Covering cases published in December 2024

This information is for REVIEW only. If you wish to take this course for CREDIT toward your 24 hours of in-service training, please contact your training officer. They can assign this course in Acadis.

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.

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 by WA Association of Prosecuting Attorneys

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

This month's training incudes four Washington Court of Appeals cases and one Ninth Circuit, use of force case. The Washington cases include two of particular interest in vehicular homicide and DUI investigations. The use of force case is disquieting because it was resolved against the officers and includes discussion of several other recent use of force cases. Two of the cases discussed have been previously summarized during 2024. Links have been provided for the prior cases, and for anyone interested in bonus reading, there is a link to yet another case worth reviewing in the area of use of force civil rights lawsuits.

Case Menu

- City of Spokane v. Ramos, 40075-1, Washington Court of Appeals, Division Three (December 5, 2024)
- State v. Haas, 39752-1, Washington Court of Appeals, Division Three (December 26, 2024)
- State v. Leer, 86863-2, Washington Court of Appeals, Division One (December 30, 2024)
- State v. Hogan, 84796-1, Washington Court of Appeals, Division One (December 2, 2024)
- Singh v. City of Phoenix, 23-15356, Federal Ninth Circuit Court of Appeals (December 26, 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.

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 may see *Id* at the end of some paragraphs in this LED. It is used to refer to the immediately preceding citation.

[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.

City of Spokane v. Ramos, 40075-1, Washington Court of Appeals, Division Three (Dec 5, 2024)

Factual Background

This case came before the court on an appeal by the municipal prosecutors in Spokane. The case involved a dismissal of an actual physical control charge by the municipal court. The dismissal was granted after the court determined that the physical control statute was unconstitutional. A physical control charge is similar to DUI but does not require proof that the suspect or defendant was driving. The dismissal motion was a challenge to the constitutionality of the statute on due process vagueness grounds.

The facts were not in dispute. The defendant was contacted at her residence, in her vehicle, asleep in the passenger seat. The officer had gone to the residence looking for the defendant after seeing her in the driver's seat at a market drinking alcohol on surveillance video. The video had been obtained and reviewed during a theft investigation. The time stamp for the footage showing the defendant drinking behind the wheel was 4:54 am.

The officer contacted the defendant at 7:28 am. She was asleep or unconscious and the motor was running. After rousing the defendant, the officer questioned her about drinking and driving and confronted her with the video. The defendant denied drinking and driving. She also refused a PBT and FSTs. She showed signs and symptoms of intoxication, however, and was arrested. The officer charged her with DUI but the municipal prosecutor amended the charge to actual physical control.

The defendant brought a pretrial dismissal motion. The basis of the motion was that the physical control statute was unconstitutionally vague as applied to her. The municipal court granted the motion and dismissed the case. This led to the municipal prosecutor filing the appeal.

Analysis of the Court

The court began by resolving procedural issues related to an attempt to have the Supreme Court hear the appeal. The Supreme Court declined review and transferred the appeal to the Court of Appeals. The Court of Appeals accepted review and resolved the constitutional challenge.

The void for vagueness doctrine is a due process doctrine that protects "the basic principle that a criminal statute must give fair warning of the conduct that makes it a crime." *Ramos Slip Opinion, p.7.* There are two possible avenues for a vagueness challenge: (1) the defendant may claim that the statute is unconstitutionally vague as to all possible defendants; and (2) the claim may state that the statute is unconstitutional as applied to the defendant's conduct. The difference between the two options is that the first generally involves a First Amendment claim, while the second need not. *Id*

The constitutional review standard that applies to an as applied challenge includes two alternative elements. "When 'challenging a statute on vagueness grounds,' '[t]he challenger must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.' " *Ramos Slip Opinion, p. 8.* Furthermore, with respect to definiteness, a "statute is 'void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id*

The court applied the vagueness standards to the physical control statute. The court quoted the statute, which requires that a defendant "while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within this state." *Ramos Slip Opinion, p.10.* After reviewing the dictionary meaning of the words, "actual physical control," the court stated that the statute "means the existing or present ability, through the use of bodily force, to control the movement of a vehicle." *Ramos Slip Opinion, p.11*

The court reviewed prior cases involving similar and unusual situations where the statue had been upheld. One such case was where the defendant was intoxicated and behind the wheel of a vehicle that had run out of gas. The claim there was that the vehicle was inoperable and therefor the defendant could not be convicted of the offense. *See State v. Smelter, 36 Wn. App. 439*. The court in *Smelter* rejected the argument in part because the ability for the vehicle to move is not required by the statute.

After reviewing prior case law and the scope of the statute the court held against the defendant's vagueness challenge. The court stated, "We do not find this definition ambiguous. The phrase is sufficiently definite. And the definition does not leave police with arbitrary discretion to decide when the law has been violated." *Ramos Slip Opinion, p. 14-15*

Training Takeaway

Both DUI and physical control involve not just driving or being in control of a vehicle, but also intoxication at the same time. A two-and-a-half-hour gap between the defendant being captured on video drinking behind the wheel could present a challenge in conclusively proving that she drank enough to be intoxicated at that time. Likewise, although there was plenty of evidence of intoxication when she was contacted in the passenger seat at her residence, there was no way to conclusively establish that she was the one who drove there, or that she was in a state of intoxication when she did so. Thus, the physical control charge was an appropriate alternative to DUI.

But just as DUI involves both driving and intoxication, physical control also involves "the existing or present ability, through the use of bodily force, to control the movement of a vehicle" and intoxication at the same time. The control mechanisms for the vehicle were within reach of the defendant and the motor was running. These facts satisfied the requirements of the statute and satisfied the requirement that ordinary people be able to determine that conduct like that of the defendant is prohibited by the statute.

EXTERNAL LINK: View the Court Document

State v. Haas, 39752-1, Washington Court of Appeals, Division Three (Dec 26, 2024)

Factual Background

This case came before the court on an appeal from multiple drug trafficking convictions. The court reviewed and resolved an issue related to an exceptional sentence allegation for major violation of the Uniform Controlled Substances Act (VUCSA).

The case was brought after an investigation of the defendant for dealing methamphetamine and fentanyl. The defendant was charged with having sold methamphetamine pills stamped to look like oxycodone and fentanyl on three separate occasions. The values of the three transactions ranged from $310 to $400. The charges included five separate charges for each substance sold during each of the three transactions. The defendant was also charged with delivery of a counterfeit substance for the methamphetamine pills stamped to look like oxycodone. Plus, the prosecution added the exceptional sentence aggravator for each charge.

The case was tried to a jury. The jury instructions for the exceptional sentence aggravators directed the jury to determine if each of the charges from the three transactions was a major violation of the VUCSA. The jury did its duty and found the defendant guilty of all counts and guilty of the sentence aggravator allegations.

The defendant appealed the convictions. Her argument on appeal focused on whether the facts and evidence supported the exceptional sentence verdicts.

Analysis of the Court

In Washington under the Sentencing Reform Act (SRA), to "impose a sentence above the standard range, a court must find substantial and compelling reasons justifying an exceptional sentence based on specifically enumerated aggravating circumstances that must be determined by a jury beyond a reasonable doubt." Haas Slip Opinion, p. 4. In drug cases, a possible

exceptional sentence can arise from a jury's verdict that the drug charges constituted a major violation of the Uniform Controlled Substances Act (VUCSA).

The specific statutory language of the exceptional sentence charged in this case was related to the number for drug transactions. "(e) The current offense was a major violation of [VUCSA] related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA: (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so. . . ." See RCW 9.94A.535(3)(e)(i)

The defendant's argument on appeal focused on the term "current offense." The defendant argued that the term required one aggravator and all of the drug transactions to be charged in one count. The state's counter argument was that "current offense" referred to the conduct for which the defendant was charged in the current case regardless of how many counts were charged. The court rejected the state's argument and concluded that the aggravator could apply only when an individual count included at least three separate drug transactions. Thus, the common practice of charging individual counts for each substance and each transaction would not allow for the addition of this particular aggravated sentence allegation.

The court's reasoning included reference to the use of the term "current offense" in other parts of the SRA. It determined that the term was used to refer to individual charges rather than an entire investigation or case. "Here, because the State charged the individual crimes separately rather than combining the charges in the aggregate, it was not entitled to also have the VUCSA multiple transactions aggravator applied to increase Ms. Haas's standard range sentence." *Haas Slip Opinion, p. 7-8*

The court acknowledged that its decision differed from a separate decision in an unpublished[2] case from Division Two of the Court of Appeals. That case "concluded that 'current offense' includes all conduct related to the crime with which the defendant is charged." See *State v. Malone Slip Opinion*, p. 19. The *Malone* interpretation was in keeping with the common practice in

[2] Unpublished opinions of the Court of Appeals do not constitute case law and are not mandatory authority in court proceedings. A court rule provides the following concerning unpublished cases: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." *GR 14.1*

drug cases of charging separate offenses for each transaction and each substance. Nevertheless, the court in this case disagreed with *Malone* in a published opinion.

Training Takeaway

The charging of drug cases is ultimately the responsibility of prosecutors. For law enforcement drug investigators this case informs charging decisions related to booking or case referral charges. Officers should confer with charging prosecutors as to the best constellation of charges to be filed out of a particular investigation.

The multiple transactions aggravator in Uniform Controlled Substances Act (VUCSA) cases allows the court to sentence above the standard sentencing range. Most felony drug trafficking charges carry a maximum sentence of ten years. The aggravator can be a powerful tool in drug prosecutions because a court is empowered to sentence up to ten years in prison, consecutive for each count.

The court's decision in this case shows the limits of the utility of the sentence aggravator. The court's decision illustrates that stacking multiple aggravators in separate counts may not achieve multiple aggravated sentences. The state must elect whether to charge one count and one aggravator or separate counts and no aggravator.

The decision in a particular case may come down to the general sentencing practices of a county's trial judges. After all was said and done in this case, the trial judge ran all of the sentences concurrent despite multiple charges and multiple aggravators. It would appear that the charging of the aggravator in multiple counts made no difference in the actual length of the defendant's overall sentence.

EXTERNAL LINK: View the Court Document

State v. Leer, 86863-2, Washington Court of Appeals, Division One (Dec 30, 2024)

Factual Background

This case came before the court on an appeal from conviction in a two-victim vehicular homicide and assault case. The issue presented in the appeal was whether the result of BAC testing of a blood sample from a search warrant-authorized blood draw was properly admitted into evidence. The court resolved the issue in favor of the prosecution and upheld the convictions. The court also discussed a recent Division Two case which arrived at the same result. That case was included in the October edition of this digest, for any officer interested in additional reading. See Law Enforcement Digest, October 2024

The incident which led to the vehicular homicide and assault charges took place in January 2020. The defendant hit another vehicle head on. He exhibited signs and symptoms of intoxication after the crash. The investigating officer obtained a warrant for a blood draw. The blood draw was accomplished by a phlebotomist in the officer's presence. The sample was collected in a vacutainer which was later analyzed by the Washington State Patrol (WSP) crime lab.

The issue addressed in the appeal concerned the expiration date of the vacutainer tube. The investigating officer and the crime lab analyst both testified that the vacutainer was not past its expiration on the date of the blood draw. (Ironically, the actual expiration date was not included as part of the record at trial or on appeal; the date was covered up on the vacutainer by an identification label.) It was also likely not expired when the sample was tested by the first WSP analyst in February 2020. However, the sample had to be re-tested. The first analyst left WSP employment before the case went to trial two years later in 2022. Although no one apparently knew the expiration date, both the appellate prosecutor and the defense agreed that the re-test in 2022 would have been past the expiration date.

As a result of the vacutainer expiration date and the necessity of the 2022 re-test, the defendant brought a pretrial suppression motion. The basis for the motion was that the prosecution could not establish all necessary elements of the statutory and WAC provisions for admitting a blood test result.

The trial court heard testimony from the investigating officer, the phlebotomist, and the crime lab analyst. The court ruled that the necessary showing had been made and that the second blood test result was admissible. The case then went to trial and the defendant was convicted as charged of two counts of vehicular homicide for the two deaths, and two counts of vehicular assault for two passengers in the victim car who were seriously injured.

Analysis of the Court

The court started its analysis with the applicable statute and WAC. It also reviewed prior cases which had interpreted either the blood test statute and WAC or the breath test provisions. It concluded that the trial court had made the correct ruling.

The applicable statute and WAC are found at RCW 46.61.506 and WAC 448-14-020. The pertinent statute delegates the details of valid blood testing to the state toxicologist. "The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist." RCW 46.61.506(3), *Leer Slip Opinion, p. 8*

The administrative code regulation specifies the actual requirements. The vacutainer must include, "(a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper will be used. (b) Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate." WAC 448-14-020(3), Leer Slip Opinion, p. 9

Both the investigating officer and the phlebotomist testified specifically that the defendant's vacutainer met the WAC requirements and that it was unexpired. Nevertheless, the defendant's argument was that an unexpired sample vacutainer should be an added to the requirements for laboratory testing. The court rejected that argument in part on the strength of a Washington Supreme Court breath test case. The supreme court case dealt with the mathematical operation of breath test

machines. Similar to the unexpired vacutainer issue in this case, the supreme court had held that the mathematical operation was not a requirement for breath test machines under the breath testing statute and WAC. See State v. Keller. See also Law Enforcement Digest, April 2024

The court in this case reasoned that it is the statute and the WAC that are the source for the requirements for admitting a blood test result. "Thus, we follow the reasoning of our Supreme Court in *Keller* and hold that the requirements for establishing the proper foundation for the admission of blood evidence in a criminal conviction are confined to the plain language of the relevant statute and code." *Leer Slip Opinion, p. 9*

The court also commented on the quality of the evidence submitted by the defense at the pretrial suppression hearing. Much of what the defense had submitted was cobbled together from other defendant motions and cases in other jurisdictions from around the state. This was frowned upon by the court, which stated,

> Leer did not, however, proffer his own expert to contest the testimony presented by the State. He filed a declaration of Elena Mack, the "WW Vice President of Quality Management, IDS—Specimen Management for the Life Sciences segment" of Becton Dickinson and Company (BD), manufacturer of BD "Vacutainer Tubes." However, the content of Mack's declaration makes clear that while it was prepared under penalty of perjury, it was offered "in lieu of live testimony from BD representative(s) *in response to the [s]ubpoena" filed in an unrelated criminal matter in Spokane Municipal Court. Despite the fact that Leer offers no authority that would allow the judge to consider a declaration prepared under penalty of perjury for another cause in a different court*, the trial court appears to have considered it, along with the briefing and other miscellaneous documents from other criminal prosecutions that Leer under a cover sheet captioned "materials in consideration of court's preli[m]inary ruling on admission of blood test results." *Leer Slip Opinion, p.12-13 (italics supplied)*

The practice among DUI and vehicular homicide defense attorneys of sharing information and evidence around the state is worth noting. The issue in this case has made its way through the trial courts to two divisions of the Court of Appeals. The issue should not be considered settled because there is still another division of the Court of Appeals, not to mention the Supreme Court, that will likely consider the issue in the not-so-distant future. Such is the nature of DUI defense in our fair state.

Training Takeaway

The most important takeaway from this case for DUI and vehicular homicide and assault investigators is that the specific provisions of the WAC should be kept in mind during an investigation and in the writing of reports. The sealed condition and expiration date of the vacutainer should be diligently noted and recorded. The officer should be ready to testify to those facts and that he or she could see that the anticoagulant powder was present in the tube before the blood draw.

It is also worthwhile to immediately submit the sample for laboratory testing. To the extent that case backlogs in the crime lab allow, testing of a sample before the expiration date should put to rest the technical arguments relied upon by the defendant in this case. In vehicular homicide cases the utmost diligence is well worth the effort.

EXTERNAL LINK: View the Court Document

State v. Hogan, 84796-1, Washington Court of Appeals, Division One (Dec 2, 2024)

Factual Background

This case came before the court on an appeal from a murder conviction. The defendant was charged with murder for shooting an individual who at one time had been a friend. The defense at trial was self-defense but the primary issue on appeal stemmed from an objection made by the defense attorney during jury selection. Fortunately, that issue did not carry the day and the conviction was upheld.

The facts did not relate to the appellate issue other than they highlighted that the actual murder had nothing to do with racial or ethnic prejudice. The defendant and the victim had been friends. But their friendship had ended years before the shooting because of an unpaid debt. The two former friends had encounters with each other after parting ways and at times the encounters included violence.

The fatal encounter started with an encounter with a younger brother of the victim. The defendant was in a vehicle with a girlfriend. The brother happened by and a fight erupted between the brother and the defendant. The brother left the area but returned in a vehicle with the victim and two other men. During the second encounter the defendant shot and killed the victim and wounded one of the other men.

The defendant was charged with second-degree murder and first-degree assault. His defense was self-defense based on the claim that the defendant was attacking him and the girlfriend. At trial the jury convicted the defendant of second-degree murder and manslaughter but hung on the first-degree assault charge.

The racial prejudice jury selection issue arose from an objection made by the defense attorney during jury selection. The objection was predicated on GR 37, a court rule that applies to instances of alleged racial or ethnic prejudice in jury selection. The defense attorney stated that the prosecutor had improperly

excused a juror, who the defense attorney characterized as transgender. The trial court denied the objection and allowed the prosecutor to excuse the juror. That decision became the focus of the defendant's appeal.

Analysis of the Court

The court started its analysis by reviewing the reasons offered by the prosecution for excusing the supposedly transgender juror. It noted that both the prosecutor and the judge were skeptical that the juror had in fact identified themselves as transgender because there was no reference to such an identification in the record. Furthermore, the prosecutor stated that the reason for excusing the juror had to do with the juror's political views about police. The court then turned to the requirements for a proper jury selection objection under *GR 37.*

From the text of *GR 37*, the court noted that the rule is concerned with racial or ethnic bias. "The 'purpose of [*GR 37*] is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.' " *Hogan Slip Opinion, p. 5.* The court then reviewed what the defense attorney had said during the objection. "Here, when the State moved to strike juror 40, Hogan's counsel objected and cited to the rule, which initiated the 'further discussion . . . outside the presence of the panel.' ... Hogan's counsel then immediately stated *sua spont*[3)]—as the sole basis of the objection—that '[t]his individual is one of the only trans persons on the jury. In the entire panel.' The entirety of the 'further discussion' between parties and the court that followed made no mention of race or ethnicity, whether as the 'basis' of the purported 'unfair exclusion' of juror 40 or otherwise." *Hogan Slip Opinion, p.6*

The court continued its analysis by pointing out that racial or ethnic bias is not the equivalent of gender identity bias. Thus, the stated basis for the defense attorney's objection was "facially improper" under the terms of the rule. *Hogan Slip Opinion, p. 6-7.* The court went on to review prior cases that had interpreted *GR 37.* It noted that claims of discrimination based on sex had also been excluded as a valid objections by other cases under *GR 37.* The court concluded that it would be improper to extend the rule to gender identity.

The court also refuted the defendant's claim that gender identification discrimination should be read into the rule. The defendant argued that gender nonconforming people have a heightened understanding of discrimination

[3] Sua sponte is a Latin phrase that means "of one's own accord". In law, it refers to actions taken by a judge without a request from the parties involved in a case.

similar to racial and ethnic minorities. The court rejected the argument and stated that a proper objection under the rule requires a connection to race or ethnicity and in this case the connection had not been demonstrated:

> Even assuming juror 40 was transgender, Hogan points to nothing in the record that ties their gender identity to their views on racial or ethnic bias that allegedly served as a factor in the State's strike. In other words, Hogan identifies no actual connection between juror 40's gender identity and their view on racial or ethnic bias to even allow the possibility that the State inexcusably relied on such a nexus.
>
> Juror 40 neither stated nor implied a connection between their identity and views on race that could have then factored into the State's strike, such as disclosing, for example, that as a transgender or gender-nonconforming person, they were more likely to be reluctant to convict a black defendant. The idea that juror 40's gender nonconformity inherently meant they held heightened sympathy toward to Hogan, as a racial minority, and that this tendency was a factor in the State's choice to strike them, only appears in Hogan's appellate brief. It is based, not on evidence in the record, but on the observation of Hogan's appellate counsel that there is some similarity in the kind of oppression both have suffered historically. Without more particularized facts, we cannot reward such speculation with a remedy under *GR 37*.

The claims made by the defendant on appeal were not limited to *GR 37*. The defense included a claim based on Equal Protection under the United States Supreme Court's *Batson* line of cases. [Batson v. Kentucky, 476 U.S.79 (1986)] The court denied the defendant's appellate claim of improper discrimination and affirmed the defendant's conviction. Fortunately, the attempt to conflate alleged transgender discrimination with a racial or ethnic discrimination was not successful. At least for now the rule addressing racial or ethnic discrimination continues to apply only to those issues.

Training Takeaway

Accusations by defense attorneys of racial or ethnic bias in jury selection will continue to confound law enforcement and prosecutors alike. The Washington Supreme Court's general rule provides the defense with an almost automatic objection where a juror could possibly be a member of a racial or ethnic minority group, or even when they can't.

The rule states, “If the court determines that an objective observer could view race or ethnicity as a factor” during jury selection, the court must deny the challenge to that juror. In this case race or ethnicity was not an issue yet the court spent 26 pages refuting the defense attorney’s transgender objection.

For law enforcement, the takeaway is that race or ethnicity is a big picture trial issue to be aware of. On the prosecution and law enforcement side of the criminal justice system, accusations of racism or ethnic discrimination will inevitably generate considerable attention by the courts no matter how unsubstantiated.

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.

Singh v. City of Phoenix, 23-15356, Federal Ninth Circuit Court of Appeals (Dec 26, 2024)

Factual Background

This case came before the court on an appeal from a dismissal of an excessive force civil rights lawsuit. The trial court had granted the officer's summary judgment motion and ruled that she was entitled to qualified immunity. The Ninth Circuit reversed that ruling. The incident included the officer discharging her duty weapon during a confrontation with a suicidal individual armed with a knife.

The Ninth Circuit panel's analysis included discussion of several other 2024 use of force cases. The comparison of the analysis in each case is well worth reading. Links to other cases are provided for those officers who might wish to undertake additional reading in this area. As always with federal cases caution should be used because the legal standards applied by the federal courts almost always are different or incomplete compared to the standards that would apply in Washington state court cases.

The facts in the *Singh* case arose from a confrontation with an individual armed with a knife. Two Phoenix officers were dispatched to a call about a man with a knife who had tried to rob another man. The dispatch information included that the suspect was chasing the victim with a knife in a Home Depot parking lot.

The officers arrived on the scene and quickly located the suspect. The suspect had moved to a nearby fast-food restaurant. The officers made contact by placing their patrol cars in front of the suspect in an L shape. They exited and began giving commands while positioning themselves behind the patrol cars. In response to commands, the suspect made comments indicating he was suicidal and that he wanted to be shot by the officers.

Approximately two minutes into the contact, the suspect began moving slowly toward one of the officers. The officer backed up and again gave commands, including a warning that the suspect would be shot if he did not comply. In response, the suspect told the officer that he wanted to get shot and that she should go ahead. The suspect kept moving toward the officer but "appeared to stop next to the front of the vehicle." *Singh Slip Opinion, p. 7.* It was at that time that the officer fired hitting the suspect in the abdomen and causing a non-fatal wound.

The court included brief excerpts from the officer's civil deposition. The excerpts included an account of the reasons she fired at the suspect. Her reasons included that the vehicle was no longer between her and the suspect, that she did not use OC spray or her tazer because it was not safe to do so, and that the parking lot where this happened was open and had "containment problems." The court's description of the facts did not include the time of day, nor whether other people were in the area of the fast-food establishment.

The court noted that the federal trial court had ruled that the officer was entitled to immunity. The trial court had acknowledged that the officer's use of force could be deemed unlawful and a constitutional violation, but that prior precedent did not clearly support a finding of such a violation.

Analysis of the Court

The civil rights legal standards applied by the court in this case were related to qualified immunity. "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." Singh Slip Opinion, p. 8

The test applied in qualified immunity cases was as follows:

> In determining whether qualified immunity shields a police officer or other governmental official, we ask two questions: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) if so, whether that right was "'clearly established' at the time of [the] defendant's alleged misconduct." *Singh Slip Opinion, pp. 8-9*

The court began its application of the qualified immunity test by noting that the defendant officers had only challenged the second step of the analysis. That step is referred to as the clearly established standard and focuses on whether there had been prior cases that were enough like the present case so that the officer would have been on notice that the use of force would be considered an unlawful violation of a constitutional right.

The court characterized the analysis by saying, "existing precedent must have placed the statutory or constitutional question beyond debate." *Singh Slip Opinion, p.9.* The court did not discuss how an officer in the field could be expected to be aware of "existing precedent," much less remember the nuances and holdings of such precedents and conduct her "clearly established" analysis while confronting a suspect armed with a knife in the parking lot of a Jack-in-the-Box.

After describing the qualified immunity test, the court applied the test to the confrontation with the suicidal, knife-wielding suspect. The court noted that the circumstances of this confrontation were similar to a confrontation in a case from 2011[4]. In that case, *Glenn v. Washington County*, the actions of a similar suicidal individual with a knife were held to not justify the use of force because of seven enumerated factors, including that the suspect had held the knife to his own neck and had not threatened anyone else with it. *Singh Slip Opinion, p. 11*

The *Singh* court spent the next nine pages of its opinion painstakingly comparing the facts in *Singh* with the facts in *Glenn* before concluding that the officer was on notice and should have been aware that her use of deadly force could be deemed unconstitutional and unlawful. "Because we hold that *Glenn* put [the officer] on notice that her use of deadly force plausibly violated Plaintiff's Fourth Amendment right to be free of excessive force, we need not and do not reach Plaintiff's alternative argument." Incidentally, the reference to an "alternative argument" was to yet another qualified immunity

[4] *Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011)*

exception, the "obvious case" exception, which was not discussed in *Singh*. *Singh Slip Opinion, p. 20*

In addition to analyzing the use of force under the *Glenn* case, the court in *Singh* differentiated this case from several other more recent use of force cases. Several of those cases have been previously summarized in prior 2024 Law Enforcement Digests[5]. Interested officers may review those summaries for the details and to compare the facts in those cases with the facts in this case. The *Singh* court also reviewed another case decided during December 2024, Napouk v. Las Vegas Metropolitan Police Department[6].

The court in *Napouk* reached a different conclusion than did the court in *Singh*. The summary paragraph *Napouk* provides a useful comparison to *Singh*. The *Napouk* court upheld the lawfulness of the officers' use of force, saying:

> [The involved officers] responded to reports of a man walking around a residential neighborhood in the middle of the night with a "machete" or a "slim jim," behaving suspiciously and walking up to cars and houses. When they arrived, they attempted to engage Lloyd Gerald Napouk for several minutes, but he refused to follow their commands and repeatedly advanced towards them with what they believed was a long, bladed weapon. When he advanced upon them a final time with the weapon, coming within nine feet of [one of the officers], both officers fired their weapons, killing him. Napouk's parents and administrators of his estate sued [the officers] and the Las Vegas Metropolitan Police Department (LVMPD), alleging constitutional and state law claims. Defendants moved for summary judgment, and the district court granted their motion, determining that the officers' use of force was reasonable as a matter of law. We affirm. *Napouk Slip Opinion, p. 1*

The difference in the basic facts in *Singh* compared to *Napouk* presents a challenge for officers in use of force cases. One may reasonably wonder whether it was the size of what the *Napouk* officers thought was a bladed weapon that made the difference, or perhaps the distance between the officer and the suspect after the suspect closed the gap while ignoring commands.

[5] See *Hart v. City of Redwood City*, summarized in April 2024. See also *Cuevas v. City of Tulare*, summarized in July 2024

[6] Case No. 23-15726, Ninth Circuit Court of Appeals (December 10, 2024)

Qualified immunity is a defense that may be available in any given use of force, civil rights lawsuit. But the "clearly established" aspect of the qualified immunity is anything but a bright line rule. This area of the law is fraught with pitfalls and exceptions that will surely continue to bedevil officers and their departments for the foreseeable future.

Training Takeaway

As a result of department use of force trainings, most officers will be aware of the speed with which a suspect with a knife can close the gap on an officer. The four cases discussed in *Singh* highlight that reviewing courts may not be aware of, or willing to give credit to, such information.

Including this case, the court discussed four similar fact patterns and came to different conclusions as to the lawfulness of the force. This is a reality that officers and their departments and their guild counsel must be aware of. Civil rights use of force lawsuits unfortunately turn on nuance and minutia. The analysis can appear not to take into account the grim reality of armed confrontations with irrational suspects.

EXTERNAL LINK: View the Court Document

Cases & Reference

1. City of Spokane v. Ramos, 40075-1, Washington Court of Appeals, Division Three (December 5, 2024)
   - *Ramos Slip Opinion*

2. *State v. Haas,* 39752-1, Washington Court of Appeals, Division Three (December 26, 2024)
   - *Haas Slip Opinion*
   - *State v. Malone Slip Opinion*
   - *RCW 9.94A.535*
   - *GR 14.1*

3. *State v. Leer*, 86863-2, Washington Court of Appeals, Division One (December 30, 2024)
   - Leer Slip Opinion
   - *State v. Keller*
   - *RCW 46.61.506*
   - *WAC 448-14-020*
   - *Law Enforcement Digest, April 2024*
   - *Law Enforcement Digest, October 2024*

4. *State v. Hogan,* 84796-1, Washington Court of Appeals, Division One (December 2, 2024)
   - Hogan Slip Opinion
   - Batson v. Kentucky, 476 U.S.79 (1986)
   - GR 37

5. *Singh v. City of Phoenix,* 23-15356, Ninth Circuit Court of Appeals (December 26, 2024)
   - Singh Slip Opinion
   - Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011)
   - Napouk v. Las Vegas Metropolitan Police Department
   - Law Enforcement Digest, April 2024
   - Law Enforcement Digest, July 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.

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 by WA Association of Prosecuting Attorneys

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.