating statements from the defendant's jail letters in which the defendant expressed remorse and indicated that the shooting was motivated by lies and not having learned the truth. And Irwin admitted having returned the gun to the wife and helping the defendant bury the body.

Reno also testified. She was not an eyewitness, but she asked the defendant about Wabinga having supposedly walked off leaving his truck and personal belongings behind. The defendant responded, "Gardner later told her, "[A]ll I can tell you, when I left him he was breathing, but I don't think he will ever be back." *Gardner Slip Opinion, p. 11*

Analysis of the Court

The court began its analysis with the legal standard that applies to alleged Fifth Amendment, *Miranda* violations where a suspect references an attorney after having been given *Miranda* warnings. The court succinctly stated that, "The Fifth Amendment protects against self-incrimination. . . Accordingly,

law enforcement officers are required to give *Miranda* warnings where an individual is subjected to custodial interrogation. . . Prior to being subjected to custodial interrogation, *Miranda* requires that an individual must be informed of their right to remain silent and their right to an attorney. . . If a suspect requests an attorney, law enforcement must stop all questioning until an attorney has been provided or the suspect reinitiates talking on their own." *Gardner Slip Opinion, p. 20-21 (citations to prior cases omitted)*

The court also noted that references to an attorney may be equivocal or unequivocal. The difference is important because a questioning law enforcement official need not immediately cease questioning and may inquire about whether the suspect is truly invoking the right to an attorney in the case of an equivocal statement about an attorney. *Gardner Slip Opinion, p. 21*

This led the court to narrow the issue as follows: "Gardner testified, and the trial court found in its oral ruling, that after he was placed in handcuffs, he informed Detective Reyna that if he was a suspect, he wanted an attorney. And the uncontroverted testimony at the hearing was that Gardner was in fact a suspect at the time of the June 13 interview. Given these findings, the only question before us is whether the trial court erred in concluding that Gardner's request for an attorney was equivocal." *Gardner Slip Opinion, p. 22*

The court discussed several prior cases before analyzing the references to an attorney from the defendant. Based on those cases it determined that the defendant's statement about an attorney was *unequivocal* and required the detectives to stop questioning. The court acknowledged that when the defendant said that if he was a suspect he wanted an attorney could be viewed as equivocal. But the court held that since he was in fact a suspect, the reference was not equivocal. All questioning should have ceased after he made that statement.

One of the prior cases discussed by the court is well worth reviewing. *See State v. Herron*, 177 Wn. App. 96 (2013)[1]. The Garner court distinguished *Herron*, which had upheld the lawfulness of a similar reference to an attorney. The court stated, "In *Herron*, the defendant told police 'if I am going to get charged,' and 'if it goes farther,' he would need an attorney. . . The court found that these were 'conditional statements of future intent.' " *Gardner Slip Opinion, p. 26.* Because the condition of being charged had not occurred the statement was equivocal.

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[1] *Herron* and other Washington cases are available via public access. The access portal can be found at this hyperlink: Washington Caselaw Public Access.

A conditional statement of future intent versus a statement of immediate intent is a subtle distinction. A conditional statement of future intent in this context would include any discussion by a suspect similar to this: "If [this happens], then [I want/need/desire/would like, etc.] an [attorney/lawyer/counsel, etc.]. According to the *Gardner* court such statements are not sufficient to require all questioning to stop. Whereas a statement that is conditioned on something that has in fact already happened does require all questioning to stop. It is likely that such statements would include that the suspect *is* a suspect or *is* under arrest.

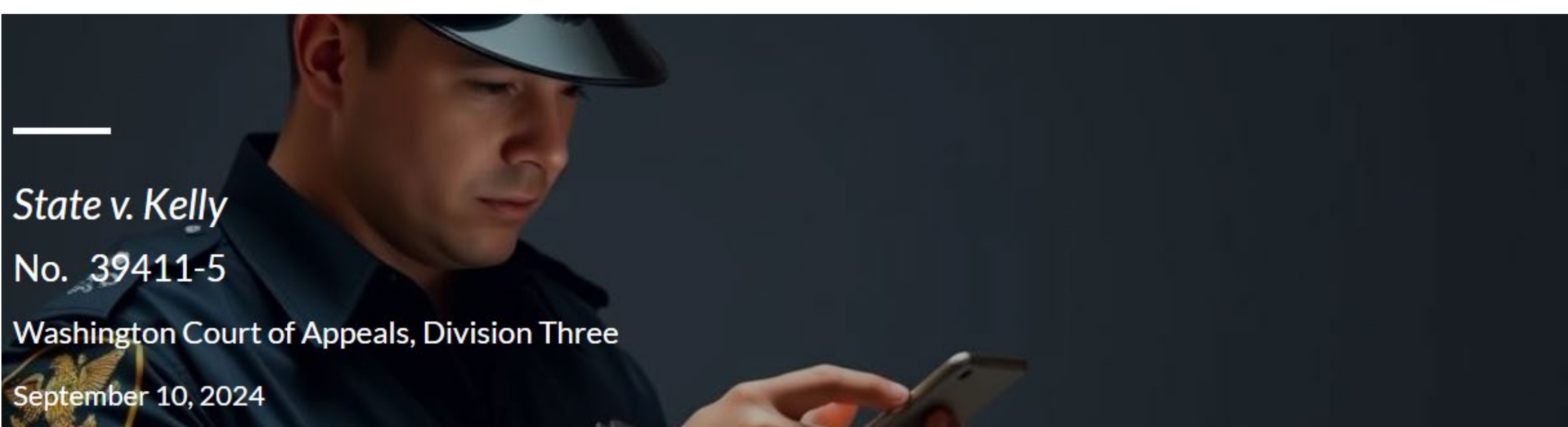
In *Gardner,* the defendant was under arrest when he made the conditional statement. The fact that the condition had been met already led the court to hold that a *Miranda* violation had occurred. The court also analyzed whether the violation and the admission into evidence of the July 17 statement was harmless error. It should not come as a surprise that the error was not deemed harmless.

Training Takeaway

The distinction between the two types of conditional references to a lawyer are subtle and difficult to analyze under the pressure of an ongoing investigation. The *Gardner* court's holding that the reference to a lawyer was unequivocal means that the detectives had no option but to stop questioning. They could not clarify what the defendant was saying because in the eyes of the court the defendant had already exercised his right to a lawyer.

Thus, one takeaway from the case is that questioning must cease if a defendant has been placed under arrest and indicates that he wants a lawyer *if he is under arrest*.

EXTERNAL LINK: View the Court Document



State v. Kelly, Washington Court of Appeals

Factual Background

This case arose from a drug delivery case in which the drug buyer was killed by a fentanyl overdose. The case was partially published and in the published portion of the case, the court resolved two issues of interest to law enforcement. The first issue was a search and seizure issue arising from the search of the deceased drug buyer's cell phone. The second issue concerned the defendant having not visited the family of the deceased after her death to offer condolences. That evidence was offered to prove guilty knowledge.

The delivery of the drugs and the death of the drug buyer occurred in May 2021. The jurisdiction was a small town in eastern Washington, Tekoa. The town was described as a small farming community where all the residents knew each other. This was certainly true of the defendant drug dealer and the victim drug buyer and the buyer's roommate.

The defendant worked as a clerk at a grocery store. She was friends with the victim buyer and the roommate and supplied both with prescription drugs. She was also friends with the victim's parents and would greet them at the store. The opinion is silent as to whether the parents had any idea about the drug relationship between the defendant and the victim.

The overdose occurred after a delivery to both the victim and the roommate. The delivery to the victim was fentanyl and oxycodone to the roommate. The victim delivered the roommate's order from the defendant and made a statement to the roommate that it was from the defendant.

The overdose death occurred during the night of May 22 and 23, 2021. The roommate reported the overdose to law enforcement the next morning. The responding officer seized several items of evidence from the apartment. The evidence included drug paraphernalia and the victim's cell phone.

The investigating officer subsequently contacted the deceased's parents and asked for the passcode and permission to search the cell phone. They provided both. Communications between the defendant and the victim about the drug deal were found on the phone. The officer also requested a search warrant, but this was apparently after the incriminating messages had already been found. The validity of the search warrant was not part of the court's analysis.

The victim's parents were understandably heartbroken. The community rallied around them. They received many visits and condolences from friends and neighbors in the community. But they did not receive a visit or condolence from the defendant despite having a friendly relationship with her. Evidence of the lack of such a visit or condolence was introduced at trial and admitted over the defendant's objection.

The defendant was found guilty of the delivery charges. The two issues discussed in the published part of the court's opinion were related to the search of the victim's cell phone and the evidence of not visiting the victim's parents.

Analysis of the Court

The court began with the issues related to the cell phone. The two primary issues were standing and validity of consent. Concerning standing, the court held that the defendant had a privacy interest protected by the Washington State Constitution in the victim's cell phone and the messages stored on it. In large part the decision was based on a prior Washington Supreme Court decision concerning standing and cell phone searches that is well worth reviewing. *See State v. Hinton,* 179 Wn.2d 862(2014[2])

The *Hinton* case involved a detective using an incarcerated drug dealer's cell phone to contact the dealer's customers. The *Hinton* court held that a hapless drug buyer had standing to object to seizure of his messages that were recovered from the dealer's phone. Relying on *Hinton*, the court in *Kelly* noted, "The Supreme Court resolved the issue on state constitutional grounds, holding Shawn Hinton retained a privacy interest in the text messages he sent to an associate's phone." Thus, the court reasoned that the defendant in *Kelly* also had a state constitution-based privacy interest in the messages that she sent to the deceased victim's cell phone. *Kelly Slip Opinion, p. 15*

[2] The *Hinton* case can be accessed via the caselaw public access portal here: Washington Caselaw Public Access.

Although the court held that the defendant had standing, it resolved the consent issue against the defendant. The court began with the general warrantless search legal standard: "Washington courts employ a two-part test to determine whether a violation of article I, section 7 occurred: (1) whether the government intruded on a private affair and, if so, (2) whether the governmental conduct was justified by authority of law." *Kelly Slip Opinion, p. 14.* The court quickly determined that the search of the cell phone and the seizure of the defendant's messages constituted an intrusion on a private affair. It then moved on to the question of authority of law.

The authority of law issue took the court into a discussion of consent. The court stated, "We move to the second element of the article 1, section 7 test. The 'authority of law' component of section 7 demands a valid warrant unless the State shows that a search or seizure falls within one of the exceptions to the warrant requirement. . . Consent is one of the exceptions." *Kelly Slip Opinion, p. 15*

Consent by the victim's parents in due course took the court into a discussion of ownership and control of the cell phone. The court noted that the victim's father had purchased the phone and given it to her to use. Upon her death, the decedent's property passed to her parents under a Washington's statute that applies when an individual dies without a will. The court held that, "Nichole Overton died without a husband or children. Under RCW 11.04.015(2)(b), all of Overton's property passed to her parents, Phil and Laurie Overton. RCW 11.28.120(2) entitled the parents of Nichole Overton to administer the estate. Thus, we conclude that Phil and Laurie Overton had the right to control the cellphone and the right to authorize a seizure and search after Nichole's death." *Kelly Slip Opinion, p. 18*

The authority of the parents by virtue of their interest in her estate was sufficient for their consent to the search to be valid. The seizure of the defendant's messages without a warrant was therefore valid over the defendant's objection.

The next issue was the failure of the defendant to visit or offer condolences to the parents after the death. The prosecution offered the evidence to prove guilty knowledge on the part of the defendant. The court rejected the argument. (The defendant also attempted to frame the issue as an issue of prosecutorial misconduct. This was rejected because the prosecution had a good faith basis for offering the evidence even if the evidence ended up being improperly admitted.)

The court noted that the legal standard for admitting such evidence requires a threshold of relevance: "Subsequent conduct often carries only marginally probative value on the ultimate issue of guilt or innocence. . . Thus, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." *Kelly Slip Opinion, p. 22*

In its analysis, the court referenced the O.J. Simpson murder case. It noted:

> O. J. Simpson attended the funeral of his deceased wife, Nicole Brown Simpson. We question whether this conduct subsequent to the knifing of Brown and Ronald Goldman bore relevance to Simpson's innocence in murdering Brown. So too, we conclude that any visit by Amber Kelly to the Overton residence would not tend to show Kelly's innocence. If she had visited and if Kelly thereafter argued the visit established consciousness of innocence, the State would have argued that Kelly visited solely for the purpose of pretending innocence. If visiting the family does not tend to show innocence, failing to visit conversely should not be deemed pertinent to guilt. *Kelly Slip Opinion, p. 24*

The court held that the admission of the condolence evidence was error. But it also held that the error was harmless and the convictions for delivery were affirmed.

Training Takeaway

The most important takeaway from this case for law enforcement is the cell phone search issue. The search of a victim's cell phone might at first glance seem not to be an unlawful search issue. To the uninformed, the notion that a defendant has a right to object or complain about the search of a victim's cell phone might seem curious. Still, the *Hinton* case and this case both stand for the proposition that in the eyes of Washington courts, the Washington Constitution confers the right to object on the defendant, no matter how curious it may appear. As with most search and seizure issues, prudence may suggest that a warrant is well worth the effort.

A second takeaway arises from the consent issue. Valid consent depends on the ownership or control rights of the person giving consent. The parents' rights in this case were solid. But in many cases, particularly cases involving vehicles or jointly occupied residences, the issue can be much less clear cut. Because the default for valid searches is a valid warrant, prudent officers should thoroughly document ownership and control authority, and should err on the side of a warrant in any but crystal clear cases.

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State v. Balles

No. 39733-5

Washington Court of Appeals, Division Three

September 27, 2024

State v. Balles, Washington Court of Appeals

Factual Background

This case concerns the validity of a Department of Corrections (DOC) secretary's warrant after the *Blake*[3] decision. The *Blake* decision held that Washington's drug possession statute was unconstitutional. The ramifications from that decision were far reaching and led to releases from prison and many other unexpected consequences.

In this case a secretary's warrant for the defendant's arrest was issued before *Blake* for a non-report violation. The defendant was on DOC supervision for a drug conviction. The warrant was issued before the *Blake* decision, but it was executed at the defendant's residence after the decision. The entry and initial search led to the discovery of drugs. The officers paused the search and obtained a search warrant. During the search warrant additional drugs, a firearm, distribution paraphernalia, and $20,000 cash was found. The defendant was subsequently charged with possession with intent.

Well after the search, and after the defendant was charged, the defendant's underlying drug conviction was vacated by a court pursuant to *Blake*. Meanwhile the defendant brought a suppression motion concerning the evidence found in his residence. He argued that when the Supreme Court issued the *Blake* decision, the decision was self-executing and rendered his conviction and supervision immediately invalid. The trial court ruled in his favor, suppressed the evidence, and ordered that the charge be dismissed. The state appealed the suppression decision and the dismissal.

[3] The *Blake* case can be accessed via the caselaw public access portal here: [Washington Caselaw Public Access](#).

Analysis of the Court

The court framed the issue decided in this case succinctly. "This appeal calls on us to decide the validity of a secretary's warrant, which issued pre-*Blake* yet served post-*Blake*, on an offender subject to supervision by the Department of Corrections (DOC), based on a conviction for unlawful possession of a controlled substance." Before addressing that issue the court resolved a dispute about the trial court's findings and fact. It held that the trial court erred by not crediting evidence from one of the officers concerning the sequences in which the search progressed.

As to the lawfulness of the search, the court overturned the trial court decision. It began with a discussion of the standards applied by courts concerning warrantless searches. "Article I, section 7 of the Washington Constitution provides: 'No person shall be disturbed in his private affairs, or his home invaded, without authority of law.' '[W]arrantless searches are unreasonable per se.' " *Balles Slip Opinion, p. 8*

Regarding authority of law, the court detailed the authority conferred on Department of Corrections by the legislature pursuant to its responsibility for supervision of offenders. "As part of its duty to supervise offenders on community custody, the DOC's secretary may issue an arrest warrant based on 'reasonable cause' to believe that an offender has violated the terms of his community custody. RCW 9.95.220(2). Further, '[i]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence . . . or other personal property.' RCW 9.94A.631(1)." *Balles Slip Opinion, p. 9-10*

The court also noted that the authority was not extinguished by the issuance of the *Blake* decision. This was because DOC could not ignore pre-*Blake* court orders and judgments and instead was required to abide by such orders until the court itself overturned, changed, or modified them. The court stated, "Said another way, the DOC is obligated to carry out a final judgment and sentence until a defendant obtains judicial relief." *Balles Slip Opinion, p. 10*

With the legal standards in mind, the court determined that the search was not unlawful because it was carried out with authority of law. For both a defendant and DOC, the court determined that a potentially invalid court order cannot be ignored. It must be overturned by a court via regular court proceedings. A defendant must timely challenge an order believed to be invalid and comply

with it until it is overturned by the court. It followed therefore that since no court had invalidated the defendant's underlying drug conviction at the time the warrant was executed, the warrant was valid insofar as the search was concerned.

It is important for law enforcement to be aware that this was not a unanimous decision. A dissenting judge would have held the other way. In other words, the dissent would have required Department of Corrections and law enforcement to comply with *Blake* and all its implications as they might apply to a defendant even though no court may have invalidated the underlying conviction. One hopes that perspective does not prevail in the future, considering the uncertainty that would be cast on all warrants.

Training Takeaway

Caution should attend reliance on Department of Corrections (DOC) secretary's warrants. The *Blake* issue in this case was resolved in the state's favor but the rule preferred by the dissent could easily carry the day in future cases.

This case arose from a task force investigation and included the sheriff's detectives. Reliance on a DOC warrant ended up being sufficient. But if the task force had probable cause for the search independent of the DOC warrant, the officers could have opted to get the search warrant.

It may seem tiresome that a search warrant is advisable even where there is statutory authority for a search. But it must always be remembered that in Washington warrantless searches are per se unreasonable.

[EXTERNAL LINK: View the Court Document]

Federal cases should be reviewed by Washington law enforcement with caution

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.

Frye v. Broomfield

No. 22-99008

Federal Ninth Circuit Court of Appeals

September 10, 2024

Frye v. Broomfield, Federal Ninth Circuit Court of Apeals

Factual Background

This case came before the court on a federal habeas corpus petition. It will be of interest to corrections officers who regularly transport defendants to court for court proceedings and prison officials who are called upon to respond to death penalty petitions. The habeas petition was filed by a death row inmate from California. The Ninth Circuit resolved the issues mostly by applying habeas procedural standards.

The case arose from a 1988 double murder. The defendant and a girlfriend began growing marijuana in 1985. An older couple lived near the marijuana grow. The wife became friends with the defendant and his girlfriend. In May 1985 the defendant unexpectedly made delusional statements to the girlfriend

and told her that he was going to kill the older couple. According to the girlfriend he forced her to accompany him to their home. He murdered the couple by shooting both of them with a shotgun. Afterward the defendant and the girlfriend fled to South Dakota.

The bodies were discovered two days after the murders. The defendant was an immediate suspect because clothing belonging to him was left at the scene. Two months later the defendant was arrested for a domestic violence (DV) incident in South Dakota. He immediately and freely made incriminating statements about the double murder to the investigating officers. He also gave a videotaped interview and led the officers to property that had been stolen from the murder victims.

The defendant was convicted of two counts of first-degree murder in a death penalty trial. The jury also sentenced him to death. The trial proceedings took place in 1988, approximately three years after the murders. The case then moved into the California appellate courts.

The direct appeal proceedings were not completed by the California Supreme Court until ten years later in 1998. The California Supreme Court affirmed the convictions and sentence. It is significant that the direct appeal proceedings did not include any claim based on the jury having seen the defendant in shackles or restraints.

After the direct appeal, the defendant filed a state habeas petition in 2000. This was approximately 15 years after the murders and 12 years after the trial. In the petition the defendant submitted over forty allegations of error. The forty allegations included a claim based on an alleged due process violation. The allegation was that the jurors had seen the defendant in restraints. This was referred to by the Ninth Circuit as "claim 44." *Frye Slip Opinion, p.4*

The defendant included affidavits from two jurors. One juror recalled having seen the defendant in restraints in the courtroom and in the hallway. She added that she believed one of the incidents "was staged" to make Mr. Frye appear more human to the jury. *Frye Slip Opinion, p.9.* Another juror had less recall but also said that she had seen the defendant in shackles.

The state habeas petition was reviewed by the California Supreme Court. In 2001 that court summarily denied the petition. This did not end the litigation. The defendant also filed a federal habeas petition. The petition was filed in 2000, the same year as the state petition. It also included the shackling claim among numerous other claims. The federal trial court held a hearing in 2008 on the shackling claim. The two jurors testified.

This took place approximately 20 years after the trial and 23 years after the murders. The trial court proceedings resulted in the trial court granting the habeas petition, which would have had the result a new trial. The order granting the petition was entered in 2022, some 34 years after the original trial.

The federal habeas proceeding was appealed to the Ninth Circuit. That court was required to apply restrictions on federal habeas cases by the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA is a federal statute passed because of perceived abuse of the federal habeas corpus remedy. Most of the court's analysis was devoted to the legal standards required to be applied in federal habeas cases.

Analysis of the Court

Before describing the legal standards and the court's analysis, it is actually important to summarize the facts and the proceedings that came before the Ninth Circuit's decision in this case. The allegations in the petition stemmed from two alleged incidents. These were made available to the defendant because two jurors provided sworn statements to the defense. The descriptions of the incidents by the two jurors were hardly shocking in the sense of malfeasance or negligence. Also, they only comprised a fraction of the allegations included in the state and federal habeas corpus petitions. Nevertheless, by 2022 they were by themselves sufficient for a federal judge to overturn a 1988 guilty verdict and death penalty decision.

The procedural history of this case presents a sobering lesson to any officer involved with transport of a defendant to court. Shackling and restraints is said by the court to be a clearly established due process violation because, "the Supreme Court articulated the right to be free from routine shackling during the guilt phase many decades earlier—which our court and others have long recognized. The prohibition on routine guilt-phase shackling was therefore 'clearly established Federal law' within the meaning of [the AEDPA] well before the state court's [habeas] decision in 2001." *Frye Slip Opinion, p.14*

The first issue that the Ninth Circuit analyzed was the "clearly established" issue. It reviewed prior case law and determined that the two instances of alleged shackling could have been a violation of a clearly established standard. The court did not discuss the meaning of "routine shackling." It simply decided that the allegations from the two jurors would have met that part of the standard. By itself this part of the decision suggests that *any* observation

of shackling could support federal habeas relief even when it is brought up a decade or more after the trial.

The second issue was the stumbling block for the defendant. The second issue under the AEDPA was essentially harmlessness. The standard is extremely difficult for a defendant to meet. "Under AEDPA, we cannot grant relief unless '*every* fair-minded jurist would agree' that the state court was not just wrong, but objectively unreasonable." *Frye Slip Opinion, p. 18.* Thus, to grant relief the court would have had to decide not just that the California Supreme Court was wrong in rejecting the shackling claim, but that all judicial officers would consider that decision wrong.

The Ninth Circuit was critical of the standard but still applied it. It could not say that under the facts available to the California Supreme Court there would have been a judge somewhere that might have agreed with the defendant. Accordingly, the Ninth Circuit reversed the federal trial court's grant of the habeas petition.

Training Takeaway

The effort put into the investigation of a death penalty case (when we still had the death penalty in Washington) is massive. So too is the effort to bring such cases to trial. The prosecution team will inevitably be the best trial team that the prosecutor's office can muster.

In the assembling of the team that will undertake such a case, the corrections officers must not be overlooked. Shackling is only one of many stumbling blocks that could benefit a defendant in the years afterward when the appellate courts micro-scrutinize the trial proceedings.

The specific takeaway from this case for corrections officers is to conference with the prosecution team ahead of time concerning security issues and the challenges of getting the defendant to and from court. Ideally this should be done out of the view of any of the jurors. Together the court transport team and the prosecution should decide how security and the requirements of due process should be balanced.

EXTERNAL LINK: View the Court Document

Hyer v. City of Honolulu

No. 23-15335

Federal Ninth Circuit Court of Appeals

September 23, 2024

Hyer v. City of Honolulu, Federal Ninth Circuit Court of Appeals

Factual Background

This case came before the court on an appeal from a summary judgment. The case was filed as an excessive force civil rights action in federal court in Hawai'i. The trial court had granted summary judgment to the officers and municipal defendants. A large part of the trial court's analysis involved admissibility of expert testimony. That issue is of little interest to law enforcement, but the discussion of the excessive force standards will be of interest.

The incident began as a call about an altercation between the suspect and a neighbor in the same rental property. The first law enforcement officers dispatched did not attempt to make an arrest. They reported that the suspect was expressing psychotic ideation, but they left the scene. Several hours later a second dispatch resulted in another set of officers engaging with the suspect and attempting to detain him for a mental health evaluation.

The attempt to detain the suspect lasted for over six hours. During the incident the suspect armed himself variously with a knife and bow and arrow. The officers escalated the level of force to include chemical munitions and a K9. It was during the attempt to detain the suspect with the K9 that the officers used deadly force.

The decision to deploy the K9 was made by a SWAT commander. The purpose in deploying the K9 was to attempt to control the suspect outside the residence so that he could not re-enter the residence and further arm himself. Commands appropriate to the deployment of the K9 were made.

The dog engaged with the suspect while the suspect was armed with a compound bow and an arrow. The suspect used the arrow to stab the K9 several times. Two of the officers reported that the suspect also tried to nock the arrow and direct it at officers. One officer used his firearm and shot the suspect three times.

The officer and municipal defendants brought summary judgment motions in the trial court. They also challenged the admissibility of evidence from three of the plaintiffs' expert witnesses. The trial court granted the motion concerning the experts. It then decided the summary judgment motions without the evidence from the experts. This resulted in the court granting summary judgment on the grounds that there was no question of material fact and that the uses of force were reasonable. That decision was appealed to the Ninth Circuit.

Analysis of the Court

The Ninth Circuit reversed the trial court on both the expert witness issues and the use of force issues. It began with the expert witness issues and concluded that the suppression of the experts was error and that the evidence they would have provided should have been considered in deciding the use of force issues. The court then turned to the use of force issues and reversed that part of the decision as well.

As to the use of force issues, the court began with the legal standards that apply to federal excessive force, civil rights cases. It noted that use of excessive force to detain a suspect is potentially a violation of the Fourth Amendment because it is an unreasonable seizure. Such uses of force are analyzed according to an objectively reasonable standard which requires balancing the individual's Fourth Amendment rights against the countervailing government interests. *Hyer Slip Opinion, p. 23*

The *Hyer* court noted that reviewing courts use a multifactor analysis to assist with the balancing decision. But the court also identified three factors as particularly important: "As a general matter, the strength of the government's interests is based on a number of factors, three of which are primary: '(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.' "

Deadly force involves the ultimate intrusion on a suspect's Fourth Amendment rights. For this reason, the court noted that "[A]n officer's use of deadly force is reasonable *only if* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Hyer Slip Opinion, p. 24.* The court also noted that in deadly force civil rights lawsuits, summary judgment in favor of officers should be granted "sparingly" for the reason that the suspect is deceased, and it is common that the only surviving witnesses are officers. *Id*

With these legal standards in mind, the court reviewed the use of deadly force in this case. It first noted that the severity of the crime weighed against deadly force. The officers were attempting to detain the defendant for a mental health evaluation rather than a serious or violent crime. Thus, as to the first factor, the court concluded that it weighed against the officers.

The court also weighed the second and third factors against the officers. It concluded that as to the second factor, there was reason to doubt the account of the two officers who reported the suspect as attempting to nock the arrow and use it against an officer. "Faced with this conflicting evidence, a reasonable trier of fact could find that Hyer was not wielding his weapon in a threatening manner. Relatedly, a reasonable trier of fact could also find that Hyer did not pose an 'immediate threat' and that the use of deadly force against Hyer was not objectively reasonable. . . Thus, summary judgment was not appropriate." *Hyer Slip Opinion, p. 28*

The court also weighed the third factor against the officers. It noted that resistance can justify some level of force. But it concluded that, "Although Hyer resisted apprehension, a trier of fact could also find that he did not engage in 'sufficient active resistance' to warrant the use of deadly force." *Hyer Slip Opinion, p. 26*

The court's analysis using the three factors led it to conclude that summary judgment should not have been granted. It then turned to a related force issue, the use of chemical munitions. The federal civil rights standard for such uses of force is similar to the standard for deadly force and employs the same factors. "To begin, the defendant officers' use of chemical munitions qualifies as an intermediate use of force. . . Thus, Defendants must show that they possessed more than a 'minimal interest in the use of force' against Hyer. As with the analysis regarding use of deadly force, this excessive force analysis is guided primarily by the three 'primary' factors. . . ." *Hyer Slip Opinion, p. 29*

The court noted that in its view the weighing of the three factors was similar for the chemical munitions claim. As to the second factor, the immediate threat factor, the court noted that although the suspect was armed with a potentially powerful weapon (the compound bow and arrow) he had not used or displayed it for three hours prior to the chemical munitions being deployed. "Further, there were no bystanders at risk of harm following the defendant officers' evacuation of the house and area, and Hyer was overwhelmingly surrounded. Together, these circumstances do not dispositively indicate that Hyer was an immediate threat to the officers, and instead raise important questions for a trier of fact to decide." *Hyer Slip Opinion, p. 31*

The Ninth Circuit reversed a significant win at summary judgment for the officers and municipal defendants in the *Hyer* case. Its analysis of both deadly force and chemical munitions force is well worth studying.

Training Takeaway

The Ninth Circuit's analysis of deadly force and chemical munitions did not conclusively establish that the officers used excessive force. Because the case was an appeal from a summary judgment, the issues were necessarily affected by the question of whether there was sufficient evidence to create a genuine issue of fact for trial. There is some small comfort in the notion that a jury may ultimately decide whether the uses of force were reasonable. But the fact that the Ninth Circuit was critical of the officers' use of force decisions is reason for great caution and clear thinking in similar situations.

Another takeaway specific to Washington Law Enforcement arises from Washington legislation and caselaw. The passage of police reform legislation has included legislation related to both deadly force (I-940) and chemical munitions. *See* RCW 9A.16.040 and RCW 10.116.030. It should be noted that the tear gas statute was adopted in 2021 and amended this year.

Washington law enforcement officers should review cases such as *Hyer* with caution because there is a strong possibility that Washington legal standards will be even less forgiving.

EXTERNAL LINK: View the Court Document

Cases & Reference

1. *State v. Gardner,* 38826-3, Washington Court of Appeals, Division Three (September 24, 2024)
   - Gardner Slip Opinion

2. *State v. Kelly,* 39411-5, Washington Court of Appeals, Division Three (September 10, 2024)
   - Kelly Slip Opinion

3. *State v. Balles,* 39733-5, Washington Court of Appeals, Division Three (September 27, 2024)
   - Balles Slip Opinion
   - RCW 9.95.220(2)
   - RCW 9.94A.631(1)

4. *Frye v. Broomfield,* 22-99008, Ninth Circuit (September 10, 2024)
   - Frye Slip Opinion

5. *Hyer v. City of Honolulu,* 23-15335, Ninth Circuit (September 23, 2024)
   - Hyer Slip Opinion
   - I-940
   - RCW 9A.16.040
   - RCW 10.116.030

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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]