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NO. 68174-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D

JUL 02 2012

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

B.K.,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE
DIVISION

The Honorable Michael Trickey, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION¹

Juvenile appellant B.K. is appealing his conviction for possessing a stolen car, following an unsuccessful motion to suppress. CP 23, 28-34. Police did not know of B.K.'s purported involvement at the time officers stopped the stolen car and arrested its driver and occupants. CP 12. Rather, police learned of B.K.'s purported involvement *only after* obtaining an illegal recording of B.K.'s friend, A.R., inculcating B.K. CP 13.

Unbeknownst to A.R. and without his permission, he was recorded talking to his girlfriend on the telephone while sitting in his police-officer father's patrol car, while his father, officer Eric Michl, was directing traffic outside for a Mariner's game; A.R. had arrived early with his father and was killing time before meeting friends and going into the game.

Officer Michl later discovered that his recording equipment had been activated and listened to his son's private conversation. As a result of A.R.'s statements inculcating B.K., Michl began the investigation that led to B.K.'s arrest. CP 13-14.

¹ This brief refers to the transcripts as follows: RP – adjudicatory hearing held December 12 and 13, 2011; 1RP – adjudicatory hearing held December 14, 2011, and sentencing held January 4, 2012.

B.K. moved to suppress A.R.'s testimony on grounds it was obtained through exploitation of the illegal recording (CP 11-20), but the court held A.R.'s testimony was sufficiently attenuated from the illegal recording to allow its admission (CP 29-34). B.K. will argue the court erred in relying on the attenuation doctrine and in thereby denying the motion to suppress.

B. ASSIGNMENTS OF ERROR

1. The court erred in denying the motion to suppress evidence obtained as a result of police exploitation of the Privacy Act violation.

2. The court erred in entering findings of fact 9-10, and conclusions of law 4-5 in its Findings of Fact and Conclusions of Law for CrR 3.6 Hearing. CP 29-34.²

² A copy of the court's findings and conclusions is attached as an appendix. To the extent the court's findings refer to a prior car theft purportedly involving B.K., they are erroneous. Evidence that B.K. allegedly stole a car previously was excluded. RP 46-47.

Issues Pertaining to Assignments of Error

1. Where A.R.'s statements inculcating appellant were illegally recorded and the police exploited the illegal recording to investigate and ultimately arrest B.K., did the trial court err in denying the motion to suppress A.R.'s testimony as fruit of the poisonous tree?

2. Did the trial court err in relying on the attenuation doctrine to deny the motion to suppress, as Washington does not recognize such an exception to the exclusionary rule?

C. STATEMENT OF THE CASE

1. Substantive Testimony

At the combined CrR 3.6 and adjudicatory hearing (RP 22), Martin Ross testified that on the morning of June 11, 2011, he awoke to find his blue Prius missing. RP 25-27. Ross later realized the spare key fob, which he kept in a kitchen drawer, was also missing. RP 29-30.

Ross and his wife had recently gone out of town and asked "Duncan," the son of neighbors, to watch over their house. RP 29-30, 33. Upon returning home, Ross and his wife deduced that Duncan had entertained several friends at their house while they

were away. RP 34. Ross reported his suspicions about Duncan and the missing car to police. RP 27, 34.

Seattle police officer William Anderson was on patrol on June 16 and spied the stolen Prius near the Northgate Mall and attempted to stop the car in the mall parking lot. RP 39. Anderson testified that after he activated his lights and siren a couple times, the car eventually pulled over into a parking spot. RP 39.

According to Anderson, the doors opened and the car's occupants started to get out. RP 39. Anderson yelled at them to get back in the car. RP 39. Anderson testified that the three backseat passengers remained, but the three in front ran toward Macy's. RP 39-40. The three who remained were identified as S.B., A.C. and S.S. CP 12; RP. 40. The driver, M.B., was apprehended inside the mall, shortly thereafter. CP 12, 36.

M.B. testified B.K. had been in the front passenger seat when they were pulled over, and that B.K. had given him the keys to drive the car earlier in the day. RP 131-32, 135. Although M.B. testified B.K. told him the car was stolen just as the police were pulling them over, M.B. initially told police the car belonged to his mother's friend. RP 145, 198.

M.B. made a similar statement to the defense investigator. RP 195, 198. M.B. told the investigator he told the police B.K. provided the car, because he (M.B.) was scared. RP 195.

S.B. testified that after school on June 16, M.B. offered S.B. and his girlfriend a ride to Northgate Mall. RP 82-84, 88. According to S.B., there were two passengers named "Brandon" (B.K.'s first name) in the car that afternoon. RP 84. S.B. believed it was B.K. who provided the car, but admitted he was confused about which Brandon is which. RP 85, 90, 92, 97. Whichever Brandon it was, he said the Prius was his dad's car. RP 85. S.B. initially told police someone named Richard was driving the car. RP 92.

Despite B.K.'s motion to suppress, A.R. was allowed to testify about B.K.'s purported confession about the Prius. RP 43-55. A.R. testified that on June 11, 2011, he and B.K. were at B.K.'s house, when B.K. took him aside and told him that he "bopped" a Prius. RP 45. B.K. reportedly said he had taken it from a house his brother's friend was watching. RP 46. A.R. claimed B.K. said he found the keys first and returned later to take the car. RP 46.

A.R. reportedly felt uncomfortable and decided to take the bus home. RP 47. According to A.R., B.K. offered him a ride in a

blue Prius, but A.R. declined. RP 48. A.R. claimed that as he walked toward the bus stop, B.K. followed him in the blue Prius. RP 49. Allegedly, B.K. said that if A.R. did not get in the car, A.R. “was screwing him over.” RP 49. A.R. reportedly took the bus home anyway. RP 49.

B.K. was waiting for A.R. at his house. A.R. assumed B.K. had already parked the car, since he did not see it. RP 50. No longer concerned about the car, A.R. was happy to spend the afternoon with B.K. and invited him inside. RP 50-51.

A.R. testified he saw B.K. driving the Prius at school the following Monday. RP 51. On another day, B.K. allegedly told A.R. about the Northgate Mall incident. RP 53. RP 53.

2. Motion to Suppress A.R.’s Testimony

As indicated above, A.R. was allowed to testify about B.K.’s confession and the surrounding circumstances. Significantly, however, A.R. did not report B.K.’s confession to police until *after* his father – Seattle police officer Michl – confronted him about a private conversation A.R. had with his girlfriend that was inadvertently recorded. RP 55-63, 68.

On June 19, A.R. rode with his police-officer father to Safeco Field in his police car. RP 55, 155, 157. A.R. had plans to watch

the Mariner's game with friends while Michl worked directing traffic. When Michl pulled over to park, he flashed his lights as a safety precaution. RP 56, 159. This is one way to activate the camera/recording system inside the car. RP 56, 158. Michl thought he either attempted to deactivate the recording system and failed, or simply forgot about the recording, upon leaving to direct traffic. RP 159-60.

Meanwhile, A.R. was too early to meet his friends so he stayed in the patrol car playing games on his phone. RP 56-57. A.R. had general knowledge that activation of the lights activated the camera but did not think about it. RP 56-57, 59.

At some point, A.R. called his girlfriend. RP 58. They discussed a number of topics, including B.K.'s purported car theft. RP 58, 62. A.R. testified he did not think about his conversation being recording, nor did he give consent for anyone to record it.³ RP 62.

When game-time neared, Michl came back to the patrol car and told A.R. he should get going. RP 59. After A.R. left, Michl realized the recording device had been activated and left on for 107 minutes. RP 161, 165. Because he is responsible for the

recordings made in his patrol car, Michl felt it was his duty to listen to the recording. RP 163. Consequently, he heard A.R. tell his girlfriend B.K. had stolen a car. RP 166, 171.

Michl contacted various parents, including B.K.'s father. RP 166-67. Later that day, Michl also confronted A.R: "And I asked him you have to come clean with me and tell me what this is all about." RP 168. After A.R. disclosed what he knew, Michl contacted detective Dennis Hossfeld. RP 60, 168. Hossfeld asked whether A.R. would provide a statement. RP 168. A.R. subsequently gave an official statement to police. RP 61, 169.

Hossfeld testified he had interviewed M.B. following his arrest on June 16. RP 99. M.B. reportedly said B.K. had provided the Prius. RP 99. Hossfeld also learned from school administrators that B.K. had been bragging that he was the one who stole the Prius, that he had given it to M.B. the day of M.B.'s arrest, and that he (B.K.) had run from police. RP 100. Despite this information, Hossfeld did not believe he had legal cause to arrest B.K. RP 101-102.

³ A.R.'s father testified A.R. did not know he was being recorded and did not consent to it. RP 170.

Hossfeld testified he was later approached by Michl, who said his son had information B.K. stole the car and was involved in the incident at Northgate Mall. RP 100. At this point, Hossfeld contacted B.K. and arrested him. RP 100, 102.

Defense counsel argued the testimony and statements of A.R. should be excluded as fruit of the poisonous tree:

But I think it's pretty clear . . . that the evidence of Ramirez would not otherwise have been discovered but for his father's illegal recording and I think at this point the court should apply the exclusionary rule to all of his testimony, including his statements and his own personal observations, again, because it is connected back to the illegal search, the illegal recording, in violation of the Privacy Act.

RP 207.

The court found A.R.'s conversation was private and entitled to protection under Washington's Privacy Act. RP 223; 1RP 4. Nevertheless, the court found the violation thereof sufficiently attenuated from A.R.'s testimony not to require its exclusion:

I would say that what I think the record shows here is that the witness Ramirez, his observations and alleged overhearing of alleged admissions of the respondent here happened before the recorded conversation, so that's a factor. The recorded conversation itself is not being offered into evidence³. The youth has said that he has decided that what is supposed to have happened here was wrong and he wanted to participate. I think the court has to analyze that with care because I think he was subpoenaed

one way or the other, so he has to participate, whether he wants to or not. His father is a police officer and did some investigation on the case, and so that's a factor or not. So I think what I do is I look at the fruit of the poisonous tree factors.

The case of Childress⁴ is helpful, and those factors were argued. I think it's not an exclusive list, so I think I can consider here that it was the testimony is sought to be admitted is prior and independent of the illegally recorded conversation and involves a witness, not a co-defendant or a participant and there was free will exercised. He was quite clear in his testimony that he wanted to come in and cooperate now. And it says: Factor 3. The fact that the exclusion would permanently disable the witness from testifying about relevant material facts, regardless of how unrelated such testimony might be to the purpose of the original illegal search. I do think I the end that his testimony is not related to the illegal recording, so I'm going to find that his testimony is sufficient attenuated, not to be subject to the exclusionary rule under the fruit of the poisonous tree doctrine. So I will admit it.

1RP 5-6.

D. ARGUMENT

A.R.'S TESTIMONY SHOULD HAVE BEEN EXCLUDED AS IT WAS ILLEGALLY OBTAINED FRUIT OF THE PRIVACY ACT VIOLATION.

Although it was A.R.'s privacy rights that were violated, B.K. has standing to assert the violation. A.R.'s privacy rights were violated when he was recorded without his permission or knowledge. Information gained as a direct result of this illegal

⁴ State v. Childress, 35 Wash.App. 314, 316, 666 P.2d 941 (1983).

recording led to B.K.'s arrest. While the court properly excluded the recording itself, it erred in failing to exclude A.R.'s testimony as it, too, was obtained as a direct result of the illegal recording. Had it not been for the recording, A.R.'s father never would have confronted him, requiring him to "come clean." The resulting investigation and A.R.'s concomitant testimony therefore were derivative of the Privacy Act violation and subject to the exclusionary rule. The trial court erred in relying on the attenuation doctrine to deny the motion to exclude.

1. B.K. Has Standing to Challenge the Privacy Act Violation.

In general, Fourth Amendment rights are "personal rights" that may not be vicariously asserted. State v. Foulkes, 63 Wn. App. 643, 647, 821 P.2d 77 (1991). Thus, to establish a Fourth Amendment violation, one must demonstrate a personal and legitimate expectation of privacy in the area searched or property seized. Without such a showing, a criminal defendant cannot benefit from the exclusionary rule's protections because one cannot invoke the Fourth Amendment rights of others. United States v. Salvucci, 448 U.S. 83, 86-87, 100 S. Ct. 2547, 2550-2551, 65 L. Ed. 2d 619 (1980).

Automatic standing is an exception to the inquiry courts engage in when an individual challenges a search or seizure under the Fourth Amendment. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In State v. Simpson, a plurality of our Supreme Court stated that a defendant has automatic standing under article 1, section 7 to challenge a search or seizure if “(1) the offense with which he is charged involves possession as an ‘essential’ element of the offense, and (2) the defendant was in possession of the contraband at the time of the contested search or seizure.” State v. Simpson, 95 Wash.2d 170, 181, 622 P.2d 1199 (1980). In addition to this automatic standing exception, there is also an automatic standing exception under the Privacy Act. RCW 9.73.030.

In State v. Williams, the court held, “on the basis of the language and history of RCW 9.73, the legislature intended to allow a defendant to object to the use in his criminal trial of evidence obtained in violation of the statute, even though the defendant himself was not a participant in the unlawfully intercepted or recorded conversation.” 94 Wn.2d 531, 546, 617 P.2d 1012, 1021 (1980). State v. Porter held that the exclusionary rule applies to

illegally obtained third party recordings. 98 Wash.App. 631, 637, 990 P.2d 460 (1990).

Accordingly, B.K. has automatic standing to object to the admission of the recording itself, as well as the admission of any information derived from the recording, which would include the entire investigation done by Michl, including the information obtained from A.R.

2. Officer Michl Violated the Privacy Act

As indicated, RCW 9.73.030 prohibits recording an individual without prior consent. There are several exceptions under RCW 9.73.030(2), which are inapplicable to this case. Any direct evidence or derivative evidence obtained in violation of the act is subject to exclusion.

Evidence directly produced by an unlawful seizure is inadmissible. State v. White, 97 Wash.2d 92, 101, 640 P.2d 1061 (1982) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). All evidence derived from an unlawful intercept is inadmissible. State v. Fjermestad, 114 Wash.2d 828, 835–36, 791 P.2d 897 (1990); [State v. Gonzales, 46 Wash.App. 388, 401, 731 P.2d 1101 (1986)]. “[O]nce the police step outside the boundaries delineated by the law, we have no choice but to make inadmissible any information obtained.” Fjermestad, 114 Wash.2d at 837, 791 P.2d 897.

Porter, 98 Wn. App. at 637.

In this case, the unlawful recordings were made of A.R. making a phone call in which he inculpated B.K. in the car theft. Michl did not have authority to record A.R. Because the resulting investigation by Michl was derivative of the unlawfully obtained recording, all information obtained by Michl should have been suppressed, including Michl's statement to detective Hossfeld, all statements made by A.R. and any derivative information derived therefrom.

3. The Attenuation Doctrine Does Not Exist in Washington.

The court found A.R.'s conversation was private and entitled to protection under Washington's Privacy Act. RP 223; 1RP 4. Nevertheless, the court found the violation thereof sufficiently attenuated from A.R.'s testimony not to require its exclusion. This was error.

Our Supreme Court recently reaffirmed that, unlike the federal exclusionary rule, Washington's rule is "nearly categorical," rejecting both the federal "good faith" and "inevitable discovery" exceptions to our rule. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) ("good faith"); State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009). The question that remains to be

determined, however, is whether the federal “attenuation” exception also runs afoul of article 1, section 7.

“In determining the protections of article 1, section 7 in a particular context, ‘the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.’” State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)).⁵ As discussed below, the federal and state exclusionary rules are based on different concerns and aimed at achieving very different goals. While the federal attenuation doctrine (like the “good faith” and “inevitable discovery” doctrines) serves its intended goals under the Fourth Amendment, it is wholly inconsistent with article 1, section 7’s unique purpose and history.

The Fourth Amendment to the United States Constitution provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” In contrast, article 1, section 7

⁵ Because it is well established that article 1, section 7 is qualitatively different than the Fourth Amendment, and often more protective of individual rights, a discussion under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is no longer necessary for an independent state constitutional analysis. Chenoweth, 160 Wn.2d at 462-463.

of the Washington Constitution provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Article 1, section 7’s greater privacy protections are well established. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). Whereas Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” State v. White, 97 Wn.2d at 104-105.

This difference in purpose impacts the remedy available for any violation. With its focus on the reasonableness of officers’ actions, the primary justification for excluding evidence under the Fourth Amendment is deterrence of police misconduct.⁶ Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); Stone v. Powell, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). “The [federal] rule is calculated to prevent, not to repair. Its

⁶An additional, albeit more limited, justification for the exclusion of evidence under the Fourth Amendment is maintaining the integrity of the federal courts. Powell, 428 U.S. at 485-486; Wong Sun, 371 U.S. at 486.

purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.” Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

As a creature of the federal exclusionary rule, the “attenuation doctrine” is heavily rooted in this same goal of deterring police misconduct. The doctrine requires federal courts to examine the admissibility of evidence “in light of the distinct policies and interests of the Fourth Amendment.” Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Thus, in Brown, the United States Supreme Court refused to apply a “but for” rule of exclusion and, instead, adopted a case-by-case balancing approach for determining when the causal connection between a Fourth Amendment violation and subsequently-discovered evidence is sufficiently attenuated. Id. at 603. Factors to consider under the Fourth Amendment are (1) temporal proximity of the unlawful arrest and confession, (2) intervening circumstances, (3) “and, particularly, the purpose and flagrancy of the official misconduct.” Id. at 603-604. Where the subsequent evidence is the defendant’s confession, a fourth factor

is whether Miranda⁷ warnings were given after the initial illegality.

Id.

In his concurring opinion in Brown, Justice Powell elaborated on the connection between these factors and the distinct interests of the Fourth Amendment:

strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. . . .

Brown, 422 U.S. at 609 (Powell, J., concurring). Justice Powell continued, "[t]he basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests." Id. at 610. "[T]he Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus." Id. at 612.

In short, the federal "attenuation doctrine" concedes a connection between the illegality and the evidence in question but, rather than automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result. See

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

New York v. Harris, 495 U.S. 14, 19, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (attenuation analysis “appropriate where, as a threshold matter, courts determine that ‘the challenged evidence is in some sense the product of illegal governmental activity.’”)(quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)); see also Nardone v. United States, 308 U.S. 338, 340-341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (“Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint”; exclusion “must be justified by an over-riding public policy expressed in the Constitution”).

The Supreme Court also focused on this goal of deterrence in another seminal attenuation case, United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In Ceccolini, the Court examined the admissibility of a witness’s trial testimony where that witness’s information was discovered as a consequence of an unlawful search. Noting the federal rule’s “broad deterrent purpose,” the Ceccolini Court emphasized “application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” Ceccolini, 435 U.S. at 275

(quoting United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

As in Brown, the Ceccolini Court refused to adopt a per se rule. Concerning admissibility of a witness's live testimony at trial, it identified factors to mark the point at which the detrimental consequences of illegal police action become so attenuated the deterrent effect of excluding the testimony, on balance, no longer justifies its cost. Ceccolini, 435 U.S. at 274-276. Those factors are: (1) the length of the road between the unlawful conduct, initial contact with the witness, and the decision to testify (2) the willingness of the witness to freely testify, and (3) the fact exclusion would perpetually disable a witness from testifying regardless of the relationship between that testimony and the original illegality or the evidence discovered at that time. Ceccolini, 435 U.S. at 274-280.

In Ceccolini, substantial periods of time had passed between the unlawful search, contact with the witness, and the witness's testimony; police already knew about the witness prior to the unlawful search; and there was no evidence the offending officer intended the violation. Id. at 279-280. The Court held that the cost of excluding the witness's testimony in that particular case was "too

great . . . to secure such a speculative and very likely negligible deterrent effect.” Id. at 280.

The Washington Supreme Court has never explicitly adopted the federal attenuation doctrine under article 1, section 7. State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011). And while the Court has employed or mentioned the doctrine in several cases, critically, in none of these cases did the appellant specifically challenge its compatibility with article 1, section 7 in light of our provision’s greater privacy protections. See, e.g., State v. Armenta, 134 Wn.2d 1, 10 n.7, 17, 948 P.2d 1280 (1997); State v. Warner, 125 Wn.2d 876, 888-889, 889 P.2d 479 (1995); State v. Rothenberger, 73 Wn.2d 596, 600-601, 440 P.2d 184 (1968); State v. Vangen, 72 Wn.2d 548, 554-555, 433 P.2d 691 (1967); State v. O’Bremski, 70 Wn.2d 425, 428-429, 423 P.2d 530 (1967).⁸

⁸ In Eserjose, Justice Alexander cited this line of cases in asserting this Court has “at least, implicitly adopted the attenuation doctrine.” Eserjose, 171 Wn.2d at 920. However, “[g]eneral statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved.” State ex rel. Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965). The Court’s failure to ever consider the constitutionality of the attenuation doctrine under article 1, section 7 should not be deemed an implicit adoption.

Article 1, section 7's exclusionary rule is not tethered to the Fourth Amendment. Indeed, not until 1961 did the United States Supreme Court hold that the Fourteenth Amendment compelled the extension of Fourth Amendment protections to defendants in state prosecutions. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). By that time, Washington had applied a rule of automatic exclusion to violations of article 1, section 7 for more than 40 years, frequently rejecting attempts to weaken the rule. See Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash.L.Rev. 459, 473-485 (1986).

In the years following Mapp, which compelled state's to apply – at a minimum – the federal exclusionary rule, the Washington Supreme Court was content to simply rely upon federal precedent when ordering exclusion under article 1, section 7. Id. at 486. “As long as the United States Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule.” Id. at 487. That changed, however,

in light of the Burger Court's "retrenchment in the area of federally guaranteed civil liberties," triggering an eventual return to independent application of the rule of automatic exclusion under article 1, section 7. Id. at 487-488.

In State v. White, this Court declared a statute making it a crime to "obstruct a public servant" unconstitutionally vague. White, 97 Wn.2d at 95-101. White was arrested for violating the statute and subsequently confessed to a burglary. At issue was whether White's unlawful arrest required suppression of the confession. Id. at 101. In DeFillippo, the United States Supreme Court (Justice Burger writing for the majority) had upheld the defendant's arrest, and use of the fruits of that arrest, for violating a similar obstruction statute under the federal good faith exception to the Fourth Amendment exclusionary rule. White, 97 Wn.2d at 35-40.

In holding that article 1, section 7 required suppression, the White Court noted the difference in purpose behind the state and federal rules:

The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary

rule can be served.⁹ This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable government intrusions. Const. art. 1, s 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

....

We think the language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases predating Mapp v. Ohio The important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

White, 97 Wn.2d at 109-110 (citations and footnotes omitted). The Court concluded that – apart from what the United States Supreme Court might do – article 1, section 7 mandated the exclusion of White's confession.¹⁰ Id. at 112.

⁹ The White Court noted that deterrence of police misconduct was the federal rule's purpose. White, 97 Wn.2d at 110 n.8.

¹⁰ Shortly after White, in State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983), the Supreme Court engaged in "a balancing of the costs and benefits of exclusion" akin to the federal approach in deciding if the defendant's post-arrest confession should be suppressed. But it did so only where the arrest in question took place in Oregon and was unlawful under Oregon law, but not Washington law, and did not involve a violation of the Washington Constitution. Bonds, 98 Wn.2d at 7, 10-15. The Bonds Court made

More recently, the Court once again highlighted the difference in purpose between the federal and state exclusionary rules:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions.

Chenoweth, 160 Wn.2d at 472 n.14 (citing cases, including White); see also In re Nichols, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011) (“We have consistently rejected the sort of balancing test that federal courts apply[.]”).

Given the material differences between the state and federal rules, it would be very odd indeed if Washington’s exclusionary rule were tied to its Fourth Amendment counterpart. And examining the factors federal courts use to find the point at which the deterrent effect no longer justifies exclusion under the Fourth Amendment further highlights these differences.

it clear, however, that a violation of article 1, section 7 would invalidate such an approach. Suppression of the subsequent confession would be required. Bonds, 98 Wn.2d at 10-11.

Under the attenuation doctrine, the most important factor is “the purpose and flagrancy of the official misconduct.” Brown, 422 U.S. at 604 (noting this factor “particularly”); see also Ceccolini, 435 U.S. at 279-280 (“not the slightest evidence” officer intended unlawful discovery of evidence). Yet, this factor should be largely irrelevant under article 1, section 7 given its primary concern with protecting privacy rights. Under our provision, the purpose and flagrancy of the constitutional violation matters little. What matters is that there was a violation at all.¹¹

The same is true for the other attenuation factors. As previously noted, when deciding whether to suppress the testimony of a witness discovered through an illegal search, federal courts weigh competing interests and examine (1) length of the road between the unlawful conduct, initial contact with the witness, and the decision to testify (2) willingness of the witness to freely testify, and (3) the fact exclusion perpetually disables a witness from testifying regardless of the relationship between that testimony and the original illegality or the evidence discovered at that time.

¹¹ The Supreme Court’s rejection of the federal “good faith exception” to the exclusionary rule, an exception only applicable in the absence of a flagrant violation of the defendant’s rights, seems to recognize this. Flagrant or reasonable, article 1, section 7 demands suppression. See Afana, 169 Wn.2d at 179-180, 183-184.

Ceccolini, 435 U.S. at 274-280. Lower federal courts have added additional factors, including “police motivation in conducting the search.” United States v. Hooton, 662 F.2d 628, 632 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982).

Again, while these factors may help federal courts in their cost/benefit analysis aimed at deterring police misconduct, they do not ensure the protection of Washington’s greater privacy rights and are inconsistent with our “nearly categorical” exclusionary rule. None of these factors converts a violation of article 1, section 7 into a non-violation or the fruits of that violation into non-fruit. As four justices of our Supreme Court recently indicated, “Evidence obtained in violation of a person’s constitutional rights, even if attenuated, still lacks the authority of law [required by article 1, section 7] and should be suppressed.” Eseriose, 171 Wn.2d at 940 (C. Johnson, J., dissenting).

Rejecting the federal attenuation doctrine is consistent with the reasoning in Winterstein, where the Court found the inevitable discovery doctrine “necessarily speculative.” Winterstein, 167 Wn.2d at 634. Attenuation is also speculative. Inevitable discovery rests on the State’s ability to prove, despite unlawful police conduct, the evidence in question would necessarily have been discovered

through proper means. Id. at 634-635. Similarly, attenuation in the context of witness testimony rests on the State's ability to prove, despite unlawful police conduct, the witness would have been lawfully discovered anyway and would have been willing to testify against the defendant. See Ceccolini, 435 U.S. at 276 ("The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness.").

In short, both doctrines call for a speculative hindsight examination of the same question: "what if police had not acted unlawfully"? Since an officer's testimony that he or she inevitably would have discovered evidence using proper procedures falls short of article 1, section 7, it is not clear why an accuser's testimony that he or she eventually would have come forward to incriminate the defendant (i.e., his testimony is the product of independent free will) is any more compelling.

In short, the trial court erred in denying the motion to suppress A.R.'s testimony based on its supposed attenuation from the Privacy Act violation.

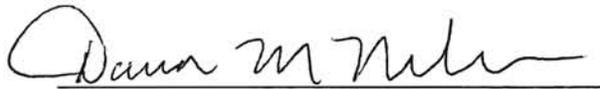
E. CONCLUSION

Absent the illegally obtained evidence, the evidence was insufficient to convict B.K. of possessing a stolen car. This Court should reverse and dismiss his conviction. See e.g. State v. Chapin, 118 Wn.2d 681, 692, 826 P.2d 194 (1992).

Dated this 2nd day of July, 2012

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 68174-5-1
)	
B.K.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF JULY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] B.K.
 8707 19TH AVENUE NW
 SEATTLE, WA 98117

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF JULY 2012.

x Patrick Mayovsky