

NO. 39486-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HARVEY,

Appellant.

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STATE OF WASHINGTON  
BY  DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jay B. Roof, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE BLOOD ALCOHOL CONTENT (B.A.C.) EVIDENCE OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH.

a. There Was Not Sufficient Independent Evidence Of Probable Cause.

Appellant Stephen Harvey asserts his constitutional rights against unlawful search and seizure were violated when arresting officer David Corn obtained private medical information and invaded his bodily privacy without a warrant. Brief of Appellant (BOA) at 8-29. In response, the State first claims the trial court was correct in admitting the B.A.C. evidence because there was probable cause to arrest Harvey for violation of RCW 46.61.520, based on evidence of reckless driving, which it suggests was independent of the medical information obtained by Corn. Brief of Respondent (BOR) at 6-8. The State's argument should be rejected because the record shows all relevant evidence known to Corn at the time he arrested Harvey was either the direct or derivative product of his illegal search and therefore "fruit of the poisonous tree."

"[A]ll evidence which is the product of an illegal search or seizure is suppressed." State v. White, 97 Wn.2d 92, 101, 640

P.2d 1061 (1982) (citing Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). When determining if something is the product of an illegal search (i.e. fruit of the poisonous tree), the guiding inquiry is “whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (citation omitted). In other words, if the “fruit” is not sufficiently attenuated from the original illegality to purge the taint of the illegal search, then it may not be admitted. State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995).

In Washington, a judicially recognized method by which evidence can be shown to have been purged of primary taint is through the independent source doctrine. State v. Winterstein, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009); State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005); State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987). Under this doctrine, even if evidence is the product of an illegal search, the State may establish its admissibility via proof that the evidence was discovered by means “wholly

independent of any constitutional violation.” Nix v. Williams, 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The threshold question under the independent source test is whether “the challenged evidence is in some sense the product of illegal governmental activity.” United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980). After it is established that evidence is the fruit of an illegal search, Courts undertake a three-part test to determine whether the primary illegal activity has been sufficiently attenuated. The three factors of the attenuation doctrine are: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997); Brown v. Illinois, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416, 427 (1975),

As discussed in detail in appellant’s opening brief, Corn’s search of Harvey’s private medical information and of his person violated appellant’s statutory and constitutional privacy rights and was therefore illegal. BOA at 14-28. Additionally, Corn’s testimony

during the 3.6 hearing<sup>1</sup> establishes that all the relevant facts relied on by him for the purpose of establishing probable cause were all in some sense the product of this illegal search, and thus, the discovery of those facts were not sufficiently attenuated. 1RP 16, 19-20.

According to Corn, prior to his search of Harvey's medical information, he knew only that Harvey was a driver in a fatal traffic collision that took place during regular commuter hours and that Harvey had asked to speak with an attorney before questioning. 1RP 10, 16. While illegally searching through Harvey's medical information, Corn discovered for the first time the paramedic's report and the notation that the paramedic had smelled alcohol on Harvey while treating him. 1RP 12. As a direct result of this, Corn spoke to the paramedic. 1RP 12. In concert with the nurse, Corn next peeled back the eyelids of an unconscious Harvey to inspect whether his pupils indicated alcohol consumption or a head trauma. 1RP 15-16. At the same time, Corn noted for the first time an odor of alcohol. 1RP 16. As a direct result of what he had learned

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<sup>1</sup> Notably, the State improperly refers to testimony established after the CrR 3.6 hearing to bolster its argument that trial court did not err in finding Corn had probable cause to arrest Harvey. BOR at 8. Clearly, the trial court could not, and did not, rely on that testimony when making its findings.

through his search, Corn telephoned Merrill to verify Harvey was the driver. 1RP 16, 20. It was only as a result of this phone call that Corn learned that Merrill suspected Harvey of reckless driving.

Significantly, the State never offered proof of any independent intervening circumstances between Corn's illegal activity and his discovery of other facts supporting probable cause. For instance, there is no testimony that the paramedic independently sought out Corn, planned to speak with him about his observations of Harvey – or even that he could legally do so.<sup>2</sup> In short, there was no evidence establishing that Merrill would have, or planned to, timely contact Corn in the hospital in order to convey to him the facts necessary to establish probable cause under the reckless driving prong of RCW 46.61.520. Likewise, there is no evidence Merrill or any other officer would have, or planned to, independently arrest Harvey within the time needed to obtain the B.A.C. evidence.

Without such evidence, there is nothing breaking the link connecting Corn's illegal action to the evidence supporting probable cause under any theory. Hence, the trial court erred in finding that

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<sup>2</sup> The unique position of the paramedic with regard to releasing medical information is discussed further below.

even without the medical evidence, Corn had probable cause to arrest Harvey.

b. Because Constitutional Rights Are At Issue, Suppression is the Appropriate Remedy.

Next, the State claims the trial court correctly admitted the B.A.C. results because suppression is not expressly listed as a remedy for violation of Washington's medical privacy laws (RCW 70.02.010-.050). BOR at 9-16. The State further suggests that Corn's violation of Harvey's right to medical privacy is merely statutory unless appellant can point to a case "that holds that violation of this statute is also a violation of his constitutional rights. BOR 15-16. This argument should be rejected because it turns constitutional legal analysis on its head.

Article 1, § 7 of Washington's constitution protects a citizen's "private affairs." The relevant question here is not whether there is an existing case that says medical privacy constitutes protected private affairs, but rather, whether the information obtained reveals intimate or discrete details of a person's life which citizens have held, or should be entitled to hold, safe from government trespass. See, BOA at 15-25 (laying out an appropriate constitutional analysis).

Although appellant has pointed to medical privacy statutes as example of Legislature's recognition of the discrete and intimate nature of such information and cited it as one source of privacy rights, this in no way suggests that these laws are the only source of privacy rights regarding medical information or bodily integrity. Although a statute may address certain privacy interests and confer certain rights, that statute cannot serve to extinguish or eliminate a person's existing constitutional rights. E.g., In re Guardianship of Grant, 109 Wn.2d 545, 553, 747 P.2d 445 (1987).

For the reasons stated in appellant's opening brief, this Court should find that Washington's constitution protects a citizen's private medical affairs and bodily integrity from the kind of warrantless invasion that occurred here and that suppression is the appropriate remedy.

c. Corn Personally Inspected Harvey's Eyes  
Thereby Invading His Bodily Privacy.

Appellant asserts his bodily privacy was invaded when a nurse peeled back his eyelids so Corn could observe Harvey's pupils to determine if there were signs of intoxication or head injury. BOA at 24-25. The State claims Corn's investigation was not an invasion of Harvey's privacy because Corn never explicitly asked

the nurse to peel back Harvey's eyelids, and because there is no evidence she did so for Corn's benefit. BOR at 16.

The State's reading of the facts is strained at best and contradicts the written findings. Corn testified he asked the nurse if Harvey's pupils were dilated or reacting normally to light. In response, the nurse went ahead and took a look. 1RP 15. Corn testified he was standing right next to the nurse and leaned over to peer into Harvey's eyes and inspect them himself. 1RP 15-16. From this testimony, the trial court concluded the nurse lifted Harvey's eyelids "[a]s a response" to Corn's inquiry, and Corn (not the nurse) inspected Harvey's eyes. CP 498. Contrary to what the State suggests, this is significantly different than a situation where an officer passively observes a nurse who is plain sight while she checks a patient's eyes as a matter of ordinary care for the patient.

Corn's actions constituted an egregious trespass into Harvey's private affairs, violating Harvey's constitutional right to privacy. BOA at 24-25.

d. No Exceptions to Washington's Uniform Health Care Information Act (UHCIA) Applied In This Case.

As an aspect of his constitutional claim, appellant asserts Corn unlawfully invaded his medical privacy rights, and in so doing,

also caused a violation of the UHCIA. BOA at 13-28. In response, the State claims that because Harvey testified he initially did not want to go to the hospital and was at some point combative with aid personnel, there was sufficient evidence to support the court's finding that the authorities "caused" Harvey to be brought to the hospital, thereby triggering an exception to the UHCIA's protections. BOA at 16-17. The State ignores Harvey's uncontroverted testimony that – having contemplated the suggestion of the paramedic – Harvey (not the police or the paramedics) ultimately made the decision to go to the hospital. 1RP 25-26. Thus, the evidence does not support a finding that the authorities "caused" Harvey to be brought to the hospital. See, BOA at 18-24.

Additionally, the State points to a new law that exempts first responders from UHCIA's nondisclosure provisions and permits disclosure of protected health care information to a requesting officer. BOR at 17, n. 2. However, this statute was not in place at the time of the accident. The plain language of the statutes in effect at that time establish that paramedics qualified as health care providers under UHCIA. RCW 70.02.010(9); RCW 18.73.081:

RCW 18.71.205. Thus, the paramedic was not exempt from UHCIA.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED THE B.A.C. RESULTS DESPITE THE LACK OF COMPETENT EVIDENCE ESTABLISHING THE STATE COMPLIED WITH THE WACS.

Appellant asserts the trial court erred when admitted the B.A.C. results where there was not reliable evidence showing Harvey's blood sample was preserved with an enzyme poison "sufficient in amount to ... stabilize the alcohol content" as required by WAC 448-14-020(3).<sup>3</sup> BOA at 32-34. In response, the State argues it produced prima facie evidence of sufficient circumstances that would support a logical and reasonable inference that the amount of enzyme poison in the blood sample stabilized the alcohol content of Harvey's blood. BOR at 18; see, RCW 46.61.506(4)(b).

The crux of the State's argument appears to be that once the State establishes a prima facie case, a trial court must admit the

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<sup>3</sup> It is important to note, the central issue here is not whether there was sufficient enzyme poison to stop coagulation – a question that can be resolved by testimony that the blood sample did not coagulate. Instead, the issue is whether there was sufficient enzyme poison to prevent micro organism growth (known to destabilize blood alcohol content), given the storage temperatures of the sample.

B.A.C. This is not so. As the Washington Supreme Court has explained:

The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are admissible. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence.

City of Fircrest v. Jensen, 158 Wn.2d 384, 399, 143 P.3d 776

(2006). The Court explained further:

[O]nce reliability of the test is established by a prima facie showing from the State, all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.

Id. at 397-98.

The State's only evidence Harvey's blood sample contained the necessary amount of poison enzyme to stabilize the blood alcohol content came from toxicologist Chris Johnston. Yet, the defense established Johnson had no first-hand knowledge or scientific expertise qualifying him to opine whether the amount of

enzyme poison in Harvey's blood sample was sufficient to stabilize the blood alcohol content. RP 654, 826, 842-45.

In fact, Johnson admitted he was relying on personal experience to support his opinion about the amount of enzyme poison necessary to prevent contamination by micro organisms. RP 826. However, Johnson also admitted that in his experience, he had never dealt with alcohol contributions from micro organisms in living subjects and he could offer no personal opinion about how often blood contamination may occur in samples. RP 652-55, 651,749, 762, 865. Thus, he had no personal experiences from which to formulate an opinion that Harvey's blood samples contained the necessary amount of enzyme poison needed to stabilize the blood alcohol content given the conditions under which it was stored. Thus, his opinion was not admissible under ER 601, 602, 701, or 702.

Without Johnston's opinion, there was no evidence that the amount of preservative used in Harvey's blood sample was adequate to stabilize the blood alcohol content given the amount of time the sample was left unrefrigerated. Hence, contrary to the State's claims, this case is more like that of State v. Bosio, 107 Wn. App. 462, 27 P.3d 636 (2001) (holding the absence of evidence

that enzyme poison was added to defendant's blood sample precluded state from making prima facie showing that defendant's blood sample was properly preserved) and State v. Hultenschmidt, 125 Wn. App. 259, 264, 102 P.3d 192 (2004) (holding the same), rather than State v. Brown, 145 Wn. App. 62, 184 P.3d 1284 (2008) (holding the State's evidence sufficient to make a prima facie case that there was enough enzyme poison in the blood sample under the facts of that case).<sup>4</sup>

Because the State's evidence was insufficient to show reliability of the tests or compliance with WAC 448-14-020(3), this Court should find the trial court erred in admitting the BAC evidence.

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<sup>4</sup> Although it is admittedly difficult to tell from the Brown opinion what kind of defense cross examination occurred in that case, it appears that it was not nearly as detailed as here. Furthermore, the Brown case can be distinguished by the fact that there was no mention of an abnormal peak in Brown. Here, the defense established the existence of an abnormal peak and that the toxicologist recommended procedures to determine its cause. RP 756-63, 766-74, 783-84, 853-55. Additionally, there is nothing in the Brown opinion that speaks to how long the sample was left unrefrigerated, which was a significant factor here. RP 573-591 790-93, 631-651, 656-61.

III. HARVEY WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED THE STATEMENTS HE MADE IN THE HOSPITAL.

Appellant asserts the trial court erred when it excluded as self-serving hearsay those statements Harvey made about Officer Corn in the hospital because the statements were not being offered to prove the truth of the matter, but were being offered to show that Harvey's belligerence and agitation was not due to alcohol consumption. BOA at 34-38. In response, the State claims the trial court properly excluded Harvey's statements because they would serve only to vilify Corn and they were more prejudicial than probative. BOR at 22-25.

First, the State's argument should be rejected because, as discussed in detail in appellant's opening brief, the statements were not self-serving hearsay. BOA 36-37. Second, even if they were, the statements should have been admitted regardless, because the State opened the door to them by presenting evidence Harvey was belligerent and agitated at the hospital and suggesting that this was sign of intoxication. RP 375-78, 426. Harvey should have had an opportunity to fully respond. See, e.g., State v. Stockton, 91 Wn. App. 35, 40 955 P.2d 805 (1998). Finally, any potential prejudice

could have been cured by an appropriate limiting instruction. See, e.g., State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

The State also claims that the error was harmless under the non-constitutional harmless error standard because Harvey was – to some extent – still able argue his theory of the case. BOR at 24. This misapprehends the right at issue here. As the United States Supreme Court held:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (emphasis added).

The trial court's ruling denied Harvey this fundamental right. While the State's version of what transpired in the hospital room was allowed before the jury in great detail, Harvey's version was not. Harvey had the right to fully present his version of the facts, including: (1) why he reacted so intensely upon seeing Corn in his hospital room; and (2) the exact words he used – to show to show

his agitation was not generalized (as one might expect from an intoxicated person), but directed toward Corn specifically. Whether Harvey would have persuaded the jury that his version of events was more accurate than the State's witnesses, he undeniably had the right to present his version.

Because this evidence bore directly on whether Harvey was intoxicated and suggested strongly that there was another explanation for his agitation and belligerence, it was fundamentally unfair to refuse Harvey the opportunity to fully present his version of the facts. The error was not harmless. See, e.g., State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (applying the constitutional harmless error standard where the defendant was not permitted the opportunity to present his version of the facts).

Moreover, even if this Court were to find this error were harmless, the error must also be looked at in the context of the numerous other trial errors in this case which cumulatively denied appellant a fair trial.<sup>5</sup> BOA at 50-51. As such, this Court should find appellant was not only denied his right to present a defense but also his right to a fair trial.

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<sup>5</sup> As to the other errors, because they were thoroughly briefed in appellant's opening brief (BOA at 38-50), appellant will not address them further in this reply.

B. CONCLUSION

For the reasons stated herein and all those stated in appellant's opening brief, this Court should reverse appellant's conviction.

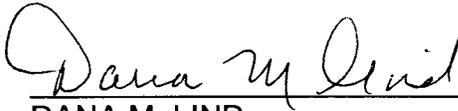
DATED this 11<sup>th</sup> day of October, 2010

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 39486-3-II
	)	
STEPHEN HARVEY,	)	
	)	
Appellant.	)	

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**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 11<sup>TH</sup> DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] RANDALL SUTTON  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF OCTOBER 2010.

x 