

No. 90608-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,  
Respondent,

vs.

WAYNE EVANS,  
Petitioner.

Received  
Washington State Supreme Court

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Ronald R. Carpenter  
Clerk

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED FOR REVIEW**

1. Has defendant established that prohibiting him from carrying a kitchen knife concealed on his person violates article I, section 24 of the Washington constitution?

2. Has defendant established that prohibiting him from carrying a kitchen knife concealed on his person violates the 2<sup>nd</sup> Amendment of the federal constitution?

**B. STATEMENT OF THE CASE**

At approximately 8:50 p.m. on February 27, 2010, Seattle Police Officer Michael Conners 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's conviction was affirmed on appeal by the superior court and by the Court of Appeals.<sup>1</sup>

### C. ARGUMENT

1. Defendant's as applied challenge to Seattle's dangerous knife ordinance must be evaluated in light of the particular knife he carried concealed on his person.

Defendant contends that his conviction for carrying a concealed kitchen knife violates his right to bear arms for self-defense under both the federal<sup>2</sup> and state constitutions.<sup>3</sup> Although

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<sup>1</sup> *Seattle v. Evans*, 182 Wn. App. 188, 327 P.3d 1303 (2014).

<sup>2</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>3</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

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>4</sup> he nevertheless claims that his particular conduct – notably that he was carrying the knife concealed on his person – cannot be considered. *State v. Jorgenson*<sup>5</sup> concerned an as-applied constitutional challenge to a statute prohibiting ownership or possession of a firearm by a person who was free on bond or personal recognizance for a serious offense. This court considered only the constitutionality of the statute’s application to such a person’s possession, rather than ownership, of a firearm because the particular facts showed only this more limited circumstance.<sup>6</sup> Similarly, defendant’s as applied challenge should be evaluated based on the particular fact that the knife he was carrying was concealed on his person.

Also, analysis of defendant’s as applied challenge must focus on the precise nature of the knife he was carrying. Officer Connors

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be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

<sup>4</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).

described it as a kitchen knife.<sup>7</sup> Defendant's knife seems significantly different, for example, from the double-edged dirk considered in *Connecticut v. DeCiccio*.<sup>8</sup> Defendant's as applied challenge must be evaluated in light of the particular knife he carried and the particular manner in which he carried it.

2. Defendant has not shown that *Seattle v. Montana* was wrongly decided.

Defendant's contention that the kitchen knife he was carrying is a constitutionally-protected "arm" does not appear to be correct. This court in *Seattle v. Montana*<sup>9</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>10</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 right to carry a

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<sup>5</sup> 179 Wn.2d 145, 149-51, 312 P.3d 960 (2013).

<sup>6</sup> *Jorgenson*, 179 Wn.2d at 157.

<sup>7</sup> RP at 18-19, 137 & 152

<sup>8</sup> 315 Conn. 79, 90-91, --- A.3d ---- (2014).

<sup>9</sup> 129 Wn.2d 583, 590-91, 599 & 601, 919 P.2d 1218 (1996).

<sup>10</sup> 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

concealed fixed-blade knife in public.<sup>11</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>12</sup> Defendant has not shown that *Montana* erroneously characterized the nature or status of a kitchen knife. This court will overrule precedent only upon a showing that it is both incorrect and harmful.<sup>13</sup> With respect to his article I, section 24 challenge, defendant has not shown that *Montana* is either incorrect or harmful.

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<sup>11</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>12</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).

<sup>13</sup> *State v. Njonge*, 181 Wn.2d 546, 555, 334 P.3d 1068 (2014).

3. Defendant has not shown that Seattle's dangerous knife ordinance prohibits him from carrying a knife in public for self-defense.

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. The circumstances do not suggest that defendant was in any imminent or even likely danger of needing to act in defense of himself, others or his property. He was not walking alone through a dangerous part of the City in the early morning hours, he was driving a car with a passenger.<sup>14</sup> The court in *Jorgenson*<sup>15</sup> noted that the defense of necessity would apply to a charge of unlawful possession of a firearm. Similarly, such a defense would apply to a charge of unlawful use of weapons under Seattle's ordinance. Seattle's ordinance does not preclude presentation of facts or argument that a kitchen knife was carried in

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<sup>14</sup> See *Jorgenson*, 179 Wn.2d at 158 (Jorgenson also possessed the firearms while driving, rather than in the home, "where the need for defense of self, family, and property is most acute.")

<sup>15</sup> 179 Wn.2d at 158 n 5.

public for self-defense. Defendant has not shown that the ordinance restricts his right to self-defense.

4. Defendant has not shown that intermediate scrutiny is not the proper standard for review under article I, section 24 or that Seattle's dangerous knife ordinance does not satisfy that standard.

In the Court of Appeals, defendant contended that strict scrutiny is the appropriate level of scrutiny for review of an arms restriction that is not presumptively lawful, and argued 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 laws imposing conditions and qualifications on the commercial sale of arms.<sup>16</sup>

The court in *Heller* stated that this list was not intended to be exhaustive.<sup>17</sup> Also, as the court noted in *Montana*,<sup>18</sup> restrictions on

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<sup>16</sup> See 128 S.Ct. at 2816-17.

<sup>17</sup> 128 S.Ct. at 2817 n. 26.

<sup>18</sup> 129 Wn.2d at 595 n. 3.

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>19</sup> A better example of a “longstanding prohibition” would be difficult to imagine.

This court in *Jorgenson*<sup>20</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>21</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 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.

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<sup>19</sup> *Robertson v. Baldwin*, 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715 (1897).

<sup>20</sup> 179 Wn.2d at 161.

<sup>21</sup> 129 Wn.2d at 592-93 & 596.

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.

5. 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 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 certainly would be part of the constitutional analysis. The more important element of any 2<sup>nd</sup> Amendment analysis, however, 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>22</sup> In the Court of Appeals, defendant relied heavily on *Peruta v. County of San Diego*,<sup>23</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>24</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>25</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>22</sup> *Evans*, 182 Wn. App. at 196 n. 27; *see also New Mexico v. Murillo*, --- P.3d ----, 2015 WL 270053, slip opinion at 3 (N.M. App. 2015) (applying intermediate scrutiny to statute prohibiting possession of switchblade knife); *DeCiccio*, 315 Conn. at 142.

<sup>23</sup> 742 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2014).

<sup>24</sup> *Jackson v. City and County of San Francisco*, 746 F.3d 953, 964 (9<sup>th</sup> Cir. 2014).

<sup>25</sup> 742 F.3d at 1172 (“To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry.”)

**D. CONCLUSION**

Based on the foregoing argument, this court should affirm the Court of Appeals decision upholding defendant's conviction for Unlawful Use of Weapons.

Respectfully submitted this 2<sup>nd</sup> day of February, 2015.

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