

ORIGINAL

No. 82219-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO IBARRA-CISNEROS,

Petitioner.

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AMICUS CURIAE BRIEF OF
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 25,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy related cases as *amicus curiae*, as counsel to parties, and as a party itself.

II. ISSUES TO BE ADDRESSED BY AMICUS CURIAE

- Whether evidence discovered through police officers’ direct exploitation of an illegal search should be suppressed under the “fruit of the poisonous tree” doctrine.
- Whether evidence discovered through police officers’ use of an arrestee’s cell phone without his consent and without a warrant should be suppressed under the “fruit of the poisonous tree” doctrine.

III. STATEMENT OF THE CASE

In the early morning of July 14, 2006, Adrian Ibarra-Raya’s residence was illegally searched by officers of the Walla Walla Police Department (“WWPD”). *State v. Ibarra-Raya*, 145 Wn. App. 516, 520, 187 P.3d 301 (2008). Officers found drugs in the house, arrested Ibarra-Raya, and brought him to police headquarters for further questioning. *Id.*

at 520-21. The police seized various personal effects during the illegal search, including Ibarra-Raya's cell phone. Respondent's Brief ("Resp. Br."), at 6.

During Ibarra-Raya's detention at police headquarters, his cell phone "rang repeatedly." *Ibarra-Raya*, 145 Wn. App. at 521. For reasons not clear from the record, a DEA agent working with the WWPD answered the illegally-seized cell phone without Ibarra-Raya's consent and without having first obtained a search warrant for the cell phone. Resp. Br. at 6. The caller turned out to be Gilberto Ibarra-Cisneros, the brother of Ibarra-Raya and the petitioner in this appeal. Ibarra-Cisneros was reportedly calling to speak with his brother about their mother's illness. Appellants' Brief ("App. Br.") at 18.

Ibarra-Cisneros asked repeatedly to speak with his brother and became "serious and insistent" when the agent would not comply. App. Br. at 19. At no point during the conversation did the stranger identify himself as a police officer. Indeed, the deceit continued even after Ibarra-Cisneros agreed to meet the officer in a nearby parking lot. *Id.* Again, the record is not clear as to why Ibarra-Cisneros agreed to meet the officer, but there is no indication that the conversation had any relation to any illegal activity. In particular, there is no evidence in the appellate record

that the meeting with Ibarra-Cisneros had any plausible connection to the ongoing investigation of Ibarra-Raya.

Ibarra-Cisneros and a friend drove to meet the stranger, but believing it was a prank, abandoned the meeting and left the meeting spot. App. Br. at 19. Undercover officers followed the two men to another parking lot, where, with guns drawn, the officers finally made contact with Ibarra-Cisneros. *Id.* at 20. Upon approaching Ibarra-Cisneros, the officers spotted a bundle of cocaine on the ground. Ibarra-Cisneros was arrested and charged with possession of cocaine. *Id.* at 20-21.

Both Ibarra-Cisneros and Ibarra-Raya moved to suppress the evidence against them, arguing that the search of Ibarra-Raya's house was illegal and that all other evidence was fruit of that illegal search. Noting that the issue was "razor thin," the trial court denied both defendants' motions to suppress, and both men were convicted. *Id.* at 22-23.

The Court of Appeals reversed the conviction of Ibarra-Raya, holding that the officers' warrantless search of Ibarra-Raya's house was illegal and that all evidence discovered as a result of that search should have been suppressed. *Ibarra-Raya*, 145 Wn. App. at 519-520. The State did not appeal that decision. The Court of Appeals also found, however, that the evidence against Ibarra-Cisneros need not be suppressed because

the connection between that evidence and the illegally-seized cell phone was attenuated.¹ *Id.* at 520. This decision was error.

IV. ARGUMENT

The evidence used to convict Ibarra-Cisneros should be suppressed as “fruit of poisonous tree.” The Court may reach this conclusion following either of two arguments. First, the disputed evidence was discovered as the direct result of officers’ exploitation of the original illegal search of Ibarra-Raya’s residence. Second, the disputed evidence was discovered as the direct result of officers’ inappropriate and unconstitutional use of Ibarra-Raya’s cell phone. Either way, the evidence used to convict Ibarra-Cisneros was discovered through exploitation of a constitutional violation and should be suppressed.

A. The Evidence Used to Convict Ibarra-Cisneros Was Discovered Through Officers’ Exploitation of the Original Illegal Search

“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002). This rule “has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” *Wong Sun v. United States*,

¹ By proceeding directly to the attenuation analysis, the Court of Appeals appears to implicitly acknowledge both that the use of the cell phone was unconstitutional and that there is a direct connection between that illegal act and the evidence used to convict Ibarra-Cisneros.

371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In determining whether evidence discovered as the result of a constitutional violation must be excluded, the Court must determine whether the objectionable evidence “has been come at *by exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.” *Id.* at 488 (internal quotation marks and citation excluded) (emphasis added). Evidence discovered through exploitation of the original illegality must be excluded as “fruit of the poisonous tree.” *Id.*

The original search of Ibarra-Raya’s house was unconstitutional. *Ibarra-Raya*, 145 Wn. App. at 523. One of the personal items seized during the illegal search was Ibarra-Raya’s cell phone. Resp. Br. at 6. Police used that cell phone, without a warrant and without Ibarra-Raya’s consent, to arrange a meeting with Ibarra-Cisneros. *Id.* The chain of increasingly illegal actions by WWPD officers – starting with the original illegal search and extending through the inappropriate use of Ibarra-Raya’s cell phone – led police to Ibarra-Cisneros and the evidence used to convict him. Indeed, the State’s brief makes this connection clear:

- “One of the items found and seized at the house where [Ibarra-Raya] was found was a cellphone.” Resp. Br. at 6.

- During Ibarra-Raya’s detention, a drug enforcement agent working with WWPD answered the illegally-seized cell phone and spoke with Ibarra-Cisneros. *Id.*
- For reasons not clear from the record, but clearly as “a result of this communication,” Ibarra-Cisneros agreed to meet the officers in a local parking lot. *Id.*
- Finally, the State makes clear that “[t]he police wanted to make contact with [Ibarra-Cisneros] for purposes of the investigation they had started earlier in the day at the house where the cellphone was found.” *Id.*

Despite a clear chain of causation, the Court of Appeals summarily found the link too attenuated to warrant suppression. *Ibarra-Raya*, 145 Wn. App. at 524. In so holding, the Court of Appeals made only passing mention of the traditional attenuation factors: “(1) temporal proximity [between the illegality and the evidence at issue]; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” *State v. Le*, 103 Wn. App. 354, 362, 12 P.3d 653 (2000). None of these factors supports a finding of attenuation.

First, attenuation requires a “considerable lapse of time” between the original illegality and the gathering of the disputed evidence. *State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334 (1977) *overruled on other grounds*

by *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Although there is no bright-line rule, a lapse of mere hours is generally insufficient to purge the taint of the original constitutional violation. *See id.* at 8 n.3 (collecting cases); *see also, e.g., State v. McReynolds*, 117 Wn. App. 309, 323 n.1, 71 P.3d 663 (2003) (finding a “mere four-day gap between [the original illegality and the challenged warrant] is not sufficient to support attenuation”); *State v. Birdsong*, 66 Wn. App. 534, 536-37, 832 P.2d 533 (1992) (three hours insufficient attenuation). Here, it appears from the record that only several hours separated the original illegal search of Ibarra-Raya’s residence and the meeting between police and Ibarra-Cisneros. This close temporal proximity weighs against a finding of attenuation.

Second, significant intervening events may purge the taint when those events counteract or mitigate the original illegality. *See, e.g., McReynolds*, 117 Wn. App. at 323-24 (attenuating intervening events included discovering corroborating evidence, receiving a tip, and securing an admission by defendant, all of which were independent of illegal of earlier unlawful searches); *State v. Jensen*, 44 Wn. App. 485, 490-91, 723 P.2d 443 (1986) (officer advising defendant of right to withhold consent to search was substantial intervening factor that dissipated taint of prior illegal search). The intervening events here – the detention of Ibarra-Raya

after the illegal search, the illegal seizure of Ibarra-Raya's cell phone, and the warrantless, nonconsensual use of that cell phone – served to compound rather than dissipate the taint of the original illegal search. Consequently, this factor also weighs against attenuation.

Third, courts have placed particular emphasis on the flagrancy of official misconduct. *See Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *State v. Gonzales*, 46 Wn. App. 388, 399, 731 P.2d 1101 (1986). Just as the Court found in *Brown*, “The illegality here . . . had a quality of purposefulness.” 422 U.S. at 605. The warrantless search of Ibarra-Raya's house was a clear violation of the state constitution. But just as egregious was the officer's use of Ibarra-Raya's cell phone to lure Ibarra-Cisneros into a meeting with police. It was inappropriate for police to answer the cell phone (without a warrant and without consent) and to pretend to be an associate of Ibarra-Raya.

Even more inappropriate, however, was the decision to continue the deceit when Ibarra-Cisneros asked to speak with his brother and made no mention, at any point, of any illegal activity. Despite there being no evidence in the record that Ibarra-Cisneros was legitimately suspected of any illegal behavior, WWPD sent several undercover officers to the meeting. And when it became clear that Ibarra-Cisneros was going to abandon the meeting, instead of letting Ibarra-Cisneros leave because

there was no evidence of wrongdoing, officers chose to apprehend Ibarra-Cisneros with guns drawn. And, significantly, all of this was undertaken without any judicial oversight: there was no search warrant sought to allow police to use Ibarra-Raya's cell phone, and there was no search warrant or arrest warrant sought for Ibarra-Cisneros. Indeed, no warrant could have issued for Ibarra-Cisneros because there was no probable cause.

The entire chain of events is tainted by the original illegal search. Ibarra-Raya would not have been in police custody and the officers would not have seized his cell phone but for the illegal search. The police would not have met with Ibarra-Cisneros but for his otherwise legal call to his brother's cell phone. Not only did officers make no attempt to purge the taint of the original illegal search, they used the fruits of the illegal search to embark on a warrantless fishing expedition to gather more evidence. Just as this Court found in *Byers*,

There was no great lapse of time or noteworthy intervening event between the [illegal] seizure and the [disputed evidence], but only a short, continuous period of investigation and interrogation. There can thus be no basis for segregating the two, no justification for upholding the one while denouncing the other.

88 Wn.2d at 8. The Court of Appeals gave no explanation as to why the taint was attenuated, but *amicus* urges the Court to find that the evidence

used to convict Ibarra-Cisneros should be suppressed as “fruit of the poisonous tree.”

B. Officers Inappropriately Used Ibarra-Raya’s Cell Phone Without a Warrant or Consent

Even if the original illegal search of Ibarra-Raya’s residence were too remote to warrant suppression of the evidence used to convict Ibarra-Cisneros – and to be clear, that is not the case – the evidence should be suppressed because it was discovered as the direct result of the officer’s inappropriate use of Ibarra-Raya’s illegally-seized cell phone.

Article I, Section 7 of the state constitution protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Because the state constitution protects “private affairs” rather than “reasonable expectations of privacy,” this Court has held that the state constitutional protection “is explicitly broader than that of the Fourth Amendment” because “it clearly recognizes an individual’s right to privacy with no express limitations and places greater emphasis on privacy.” *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (internal quotation marks and citations omitted). In short: “Article I, section 7 is a jealous protector of privacy.” *State v. Valdez*, --- P.3d ---, 2009 WL 4985242, at *8 (2009).

Of particular note here is Washington's "long history of extending strong protections to telephonic communications." *State v. Archie*, 148 Wn. App. 198, 202, 199 P.3d 1005 (2009). Not only has this Court repeatedly found that the state constitution provides greater protection for telephonic communications than the Fourth Amendment, *see, e.g., State v. Gurwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986), the state legislature supplemented these strong constitutional protections with a privacy act that "is one of the most restrictive in the nation," *State v. Faford*, 128 Wn.2d 476, 481, 910 P.2d 447 (1996). *See* Revised Code of Washington 9.73.030. These legal protections reflect the fundamental belief that the telephone is a conduit of much of today's private affairs and that these communications must be well protected from invasion by government officials.

The concerns driving strong privacy protections for telephonic communications apply with special force to cell phones. "[I]n today's advanced technological age many 'standard' cell phones include a variety of features above and beyond the ability to place phone calls." *State v. Smith*, --- N.E.2d ---, 2009 WL 4826991, at *5 (Ohio 2009). Indeed, today's cell phones are rich repositories of personal data, capable of sending, receiving, and storing large amounts of diverse media, including

email, text messages, audio recordings, pictures, movies, contact information, and call histories.

Additionally, while the cell phone is still primarily a telephone, it is unlike the traditional telephone in key respects. First, the cell phone is portable and is associated with an individual account holder, whereas the traditional fixed-line telephone is associated with a particular physical address. While there may still be a “family phone” in many homes, there are likely also cell phones for each individual user within the home. Consequently, while it is equally likely that a call to a fixed-line phone is answered by any occupant at the address, one assumes that a call to a cell phone will be answered by the owner. In this way, a call to a cell phone is presumptively a more private communication. When Ibarra-Cisneros called his brother’s cell phone, he expected to speak with his brother and became angry when the officer would not let him. Ibarra-Cisneros’s expectations likely would have been different had he called his brother’s home telephone.

These aspects of the cell phone create an increasingly uneasy relationship with many traditional search and seizure cases. *State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994) illustrates this point. In *Goucher*, police were present in the house of suspected drug dealer Jose Luis Garcia-Lopez, pursuant to a valid search warrant. *Id.* at 780. The

warrant was based in part on an affidavit that referenced use of the house's telephone to arrange drug sales. *Id.* at 782 (noting trial court's conclusion that "supporting affidavit gave the officers reason to answer the telephone at the residence when it rang and to make such cocaine deals as the callers sought to make"). During the officers' search of the residence, Goucher called the house. *Id.* at 781. When an officer answered the telephone and pretended to be an associate of Garcia-Lopez, Goucher told him that he wanted to buy drugs, and the officer invited Goucher to the house. *Id.* The police set up a sting operation and arrested Goucher on a controlled buy. *Id.* On appeal, this Court found there was no intrusion into Goucher's private affairs, noting that the police were lawfully in the house and that Goucher had no expectation of privacy when he "made no attempt to keep his desire to buy drugs a secret from someone he did not know." *Id.* at 786.

This case is simply inapposite in the cell phone context. First, cell phones are personal to an individual. Thus, callers to a cell phone should have a heightened expectation of privacy. In *Goucher*, this Court emphasized that Goucher was calling a stranger at a house known for drug sales and that that diminished Goucher's reasonable expectation of privacy. *Id.* at 784. Compounding that issue was the fact that Goucher announced his illegal intentions almost immediately after the officer

answered the phone. Here, Ibarra-Cisneros reasonably expected to reach his brother when he called the cell phone, and he was agitated and angry when he could not. From the appellate record, it appears that Ibarra-Cisneros never announced any illegal activity or intent to the officer answering the phone.

Second, a key point in *Goucher* was that police were in the residence pursuant to a valid search warrant. *Id.* at 780. Even assuming *arguendo* that the officers searched Ibarra-Raya's house pursuant to a valid warrant, would they then have had the legal authority to answer Ibarra-Raya's cell phone only while in the house? Or would that authority extend indefinitely into the future? Would officers have had the authority to answer the cell phone of others present in the house during the search? Would officers have had the authority look through the call histories, email, text messages, or photographs stored in any or all of the cell phones present during the search? Because cell phones are not tied to a particular address, the rules allowing the police to use fixed-line telephones during a search of an address should not be automatically or blindly applied in the cell phone context.

Amicus urges the Court to establish a bright-line rule here: Officers may not search, use, or otherwise manipulate a cell phone without either the owner's consent or a valid search warrant specific to the cell phone.

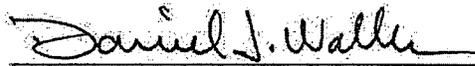
Because the officers used Ibarra-Raya's phone in derogation of his constitutionally protected right to privacy, all evidence discovered as a result – including the evidence discovered during the meeting with Ibarra-Cisneros – should be suppressed as fruit of an unconstitutional invasion of private affairs.

V. CONCLUSION

Amicus urges the Court to find that the evidence used to convict Ibarra-Cisneros should be suppressed as “fruit of the poisonous tree.” The Court may reach that conclusion following either of two arguments. First, there is a clear chain of causation running from the original illegal search to the parking lot meeting with Ibarra-Cisneros. The State has not made any argument as to how the evidence used against Ibarra-Cisneros might be sufficiently distinguishable from the original illegality to avoid the taint of the constitutional violation. Second, the officers violated Article I, Section 7 by using Ibarra-Raya's cell phone without a warrant and without consent to arrange a meeting with Ibarra-Cisneros. The evidence used to convict Ibarra-Cisneros was the direct result of this meeting. Under either theory, the evidence used to convict Ibarra-Cisneros was discovered through exploitation of a constitutional violation and should be suppressed.

Respectfully submitted this 8th day of February 2010.

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