NO. 72120-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM PHILLIP, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The State fundamentally misconstrues the analytical framework for an unconstitutional search and misrepresents the intimate connection of the illegal search warrant to the prosecution

a. The State was constitutionally barred from invading Mr. Phillip's privacy by using his cell phone to learn his whereabouts and his phone calls or text messages.

The State concedes but downplays the unconstitutional search by calling the records seized less "intensely private" than other possible intrusions. Resp. Brief at 14 n.2. This argument should be disregarded. The information unlawfully seized was a constitutionally protected private affair.

Tracking a person's movements by GPS device requires a valid warrant. *United States v. Jones*, _U.S. _, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (2012); *State v. Jackson*, 150 Wn.2d 251, 261-62, 76 P.3d 217 (2003) (GPS tracking of a vehicle requires a warrant). Here, the police obtained two months of data pinpointing Mr. Phillip's movements by an invalid warrant.

Outgoing and incoming phone calls are private affairs requiring a valid warrant. *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986). The State improperly seized two months of records detailing

phone calls and text messages from Mr. Phillip's phone.

There is no diminished expectation of privacy reducing these constitutional protections, as the State implies. *See State v. Snapp*, 174 Wn.2d 177, 201, 75 P.3d 289 (2012) (rejecting reduced privacy protection for automobile under article I, section 7). As a result, "[t]he fruits of an unconstitutional search and seizure must be suppressed." *State v. Duncan*, _ Wn.2d _, 2016 WL 1696698, at *3 (April 28, 2016).

b. The State misapplies and misunderstands the exclusionary rule.

The exclusionary rule is "constitutionally mandated," "nearly categorical," and not "selectively applied." *State v. Winterstein*, 167 Wn.2d 620, 632, 635, 220 P.3d 1226 (2009). Excluding evidence derived from an illegal search rectifies the privacy violation and "protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence." *Id*. at 632.

Without legal analysis, the State's remedy is to excise explicit references to the illegally obtained cell phone information from later search warrants, but keep the warrants intact and their fruits fully admissible. This remedy ignores the mandatory protections stemming from article I, section 7 violations and "[t]he exclusionary prohibition"

of the Fourth Amendment, which "extends as well to the indirect as the direct products of such invasions." *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Evidence derived from an illegal search "will be excluded unless it was not obtained by exploitation of the initial illegality" or it is so distinguishable that it is untainted. *State v. Le*, 103 Wn.App. 354, 361, 12 P.3d 653 (2000).

In *Winterstein*, the Court rejected the inevitable discovery doctrine because it involves speculation about what the police would have done but for the illegality. 167 Wn.2d at 634. The State must prove that subsequently obtained evidence was truly independent of the illegal search, requiring a narrowly applied, non-speculative independent source test for admission of invalidly seized evidence. *Id*.

The State cites two cases for its remedy of striking references to the cell phone data from later search warrants: *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1997), and *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005). Resp. Brf. at 14-16. But *Winterstein* cautioned *Coates* and *Gaines* may not be read "expansively." 167 Wn.2d at 634.

In those cases, police arrested suspects and then obtained warrants to search the cars they drove at the time of the offenses.

Gaines, 154 Wn.2d at 714-15; *Coates*, 107 Wn.2d at 883-85. Both warrants included one piece of illegally obtained information (a gun viewed from glance into a locked trunk in *Gaines* and a statement about the location of a knife elicited after the defendant invoked his rights in *Coates*). *Id*. The illegally obtained information was a minor part of the investigation and not the reason for the search warrant. *Gaines*, 154 Wn.2d at 717-18 (in four page search warrant, only single sentence mentioned illegally viewed evidence); *Coates*, 107 Wn.2d at 888 (when defendant stabbed police officer, police had independent basis to search car for weapon). Neither case involved illegally obtained information used to identify a primary suspect and then become the platform for the subsequent investigation.

c. An illegal search that is central to the resulting investigation cannot be ignored.

The results of the illegal search were central to both obtaining the subsequent warrants and the motivation for seeking them, as summarized below:

1. The detectives sought the first cell phone warrant because they "didn't really have any suspects" and thought the "guys" Ms.

Johnson had talked to regularly were "also a possibility" in their search for a suspect. CP 214.

2. One day after obtaining cell phone data from the invalid warrant, the police used it to map Mr. Phillip's locations, combined the voice and text records with Bonny Johnson's to document their relationship over two months, and investigate who else he had contact with. CP 51-53. They immediately sought a search warrant for Mr. Phillip's home, including any cell phones, papers, clothes, and his email account, as well as phone records from a number he dialed the evening of Mr. Frankel's death. CP 53-54.

This warrant application contains multiple pages of detailed information from the cell phone data, unlike the single sentence in *Gaines*. CP 50-54 (Washington warrant); CP 66, 70-74 (identical Oregon version). In addition to spelling out Mr. Phillip's location near the incident and corroborating his relationship with Ms. Johnson, the police highlighted records showing Mr. Phillip called an attorney two times after the incident. CP 53, 74. The cell phone data was the reason this warrant was requested, why specific items were sought, and central to convincing a magistrate to sign the warrant.

4. This second warrant also sought phone records and location for a person Mr. Phillip spoke to the evening of the incident, who was Mr. Phillip's childhood friend Michael Fowler. CP 53. Once the cell data led police to Mr. Fowler, they learned information such as Mr. Phillip's access to a car, any reason for travelling to Auburn, and his mother's name and location. CP 86, 112-15. From this lead, they interviewed his mother, who gave important information cited in later warrants, such as Mr. Phillip's feelings for Ms. Johnson and car access. CP 113-15. The police gained this information due to the illegal cell phone search.

5. The next warrant drawn from the fruits of the first illegal warrant was for Mr. Phillip's DNA. CP 85-121. The application attached and incorporated the prior warrant affidavit for Mr. Phillip's home and possessions, relying on the same extensive discussion of the cell phone records to convince the judge of the evidence linking Mr. Phillip to the offense. CP 86, 105-110. Notably, the State's first request to obtain Mr. Phillip's DNA had been rejected by a judge – the earlier attempt preceded the illegally obtained cell phone data. CP 42-43.

6. The fourth warrant was to search the cell phone's contents. It was seized when searching Mr. Phillip's home immediately after

obtaining the cell phone data. CP 124. This application emphasized the cell phone records, which "revealed a pattern of cell phone usage" connecting Mr. Phillips to the incident. CP 125. It also reported that once the phone was seized right after getting the cell phone data, police immediately turned off its power and held it securely to maintain its "integrity." CP 125. The cell phone was searched as a direct result of the initial illegal warrant; but for the first illegal warrant, it would not have been secured and available to investigate.

Each of these warrants and the investigation that followed was premised on the cell phone tracking data.

Winterstein prohibits the court from speculating about what the police would have done had they not obtained the initial information. If speculation was permitted, evidence shows the investigation would have been different. James Whipkey was similarly positioned as a suspect due to his close relationship with Ms. Johnson, but he was barely investigated after the illegal search of Mr. Phillip's cell phone data. CP 26-28. Early in the case, the police tried to get a warrant for Mr. Phillip's DNA. CP 42. But when the evidence about Mr. Phillip was merely text messages from Ms. Johnson's phone and his invocation of the right to counsel, the judge rejected the warrant. CP 42-43.

The State does not try to show the independence of the above-noted warrants in its Response Brief even though it bears this burden. Its proposal to merely "excise" references to the cell phone data is incompatible with article I, section 7 and contrary to the independent source doctrine.

d. The second cell phone warrant fails the independent source test.

The final warrant the State obtained was for the same cell phone data already received, sought two years later. The Response Brief cursorily reviews the independent source doctrine for this warrant, ignoring some necessary components and mischaracterizing others. This narrow exception to the exclusionary rule requires a "genuinely independent," legally valid source for unlawfully seized information. *Murray v. United States*, 487 U.S. 533, 540, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The State has a heavy burden of proving genuine independence of both the officer's decision to seek a warrant and the magistrate's decision to grant it. *Id.*

Puzzlingly, the State claims its motive was only to rectify the warrant's flaws, not ensure the admissibility of the information uncovered. Resp. Brf. at 21-22. Without this cell phone data, the

prosecution admitted its case would be "dead in the water." 10/17/13RP 116. The content of the first warrant and concern the case would be "dead in the water" motivated the State to seek this second warrant.

The genuine independence of the second warrant falters for several reasons the State ignores. In seeking the second warrant, the State undermined independent judicial review by: (1) telling the judge that the information sought was already part of the case and "approved" by judicial warrant, (2) attaching this prior, signed warrant; (3) omitting the reason for the second warrant was the concern the information was seized unlawfully; and (4) seeking judicial approval from the same judge who had already signed the first warrant while reminding him it was merely asking him to "review a second warrant for a warrant he had already signed, for the same information that we had already obtained." CP 131-32, 225.

The State also ignores the deliberately omitted, material information that misled the judge about the strength of its case. It does not address this defect in its response brief. *See* Opening Brief at 20-23. Instead, it exaggerates its allegations even more. Resp. Brf. at 23. The other warrants fairly noted reasons to discount Ms. Johnson's allegation and did not exaggerate his military service. Opening Brief at 20-23; CP

42, 48, 63-64. It also used his request for counsel to draw the impermissible inference that he must be guilty by invoking his right. CP 134. Striking the deliberately misleading and improper inferences undermines the warrant.

The independent source doctrine also requires the State to prove the cell phone data would have been independently available, but the State did not make this showing. AT&T's record custodian admitted the company routinely destroyed records within a matter of months unless requested by the State, and the State knew this procedure well. *See* 12/5/13RP 38-39, 41-42, 44-46. The State contends it is too "metaphysical" to prove availability of information. But it is not speculative to provide company policy on maintaining records. The State also claims *Miles* disavows an obligation to show the information would have remained available but for the invalid warrant. *See State v. Miles*, 159 Wn.App. 282, 294, 244 P.3d 1030 (2011). But *Miles* was remanded because the court had applied the wrong test, and it did not excuse the State from proving the genuine independence of information gathered as a result of a second warrant, including its actual availability had the illegality not occurred. *Id.* at 298.

The controlling legal framework for independent source must remain distinct from notions of inevitable discovery under article I, section 7. The State's second warrant was not independently motivated, independently reviewed, or premised on valid allegations amounting to probable cause. It went to the same judge, reminding him he already signed this same warrant and they had the information. It misled the judge about the strength of its reasons to suspect Mr. Phillip. It did not prove the same records would have been available two years later without the earlier warrant. This improperly obtained evidence should be suppressed under article I, section 7 and the Fourth Amendment.

2. The purposeful invasion of Mr. Phillip's right to private communication with counsel by the lead detective and prosecutor affected the State's zealous prosecution of Mr. Phillip.

"[E]avesdropping on attorney-client conversations is an egregious violation of a defendant's constitutional rights and cannot be permitted." *State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). The State's efforts to learn the content of private conversations with an attorney is "a blatant violation of a foundational right," and an "odious practice" that our courts "strongly condemn." *Id*. at 811.

It is presumed prejudicial to the accused and the prosecution must prove no possibility of prejudice beyond a reasonable doubt. *Id*. No possibility of prejudice means the information was not communicated to anyone involved in the case. *Id*. at 819, *citing Weatherford v. Bursey*, 429 U.S. 545, 557–58, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (no possibility prejudice where an undercover agent sat in on a meeting between defendant and counsel but did not communicate anything about the meeting to anyone else).

Here, the lead detective and assigned trial prosecutor deliberately sought, read, and discussed emails between Mr. Phillip and an attorney in gleeful tones indicating this was significant information. 2/24/13RP 40. The detective conceded he had no training on the attorney-client privilege, was "intrigued" by the email, thought it was "potentially incriminating," and immediately reported it to the prosecutor. 2/24/14RP 37, 39, 63. He searched for more attorney emails but did not find any. *Id*. at 40. The prosecutor asked the detective to forward any attorney contact he found. *Id*. at 40, 43.

In *Pena Fuentes*, the Court was "appalled" that it even needed to "again reiterate" that the State may not eavesdrop on attorney-client communications and therefore set a near insurmountable burden on the

prosecution to prove the complete absence of prejudice. 179 Wn.2d at 827. The trial court here was "dismayed" the detective had no training in the attorney-client privilege and even "more dismayed and disappointed" in the prosecutor's behavior. 2/26/14RP 5. But the judge blamed the defense for not articulating a specific enough prejudice to impact the fairness of the trial. *Id*. at 6.

The only example *Pena Fuentes* provided of a case with "no possibility of prejudice" is when the eavesdropper is an undercover agent who does not convey any of the information to anyone. *Id*. at 818.

The State does not meet its heavy burden in the case at bar. Unlike the example of a no prejudice case cited in *Pena Fuentes*, the lead detective and prosecutor were intimately connected with the case and in charge of making all discretionary decisions. Should any of this information have shaped strategy, the possibility of prejudice exists.

The detective and prosecutor saw the email as an admission of guilt in a case without any other incriminating statements and they considered using it at trial against Mr. Phillip and discussed it in written reports. CP 615-16. They got this information at a time they were redoubling their efforts to shore up their case. 2/24/14RP 41. They sought additional search warrants for the cell phone data and DNA in

case the prior warrants were invalid. *Id*.; 9/9/13RP 71-72. They did not engage in plea bargaining with Mr. Phillip, even though as a first time offender with an honorable history of military service, Mr. Phillip would be a reasonable candidate for an agreed resolution. Where the lead detective and prosecutor review and discuss an apparent admission of responsibility in a case where no other such admissions exist, the intrusion carries a realistic possibility of prejudice to the accused person. The State has not met its burden beyond a reasonable doubt of showing no possibility of prejudice from its own misconduct.

3. The State ignores any legal discussion of the improperly admitted expert testimony despite the numerous persuasive cases cited in Appellant's Opening Brief.

The Response Brief's failure to discuss pertinent case law on the inadmissibility of cell tower location testimony from a lay witness indicates the State has no basis to counter these decisions. In the five months between Mr. Phillip's Opening Brief and the State's Response, additional decisions similarly hold that testimony about cell towers' operation and ability to ascertain a user's location requires expert testimony, with adequate pretrial notice and qualifications of witness. *United States v. Hill*, _ F.3d _, 2016 WL 1085115, at *5 (7th Cir. Mar. 21, 2016) ("Agent Raschke's testimony in this case included statements

about how cell phone towers operate. In our view, this fits easily into the category of expert testimony, such that Rule 702 governs its admission."); *see also Fleming v. State*, 179 So.3d 1115, 1119 (Miss. Dec. 17, 2015) (holding State's insistence that location testimony from phone records not expert testimony was impermissible "ambush" requiring new trial).

Rather than acknowledge the abundance of recent case law analyzing similar overreaching of expert testimony wrongly admitted as lay opinion, the State contends Mr. Phillip did not adequately object. The record shows this claim is wrong. There was extensive argument and briefing discussion the admissibility and interpretation of AT&T records from a field engineer and sales agent. *See, e.g*., 10/17/13RP 95-109; CP 406-11, 521-33. The court denied the motion to prohibit Kenneth Carter from testifying about the accuracy of the information transmitted from cell towers and the location of the phone signals to those towers. 10/21/13RP 13. The court noted that the State could lay a foundation for whether Mr. Carter "qualifies as an expert on that," but the State insisted he was not presented as an expert witness and never tried to qualify him as one. 10/17/13RP 113, 125. Yet it offered his

opinions about the operation of cell towers as they interacted with Mr. Phillip's phone.

At the second trial before the same judge, defense maintained its objection to Mr. Carter's testimony and mapping, premised on his lack of adequate experience and knowledge, acknowledging the court would similarly admit it despite objection. 3/31/14RP 11, 56, 83.

As a lay witness, Mr. Carter was required to "state facts and not draw conclusions or give opinions." *State v. Smith*, 16 Wn.App. 300, 302, 555 P.2d 431 (1976). Lay opinion testimony is not based on specialized knowledge. ER 701. Despite insisting Mr. Carter was not expert and never asking the court to assess his qualifications as an expert, the State repeatedly elicited his opinions about the accuracy of the records, the cell towers' mechanisms for recording certain information, the anomalies in how the data is recorded for text messages or data streaming, and the precise positioning of the cell phone owner throughout the day. This critical opinion testimony was admitted without proper notice and vetting, in violation of the rules of evidence, and despite the defense's repeated objections to his lack of knowledge or experience to attest to the detailed operations of these cell towers and their resulting ability to pinpoint a person's location.

4. The jurors disregarded their obligation to refrain from discussing the case and lied about their improper contact, requiring a mistrial

After engaging in a short inquiry that revealed jurors were misrepresenting or underreporting the degree of discussion that had occurred among jurors before deliberations, the court stopped inquiring and refused to grant a mistrial. As explained in Appellant's Opening Brief, the first inquiry revealed the jurors were not being candid about their pre-deliberation communications when such talk was forbidden. Inexplicably, despite the obvious evidence of jurors' being less-than-forthright, the court fully credited the jurors' representation that they remained fair. This conclusion was unreasonable. The court was at least required to further inquire of the jurors when confronted with deception about the mid-trial communications before sending them to deliberate and accepting their rapidly-issued verdict.

5. A new sentencing hearing is required because the court lacked authority to shackle a well-behaved defendant

The State complains that Mr. Phillip cites to trial cases about shackling, and not sentencing cases, but it does not point to any uncited cases that would apply a different analysis. Resp. Brf. at 37-38. And as shown by the sentencing-shackling case cited in the Opening Brief,

State v. Walker, 185 Wn.App. 790, 344 P.3d 227 (2015), the judge did not make the requisite individualized determination of the necessity of shackling Mr. Phillip before deciding the sentence to impose.

Mr. Phillip was likely harmed by the shackling decision, as it was premised on a risk of flight, the idea he would do something stupid, and his on-going dangerousness. 6/27/14RP 18. Yet Mr. Phillip was well-behaved and respectful in custody and in court. He had no criminal record and faced no other criminal charges. By forcing him to remain tightly shackled, the State bolstered its request for a maximum sentence by impermissible means. A new and fair sentencing hearing is required.

B. CONCLUSION.

Mr. Phillip's conviction must be reversed and his case remanded for further proceedings consistent with this opinion.

DATED this 12th day of May 2016.

. Respectfully submitted,

s/ Nancy P. Collins

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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