NO. 98315-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

COREY DEAN HARRIS, Respondent

FROM THE COURT OF APPEALS DIVION II
CAUSE NO. 51539-3
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01492-3

PETITION FOR REVIEW

Attorneys for Petitioner:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Unpublished Opinions

IDENTITY OF PETITIONER

The State of Washington asks this Court to accept review of the decision in Part B of this Petition.

DECISION

Petitioner State of Washington seeks review of the Court of Appeals, Division II's unpublished opinion, which was filed on January 7, 2020, affirming the trial court's order suppressing evidence and dismissing the State's case with prejudice. A copy of the opinion of the Court of Appeals is attached as Appendix A. A copy of the order, which was filed on February 20, 2020, denying the State's motion for reconsideration that is attached as Appendix B.

ISSUES PRESENTED

I. Does the independent source doctrine require the State to prove that "the illegally obtained information did not affect the magistrate's decision to issue the warrant"?

II. When the trial court did not address whether the police "would have sought a warrant even without the information obtained from the warrantless search" should an appellate court remand to the trial court for findings or an additional hearing on that issue in accordance with precedent?

STATEMENT OF THE CASE

A. FACTUAL SUMMARY

John Cory Dean Harris was charged by information with five counts of Possession of Stolen Property in the First Degree occurring between March 20, 2017 and March 22, 2017. CP 1-2. The information alleged that Harris was in possession of a stolen Caterpillar 259D track loader, a stolen Takeuchi TB260 excavator, a stolen 2015 Olympia tilt trailer, a stolen 2011 Great Northern 18' total tilt trailer, and a stolen 2011 Great Northern 20' 14k tilt trailer. CP 1-2. All of these farm or construction vehicles were found in an outbuilding[1] that Harris leased in rural Battleground. CP 5-7.

The investigation into Harris and his leased building began when Redmond Oregon Police Officer Michael Maloney contacted Clark County Sheriff Deputy Jeremiah Fields and reported getting a GPS location of a stolen Caterpillar 259D track loader in the area of 18288 NE 72nd Avenue, Battleground, Washington. CP 5, 13. Upon Dep. Fields initial check of the reported area, he was unable to find a residence address associated with 18288 NE 72nd Avenue or see the stolen Caterpillar outside of any property. CP 5, 14.

[1] The relevant building is also referred to, interchangeably, as a "shop building." CP 104-111.

The next day, Dep. Fields returned to the area and had contact via telephone with Mark Rickabaugh the owner of the stolen Caterpillar. CP 5, 14. Rickabaugh provided Dep. Fields with "pictures and GPS locations of where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding." CP 5, 14. Dep. Fields was able to match the pictures to Google Maps and found the residence address associated with the outbuilding to be 18110 NE 72nd Avenue. CP 5, 14. Rickabaugh told Dep. Fields that the value of the stolen Caterpillar was $46,000. CP 5, 14.

Dep. Fields proceeded to the residence located at 18110 NE 72nd Avenue. CP 5, 14. There, he spoke with a female resident who had been living in the home for three years. CP 14. She put Dep. Fields on the phone with the property owner (of the residence and the outbuilding), Daniel Tucker. CP 5, 14. Tucker told Dep. Fields that he rents the outbuilding to Corey Harris and has for the last six to eight years. CP 5, 14. Tucker indicated that he shared storage space in the building with Harris, kept property such as snowmobiles and ATVs in the building, and stated to Dep. Fields that he knew that Harris had a tractor in the building, but that he did not know the type. CP 5, 14.

Tucker told Dep. Fields that he (Tucker) did not need permission to access the outbuilding and provided Dep. Fields with the access code to

the key box located on the door of the outbuilding as well as permission to enter the building. CP 5, 14. Dep. Fields retrieved the key from the key box and then knocked on the door and "announced 'Sheriff's Office'" before entering the building. CP 5, 14. Dep. Fields immediately noticed Rickabaugh's stolen Caterpillar. CP 5, 14. Dep. Fields did not find the serial number on the Caterpillar but instead found a sticky residue left where the serial number plate should have been. CP 5, 14.

Next, Dep. Fields exited the outbuilding and applied for a search warrant. CP 5, 14. Dep. Fields returned to the outbuilding, executed the search warrant, and found the stolen vehicles listed in the information. CP 5-7, 21-24.

B. PROCEDURAL HISTORY AND DECISION BELOW

After the State charged Harris, Harris filed a motion to suppress arguing numerous bases for the suppression of the evidence found in his leased outbuilding and a rebuttal to the State's response brief, which included additional arguments as to why Dep. Fields's initial entry into the building was unlawful. CP 8-9, 25-48, 78-98. Following a CrR 3.6 hearing, which included testimony from Dep. Fields and Harris, the trial court concluded that Tucker did not have the authority to consent to search of the outbuilding that he leased to Harris, i.e., Tucker did not have "common authority" over the building. *See* RP; CP 109-110 (Conclusions

of Law #1-#9). Consequently, the trial court held that Dep. Fields's observations of the stolen Caterpillar in Harris's leased building were unlawfully obtained and must be excised from the search warrant affidavit. CP 110 (Conclusion of Law #13).

The trial court also concluded that without Dep. Fields's "unlawful observations, there was no probable cause for the search warrant," that "[a]fter the Court excises the observations of Deputy Fields after entering the building from the affidavit, the State fails to establish Probable Cause for the issuance of the warrant," and that "the subsequent entry under the search warrant [was] . . . unlawful because Deputy Fields did not comply with RCW 10.31.040," the knock and announce rule. CP 110 (Conclusions of Law #12, #14, #19). Because of the aforementioned conclusions the trial court suppressed all of the State's evidence and dismissed the State's case. CP 111. The State timely appealed the trial court's suppression rulings based on the independent source doctrine and knock and announce rule.[2] CP 114.

The State appealed and argued that, pursuant to the independent source doctrine and contrary to the trial court's conclusion, probable cause still existed to support the search warrant when the unlawfully obtained information was stricken. Brief of Appellant at 6-18; Reply Brief of

[2] The State did not challenge the trial court's conclusion that Dep. Fields's initial observation of the stolen Caterpillar was unlawful.

Appellant at 12-20. The court of appeals held that "the independent source rule d[id] not apply" because "there is no evidence in the record and no findings of fact or conclusions of law to support the assertion that the illegally obtained information did not affect the magistrate's decision to issue the warrant or that Deputy Fields would have sought a warrant even without the information obtained from the warrantless search." App. A at 5. Because the court of appeals affirmed the trial court on the basis of the above holding, it did not address whether probable cause existed to issue the original warrant after striking all references to the initial, illegal search from the warrant affidavit or whether the State complied with the knock and announce rule. *See* App. A.

The State filed a motion for reconsideration with the court of appeals. The court of appeals entered its order denying the motion for reconsideration on February 20, 2020. App B.

Because the court of appeals misapprehended the law—there is no requirement that the State show that the illegally obtained information *did not affect the magistrate's decision* to issue the warrant—and overlooked precedent—it did not address the cases that hold that the trial court, *upon remand*, is supposed to determine whether the police would have still sought a search warrant—the State respectfully requests this Court to accept review of this decision and reverse the decision.

ARGUMENT WHY PETITION SHOULD BE GRANTED

RAP 13.4(b) provides the considerations governing acceptance of review. Review may be granted:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State asserts that review is appropriate under RAP 13.4(b)(1), (2), and (3).

I. Does the independent source doctrine require the State to prove that "the illegally obtained information did not affect the magistrate's decision to issue the warrant"?

Under the independent source doctrine, evidence tainted by "unlawful police action is not subject to exclusion 'provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.'" *State v. Betancourth*, 190 Wn.2d 357, 364-65, 413 P.3d 566 (2018) (quoting *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005)). "The independent source doctrine recognizes that probable cause may exist for a warrant based on legally

obtained evidence when the tainted evidence is suppressed." *Id.* at 365. Therefore, reviewing courts are to uphold a search warrant unless the illegally obtained information in the search warrant affidavit was "*necessary* to the finding of probable cause." *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992) (emphasis in original) (citations omitted); *State v. Coates*, 107 Wn.2d 882, 887-89, 735 P.2d 64 (1987). The independent source doctrine ensures that the State neither benefits from its unlawful conduct nor is it placed in a worse position than it otherwise would have occupied. *Gaines*, 154 Wn.2d at 720; *Betancourth*, 190 Wn.2d at 365, 371-72.

This Court recently described the independent source doctrine in *Betancourth*:

> In its classic form, the independent source doctrine applies when the State procures the challenged evidence pursuant to a valid warrant, untainted by prior illegality. In the first type of independent source scenario, police conduct an initial unwarranted search of a constitutionally protected area, during which they discover but do not seize incriminating items. Police later obtain a search warrant for the area and seize the evidence during the warranted search.
>
> For example, in *Gaines*, the police performed an illegal warrantless search of the trunk of the defendant's car, during which officers saw what appeared to be the barrel of an assault rifle and numerous rounds of ammunition. Rather than seizing the items, officers immediately closed the trunk without disturbing the contents. The following day, the police sought a search warrant for the defendant's trunk, which included a single reference to the officer's

> observation of the weapon, as well as other evidence to establish probable cause. After obtaining the warrant and searching the vehicle, the police recovered the rifle and ammunition from the trunk of the defendant's car. We concluded that this conduct violated article I, section 7 and that the appropriate remedy was to strike all references to the initial illegal search from the warrant affidavit when assessing whether probable caused existed to issue the original warrant; we held that the evidence was ultimately seized pursuant to a lawful warrant.

190 Wn.2d at 368-69 (internal citations omitted). Additionally, to determine whether a search warrant is truly an independent source for the discovery of the challenged evidence a court must determine whether the "police would have sought the warrant even absent the initial illegality." *Id.* at 365. This determination must be made by the trial court following remand. *State v. Spring*, 128 Wn.App. 398, 405, 115 P.3d 1052 (2005) (citations omitted); *State v. Miles*, 159 Wn.App. 282, 296-98, 244 P.3d 1030 (2011).

In reaching its conclusion that "the independent source rule does not apply" to Harris' case, the court of appeals quoted this Court's opinion in *Betancourth*, which cites *Murray v. U.S.*[3], for the proposition that to "determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected [] the

[3] 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed. 2d 472 (1988)

magistrate's decision to issue the warrant. . . ." App. A at 5. *Murray* does in fact state this. 487 U.S. at 542.

But our courts, *all* of the federal circuit courts of appeal, and the vast majority of state courts, have interpreted this language from *Murray* in one of three ways with some overlap: (1) when dealing with the classic, single-warrant independent source scenario, the *Murray* language is dictum; or (2) *Murray* "endorse[s] an objective test along the lines employed in *Franks v. Delaware* rather than a subjective test of whether tainted information *actually affected the decision of the issuing magistrate*"; or (3) that a "finding that the redacted affidavit is sufficient to establish probable cause is enough to meet the burden of showing the magistrate would have issued the warrant without the illegally obtained information," i.e., the illegally obtained information did not affect the magistrate's decision, and "no further finding is necessary." *State v. Spring*, 128 Wn.App. 398, 404-05, 115 P.3d 1052 (2005) (citing cases); *United States v. Jenkins*, 396 F.3d 751, 757-760 (6th Cir. 2005) (citing cases and recognizing the unanimity among the federal circuit courts of appeal that *Murray* does not alter *Franks*); *Williams v. State*, 372 Md. 386, 813 A.2d 231 (2002) (emphasis added) (citing cases and holding that an objective test is employed rather than a subjective test as to whether the unlawfully obtained information "actually affected the decision of the

issuing magistrate"); *People v. Weiss*, 20 Cal. 4th 1073, 1080-81, 978 P.2d 1257 (1999) (citing cases and concluding that a redacted affidavit that establishes probable cause "meet[s] the burden of showing the magistrate would have issued the warrant without the illegally obtained information"). Crucially, all of the above interpretations of the *Murray* language end up in the sample place: with a court determining whether, after constitutionally tainted information is excised from the warrant, the remaining information is sufficient to support a finding of probable cause.

In our State, the court in *Spring* acknowledged that "the vast majority of courts have concluded that *Murray* did not alter the principles applied in *Franks*." 128 Wn.App. at 404. *Spring* then explicitly approved of the following reasoning in *State v. Chaney*[4]:

> If viewed in isolation from the rest of the Court's opinion and prior case law, the ["affected his decision to issue the warrant"] passage from *Murray* could be read to support the trial court's decision. However, this part of *Murray* is dictum because the warrant affidavit involved in that case did not set forth the police officers' observations during an earlier warrantless entry into the searched premises. Thus, it was clear in *Murray* that an earlier unlawful search did not affect the judge's decision to issue the warrant, and the Court had no occasion to consider whether the warrant would have been invalid if the supporting affidavit had included unlawfully obtained information. Moreover, the Court in *Murray* did not even mention . . . *Franks* or the line of lower court decisions which have held that a search warrant issued on the basis of an affidavit containing

[4] 318 N.J.Super. 217, 723 A.2d 132 (1999).

> unlawfully obtained information may be valid if the affidavit also contains other lawfully obtained information which establishes the probable cause required for the search. Consequently, it seems unlikely that the Court in *Murray* intended to change this well established law.
>
> In addition, just two sentences before the passage in *Murray* relied upon by the trial court, the Court stated that 'while the government should not profit from its illegal activity, neither should it be placed in a worse position than it otherwise would have occupied.' If the inclusion in a warrant affidavit of unlawfully obtained information automatically required suppression of the evidence obtained in a search under the warrant even though other untainted information in the affidavit established probable cause, the government clearly would be placed in a 'worse position' than if it had not engaged in a prior unlawful search. Therefore, the trial court's expansive reading of the dictum in *Murray* is inconsistent with the overall tenor of the opinion and with prior case law.

128 Wn.App. at 404-05 (internal citations omitted).

Spring concluded that:

> this reading of *Murray* is supported by the rationale of *Murray* itself, and by the fact that *Murray* does not mention or purport to overrule *Franks*. We are persuaded that the majority view is correct. Applying the principles in *Franks* . . . to this case, *the warrant was valid if the lawfully obtained evidence in the warrant application supported probable cause to search*.

Id. at 405 (emphasis added).

Moreover, this Court's decision in *Betancourth*, despite reciting the *Murray* language ("affected [] the magistrate's decision to issue the warrant") did not change the analysis. In discussing the "classic . . .

independent source scenario," *supra*, this Court concluded that in such a case "the appropriate remedy was to strike all references to the initial illegal search from the warrant affidavit when assessing whether probable caused existed to issue the original warrant" and that where probable cause still existed that the independent source doctrine applied, i.e., "[n]o second warrant need be issued" based on an affidavit without the unlawfully obtained information. 190 Wn.2d at 368-39. This Court also quoted with approval the holding of *Coates* that "'a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information.'" *Id.* at 369 (quoting *Coates*, 107 Wn.2d at 887). Notably, *Betancourth* also determined that to hold otherwise would make it "difficult to justify *Coates* and *Gaines*" two "legitimate independent source cases" despite the fact that in "neither of those cases did the State obtain a second, valid warrant; rather, on appeal we backed out the unlawfully obtained information in the original warrant and held the warrant was otherwise valid." *Id.* at 371.

Furthermore, in 2019, division II of the court of appeals applied the independent source doctrine consistent with the above analysis in two

unpublished opinions, one of which originated in this county.[5] Thus, in *State v. Lewis*, like here, the State conceded that an initial search was unlawful and that the search warrant referenced information that was learned pursuant to that unlawful search, but argued that the independent source doctrine applied. 9 Wn.App.2d 1091, 2019 WL 3628834, 4 (2019). The court of appeals agreed, struck "all references to information obtained from that search in the warrant" and concluded that "[t]he remaining portion of the affidavit nonetheless supports probable cause." *Id.* As a result, the court held that the search pursuant to the warrant was valid under the independent source doctrine. *Id.* at 3-4.

And, as noted above, *all* the federal circuit courts of appeal and the vast majority of state courts, have interpreted the language from *Murray* ("affected [] the magistrate's decision to issue the warrant") in a way that leads to the same result: the result reached in *Spring*, *Betancourth*, and *Lewis*. For example, after an analysis of *Murray* and its sister federal circuit court's decisions, *Jenkins* concluded that "[i]n sum, authority from this and other circuits, as well as the principles underlying the *Murray* rule, support an interpretation of the independent source rule that

[5] *State v. Lewis*, 9 Wn.App.2d 1091, 2019 WL 3628834, 4 (2019); *State v. Kotlyarov*, in 2019. 10 Wn.App.2d 1006; 2019 WL 4034388, 2-3 (2019). *Lewis* and *Kotlyarov* are unpublished opinions. Pursuant to GR 14.1(a) the opinions "may be accorded such persuasive value as the court deems appropriate."

incorporates consideration of the sufficiency of the untainted affidavit to see if probable cause exists without the tainted information." *Jenkins*, 396 F.3d at 757-760. Similarly, *Williams* conducted a wide ranging survey among the states and noted that "[c]ourts around the country, however, have interpreted *Murray* to endorse an objective test along the lines employed in *Franks v. Delaware* rather than a subjective test of whether tainted information actually affected the decision of the issuing magistrate." 372 Md. at 419-420; *see also Weiss*, 20 Cal.4th at 1080-81.

Here, the State's briefing in the court of appeals reiterated the correct legal standard and argued at length that the search warrant affidavit established probable cause even after the unlawful evidence was excised. Br. of App. at 6-17; Rep. Br. of App. at 12-20. Nonetheless, the court of appeals, after quoting the *Murray* language in *Betancourth* ("affected [] the magistrate's decision to issue the warrant") summarily concluded that "the independent source rule d[id] not apply" because "there is no evidence in the record and no findings of fact or conclusions of law to support the assertion that the illegally obtained information did not affect the magistrate's decision to issue the warrant. . . ." App. A at 5.[6] As

[6] The situation in which a magistrate who issued a search warrant testifies at a suppression hearing months to years later on the subject of what evidence affected their decision to issue the warrant seems farfetched enough to almost be inconceivable. There is no other way, if the subjective test is employed, to establish whether the illegally obtained information did or did not affect the magistrate's decision to issue the warrant.

established above, this conclusion misapprehends the law especially as it relates to the "classic . . . independent source scenario," which is present in this case. *Betancourth*, 190 Wn.2d at 368-69. Accordingly, the court of appeals did not apply the correct legal standard which is "to strike all references to the initial illegal search from the warrant affidavit" and then, de novo, "assess[] whether probable cause existed to issue the original warrant. . . ." *Id*.; *State v. Ollivier*, 178 Wn.2d 813, 847-48, 312 P.3d 1 (2013); Rep. Br. of App. at 12-13. As a result, the decision of the court of appeals is in conflict with a decision of this Court and with multiple other decisions of the court of appeals, and the State respectfully requests this Court to accept review of the decision of the court of appeals and its application of the independent source doctrine to Harris' case. RAP 13.4(b)(1)-(3).

II. When the trial court did not address whether the police "would have sought a warrant even without the information obtained from the warrantless search" should an appellate court remand to the trial court for findings or an additional hearing on that issue in accordance with precedent?

In evaluating whether the independent source rule applied to Harris' case, the court of appeals also quoted this Court's opinion in *Betancourth* for the proposition that to "determine whether challenged evidence truly has an independent source, courts ask whether" the "*police*

would have sought the warrant even absent the initial illegality. . . ." App. A at 5 (emphasis in original). The court of appeals then concluded that because "there is no evidence in the record and no findings of fact or conclusions of law to support the assertion that . . . Deputy Fields would have sought a warrant even without the information obtained from the warrantless search . . . the independent source rule does not apply." *Id.* And while it is true that the State must show that the "police would have sought the warrant even absent the initial illegality" (the "motivation prong") precedent dictates this factual issue should be resolved at the trial court upon remand rather than by an appellate court. The court of appeals overlooked, and did not address, that precedent.

Notably, the State could not find one opinion in which an appellate court decided, based on the record before it, that the State could not meet the motivation prong where either the evidence was suppressed below[7] or the trial court did not address the motivation prong. Instead, in *Miles*, where "*the trial court did not address* the motivation prong," the court specifically remanded to the trial court to make that determination because "whether the motivation prong is met is a question of fact." 159 Wn.App. at 297-98 (emphasis added). And it's a question of fact that is only

[7] Suppressing the evidence for lack of probable cause in the trial court realistically precludes the taking testimony on whether the police would have still sought a search warrant; the answer is immaterial since purportedly there would be no probable cause or lawful basis on which to seek a warrant and the probable cause issue is dispositive.

relevant if the first prong of the independent source doctrine is satisfied (whether the qualifying information in the affidavit supports probable cause).

Similarly, *Spring* noted that where findings are not made regarding whether "officers would have sought the warrant in the absence of the unlawfully obtained evidence . . . [o]ften the result on appeal has been a remand for entry of findings on this point." 128 Wn.App. at 405. And despite "see[ing] nothing in the record suggesting that the officers were prompted to obtain a warrant" based on their unlawful observation(s), *Spring* concluded that "The Supreme Court rejected th[e] approach" that this is a fact that an appellate court is entitled to find. *Id.* Thus, *Spring* held that it "*must* therefore remand." *Id.* (emphasis added); *see also In re Pietz*, 9 Wn.App.2d 1092, 2019 WL 3781915, 5 (2019) (holding that a trial court is required to "make an explicit finding that the officer would have sought a warrant regardless of the unlawful search or seizure" and remanding "to the trial court to consider the limited issue of whether [the police] would

have sought a warrant") (*Pietz* is unpublished).[8] Moreover, *Miles* and *Spring* are not outliers; support for the opinions exists in federal case law and in case law from other states. *See e.g., U.S. v. Restrepo*, 966 F.2d 964, 971-72 (5th Cir. 1996); *U.S. v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995); *U.S. v. Hill*, 776 F.3d 243, 253 (4th Cir. 2015); *Lauderdale v. State*, 82 Ark. App. 474, 487-88 (2003); *State v. Winkler*, 552 N.W.2d 347, 354-55 (1996).

Here, despite the State arguing that the court of appeals should remand to the trial court pursuant to *Spring* and *Miles*, the court, without addressing or referencing either, summarily concluded that because "there is no evidence in the record and no findings of fact or conclusions of law to support the assertion that . . . that Deputy Fields would have sought a warrant even without the information obtained from the warrantless search . . . the independent source rule does not apply." Br. of App. at 11, 17; Rep. Br. of App. at 20-22; App. A at 5. Because this conclusion being made by an appellate court is not supported by case law and is contrary to *Spring* and *Miles*, it appears that the court of appeals overlooked the

[8] In fact, the only Washington court that did not remand to the trial court for further findings where the trial court did not address the motivation prong of the independent source doctrine this Court in *Gaines*. There, the trial court did not suppress the challenged evidence and did not apply the motivation prong, but "found that the police would have obtained the items in the trunk "'through the course of predictable police procedures.'" 154 Wn.2d at 721. Nonetheless, *Gaines* held that "[t]his finding strongly, and we believe adequately, supports the conclusion that the police would have sought a search warrant for Norman's trunk based on facts gathered independently from the improper glance inside the trunk." *Id.*.

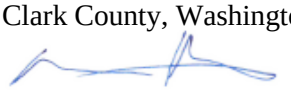
State's cited authority on this issue and its decision is in conflict with other decisions of the court of appeals. RAP 13.4(b)(2)-(3). Moreover, because of the procedural posture of this case (suppression in the trial court) the court of appeals scoured the record for facts or evidence that plainly would not be present by no fault of the State. Consequently, the State respectfully requests this Court to accept review of the decision of the court of appeals and, on this issue, remand for the trial court to determine if the search warrant would have been sought absent the initial entry into the outbuilding.

CONCLUSION

The State respectfully asks this Court to accept review of the decision of the court of appeals and to remand to the court of appeals to properly apply the independent source doctrine and determine whether the qualifying information in the search warrant affidavit established probable cause.

DATED this 23rd day of March, 2020.

Respectfully submitted:
ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. COREY DEAN HARRIS, Respondent.	No. 51539-3-II UNPUBLISHED OPINION

SUTTON, J. — The State appeals the trial court's order of suppression and dismissal of charges filed against Corey Harris for five counts of possession of stolen property. The trial court (1) concluded that the deputy's initial entry into the shop building leased by Harris was unlawful, (2) suppressed all the evidence seized, and (3) dismissed the case with prejudice. The State argues that the evidence should have been admissible under the independent source rule.

We conclude that the State did not waive its independent source argument. However, we hold that the independent source doctrine does not apply. Accordingly, we affirm the trial court's order suppressing the evidence and dismissing the case with prejudice.

FACTS

The State charged Corey Harris with five counts of possession of stolen property in the first degree. Deputy Jeremiah Fields of the Clark County Sheriff's Office received information from Oregon law enforcement regarding potential stolen property in Clark County. Deputy Fields eventually located a residence at the location he was given, and the landlord, Daniel Tucker, gave

him permission over the telephone to enter the shop building on behalf of Tucker's tenant, Harris. Upon entering, Deputy Fields found what he believed to be the stolen property. Deputy Fields then obtained a search warrant, returned a second time, and seized items.

Harris filed a CrR 3.6 motion to suppress the evidence. He argued that the initial entry was unlawful because Tucker did not have the authority to consent to the search of the shop building that Harris leased for storage, and thus all evidence seized should be suppressed. Harris also argued that without Deputy Fields' observation of the stolen property during the unlawful entry, there was no probable cause to support the search warrant. The trial court agreed with Harris and ruled that the initial entry was unlawful and that there was no probable cause for issuance of the search warrant for the shop building.

At the subsequent hearing to enter written findings of fact and conclusions of law, the State raised the issue of "severability."[1] Verbatim Report of Proceedings at 116. The State argued that there was probable cause to support the search warrant even after the trial court excised the evidence obtained in the unlawful initial entry. The trial court stated that it did not conduct a severability analysis at the CrR 3.6 hearing because the State had conceded that the granting of Harris's CrR 3.6 motion to suppress would be dispositive of the whole case and dismissal with prejudice would be appropriate.

The trial court found that the State had waived the issue of severability because it did not raise the issue at the suppression hearing, and even if it had not waived the issue, the severability theory did not apply. The trial court entered findings of fact and conclusions of law, concluding

[1] The parties interchangeably use "severability" and "independent source."

that "[t]he State presented insufficient argument or evidence at the suppression hearing to support a theory of severability of the search warrant affidavit." Clerk's Papers (CP) at 110. In this same order, the court dismissed the case.

The State appeals the dismissal.

ANALYSIS

I. WAIVER OF INDEPENDENT SOURCE ARGUMENT

The State argues that the trial court erred by suppressing evidence because the independent source doctrine applies. Harris argues that the State waived its independent source argument because it did not raise or brief this issue at the suppression hearing; instead, the State waited until the hearing where written findings and conclusions were presented to the trial court to raise the issue. The State responds that it did not waive this issue because the independent source doctrine was raised at the presentation hearing. We agree with the State and hold that there was no waiver.

RAP 1.2(a) directs us to apply the rules of appellate procedure liberally "to promote justice and [to] facilitate the decision of cases on the merits."

RAP 2.5(a) provides:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

"The purpose of issue preservation is to 'encourage the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.'" *State v. Fenwick*, 164 Wn. App. 392, 398, 264 P.3d 284 (2011) (alteration in original)

(internal quotation marks omitted) (quoting *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011)).

A right may be "forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233 (2015). Preservation also serves to ensure the record for appeal is complete, and it "prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address." *Lazcano*, 188 Wn. App. at 356.

Here, although the State did not raise the independent source doctrine until after the trial court made its oral ruling on the suppression issue, the State did raise the independent source doctrine at the hearing to enter the written findings and conclusions and claimed that there was probable cause to support a search warrant even without the information obtained from the initial illegal entry. After hearing arguments, the trial court concluded that "[t]he State presented insufficient argument or evidence at the suppression hearing to support a theory of severability of the search warrant affidavit." CP at 110.

Thus, the State raised the argument and gave the trial court the opportunity to correct the error. *Fenwick*, 164 Wn. App. at 398. The trial court heard oral argument from both parties regarding the independent source doctrine and made a conclusion of law related to this argument. Therefore, we hold that the State did not waive the argument that the independent source doctrine applies and we consider the issue on the merits below.

II. INDEPENDENT SOURCE DOCTRINE

We review a trial court's conclusions of law relating to the suppression of evidence de novo. *State v. Betancourth*, 190 Wn.2d 357, 363, 413 P.3d 566 (2018).

The exclusionary rule generally requires that evidence obtained from an illegal search and seizure be suppressed, including the unlawfully seized evidence and any fruit of the poisonous tree. *State v. Gaines*, 154 Wn.2d 711, 716-17, 722, 116 P.3d 993 (2005). The independent source doctrine is a well-established exception to the exclusionary rule. Although initially applied under a federal Fourth Amendment analysis, our courts have repeatedly held that the independent source doctrine is compatible with article 1, section 7 of the Washington Constitution. *Gaines*, 154 Wn.2d at 722; U.S. CONST. amend IV.

Under the independent source doctrine, "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." *Gaines*, 154 Wn.2d at 718.

> To determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant. If the illegal search in no way contributed to the issuance of the warrant *and police would have sought the warrant even absent the initial illegality*, then the evidence is admissible through the lawful warrant under the independent source doctrine.

Betancourth, 190 Wn.2d at 365 (emphasis added) (internal citations omitted).

Here, there is no evidence in the record and no findings of fact or conclusions of law to support the assertion that the illegally obtained information did not affect the magistrate's decision to issue the warrant or that Deputy Fields would have sought a warrant even without the information obtained from the warrantless search. In the absence of such evidence, the independent source rule does not apply. *Betancourth*, 190 Wn.2d at 365. Therefore, we hold that the trial court did not err by suppressing the evidence.

CONCLUSION

We affirm the trial court's order of suppression and dismissal with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Lee, J.

LEE, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 20, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. COREY DEAN HARRIS, Respondent.	No. 51539-3-ii ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, State of Washington moves for reconsideration of the Court's January 7, 2020, unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. MAXA, LEE, SUTTON

FOR THE COURT:

SUTTON, JUDGE

CLARK COUNTY PROSECUTING ATTORNEY

March 23, 2020 - 4:27 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Appellant v Corey Dean Harris, Respondent (515393)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200323162640SC069950_8210.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- rbenn21874@aol.com

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov
Filing on Behalf of: Aaron Bartlett - Email: aaron.bartlett@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (564) 397-5686

Note: The Filing Id is 20200323162640SC069950