The Need for Reform: Washington's Felonious Conduct Bar

The Washington State Legislature enacted RCW 4.24.420 as part of the 1986 tort reforms. From what we can glean from the legislative record, it was prompted by a case where a burglar, who was in the process of breaking and entering, stepped through an unprotected skylight, fell to the floor below, and sued the property owner. Since the enactment of the statute, however, law enforcement officers have primarily asserted the defense to completely bar wrongful death or personal injury claims arising from the deadly or excessive use of force—which was not what the Legislature had intended.

For example, last year, the King County Superior Court dismissed a wrongful death action brought by the family of Renee Davis, a pregnant, suicidal Muckleshoot mother who was killed by two King County Sheriff's Deputies during a welfare check in 2016. Less than a minute after their arrival and without any plan, the deputies rushed into Renee's home, past two of Renee's three children, and into her bedroom with guns drawn. They found Renee lying in her bed, covered in a blanket up to her neck, and staring blankly at the door. Less than one minute later, they shot Renee dead. She had a gun, but the deputies' accounts of whether and how she allegedly pointed it at them materially differ. She slumped over and said, "It's not even loaded," before falling off the bed onto the floor.

The Superior Court dismissed her family's case pursuant to RCW 4.24.420, regretting that "this case illustrates in a number of respects some issues that you can tell I find somewhat troubling in terms of holes or gaps in the law." On August 31, 2020, the Washington State Court of Appeals affirmed the trial court's order also with regret, explaining "that Davis's death is tragic and echo[ing] the trial court's sentiment that the application of RCW 4.24.420 here is problematic because it precludes claims where law enforcement officers' actions and training may have been unreasonable, given their knowledge that the individual they were confronting was suicidal and armed."

RCW 4.24.420 also contributed to the King County Superior Court's dismissal of a lawsuit arising from the Seattle Police Department killing of Charleena Lyles in 2017. Repeal or reform of RCW 4.24.420 is urgently needed, so that the families of deceased citizens like Renee and Charleena may achieve justice and hold law enforcement accountable.

RCW 4.24.420, provides, in full:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence accusing the injury or

> death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.[1]

Washington courts apply RCW 4.24.420 unconstitutionally and inconsistently and in a manner that prevents juries from deciding cases that involve the deadly or excessive use of force by law enforcement officers. Judges determine, in the civil rather than criminal setting, whether an individual "was engaged in the commission of a felony." That runs afoul of due process protections—especially the constitutional protection of being deemed innocent unless found guilty beyond reasonable doubt by a jury of one's peers.

Judges have dismissed cases against law enforcement officers on summary judgment based on this statute by impermissibly weighing evidence and making credibility determinations—all while no felony conviction exists and the only non-law enforcement witness is dead. Judges have also dismissed deadly force cases against law enforcement officers where evidence indicates that the law enforcement officer's own negligent conduct precipitated the alleged felony and created questions regarding whether the alleged felony was the proximate cause of the injuries.

Repeal or reform of RCW 4.24.420 is urgently needed. Courts in Washington have not uniformly applied the defense in "they said, she's dead" cases—*i.e.,* where the injured party is dead and the defendant law enforcement officers are the only witnesses to what occurred. Courts not only prevent a jury from hearing the case—thereby preventing any fact-finding as to the actual cause of officer-involved deaths as with Renee and Charleena—but they dismiss cases against officers where their testimony is the only evidence of purported felonious conduct. This is not what the Legislature intended.

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[1] As the law specifically notes, an injured party may still bring federal civil rights claims against law enforcement officers who use deadly or excessive force notwithstanding felonious conduct. Federal civil rights claims, however, require a higher standard misconduct, are subject to the prohibitive "qualified immunity" doctrine, and will most likely be tried in federal court where a unanimous jury is required—a jury pool that likely will not represent the community in which the misconduct occurred.