

No. 43659-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

DAVID C. DICKJOSE

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 07-1-06241-8

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

COMES NOW the Petitioner, David C. Dickjose, by and through his attorney of record, Michael E. Schwartz of the Law Offices of Michael Schwartz, and submits the following memorandum in support of his interlocutory appeal from the Order of the Pierce County Superior Court, Judge Bryan Tollefson, Presiding, on May 21, 2012, that Petitioner's Statements to police were admissible for purposes of trial. This Court granted discretionary review on January 17, 2013.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded that Petitioner's statements were sufficiently attenuated from the unlawful entry into his home and subsequent arrest so as to dissipate any taint from the illegal conduct.

2. The trial court did not err when it concluded that the arrest of petitioner inside his home was unlawful.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1) Did the trial court err in concluding that Petitioner's statements were sufficiently attenuated from the unlawful entry into his home and subsequent arrest so as to dissipate any taint from the illegal conduct?

2) Did the trial court err when it concluded that the arrest of petitioner inside his home was unlawful?

IV. STATEMENT OF THE CASE

A. Procedural History

On December 14, 2007, David C. Dickjose was charged in the Pierce County Superior Court with three counts of Unlawful Delivery of a Controlled Substance (methamphetamine) and one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (methamphetamine). On April 8, 2009, the Pierce County Superior Court, Judge James Orlando, denied Mr. Dickjose' Motion to Suppress evidence seized from petitioner's residence on December 13, 2007, pursuant to a search warrant. The evidence included, drugs, materials used to package, weigh and distribute drugs, documents and cash.

Division II of the Washington State Court of Appeals granted discretionary review of the trial court's denial of Mr. Dickjose Motion to Suppress that evidence. *See, State v. Dickjose*, 160 Wn.App. 1011, 2011 WL 1001552 (February 23, 2011). This Court concluded that the search warrant affidavit did not allege facts sufficient to establish a nexus between Mr. Dickjose' residence and the offenses alleged, narcotics possession and delivery. The matter was remanded to the Pierce County Superior Court and a trial date was set for the three counts of Unlawful Delivery of a Controlled Substance.

Mr. Dickjose then brought a motion to suppress statements given to police on the day of his arrest. On May 21, 2012, The Honorable Judge Tollefson of the Pierce County Superior Court ruled that Petitioner's confession about his involvement in drug dealing was sufficiently attenuated from the illegal entry into his home. Moreover, the Court ruled that the officers' promise not to take him to jail was a significant intervening event so as to dissipate any taint of the entry into the house. Therefore, the Court concluded that the statements the defendant made at the police station were admissible for purposes of trial.

On July 13, 2012, Mr. Dickjose, appearing Pro Se, filed a Notice of Appeal for Discretionary Review. On January 17, 2013, this Court issued a ruling granting review of this matter.

B. Facts

On December 13, 2007, Lakewood Police Officers, armed with a Pierce County Superior Court Search Warrant, entered the residence of David Dickjose shortly before seven o'clock a.m. RP-11, 5/11/12. Officer Sean Conlon, of the Lakewood Police Department contacted Mr. Dickjose after the house was secured by other officers. Mr. Dickjose was seated on the couch in the living room. Officer Conlon read him his *Miranda* Rights. RP-12, 5/11/12. According to Officer Conlon, Mr. Dickjose waived his right to remain silent and to have counsel present. RP-13, 5/11/12. Officers searched the residence, as well as a truck outside. In the pickup truck in the driveway, the officers seized methamphetamine. RP-14, 5/11/12. Police also found between a quarter and a half ounce of methamphetamine in the residence. RP-14, 5/11/12. Officer Conlon confronted Mr. Dickjose about the methamphetamine, and also placed him under arrest for possession of methamphetamine, as well as for delivery of a controlled substance. RP-15, 5/11/12.

The Officer testified that a confidential informant purchased methamphetamine from Kenny Gross, who was supplied by Mr. Dickjose. According to the Officer, the informant made three (3) purchases from Mr. Gross. RP-2:5/11/12. Officer testified that he believed he had probable cause to arrest Mr. Dickjose for Unlawful Delivery of a Controlled Substance based on narcotics transactions that took place on August 23, 2007, October 25, 2007 and December 5, 2007. RP- 8-9, 5/11/12.

When Officer Conlon confronted Mr. Dickjose about the methamphetamine seized from his residence, and a truck parked in the driveway, Mr. Dickjose denied any knowledge about it. RP-15, 5/11/12. Officer Conlon testified that Mr. Dickjose' demeanor was calm and cooperative. RP-16, 5/11/12.

Officer Conlon spoke to Mr. Dickjose a third time that morning, within an hour of the police entry into the house. During this third conversation, Conlon him to another room in the residence. RP-20, 5/11/12. During that conversation, Officer Conlon stated that he gave Mr. Dickjose "an opportunity to help himself out." RP-21, 5/11/12. The Officer told Mr. Dickjose that if he would help them out, and

order narcotics for the police, in exchange, Officer Conlon agreed not to book him into jail that night. Further, the Officer stated that he told Mr. Dickjose that they would enter into a contract with his attorney and the prosecutor's office. RP-21, 5/11/12. According to Officer Conlon, Mr. Dickjose agreed. RP-21, 5/11/12. In this third conversation, Mr. Dickjose told the officer that he agreed he could help himself out. RP-21, 5/11/12. Conlon asked Mr. Dickjose how much he could purchase, and Mr. Dickjose responded that he could order up to a pound of methamphetamine. RP-21, 5/11/12.

At some point between ten o'clock a.m. and eleven o'clock a.m., Mr. Dickjose was transported by Officer Conlon to the police station. At that time, he was still under arrest. RP-22, 5/11/12. As a part of initiating the process of making Mr. Dickjose a confidential informant, the police debriefed him to find out what he could do to help himself. RP-23, 5/11/12. During that debriefing, Officer Conlon testified that Mr. Dickjose admitted that he deals methamphetamine and that he had a fairly large Hispanic male supplier. According to Officer Conlon, Mr. Dickjose told him that he deals about a half a pound of methamphetamine at a time. RP-23, 5/11/12. With Mr. Dickjose's assistance, the police were able to order a pound of methamphetamine and later arrested an individual who arrived at the meeting place to deliver it. RP-25-26, 5/11/12. Mr. Dickjose never did become a confidential informant for the police. RP-27, 5/11/12.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT PETITIONER'S STATEMENTS WERE SUFFICIENTLY ATTENUATED FROM THE UNLAWFUL ENTRY INTO HIS HOME AND SUBSEQUENT ARREST SO AS TO DISSIPATE ANY TAIN FROM THE ILLEGAL CONDUCT.

The State bears the burden of demonstrating the admissibility of a suspect's statement. Brown v. Illinois, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). In Washington, the Court of Appeals will review the trial court's conclusions of law *de novo*. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

Police may not make a warrantless arrest in a suspect's home in the absence of exigent circumstances or the suspect's consent. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). A statement made while the suspect is unlawfully detained in his home during an arrest in violation of Payton, is subject to suppression under the exclusionary rule. See, State v. Eserjose, 171 Wn.2d 907, 912-13, 259 P.3d 172 (2011). The Washington State Supreme Court, in a plurality opinion, ruled that the "Attenuation Doctrine" could be used to admit a defendant's confession where he was arrested in his home in violation of Payton and then confessed once at the police station. Eserjose, 171 Wn.2d at 923.

Under the U.S. Constitution, once a suspect whom the police have unlawfully arrested within the home is brought outside the home, the unlawful arrest will not taint any statements he makes, so long as his arrest is supported by probable cause. New York v. Harris, 495 U.S. 14, 20, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). The Harris court held that a confession is not subject to the exclusionary rule, despite a Payton violation, if law enforcement had underlying probable cause to arrest the suspect. Harris, 495 U.S. at 20.

In Eserjose, the defendant was arrested in his home for the burglary of a coffee-stand. Eserjose, 171 Wn.2d at 910. He was advised of his *Miranda* rights while he was seated in the patrol car outside his home. Id. at 911. He was then taken to the Kitsap County Sheriff's Office in Silverdale, Washington. Id. Importantly, Eserjose was not questioned about the burglary until he reached the sheriff's office. Id. At the Sheriff's Office, Eserjose was again advised of his *Miranda* rights and he signed a form acknowledging that he understood those rights. Although he initially denied any knowledge of the burglary, he ultimately confessed after being told that his co-defendant had already done so. Id.

The State charged Eserjose in the Kitsap County Superior Court with Second Degree Burglary. Eserjose moved to suppress his confession on the ground that his arrest was unlawful. The trial court found that the arrest of Eserjose was unlawful because even though they had probable cause to arrest him,

and they had consent to enter the residence, they exceeded the scope of that consent when they entered the upstairs hallway and effected the arrest of Eserjose. Eserjose, 171 Wn.2d at 911. The Eserjose court concluded, however, that Eserjose' confession was not attributable to his illegal arrest. Thus, the Court stated, the trial court did not err in determining that Eserjose' confession was admissible under Article I § 7 of the Washington State Constitution as well as the Fourth Amendment to the United States Constitution. Eserjose, 171 Wn.2d at 929.

Under the Attenuation Doctrine, illegally obtained evidence is not subject to exclusion if it is "so attenuated [from the unlawful conduct] as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939); *see also*, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In evaluating whether a confession following an unlawful arrest is admissible under the Attenuation Doctrine, the courts look to three factors: (1) "the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) particularly, the purpose and flagrancy of the official misconduct." Brown, 422 U.S. at 603-04 (citation and footnote omitted); Eserjose, 171 Wn.2d at 923 (adopting the Brown factors as the "proper analytical framework for determining whether a confession is sufficiently an act of free will to purge the taint of an illegal arrest").

What the trial court failed to note in its ruling was that Mr. Dickjose made inculpatory statements in his home within one hour of being arrested. The trial court based its ruling on a factual finding that Mr. Dickjose's only in-home statement was exculpatory. This was plainly not true. According to the detective, he took Mr. Dickjose to a separate room to interview him privately. It was during this conversation that he made an offer to Mr. Dickjose that he could help himself out by entering into a contract with the prosecutor's office. RP 20-21. Up this point, Mr. Dickjose had been denying that he knew anything about the methamphetamine found in the residence and the truck, and, moreover, he explicitly denied that he was a dealer of methamphetamine. But according to the detective, once he had Mr. Dickjose alone in another room and made an offer of cooperation, Mr. Dickjose changed his tune.

In Brown v. Illinois, *supra*, the defendant made his first statement less than two hours after his illegal arrest. Brown, 422 U.S. at 594-95. He made another statement later in the evening. Brown, 422 U.S. at 594. The Court noted: “the fact that Brown had made one statement believed by him to be admissible . . . [and] his anticipation of leniency bolstered the pressure for him to give the second, or at least vitiated any incentive on his part to avoid self incrimination. Brown, 422 U.S. at 605 n. 12.

Similarly, the Eserjose court observed:

The circumstances surrounding Eserjose’s confession are significantly different from those in Harris. Notably, in Harris, the suspect first confessed in his home, at a time when the Fourth Amendment violation was ongoing. Although the confession was determined to be inadmissible, the suspect “had let the cat out of the bag by confessing and was not thereafter free of the psychological and practical disadvantages of having confessed.” The United States Supreme Court did not consider what effect the suspect’s first confession might have had on his willingness to sign a second confession at the police station because, as we have seen, it determined that the was in lawful custody at that point. Eserjose, on the otherhand, was not questioned in his home, and so the “voluntariness and admissibility” of his confession at the Sheriff’s Office was not “compromised” by a prior confession. Eserjose maintained his innocence until he was informed that [his codefendant] had confessed, which suggests that it was this information, not the illegal arrest, that induced the confession.

Eserjose, 171 Wn.2d at 923. (Internal citations omitted); *see also*, State v. Erho, 77 Wn.2d 553, 561, 463 P.2d 779 (1970) (holding that a written confession, which had the same content as previous oral statements taken in violation of *Miranda* was suppressible because of psychological effects of having made prior admission).

Turning back to the three factors the Court looks to following an unlawful arrest it is clear that the temporal proximity between Mr. Dickjose unlawful arrest and his confession supports suppression. Mr. Dickjose first inculpatory statements – that he “could order up to a pound of methamphetamine” and that he wanted to “help himself out” – were made while he was illegally detained in his house. Indeed, the subsequent confession at the police station was no more than a continuation of the interrogation that began at the house. The initial confession takes place within one hour of the arrest of Mr. Dickjose. No

intervening circumstances occurred because the subsequent confession at the station was merely a continuation of the conversation between the detective and Mr. Dickjose that began at the house after his illegal arrest.

B. THE TRIAL COURT DID NOT ERR WHEN IT CONCLUDED THAT THE ARREST OF PETITIONER INSIDE HIS HOME WAS UNLAWFUL.

An “attenuation analysis is only appropriate where, as a threshold matter, Courts determine that the ‘the challenged evidence is in some sense the product of illegal government activity.’” (*Quoting, United States v. Crews*, 445 U.S. 463, 471, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980)); *Eserjose*, 171 Wn.2d at 936-37 (*See, Johnson, J., dissenting*) (“because a warrantless arrest within a suspect’s home is almost necessarily results in illegal custody, the rule should be that the legality of the arrest determines the legality of custody and a confession obtained during an illegal seizure should be excluded.”).

The State seems to be asserting (for the first time) that the trial court’s ruling, that the arrest of Mr. Dickjose was unlawful, is in error. Hence, the State argues, because the search warrant allowed for the search of Mr. Dickjose’ person, his arrest was lawful, because it can be “separated” from the unlawful search of his home. Yet such an assertion belies this court’s earlier decision that no probable cause existed for the search of Mr. Dickjose’ home in the first place...where the arrest of Mr. Dickjose took place.

Moreover, the record before the trial court reflects that Det. Conlon didn’t arrest Mr. Dickjose, and advise him of his Miranda warnings, until the police found methamphetamine in the residence and a truck parked outside.RP-15, 5/11/12. The argument also is without merit because, under these facts, the arrest of Mr. Dickjose cannot, in any sensible fashion, be untethered from the unlawful entry into his home. As this Court noted in its unpublished decision, *State v. Dickjose*, 160 Wn.App. 1011, not reported in P.3d (2011):

Dickjose argues that the facts in the search warrant affidavit fail to establish a “nexus” between his residence and the evidence related to unlawful possession and delivery of a controlled substance. The State counters that the affidavit contains sufficient facts to establish the requisite nexus. *We agree with Dickjose and disagree with the State.* (Emphasis added).

The fact remains that the police arrested Mr. Dickjose in his home, pursuant to a warrant for which this Court found there was no nexus between the alleged illegal activities and the search of the home where Mr. Dickjose was found. Even if there was probable cause to arrest Mr. Dickjose for the three deliveries, the issue is rendered moot by this Court's decision in Dickjose I. The officer's entry into the house to search the house for Dickjose's person was made pursuant to a warrant, and this Court has found no such nexus existed for that warrant to issue.

Moreover, both the officers entry into Mr. Dickjose's residence and their arrest of Mr. Dickjose are inextricably linked to the analysis set forth above about whether Mr. Dickjose's subsequent inculpatory statements were sufficient attenuated from what the trial court concluded was an illegal arrest. An attenuation analysis is only appropriate where, as a threshold matter, courts determine that "the challenged evidence is in some sense the product of illegal government activity." Harris, 495 U.S. at 19. (Quoting, United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980)). In this case, Mr. Dickjose's arrest was unlawful because the police were present in his home pursuant to a warrant that lacked probable cause.

VI. CONCLUSION

The Attenuation Doctrine does not apply because Mr. Dickjose interrogation began at the house the police had unlawfully entered and then continued once they took him to the police station. Additionally, the trial court was correct when it found that the arrest of Mr. Dickjose was unlawful . Police entered the house with a search warrant that lacked probable cause and this Court has already ruled so.

Respectfully submitted on November 6, 2013.

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CERTIFICATE OF SERVICE

Patti Wood, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the Opening Brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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