

SEP - 2 2014

No. 90608-4

E RCF  
Ronald R. Carpenter  
Clerk

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**CITY OF SEATTLE,**  
Respondent,

vs.

**WAYNE EVANS,**  
Petitioner.

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**ANSWER TO PETITION FOR REVIEW**

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**A. IDENTITY OF RESPONDENT**

The City of Seattle asks this court to deny review of the decision designated in Part B of this answer.

**B. DECISION**

The Court of Appeals decision, entered on June 30, 2014, affirmed the superior court RALJ decision affirming defendant's conviction for Unlawful Use of Weapons.

**C. ISSUE PRESENTED FOR REVIEW**

Does the Court of Appeals' decision upholding the constitutionality of Seattle's dangerous knife ordinance involve a significant question of constitutional law or involve a substantial issue of public interest justifying review under RAP 13.4(b)(3) or (4)?

**D. STATEMENT OF THE CASE**

At approximately 8:50 p.m. on February 27, 2010, Seattle Police Officer Michael Connors stopped a car driven by defendant for speeding. RP (RP is the Report of Proceedings of the September 15-16, 2010 trial) at 117-21, 124-26 & 148. The officer observed furtive movements from defendant and his passenger, and

defendant's condition and conduct during the traffic stop further suggested that he might be armed. RP at 126-30, 134-35, 151 & 157. Defendant acknowledged that he had a knife in his pocket, and the officer retrieved a fixed-blade kitchen knife from defendant's front right pants pocket. RP at 136-37, 152 & 154. Defendant told the officer that he carried the knife for protection. RP at 147.

Defendant was charged in Seattle Municipal Court with Unlawful Use of Weapons. Defense counsel told the trial court that the case did not involve self-defense. RP at 3. Defendant's motion to dismiss the charge on the ground that the ordinance was unconstitutional was denied. RP at 92-98. Defendant was convicted as charged. RP at 205.

Defendant appealed, contending that the ordinance prohibiting his conduct was unconstitutional, the evidence was not sufficient to support his conviction, the trial court should have instructed the jury on the exceptions to the prohibition on carrying a dangerous knife, the trial court should have suppressed the knife obtained from a warrantless search of his person and the trial court should not have admitted testimony regarding the reasons the officer

searched him. The superior court rejected each of these contentions and affirmed defendant's conviction. The Court of Appeals accepted review solely with respect to the constitutionality of the ordinance, and affirmed the superior court decision.

**E. ARGUMENT**

Defendant contends that review should be accepted because Seattle's prohibition on carrying a concealed fixed-blade knife violates his right to bear arms for self-defense under both the federal<sup>1</sup> and state constitutions.<sup>2</sup> Although defendant frames his argument as an "as applied" challenge, *i.e.*, the ordinance is unconstitutional as applied in the particular context in which he acted,<sup>3</sup> he nevertheless claims that his particular conduct – notably that he was carrying the fixed blade knife concealed on his person – cannot be considered. The only authority defendant cites for this proposition concerned a

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<sup>1</sup> The 2<sup>nd</sup> Amendment provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

<sup>2</sup> Article 1, section 24 of the Washington Constitution provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

facial constitutional challenge to a statute so would not seem to support defendant's position.<sup>4</sup> Defendant's arguments must be evaluated based on the actual facts of the incident.

1. Defendant has not shown that *Seattle v. Montana* was wrongly decided or that Seattle's dangerous knife ordinance prohibits carrying a knife in public for self-defense.

The premise of defendant's contention does not appear to be valid. He first contends that the kitchen knife he was carrying is a constitutionally-protected "arm." The court in *Seattle v. Montana*<sup>5</sup> came to the opposite conclusion with respect to remarkably similar knives. Defendant asserts that this conclusion should be reconsidered in light of *District of Columbia v. Heller*,<sup>6</sup> but, inasmuch as that case concerned a handgun, it certainly did not determine that a kitchen knife was an "arm." Cases from the early days of the nation and more recently have held that the 2<sup>nd</sup> Amendment does not grant the

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<sup>3</sup> See *In re Detention of Turay*, 139 Wn.2d 379, 417 n. 27, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125 (2001).

<sup>4</sup> *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) ("We are thus brought to the question whether any one of the three clauses, as construed by the state court, is upon its face repugnant to the Federal Constitution so that it could not constitute a lawful foundation for a criminal prosecution.")

<sup>5</sup> 129 Wn.2d 583, 590-91, 599 & 601, 919 P.2d 1218 (1996).



right to carry a concealed fixed-blade knife in public.<sup>7</sup> Cases decided under state constitutional provisions protecting the right to bear arms likewise have rejected challenges to carrying a concealed knife in public.<sup>8</sup> Defendant has not shown that *Montana* erroneously characterized the nature or status of a kitchen knife.

The other part of defendant's argument – that Seattle's ordinance prohibits him from carrying his kitchen knife for self-defense – is not supported by the facts or the law. His trial counsel disavowed any claim of self-defense. As the court noted in *State v.*

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<sup>6</sup> 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

<sup>7</sup> See *Arkansas v. Buzzard*, 4 Ark. 18 (1842) (holding that statute prohibiting the wearing of any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, does not violate 2<sup>nd</sup> Amendment); *Nunn v. Georgia*, 1 Ga. 243 (1846) (upholding constitutionality of statute prohibiting bowie-knives, dirks, spears from being sold, or secretly kept about the person); *Wooden v. United States*, 6 A.3d 833, 840-41 (D.C. Ct. App. 2010) (2<sup>nd</sup> Amendment does not protect the carrying of a knife for self-defense outside the home); *California v. Mitchell*, 209 Cal.App.4<sup>th</sup> 1364, 1373-79, 148 Cal.Rptr.3d 33 (2012), review denied (2013) (statute prohibiting carrying a concealed dirk or dagger does not violate the 2<sup>nd</sup> Amendment).

<sup>8</sup> *Lacy v. Indiana*, 903 N.E.2d 486 (Ind. App.), transfer denied, 915 N.E.2d 991 (2009) (statute prohibiting possession of a switchblade did not violate a provision of the Indiana constitution that "the people shall have the right to bear arms, for defense of themselves and the State"); *Wyoming v. McAdams*, 714 P.2d 1236, 1236 (Wyo.1986) (no right under state constitution to carry a concealed knife).

*Jorgenson*,<sup>9</sup> the defense of necessity would be available to any defendant who might need to carry a knife in public for self-defense. Seattle's ordinance does not preclude presentation of facts or argument that a kitchen knife was carried in public for self-defense. Defendant has not shown that the ordinance restricts his right to self-defense.

2. Defendant has not shown that intermediate scrutiny is not the proper standard for review or that Seattle's dangerous knife ordinance does not satisfy that standard.

Defendant also contends that review should be accepted so the court can clarify the appropriate level of scrutiny for an arms restriction that is not presumptively lawful, and argues that Seattle's prohibition is not presumptively valid because it is not the type of restriction so identified in *Heller* as follows:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or

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<sup>9</sup> 179 Wn.2d 145, 158 n 5, 312 P.3d 960 (2013).

laws imposing conditions and qualifications on the commercial sale of arms.<sup>10</sup>

The court in *Heller* stated that this list was not intended to be exhaustive.<sup>11</sup> Also, as the court noted in *Montana*,<sup>12</sup> restrictions on knives have been part of Washington law even prior to statehood. More than 100 years ago, the Supreme Court stated, admittedly in dicta, that the 2<sup>nd</sup> Amendment “is not infringed by laws prohibiting the carrying of concealed weapons.”<sup>13</sup> A better example of a “longstanding prohibition” would be difficult to imagine.

This court in *Jorgenson*<sup>14</sup> quite recently determined that intermediate scrutiny is the appropriate standard. That Seattle’s ordinance satisfies intermediate scrutiny seems to be clear from the court’s analysis in *Montana*<sup>15</sup> of the government purpose involved and the degree to which the ordinance serves that purpose:

SMC 12A.14.080 furthers a substantial public interest in safety, addressing the threat posed by knife-wielding individuals and those disposed to brawls and

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<sup>10</sup> See 128 S.Ct. at 2816-17.

<sup>11</sup> 128 S.Ct. at 2817 n. 26.

<sup>12</sup> 129 Wn.2d at 595 n. 3.

<sup>13</sup> *Robertson v. Baldwin*, 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715 (1897).

<sup>14</sup> 179 Wn.2d at 161.

<sup>15</sup> 129 Wn.2d at 592-93 & 596.

quarrels, through reducing the number and availability of fixed-blade knives in public places in Seattle. It addresses the reality of life in our state's largest city, where at all hours residents must step outside their homes and workplaces and mingle with numerous strangers in public places. Unfortunately, street crime involving knives is a daily risk.

Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed. The harm of carrying concealed knives is even more manifest.

Defendant has not shown that intermediate scrutiny is not the proper standard for review or that Seattle's dangerous knife ordinance does not satisfy that standard.

3. Defendant has not shown that the standard for review, or the result of applying that standard, would be different under the 2<sup>nd</sup> Amendment.

Defendant also contends that review should be accepted because Seattle's ordinance violates his 2<sup>nd</sup> Amendment right to bear arms in public. To what extent the 2<sup>nd</sup> Amendment applies in public would be, however, only part of the constitutional analysis. The

more important element of any 2<sup>nd</sup> Amendment analysis would be the appropriate standard of review. As the Court of Appeals noted, courts almost always apply intermediate scrutiny to a 2<sup>nd</sup> Amendment challenge.<sup>16</sup> Defendant seems to rely heavily on *Peruta v. County of San Diego*,<sup>17</sup> which concerned the requirement of “good cause” to obtain a concealed pistol license, for a different standard, but a subsequent 9<sup>th</sup> Circuit case applied intermediate scrutiny to a restriction on storing a handgun in the home.<sup>18</sup> The 9<sup>th</sup> Circuit does not appear to be abandoning the intermediate scrutiny standard. Also, the court in *Peruta* expressly rejected the idea that the 2<sup>nd</sup> Amendment affords the right to carry a concealed weapon in public.<sup>19</sup> Defendant has not shown that the standard for review would be different under the 2<sup>nd</sup> Amendment than under article 1, section 24 or that application of intermediate scrutiny would lead to a different result under the federal constitution.

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<sup>16</sup> *Seattle v. Evans*, \_\_\_ Wn. App. \_\_\_, 327 P.3d 1303, 1308 n. 27. (2014).

<sup>17</sup> 742 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2014).

<sup>18</sup> *Jackson v. City and County of San Francisco*, 746 F.3d 953, 964 (9<sup>th</sup> Cir. 2014).

<sup>19</sup> 742 F.3d at 1172 (“To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry.”)

4. Defendant has not established that this case involves a significant question of constitutional law or an issue of substantial public interest justifying review under RAP 13.4(b)(3) or (4).

Defendant contends that review of the Court of Appeals decision is warranted under RAP 13.4(b)(3) and (4).<sup>20</sup> While defendant may well have presented a constitutional issue, he has not shown that it is a *significant* constitutional issue. Not a single authority he relies on concerns any type of knife restriction. Defendant did not even try to argue at trial that he was carrying the kitchen knife for self-defense. His challenge to Seattle's ordinance already has been reviewed, and rejected, by three courts and he does present any compelling reason for review by a fourth court. Defendant also may well have presented an issue of public interest, but considering that the ordinance applies only in a single jurisdiction and application of the ordinance would not appear to

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<sup>20</sup> RAP 13.4(b) provides, in pertinent part:  
Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

have any real and practical effect on self-defense, he has not demonstrated that this case presents an issue of *substantial* public interest.

**F. CONCLUSION**

Based on the foregoing argument, this court should deny review of the Court of Appeals decision.

Respectfully submitted this 28<sup>th</sup> day of August, 2014.

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