

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: *Thank you for your service, protection and sacrifice*

JANUARY 2022

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT UNDER SECTION 1983: 3-JUDGE PANEL RULES THAT, VIEWING PLAINTIFF’S CLAIMS IN THE BEST LIGHT FOR HER, OFFICERS DID NOT USE EXCESSIVE FORCE WHEN THEY REMOVED A DISRUPTIVE BUT PASSIVELY RESISTING PROTESTER FROM A CITY COUNCIL MEETING BY USING MINIMAL FORCE IN LIFTING HER BY HER ARMS AND CARRYING HER OUT OF THE MEETING

In Williamson v. City of National City, ___ F.4th ___, 2022 WL ___ (9th Cir., January 24, 2022), a three-judge Ninth Circuit panel rules that, even when one views the Plaintiff’s allegations in the best light for her (as is required in the summary judgment stage of the case), law enforcement officers did not use excessive force in their actions in using minimal force to remove a disruptive but passively resisting protester-Plaintiff from a city council meeting.

A staff summary of the Ninth Circuit Opinion (the staff summary is not part of the Opinion) summarizes the panel’s Opinion as follows:

The panel reversed the district court’s denial of [the government] defendants’ summary judgment motion asserting qualified immunity in an action brought pursuant to 42 U.S.C.

§ 1983 and state law alleging that police officers used excessive force when they removed plaintiff from a city council meeting where she and others were protesting.

The protest prevented the city council meeting from continuing, and police officers warned the protesters that they had to leave the meeting room or they would be arrested. The protesters refused to leave and passively resisted being removed by going limp. Officers handcuffed the protesters and carried or pulled them by their arms from the meeting room. Plaintiff Tasha Williamson alleged that she suffered wrist and shoulder injuries when she was forcibly removed.

The panel determined that it had jurisdiction over this interlocutory appeal, noting that whether an officer's conduct violates the Fourth Amendment is a legal issue. The panel next [addressed California law issue not addressed in this Legal Update entry]. The panel concluded that the Officers did not violate Williamson's Fourth Amendment rights; therefore, there was no need to address the clearly-established prong of the qualified immunity analysis.

Even viewing the evidence in Williamson's favor, the type and amount of force used by the Officers in this case was minimal. The Officers did not strike Williamson, throw her to the ground, or use any compliance techniques or weapons for the purpose of inflicting pain on her.

Rather, they held her by her arms and lifted her so they could pull her out of the meeting room after she went limp and refused to leave on her own or cooperate in being removed. The panel further concluded that although National City's interest in forcibly removing Williamson from the city council meeting was low, it was not nonexistent; the city was not required to permit the organized lawlessness conducted by the protesters.

The panel concluded that the severity of the officers' intrusion and the weight of National City's interests were aligned; that is, the city's interests were low, and the Officers' use of force was appropriately minimal. The Officers were therefore entitled to qualified immunity.

[Some paragraphing revised for readability]

Result: Reversal of U.S. District Court (Southern District of California) order that denied the government defendants' motion for summary judgment asserting qualified immunity.

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT UNDER SECTION 1983: 3-JUDGE PANEL RULES THAT, VIEWING PLAINTIFFS' CLAIMS IN THE BEST LIGHT FOR THEM, TWO OFFICERS USED EXCESSIVE FORCE AND VIOLATED CLEARLY ESTABLISHED LAW WHEN THEY USED A TASER AND PUT A PRE-TRIAL DETAINEE IN A HEAD RESTRAINT, EVEN AFTER THE DETAINEE — WHO HAD HIS HANDS HANDCUFFED AND LEGS SHACKLED — HAD APPARENTLY STOPPED RESISTING AND POSED NO THREAT

In Hyde v. City of Willcox, ___ F.4th ___, 2022 WL ___ (9th Cir., January 6, 2022), a three-judge Ninth Circuit panel affirmed in part and reversed in part the U.S. District Court's denial of a motion to dismiss a complaint brought under 42 U.S.C. § 1983. The Plaintiffs are suing for the death of a prisoner. The Plaintiffs allege, among other things, (1) that two law enforcement

officers used excessive force on a pretrial detainee when they applied physical force and a Taser to subdue him, and (1) that the officers then failed to provide him with adequate medical care. Two of the officers are denied qualified immunity on the first part of the claim because, under the Plaintiffs' allegations viewed in the best light for the Plaintiffs, the officers' use of force was excessive, and they should have known this under well-established case law on use of force.

A staff summary of the Ninth Circuit Opinion (the staff summary is not part of the Opinion) summarizes the panel's Opinion as follows:

Hyde stopped breathing 21 minutes after being put in a restraint chair, and despite efforts by the officers to resuscitate him, he died five days later. Hyde's parents sued on several theories under § 1983, including excessive force [by numerous officers], failure to train, failure to supervise, failure to provide adequate medical care, and municipal liability.

The district court held that [all of] the officers used unreasonable force and were not entitled to qualified immunity. The panel affirmed the district court's denial of the motion to dismiss for the excessive force claim against officers Pralgo and Callahan-English. The panel held that the two officers used excessive force and violated clearly established law when they used a Taser and put Hyde in a head restraint, even after Hyde – who had his hands handcuffed and legs shackled – had apparently stopped resisting and posed no threat.

The panel reversed the denial of the motion to dismiss for the excessive force claim as to the other officer defendants, determining that they had reasonably used force earlier in the altercation when Hyde resisted prior to being subdued and restrained.

The panel also reversed the district court's denial of dismissal on the claim that Hyde was denied adequate medical care. The panel determined that the complaint had not adequately alleged that the named officers knew of Hyde's mental health condition or that he was in distress after the altercation. The panel therefore held that qualified immunity barred the claim that individual officers violated Hyde's right to adequate medical care.

Finally, reviewing under pendent jurisdiction the district court's denial of the motion to dismiss the claims against the municipal defendants, the panel reversed on the failure-to-train and municipal liability claims. The panel stated that while deliberate indifference can be inferred from a single incident when "the unconstitutional consequences of failing to train" are "patently obvious," an inadequate training policy itself cannot be inferred from a single incident.

The Ninth Circuit Opinion describes the facts of the case as follows:

Luke Ian Hyde – a 26-year-old man with mental health issues, including bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder – managed his condition through six prescription medications. One night, Hyde was driving through the City of Willcox towards his parents' home in San Antonio. Around midnight, Willcox police detective J. Valle pulled Hyde over and arrested him on suspicion of driving under the influence. Hyde arrived in booking at around 1:30 a.m. and submitted to a blood draw. He tested negative for alcohol but positive for amphetamines, a finding consistent with

his Adderall prescription for his diagnosed attention deficit hyperactivity disorder. For the next five and a half hours, Hyde napped, ate, talked to officers on duty, and requested a phone to contact a lawyer.

Hyde did not receive his prescribed medication, and by 7:30 a.m., he appeared restless. Minutes later, he charged toward the door, fell to the floor, and injured his head. Deputy Raymond Robinson and Sergeant Brian Pralgo opened Hyde's cell, while Jordan Faulkner, a medic, waited in the booking area to examine Hyde's head wound. Hyde first emerged from his cell calmly, but then sprinted through the booking area and into the female cell area while Robinson, Pralgo, and Detention Officer Sam Bohlender unsuccessfully tried to tackle him. Hyde reached a dead end in the female cell area, where he stood with his back against the wall, facing Robinson, Pralgo, and Bohlender. At this point, Pralgo, and Robinson deployed their Tasers at Hyde in a fast sequence three times.

In the doorway of the booking area, a scuffle ensued: Pralgo, Robinson, and Bohlender heaped onto Hyde, and tried to handcuff him to the door handle. Lieutenant Sean Gijanto and Sergeant D. Noland then entered the fray. With Hyde lying on the ground, Robinson delivered 11 closefisted peroneal strikes to Hyde's legs while other officers fastened leg irons on him. Pralgo again used his Taser twice at Hyde's thigh for about five seconds each.

At 8:02 a.m., Hyde was dragged to his feet and collapsed to his knees as at least six officers lifted his body and handcuffed Hyde's hands behind his back. At 8:03 a.m., Pralgo retrieved the restraint chair, and four officers hoisted Hyde's body into it with his hands cuffed behind his back and his legs fastened in leg irons. At 8:05 a.m., Pralgo again used his Taser on Hyde's thigh for about five seconds, while Callahan-English used her arms to force Hyde's head into a restraint hold as four officers fastened Hyde into the chair. Hyde was "fully restrained" in the chair at 8:06 a.m.

At 8:24 a.m., Hyde rolled his head back, gasping for air, as four officers passed by him. Three minutes later, he stopped breathing. A minute later, Pralgo, Valle, and Faulkner found Hyde pulseless. They immediately removed Hyde from the chair tried to revive him through chest compressions and defibrillator shocks for the next ten minutes. At the hospital, he regained his pulse but was later put on life support. Several days later, Hyde's parents requested that he be removed from life support; he died the next day, about a week after his arrest. According to the autopsy, Hyde's causes of death included blunt force injuries, rhabdomyolysis (kidney damage caused by muscle breakdown), cardiomegaly (enlarged heart), and coronary artery atherosclerosis.

In key part, the **LEGAL ANALYSIS** by the Ninth Circuit panel on whether any or all of the officers used excessive force in violation of clearly established case law under the facts alleged by plaintiffs is as follows (many of the case citations in the Opinion are omitted from the excerpts below):

*The Complaint Plausibly Alleges That Two of the Officers Violated Hyde's
Clearly Established Constitutional Rights.*

To determine whether an officer enjoys qualified immunity, the court asks, in the order it chooses, (i) whether the alleged misconduct violated a constitutional right and (ii) whether the right was clearly established at the time of the alleged misconduct. . . . A

clearly established right is one that is “sufficiently clear ‘that every reasonable official would have understood that what he is doing violates that right.’” . . . “Plaintiffs must point to prior case law that articulates a constitutional rule specific enough to alert these deputies that their particular conduct was unlawful.”

A. The complaint plausibly alleges that Callahan-English and Pralgo used excessive force under clearly established law when they continued to use force after Hyde had been restrained and was not resisting.

Use of force during pretrial detention is unconstitutionally excessive if it is “objectively unreasonable.” . . . Objective reasonableness turns on the “facts and circumstances of each particular case.” [Graham v. Connor, 490 U.S. 386, 396 (1989)]. “A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.” Thus, a court must consider the “‘legitimate interests that stem from the government’s need to manage the facility in which the individual is detained,’ appropriately deferring to ‘policies and practices that in the judgment’ of jail officials ‘are needed to preserve internal order and discipline and to maintain institutional security.’” . . . Bell v. Wolfish, 441 U.S. 520, 540, 547 (1979).

The following considerations may bear on the reasonableness (or unreasonableness) of the force used: “the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.” . . . The most important factor is whether the suspect posed an immediate threat. See Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011) (en banc). This analysis is not static, and the reasonableness of force may change as the circumstances evolve. . . .

I. Until Hyde was subdued and restrained, the force used by officers Pralgo, Robinson, Bohlender, Gijanto, and Noland was reasonable.

At the outset, the officers handled the situation reasonably. After Hyde first violently injured himself in his cell, he ran free through the booking area of the detention center, despite three officers trying to contain him. Given the need to quell a potentially dangerous situation, Pralgo and Robinson justifiably used their Tasers against Hyde. . . .

As more officers joined the fray, they justifiably continued using intermediate force – the Taser and strikes on Hyde’s leg – because (i) Hyde violently scuffled with the officers, (ii) the officers had not yet restrained Hyde, and (iii) the officers were “forced to make split-second judgments – in circumstances that [were] tense, uncertain, and rapidly evolving.” Graham, 490 U.S. at 397.

Plaintiffs rely on Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001), to argue that we must consider Hyde’s mental health issues in assessing the officers’ use of force. In Deorle, we concluded that “where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining . . . the reasonableness of the force employed.” . . .

But the complaint here does not allege that these officers knew about Hyde’s mental health condition. Instead, the complaint asserts that a cursory inspection of Hyde’s

medication would have alerted any trained officer to his conditions, but it fails plausibly to allege that any of the named defendants even knew Hyde was taking medications. And unlike the plaintiff in Deorle – who appeared to be a “deeply troubled, emotionally disturbed individual . . . [who] repeatedly asked officers to shoot him,” *id.* at 1280 – there are no allegations here that Hyde exhibited any similar behavior. To the contrary, the complaint reflects that Hyde remained calm and cooperative for several hours.

2. *After Hyde was subdued and restrained, officers Pralgo and Callahan-English used excessive force.*

But the need for more force waned as circumstances changed. By 8:03 a.m., Hyde had his hands handcuffed behind his back and his legs shackled. Hyde appeared “fatigued,” remained on his knees, and seven officers surrounded him. Yet two minutes later, Pralgo used his Taser on Hyde’s thigh again for about five seconds and Callahan-English used her arms to force Hyde’s head into a restraint hold, while four other officers fastened Hyde into the restraint chair. This continued use of force by Pralgo and Callahan-English was unreasonable. . . .

By 8:03 a.m., it was no longer a frantic and fast-evolving situation requiring officers to make split-second decisions. Two minutes had elapsed between Hyde being handcuffed and shackled and Pralgo and Callahan-English using more intermediate force. For two minutes, Pralgo and Callahan-English saw an exhausted Hyde on his knees with both his hands and feet restrained.

They should have recognized that Hyde had effectively stopped resisting and posed no threat to the officers surrounding him. They thus had enough time to reassess their use of force and understand that they no longer needed to use a Taser or a head restraint.

The defendants argue that continued force was justified because, according to their interpretation of the complaint, Hyde is never plausibly alleged to have ceased fleeing, resisting, or fighting before being “fully” restrained 8:06 a.m. Admittedly, the complaint confusingly does not state what was occurring between 8:03 a.m. (when Hyde had his hands and legs restrained) and 8:06 a.m. (when Hyde was “fully restrained”).

The parties also inexplicably did not include the jailhouse video in the record. But we must construe the complaint in favor of the non-moving party – Plaintiffs – at this stage. . . . And the complaint, when read as a whole and in Plaintiffs’ favor, supports the claim that he was restrained, was not resisting, and posed no threat by 8:03 a.m.

To start, the complaint alleges that – several minutes before Pralgo’s final Taser use and Callahan-English’s head restraint – Hyde had his hands handcuffed and feet shackled, was too weak to stand, and was surrounded by seven officers. Construing these facts in Plaintiffs’ favor, we conclude that Hyde was not fleeing and could no longer resist the officers.

We also construe the statement that Hyde was not “fully” restrained until 8:06 a.m. to mean that Hyde had not been fastened into a restraint chair. And we have never required that a suspect’s every inch be immobilized before he is considered restrained for a reasonable force analysis. To the contrary, our cases routinely call suspects “restrained” after they have been handcuffed, . . . or simply pinned down by officers . . .

We thus conclude that, viewing the complaint in the light most favorable to Hyde, Pralgo and Callahan-English used excessive force after Hyde was restrained and apparently no longer resisting.

3. Pralgo and Callahan-English violated clearly established law.

Our cases clearly establish that the use of intermediate force – such as a head restraint or Taser – on a restrained and non-resisting suspect is unreasonable. For example, we have held that “the use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment’s prohibition on the use of excessive force.” [Tuuamalemalu v. Greene, 946 F.3d 471, 477 (9th Cir., 2019)]. In Tuuamalemalu, we also relied on [Drummond v. City of Anaheim, 345 F.3d 1052, 1056 (9th Cir., 2003)] in which we held that officers used excessive force by “press[ing] their weight on [the suspect’s] neck and torso as he lay handcuffed on the ground.” . . . It thus should have been clear to Callahan-English that the use of a head restraint on Hyde was unreasonable when he had both his hands and feet shackled for two minutes and no longer could resist.

Similarly, the Ninth Circuit has found the use of a Taser excessive if the suspect does not pose an immediate threat. For example, in Mattos, this court held that it was unreasonable to use a Taser on a suspect who committed a minor offense and did not present an immediate threat to the officers, even though she refused to exit the car. . . see also Bryan v. McPherson, 630 F.3d 805, 826–30 (9th Cir. 2010) (use of a Taser unreasonable because suspect committed a minor traffic infraction and did not present an immediate threat). Pralgo thus should have been on notice that it was unreasonable to use the Taser on Hyde, who was similarly not suspected of a serious crime, no longer threatened the officers after being restrained for two minutes and was no longer capable of resisting in the final stages of the scuffle

Our cases also make it clear that the officers must reassess use of force in an evolving situation as the circumstances change. . . .

To be clear, we are generally loath to second-guess law enforcement officers’ actions in a dangerous situation by analyzing each act without looking at the entire event and considering the officers’ mindset amid the uncertainty and chaos. We should not scrutinize an officer’s every minor move in a frantic and chaotic situation as if we were examining the Zapruder film in slow-motion. But here, Pralgo and Callahan-English had two minutes to realize that Hyde – who was handcuffed, shackled, and exhausted – could no longer resist and did not pose a threat. It is clearly established that officers cannot use intermediate force when a suspect is restrained, has stopped resisting, and does not pose a threat. These two officers thus cannot shield themselves by invoking qualified immunity. We affirm this aspect of the district court’s ruling.

[Many case citations omitted, others revised for style; footnotes omitted; some paragraphing revised for readability]

Result: Affirmance of the U.S. District Court (Arizona) ruling denying qualified immunity to two of the law enforcement officers; reversal of ruling that denied qualified immunity to other officers for their use of force earlier in the struggle when Hyde resisted prior to being subdued and restrained.

CIVIL RIGHTS ACT CIVIL LIABILITY FOR CORRECTIONS UNDER SECTION 1983: 3-JUDGE PANEL RULES THAT CASE MUST GO TO TRIAL ON PRISONER'S CLAIMS THAT PRISON OFFICIALS VIOLATED HIS CONSTITUTIONAL FREE SPEECH RIGHTS AND CONSTITUTIONAL AND STATUTORY RELIGIOUS FREEDOM RIGHTS IN CONFISCATING SOME OF HIS MAIL

In Jones v. Slade, ___ F.4th ___, 2022 WL ___ (9th Cir., January 24, 2022), a three-judge Ninth Circuit panel reverses the U.S. District Court's summary judgment for prison officials, and the panel rules that the case must go to trial. The case involves an action by an Arizona state prisoner alleging that the confiscation of his mail violated his rights under the Free Speech and Free Exercise of Religion Clauses of the First Amendment, as well as violating his rights as a prisoner protected under the Religious Land Use and Institutionalized Persons Act (RLUIPA).

A staff summary of the Ninth Circuit Opinion (the staff summary is not part of the Opinion) summarizes the panel's Opinion as follows:

Plaintiff, Edward Lee Jones, Jr., is incarcerated at the Arizona State Prison Complex. In late 2017 and early 2018, Jones ordered by mail six hip-hop, R&B CDs and two Nation of Islam texts. All of the items were confiscated as contraband pursuant to an Arizona Department of Corrections (ADC) Department Order 914 ("DO 914"), which regulates the content of incoming mail.

The panel held that genuine issues of material fact existed both as to whether the ADC applied its order inconsistently as to the CDs, in violation of Jones's free-speech rights, and whether the exclusion of Jones's Nation of Islam texts substantially burdened his religious exercise in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Free Exercise Clause [of the First Amendment].

Addressing first the claims pertaining to the confiscation of the CDs, the panel held that, viewing the evidence in the light most favorable to Jones, there was a material question of fact here – whether ADC selectively enforces DO 914 against disfavored expression, rap and R&B musical genres. Jones had proffered sufficient evidence of inconsistent application of DO 914 to preclude summary judgment.

Because a genuine issue of fact existed as to whether there was a valid, rational connection between DO 914, as applied to Jones, and ADC's legitimate interests in security, rehabilitation, and reducing sexual harassment, the panel determined that it need not address the remaining factors set forth in Turner v. Safley, 482 U.S. 78 (1987). The panel reversed the grant of summary judgment with respect to the CDs ADC withheld from Jones and remanded for further proceedings, expressing no views on the merits of Jones's claims.

Addressing the claims relating to the confiscation of two religious texts, the panel determined that the district court characterized Jones's religious exercise too broadly as observing Ramadan rather than reading Nation of Islam texts during Ramadan. Having defined the scope of Jones's religious exercise – reading his Nation of Islam texts during Ramadan – the panel next held that there was a genuine issue of fact as to whether denying Jones essential religious texts during Ramadan was a substantial burden on his religious exercise.

Accordingly, summary judgment was inappropriate Jones's RLUIPA claim. The panel left it to the district court on remand to assess whether ADC could demonstrate that applying the challenged regulation to Jones served a compelling interest and met the exceptionally demanding least-restrictive-means standard [for assessing government regulation in this legal area].

The panel further held that for the same reasons that the district court's analysis was flawed under RLUIPA, it did not hold up under the Free Exercise Clause [of the First Amendment]. Thus, it was impermissible for the district court to focus on whether reading Elijah Muhammad's texts was required to observe Ramadan, rather than whether Jones sincerely believes reading these texts during Ramadan was consistent with his faith. Because the district court did not reach analysis [under Turner v. Safley, 482 U.S. 78 (1987)], the panel left it to the district court on remand to determine whether DO 914 was rationally related to a legitimate penological interest.

[Some paragraphing revised for readability]

CIVIL RIGHTS ACT CIVIL LIABILITY FOR CORRECTIONS UNDER SECTION 1983: 3-JUDGE PANEL RULES THAT CASE MUST GO TO TRIAL ON PRISONER'S CLAIM THAT PRISON OFFICIALS VIOLATED HIS STATUTORY RELIGIOUS FREEDOM RIGHTS IN RELATION TO HIS BELIEF THAT HE MUST USE SCENTED OIL FOR HIS PRAYERS

In Johnson v. Baker, ___ F.4th ___, 2022 WL ___ (9th Cir., January 26, 2022), a three-judge Ninth Circuit panel affirms a U.S. District Court ruling against the State of Nevada prison officials in a Prisoner Civil Rights action brought under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) by a Nevada state prisoner.

A staff summary of the Ninth Circuit Opinion (the staff summary is not part of the Opinion) summarizes the panel's Opinion as follows:

The panel affirmed the district court's injunction, entered following a bench trial, requiring Nevada prison officials to allow plaintiff to possess no more than a half ounce of scented oil in his cell for personal use with his prayers. Noting that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides expansive protection for religious liberty, the panel agreed with the district court that Nevada's regulation banning personal possession of scented oil substantially burdened plaintiff's religious exercise, and that the State failed to show that the regulation was the least restrictive means of serving its compelling interest.

The panel stated by the plain language of RLUIPA, it was forbidden from evaluating the centrality of a religious practice or belief. See 42 U.S.C. § 2000cc-5(7)(A). Instead, the panel could only scrutinize the sincerity of the prisoner's beliefs.

Because RLUIPA's plain text and this court's precedent prohibits courts from peering into the centrality of a religious practice or whether a particular practice was necessary to the religion, the panel rejected defendants' assertions that scented oil was not "really that important" to plaintiff's worship practice, or that plaintiff needed to point to textual support or oral history proving that the Prophet Mohammad used scented oil in prayer.

The panel noted that the prison regulation at issue prohibited plaintiff from using scented oil for prayer – the way plaintiff believes the Prophet Muhammed prayed – for 34 out of his 35 prayers per week. The panel concluded that the regulation constituted a “substantial burden” on plaintiff’s particular religious exercise and that in advancing a general interest in prison security and minimizing contraband, Nevada failed to meet the exceptionally demanding” burden of proving that its ban was the least restrictive means of furthering its security interest.

[Some paragraphing revised for readability]

WASHINGTON STATE COURT OF APPEALS

EVIDENCE IS HELD TO BE SUFFICIENT TO SUPPORT CONVICTIONS FOR FIRST DEGREE HUMAN TRAFFICKING AND FIRST DEGREE PROMOTING PROSTITUTION

In State v. Braun, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, January 20, 2022), a three-judge Division Three panel rules that there is sufficient evidence in the record to support defendant’s convictions for first degree trafficking under RCW 9A.40.100, and for promoting prostitution in the first degree under RCW 9A.88.070.

The Court rejects Defendant’s argument that the totality of his conduct toward his victim did not meet the “force, coercion or fraud [against the victim]” element of RCW 9A.40.100. Defendant also loses his argument that the totality of his conduct toward his victim did not meet the “threat or force” element of RCW 9A.88.070. And the Court also rules that the totality of the evidence supports the causation requirements of the two statutes.

The Braun Opinion contains a lengthy description of the facts relating to Defendant Braun’s manipulation of his female victim, and the Opinion also contains a lengthy discussion of the fact-intensive legal issues in this statutory construction case. Both Washington and federal precedents are discussed at length. The Braun Opinion begins by quoting with approval a federal court decision’s description of testimony by a sex trafficking expert in that federal case:

“[S]ex traffickers select victims who demonstrate vulnerabilities including homelessness, substance abuse, mental health issues, and histories of physical, emotional or sexual abuse. A typical trafficker recruits victims by telling them that he loves them, promising them a better life, providing them with shelter and drugs, and lying to them about the nature of the job. . . .

. . . .

[T]raffickers control their victims through physical violence, sexual violence, psychological violence and grooming. Traffickers . . . groom victims with promises and compliments, but escalate to physical abuse, sexual assault and death threats. . . . They also use psychological violence such as tearing a victim down, telling them they are worthless, socially isolating them, and controlling them financially and by taking advantage of a victim’s drug dependency. . . .

. . . [V]ictims often stay with their traffickers – or leave and then return – because they believe they have nowhere to go; that there is no one else out there for them, and no

other options for them; they feel ashamed and guilty and stigmatized, thinking that they will not be accepted elsewhere. They are also afraid that if they leave, the trafficker will find them and harm them even more egregiously.”

United States v. Carson, 870 F.3d 584, 590-91 (7th Cir. 2017) (Describing testimony of Sharon Cooper, expert on sex trafficking)

Result: Affirmance of Kittitas County Superior Court convictions of Lars Ronson Braun or human trafficking in the first degree and promoting prostitution in the first degree.

WASHINGTON STATE ATTORNEY GENERAL OPINION

AGO 2022 NO. 1 ADDRESSES SOME QUESTIONS RELATING TO 2021 WASHINGTON LEGISLATION THAT ADDRESSED LAW ENFORCEMENT USE OF PHYSICAL FORCE

On January 20, 2022, the Washington State Attorney General issued a formal opinion, Attorney General Opinion 2022, No. 1, addressing some questions that were posed by legislators asking for interpretation of Engrossed Second Substitute House Bill 1310, which passed the Legislature as chapter 324, Washington Laws of 2021.

The body of the Opinion begins by noting that the legislators posed six questions, but that AGO 2022 No. 1 addresses only the first three questions, reserving for a future opinion or opinions the answers to the final three questions. The six questions are framed in AGO 2022 No. 1 as follows:

By letter previously acknowledged, you have requested our opinion on the following questions: ATTORNEY GENERAL OF WASHINGTON The Hon. Goodman and Johnson 2 AGO 2022 No. 1

1. What constitutes “physical force” in the context of the standard in Engrossed Second Substitute House Bill 1310, 67th Leg., Reg. Sess. (Wash. 2021) (E2SHB 1310)?
2. Does the standard in E2SHB 1310 preclude an officer from using physical force in the context of an investigatory detention (based on reasonable suspicion and not probable cause) when it becomes apparent that an individual will not otherwise comply with the request to stop?
3. In light of the standard in E2SHB 1310, are the provisions of RCW 71.05, RCW 13.34, RCW 43.185C, and other statutes and court orders (civil or criminal) authorizing or directing a law enforcement officer to take a person into custody to be interpreted as authorizing the officer to use physical force when necessary for that purpose?
4. In light of the standard in E2SHB 1310, is a law enforcement officer authorized to use physical force pursuant to the emergency aid doctrine, where there is no “imminent threat of bodily injury to the officer, another person, or the person against whom force is being used”? Does using physical force in this manner breach a legal duty to leave the scene, and would an officer’s efforts constitute an exception to the Public Duty Doctrine under the rescue doctrine?

5. Read together, does section 3(3) of E2SHB 1310 effectively authorize a law enforcement officer to use a chokehold or neck restraint “to protect against his or her life or the life of another person from an imminent threat” despite the specific prohibition of such tactics in section 2 of Engrossed Substitute House Bill 1054, 67th Leg., Reg. Sess. (Wash. 2021)?

6. How should the terms “possible,” “available,” and “appropriate” in section 3 of E2SHB 1310 be interpreted? Should those terms be interpreted according to their common definitions or according to the “reasonable officer” standard established under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), which provides that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight”? *Id.* at 396.

The Opinion then provides the following additional information regarding pending requests for interpretations of the 2022 legislation:

In the interest of providing you answers as quickly as possible, we are answering your questions on a rolling basis. This opinion [AGO 2022 No. 1] addresses only the first three questions; the remainder will follow separately.

We also note that a separate group of legislators requested our opinion on ten additional questions relating to these same bills. We will address those questions after finishing your request. See Letter from Representative Skyler Rude et al. to Attorney General Bob Ferguson (Sept. 16, 2021).

AGO 2022 No. 1 provides the following brief answers to the first three questions:

1. The term “physical force” is not defined in E2SHB 1310 or in the law more generally, and therefore there is significant uncertainty as to its meaning. The most natural reading of the statute’s plain language is that physical force includes all acts by officers that involve violence, compulsion, or constraint used against another person’s body, even if it is unlikely to cause pain or injury. However, physical touch that occurs in the course of rendering aid would generally not be physical force, provided the individual receiving assistance is not resisting.

2. While the answer is unclear, the more likely reading of E2SHB 1310 is that officers may only use physical force under the circumstances listed in the statute. Therefore, the statute precludes an officer from using physical force in the context of an investigatory detention based solely on reasonable suspicion, even if the individual does not comply with the request to stop.

3. In light of our answer to your second question, we conclude that officers may use physical force to take a person into custody under RCW 71.05, RCW 13.34, and RCW 43.185C only if they can articulate a permissible use of force specified in E2SHB 1310. In many cases, however, physical force may be justified under that statute to “protect against an imminent threat of bodily injury” when an officer takes someone into custody under these other statutes.

AGO 2022 No. 1 provides detailed analysis (not provided in the [Legal Update](#)) explaining these brief answers.

LEGAL UPDATE EDITORIAL NOTE: The Washington Association of Sheriffs and Police Chiefs has released the following statement regarding WASPC’s embracing of language in AGO 2022 No. 1 that advises the Washington Legislature, as follows, that improvement and clarification of the 2021 legislation is needed:

WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS STATEMENT ON ATTORNEY GENERAL OPINION (Lacey, WA) --- The opinion issued by the Office of Attorney General reflects the Washington Association of Sheriffs and Police Chiefs’ (WASPC) position that the reform laws enacted in 2021 need improvement and clarification. Specifically, we emphasize the portion of the summary of the opinion that states:

“We begin by emphasizing that the answers to all of your questions are extremely difficult. Reasonable minds disagree about the correct legal conclusions.

We give our best legal answers for them here, but must acknowledge that these answers are debatable and uncertain. In light of this uncertainty, for the following reasons we strongly urge the Legislature to clarify its intent regarding these important questions.

First, these bills address profoundly important topics regarding policing, and issues that can literally constitute matters of life and death. Consequently, legislative clarity in this area is especially important. Indeed, the Washington State Supreme Court emphasizes that uncertainty in the law around policing harms “both effective police enforcement and also protection of individual rights.”

We continue to urge our legislators to provide for clarity and balanced reform. The legislature cannot take its eye off the ball to help victims find justice, and to ensure communities can expect the police to have the authority to detain suspects who pose a danger to the community.”

BRIEF NOTES REGARDING JANUARY 2022 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: “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.”

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

The four entries below address the January 2022 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. Michael Steven Thompson: On January 6, 2022, Division Three of the COA rejects the challenge of Michael Thompson to admissibility of evidence obtained by law enforcement based on a third party's consent to search. The Court rules in the State's favor under the "independent source" doctrine. The Court therefore affirms the Mr. Thompson's Spokane County Superior Court convictions for *attempting to elude a police vehicle, second degree possession of stolen property and possessing a motor vehicle theft tool*. Police pursued a fleeing Chevy Blazer that was towing a snowmobile trailer. The fleeing suspect fled into a field and managed to escape on a snowmobile. Police followed the snowmobile tracks and located a snowmobile in the back yard of a residence. The Court of Appeals declares that the officers made an unlawful search by going into the backyard without consent and feeling the snowmobile to determine if it was warm, but the Court of Appeals rules that the subsequent discovery of Mr. Thompson inside the home following consent to entry and search the home given by the homeowner was supported by the Independent Source doctrine. The Court of Appeals discusses numerous appellate court decisions interpreting the Independent Source doctrine and then concludes as follows:

These cases reaffirm that the relevant question for the independent source doctrine is not whether improperly obtained evidence is so far removed from the evidence at issue as to dissipate any taint, but rather whether there was sufficient properly obtained evidence to independently justify the search or seizure. Here, it is undisputed that police lawfully tracked the snowmobile and observed it in Ms. Morris's backyard. Entering Ms. Morris's home to search for Mr. Thompson is the logical result of the deputies' thorough pursuit of this lead.

The Thompson Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/373754_unp.pdf

2. State v. Christopher John Krug: On January 31, 2022, Division One of the COA rejects the challenge of Krug to his Snohomish County Superior Court conviction for *possession of drug paraphernalia*. Defendant argued that an officer violated the Miranda-based rule against two-step interrogation under Missouri v. Seibert, 542 U.S. 600 (2004) by asking Krug – after arresting him on a warrant but before *Mirandizing* him – if an item in Krug's vehicle was a "tooter." **The Krug Court rules that, because Krug did not admit anything in response to the pre-Mirandizing custodial questioning, the rule of Missouri v. Seibert does not require suppression of the post-Mirandizing custodial admissions.** The Court warns, however, that if the pre-Mirandizing questioning by the officer had evoked an incriminating response from Krug, any answers given in post-Mirandizing questioning likely would have been suppressed.

The Krug Opinion can be accessed on the Internet at:
<https://www.courts.wa.gov/opinions/pdf/815865.pdf>

3. State v. Daniel R. L. Powell: On January 31, 2022, Division One of the COA rejects the challenge of Powell to his Clark County Superior Court conviction for *second degree assault*. **The Court of Appeals rules that when an officer questioned defendant outside a residence regarding an altercation that occurred the previous evening, defendant was not in the kind of “custody” that triggers the requirement for giving Miranda warnings.** Defendant was in a Terry detention and was temporarily not free to leave, but his “freedom of movement was not curtailed to a degree that would be considered formal trappings of arrest.” The Court of Appeals distinguishes factually the Division Two decision in State v. France, 129 Wn. App. 907, 910 (2005) – a decision that I criticized in the October 2021 Legal Update as incorrectly making an officer’s un-announced probable cause to arrest a factor in Miranda custody analysis.

The Powell Opinion can be accessed on the Internet at:
<https://www.courts.wa.gov/opinions/pdf/833448.pdf>

4. State v. Shawn Eugene Whisler: On January 31, 2022, Division One of the COA rejects the challenge of Whisler to his Snohomish County Superior Court convictions for (A) *possession of a stolen vehicle*, and (B) *hit-and-run injury accident*. **The Court of Appeals rules that reasonable suspicion justified an investigative detention of Whisler** where, in the words of the Court:

Police received a call that a gray Chevrolet Suburban with front-end damage was fleeing the scene of an accident. [An officer], close to the scene, responded to police dispatch. Police then received a second call reporting the fleeing vehicle parked behind the Mukilteo Chamber of Commerce. [The officer, who was already] close to the building, arrived to spot three individuals fleeing from a vehicle matching dispatch’s description [including the fact that the vehicle’s headlight, front bumper, and quarter panel were significantly damaged, with wiring and vehicle parts hanging from the hole where the headlight once was]. All these events happened in under five minutes.

The Whisler Opinion can be accessed on the Internet at:
<https://www.courts.wa.gov/opinions/pdf/818813.pdf>

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the “LE Resources” link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General’s Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission’s Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-

area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules/].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [<http://www.supremecourt.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [<http://www.leg.wa.gov/legislature>]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct

access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].
