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SUPREME COURT
STATE OF WASHINGTON
8/9/2022 12:43 PM
BY ERIN L. LENNON
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No. 101069-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALBERT SPEEDY MOSES,

Petitioner.

ANSWER TO
PETITION FOR REVIEW

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I. INTRODUCTION

The defendant was arrested on an outstanding felony warrant. After he exited the vehicle in which he had been riding as a passenger, officers saw drug paraphernalia in the vehicle. A drug-detection canine later performed a sniff of the exterior of the vehicle and positively alerted to the scent of controlled substances. The vehicle was impounded, and officers applied for a warrant to search the vehicle. The reviewing judge found that probable cause existed for the crimes of "VUCSA and PDP."

A later search pursuant to the warrant located a loaded Ruger .45-caliber handgun in a backpack that, early in the contact, was seen between the defendant's feet. The backpack also included paperwork belonging to the defendant.

On the defendant's motion, the trial court suppressed the firearm evidence because the warrant

was based in part on the possession of controlled substance statute, former RCW 69.50.4013, which had recently been held unconstitutional in Blake¹.

By published decision, Division 1 of the Court of Appeals reversed the trial court in reliance on the DeFillippo rule as applied by this court in Brockob and Potter. Division 1 also noted that its decision was consistent with the recent decision of Division 3 of the Court of Appeals on the same question.

This court should decline further review.

II. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

III. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion.

¹ State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

IV. ARGUMENT

A. UNDER RAP 13.4(b)(1), THE DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The defendant seeks review under RAP 13.4(b)(1).

The Court of Appeals decision is not in conflict with any decision of the Supreme Court. RAP 13.4(b)(1).

The settled precedent of this court applies the DeFillippo rule when determining probable cause pursuant to a statute later held unconstitutional. State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006). In Brockob, a warrantless search of a vehicle was conducted after the driver was arrested for driving with a suspended license. The statute which provided for the suspension was later held unconstitutional. Id. at 341–42. The court noted that there was no doubt that the officer held probable cause at the time of the arrest. Id. at 341 n.19. In applying the DeFillippo rule, this court held that criminal justice participants are entitled to rely on the presumptive validity of statutes when making

determinations about probable cause “unless the law is ‘so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest.” Id. (quoting Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979)).

This court noted the conclusion was consistent with the Supreme Court’s previous decision in Potter. Brockob, 159 Wn.2d 311, 342 ¶ 74–75. In Potter, the Court of Appeals held, “[A]n arrest is not invalid for lack of probable cause simply because the criminal statute a defendant is arrested under is later found to be unconstitutional” and this court affirmed. State v. Potter, 129 Wn. App. 494, 119 P.3d 877 (2005), aff’d 156 Wn.2d 835, 132 P.3d 1089 (2006).

In addition to being consistent with prior decisions of this court, Division 1’s decision below is also consistent with the recent decision by Division 3 of the Court of

Appeals. In re Pleasant, 21 Wn. App. 2d 320, 509 P.3d 295 (2022). In Pleasant, Division 3 held that the DeFillippo rule controlled the determination of probable cause. In applying the DeFillippo rule, Division 3 examined whether the possession of controlled substance statute should have been seen as “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest.” Id. at 339–40 ¶ 37 (citing State v. White, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982)). The Pleasant court surveyed the decisions related to the constitutionality of the possession of controlled substance statute in advance of Blake and found no such prior dispositive judicial holding that would have made the unconstitutionality of the statute apparent. Id. at ¶ 38–39. Accordingly, probable cause was appropriately determined assuming the validity of the statute at the time the warrant was issued.

The defendant's primary argument in seeking review is that the Court of Appeals decision conflicts with State v. Afana, 169 Wn.2d 169, 184, 179–81, 233 P.3d 879 (2010). However, the two decisions are not inconsistent, and the Court of Appeals properly rejected the defendant's arguments that Afana required a different result than the result reached by the Court of Appeals. State v. Moses, ___ Wn. App. 2d ___, 512 P.3d 600 (2022).

The decision of the Court of Appeals properly identified that the defendant's argument, raised below and again here, failed to distinguish between application of a good faith exception to the exclusionary rule as discussed in Afana and whether authority of law existed to conduct a search as discussed in the settled precedent of this court. Id. at ¶ 21. The court stated that the defendant "conflates determining the authority to search with applying the exclusionary rule to unlawfully obtained evidence." Id. at ¶

21. Notably, this court has previously rejected the identical conflation and characterized the attempt to conflate the scope of the exclusionary rule with the scope of authority of law to conduct a search as being “without merit.” Brockob, 159 Wn.2d at 341 n.19; Afana, 169 Wn.2d at 183 ¶ 20 (“Indeed, we said in Brockob, that the argument that we were adopting a ‘good faith’ exception to the exclusionary rule by applying the DeFillippo rule was ‘without merit.’”).

This court’s decision in Afana is in fact consistent with the lower court’s decision. In Afana, this court held that a search of a vehicle conducted pursuant to the automobile search incident to arrest exception violated article I, section 7 of the Washington State Constitution. Afana, 169 Wn.2d at 178 ¶ 13. The validity of the search in Afana did not turn on the existence of probable cause but instead on whether the search was “justified by a concern for the safety of the arresting officer or the

concealment or destruction of evidence of the crime of arrest.” Id. at 178 ¶ 11. The court found the search was not so justified and therefore was in violation of article I, section 7. Id. at 178 ¶ 13.

The validity of the search examined in Afana was entirely divorced from whether probable cause existed. And notably, the court did not discuss DeFillippo, Potter, or Brockob in determining whether the search was valid. Instead, the court examined DeFillippo, Potter, and Brockob only in context of the exclusionary rule after the court found the search was invalid. The court examined these cases only as to the remedy for the unlawful search and held (as did the Court of Appeals) that these cases did not provide for a good faith exception to the exclusionary rule. Id. at 183 ¶ 20 (“Our adoption of the DeFillippo rule under article I, section 7, did not signal a willingness to consider the reasonableness of a police officer’s reliance on subsequently invalidated legal

authority when determining *whether the exclusionary rule should be applied, but only when determining whether probable cause existed.*" (emphasis added)).

The rule set forth by the Afana court is strikingly similar to the holding by Division 1 below which stated that a probable cause determination:

is made at the time of arrest. Thus, even if the statute that contributed to the determination of probable cause by proscribing the defendant's conduct is later declared unconstitutional, a reasonable person at the time of the arrest, with knowledge of the fact of the defendant's conduct and the circumstances of the statute, would have reasonably believed that there was probable cause to make an arrest.

Afana, 169 Wn.2d at 183 ¶ 19.

The lower court's decision is consistent with Afana and prior authority of this court.

B. THE INTERACTION OF THE DEFILLIPPO RULE AND ARTICLE 1, SECTION 7 IS SETTLED LAW.

The defendant also argues this court should accept review because a significant issue of constitutional law is raised under RAP 13.4(b)(3). However, the defendant

overlooks that this court has already grappled with and settled these questions.

In 1982, this court examined whether the DeFillippo rule was compatible with Article I, Section 7 and initially held that the two were incompatible. White, 97 Wn.2d at 109. The defendant cites to this precise discussion. Petition for Review at 21. However, the court then reversed direction in Brockob and Potter. Afana, 169 Wn.2d at 182 n.8, (“In White, this court rejected the DeFillippo rule under article I, section 7. That aspect of White was abrogated by Potter and Brockob.”). The constitutional question related to the compatibility of the DeFillippo rule and article I, section 7, has been settled by this court since 2006. Id. The defendant’s claim does not warrant further review.

C. THE VALIDITY OF THE WARRANT UNDER THE SEVERABILITY DOCTRINE DOES NOT NECESSITATE FURTHER REVIEW.

The court should also decline to accept review because the Court of Appeals properly determined the warrant was valid under the severability doctrine. Whereas the trial court misapplied the third prong of severability doctrine, the Court of Appeals corrected the lower court's misapplication. Unlike many severability cases, here, the defendant identified no invalid portion of the warrant beyond the reference to the possession of controlled substance statute. The defendant identified no evidence, locations searched, or other portions of the warrant that would be invalidated if the court had found probable cause only for the drug paraphernalia charge. The lower court correctly determined the warrant was valid under the severability doctrine.

Lastly, although not reached by the Court of Appeals, the warrant in this case was also valid under the

severability doctrine as the warrant validly authorized a search for particularly described contraband located in the vehicle as permitted by CrR 2.3(b)(2).

The defendant has not identified any appellate decision in conflict with the Court of Appeals decision on the severability doctrine or any significant question of constitutional law. This issue does not warrant further review.

V. CONCLUSION

The petition for review should be denied.

This Answer contains 1,713 words pursuant to RAP 18.17.

Respectfully submitted on August 9, 2022.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

No. 101069-9

SEAN ALBERT SPEEDY
MOSES,

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

Petitioner.

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I, DIANE K. KREMENICH, STATE THAT ON THE 9th DAY OF AUGUST, 2022, I CAUSED THE ORIGINAL: ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

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E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 9th DAY OF AUGUST, 2022.



DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

August 09, 2022 - 12:43 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,069-9
Appellate Court Case Title: State of Washington v. Sean Albert Speedy Moses
Superior Court Case Number: 18-1-00394-1

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