RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 24, 2014, 4:56 pm
BY RONALD R. CARPENTER
CLERK

E CRF
RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. JOSE MARTINES, Respondent.	Supreme Court 90926-1 COA No. 69663-7-I REPLY TO ANSWER TO MOTION TO STRIKE AND **RAP 9.11 MOTION** IN THE ALTERNATIVE FOR REMAND TO THE FACT-FINDING TRIBUNAL

I. REPLY

The Petitioner has now acknowledged the salient points that undergird Mr. Martines' Motion to Strike ("Motion"). The Court of Appeals held that the search warrant in Mr. Martines' case failed to authorize testing of his blood, a search. Decision, at pp. 3-11. The State's claim of cure by 'physical attachment' of the warrant affidavit is a newly-minted issue that the Petitioner in the Court of Appeals made a decision to forego completely, in favor of an argument that blood-testing is not a search at all, but instead is akin to a police

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

officer looking at the tread pattern of an arrestee's sneakers in the evidence room. Brief of Respondent, at pp. 1-19.

Following the State's Answer to Mr. Martines' Motion to Strike ("Answer"), the fundamental procedural facts of the case, which establish the State's affirmative non-entitlement to raise this wholly new issue in its Court of Appeals motion to reconsider and now in its Petition for Review, stand unassailed:

> **(1)** A party cannot raise a new legal issue (much less a diametrically opposite issue) in a motion for reconsideration, and in counsel's experience this Supreme Court has been scrupulously consistent in declining to address issues so untimely raised; and
>
> **(2)** Answering the factual question of 'physical attachment' of the affidavit to the warrant at the relevant times including service and execution of the search would require the taking of testimonial evidence from Trooper Tardiff, from the WSPCL forensic scientist who tested the blood, and from Mr. Martines (at a minimum).

However, this Supreme Court does not preside over the litigation of issues of fact.

a. <u>Acknowledgement – issue waived</u>. The State of Washington has now acknowledged that the factual question of physical attachment of the warrant affidavit was an issue of cure that the State affirmatively, consciously, and for strategic reasons decided not to raise in its Brief of Respondent in the Court of

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

Appeals, even though Mr. Martines placed it squarely in his Appellant's Opening Brief. Answer, at pp. 5-6; see AOB, at pp. 6-10 (Part D.3, entitled "The warrant fails to grant any authority to test Mr. Martines' blood."); see also Reply, at pp. 1-8 (Part A, entitled, "The Respondent concedes that the search warrant did not authorize blood testing, and also concedes that there was no probable cause for any drug testing of Mr. Martines' blood."). The State suggests in its Answer to Motion to Strike that Mr. Martines' arguments have 'shape-shifted' from the trial court to the Court of Appeals. Of course, in general, it is not 'shape-shifting' to properly raise, on appeal, a manifest error in the trial court that affected a constitutional right. See RAP 2.5(a)(3). Appellate counsel would have been ineffective under Strickland v. Washington if he had failed to raise this issue.[1]

Further, specifically, the defendant's trial counsel *himself noted* to the State and described in his CrR 3.6 briefing to the trial court the existence of the doctrine of possible 'cure' of a defective

[1] The State's assertion that the Court of Appeals "exceeded the proper scope of appellate review" is therefore a wrongful description of the learned opinion of that Court which properly reached the question of the manifest constitutional error of the inadequate search warrant, and plainly stated its undebatably clear basis for doing so under RAP 2.5(a). Decision, at p. 3.

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

warrant if it is established that the warrant had the warrant application affidavit physically attached to it at relevant times. CP 7 (Defendant Martines' CrR 3.6 Motion to Suppress). The Petitioner State of Washington argues that the defense's own act of coming forward with this doctrine did not place the prosecution on notice that it had the option of making that legal argument of cure, because it was simply included as part of the defense briefing's "boilerplate search and seizure law" section as a prelude to the defense *probable cause* argument. Answer, at p. 2. But the potential cure of a defective warrant by proving physical attachment of the affidavit to the warrant is just as much a possibly available cure for a warrant that lacks *probable cause* – the very issue raised by counsel in the trial court and decided by that court -- as it is (or may be) a cure for a warrant that fails *particularity* – the issue that appellate counsel also raised and which the Court of Appeals decided. CP 7-12. In any event, whatever the impetus for the State's non-litigation of this factual issue in the trial court, the facts do not exist; and when the State sought to raise the entire matter for the first time in its Motion for Reconsideration, the matter then became both factually and legally brand-new.

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

Petitioner argues that the Court of Appeals improperly acted to "presume a set of facts" that favored the appellant. Answer, at p. 8. But the presumption is not that a warrant affidavit *was attached* to the warrant; rather, the presumption is the opposite. If this were not correct, the many federal and state court decisions including this Court in Stenson that have noted the doctrine that a defective warrant can be cured by establishing that the affidavit *was attached*, must be deemed to have gotten the whole matter entirely backwards for the past many decades of jurisprudence. See, e.g., United States v. Stubbs, 873 F.2d 210, 212 (9th Cir. 1989) ("We will not, however, rely on an affidavit to cure the generality of a warrant where the affidavit is not 'attached to and incorporated by reference in the warrant'.") (citing United States v. Spilotro, 800 F.2d 959, 967 (9th Cir.1986)). In this case, the State could have, but did not, make any argument based on physical attachment in the Court of Appeals. It must be re-emphasized that the reasons for the State's strategic decision to not litigate the question of attachment in the tribunal seem obvious – the documentation that did exist below appears to shows that, at the time of the warrant's execution upon Mr. Martines, he was served only with the warrant itself, and there is no showing

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

that he was served with any attached warrant application. See Filing of April 18, 2014 (attachments 1 and 2).

Furthermore, the issues raised by Mr. Martines in his Appellant's Opening brief were the precise same issues noted by the Court of Appeals as having been so raised by him – the issue of warrant authority (the Court concluded the warrant granted no authority to test for anything, including drugs and alcohol), and the alternative argument that there was no probable cause for drug testing, even if there was cause for alcohol testing. These arguments are, by their very framing, arguments that were proffered in the *alternative*. This is a routine appellate methodology, e.g., ***if*** the warrant was supported by probable cause for drug testing of the blood, the warrant still fails because it did not ***authorize*** any blood-testing at all; e.g., ***if*** the warrant granted blood-testing authority, it nonetheless fails, because there was no authority for testing the blood for ***drugs***. Counsel's various answers to the Court of Appeals' wide-ranging questions during oral argument regarding one, or the other, of these issues do not stand as a 'concession' of any matter for purposes of the other, alternative argument. And more broadly, the Petitioner's claim in its Answer – that various questions asked

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

during the parties' oral argument in the Court of Appeals in April of 2014 are the causal reason that the Petitioner had not made certain legal arguments in its Brief of Respondent filed in *August of 2013*, merits no further response than the foregoing chronological clarification.

b. Misstatement of state and federal law. Petitioner State of Washington also appears to argue that the question of whether a defective warrant can be cured by the affidavit can be answered simply if a court will just "consider the affidavit in tandem" with the warrant to see what things the State really wanted to search for, but which the warrant did not authorize, and that no further facts need be established. Answer, at p. 8. This is plainly incorrect, as the Petitioner's lack of citation to any legal authority for the proposition shows. In fact the opposite is true. See Groh v. Ramirez, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (the Fourth Amendment requires particularity in the warrant, not in the supporting documents, and the high function of the Fourth Amendment's particularity requirement is "not necessarily vindicated" when some other document not delivered or posted says something about the objects of the search); 2 LaFave, Search and

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

Seizure – A Treatise on the Fourth Amendment, § 4.12(a) (5th ed. 2012). And even more fundamentally, the scope of a warrant is not determined by looking at what authority the warrant application asked for but the magistrate did not give, and reversing the two.

Mr. Martines has no dispute whatsoever with the State's description of the warrant in this case as using language stating that it incorporated the affidavit. But that is merely a phraseology predicate that is of no moment whatsoever unless the necessary *factual* showing is made that the affidavit was physically attached to the warrant at the relevant times. Groh v. Ramirez, supra; State v. Stenson, (1997) 132 Wn.2d 668, 696, 940 P.2d 1239, certiorari denied, 118 S.Ct. 1193 (1997) (constitutional violation of the Fourth Amendment's particularity requirement for search warrants includes rule that such violation may only be "cured" where the affidavit and the search warrant are physically attached) (citing State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993)).

In the absence of establishment of the fact of attachment, there are no litigated facts favorable to the State to apply any of this law of "cure" to – and indeed, the State's decision to not make the "physically attached" argument in the Court of Appeals was not only

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

strategic, it was understandable. The record that *does* exist in the form of the "Inventory and Return of Property Taken Under Search Warrant" dated June 2012 and the "Receipt for Property Taken" dated June 2012 states solely that the warrant was served, and says nothing about any affidavit.

The Petitioner disingenuously states that Mr. Martines' post-oral argument supplemental filing noted above (describing the limited language of the return of the warrant and of the receipt for property taken under the warrant) should be viewed as demonstrating that the defense somehow "regrett[ed] the approach" it took during the appeal to that point. Answer, at p. 6. The assertion, apparently, is that Mr. Martines would have wished that he had put an argument in his Opening Brief about how the warrant affidavit might be an available escape route or 'end-around' the warrant's inadequacy, for the State.

Nothing could be more off the mark. The record on appeal showed no attachment, and strongly suggested the affidavit was not attached. During oral argument, the Court of Appeals asked whether the defective warrant could be cured by the warrant affidavit. Counsel for Mr. Martines, noting that the State had not

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

offered up any such defense, submitted a supplemental filing that included documents from the record noting that (1) the record did not show physical attachment; and (2) that physical attachment is a "cure" under Stenson that the State had not and was not posing as fix for the defective warrant in the first place.

The State borrows, and misuses, a phrase aptly employed in Mr. Martines' Motion when it describes this filing as raising a "newly-minted" argument (Answer, at p. 7). To the contrary, where a warrant is fatally defective, it is for the State to "mint" a defense that the affidavit was physically attached; Mr. Martines' filing in answer to Judge Becker's query endeavoured to and succeeded in showing that the argument was for the State to raise, but it had not.

And yet, even when alerted to this possible escape route by the Court of Appeals query, and by Mr. Martines' response to that query, once again the State submitted nothing.

Subsequently, the Court of Appeals succinctly noted in its Decision – it could have done nothing else -- that physical attachment might be a cure in some instances -- but the State *hadn't and wasn't arguing it.* Decision, at p. 13 note 1.[2]

---

[2] The State, as it did in its Petition for Review, announces that Mr.

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

II. MOTION UNDER RAP 9.11

Even if this Court decided to concern itself with the State's newly raised legal argument, without a factual determination on the foundational questions of attachment at the relevant times, there *are no facts* to which the determinations of law that this Court might make can be applied.

Without such facts, deciding the law in this area would be a purely advisory opinion – which are disfavored by this Court -- without either application, or consequence, to the present controversy.

RAP 9.11 allows this Court to direct the trial court to take additional evidence on the merits of the matter that is needed to fairly resolve the issues on review. RAP 9.11(a) and (b). Without waiving his argument that the motion to strike should be granted, Mr. Martines moves – solely in the alternative to that motion -- that the

---

Martines should be the party responsible for proving the absence of the existence certain facts (physical attachment) that, if their existence was established, would be favorable to the State, and that the Court of Appeals should presume these facts' existence if appellant failed to prove the contrary negative. Answer, at pp. 6-8; see PFR, at pp. 8-9. This novel argument is certainly not supported by State v. Njonge, ___ Wn.2d ___, 334 P.2d 1068, 1077 (Wash., Sept. 25, 2014), from which the State in any event cites an opinion concurring in result only; or State v. Jasper, 174 Wn.2d 96, 121-24, 271 P.3d 876 (2012) (both stating that a defendant arguing that a court closure violated his public trial rights must first show that there was a court closure).

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

case be remanded to the King County Superior Court for the State to endeavour to prove, through the taking of testimony from Trooper Tardiff who served the warrant on Mr. Martines, from the Washington State Patrol Crime Laboratory forensic scientist that executed the search, and from Mr. Martines who could choose to testify at such a CrR 3.6 hearing, by proving that the warrant affidavit was attached to the warrant.

III. CONCLUSION

The proper issue on review in the Supreme Court is whether the testing of drawn blood for physiological data is a "search" under the Fourth Amendment and/or an intrusion into a person's private affairs under Article 1, section 7 of the state constitution. The issue that must also necessarily be decided is whether there was probable cause for drug testing of Mr. Martines' blood when the arresting officer, despite being a Drug Recognition Expert, described Mr. Martines *solely* as driving while inebriated by alcohol.

Based on the foregoing and on his Motion to Strike, Mr. Martines respectfully requests that this Court strike that portion of the State's Petition for Review raising a new factual and legal issue of physical attachment of the warrant affidavit to the warrant.

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

DATED this 24 day of November, 2014.

Respectfully submitted,

OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project (91052)
Attorneys for Appellant

Washington Appellate Project
1511 Third Avenue,
Suite 701
Seattle, Washington 98101
(206) 587-2711

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 90926-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner James Whisman, DPA; Erin Becker, DPA
[paoappellateunitmail@kingcounty.gov]
King County Prosecutor's Office – Appellate Unit

☐ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 24, 2014

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: paoappellateunitmail@kingcounty.gov; Oliver Davis
Subject: RE: 909261-MARTINES-REPLY

Received 11-24-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Monday, November 24, 2014 4:56 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: paoappellateunitmail@kingcounty.gov; Oliver Davis
Subject: 909261-MARTINES-REPLY

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Reply to State's Answer to Motion to Strike

Oliver R. Davis- WSBA #24560
Attorney for Respondent
Phone: (206) 587-2711
E-mail: oliver@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org